

# Real Estate Brokerage Laws and Customs: Massachusetts

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A Q&A guide to state laws and customs on brokerage laws relating to commercial real estate transactions in Massachusetts. This Q&A addresses the state-specific guidance on several questions relating to brokerage laws and customs, including, licensing requirements, legal restrictions on a broker's role in a real estate transaction, brokerage agreements, commission payments and brokers' lien rights. This Q&A guide also provides guidance on any licensing requirements for managing commercial real estate. Answers to questions can be compared across a number of jurisdictions (see *Real Estate Brokerage Laws and Customs: State Q&A Tool*).

## LICENSING LAWS AND REQUIREMENTS

### 1. Does your state regulate real estate brokers? If so:

- What statutes or laws regulate licensing requirements for brokers?
- What department oversees the licensing and regulation of brokers?
- Are different types of brokers or other roles recognized by the regulations? If so, specify the scope of responsibilities of these different roles.

## LICENSING LAWS

Sections 87PP to 87DDD1/2 of Chapter 112 of the Massachusetts General Laws and Title 254 of the Code of Massachusetts Regulations regulate the licensing requirements for real estate brokers and real estate salespersons in both commercial and residential transactions.

## REGULATOR

The Massachusetts Board of Registration of Real Estate Brokers and Salespersons oversees the licensure, registration and regulation of real estate brokers and real estate salespersons.

## TYPES OF BROKERS AND THEIR ROLES

Massachusetts recognizes the following real estate professionals:

- Real Estate Broker (see *Real Estate Broker*).
- Real Estate Salesman (see *Real Estate Salesman*).
- Non-agent Facilitator/Transaction Broker (see *Non-agent Facilitator/Transaction Broker*).

## Real Estate Broker

A real estate broker is any person who for another person and for a fee, commission or other valuable consideration does any of the following in dealing with real estate:

- Sells.
- Exchanges.
- Purchases.
- Rents or leases.
- Negotiates.
- Offers, attempts or agrees to list any real estate.
- Buys or offers to buy.
- Sells or offers to sell.
- Otherwise deals in options on real estate.
- Advertises or holds himself out as engaged in the business of selling, exchanging, purchasing, renting or leasing real estate.
- Assists or directs in the procuring of prospects.
- Negotiates or completes any agreement or transaction which results or is intended to result in the sale, exchange, purchase, leasing or renting of any real estate.

(*Mass. Gen. Laws ch. 112, § 87PP.*)



In Massachusetts, a real estate broker is responsible for the supervision and conduct of the real estate brokerage business. A corporation or entity may not obtain a brokerage license unless an officer or partner of the corporation or entity is issued a broker's license as an individual. The broker that applies for and holds the license on behalf of the brokerage business is known as the designated officer or partner.

### Real Estate Salesman

A real estate salesman is an individual who performs any act or engages in any transaction included in the description of a real estate broker, except that a salesman may not complete the negotiation of any agreement or transaction which results or is intended to result in the sale, exchange, purchase, renting or leasing of any real estate (*Mass. Gen. Laws ch. 112, § 87PP*).

A salesman may not conduct his own business but must be engaged by a licensed real estate broker.

A salesman must be supervised by a licensed broker who must approve the negotiation and completion by the salesman of any transaction or agreement.

A salesman may not be affiliated with more than one broker at the same time.

### Non-agent Facilitator/Transaction Broker

A non-agent facilitator or transaction broker is a licensed real estate broker or salesman who provides services as a facilitator and does not represent a purchaser or a seller and does not act in any agency capacity (*Mass. Gen. Laws ch. 112, § 87AAA 3/4(f)* and *Mass. Code Regs. tit. 254, § 3.00(13)(e)*).

### 2. What are the licensing requirements for brokers and other roles listed in Question 1?

All real estate professionals must:

- Be at least 18 years old.
- Be licensed by the Massachusetts Board of Registration of Real Estate Brokers and Salespersons (Board).
- Renew their licenses every two years.

(*Mass. Gen. Laws ch. 112, § 87SS*.)

There is no difference between the licensing requirements for commercial and residential real estate professionals.

### REAL ESTATE BROKER

A real estate broker must:

- Have at least three years experience as a licensed salesman affiliated with a licensed real estate broker.
- Complete 40 hours of pre-licensure broker education approved by the Board.
- Pass the broker examination conducted by the Board or independent testing service designated by the Board.
- Obtain a \$5,000 bond posted with the Board.

(*Mass. Gen. Laws ch. 112, § 87SS*.)

### REAL ESTATE SALESMAN

A real estate salesman or salesperson must:

- Complete 40 hours of pre-licensure salesperson education approved by the Board.
- Pass the salesperson examination conducted by the Board or independent testing service designated by the Board.

(*Mass. Gen. Laws ch. 112, § 87SS*.)

### 3. What are the on-going requirements for maintaining a license for brokers and other roles listed in Question 1?

In Massachusetts, all real estate licensees must complete 12 hours of continuing education course work developed by the Massachusetts Board of Registration of Real Estate Brokers and Salespersons within the two-year period immediately preceding the renewal (*Mass. Gen. Laws ch. 112, § 87XX 1/2*).

Licensed real estate brokers who are Massachusetts attorneys in good standing with the Board of Bar Overseers are exempt from the continuing education requirements (*Mass. Gen. Laws ch. 112, §§ 87SS and 87XX 1/2*).

### 4. What is the best way to determine if a real estate professional is duly licensed?

The Massachusetts Office of Consumer Affairs and Business Regulation website can be used to check if a particular real estate professional is licensed and the status of the license.

### 5. What is the best way to file a complaint against a real estate professional for fraud, material misrepresentations, negligent acts or intentional misconduct?

A formal complaint can be downloaded from Massachusetts Office of Consumer Affairs and Business Regulation website.

### CUSTOMS IN PRACTICE FOR BROKERS

### 6. With regard to brokers in your jurisdiction, please briefly describe:

- The broker's customary involvement in a transaction.
- Whether there are any restrictions on the broker's role.

### BROKER'S INVOLVEMENT

The practice and customs are generally uniform in both commercial and residential real estate transactions throughout Massachusetts. Generally, a broker's involvement in key transactions is as follows:

- **Transfer of Commercial Real Estate.** Brokers are very involved in the initial stages of the transaction, including:
  - the preparation of marketing materials;
  - the establishment of a listing price; and
  - the preparation and negotiation of term sheets which are usually non-binding. Brokers may be involved with the preparation of offers, but attorneys are more often involved at the offer stage. Brokers typically stay actively involved throughout the contract period.

- **Transfer of Residential Real Estate.** Brokers are typically involved in the establishment of a listing price and in the preparation and negotiation of an offer to purchase. Some brokers prepare an industry standard purchase and sale agreement, but attorneys are involved in the negotiation and completion of the contract. Brokers typically stay actively involved throughout the contract period.
- **Leases of Commercial Real Estate.** Brokers are typically involved in preparation of marketing materials, the establishment of a rental rate and in the preparation and negotiation of term sheets which are usually non-binding. Brokers may be involved with the preparation of offers, but attorneys are more often involved at the offer stage. Brokers typically stay actively involved throughout the lease negotiation process.
- **Leases of Residential Real Estate.** A real estate broker typically prepares the lease agreement by filing in the blanks in an industry standard residential lease form. Real estate attorneys are not widely used for residential tenancies unless they involve multifamily apartment buildings.

### RESTRICTIONS ON BROKER'S INVOLVEMENT

Section 46a of Chapter 221 of the Massachusetts General Laws prohibits the unauthorized practice of law in Massachusetts.

Whether a particular activity constitutes the practice of law in Massachusetts "must be decided upon its own particular facts" (*In re Chimko*, 831 N.E.2d 316, 321 (2005)).

### CUSTOMS IN PRACTICE FOR ATTORNEYS

#### 7. With regard to real estate attorneys in your jurisdiction, please briefly describe:

- When an attorney becomes involved in the transaction, if at all.
- If an attorney can receive commission without a real estate broker license?
- Whether the attorney is exempt from the licensing regulations in *Question 1*.
- Whether an attorney can act as broker and legal counsel in the same transaction? If so, are any disclosures required?

### INVOLVEMENT

In commercial transactions, attorneys usually get involved at the term sheet and offer stage and then negotiate and complete the contract or lease. However, in residential transactions, attorneys do not usually get involved until the contract stage. Attorneys are rarely involved in residential leasing transactions.

### COMMISSION

In Massachusetts, an attorney may not receive commissions without having a real estate broker's license.

### EXEMPTION FROM LICENSING REGULATIONS

Massachusetts attorneys in good standing with the Board of Bar Overseers are exempt from the examination, education and apprenticeship requirements. To obtain a broker's license, licensed attorneys in good standing need only to complete the application and pay the required fee (*Mass. Gen. Laws ch. 112, § 87SS*).

### ACTING AS BROKER AND LEGAL COUNSEL

An attorney may not act as a broker and counsel on the same transaction without a full disclosure and a signed waiver by the client.

Generally, an attorney has a conflict of interest if the attorney has a personal stake in the outcome of a transaction. For example, an attorney's obligation to advocate for the client might be compromised if the attorney receives a commission when the transaction is complete.

### BROKERAGE AGREEMENTS

#### 8. Please describe different brokerage agreements commonly used in your jurisdiction between individuals selling or leasing their property and the brokers.

Generally, exclusive and non-exclusive brokerage agreements are used in Massachusetts for both commercial and residential transactions.

The types of listings used in Massachusetts are:

- **Open listing.** This is where the broker has the right to bring prospective purchasers to see the property. If the purchaser purchases the property, the broker earns a commission. Open listings can be given to several brokers. However, this arrangement is not customarily used in Massachusetts and is not popular with brokers because they cannot effectively market the property.
- **Exclusive agency listing.** This is where one broker lists and markets the property, and obtains a commission if the property sells or is rented through that broker, any broker or any real estate company. The terms of these agreements are typically negotiable.
- **Exclusive right to sell or lease listing.** This is the most commonly used listing agreement. In this arrangement, the broker receives a commission no matter who finds the purchaser or tenant. In contrast to an exclusive agency listing, a commission is due even if a broker or real estate company did not find the purchaser or tenant. If the seller or landlord finds a purchaser or tenant independently of the broker, then a commission would still be owed to the broker, but the parties may negotiate to exclude certain potential purchasers or tenants that the seller or landlord has previously contacted.
- **Multiple listing.** This is an arrangement available in residential markets only. Individual real estate brokers in a particular area pool their listings. The broker provides certain listing information to the Multiple Listing Service (MLS) office, where it is coordinated with listings from other members. The listings are then published to all MLS members, any of whom may sell any listed property. If a sale of property is made by someone other than the broker which took the listing initially, the commission is divided between the listing and selling broker. Multiple listing is typically used with the other listing arrangements used in Massachusetts.

Net listing agreements are prohibited in Massachusetts.

#### 9. Is there a customary tail period for exclusive brokerage agreements?

Tail periods are negotiated on a case by case basis and tails for commercial property are generally longer than tails for residential property.

Tails generally range from 90 days to six months.

## COMMISSION PAYMENTS

### 10. With regard to commissions in your jurisdiction:

- Does a broker need a written brokerage agreement to claim its commission?
- When is a broker entitled to its commission?
- May a commission be earned if the closing does not occur?
- Are there any statutory restrictions on commission rates?
- If the parties are permitted to negotiate a commission, what is the customary range for commission rates.

### WRITTEN BROKERAGE AGREEMENT

In Massachusetts, a written agreement is not required to seek enforcement of unpaid commissions. Under Section 1 of Chapter 259 of the Massachusetts General Laws, an agreement for brokerage services does not require the execution of a written contract to be enforceable under the Massachusetts Statute of Frauds.

### TIMING OF COMMISSION PAYMENT

Generally, the commission is payable at the closing of the transaction, either the execution of a lease by both parties or the closing of a contract for the sale of property. However, the timing of payment of a commission is generally heavily negotiated with most agreements providing that no commission will be due until the closing and the full payment of the consideration by the purchaser or tenant, as applicable.

### COMMISSION PAYMENT WITHOUT CLOSING

In Massachusetts in a sale transaction, the broker earns a commission when all of the following occur:

- The broker produces a purchaser who is ready, willing and able to buy on the terms fixed by the owner.
- The purchaser enters into a binding contract with the owner to buy on the terms fixed by the owner.
- The purchaser completes the transaction by closing the title in accordance with the provisions of the contract.

(*Tristram's Lending, Inc. v. Wait*, 327 N.E.2d 727, 729 (1975).)

If the contract is not completed because of the purchaser's finances or because of any other default of the purchaser, there is no right to a commission against the seller (*Tristram's Lending, Inc.*, 327 N.E.2d at 732).

However, if the failure to complete the contract is because of a wrongful act of or interference by the seller, the broker's claim for a commission is valid and must be paid (*Tristram's Lending, Inc.*, 327 N.E.2d at 732 and *Lobosco v. Donovan*, 565 N.E.2d 819, 821 (Mass. App. Ct. 1991)).

No commission is due if either:

- The sale fails through no fault of the owner (*Hills v. Lake*, 646 N.E.2d 1081, 1085 (Mass. App. Ct. 1995)).
- A broker has produced a purchaser but the sale did not occur because a municipality exercised its right of first refusal (*Dalvis, Inc. v. Coz*, 594 N.E.2d 890, 892-93 (Mass. App. Ct. 1992)).

### STATUTORY RESTRICTIONS

In Massachusetts, commission rates are not prescribed by law but negotiated by the parties.

## RANGE OF NEGOTIATED RATES

The customary range of negotiated rates for residential and commercial transactions is 4-6% of the gross selling price of the real estate.

### 11. Is it customary for the seller or the landlord to pay the commission? If so, how is payment to the purchaser's or tenant's broker usually ensured?

In Massachusetts in sale transactions, the seller typically pays the commission in both residential and commercial transactions. The seller enters into a brokerage agreement with a broker that obligates the seller to pay the broker a commission upon the occurrence of certain events (see *Question 10*).

The seller's broker usually then enters into a co-brokerage agreement with the purchaser's broker. The seller's broker provides the purchaser's broker with its portion of the commission under the co-brokerage agreement.

In commercial leasing transactions, the landlord generally pays the commission, which is usually paid out over a period of time outlined in a schedule attached to the brokerage agreement. The landlord's broker usually then enters into a co-brokerage agreement with the tenant's broker. The landlord's broker provides the tenant's broker with its portion of the commission under the co-brokerage agreement. It is common for brokers to earn commissions on lease renewals with the same tenant where options in the lease are executed.

### 12. Is fee splitting permitted or customary in your state? If so, are there any restrictions?

Fee splitting is permitted in Massachusetts. However, Massachusetts laws limit the splitting of fees, commission or other compensation received by a real estate broker with other licensed real estate brokers or salespersons.

### 13. When real property is sold, is the grantor deemed released from any deferred commission payment obligations that are scheduled to come due after the transfer of fee title to the grantee or must there be an express release? Are deferred commission payments automatically assumed by the grantee or must the assumption be express?

#### GRANTOR RELEASE FROM DEFERRED COMMISSION

A grantor is not deemed released from any deferred commission obligations because deferred commission payments do not run with the land and the obligations follow the grantor.

#### GRANTEE'S ASSUMPTION OF DEFERRED COMMISSION

The brokerage agreement controls how this is handled. It is typical for grantees to assume the obligations for deferred commission payments but it is negotiable.

## COSTS

### 14. With regard to the marketing and advertising costs associated with the listing:

- Does a broker typically pass on these costs to the seller or the landlord?
- Are provisions dealing with these costs usually found in exclusive or non-exclusive agreements, or both?

### REIMBURSEMENT OF COSTS

Local customs and market conditions govern the reimbursements of costs.

In a commercial transaction where the broker has an exclusive agreement, the seller or landlord typically reimburses the broker for its marketing and advertising costs. However, reimbursement of marketing and advertising costs in commercial transactions is negotiable and costs can be capped at a specific amount.

In residential transactions or lease transactions, there is typically no reimbursement of marketing and advertising costs.

Reimbursement of marketing and advertising costs is generally paid with the commission the broker receives at the closing. Brokers may also negotiate to include a separate marketing budget for commercial properties where the seller agrees to pay those costs regardless of whether the property is sold.

### COST PROVISIONS

Provisions dealing with the reimbursement of marketing and advertising costs are more likely to be found in exclusive brokerage agreements. However, these provisions are usually negotiable.

## DISCLOSURE LAWS

### 15. Describe any disclosure laws affecting real estate brokers or salespersons. Is a broker required to disclose its dual agency?

### GENERAL DISCLOSURE LAWS

All brokers and salespersons engaged in renting real property must provide each prospective tenant with a written notice which states all of the following:

Whether the prospective tenant must pay any fee for the service.

- The amount of the fee.
  - The manner and time in which the fee is to be paid.
- Whether or not the fee or any portion of the fee must be payable by the tenant if a tenancy is not created.

Additionally, a broker must provide disclosures concerning the dangers of lead based paint on approved forms before a potential purchaser makes an offer on a particular property.

### DUAL AGENCY DISCLOSURE

In Massachusetts, real estate brokers or salespersons may act as dual agents representing both prospective purchasers and sellers. These brokers or salespersons must obtain informed written consent from both the seller and the prospective purchaser (*Mass. Gen. Laws ch.*

*112, § 87AAA 3/4(b)*). This consent must be in the form prescribed by the Massachusetts Board of Registration of Real Estate Brokers and Salespersons and must be signed and dated (*Mass. Gen. Laws ch. 112, § 87AAA 3/4(b)*).

This written consent may be obtained when an agency relationship with the seller or purchaser is created, but notice of a dual agency relationship must also be given to the prospective purchaser and to the seller after a listed property is first shown to the purchaser (*Mass. Gen. Laws ch. 112, § 87AAA 3/4(b)*).

However, brokers and salespersons are not required to provide written notice to each prospective purchaser or seller who attends an open house showing of real property if the broker or salesperson conspicuously discloses the agency relationship (*Mass. Gen. Laws ch. 112, § 87AAA 3/4(b)*).

The dual agency disclosure requirements apply only to the intended purchase or sale of land either:

- With a building intended to be used as one to four residential dwellings.
- On which a building is intended to be constructed for use as one or two residential dwellings.

(*Mass. Gen. Laws ch. 112, § 87AAA 3/4(a)*).

## BROKER'S LIENS

### 16. Can a broker file a lien against real property if it has a claim for its commission? Is a broker's lien an inchoate lien?

### FILING A LIEN

Massachusetts law does not provide for a broker's lien against real property based on unpaid commissions. Brokers with unpaid commission claims may pursue an action for a breach of contract claim.

### BROKERS' LIENS AS INCHOATE LIENS

Massachusetts law does not provide for a broker's lien against real property.

### 17. How can a real property owner remove a broker's lien?

Massachusetts law does not provide for a broker's lien against real property.

## MANAGING REAL ESTATE

### 18. Is a broker's license required to manage real estate and collect rents on behalf of a landlord? If so, what are the statutes regulating the licensing requirements?

In Massachusetts, a broker's license is not required for:

- Employees of real estate owners if the employees are performing the acts of a real estate broker or salesman for the subject property and if these acts are performed in the regular course of, or incident to, the management of the property.
- Any management agent (or regular employees of the agent acting on the agent's behalf in the regular course of business) while acting under a contract with a real estate owner.

Massachusetts does not have other licensing requirements for property managers.

(*Mass. Gen. Laws ch. 112, § 87QQ.*)

For the links to the documents referenced in this note, please visit our online version at <http://us.practicallaw.com/5-569-6228>

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- Office Leasing: Key Provisions in an Office Lease (<http://us.practicallaw.com/6-503-7910>)
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- Real Estate Brokerage Laws and Customs: State Q&A Tool (<http://us.practicallaw.com/2-535-6065>)

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