

## **TEAMS: OUTLINE OF THE ISSUES**

For many, years Realtors® have operated in an arrangement commonly referred to as a team. However, what started as an informal arrangement between salespersons to provide mutual support has evolved in many instances into a separate business organization. As a team becomes formalized, there is the possibility for numerous legal issues to arise. This is particularly true because under Michigan law, there are only licensed brokers and brokerage firms, associate brokers and salespersons. There is no recognition of an entity known as a “team.”

### **LEGAL STATUS OF THE TEAM**

If team members wish to form a separate legal entity which can receive compensation from the brokerage firm with whom they are affiliated, the following basic steps must be taken:

- 1) Team members form a Michigan business corporation (with an “S” election) or limited liability company and obtain a broker’s license for the new company (“NUCO”).
- 2) At least one of the team members must obtain an associate broker’s license with the brokerage firm with whom they are affiliated and with NUCO. This team member would have two associate broker’s licenses.
- 3) An Employer Identification Number (“EIN”) must be obtained for NUCO.
- 4) Establish a business checking account for NUCO which can be used to receive commission checks from the real estate brokerage firm and pay expenses.
- 5) NUCO must maintain its corporate existence in good standing with the State of Michigan which requires the filing of annual reports with the corporations division of the Department of Licensing and Regulatory Affairs.

6) Maintain NUCO's real estate broker's license and the team member's associate broker's license in NUCO.

### **OPERATING STATUS OF THE TEAM**

If a team is being formed through the use of a corporation or a limited liability company solely for the purpose of receiving compensation from the real estate brokerage but otherwise wishing to avoid many potential issues which could be involved in the operation of a team, the team should not:

- 1) Advertise or otherwise conduct business in the name of NUCO.
- 2) Hire administrative assistants or other employees or independent contractors through NUCO.
- 3) Set up a trust account in the name of NUCO.
- 4) Deposit funds belonging to others in the NUCO business checking account.

If a team through NUCO engages in one or more of these activities, then other legal issues come into play.

### **INDEPENDENT CONTRACTOR STATUS**

1) Realtors® in Michigan automatically qualify for independent contractor status for all purposes if an associate broker or salesperson has a written independent contractor agreement with his or her brokerage firm and the compensation from the firm is 75% or more in the form of commissions.

2) If the real estate brokerage firm is paying commissions earned by team members to NUCO, who is then paying the team members pursuant to an agreement between the team members, there is a risk the Internal Revenue Service and State of Michigan could claim the

payments paid to team members by NUCO are not commissions or are not being paid by their broker.

3) If team members become licensed as agents of NUCO, they could not also be agents of the real estate brokerage firm. The Occupational Code does not permit salespersons to be licensed through more than one broker. Salespersons licensed with NUCO would need to have independent contractor agreements with NUCO. Further if the real estate brokerage firm pays commissions earned by the team members to NUCO and in turn NUCO pays the team members affiliated with salespersons, the Internal Revenue Service or the State of Michigan may not agree that the 75% commission exemption applies. It could contend that the only commissions are originally received by the real estate brokerage firm and then paid to NUCO for distribution in accordance with the agreement among the team members.

#### **ADVERTISING AND INSURANCE COVERAGE**

In the past, agents typically formed a “company within a company” for tax advantages. However, the agents continued to function solely under the banner of the real estate brokerage firm. The public did not even know that the “company within a company” existed. However, many teams now advertise in the name of their team. There is nothing unlawful about such advertising so long as the real estate brokerage firm’s name or name and address or telephone number appears in the advertisement.

When a team “goes public” with its existence, it could become a target in the event a dissatisfied seller or buyer decides to begin litigation. Typically, in that situation, the lawyer for the seller or buyer will target any entity involved in the transaction, *i.e.*, the real estate brokerage firm and the team. If NUCO is operating and advertising as a separate entity, then it is very possible that the errors and omissions insurer for the real estate brokerage firm would decline to

provide coverage to NUCO. If there is no insurance coverage for NUCO, the cost of even successful litigation could be financially disastrous.

Realtors® working in teams who advertise themselves as a team should confer with their real estate brokerage firm and insurance agent to make certain that there is errors and omissions coverage or alternatively obtain their own errors and omissions coverage.

### **SUPERVISION AND EMPLOYEES**

Under the Occupational Code, there is no concept of a “team.” The Occupational Code anticipates that all salespersons shall be affiliated with a broker. A broker is required under Michigan law to supervise salespersons. Rule 325 specifically provides that a broker cannot contract with a salesperson or a non-principal associate broker to lose authority to supervise the salesperson or non-principal associate broker. NUCO may well wish to operate semi-autonomously and pursuant to its own marketing practices. However, the real estate brokerage firm will still be responsible for supervising NUCO and its team members. Thus, the brokerage firm must make certain that NUCO and its team members conform with the policies of the firm.

If NUCO takes on unlicensed assistants or other staff, the real estate brokerage firm must make certain that any employees of NUCO are legally employees of NUCO and not the brokerage firm. The real estate brokerage firm would not want to wake up as a subject of a worker’s compensation or unemployment insurance claim by an employee or former employee of NUCO. Most likely, the real estate brokerage firm would have no applicable insurance, and thus the principals of the real estate brokerage firm could face personal liability.

In sum, in operating as a team through a “company within a company” Realtors® are attempting to drive a square peg into a round hole known as the Occupational Code. Care is required.