

A COMPANY WITHIN A COMPANY?

Over the years, we have been told by any number of individual Realtors® that their accountant has advised them to set up a corporation or limited liability company and have their broker pay that entity rather than the Realtor® individually. Licensing law does not permit this structure if the Realtor® is a salesperson. This structure can work for an associate broker, but perhaps not in the manner envisioned by your accountant. This article is intended to help Realtors® and their accountants understand the restraints imposed by license law.

In the commercial world, it is very common to layer entities. For example, some or all of the shareholders of a small company may be corporations themselves. Michigan real estate license law does not permit this. Under Michigan license law, both salespersons and associate brokers are individually licensed through a particular broker. A licensed broker may be a corporation or a limited liability company, but the licensees who work for that broker are persons with real estate licenses in their individual names.

An associate broker can be licensed through more than one broker. A broker can, of course, pay another licensed broker. So while an associate broker cannot be a licensed entity within a brokerage firm, he or she can create a licensed brokerage entity “on the side” and direct his or her broker to pay that outside entity rather than pay the individual associate broker directly.

A real estate salesperson, on the other hand, can only be licensed through one broker at a time. A licensed salesperson can only be paid by the one real estate broker through whom he or she is licensed. A real estate broker cannot pay a commission to an entity that does not have a real estate license. For these reasons, unlike an associate broker, a salesperson cannot direct his or her broker to pay an outside entity rather than the salesperson directly. The salesperson cannot get a

real estate license for a separate entity, and the salesperson's broker cannot pay an unlicensed entity.

If an associate broker wishes to be paid through a corporation or limited liability company, she needs to take the following steps. First, the associate broker should create a new entity ("LLC") by filing articles of organization with the Corporations and Securities Bureau. Next, the associate broker should file an application with the Department of Licensing and Regulatory Affairs ("DLARA") to obtain a real estate broker's license for her new LLC. Once the new LLC has a real estate license, the associate broker will be licensed through both the real estate brokerage firm where she has been working and through her newly-formed LLC.

After the newly-created LLC is licensed, the real estate brokerage firm can pay the LLC rather than the individual associate broker directly. The new LLC may be useful if there are tax advantages or other accounting reasons for an associate broker to receive payment through an LLC. The new LLC does not work as a liability shield. License law makes clear that the work being done for the real estate brokerage firm is being done by the associate broker individually and not by the associate broker's LLC. Since the work cannot be done in the name of the LLC, a court will not allow the associate broker to use that LLC as a liability shield.

After the LLC is in place, the real estate activities of the associate broker must continue to be performed in the name of the real estate brokerage firm. It is that firm's liability shield (and that firm's errors and omissions insurance coverage) that provides protection to the associate broker. If the associate broker attempts to conduct business in the name of the LLC or otherwise fails to make clear that the business is being conducted by the real estate brokerage firm, she may put both herself and her firm at risk. If a client can show that he did not understand that he was working with a particular real estate brokerage firm, a court may allow the client to pierce that

firm's liability shield. Additionally, under these circumstances, the brokerage firm's errors and omissions carrier may deny coverage. It is for this reason that the LLC should remain "invisible" to the associate broker's clients and customers.

In summary, while it is true that creating a second corporate layer within a real estate brokerage firm could provide some additional liability protection, this structure is not available under Michigan license law. Moreover, if real estate licensees attempt to do business in the name of a separate entity, they may jeopardize the protections they already have as part of the real estate brokerage firm through whom they are licensed. Associate brokers may establish "on-the-side" licensed entities for tax advantages or other accounting reasons, but they should not conduct business in the name of those entities.

A Note on Teams:

The above analysis also applies to teams. The name of a team and the way the team advertises should make clear that the team is part of the real estate brokerage firm. A team may want to form a separate legal entity in order to hire assistants, deduct expenses and for other behind-the-scenes bookkeeping purposes. Even if the team is a separate legal entity, the members of the team should still do business in the name of the real estate brokerage firm. Listing contracts and buyer's broker contracts should be in the name of the real estate brokerage firm and should be signed on behalf of that firm using individual names of team members and not in the name of the team. It is the individual team members and not the team itself (even if a separate legal entity) who work for the real estate brokerage firm.