

Beware the Sellers' Bonus!

By Barry S. Goodman, Esq.



You have just listed a new home and have very motivated sellers who already are under contract to buy another home. The sellers suggest a "bonus" to the selling agent above the commission that normally would be offered and decide to offer a \$5,000 bonus plus a seven-day trip to Bermuda as an incentive for selling agents to sell their home. The sellers also offer you a bonus of a \$5,000 American Express Gift Card if you can sell their home within 30 days.

Can the sellers offer such bonuses to the selling agent and you? Is there any problem with the selling agent or you accepting such bonuses? In a slow market in which sellers are seeking ways to gain an edge to sell their house, it is important that you understand what you can and cannot do regarding such bonuses.

Legal Considerations Regarding Bonuses

The real estate licensing law provides some clear parameters for any such bonuses. First and foremost, the licensing law specifically provides that "[n]o real estate salesperson or broker-salesperson shall accept a commission or valuable consideration for the performance of any of the acts herein specified [as a licensee], from any person except his employer, who must be a licensed real estate broker."¹ Thus, not only must the broker pay all commissions to an agent, but any "valuable consideration" provided to an agent for any activities as a real estate licensee also must be paid through the broker to the agent.

This requirement that such compensation only be paid to the agent by the broker is reinforced in a provision in the licensing law that provides that a salesperson can be sanctioned for accepting such a payment from someone other than the broker. The licensing law specifically provides that a real estate licensee can be sanctioned by the Real Estate Commission for "[a]ccepting a commission or valuable consideration as a real estate broker-salesperson or salesperson for the performance of any of the acts specified in this act from any person, except his employing broker, who must be a licensed broker."²

Sanctions for violating this rule may include the Commission placing the real estate licensee on probation, or suspending or revoking the agent's license, as well as fining the agent not more than \$5,000 for the first violation and not more than \$10,000 for any subsequent violation. If the licensee is guilty of a third offense, the Commission may direct that no license as a real estate broker, broker-salesperson or salesperson shall ever be issued to that person again. Under the licensing law, each transaction shall be construed as a separate offense.ⁱⁱⁱ

In addition, only a real estate broker, not a salesperson or broker-salesperson, has the right to sue to be paid a commission or any other consideration if the seller failed to pay the bonus.^{iv} Thus, the agent would not have any right to sue the seller for the bonus since only the broker can file a lawsuit to recover the bonus.

Finally, it should be noted that, under Real Estate Commission regulations, all salespersons must have a written agreement with the broker specifying the rate of compensation to be paid to the salesperson during his or her affiliation with the broker.^v The terms of this written agreement presumably would be binding with regard to any split of compensation to be paid to the salesperson, including a bonus.

Monetary v. Other Consideration

There are two types of bonuses that a seller can offer, a cash bonus or some item of value. Under New Jersey law, each of these bonuses has to be analyzed in a different way.

With regard to a cash bonus, since all payments for work done as a real estate licensee must be paid through the broker, the bonus can be paid to the broker, who then can compensate the agent. Of course, such a payment would be subject to the provisions of the written agreement between the salesperson and the broker.

More problematic is a bonus that is offered in the form of a trip, gift card, plasma television, or some other item. Unless the agent and broker have agreed, or at least can agree, how such a bonus will be paid through the broker to the

agent, it is unclear how the agent could be paid this bonus.^{vi} This would be true whether the seller was offering this bonus to the listing agent or the selling agent.

Conclusion

As a result, it is clear that sellers may offer bonuses to selling agents, as well as listing agents, in New Jersey. However, agents must understand that they cannot accept any such bonus directly from the seller. All such bonuses must be paid through the agent's broker. Otherwise, there could be serious consequences for the agent.

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i N.J.S.A. 45:15-16.

ii N.J.S.A. 45:15-17(m).

iii N.J.S.A. 45:15-17.

iv N.J.S.A. 45:15-3.

v N.J.A.C. 11:5-4.1(a).

vi This agreement should be included in the written agreement between the broker and salesperson that is required to set forth the rate of compensation to be paid to the salesperson

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