

# **Guidelines for the Preparation & Use of the Pennsylvania Association of Realtors® Buyer (Tenant) Agency Contract (Form BAC)**

## **General Notes on Usage of PAR Standard Forms**

The Pennsylvania Association of Realtors® Standard Forms are developed by the PAR Standard Forms Committee for use in a wide variety of transactions and market areas. To provide maximum flexibility to the parties, many provisions contain blank spaces that can be filled in as appropriate. Further, it is helpful to remember that where pre-printed language is not agreeable to the parties it can be crossed out and/or modified, with the parties *dating and initialing the change in the margins*. As a general rule, text added by the parties that changes pre-printed text, or pre-printed text altered by the parties, will prevail over pre-printed language should a dispute arise.

As stated in the title, these are only *guidelines* for the proper use of this form. The Guidelines presented here should be used in conjunction with, and as a supplement to, your professional education, and are in no way meant to substitute for proper professional education. Seek guidance from your Broker and/or your legal counsel if you have any questions about the proper use of this or any PAR form in a transaction.

To make these Guidelines more useful there may be helpful “extras” added to the main text. Many of the “NOTE” or “Practice Tip” items you will see are based, in part, on the experiences of PAR members and legal counsel, and are designed to point out some of the more practical items involved in filling out this form.

## **General Usage Information – Exclusive Representation**

This form is designed to be a binding contract for both Broker and Buyer, wherein Buyer agrees to be represented by Broker and no other. Neither side has an automatic right to terminate and walk away unless both sides negotiate that sort of term into the contract. If you aren't entirely sure about locking this client into a long-term contract – or the client doesn't seem sure about wanting to be in a long-term contract with you – there are at least 4 ways to handle it:

- (1) Sign the exclusive contract for a short time period, maybe for a couple of weeks.
- (2) Provide a cancellation provision where one side or the other can cancel after a certain period of time.
- (3) Use PAR Form NBA, the Non-Exclusive Buyer Agency contract to establish Broker as a buyer agent for any properties shown by Broker without requiring Broker and the client work together on any other properties if they don't want to.
- (4) Establish an oral non-exclusive contract with the client, using Form NBA as a “written memorandum” of your discussion.

Definitely *do not* address discomfort with a client by simply deciding to not develop any buyer agency agreement. While the Real Estate Licensing and Registration Act (RELRA) does permit brokers to provide services prior to getting a signed agreement, it also says that the broker isn't entitled to collect a fee without an agreement. Don't get caught trying to get your representation agreement signed at

the same time as the Agreement of Sale. That probably isn't the best time to first bring up that the buyer might owe a fee of some sort.

Remember that you only use this form if you are, in fact, representing Buyer as an *exclusive* buyer agent. For non-exclusive agency, use Form NBA. If you are working as a transaction licensee for both Buyer and the seller, you would want to use the Transaction Licensee Contract (PAR Form TLC).

## Parties

### **BROKERS & LICENSEES:**

On the left side, the Broker should fill in the name of the company (brokerage), its license number, and its contact information. On the right side, the Licensee should fill in his or her name, license number, and contact information. If more than one Licensee is representing the Buyer, each Licensee should write their name, license number, and contact information.

### **BUYER:**

Starting by the word "BUYER" insert the name or names of Buyers and their contact information. Be sure to list all Buyers, to make sure each one is fully bound to the Agreement.

## Other Agency Contracts

The NAR Code of Ethics requires that its member-Brokers ask whether a consumer is currently subject to another exclusive representation agreement before entering into an agreement with them. That question is asked in the heading, with an opportunity for Buyer to explain if the answer is "yes." Specifically, this is addressed to Standard of Practice 16-9, which states:

"REALTORS®, prior to entering into a representation agreement, have an affirmative obligation to make reasonable efforts to determine whether the prospect is subject to a current, valid exclusive agreement to provide the same type of real estate service."

Note that the question is very general, so a "yes" answer does not necessarily require that Broker cease all contact with the consumer. For example, Buyer may answer "yes" if she already has a listing contract with another broker who is selling her house but is not going to act as a buyer agent. Similarly, Buyer may have other non-exclusive agency contracts in place that wouldn't prevent you from working with her.

It is important to fully understand the boundaries that may be created by any other representation agreement so you do not cross those boundaries and potentially expose a client to a situation where two fees might be due. If Buyer is subject to other contracts at the time he signs an "exclusive" contract with you, he may end up owing multiple fees – sure to cause a problem in the distribution of fees at closing. If you have any questions about whether entering into a representation agreement would be prohibited by an existing contract with another broker, be sure to check with your broker or counsel before signing the contract.

**Note:** There are many ethical and legal questions that should be answered before discussing the representation of a buyer currently subject to an exclusive representation agreement. Always consult your Broker or counsel before entering into an agreement under these circumstances.

## **Paragraph 1: STARTING AND ENDING DATES OF BUYER AGENCY CONTRACT (ALSO CALLED “TERM”)**

### **Subparagraph (A): RELRA Requirements**

RELRA requires a statement that the length of a buyer agency contract is negotiated between Buyer and Broker, which is provided here. This provision also notes that where Broker is working as a buyer agent all duties are to Buyer, even though the fee may be coming from a seller.

### **Subparagraph (B): Starting Date & Ending Date**

By signing this Contract, Buyer agrees to work exclusively with Broker to secure any property by purchase or lease during the term of the agreement. Buyer agrees to refrain from signing any other buyer agency contracts (even non-exclusive) with another broker that would begin prior to the Ending Date of this Contract.

The contract automatically begins when executed by Broker and Buyer, unless the parties state a different date. If the contract is to begin on a specific date after signing, fill in the blank to state that date.

**Practice Tip:** The buyer agency contract should generally be signed by the buyer first, so it becomes binding when the licensee signs it. This allows the licensee to know exactly when the contract starts, so any issues relating to contract term can be tracked.

An ending date for the contract must be specified. This is required to meet general legal requirements for contract formation. There is no “implied” ending date or time period; a contract without an ending date may be considered to be void or unenforceable.

**Practice Tip:** The Ending Date provision anticipates that a specific date will be filled in. A Broker may choose to use a more general time period – for example, “3 months from Starting Date” – but this is less precise. If there is an issue as to the exact ending date, the more general provision may be subject to interpretation (e.g., When did the contract start if there were multiple negotiated changes? Is the day of signing counted as a “day” in the calculation?). Providing a specific Ending Date avoids these issues.

**Note:** Paragraph 2(C)(2) contains a “protection period” that protects Broker’s fee if Broker’s actions lead to the purchase of the property, but the transaction occurred after the ending date of the Buyer Agency Contract (subject to certain restrictions).

## **Paragraph 2: BROKER’S FEE**

### **Subparagraph (A): Fee is Negotiable**

RELRA requires a statement that any fee is negotiated between Broker and Buyer, and that a fee may possibly be based on a percentage of the purchase price. Broker’s fees cannot be set or recommended by any association, multi-list, or any other organization or group, and members should avoid antitrust issues by not discussing fee structures with other brokers.

**Note:** The fact that a fee is negotiable between a broker and a buyer does not prevent a broker from requiring his or her salespersons to charge a specific fee. For example, it is

not permissible for all brokers in a market to get together and determine that the market-rate fee will be x% for every transaction. It is permissible, however, for a single broker to set an internal policy that agents may not work as a buyer's agent for a fee of less than x% or \$yyy.

**Subparagraph (B): Calculating the Broker's Fee**

Paragraph 2(B)(1) is broken down into two separate subparagraphs. The first deals with the fee owed if a property is purchased from a seller represented by a broker; the second deals with the fee owed if a property is purchased from an unrepresented seller (FSBO). Just as some listing agents have a policy of accepting variable compensation from sellers based on the identity and representation status of a buyer, some buyer brokers might choose to institute a variable fee structure based on the identity and representation status of the seller.

The fee is expressed as “ \_\_\_\_\_% of the sales price, or \$ \_\_\_\_\_, whichever is greater, AND \$ \_\_\_\_\_.” This is done to allow for the maximum flexibility in presenting a fee, and it should be usable in a wide variety of circumstances. This method of expressing the fee, known as a blended fee, expresses the entirety of Broker's fee, even though it is laid out in multiple parts.

The fee percentage is a percentage of the sales price. The dollar amount in the middle blank is the minimum amount Broker would be willing to accept from that fee percentage. The flat fee is an amount that is charged in addition to or in place of the fee percentage. One or all of these three pieces can be included as part of your fee.

For example:

Description	Fee Percentage	Minimum \$ for That %	Flat Fee	Combined
% Fee Only	X%	\$ 0	\$ 0	X% of the sale price OR \$ 0, whichever is greater, AND \$ 0
% Fee, Plus Flat Fee	X%	\$ 0	\$ ZZZ	X% of the sale price OR \$ 0, whichever is greater, AND \$ ZZZ
% Fee with Minimum	X%	\$ YYYY	\$ 0	X% of the sale price OR \$ YYYY, whichever is greater, AND \$ 0
% Fee with Minimum, Plus Flat Fee	X%	\$ YYYY	\$ ZZZ	X% of the sale price OR \$ YYYY, whichever is greater, AND \$ ZZZ
Flat Fee Only	0%	\$ 0	\$ ZZZ	0% of the sale price OR \$ ZZZ, whichever is greater, AND \$ 0

This contract is designed to work as both a buyer agency contract and a tenant agency contract. Paragraph 2(B)(2) allows you to fill in Broker's fee when working as a tenant agent to secure a lease.

**Practice Tip:** It is important to fill out both subparagraphs (1) AND (2) when working with a client, even if you do not think that you will be helping your client find a rental property or vice versa. It is possible that the client who wanted to buy a home will decide to rent or determine that purchasing a property is not financially possible and would look to you for assistance. The same is true when you begin by using this form to work with a client who is looking to rent. The Buyer may find that purchasing is a better option than renting and would want your representation in doing so. In either case, if no fee is filled in for the type of work that is carried out, there is no guarantee of payment.

If brokerage policy is to accept any amount of cooperating compensation (including no compensation) as full payment of any fee that might be owed by Buyer, then Broker can insert “\$0” or “zero” in the blanks in subparagraph (B)(1) and (B)(2). If brokerage policy is to set a fee amount but allow Buyer to offset that amount with any cooperating compensation, insert the amount of the fee in the blank.

**Practice Tip:** Check with your broker and/or counsel to determine how best to fill out the fee provisions. Brokers have the authority to set rules and policies on acceptable levels of compensation that can be negotiated by their salespeople. There may be financial issues if an individual salesperson negotiates a fee that is outside of the guidelines set by the broker.

Sometimes a buyer’s broker will accept cooperating compensation from a listing broker as partial or complete satisfaction of any fee owed by a buyer. Note that this provision does not state that cooperating compensation will always be accepted as full payment of a fee, only that it will be accepted if offered.

If the cooperating compensation received by Broker is less than whatever fee is inserted in subparagraph (B)(1) and (B)(2), then the terms of the provision state that Buyer will pay Broker the difference between what is written in the contract and what is received by Broker.

*Example:* For example purposes only, assume Broker’s Fee is \$5,000. If the cooperating compensation is only \$4,000, Buyer must either pay the \$1,000 difference directly to Broker or convince the seller to provide funds to pay that fee. If the cooperating compensation received from the listing agent is \$5,000 or more, Buyer owes no fee under this provision.

**Note:** As long as it is done within the bounds of the law and the Realtor® Code of Ethics, brokers may voluntarily renegotiate cooperating compensation among themselves. PAR publishes the Cooperating Broker Compensation Agreement (PAR Form CBC) and the Cooperating Broker Compensation Agreement for Rentals (PAR Form CBCR) for this purpose. It is also permissible for buyers to negotiate a “seller assist” from the seller to help pay Buyer’s broker fees. The Compensation Addendum to the Agreement of Sale (PAR Form CAS) can be used for this purpose. Carefully read the Guidelines for each of these documents prior to use, as the ethical issues can be rather technical.

Broker may, but is not required to, charge Buyer a portion of Broker's Fee as a non-refundable (upfront) fee at the time this contract is signed. This upfront fee is part of Broker's Fee, not in addition to it.

**Practice Tip:** Some brokers will prefer to charge this upfront fee to cover their initial investment of time and resources when showing properties to a buyer. Some brokerages may not wish to charge upfront fees to attract more listings; other brokerages may wish to charge these fees to reduce their risk.

Any other fees that Buyer will be expected to pay to Broker should be detailed in subparagraph (B)(5).

**Practice Tip:** One good test for determining whether to use a separate form is to determine whether the fee is for "separate" activities that would otherwise not be performed. For example, if you are charging a percentage fee plus a separate "transaction fee" for work generally included in your normal brokerage activity (i.e., work that you'll do regardless of the final fee agreed upon), you may want to use the Buyer Agency Contract to negotiate and disclose that fee as a single "blended fee." If you are thinking of charging for tasks that you won't perform unless you receive payment above your normal brokerage fee, then the Consumer Services Fee Addendum (Form CSF) is a better place to put it.

### **Subparagraph (C): Balance of Broker's Fee**

The balance of Broker's fee is earned at the time Buyer enters into a sale or lease agreement. This amount is calculated by subtracting any upfront fee (Paragraph 2(B)(4)) from the total fee (Paragraph 2(B)(1) or (2)). For example, if Broker's fee is \$3,000 and \$250 was paid at the time of signing, \$2,750 is the balance of Broker's fee.

**Note:** Oftentimes in sales transactions the balance of Broker's fee is paid at settlement, particularly if that fee is being paid through cooperating compensation. The listing broker can't pay cooperating compensation until he has received his fee at settlement. As an exclusive buyer agent, the preprinted terms of the contract state that a fee is earned for any purchase or lease during the term of the contract, regardless of whether the broker is involved in the process.

### **Paragraph 3: DUAL AGENCY**

RELRA requires a disclosure to Buyer if Broker could potentially be working as a dual agent. To ensure that buyers understand in advance, the disclosure is included in the Buyer (Tenant) Agency Contract.

**Note:** If Broker does not practice dual agency, use the PAR Single Agency Addendum (PAR Form SA) to change the terms of this paragraph.

### **Paragraph 4: DESIGNATED AGENCY**

The standard language in this Contract states that designated agency is applicable. Broker designates one or more licensees to represent the interests of Buyer and that designated licensee will work

exclusively for Buyer. If Broker does not allow designated agency, check the “Designated Agency is not applicable” box.

If Buyer’s agent shows a property to Buyer that is listed by another licensee working for the same brokerage who is designated to represent the seller, neither licensee is a dual agent. If the same designated agent represents both Buyer and the seller in the same transaction, that licensee is a dual agent.

## **Paragraph 5: BROKER’S SERVICES TO OTHERS**

### **Subparagraph (A): Broker’s Relationship with Seller**

This language is a disclosure required by RELRA, stating that Broker might also provide services to the seller. The fact that the seller might pay a separate fee to Broker for any services must be disclosed to Buyer. Additional language informs Buyer that Broker has not breached a duty to Buyer when providing services to the seller.

### **Subparagraph (B): Other Buyers**

With this provision, Buyer acknowledges that Broker may work with other buyers and may show the same properties to prospective buyers. RELRA states that this type of activity is not a conflict of interest.

### **Subparagraph (C): Conflicts of Interest**

This provision informs Buyer that Broker has an ongoing obligation to inform Buyer of any conflicts of interest on the part of Broker or any of Broker’s salespeople. Note that even without this contractual clause, all brokers and licensees are legally and ethically required to disclose any conflicts.

## **Paragraph 6: ENTIRE CONTRACT**

Like the Representations paragraph in the PAR Agreement of Sale, this reminds both Broker and Buyer that all terms of the contract between the two must be in writing and may not be enforceable if they are not. All changes to this contract must also be reduced to writing and signed by Buyer and Broker/salesperson. This may be done in the body of the contract, if initialed by Broker and Buyer, or on various addenda, including the Change to Buyer Agency Contract form (PAR Form CBA).

## **Paragraph 7: TRANSFER OF THIS CONTRACT**

### **Subparagraph (A): Circumstances for Transfer**

Buyer agrees that Broker may transfer the Buyer Agency Contract to another broker under certain circumstances. This paragraph outlines which situation(s) would permit Broker to transfer the contract.

### **Subparagraph (B): Written Notice**

Broker must immediately notify Buyer in writing if a transfer is made.

## **Paragraph 8: CONFIDENTIALITY**

This paragraph informs Buyer of Broker’s general obligation to keep Buyer’s sensitive information confidential. It also tells Buyer that sellers are not under the same obligation. Buyer understands that a seller may not treat the terms of any offer as confidential unless there is some written agreement to

the contrary. This statement is included because it is required by the NAR Code of Ethics, Standard of Practice 1-13.

**Note:** There is no law, regulation or ethical provision requiring sellers to maintain information as confidential. Despite this fact, some buyers – and even some brokers and agents – mistakenly believed that offers were confidential and that sellers were not permitted to provide information about an offer to other buyers. This confidentiality disclosure to buyers is a required term to be sure that buyers understand the issue; it doesn't in any way give permission to a seller, it just reflects the reality of the situation. Removing this clause from the contract does nothing to change the underlying fact that a seller isn't required to treat information as confidential.

### **Paragraph 9: EXPERTISE OF REAL ESTATE AGENTS**

Realtors® are experts in real estate, not law, accounting or science. If Buyer needs those services, they should get into contact with experts in those fields.

### **Paragraph 10: DEPOSIT MONEY**

Unless another escrow agent is named in the agreement of sale, Broker agrees to retain all deposit monies received on the property in an escrow account in accordance with Pennsylvania law.

**Note:** If the buyer gives you a deposit and you intend to transfer it to the listing agent, notice must be given to your buyer *before the buyer signs the agreement of sale* that the money is being transferred to the listing broker. The Deposit Money Notice (PAR Form DMN) or the Buyer's Estimated Closing Costs (PAR Form BEC) can be used to fulfill this requirement.

The broker holding the deposit monies will continue to do so until both parties agree to release them, a final court order is received, or the terms of a pre-agreement between Buyer and the seller are met. PAR includes this pre-agreement in the Deposits paragraph of the Agreement of Sale.

### **Paragraph 11: CIVIL RIGHTS ACTS**

This paragraph alerts Buyer that both federal and state legislation exists to protect against discrimination. This language is adapted from the Pennsylvania Human Relations Act.

### **Paragraph 12: NOTICE REGARDING CONVICTED SEX OFFENDERS (MEGAN'S LAW)**

This language, encouraging Buyer to check the registry, is mandated by state law.

### **Paragraph 13: BUYER INSPECTIONS**

#### **Subparagraph (A): Buyer's Inspections**

Buyer is reminded that he has a responsibility to satisfy himself as to whether any particular property will be adequate for his needs. Buyers are also informed that property will be sold in "as-is" condition unless the parties agree in writing to make changes to the property. The paragraph contains a list of potential inspections that Buyer may elect to have once an offer is made on a property.



**Note:** While this list of potential inspections is long, it is not all inclusive. Buyer agents should take time to discuss with their clients what inspections might be done and how they might be handled, particularly if there are things unique to a particular market or municipality.

### **Subparagraph (B): Buyer's Own Determinations**

Subparagraph (B) is language similar to that contained in the Representations paragraph of the Agreement of Sale, reinforcing that Buyer cannot rely unquestioningly on any of the information provided in the course of the transaction, including the MLS listing, the seller disclosure form or any other statements that might be made by the seller or either agent. If Buyer wants to verify a particular bit of information, Buyer is encouraged to conduct inspections.

### **Paragraph 14: RECORDINGS ON THE PROPERTY**

Either the Buyer or the seller (or both) may be doing some video recording on the property. If that is the case, then Buyer should be aware that there are laws in place that limit what a person may record without someone's consent. Pennsylvania is known as a "two party consent" state, which means that the law does not permit the recording of audio without the speaker's consent. Buyer should not attempt to use any subversive tactics in order to get an advantage over other interested buyers or the seller. Sellers will hopefully receive a similar warning, but in the event they do not or choose to ignore it, Buyer should be advised against holding confidential conversations on the Property.

### **Paragraph 15: RECOVERY FUND**

This paragraph contains the disclosure required by RELRA and the Rules & Regulations of the State Real Estate Commission.

### **Paragraph 16: SPECIAL CLAUSES**

Any other terms and conditions relevant to the representation and agreed to by the broker and the buyer should be specifically stated here. For example, if there are any exclusions to the representation or if there are certain circumstances in which Buyer might owe a fee, those changes could be added here. Remember that any conversation or writing made outside of this contract may not be enforceable.

## **SIGNATURE AREA**

### **Consumer Notice**

By signing this contract, Buyer acknowledges having read the Consumer Notice. The form is required by RELRA.

### **Delivery of Documents**

If Buyer will be obtaining mortgage financing, he or she agrees to provide copies of the Loan Estimate and Closing Disclosure to Broker as soon as they are received. Although it may not be strictly required by law or regulation, this provision is included as a precaution to provide written permission for fax and e-mail communications to Buyer.

**Acceptance**

Return of the contract, and any addenda and amendments, including return by electronic transmission, bearing the signature of all parties constitutes acceptance by the parties.

**Counterparts**

Two contracts with identical terms can be signed on separate documents in different locations but will still be counted as one executed contract. For example, if three buyers must sign the contract, each can sign an identical version and do not need to each sign the same contract in sequence.

**Note:** Agents and brokers are strongly encouraged to retrieve a copy of the other counterpart(s) for their files to ensure the terms in each signed contract are identical.

**Notice Before Signing**

Once the contract is signed, Broker and Buyer are legally bound by the terms of the agreement. Encourage Buyer to consult a lawyer if Buyer has any questions about his or her rights and obligations under the contract.

**Signing Notice**

Make sure *all* the potential buyers sign and date the contract. In the blank next to “Broker,” put the name of the real estate company, as it appears on the real estate license. The salesperson or associate broker who is handling the contract should sign his or her name in the blank next to “Accepted by” and put the date in the space provided.