

IAR LEGAL HOTLINE



UPDATED

COVID-19
May 29, 2020

This document is a work in progress. Put news@indianarealtors.com in your address book so you receive updates directly and timely on these important matters.



Q: Can we now hold in-person showings and open houses?

- A.** Yes, if there is no local order that would prohibit these in-person meetings. Governor Eric Holcomb's Back on Track plan/latest executive order strongly recommends:
- Screening for symptoms
 - Wearing face masks
 - Social distancing/limits on participants
 - Regular sanitation

You may review the Back on Track plan here – <https://backontrack.in.gov/>

Also, the National Association of REALTORS® has provided guidance on showings you can find here – <https://www.nar.realtor/coronavirus-a-guide-for-realtors>

Q: What is the status of evictions and foreclosures?

- A.** Governor Holcomb extended the moratorium on evictions and foreclosures through August 1. This does NOT mean that payments are forgiven, or that rent is not due. At best, this moratorium acts as a deferral if someone is unable to pay due to COVID-19.

Q: Is there any kind of enforcement included in Governor Holcomb's Back on Track plan/latest executive order?

- A.** Yes, this is a significant change from past orders. There are “teeth” via cease and desist orders, closures, reporting to licensing/permitting/ certifying boards, fines, and jail time.

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Q: Is there any guidance on readying the workplace for the return of employees, customers, or clients?

A. Yes. Governor Holcomb's Back on Track plan/latest executive order strongly recommends all Indiana businesses take measures to ensure a safe environment. This includes any business that has remained open during the stay-at-home order, as well as those opening in the coming days and weeks. The recommendations are based on those from the U.S. Centers for Disease Control and Prevention (CDC) and the U.S. Occupational Safety and Health Administration (OSHA); you may view the specifics here – https://backontrack.in.gov/files/BackOnTrack-IN_BackOnTrack-IN_Guidelines-Office.pdf

Also, NAR has provided REALTOR®-specific guidance you can find here – <https://www.nar.realtor/covid-19-workplace-re-entry-checklist>



Q: Does screening for symptoms mean taking temperatures?

A. Screening does not have to include taking temperatures. Screening could be 1) self-assessments before arrival to the workplace/office/showing/open house, 2) asking questions about COVID-19 related symptoms, or 3) taking temperatures with a no-touch thermometer.

If you are screening clients, make sure to ask every person the same questions and make the same business decisions for all to avoid any discrimination issues under fair housing laws.

Q: Can we require a member of the public (clients) or independent contractor (agents) to undergo or comply with screening procedures for COVID-19 related symptoms?

A. Yes. It is of course an individual's choice whether to enter an office, home, or apartment. If they do enter, they must abide by the rules and regulations of that office, home, or apartment.

Q: How is the 60-day release of earnest money impacted by COVID-19 related issues? What if a client cannot initiate litigation due to the stay of proceedings by the court?

A. Generally, you can still file with the court. That will indicate to the other side not to release the earnest money (certified letter). The broker should not release earnest money if there is any indication of litigation via the 60-day release instructions.

Q: Can you advertise a blanket prohibition in the MLS prohibiting children from showings due to COVID-19 concerns?

A. Prohibiting children from showings would likely be discriminatory in violation of the Fair Housing Act. Such a restriction would likely discourage families with children, a protected class under the Fair Housing Act, from inquiring, viewing, buying, and/or renting the property.

Such an exclusion appears arbitrary since children have not been identified as having an increased risk for serious illness as a result of COVID-19, and those that have been identified as more vulnerable – those with underlying conditions, age 65+ – are not excluded from showings.

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However, NAR's showing guidance recommends limiting the number of persons who may attend a showing, such as 2-3 people, unless state/county/local guidance says otherwise. You may see that guidance here –

<https://www.nar.realtor/coronavirus-a-guide-for-realtors>



Q: Is there a contract clause that I can use for rental properties for protection due to COVID-19 related issues?

A. Here is a clause that may be used for property management. The language may be used as additional terms or in an addendum or amendment.

In no event shall Broker, brokerage firm, or any agents or employees of the brokerage firm, be responsible for or liable for any claims arising out of the COVID-19 Pandemic; entry into the property by Invited Parties, any person(s) accompanying an Invited Party, or any agent or third party entering the property on an Invited Party's behalf; or the availability of the property for showing or inspection. Tenant understands the risks associated with entering properties and/or allowing others to enter their property during the COVID-19 Pandemic. Tenant releases, waives, discharges, and forever holds Broker, the brokerage firm, and its agents and employees, individually and collectively, harmless from and against claims, damages, losses, and suits arising from or in any way connected with the Pandemic. Invited Parties includes, but is not limited to, potential buyers or tenants, agents, inspectors, contractors, appraisers, or other third parties related to a real estate transaction.

Q: Is it an ethical violation if an IAR member is not following an executive order?

A. REALTORS® are required by their state or municipality to follow the provisions of the order in their jurisdiction. But to be a violation of the Code of Ethics, a violation of the order must involve conduct directly addressed by the Code.

Let's say a stay-at-home order requires that a REALTOR® not meet a customer for an in-person meeting but that the REALTOR® and the customer decide they want to meet anyway. The fact that the meeting takes place is a violation of our assumed stay-at-home order, but it's not a violation of the Code. There's no Article or Standard of Practice that prohibits an in-person meeting with a customer.

Q: Regarding Executive Order 20-18, what about home inspectors?

A: Inspectors will make their own business decision, but if an inspector/inspection is necessary to close a deal and seller and inspector are willing to allow physical access, then it is a service that must be done in person. It is not reasonably possible otherwise.

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Q: Indiana Governor Eric Holcomb issued Executive Order 20-18 that extends the stay-at-home order for Hoosiers through the end of the day April 20, 2020. This order provides stronger language for our industry. Does it mean no open houses or showings?



A: The order says the following –

Professional services, such as legal services, accounting services, insurance services, and real estate services (including appraisal and title services) should be conducted virtually or by telephone whenever reasonably possible and any professional services requiring face-to-face encounters should be postponed unless the failure to meet in-person will have a significant adverse impact on the client's financial or legal position.

Real estate services should be conducted virtually or by telephone whenever reasonably possible. Which is what most of our members have been doing already. Virtual open houses need to replace in-person open houses. Virtual showings should be conducted. Face-to-face showings or interactions should be very rare. Face-to-face interaction is only allowed if not doing so will have a significant adverse impact on the client's financial or legal position. This remains to be interpreted per each specific situation. Make sure the seller consents to in-person showings, if it fits in this exception, as well as the REALTOR® being willing to do so.

Please remember, not every state's governor included real estate as an essential business or service. It's a privilege to conduct real estate transactions in Indiana right now. Maintaining that privilege depends in part on the responsibility we show in exercising it.

Q: On the Disclosure and Waiver Prior to Physical Showing or Inspection Form there are two broker signature lines, is that for listing broker and buyer broker?

A: No. The two broker lines can include buyer broker company and buyer agent unless there are two buyer brokers entering the property. Either use is permitted.

Q: As a listing agent, I would be asking visiting parties to sign and return the Disclosure and Waiver Prior to Physical Showing or Inspection Form to me. Is that how you think it should be used?

A: Yes. This form gives seller a comfort level for health and safety reasons and protection when someone enters the property. This form also provides risk reduction for buyer brokers and their companies, including hold harmless language, when visiting parties enter the property such as a buyer or inspector. Under the Governor's [Executive Order 20-18](#) (issued April 6th), physical showings were limited and should be exercised only when virtual showings are not an option.

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Q: In order to do virtual showings, photographers/videographers need to get in homes. Do we think that is acceptable if the sellers/families are outside or in cars outside the home so there is no face-to-face contact?



A: Many are allowing the seller's agent to use a video-conferencing app like Skype or FaceTime to virtually show a property in real-time. That way professional photographers/additional folks do not have to be physically present in the home.

If the seller is agreeable to having a photographer/videographer enter their home one time to record/prepare for a virtual showing, and they maintain their 6-foot distance, sanitize, etc. then this is acceptable.

Q: How did you come up with the 30-day part of the COVID-19 language? I've had some clients want that to be negotiable, specifically a builder I work with. He wanted me to change it to 90 days.

A: Nationwide, 30 days has been the timeline of choice for state and local REALTOR® association counsel as most parties do not want to be tied to more than an extra 30 days without further agreement. The parties can certainly agree to whatever timeframe they desire.

Q: Are home inspectors essential to the provision of real estate services?

A: Yes. Inspections are generally an integral provision contained in the purchase agreement and therefore necessary to fund and close a real estate transaction.

Q: In the COVID-19 Addendum/Amendment to the Purchase Agreement (Form #61), the last paragraph allows for the extension of all timeframes in the Purchase Agreement to comply with this related delay, if necessary, up to a maximum of 90 days as provided for closing. Doesn't this allow for timeframe extensions for any reason?

A: The last sentence was added due to the numerous concerns that the COVID-19 delay language was irrelevant if the timeframes contained therein were not extended as well to comply with the delay and protective closing language.

This last paragraph only applies IF NECESSARY and ONLY DUE TO COVID-19 RELATED DELAYS. That highlighted language is in the last paragraph. Buyers cannot simply "just walk" or use the language to extend a timeline "for any reason."

Having said that, there are scenarios where this language may not fit the needs, goals, and purposes of the parties. In that case, the parties may certainly continue with the original contract or prepare an addendum that fits that specific transaction's needs.

Q: Are we legally required to use the IAR forms?

A: IAR cannot mandate the use of these forms, but we strongly recommend that the language statewide be consistent – which is what our forms achieve. It will allow for uniform interpretation. There is no perfect language.

Do not use another state's legal forms as the laws and language therein may not be consistent with Indiana law.

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Q: Can we cross out or delete certain language in the IAR forms?

A: We never advise members to cross out or delete certain language as it is there for a purpose. Speak with your managing broker or legal counsel to steer clear of the unauthorized practice of law if a certain provision does not apply in your transaction. Deletion can sometimes create an unintended consequence.



Q: Once a seller informs us that they have had COVID-19, but are now past it, what/if any disclosure requirement does the listing agent/seller have to buyer/buyer's agents?

A: None, if the 14-day timeline or specific quarantine ordered by the doctor has expired.

Q: If the seller is a healthcare worker and does have possible daily exposure to COVID-19 patients, the COVID-19 Addendum/Amendment to Listing Contract (Form #62) says they must inform the broker. What does the broker then do with that information? What disclosure requirement does the listing agent/seller have to the buyer/buyer's agents in this case?

A: The suggestion would be to disclose this in broker-to-broker comments for buyers/buyer's agents to decide if they want to physically view the property. Some buyers/buyer's agents are in high-risk categories. It is the moral and ethical course to take in these difficult times. Most sellers would understand and agree to this course of action for disclosure. It is always best practices to err on the side of disclosure.

Q: My client wants me at closing, but the title company says I cannot be in the room – only in their lobby or in my car. Is the title company allowed to keep me out?

A: Legally, the answer is no. However, we understand a title company's desire to help stop the spread of COVID-19. We suggest FaceTime, speakerphone, or another virtual option if that's agreeable to your client. Otherwise, you should be allowed to attend the closing so long as you keep the suggested social distancing.

Q: Is real estate considered an essential service in Governor Holcomb's stay-at-home order?

A: Yes. Real estate services in Indiana, including title and appraisal services, were defined as essential and therefore, can continue during the time period covered by the Governor's stay-at-home order.

Q: Does the seller need to disclose on the Seller's Residential Real Estate Sales Disclosure that a member of the household has tested positive for the COVID-19 virus?

A: No. There are no questions on the disclosure that would require a seller to complete a new disclosure or amend an existing one to indicate an occupant has tested positive for the virus. However, a seller should disclose such information to the listing broker and any potential buyers and buyers' brokers prior to a showing.

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Q: I have a home listed and the seller has informed me she doesn't want to have people in the home at the present time due to possible exposure to the virus. What can I do to cover this situation?

A: IAR attorneys have prepared a form for that. It is the COVID-19 Addendum/Amendment Listing Contract (Form #62) which can be accessed here temporarily until it can be added as a form in the library of the provider you use.



Q: Does IAR have any guidance in dealing with COVID-19 contract delays?

A: Yes. In dealing with future delays or possible contract cancellations, we suggest the following language be used in the Further Conditions of the Purchase Agreement.

Notwithstanding any other provisions of this Agreement, the parties agree and a knowledge that in the event either the Buyer, Buyer's lender, Seller, any of their respective service providers, or any other agency becomes the subject of a voluntary or mandatory COVID-19 virus quarantine or closure prior to or at the time of Closing, or if Buyer or Seller is the party to another transaction that is delayed as a result of a voluntary or mandatory COVID-19 virus quarantine, that results in the parties inability to perform on the Closing Date, the closing may be automatically extended by either party for a period of up to ten (10) business days after such quarantine or closure order is lifted, up to a maximum delay of thirty (30) days unless the parties otherwise mutually agree to extend the performance date further. Upon the expiration of any automatic or agreed extension, either party may terminate this Agreement without any further liability to the other party, and the Earnest Money shall be immediately refunded to the Buyer.

Q: Can this language be used for contracts already in place?

A: Yes. This protective language can also be used for transactions already in place by adding it in an Addendum, Amendment, or other applicable legal form. Making a clause available was more flexible and adaptable for immediate use with different forms.

Q: I have seen other language out there floating around for COVID-19 related delays; can I use this language instead of, or in addition to, the suggested language?

A: It is important to have statewide standardization and uniformity in these difficult times to help with the interpretation of said language and the comfort levels of our members in preparing for a COVID-19 related transactional delay. There is no perfect language as these are not perfect times. They all accomplish the same purpose.

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Q: The COVID-19 contract delay language states that the Earnest Money is returned to the Buyer after the automatic extension expires if the parties are unable to close the transaction. Is that fair?

A: Yes. This return to Buyer of the Earnest Money will only apply if the contract fails to close due to COVID-19 related issues. The failure to close is not due to the fault of the buyer (or seller) as circumstances are outside of their control.



Q: Will IAR be providing a formal legal document for COVID-19 related delays?

A: Yes. Form #61 is available to members and is to be used with the Purchase Agreement.

Q: Do we have to attend real estate closings due to COVID-19 related issues?

A: In Indiana, 876 IAC 8-2-4 requires broker attendance at closing. However, there is an exception that if your client does not attend, then the broker does not have to attend. Remote closings for your client, or requests not to appear in person, may lend itself to falling within this exception.

If you are not able to attend closing, communicate with your client, advise of the circumstances, and let them know that you will be available virtually, by phone or some other acceptable means of communication. *Document this disclosure with your client.*

Acting in good faith pursuant to emergency Centers for Disease Control and Prevention (CDC), local, state, and national guidelines in these unusual circumstances should protect our members from any violation of this law. If the Indiana Real Estate Commission (IREC) provides some guidance in the future, we will keep you updated.

Q: Do we need to be careful about fair housing issues with COVID-19 concerns?

A: Yes. Be sure you treat everyone the same, ask the same questions, and make the same business decision with all clients. The Fair Housing Act requires brokers not discriminate against any segment of the population. While the novel coronavirus outbreak began in Wuhan, China, that does not provide a basis for treating Chinese persons or persons of Asian descent differently.

Q: May I ask clients or others I interact with in my real estate business if they have traveled recently, or have any signs of respiratory illness?

A: Yes. You may ask clients or others about their recent travel, particularly to areas identified as having an increased risk of the novel coronavirus. To avoid potential fair housing issues, be sure to ask all clients the same screening questions based on current information from public health authorities.

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Other Questions?

The IAR Legal Hotline is open. We know new questions will develop as we navigate these uncharted waters. Ask your Managing Broker to call or authorize you to call the hotline.

1-800-444-5472

Monday – Friday | 9am – 5pm ET

Calls are answered in the order they are received, always by phone, and within 24 hours.

Reminder: IAR communications are intended for member use only.

