



New Personal Assistant Rules & Forms

PLEASE ROUTE TO:

The information contained herein is believed accurate as of January 30, 1998. The information is of a general nature and should not be considered by any member or subscriber as advice on a particular fact situation. Members should contact the Wisconsin REALTORS® Association Legal Hotline with specific questions or for current developments.

Reproduction of this material may be done without further permission if it is reproduced in its entirety. Partial reproduction may be done with written permission of the Wisconsin REALTORS® Association Legal Department.

EDITORIAL STAFF

Authors Debbi Conrad
 Tom Larson
Production Mark A. Klossner
 Rick Staff
 Debbie McNelly

ASSOCIATION MANAGEMENT

President Dave Stark

Executive VP William E. Malkasian,
 CAE

© 1997 Wisconsin REALTORS® Association



recycled paper

Introduction

It is becoming increasingly common in this state, as well as nationally, for real estate salespersons and broker-employees of other real estate brokers to employ personal assistants, both unlicensed and licensed, to provide administrative, clerical, or personal services to a salesperson or broker-employee. Some salespeople view the use of personal assistants as a way of maximizing their efficiency and productivity; others view this practice as a useful training technique for prospective or newly licensed individuals.

The use of personal assistants presents a challenge for brokers in determining how to manage these assistants given the potential liability involved. Until recently, there were no rules nor specific parameters defining exactly what a personal assistant may and may not do.

New administrative rules relating to the use of personal assistants have been implemented, effective Feb. 1, 1998, in Chapter RL 17 of the Wisconsin Administrative Code. The new rules deal with unlicensed

personal assistant practices. They clarify what activities an unlicensed assistant can perform and establish guidelines for agreements between salespeople hiring unlicensed assistants and their brokers. A set of guidelines laying out tasks that an unlicensed personal assistant may and may not do has also been generated by the Personal Assistants Advisory Committee (Committee) which worked with the Department of Regulation and Licensing's (DRL) Real Estate Board (REB) in developing the new rules.

This *Legal Update* will discuss what the new rules require of brokers, salespersons, and personal assistants. Other areas of personal assistant practice not specifically addressed in the rules are also examined. The Licensed and Unlicensed Personal Assistant Agreements developed by the WRA to assist members in implementing these rules are also reviewed. Other personal assistant topics included in this *Update* are employment of assistants by salespersons versus brokers, employee versus independent contractor status, compensation of personal assistants, the effective use of personal assistants, and how to find and hire personal assistants.

Table of Contents

Introduction	1
Personal Assistant Terminology	2
Definition of Employment	2
Definition of Licensed and Unlicensed PAs	3
Personal Assistant Practice Before the New Rules .	3
Unlicensed Personal Assistants	3
Licensed Personal Assistants	4
New Personal Assistant Rules Overview	4
New Open House Rule	4
Required Personal Assistant Agreements	5
Personal Assistant Agreement Forms	5
The Agreements	6
Committee Discussion of Other PA Activities	6
Practice Guidelines for Unlicensed PAs	6
Employee versus Independent Contractor	8
Common Law Test	8
Statutory Independent Contractor Test	9
Compensation Issues	9
Unlicensed Personal Assistants	9
Licensed Personal Assistants	10
Practice Issues	10
Making the Decision to Hire a PA	10
Identifying the Benefits	10
Finding the Right Person	10
Unlicensed versus Licensed PAs	11
Where To Find A Personal Assistant	11
Conclusion	11
LICENSED AND UNLICENSED PA FORMS	12-15

Personal Assistant Terminology

A note of explanation about the terminology used in this *Update* is first in order.

Definition of Employment

Members may read about brokers “employing” salespersons, for example, and wonder why is that word being used when the salesperson is an independent contractor. The reason is that this is the terminology used in Chapter 452 of the Wisconsin Statutes and in many of the RL rules in the Wisconsin Administrative Code. “Employ,” for instance, is defined in the statutes to include the engaging of a broker, salesperson, or time-share salesperson to provide services as an independent contractor for a broker/company. “Employee” includes licensees retained as traditional employees or as independent contractors, and “employer” includes brokers who engage licensees as employees or as independent contractors.

Similarly, the new personal assistant rules are accompanied by new definitions which provide that “‘broker-employee’ means a broker who is employed to provide services for another broker,” and that “‘broker-employer’ means a sole proprietor or business entity that employs another broker or salesperson to provide services to the broker.” In other words, the term “employ,” when used in license law with respect to brokers, salespersons, and personal assistants, may mean

“employ” in the traditional sense or it may mean to engage as an independent contractor.

Definition of Licensed and Unlicensed Personal Assistants

An “unlicensed personal assistant” is an individual hired to provide services which do not require a real estate license. The individual may or may not have a real estate license, but for the purpose of this definition, the individual’s activities will not require a license. Under the new personal assistant rules, “ ‘unlicensed personal assistant’ means a person not licensed, or licensed but not employed for the purpose of providing services for which a license is required under ch. 452, Stats., who on behalf and under the direction of a license, provides the licensee with administrative, clerical, or personal services for which a licensee under ch. 452, Stats., is not required.” The key, therefore, is whether the individual will be performing licensed services.

A “licensed personal assistant,” on the other hand, may perform activities which require a real estate license. The licensed personal assistant accordingly must have a real estate license and must affiliate that license with a broker-employer. A licensed personal assistant may do anything a salesperson may do, subject to the restrictions and limitations imposed by the broker-employer.

Personal Assistant Practice Before the New Rules

To better understand the impact of the new personal assistant rules and guidelines, it is important to understand personal assistant practice before the new rules were enacted. Most of the informal guidelines followed by REALTORS® before Feb. 1, 1998, remain the same after Feb. 1, 1998.

Unlicensed Personal Assistants

The practice of a salesperson hiring an unlicensed personal assistant is not prohibited by license law or by local board rules. It is clear, however, that the salesperson must provide close supervision and instruction to assure that the unlicensed assistant does not engage in any activity constituting real estate practice which would require a real estate license. Any activity considered to be the “negotiation” of a real estate transaction would be considered unlicensed real estate practice and must be avoided.

“Negotiation” is broadly defined by the courts as activities designed to make a prospective purchaser more likely to actually purchase a property, but there is no clear-cut line as to when negotiation occurs. Accordingly, use of unlicensed personal assistants should be evaluated as a matter of business risk. The salesperson, and possibly the broker, may be liable for errors or misstatements made by unlicensed assistants, and this liability may not

be covered by the broker’s standard errors and omissions insurance policy.

Salespeople may find it beneficial to hire unlicensed assistants to perform functions incidental to the salesperson’s typical practice, for example telemarketing. In each case, great care should be exercised to ensure that the assistant does not engage in any activity which might be construed as negotiation. At some point, simply providing information reaches the level of negotiation. Thus, a salesperson would be well advised to provide written procedures for the assistant to follow when answering inquiries from the public regarding the salesperson’s listings. As a general rule, the non-licensee can give factual information which is normally found on an MLS data sheet or in a newspaper advertisement. Questions or requests which go beyond such information should be referred to the salesperson.

Non-licensees serving as hosts at open houses was generally not recommended. There are certain activities which might be acceptable such as unlocking the door, turning on the lights, and safeguarding valuables. Visitors at an open house typically will expect the host or hostess to provide information and other services which would require a real estate license.

Salespeople using unlicensed assistants as “telemarketers” should provide the non-licensee with a script to follow and should closely monitor the assistant’s activities. The assistant may contact prospective buyers or sellers in order to identify whether they have a current or future interest in real estate and arrange a time for the salesperson to meet with them.

Licensed Personal Assistants

All of the concerns associated with hiring an unlicensed assistant may be eliminated when a salesperson hires a personal assistant who holds a real estate license. Using a licensed assistant, however, raises different considerations. First of all, salespersons licensed or employed by a broker may not personally hire a licensee to engage in licensed activities (even if the salesperson has a broker's license). Thus, the licensed assistant must be hired by the company broker.

Second, if the licensed assistant is to engage in any licensed activities, local board and MLS rules generally will require that dues and fees be paid with respect to this licensed personal assistant in the same manner in which they are paid for licensed salespeople. These licensed assistants also generally are employees for purposes of tax law. Therefore, any cost-effective benefits anticipated to be achieved through the use of a licensed assistant must be evaluated in light of these potential additional dues and payroll costs, as well as the general business risk and liability considerations.

New Personal Assistant Rules Overview

The new rules: 1) formally recognize the practice of salespersons and broker-employees in employing individuals to assist the licensees in carrying out their responsibilities for their broker-employers; 2) assure that broker-employers are informed that their salespersons or broker-

employees have hired personal assistants; and 3) protect the interests of the licensees, personal assistants, and the public by requiring that the duties of the unlicensed personal assistant, the manner in which the personal assistant will be compensated for his or her services, and the responsibilities between the salesperson or broker-employee and broker-employer for supervision of the personal assistant's activities, are all set forth in writing.

The new rules also prohibit unlicensed personal assistants from conducting an open house for the sale of real estate or a business without being accompanied by a real estate licensee, as it is deemed nearly impossible for an individual to conduct an open house without engaging in negotiations with a prospective purchaser. The *Update* first looks more closely at the new open house rule.

New Open House Rule

The rule against conducting an open house without a license was enacted for two primary reasons. First, the interpretation of "negotiation" suggests that a license currently is not needed to conduct an open house, as long as the "host's" activities are limited to handing out prepared literature provided by the salesperson, no oral representations about the property are made, and the terms of possible purchase are not discussed. However, it is not reasonable to expect unlicensed hosts to silently sit on the couch as the public tours the premises, and then refuse to answer any questions which they might have about the property before they leave. The potential for abuse and the human inclination to answer questions

about the property are so great that licensees should not permit unlicensed assistants to conduct open houses in their absence. Unlicensed individuals should not be placed in the vulnerable position of being tempted to respond to the inevitable consumer questions which arise at an open house and which the public expects will be answered.

The Committee was not in complete agreement on this issue. There was some sentiment for permitting unlicensed hosts to conduct open houses as long as appropriate safeguards are in place, such as providing for written disclosure of the unlicensed host's status and permitted functions at the time the open house is held. Given the difference of opinion on this issue, the Committee recommended that there be an administrative rule which provides that unlicensed personal assistants are not permitted to conduct an open house, but they may assist a licensee present at the site.

The new open house rule, and the accompanying new definition of "open house," read as follows:

" 'Open house' means a showing of real estate open to the public for viewing without an individual appointment."

"An unlicensed personal assistant may not assist a licensee at an open house for the sale of real estate or a business without the direct, on-premises supervision and presence of a real estate licensee, and may not provide any services at an open house for which a license under ch. 452, Stats., is required."

"Note: This rule does not prevent an owner from showing or holding an open house regarding his or her own residence, for example, or from permitting a non-compensated person,

such as a relative or neighbor, from showing or holding an open house on the owner's behalf."

Required Personal Assistant Agreements

The Committee also recommended that an administrative rule be enacted to require that salespersons who employ unlicensed personal assistants must enter into a formal agreement with their employing broker. The broker is responsible for damages resulting from the unlicensed personal assistant's actions, and the public is at some risk if the unlicensed personal assistant's activities are not properly supervised. Accordingly, the new rules require salespeople hiring unlicensed personal assistants to enter into an agreement with their broker which indicates: (1) that the unlicensed personal assistant has been hired; (2) the duties of the personal assistant will perform; (3) how the personal assistant is going to be compensated; and (4) how the personal assistant is going to be supervised. The Committee discussed whether a rule is necessary to address similar issues pertaining to licensed personal assistants, but concluded that existing laws adequately address such issues. The broker will be responsible for the actions of an unlicensed assistant hired by a salesperson. A broker who employs a salesperson, who in turn employs an unlicensed assistant, must be aware that the salesperson has done so. Just as the broker will be responsible for the actions of the salesperson undertaken on the broker's behalf, so too will the broker be responsible for the actions of the unlicensed assistant. For example, if the unlicensed assistant incorrectly quotes the zoning of a property to a prospective buyer, the broker will be

held accountable for the misrepresentation.

The agreement contemplated under the rule gives the broker information regarding the tasks the unlicensed assistant will be performing for the salesperson. This provides the broker with an opportunity to "revise" the list if concerned, as well as a "defense" vis-à-vis the salesperson if the unlicensed assistant performs inappropriate tasks without the broker's knowledge. The agreement is intended to also require the broker and salesperson to discuss and determine responsibility for the unlicensed assistant's compensation.

The new personal assistant agreement rule states that: "A real estate salesperson or broker-employee who intends to employ an unlicensed personal assistant shall enter into a written agreement with his or her broker-employer, setting forth the duties of the unlicensed personal assistant, the manner in which the personal assistant will be compensated for his or her services, and the responsibilities between the salesperson or broker-employee and broker-employer for supervision of the personal assistant's activities." Based upon the language used in this rule, the unlicensed personal assistant agreement is not required if a licensee has already hired one or more personal assistants, although entering into the agreement certainly would be beneficial to clarify, confirm, or perhaps modify and improve the relationship which has been already established.

Personal Assistant Agreement Forms

The WRA has developed a form agreement to be used to comply with new rule. A sample copy of the WRA's Unlicensed Personal Assistant Agreement appears on pages 14 - 15 of this *Update*. Once completed, the form will allow the broker to insure that: (1) the activities being performed by the personal assistant are appropriate; (2) that the assistant is being paid in a manner that is consistent with state and federal law; and (3) that the activities of the personal assistant are being properly supervised to insure that any potential problems are avoided.

The WRA's Unlicensed Personal Assistant Agreement will be included in the Policy Manual and made part of Zipforms[®], sold on disk. It provides a useful checklist of duties a personal assistant might perform for the salesperson and provides a vehicle for documenting how the personal assistant will be compensated and supervised.

The WRA also has developed Licensed Personal Assistant Agreement. The Licensed Personal Assistant Agreement is not required by the new rules, but a written agreement setting forth the parameters of the relationship is certainly beneficial and recommended. A sample copy of the WRA's Licensed Personal Assistant Agreement appears on pages 12-13 of this *Update*.

The Agreements

The following discussion overviews the various sections in the Unlicensed and Licensed Personal Assistant Agreements.

The Parties

Both the Unlicensed and Licensed Personal Assistant Agreements are three-way agreements entered into by the Broker, the salesperson or broker-employee who will be assisted by the Personal Assistant (both referred to as a “Salesperson” in these Agreements), and the Personal Assistant.

Personal Assistant Duties

Both agreements begin with a long list of potential personal assistant duties which may be checked if applicable. This is followed by a section of blank lines at the bottom of page 1 of the form where additional authorized duties not already listed may be written in.

The listing of prohibited activities at the top of page 2 restricts and limits the Personal Assistant’s authority. Thus, by checking and writing in the permitted duties, the Personal Assistant’s scope of authority may be rather precisely and narrowly drawn.

Employment Status

The first heading on page 2 of each form refers to the “employment” status of the Personal Assistant. Unlicensed Personal Assistants may be employed by either the salesperson or the broker. As is reflected in the WRA Unlicensed Personal Assistant Agreement, however, the Salesperson generally hires the unlicensed assistant to help the Salesperson by performing administrative, secretarial, and other tasks not requiring a real estate license. The WRA Unlicensed Personal Assistant Agreement, on the other hand, states that the licensed

Personal Assistant is engaged by the Broker, as required per § RL 17.03(2). That rule indicates that a Salesperson (with a salesperson’s or a broker’s license) who is employed by and licensed with a Broker may not, in turn, employ and license another licensee such as a licensed Personal Assistant. The Broker must be the one to employ and license the licensed Personal Assistant.

Tax Status

When it comes to “Tax Status,” the unlicensed Personal Assistant is declared to be an employee of the Salesperson for tax purposes, while the check boxes on the Licensed Personal Assistant Agreement offers a choice between independent contractor or employee status, provided the appropriate tests can be met. See the discussion of Employee versus Independent Contractor on page 11 of this *Update*.

The Unlicensed Personal Assistant

Agreement also offers a choice in this section between having the unlicensed Personal Assistant paid directly by the Salesperson, or by the Broker via a broker’s payroll service (for which the Salesperson would pay a fee to the Broker). Tax or legal counsel should be consulted to determine if the Broker’s actions in providing a payroll service could cause the Personal Assistant to be classified as an employee of the Broker and thus entitled to any benefits provided to the Broker’s other employees. See the discussion of Compensation on page 9 of this *Update*.

Compensation

The manner in which the Personal Assistant will be compensated is written into this section. The manner in which the Salesperson compensates or reimburses the Broker for the services of a licensed Personal Assistant is also stated in this section

in the Licensed Personal Assistant Agreement.

Supervision

In both of these Agreements, the Salesperson is responsible for supervising the Personal Assistant whenever the Personal Assistant is performing unlicensed activities. In the Licensed Personal Assistant Agreement, the Salesperson and the Broker are jointly responsible for monitoring a licensed Personal Assistant when the Personal Assistant is engaged in activities requiring a real estate license.

The Salesperson is held responsible for all actions taken by the Personal Assistant while under the supervision or direction of the Salesperson. The Salesperson is also responsible for immediately notifying the Broker whenever the Salesperson becomes aware that the Personal Assistant’s actions or omissions could result in injury to any party, or are in violation of license law, the Code of Ethics, or any other laws or regulations which could lead to any discipline or civil or criminal liability for the Salesperson and/or the Broker. The Salesperson also agrees to indemnify the Broker and hold the Broker harmless from any liability or damages, costs, or attorneys’ fees. In other words, the Salesperson assumes the responsibility for the Personal Assistant as far as supervision, liability, and damages.

Other Obligations

The remaining sections of each Agreement provide blank lines where other duties of the Broker, Salesperson, or Personal Assistant may be written in. The Agreements conclude with signature lines for the Broker, Salesperson (Agent), and the Personal Assistant.

While the new rules address open house and require a written agreement

whenever an unlicensed Personal Assistant is engaged, the new rules are silent with regard to all of the other activities where personal assistants are typically involved. All other activities will continue to be judged based upon whether the particular activity requires a real estate license. This, in turn, is evaluated by determining whether the particular activity constitutes part of the “negotiation.”

Committee Discussion of Other Personal Assistant Activities

The Personal Assistant Advisory Committee’s discussions centered on defining activities that do or do not constitute “negotiation” within the meaning of Wis. Stat. § 452.01 (5m). An individual who engages in “negotiation” must have a real estate license. The Committee made several recommendations respecting the utilization of personal assistants who are not real estate licensees and who are employed by a real estate salesperson rather than the salesperson’s employing broker.

Cold-Calling (telephone solicitation)

The Committee concluded that an unlicensed personal assistant may be allowed to conduct “cold-calling” on behalf of his or her employing salesperson. The Committee recommended that unlicensed personal assistants be given a script that is narrowly drafted so as to limit the unlicensed assistant’s inquiries to whether or not the consumer has an interest in the employing salesperson’s services. The assistant may call on behalf of the employing

salesperson and, if the consumer is interested in the employing salesperson’s services, the assistant may schedule an appointment between the consumer and the employing salesperson.

It is an accepted practice to hire telemarketers to make telephone contacts with consumers and inquire as to their interest in either selling or purchasing real estate. The use of telemarketing is appropriate and unlikely to be subject to abusive or unlicensed practice as long as the calls are tightly scripted.

Preparation Of Advertisements

The Committee recommended that the unlicensed personal assistant be permitted to prepare and send advertisements to the media in accordance with the policies and procedures of the broker. The unlicensed assistant’s immediate supervisor and the employing broker should be accountable for any ads that do not comply with statutes and rules.

Preparation Of Transactional Documents

The Committee recommended that an unlicensed personal assistant may perform the secretarial function of typing a document under the direction of a licensee. It is important to note that the licensee’s name will be on the form, showing that he or she negotiated it and is responsible for its contents. The act of physically “typing” a real estate contract which sets forth the terms and items directed by a licensee is a secretarial task and does not require a real estate license. This is similar to a secretary that types contracts or legal briefs in a law firm.

Practice Guidelines For Unlicensed Personal Assistants

In order to assure that unlicensed personal assistants are not performing licensed activities (which not only require a real estate license but also employment by a real estate broker), the Committee reviewed and discussed the various duties personal assistants are performing. The result of that review is a listing of those activities that the Committee believes do and do not require a real estate license. These practice guidelines have been accepted by the DRL as consistent with license law for enforcement practices, and reflect an appropriate analysis of Wis. Stat. Ch. 452.

Practice guidelines provide an important benefit to licensees by implicitly representing that disciplinary action will not be taken for conduct consistent with the guidelines. No such assurance is available for persons engaging in activity outside guidelines, as they run the risk that the existing statutes and regulations will be interpreted against them by the DRL, local boards, and the courts.

Activities NOT Requiring a Real Estate License

An unlicensed personal assistant, on behalf of and under the direction of a licensee, may engage in the following administrative, clerical, or personal activities without being in violation of the licensing requirements. The following list is intended to be

illustrative and declarative of existing law and is not intended to increase or decrease the scope of activities for which a license is required. An unlicensed personal assistant of a licensee may:

- 1) Answer the telephone, take messages, and forward calls to a licensee;
- 2) Submit listings and changes to a multiple listing services;
- 3) Follow up on a transaction after a contract has been signed;
- 4) Assemble documents for a closing;
- 5) Secure public information from a courthouse, sewer district, water district or other repository of public information;
- 6) Have keys made for a company listing;
- 7) Draft advertising copy and promotional materials for approval by a licensee;
- 8) Place advertising;
- 9) Record and deposit earnest money security deposits and rents;
- 10) At the direction and with the approval of a licensee, enter information that a licensee has approved into a contractual form;
- 11) Monitor licenses and personnel files;
- 12) Compute commission checks and perform bookkeeping activities;
- 13) Place signs on property;
- 14) Order items of routine repair as directed by a licensee;
- 15) Prepare and distribute flyers and promotional information under the direction of and approval by a licensee;
- 16) Act as a courier to deliver documents, pick up keys, etc.;
- 17) Place routine telephone calls on late rent payments;
- 18) Schedule appointments for the licensee;
- 19) Respond to questions by quoting directly from published

information;

- 20) Gather feedback on showings; and
- 21) Perform other administrative, clerical, and personal activities for which a license is not required.

Activities Requiring a Real Estate License

An unlicensed assistant of a licensee may not perform the following activities for which a real estate license is required. The following list is intended to be illustrative and declarative of existing law and is not intended to increase or decrease the scope of activities for which a license is required. An unlicensed personal assistant of a licensee may not:

- 1) Host open houses, kiosks, home show booths, or fairs, except that an unlicensed personal assistant may assist a licensee at such locations;
- 2) Show property;
- 3) Interpret information on listings, titles, financing contracts, closings, or other information relating to a transaction;
- 4) Explain or interpret a contract, listing, lease agreement, or other real estate document with anyone outside the licensee’s firm;
- 5) Negotiate or agree to any commission, commission split, management fee, or referral fee on behalf of a licensee; or
- 6) Perform any other activity for which a license is required.

Employee Versus Independent Contractor

Unlicensed personal assistants typically are employees — the WRA Unlicensed Personal Assistant Agreement assumes that this is so. As is discussed in this section, this is due to the amount of supervision and control usually exercised over the activities of an unlicensed personal assistant, as well as the fact that they do not perform licensed real estate services and normally are not compensated by commission. On the other hand, licensed personal assistants may be employees or independent contractors.

Common Law Test

The determination of whether a personal assistant is an independent contractor or an employee generally will be made according to the common-law test: does the employing licensee (salesperson and/or broker) have the right to control the details and means by which the personal assistant performs his or her job? If the employing licensee can direct not only the result to be accomplished but also the manner in which the personal assistant does the job, the personal assistant is an employee. If the employing licensee can only direct the result which is to be accomplished and the personal assistant decides the means, ideas, and plans he or she will use to reach that end, the personal assistant is an independent contractor under common law.

When determining whether a personal assistant is an employee or an independent contractor under the common-law test, the particular

relationship will be evaluated based upon the facts and circumstances. This analysis is made on a case-by-case basis by examining the amount of control the employing licensee has over the personal assistant, including consideration of the Internal Revenue Service's list of 20 factors which the IRS deems relevant to this evaluation. This 20 factor test appears in *Legal Update 97.12* on page 11. It is irrelevant whether the personal assistant is designated as an independent contractor if the actions of the employing licensee demonstrates an employer/employee relationship.

Statutory Independent Contractor Test

In response to the difficulty of working with the common-law test, Congress in 1982 created a statutory independent contractor category for federal tax purposes. As was reported in *Legal Update 97.12*, this test now is also recognized for Wisconsin tax purposes. This test is far less complicated than case-by-case determinations under the common-law test.

In order to qualify for statutory independent contractor status, the following must apply:

- (1) The personal assistant must be licensed as a real estate agent;
- (2) Substantially all (90%) of the personal assistant's compensation for real estate services performed must be commission, success fee, or otherwise related to output;
- (3) A written agreement between the personal assistant and the broker/employer must specifically provide that the personal assistant will not be treated as an employee for federal tax purposes with respect to the services performed by such

personal assistant as a real estate agent. When applying the test to a licensed personal assistant, the licensed personal assistant will have a real estate license and can have a contract which states that the personal assistant is not an employee for federal and state tax purposes. Thus the first and third parts of the test can be readily met. The deciding factor will often be whether the licensed personal assistant is paid by commission or success fee, or whether the assistant is paid wages or a salary. The personal assistant's compensation must be 90% or more commission or success fees if the assistant is to qualify as an independent contractor under the statutory independent contractor test.

The common-law test will be applied if there is no written independent contractor agreement, if the licensed personal assistant is not paid by commission/success fee, or if the licensed personal assistant does not otherwise qualify as an independent contractor under the statutory test. The statutory independent contractor test will not apply to unlicensed personal assistants because they do not, by definition, perform licensed real estate services.

Compensation Issues

The alternatives for compensating unlicensed versus licensed personal assistants differ as a result of license law.

Unlicensed Personal Assistants

Wis. Stat. § 452.19 prohibits the paying of commissions, finder's fees,

and referral fees to unlicensed persons. This prohibition operates to prohibit the payment of commissions or success fees to unlicensed personal assistants. Accordingly, unlicensed personal assistants are often paid an hourly wage or a salary.

Unlicensed personal assistants employed by salespersons will either intentionally, or inevitably by virtue of their contact with the public on the salesperson's behalf, "find" buyers who are "referred" to the salesperson for follow-up. They will also expect to be paid for their services. The payment of an hourly wage or a salary for the assistant's secretarial and ministerial services does not constitute unlawful "fee-splitting" with unlicensed persons. As long as the unlicensed assistant's employment remuneration is not based upon "success" (e.g., commission or fee paid per each successful "lead" obtained), Wis. Stat. § 452.19 is not violated.

However, if an individual working as an unlicensed personal assistant did hold a current salesperson's license and that individual made a referral, that individual could be paid a referral fee directly. Wis. Stat. § 452.19 permits a broker to pay referral fees and finders fees to other Wisconsin licensees as long as that person's license is active and regardless of the fact that the person holds a salesperson's license (rather than a broker's license). The fact that the person is not currently employed by and licensed with a broker is not relevant. The individual with a current salesperson's license who is not working as a licensed real estate agent and who does not have his or her license affiliated with a broker can make a referral and receive a fee. Thus an unlicensed personal assistant who does hold a current salesperson's license may be paid referral and finder's fees.

Many salespeople prefer the broker to take on the administrative burdens involved in employing and paying an unlicensed personal assistant. If the broker is willing and the salesperson prefers, the agreement between the broker and the salesperson would recite that the broker agrees to act as the payroll service for the salesperson. In exchange for this service the broker usually charges an administrative fee to cover the costs involved. One problem with this approach is that the broker may be held to be the employer of the personal assistant, thus entitling the personal assistant to the benefits other company employees are entitled to. Because of this potential issue brokers and salespeople may wish to consult with private tax and employment law specialists or consider hiring a private payroll service.

Licensed Personal Assistants

Licensed personal assistants must be employed by the salesperson's broker. When a licensed personal assistant is being compensated for performing a service which requires a license, he or she may only be compensated by the broker. Pursuant to Wis. Stat. § 452.14(3)(f), any commission or other compensation for licensed real estate services paid to the licensee, and any referral fee paid to the licensee, must only be received from the employing broker. Salespeople may pay a licensed personal assistant directly only if the activity does not require a license.

Licensed personal assistants will be treated much like any other salesperson for purposes of the DRL and the local board of REALTORS®. This means that the broker will be required to verify license renewal,

may be assessed local board dues for the personal assistant, and may have to pay a user fee to the MLS.

Practice Issues

Making The Decision to Hire a Personal Assistant

At some point in a their career, a licensee may consider hiring a personal assistant. There is a myriad of time-consuming responsibilities that detract from a licensee's ability to find more buyers and sellers. A successful salesperson tends to be best at working with people and getting the deals put together, and sees real estate as a career or a profession, not just a job. A personal assistant is the perfect answer for dealing with the paperwork and details, thus leaving the salesperson to generate more sales and income. The hiring of a personal assistant tends to increase productivity and expand the salesperson's business. It also may actually decreased the number of hours the salesperson must devote to his or her profession, thus creating a less hectic lifestyle where free time for personal pursuits can become a reality.

Identifying The Benefits

Having a personal assistant is beneficial both to the licensee and his or her customers and clients. Having a personal assistant will permit the licensee to provide better service to your customers and clients, create greater consistency in the licensee's business, generate a greater quantity of quality buyers and sellers, give the

licensee more free time and less stress, and significantly increase the licensee's income. If a licensee looks at what his or her time is worth (assume, for example, \$50/hour) and then looks at all the task he or she performs which could be farmed out at a much lower rate (assume \$5-8/hour), then it is easy to see that having a personal assistant to perform the \$8/hour work is a wonderful asset.

Finding The Right Person

The first step is to create a job description and determine what qualities are important for the personal assistant to possess. Many licensees find that a person with a good eye for detail and who enjoys paperwork and numbers may be most desirable. The job description may include a long list of all of the tasks the personal assistant will perform.

Licensees should keep in mind that hiring a personal assistant is not the same thing as hiring a secretary or a "gofer." The personal assistant works directly for the licensee and helps to convey the licensee's image and create the licensee's reputation to the licensee's clients, customers, and the general public. The personal assistant is going to be a significant member on the licensee's "team." On the other hand, licensees should also recognize that a personal assistant, especially a successful one, is likely to stay with the licensee's team only for a few years (not until the end of the licensee's career) before moving on to more challenging and lucrative prospects.

Unlicensed Versus Licensed Personal Assistants

This decision has to be made on an individual basis, depending upon the jobs the licensee wants to have done and the amount of supervision, responsibility, and expense the licensee, and his or her broker, wish to assume. This typically involves balancing the pro's and con's, many of which have been discussed in this *Legal Update*.

Where To Find A Personal Assistant

The following are just a few possible places to look for personal assistant candidates:

- The licensee's past clients and customers,
- The licensee's family and friends,
- Other salespersons who would prefer 8-5 hours,
- Lenders and title companies, and
- Local licensing schools, business schools, and community colleges.

The actual process of hiring a personal assistant will be the normal procedure used when hiring any other worker. A resume will give an idea of the person's spelling, typing, professionalism, etc. The interview may give an idea of how the person reacts to stress. It also may be helpful to have a telephone conversation with the candidate because telephone manners and skills will be important. Once a personal assistant has been hired, the licensee can begin delegating administrative tasks and devote him or her self to increased productivity.

Conclusion

The new personal assistant rules, the WRA personal assistant agreement forms, and the committee's guidelines all help define the role of personal assistants in Wisconsin real estate. Members should, as always, refer related employment and tax questions to their legal counsel. Wisconsin REALTORS® may now confidently engage personal assistants to enhance their productivity and professional success.

This Legal Update and others Updates beginning with 92.01 can be found in the Members Section of the WRA website at <http://www.wra.org>.

A subscription to the Legal Update is included in all Association Designated REALTOR® dues. Designated REALTORS® receive a monthly publication package including the Legal Update, and three rotating quarterlies (Technology, Sales & Marketing Tips, The Manager).

REALTORS® and Affiliate members may subscribe to the Designated REALTOR® publication package for \$30 annually. Non-member subscription rate for the package is \$130 annually. Member subscription price for the Legal Update is \$25, non-member price is \$75. Each subscription includes 12 monthly issues.

Contact the Wisconsin REALTORS® Association at 1-800-279-1972 or (608) 241-2047 to subscribe.