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COVID-19 Changes How You Sell Your Home: Real Estate Lawyer Explains Rule Changes And What Could Be Next In Your State

Bruce Brumberg, JD Contributor ⓘ

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Selling a house in the age of COVID-19 is tricky, but the real estate business is finding ways to ... [+]

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COVID-19 hit the home-selling market during the usually robust spring season. Data from Realtor.com shows a big drop in sales and new listings. The outlook for home sales is uncertain and very reliant on shape of the post-COVID-19 recovery.

As states reopen for business in stages, every industry wants priority. One approach is to prioritize those that can best jump-start local economies, such as businesses involved with residential real estate. Home sales have a ripple effect, leading to more work for contractors doing renovations and for local retailers, whether they sell mattresses, furniture, or appliances.

One big new development that could increase sales is that real estate professionals in most states are now allowed to show homes in person. For example, Michigan started to permit this on May 7. However, COVID-19 raises many new issues during the home-sale process. For example, does the seller need to disclose whether someone in the house had COVID-19 or died from it?

This article offers insights on these developments and their national importance from Gregg Nathanson, a real estate lawyer with Couzens, Lansky Fealk, Ellis, Roeder & Lazar, a Michigan law firm in the Detroit area.

1. What's the big change in Michigan that impacts how everyone sells their home?

Effective May 7, 2020, Governor Gretchen Whitmer's Executive Order 2020-70 permits workers in the real estate industry, including agents, appraisers, brokers, inspectors, surveyors, and registers of deeds, to resume in-person work activities under certain specified restrictions. The restrictions include:

- Any showings, inspections, appraisals, photography or videography, or final walk-throughs must be performed by appointment and must be limited to no more than four people on the premises at any one time.
- No in-person open houses are permitted.

- Private showings may only be arranged for owner-occupied homes, vacant homes, vacant land, commercial property, and industrial property.

This new order will facilitate the sale of homes subject to stringent precautionary safety measures. Real estate professionals are confident that they will be able to increase greatly the volume of residential transactions consistent with these requirements.

The Order does not specifically address a For Sale By Owner (FSBO) situation where someone is selling their home without a broker. With limited exceptions, all individuals living in Michigan are required to stay at home, travel is prohibited, and gatherings of any number of people not part of a single household are not permitted. This would seem to broadly limit, if not prohibit, FSBO showings. Other states may allow FSBO sales during the COVID -19 pandemic.

What Happened Earlier

Everything had changed earlier in Michigan on March 23, 2020, when Governor Whitmer issued Executive Order 2020-21, requiring all people in Michigan to stay home and stay safe. The Order permitted certain critical infrastructure workers to continue with in-person work, but excluded licensed real estate brokers and salespersons. As a result, brokers could continue to work remotely through use of technological tools. However, the Governor's Order prevented in-home showings and therefore drastically limited the ability to sell any home other than using virtual showings (see #4 below).

Real estate sellers clamored for opportunities to continue to sell homes during the pandemic. The real estate industry had been lobbying for an exemption from the Governor's initial stay-home and stay-safe Order, which it is doing in other states, too.

2. Could this be a model for other states to follow?

The change in Michigan is part of the national discussion, played out separately in each state, over what businesses beyond the obvious are "essential" and which ones fit into the various stages of reopening the economy. Even when states had not designed real estate brokerage activities as an essential service, agents were still helping their clients while following stay-at-home orders.

The guidelines established in Michigan, which balance public safety with the economic need to permit home sales, are a model for other states. The Michigan model permits individual workers in all segments of the real estate industry to leave their homes to participate in the many steps necessary to complete a home sale.

At the same time, everyone needs to adhere to the social distancing measures recommended by the Centers for Disease Control and Prevention (CDC) in addition to any applicable state and local health-related restrictions. The lawyers at Michigan Realtors®, the trade association for real estate brokers in Michigan, have also prepared a Safely Reopening Real Estate Toolkit with various resources and best practices that could be useful in other states.

3. Does the Michigan change also apply to commercial real estate sales?

The Governor's new executive order applies to both commercial and residential real estate sales transactions. Commercial transactions are different, since the property is not a residence but rather a place of business. However, the parties must still respect the social distancing and related federal, state, and local health guidelines necessary to minimize transmission of the COVID-19.

4. What were home sellers and real estate brokers doing to sell a house/condo when social distancing rules made in-person visits impossible?

Over the past few years, even before the coronavirus, real estate brokers have increasingly been integrating the use of technological tools into the sale of homes. Examples include:

- On-line listings
- Virtual presentations for attracting prospective clients, such as for new listings
- Remote virtual tours
- Direct interaction using 2-way real-time audiovisual technology, such as Zoom, Skype, and FaceTime
- Electronic execution and delivery of documents

Many brokers were able to apply these tools to facilitate transactions after social distancing rules went into effect.

5. How have real estate closings taken place during the COVID-19 pandemic?

Real estate title companies have found innovative ways to complete transactions during this period. At least in Michigan, title companies are deemed to provide financial services. They are considered critical infrastructure workers permitted to continue in-person work under Michigan Department of Insurance and Financial Services Bulletin 2020-11.

During this period, some title companies have been keeping buyers and sellers in different rooms, sanitizing tables and chairs, and providing individual signing pens that are not returned.

Everyone has had to get creative. Occasionally, staff handling the closings visit a buyer or seller's home, drop the documents on their porch, step back while the documents are signed, and then grab the documents from the porch. Some closings take place in public parks, across large picnic tables.

Many states, including Michigan, allow for remote witnessing and notarization, as well as electronic recording of documents, with stringent requirements. Governor Whitmer's Executive Order 2020-41, effective April 8 through May 6, 2020, temporarily relaxed some of the requirements for remote witnessing and notarization and e-recording documents. Executive Order 2020-74 issued May 5, 2020 extended this until June 30, 2020. This minimizes in-person transactions in order to facilitate execution and recording of closing documents.

Other states have taken similar actions. The interest in remote notarization started before the COVID-19 pandemic, with developments in the past few months accelerating the trends.

6. How does the COVID-19 pandemic create new legal risks for home sellers and real estate brokers?

The coronavirus pandemic has created many new legal risks for home sellers and real estate brokers. The risks vary depending on whether or not the home is under a purchase contract.

Sales Under Contract

Sellers with a signed purchase agreement run an increased risk that they may not be able to complete their home sale transaction due to buyer default for reasons including:

- The buyer may not have sufficient time to satisfy their lender's financing requirements
- The buyer may have lost their job due to the pandemic

- Lender guideline changes based on credit scores leading to denial of mortgage
- The buyer may have suffered a steep decline in net worth due to the recent sharp decline in the stock market
- The house might not appraise for the purchase price value depending upon how the real estate market reacts to the ongoing crisis

Any of these types of unanticipated factors may cause the buyer to default, leading to: (1) home sellers being unable to close the sale of their home; and (2) brokers being unable to collect their sales commissions.

Home sellers and real estate brokers also run the risk that they may not be able to complete their home sale transaction due to seller default if the seller refuses to permit an inspector or appraiser to enter their home due to coronavirus-safety-related concerns.

Homes Listed For Sale With A Broker/Not Under Contract

For home sellers where a home listed for sale is not yet under contract, a challenge may arise when a seller refuses to permit the home to be shown to potential buyers due to coronavirus-related safety concerns. Open houses are no longer an option, and this restriction continues at least in Michigan and has led to the popularity of virtual showing. It would be extremely challenging for a listing agent to effectively screen potential buyers for the coronavirus prior to permitting them to enter a seller's home for a showing, a risk that doesn't change with the new rules starting May 7 in Michigan.

At a minimum, showings could be limited to pre-qualified buyers. Additional protection would be provided if buyers were required to wash their hands with soap and water or use a hand sanitizer, remove or cover their shoes before entering the house, wear a face covering when inside the home, and not touch any objects during the showing.

7. How can Purchase & Sale Agreements be modified to provide protections during the coronavirus pandemic?

Purchase agreements can be drafted or amended to include coronavirus-based protections for both buyer and seller.

New purchase agreements may now contain a coronavirus provision that provides the buyer extra time to satisfy inspection and financing contingencies, triggered by the uncontrollable time delays caused by compliance with stay-at-home orders. For properties under contract, parties can execute a coronavirus rider that modifies the initial purchase contract to provide extra time to satisfy contingencies and close. In addition, the purchase agreement could include a *force majeure clause* to provide a legal basis for a party to terminate an otherwise binding purchase agreement under these circumstances.

8. What about if the seller had COVID-19 or someone in the house died from it? Does this need to be disclosed to potential buyers?

The issues stemming from the COVID-19 pandemic seem endless and challenging. One is to what extent a seller or listing agent should be required to disclose if anyone living in the seller's home contracted the coronavirus, particularly if that person died.

This type of stigma is a so-called psychological defect. The law has not squarely addressed disclosure requirements under these circumstances. I generally advise in this situation that a seller make full disclosure, to avoid the risk of being sued by the buyer for having wrongly concealed a material defect. However, it is debatable whether an occupant having suffered or died from the coronavirus is a material fact requiring disclosure, since it does not affect the property's condition. Nevertheless, you would need to reply honestly to any prospective buyer who specifically asks whether someone in the house had COVID-19 or died in the house or what they died of (without violating fair-housing laws).

State Laws Differ

State laws vary regarding a seller's or listing broker's duty to disclose a psychological defect that makes the house what's considered a stigmatized property. A study showed that these types of properties sell for less and take longer to sell. For example, with "haunted" houses a Realtor.com survey found 49% of those who responded stated that "there's no price low enough or kitchen large enough to make them purchase [it]."

Most states, like Michigan, require a home seller to provide the buyer with a written disclosure statement regarding known facts about the property's condition before the buyer makes an offer.

A question about COVID 19 will not be part of the required disclosure. Some states require disclosure about a recent death, murder, or other violent criminal activity because the stigma could materially impact a buyer's purchase decision. In one spooky New York case, the court held that the seller had a duty to disclose the house was haunted.

Other states have found no duty to disclose such matters since they do not affect the physical condition of the property. An article on the website of Omega Homes reviews the stigmatized property law in all states.

Somewhat related, what if a neighbor died of the coronavirus or the home is in a cluster area of high COVID-19 infections? Many states require disclosure regarding area environmental concerns. It is too early to know whether a court would find a seller liable for failing to disclose this type of information, particularly since it does not affect the property's condition, and the information may be reasonably discoverable upon a diligent inspection of the public records.

9. The construction industry is closely related to the real estate industry. Is there also now a change in how construction workers can return to work for residential projects?

According to an article in a NAHB Now, a publication of the National Association of Home Builders (NAHB), most states are taking steps to allow home building to resume. The Department of Homeland Security (DHS) on March 28 had already designated construction of single-family and multifamily housing as an "Essential Infrastructure Business."

Initially, stay-at-home orders in Michigan prevented construction, with certain limited exceptions necessary to sustain or protect life. Most other states allowed construction in their orders or didn't have orders at all. Starting May 7, 2020, workers in the Michigan construction industry, including workers in the building trades (plumbers, electricians, HVAC technicians, and similar workers), can now return to work subject to enhanced social-distancing rules.

Examples of these rules to follow:

- Designate a site-specific supervisor to monitor and oversee the implementation of COVID-19 control strategies
- Conduct a daily entry screening protocol for workers and visitors entering the worksite, including a questionnaire covering symptoms and exposure to people with possible COVID-19, together with, if possible, temperature screening
- Require face shields or masks to be worn when workers cannot consistently maintain six feet of separation from other workers
- Encourage or require the use of work gloves, to prevent skin contact with contaminated surfaces
- Ensure sufficient hand-washing or hand-sanitizing stations to enable easy access by workers
- Create protocols for minimizing personal contact upon delivery of materials to the worksite

These types of requirements seek to strike a balance between protecting public safety while permitting the construction industry sector of the economy to re-open, not just in Michigan but across the country.