

OFFER TO LEASE LISTING AGREEMENTS - WHAT TO LOOK FOR AS A LANDLORD LOOKING TO HIRE A BROKER

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Are Listing Agreements Negotiable?

A listing agreement is the contract that gives the listing brokerage authority to list the landlord's premises for lease to prospective tenants. Essentially, it is a promise of a landlord to pay a sum of money to a brokerage that is dependent on the price of the rent that the landlord and tenant agree upon in a lease.

The standard form of the Ontario Real Estate Association - OREA Form 525 - is used in the majority of commercial leasing transactions in Ontario. Despite Form 525 being in the nature of a pre-printed, fill-in-the-blank, standard form, the terms are negotiable and able to be amended before being signed by a landlord. As with any contract, any edits to the listing agreement should be in writing, with clear and unambiguous language.

Recent Changes

There have been some recent changes to the laws governing real estate brokers in Ontario designed to provide greater consumer protection, and to improve the transparency of real estate transactions. Effective December 1, 2023, the *Trust in Real Estate Services Act* (TRESA) fully replaced the *Real Estate and Business Brokers Act*. Several significant changes were implemented in Ontario. One of the biggest changes is the introduction of the **Designated Representation Model**.

Prior to TRESA, Ontario operated under a **Brokerage Representation Model**, which meant that landlords were represented by the entire brokerage, not an individual broker. When a single brokerage worked with multiple landlords or tenants in a single transaction, it was known as multiple representation. In this arrangement, the brokerage is neutral, which meant that services provided during a multiple representation transaction were limited as there were certain details that the listing brokerage could not disclose.

TRESA introduced the **Designated Representation Model**, which would permit each designated broker to promote his/her respective client's best interests in full, with the brokerage as a whole remaining objective and impartial.

Currently under TRESA, brokerages will now be allowed, on a transaction-by-transaction basis, to enter into either a Brokerage Representation agreement or a Designated Representation agreement at the outset of the relationship. OREA Form 525 has been updated accordingly.

Clauses to Look for in the OREA FORM 525

Before entering into a binding listing agreement with a brokerage, landlords must be clear as to what it seeks to receive from such brokerage and should consider the following:

Multiple Listing Service (MLS®) or Exclusive Listing

To be listed on the MLS® means the premises are added to the online real estate database, which gives the premises the broadest exposure possible. In order for a premises to qualify for listing on MLS®, the listing period must be for a period of at least 60 days.

An exclusive listing means the premises can only be viewed by brokers within the same brokerage and tenants are attracted to the premises through direct referrals. A landlord may wish to add to an exclusive listing agreement a provision which allows the landlord to list the property with MLS® at any time in the future.

Listing Period

The length of the listing period is negotiable between the landlord and the listing brokerage. Form 525 no longer requires the landlord's initials only if the listing period exceeds 6 months. Now, the listing brokerage must obtain the landlord's initials, whether the agreement is for one week or one year. Generally, due to rapidly changing markets, landlords should consider shorter listing periods which can always be extended if both parties are content with the relationship.

Commission

There are generally three commission models used in Ontario: a fixed rate per square foot, a percent of gross or net rent payable over the lease term, or a hybrid of the two models. However, the commission rate can be negotiated between the parties based on various factors, including the type of property, location, the level of services provided by the broker, and complexity of the deal. Landlords should be familiar with the current market rates for commercial leasing commissions and fees in the area of the premises to get an idea of what it can expect to pay. It is important to note that the landlord, not the tenant, generally pays commercial lease commissions of the tenant's broker (the co-operating brokerage) which typically is 50% of the total commission payable by the landlord.

(i) When is Commission Payable?

The previous Form 525 provided that the commission was payable simply for any valid offer to lease being obtained during the listing period. Now, commission is payable upon the brokerage bringing in a valid offer to lease the premises during the listing period **which is acceptable to the Landlord**. Landlords should consider revising this clause to add that the acceptance by a landlord will be evidenced **“in writing to the Listing Brokerage”** to ensure there is no ambiguity or misunderstanding as to what the landlord may think is an acceptable offer to lease its premises.

Form 525 also provides that commission is **payable on the earlier of occupancy by the tenant or execution of the Lease**. As many landlords do not permit occupancy of the premises without an executed lease, the date of execution of the lease will typically be the triggering event for commission. It is important to note that in accordance with well-established principles of contract law, even though the lease is executed, there is still the possibility that the lease can become null and void and of no force or effect if the lease contains conditions that are not satisfied or waived. In addition, Form 525 provides that the landlord agrees to pay the commission even if the lease is not completed, if such non-completion is owing or attributable to the landlord's default or neglect. Accordingly, landlords may wish to revise such clauses so that commission is payable upon the lease becoming firm and binding (or better yet, upon the date rent commences to be payable under the lease).

With respect to the requirement in Section 2 for the landlord to pay a commission for any valid offer to lease the Premises, **from any source whatsoever obtained during the Listing Period** landlords may wish to carve out from such phrase, any contacts made by the landlord or its employees without the broker making the introduction. If the landlord had itself met and engaged in discussions with potential tenants prior to or during the listing period of the listing agreement, landlords should consider creating a written record including the names of such potential tenants and dates of any meetings to substantiate that commission should not be payable to the broker with respect to those tenants.

(ii) Extension Terms

Section 2 states that if a lease the listing brokerage arranges contains an option to extend or renew, then the landlord agrees to notify the listing brokerage of the exercise of such option and to pay the listing brokerage a further commission of the total rent for the term of such lease extension or renewal.

It is suggested that this broadly-worded clause should be deleted in its entirety, as it can be argued that a commission should be payable on a one-time basis for the current transaction inclusive of all options, as the landlord and brokerage could part ways and the landlord may not remember to notify the brokerage of the exercise of such option, particularly if the initial term is lengthy, such as 10 years. If such clause cannot be struck out, then it should be made clear that any additional commission flows only from an option **“within the original lease”**, as a broker should only be entitled to reap the fruits of commission, if any, that directly flow

from the original lease agreement.

(iii) Holdover Period

Section 2 contains a 'holdover' clause that entitles a broker to a commission even after the listing period expires if the premises is later leased to a tenant who was introduced to the premises from any source whatsoever during the listing period. The holdover term is typically 60 to 90 days, although a landlord should consider shortening the period, such as 30 days. Landlords should also consider limiting the entitlement to commission only to tenants who were made aware of the premises by way of direct communication from the listing brokerage, or shown the premises by the broker, during the listing period, and excluding any tenant who was introduced to the premises by the landlord's own efforts.

Looking Ahead

A potentially big change may occur in the next few years to the OREA standard forms. It pertains to the so-called rule contained in such forms requiring sellers and landlords to pay the commission of a buyer's or tenant's co-operating broker. Two class action lawsuits within the residential real estate purchase and sale context have been filed in federal court (on the heels of a similar case in the US).

Both class-action lawsuits relate to alleged occurrences in the industry where the sellers who do not offer the standard commission rate to co-operating brokerages are potentially depriving their property from gaining full exposure in the market to prospective sellers, as the lower commission rate effectively causes brokerages to 'steer' buyers away from such properties, and guide buyers towards those properties offering standard or better commission rates. This allegedly effectively coerces sellers into offering the standard co-operating commission rate. There is a growing view that the buyer broker commission should not be required to be taken out of the seller's sale proceeds, and that buyer should instead pay the broker commission to its own broker.

It remains to be seen what impact, if any, the Court's decision(s) in such class-action lawsuits may have in the commercial leasing context and on the structure of commissions for tenant's cooperating brokers in OREA Form 525.

by [Kari Kim-Gallately](#)

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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