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This month we report on the recently announced guidelines for loan servicers and borrowers under the federal programs to avoid foreclosures and incentivize short sales and deeds-in-lieu, and we provide a recap of selected new federal and state laws that impact real estate business owners.

Federal Programs for Troubled Borrowers

The Home Affordable Foreclosure Alternatives program (HAFA) will go into effect on April 5, 2010, to provide help to distressed homeowners who have non-Fannie Mae or Freddie Mac owned loans up to \$729,750. Lenders and services may voluntarily adopt HAFA.

HAFA will help standardize the short sale and deed-in-lieu process by creating an alternative to foreclosures for homeowners who have been unable to modify their mortgage under the Making Home Affordable Program and Home Affordable Modification Program (HAMP).

HAFA provides instructions for lenders and servicers participating in HAMP, including the following:

- Requiring all borrowers be evaluated for a loan modification prior to going to HAFA
 - Providing web tools for borrowers, including links to all required documents and an income verification checklist to request modification in four easy steps
- Permitting borrowers to receive pre-approved short sale terms before listing a property
 - The servicer will determine the minimum net proceeds for a short sale
 - The servicer must accept an offer that meets the net proceeds requirements
 - The servicer must develop a written policy describing the basis on which it will offer the HAFA program to borrowers
 - Borrowers are fully released of future liability on successful sale
- Providing timeframes by which servicers must respond to an offer on a short sale:
 - The borrower or listing broker has three business days to submit an executed short sale purchase offer and related documents to the servicer
 - The servicer has 10 business days to respond
- Protecting real estate commissions in listing agreements from reduction by servicers as condition of approval
 - The servicer may negotiate the real estate commission prior to listing the property, up to 6%
 - Once agreed upon, the commission may not later be reduced
- Providing financial incentives to borrowers, servicers, and investors
 - Payments to second-lien holders who often prevent short sales
 - Servicers and investors who sign off on payment to subordinate lien holders earn up to \$1,000 on successful sale or deed-in-lieu
 - Borrowers who agree to a short sale or deed-in-lieu of foreclosure receive relocation assistance expense reimbursement up to \$1,500
 - Subordinate lien holders are limited to recovering no more than \$3,000 from sale proceeds
 - Servicers failing to perform under a servicer participation agreement may be subject to monetary penalties and sanctions

FHA Condo Financing Rules

The Federal Housing Administration (FHA) implemented new financing rules for condominium units in early December 2009. *RealtyTimes* reported mixed reactions to the new rules from a developer, a financing expert, and a government affairs representative of the Community Associations Institute. Some fear the rules will curtail availability of low-downpayment FHA financing for many individual buyers, that the percentages and time frames are arbitrary and inappropriate, that developers forced to rent unsold units may prevent other units from being sold with FHA financing, that mixed-use projects may exceed the commercial use limitation.

Here are some key points from the new rules:

- At least 50% of the units in a project must be owner-occupied or sold to purchasers who intend to occupy them
- No more than 50% of the units in a single project can have FHA insured financing
- No individual owner or investors can hold title to more than 10% of the units in the project
- No more than 25% of the square footage of the project can be non-residential (used for commercial purposes)
- At least 30% of the units in the project or building must have been sold to obtain FHA insured mortgages
- No more than 15% of the units in a project can be 30 days or more delinquent on monthly dues to the condo association

IRS Rules for Co-Borrowers Tax Credit

IRS guidelines for co-borrowers' eligibility for the home buyer credit have been announced.

- When a home-owning partner of an adult child co-signs for a mortgage and both names appear on the note, the IRS says that the first-time home buyer can qualify for the whole \$8,000 credit, if the child has not owned a home during the three years preceding the purchase and can qualify based on income. The parent does not qualify for any of the credit.
- When unmarried individuals co-purchase a home and only one of them is eligible for the credit, the full \$8,000 can be allocated to the eligible buyer.

Reminder: Use the NEW Good Faith Estimate and HUD-1 Settlement Statement Forms

Starting on January 1, 2010, the new Good Faith Estimate (GFE) and HUD-1 Settlement Statement Forms (HUD-1) must be used by all home buyers, lenders, real estate licensees and others engaged in real estate activities. All consumers making loan applications on or after January 1st must receive the new forms at application and at closing. HUD's Secretary Shaun Donovan has indicated that "restraint" would be shown in enforcing the regulations during the first 120 days of 2010 to accommodate mortgage firms that need additional time to bring their systems into compliance.

Texting While Driving

California law prohibits operating a vehicle while talking on a cell phone, unless it is a hands-free phone. Senate Bill 28 added writing, sending, or reading text messages on a cell phone while driving. The fine for violation of this law is \$20 for the first offense and \$50 for each subsequent offense. The risk to employers is that an employee using a cell phone in violation of law could cause an accident and claims could be made that the employer is responsible for the conduct of its employees. Employers should check their policies to be sure appropriate cell phone use is covered, including text messaging, and give written notice of the company policies to all its employees, with periodic reminders.

Workers' Compensation Penalty Increased

California law requires every employer to secure payment of workers' compensation benefits through insurance or be self-insured. Senate Bill 313 increases the monetary penalty that may be imposed on an employer for failure to obtain Workers' Compensation Insurance. The penalty is now the greater of either \$1,500 per employee or twice what the employer would have paid in premiums for workers' compensation coverage during the prior three years. Employers should maintain required insurance coverage for all employees, and real estate brokers should provide their independent contract salespersons with workers' compensation insurance coverage.

Offering Discounts Not Discriminatory

Senate Bill 367 enables a business to offer discounts and other incentives, without being subject to claims of discrimination under the Unruh Civil Rights Act, to customers who have had their wages reduced, been furloughed and lost their jobs.

Unemployment Benefits Extended

Assembly Bills 23 and 29 extend the prior 59-week limit on California unemployment benefits by an additional 20 weeks for persons whose benefits expired after February 21, 2009.

Compensation Discrimination Legislation

The federal *Lilly Ledbetter Fair Pay Act of 2009* extended the statute of limitations for discrimination claims based on compensation, so that each time an employee is affected by any alleged discriminatory compensation practice or decision (for example, each payroll check) the time period to bring a claim is re-started. The Act also provides that the employee is entitled to back pay for discriminatory compensation practices during the two years prior to the time the employee filed the discrimination claim. The Act applies retroactively to claims pending on or after May 28, 2007. Employers should review the compensation packages of its employees and company policies and practices to confirm they are complying with the equal pay provisions of federal and state law (Title VII, the Age Discrimination in Employment Act of 1967, the Rehabilitation Act of 1973, and the Americans with Disabilities Act of 1990).

Job-Protected Leave for Military Families

Entitlement to job-protected unpaid leave under the federal Family and Medical Leave Act (FMLA) has been expanded for families of employees in the military. Employers must have 50 or more employees to be covered under FMLA, and employees must have worked for the employer for specified periods of time within the previous 12 months. Eligible employees are permitted to take up to 12 weeks of job-protected leave in a 12 month period for any "qualifying exigency" arising out of the active duty status of a spouse, son, daughter or parent, and 26 weeks of job-protected leave in a "single 12 month period" to care for a covered service members with a serious injury or illness incurred in the line of duty. Reinstatement provisions are included in the FMLA. Employer may not retaliate against employees for exercising their leave rights. Employers who are covered under FMLA should review their policies and practices to be sure they comply with these extended leave entitlements.

Federal Stimulus Legislation and California AB 23 Impact on COBRA

Provisions regarding COBRA and whistleblowing are included in the federal *American Recovery and Reinvestment Act of 2009* (ARRA), and California Assembly Bill 23 made ARRA applicable to Cal-COBRA and to "small employers" with 2 to 19 employees. ARRA provides federal assistance to workers involuntarily terminated between September 1, 2008 and December 31, 2009, who lose insurance coverage provided through an employer. The eligible employee may obtain COBRA coverage by paying a reduced premium for up to nine months (35% of the original COBRA premium). The employer initially pays the balance of the premium and is reimbursed by the federal government.

Employers must provide notice of the availability of premium assistance under the ARRA to qualified beneficiaries who may be eligible for the assistance. The notice must be given at the time of termination or, if an employee was terminated between September 1, 2008 and February 17, 2009 and did not elect to obtain COBRA coverage, the employer must provide notice of a second opportunity to elect COBRA coverage under the AARA provisions.

Employers receiving AARA funds must post a notice regarding the whistleblowing rights and remedies. ARRA contains broad whistleblower provisions, including protections from discharge, demotion or other discrimination against an employee who reports a "reasonable belief" of gross mismanagement of ARRA funds. Employee complaints can be investigated and a civil action for compensatory damages could be filed.

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