

Buyer Interest Letters Accompanying Offers: Legal Risks and Potential for Unconscious or Implicit Bias

What is a buyer interest letter?

Also known as “buyer love letters” or just “buyer letters,” these are personal letters written by buyers, often with photos attached, in the hopes that a buyer’s offer will stand out among many that a seller may have received.

What are the potential problems with buyer letters?

These letters can reveal information about a buyer (such as the below protected classes or characteristics) that should not be considered by the seller in choosing among competing offers. Sometimes, these considerations can inadvertently occur in the decision-making process because of a person’s unconscious or implicit bias.

What is unconscious or implicit bias? And if it is not overt, what can be done about it?

Every person has their own set of life experiences and sometimes, based on those experiences, assumptions are made about groups of people, or individuals belonging to those groups or having certain characteristics. Applying those assumptions (whether intentional or not) can result in unlawful discrimination. Recognizing that one might be influenced by unconscious or implicit bias can allow one to consciously make the effort to avoid making decisions based on those biases if they concern protected classes or characteristics.

What are the protected classes and characteristics?

Race, color, ancestry, national origin, religion, sex, sexual orientation, gender, gender identity, gender expression, marital status, familial status, source of income, disability, medical condition, citizenship, primary language, immigration status, military/veteran status, age, criminal history, and any arbitrary determination.

Does a seller have to accept a buyer letter that accompanies an offer?

No. But if a seller is going to refuse to accept letters from one buyer, the seller should refuse to accept letters from all prospective buyers. Otherwise, the unequal treatment of different buyers may itself be discriminatory.

What can a seller do to discourage buyer letters in the context of a real estate sale?

Sellers who want to avoid even the appearance of impropriety and avoid any risk associated with unconscious bias can instruct their agent in writing not to present such letters or not to present any offer that is accompanied by such a letter.

Doesn’t a real estate agent have a fiduciary duty to present all offers received? What can an agent do to discourage buyer letters?

A real estate licensee has a duty to present all offers received, unless instructed otherwise, in writing, by the seller. If the seller gives instructions not to present buyer letters, the seller’s agent can include such a statement in the remarks or other agent accessible area of the MLS. The statement could read something like, “Per seller instruction, buyer letters that accompany an offer will not be presented to seller. If a buyer letter cannot be separated from the offer, the entire offer shall be returned to buyer or buyer’s agent.”

Even if the agent is following the seller’s instruction, the agent should disclose to the seller that an offer was received with a buyer letter and returned to buyer or agent per the seller’s instruction. Paragraph 10C(2)(A) of the C.A.R. Residential Listing Agreement, C.A.R. Form RLA, contains a seller instruction not to present buyer letters. Only if the alternate paragraph 10C(2)(B) is checked is broker authorized to present such letters.”