

Pre-possession Agreement Checklist

Pre-possession and Post Possession agreements are NOT recommended, carry inherent risks, and raise a variety of legal and practical issues. For that reason, Commissioner’s Rule R4-28-1101(K) provides that “A salesperson or broker shall recommend to a client that the client seek appropriate counsel from insurance, legal, tax, and accounting professionals regarding the risks of pre-possession or post possession of a property.” **Due to the risk and liability involved with pre-possession and post possession, the best practice is for the parties to enter into a lease agreement rather than a pre or post possession agreement.**

1. **Purpose:** State whether the Buyer and Seller’s relationship will create a landlord-tenant relationship and thereby be governed by the Arizona Residential Landlord Tenant Act or whether the pre-possession agreement will not create a landlord-tenant relationship under A.R.S. § 33-1308(2).
2. **Possession date:** Provide the date Buyer’s possession of the premises will begin and when the Buyer has to vacate the premises if close of escrow does not occur.
3. **Occupancy:** State the reason for the occupancy (e.g., Buyer will occupy the premises or Buyer is moving personal property into premises) and who/how many occupants are allowed, including pets, if any.
4. **Compensation:** Determine the amount Buyer will compensate Seller to pre-possess the premises (e.g., daily rate, flat rate, etc.), whether Buyer will directly pay Seller the compensation, and whether Buyer will owe additional funds if close of escrow is extended.
5. **Security deposit:** Consider whether Seller will charge an additional security deposit and how much, whether Seller will hold the security deposit, and how the security deposit will be used and/or returned to Buyer.
6. **Use of premises:** Include how the premises are to be utilized (e.g., personal residence) and that Buyer will comply with any and all applicable laws, ordinances, regulations, CC&Rs, etc. Additionally, address who is responsible if any fines or assessments are incurred during the pre-possession.
7. **Utilities/services:** Determine who will pay the utility bills and other services for the premises during the pre-possession.
8. **Condition of the premises:** The parties should agree on the condition of the premises prior to Buyer’s pre-possession.
9. **Insurance:** Address whether renter’s insurance and/or additional insurance is needed.
10. **Risk of loss:** Determine who is responsible in the case of damage to the premises during the pre-possession.
11. **Contingencies:** Consider whether any remaining contingencies that are not met will continue to be effective or whether the contingencies will be deemed waived once Buyer takes occupancy of the premises.
12. **Maintenance:** Determine who is responsible for any repairs or maintenance of the premises during the pre-possession. The parties may want to consider purchasing a home warranty that will cover the premises prior to close of escrow.
13. **Improvements:** State whether alterations, repairs, or improvements are allowed during the pre-possession and what happens if any alterations, repairs, or improvements were made and then escrow fails to close.
14. **Assignment:** Consider whether the Buyer is allowed to assign their right to the premises.
15. **Entry to premises:** The parties should determine what type and how much notice Seller should give Buyer to enter the premises for completing repairs or inspecting the premises.
16. **Indemnification:** REALTORS® should ensure the Buyer and Seller will hold harmless and indemnify their broker(s) in the transaction from any and all liability and responsibility related to the pre-possession.
17. **Other terms and conditions:** Include any other items of importance (e.g., no smoking in the property).

Note: Prior to any parties signing a pre-possession agreement, the Broker should review the agreement and the parties should be encouraged to seek appropriate counsel.