

Pre-Possession Agreement Provisions

**This document is for informational purposes only.
This is not a contract and should not be used as a contract or as an addendum to a contract.**

USE THE BELOW INFORMATION ONLY AFTER HAVING CONSULTED INSURANCE, LEGAL, TAX, AND ACCOUNTING PROFESSIONALS.

Introduction: Keep in mind that pre-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.” It may therefore be beneficial to include disclaimer language at the top of your pre-possession agreement, such as:

This form is provided as a courtesy to the parties only. It is not required to be used in this transaction and may not fit the needs, goal, and purposes of the parties. Broker(s) makes no statement or warranty as to the legal validity of this form, its contents or use, and the parties, by their use of this form, acknowledge and agree that Broker(s) shall not be liable to any party or person for its contents or use. Pre-Possession agreements are not recommended and the parties are aware there are many risks associated with allowing the Buyer to possess the Premises prior to close of escrow. The parties are advised to: (i) seek appropriate counsel from insurance, legal, tax and accounting professionals before entering into an agreement that provides Buyer with possession prior to close of escrow; and (ii) consider the use of a lease agreement rather than a pre-possession addendum.

Parties: Any agreement should identify the name of the Buyer, Seller and Premises address. For example:

This is an Addendum to the Residential Resale Real Estate Purchase Contract (“Contract”) dated _____ between the following parties:
MO/DA/YR

SELLER:

BUYER:

PREMISES ADDRESS:

Purpose: Identify the intent of the agreement. This provision may choose to address whether the parties’ relationship will create a landlord-tenant relationship and thereby be governed by the Arizona Residential Landlord Tenant Act. Arizona law does not directly address short term rentals and legal counsel should determine whether the pre-possession agreement is governed by Arizona’s Residential Landlord and Tenant Act or exempt under A.R.S. § 33-1308(2). If it is determined that the pre-possession agreement is governed by the Residential Landlord and Tenant Act, the parties should consult their independently selected counsel regarding their rights and obligations thereunder. Independent counsel should additionally advise the parties as to the potential applicability of state regulations pertaining to transient housing and innkeeper liability. Once legal counsel provides guidance on these issues, this provision should be drafted accordingly. Moreover, if the property is governed by a homeowner’s association, governing documents such as CC&Rs should be reviewed by the parties and/or their attorneys to determine the contractual legality of their contemplated pre-possession agreement. This provision should not be finalized until the parties have received legal guidance, but until such time, initial boilerplate language identifying the purpose of the agreement may include:

This Addendum is intended to grant Buyer exclusive possession of the Premises prior to close of escrow, pending the completion of the sale of the Premises. The following additional terms and conditions are hereby included as part of the Contract. **This form is not recommended to be used for periods that exceed 30 days.**

Possession date and occupancy: 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. State the reason for the occupancy and who/how many occupants are allowed, including pets, if any. For example:

Seller grants Buyer permission to access and possess the Premises before the close of escrow date beginning on _____, 20____ ("Possession Date") for the limited purpose checked below:

- Move in personal property (e.g., furnishings) and physically occupy the Premises; OR
- Store personal property in the following areas, without physically occupying the Premises; OR

- Other: _____

Occupancy shall be limited to the following number of: _____ adults _____ children _____ pets. Type of pet(s): _____.

In the event close of escrow (COE) does not occur, Buyer's right of possession ends and Buyer will remove all personal property and vacate the Premises no later than 5:00 p.m. on the day after the COE Date stated in the Contract or any extension(s) thereof.

Compensation and deposit: Consider whether the Buyer will compensate the Seller to possess the premises. If compensation will be charged, 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. Consider whether Seller will charge an additional security deposit and how much, who will hold the security deposit, and how the security deposit will be used and/or returned to Buyer, which may depend on the applicability of Arizona's Residential Landlord and Tenant Act. Language to be considered may include:

Prior to the Possession Date, Buyer shall pay to Seller, as compensation for the use of the Premises, certified funds in the amount of \$_____ per day for _____ days from the date of possession up through the day prior to COE, for a total payment in the amount of \$_____. Any agreed extension of possession shall be at the same per day rate, and payment shall be made by Buyer to Seller upon execution of an extension agreement, which must be in writing and signed by the parties. The sums paid for compensation under this Addendum will NOT be applied toward the purchase price of the Premises.

If escrow fails to close by the COE Date stated in the Contract or any agreed-upon extension thereof and Buyer remains in possession of the Premises without a written extension agreement, Buyer agrees to pay Seller: one percent (1%) of the purchase price per month, prorated daily for use of the Premises or \$_____ per day.

In addition to the pre-paid compensation, Buyer shall deposit with escrow agent or Seller the amount of \$_____ as damage and security deposit. At COE, the deposit shall be returned to Buyer. If escrow fails to close, the deposit shall be released to Seller and Seller is entitled to use the deposit monies to recover any unpaid compensation for use of the Premises, costs to clean or repair the Premises necessitated by Buyer's possession, and any costs incurred for collection, including attorneys' fees. Seller may further hold Buyer liable for any additional charges and obligations incurred by Seller or caused to be incurred by Seller that arose out of Buyer's use of the Premises under the terms of this Addendum. Seller shall return any unused portion of the deposit, along with an itemization of the monies withheld, to Buyer within 14 days after Buyer vacates the Premises.

Use of premises: Identify how the premises are to be utilized (e.g., personal residence) and address Buyer's compliance 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. For example:

Buyer shall use the Premises as a personal residence only. Buyer agrees to comply with applicable laws, ordinances, regulations, Covenants, Conditions and Restrictions, and Homeowner's Association rules and regulations concerning the Premises. If Seller incurs any fines or assessments due to Buyer's actions or conduct, Buyer shall be responsible to pay those fines or assessments.

Utilities/services: Determine who will pay the utility bills and other services for the premises during the pre-possession term. For example:

Buyer shall have all utilities and services placed in Buyer's name by the Possession Date and shall pay all applicable charges and costs incurred during Buyer's use of the Premises.

Condition of the premises: The parties should agree on the condition of the premises prior to Buyer's pre-possession and advised to seek independent legal counsel regarding the implications of accepting the premises in its as-is condition upon taking possession.

Buyer has had the Premises fully inspected to Buyer's complete satisfaction. Buyer hereby acknowledges that Buyer has or will have conducted a final walk-through of the Premises prior to possession. Buyer must object in writing to any Premises defects prior to possession or waive any further claim in relation thereto. By taking possession, Buyer accepts the Premises in its AS-IS condition, subject to any agreed upon repairs to be made by Seller prior to COE. As set forth in the Contract, the Seller Warranties and Risk of Loss provisions terminate upon Buyer's possession of the Premises.

Insurance: The parties should contact their respective insurance carriers to determine what types of insurance should be secured by Buyer and Seller, the appropriate coverage limits, and who should be named as an insured. This provision should not be finalized until the parties have received guidance from insurance professionals, but until such time, initial boilerplate language addressing insurance and risk of loss may include the following:

Buyer shall obtain insurance policies with minimum coverage limits of \$_____ in contents insurance and \$_____ in liability insurance. Buyer shall provide Seller with proof of insurance upon request. Buyer agrees to indemnify and hold Seller harmless from all loss, damage, liability and expense by reason of personal injury or death of any person(s) and/or by reason of damage to any personal property in or upon the Premises during Buyer's possession or use of the Premises up until COE.

Contingencies: Consider whether any remaining contingencies that are not yet met will continue to be effective or whether the contingencies will be deemed waived once Buyer takes occupancy of the premises. This provision must coincide with the language contained in the "condition of the premises" provision. Depending on the terms agreed upon by the parties, sample language may include:

Upon possession of the Premises, Buyer waives any and all of Buyer's remaining contingencies, including financing contingencies, notwithstanding any agreed upon repairs to be made by Seller prior to COE.

Maintenance: Determine who is responsible for any repairs or maintenance of the premises during the pre-possession term. The parties may want to consider purchasing a home warranty that will cover the premises prior to close of escrow. Potential language may include:

Buyer shall maintain and/or repair the Premises, including heating, cooling, mechanical, plumbing and electrical systems, pool, spa, landscaping and grounds, and all personal property included in the sale in substantially the same condition as on the date of possession; normal wear and tear is excepted.

Improvements: State whether alterations, repairs, or improvements are allowed during the pre-possession term and what happens if any alterations, repairs, or improvements were made and then escrow fails to close. Potential language may include:

Buyer shall not perform any alterations, repairs or improvements to the Premises without first obtaining the prior written consent of Seller. If Seller consents, Buyer shall promptly pay all third parties for labor, services and materials performed or supplied in making the alterations, repairs or improvements. Buyer shall furnish Seller with proof that all labor, services and materials have been paid for in full and shall indemnify and hold harmless Seller against, and from, any and all liens which may be asserted or filed against the Premises related to the making of the alterations, repairs or improvements. In the event COE does not occur, any alterations, repairs or improvements made to the Premises by Buyer shall become the sole property of Seller without any compensation to Buyer.

Assignment: Consider whether the Buyer is allowed to assign their pre-possession right to the premises. If it is agreed that Buyer cannot assign their rights without the prior written consent of Seller, language may include the following:

Buyer shall not assign this Addendum nor lease the Premises or any portion thereof without the prior written consent of Seller, and any attempted assignment or lease shall be void and unenforceable.

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. While this provision should not be finalized until the parties are advised by their respective attorneys whether their pre-possession agreement is governed by Arizona’s Residential Landlord and Tenant Act, initial boilerplate language may include:

During the pre-possession term, Buyer shall not unreasonably withhold consent to Seller or Seller’s representative(s) to enter the Premises to inspect, make repairs, or supply necessary or agreed services. Seller may enter the Premises without Buyer’s consent in case of emergency. Seller shall not abuse the right to access or use it to harass Buyer. Except in case of emergency or it is impracticable to do so, Seller shall give Buyer at least 24 hours’ notice in writing of the intent to enter and enter only at reasonable times.

Indemnification: REALTORS® should ensure the Buyer and Seller will hold harmless and indemnify broker(s) in the transaction from any and all liability and responsibility related to the pre-possession. Designated Brokers should consult with their company’s legal counsel to obtain exact verbiage, but sample language may include:

Seller and Buyer hereby expressly release, hold harmless and indemnify all Brokers, their licensees, employees, and any of their officers or partners, and any other person, firm, or corporation who may be liable through them from all claims, lawsuits, and actions that arise from or relate to: (i) this Addendum; or (ii) the actions of Buyer or anyone else entering the Premises while the Premises is occupied or used by Buyer during the pre-possession term. The parties understand and agree that Broker(s) do not provide advice on property as an investment and are not qualified to provide financial, legal, or tax advice regarding the implications of entering into a pre-possession agreement.

Other terms and conditions: Include any other items of importance (e.g., no smoking in the property).

Signature: Place signature lines at the end of the agreement for Buyer and Seller. For example:

The undersigned agrees to the additional terms and conditions and acknowledge receipt of a copy hereof.

| | | | |
|----------------------|----------|----------------------|----------|
| _____ | _____ | _____ | _____ |
| ^ BUYER’S SIGNATURE | MO/DA/YR | ^ BUYER’S SIGNATURE | MO/DA/YR |
| _____ | _____ | _____ | _____ |
| ^ SELLER’S SIGNATURE | MO/DA/YR | ^ SELLER’S SIGNATURE | MO/DA/YR |