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SALES REPRESENTATIVE AND DISTRIBUTORSHIP CONTRACTS IN NEW YORK

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Companies from all over the world commonly conduct business in New York State through sales representatives and distributors. New York State supports a strong legal tradition based in English common law. This legal tradition will apply to the terms and conditions of sales representative and distributor contracts throughout the State, unless the contracting parties explicitly choose the law of a different forum.

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Freedom of Contract:

New York common law affords expansive rights to contracting parties to negotiate the terms of their agreement. This tradition will apply to sales representative and distributor agreements, subject to a few exceptions described herein.

Exceptions:

In addition to the non-enforceability of contracts that violate public policy or are defective by their original terms, oral contracts are not enforceable in New York State if they violate the Statute of Frauds. The Statute of Frauds, as adopted by New York General Obligations Law, requires all agreements to be in writing if, among other things, they govern the sale of goods worth over \$500 or if, by their terms, they cannot be performed within one year from execution. Sales representative and distributor agreements are no exception. New York Labor Law specifically provides that contracts with sales representatives who solicit wholesale orders within the State must (i) be in writing, (ii) set forth the method by which commission will be paid and (iii) be fully executed and a copy provided to each representative. In addition, the principal must obtain a signed receipt for the contract from the sales representative. New York Labor Law also provides that sales representatives are to be paid earned commission, and all other monies earned under the sales representative contract, within five (5) business days after commission is earned. In the event the sales representative's employment is terminated, all earned commissions are to be paid within five (5) business days after termination or within five (5) business days after they become due, if such commissions are not due when the contract is terminated. Failure to abide by these rules will expose the principal to double damages (as well as reasonable attorney's fees, court costs and disbursements) should the sales representative win a civil action for the recovery of commission.

Another material restriction on the contracting parties' freedom of contract in New York State is the common law limitation on the enforceability of non-compete clauses. New York courts disfavor such clauses, distinguishing them as potentially harmful to a person's ability to earn a living. In an effort to strike an appropriate balance, New York courts employ a reasonableness test to non-compete, ensuring they (i) protect the legitimate interests of the employer, (ii) do not impose undue hardship on the employee and (iii) are not contrary to the public interest. Contracting parties are advised to incorporate reasonable time, scope and manner restrictions if they choose to employ a non-compete clause in a sales representation or distributor agreement.

Absent or Ambiguous Terms:

New York courts are permitted to weigh extrinsic evidence to ascertain the intention of the parties if terms of a contract are ambiguous. Contracting parties are advised to craft their contractual agreements in clear and unambiguous terms to ensure that New York courts will construe them by their express language, independent of such outside interpretive evidence.

UCC:

New York State has incorporated the Uniform Commercial Code ("UCC") into its laws. The UCC rules will serve as default provisions under any distribution or sales representative agreement, should the parties fail to incorporate terms necessary to their relationship. For example, unless disclaimed or limited in the representations and warranties section of the sales representative

agreement, the UCC will substitute warranties for merchantability and fitness of the goods to be transferred. Foreign contracting parties are advised to become familiar with the terms of the UCC in New York State in an effort to craft contracts that necessarily avoid any undesired default provisions.

Competition/Antitrust/Non-Compete Covenants:

New York State's General Business Law defines a franchise as any contract or agreement between two parties by which a franchisee is granted the right to engage in offering, selling or distributing goods or services (i) under a marketing plan or system prescribed in substantial part by a franchisor, or (ii) that are substantially associated with the franchisor's trademark, service mark, trade name, logotype, advertising or other commercial symbol designating the franchisor or its affiliate. In both described circumstances, a franchise exists once the franchisee pays a franchise fee to the franchisor. The definition of franchise upheld by New York State as described herein is widely considered one of the broadest in the country, since it requires only one of the above-mentioned conditions for a franchise to exist. Other jurisdictions often require both elements to be present before making the same determination. This broad characterization begs caution to parties entering into a sales representation or distributor arrangement in New York State to be aware of any inadvertent characterization of their relationship as a franchise, as such characterization would necessarily bring about unintended registration and disclosure requirements.

Tax Considerations:

Parties to sales representation or distributor agreements in New York State should be careful to structure them to clearly indicate the independent relationship of the parties, as failure to do so could result in unintended tax and employer-related liabilities for the principal. Determination of an independent contractor relationship is accomplished by examining all aspects of the relationship between the contracting parties, the guiding principle for such determination being the level of control and direction exerted by the principal over the contractor. Factual considerations that may shape such determination include whether the contractor (i) determines his/her work schedule, (ii) is free to engage in other employment, (iii) receives any fringe benefits, and (iv) is on the principal's payroll. A simple contractual designation as an independent contractor will not be determinative, separate from a broader evaluation of the circumstances of the relationship between the principal and the contractor. If found to be an employee and not an independent contractor, the principal may be responsible for a host of employer obligations under New York law, including compliance with wage and hour laws.

Other Issues:

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