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## SALES REPRESENTATIVE AND DISTRIBUTORSHIP CONTRACTS IN MASSACHUSETTS

BY: SHERIN AND LODGEN LLP

GARY M. MARKOFF  
gmarkoff@sherin.com  
(617) 646-2141

SUZANNE D. WANN  
sdwann@sherin.com  
(617) 646-2267

101 Federal Street  
Boston, MA 02110  
Main Tel: (617) 646-2000  
Main Fax: (617) 646-2222

Unless there is an express contractual provision to the contrary, Massachusetts laws will generally govern an agreement with a sales representative or distributor within the Commonwealth. As one of the original thirteen British colonies in America, Massachusetts' legal system is rooted in English common law, and common law will primarily govern sales representative and distributorship contracts to be performed in Massachusetts.

### **Freedom of Contract**

Massachusetts common law gives the parties to a contract wide latitude to negotiate the terms of their agreement, and Massachusetts courts will generally enforce the terms of a contract as written unless there was a problem with the formation of the contract or the terms are clearly against public policy. Massachusetts law does not require that such contracts include specific terms, and courts generally do not read mandatory terms into such contracts. It is worth noting that oral contracts are enforceable in Massachusetts (unless the contract is for the sale of goods over \$500), provided such oral contracts do not violate the statute of frauds (for example, in commercial contexts, written contracts are required if the contract cannot be performed within one year; for promises to pay the debt of another; and for transfers of interests in real estate).

### **Exception:**

Although parties are generally free to contract as they wish, Massachusetts law provides three notable exceptions. First, Massachusetts requires non-employee (*i.e.*, independent contractor) sales representative commissions to be timely paid, with all commissions paid within fourteen (14) days of the termination of the sales representative's contract (or, if commissions are due after the termination of the contract, within fourteen (14) days after the commissions became due). Willful or knowing failure to promptly pay commissions gives rise to liability for the entire amount of commissions due plus treble (triple) damages and attorneys' fees and costs. These requirements may not be waived, and attempts to do so will be void. Second, although Massachusetts does not have a specific statute prohibiting the enforcement of noncompetition agreements, courts are reluctant to enforce these agreements unless they are: (i) necessary to protect certain employer interests (such interests must be more substantial than merely preventing

competition from an ex-employee), (ii) reasonable in time and scope, (iii) consistent with public interest, and (iv) supported by consideration. Recent Massachusetts court decisions have further elaborated that the terms of a noncompetition agreement must be carefully tailored to the realities of the business in question and the responsibilities of the employee. This means that an agreement should be renegotiated whenever a current employee's duties substantially change if an employee wishes to retain the benefits of a noncompetition agreement. Third, any contract that contains provisions that attempt to discourage competition or restrain trade will be held strictly illegal, and may nullify the entire agreement.

### **Absent or Ambiguous Term**

In Massachusetts, the use of parol or extrinsic evidence is only allowed to explain or supplement an agreement. To resolve ambiguity in a contract, courts will first look to the express language of the agreement, independent of other evidence concerning the drafting history or the intention of the parties. If the language of the contract is ambiguous on its face, then courts will look to using extrinsic evidence as an interpretive guide.

### **Independent Contractor and Employment Laws**

Under Massachusetts law, there is a presumption of employee status for purposes of the Commonwealth's wage laws. In order for a business to classify a worker properly as an independent contractor, the worker must meet all three of the requirements of the following test: (1) the worker must be free from control and direction of the principal in connection with the performance of services, both under the governing contract and in fact; (2) the service must be performed outside the usual scope of the principal's business; and (3) the worker must be customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the service performed. If a worker does not meet all three prongs of the foregoing test, he or she will be considered an employee, giving rise to a host of employer obligations under Massachusetts law, including but not limited to compliance with wage and hour laws.

In light of the above presumption, it should be noted that all violations of Massachusetts wage and hour laws are subject to mandatory treble (triple) damages, even when employers have acted in good faith and have taken reasonable steps to comply. The concept of treble damages is relatively new to Massachusetts law, and there is a concerted effort to either repeal this aspect of the wage and hour laws or modify the same to require employer fault before treble damages may be imposed. In addition, employers with six (6) or more employees are prohibited from discriminating against current and prospective employees based on categories such as race, gender (including pregnancy status), age (applies to people 40 years and older), color, religion, national origin, ancestry, criminal record (applications only), disability, mental illness, sexual harassment, sexual orientation and genetics and are required to have a written sexual harassment policy.

It should also be noted that every resident of Massachusetts must have coverage under a health insurance plan, and employers with eleven (11) or more full-time employees that do not provide group health insurance and do not make a "fair and reasonable" contribution toward the premiums for such insurance may be subject to a surcharge of up to \$295 per employee and may be subject to further surcharges if their employees or their dependents end up receiving free health services from the state.

### **Uniform Commercial Code**

Massachusetts has incorporated the Uniform Commercial Code ("UCC") into its laws; therefore, if the parties enter into a distribution agreement involving the sale of goods and fail to address certain aspects of the transaction, Massachusetts law supplies default rules that will govern the transaction. A foreign

manufacturer should be aware that there are certain implied warranties contained in the UCC regarding merchantability and fitness of goods unless disclaimed or limited in the representation and warranties section of the distribution agreement. Further, if the agreement fails to limit the remedies in the event of breach, the UCC provides a broad variety of default remedies, some of which may be undesirable to the seller.

### **Business Tax**

Generally, any foreign corporation, partnership, LLC, joint venture or other entity “doing business” in the Commonwealth will be subject to taxation by the Commonwealth. Activities that qualify as “doing business” are executing contracts and hiring employees. Interstate activities constituting “mere solicitation” of orders for sales of tangible personal property filled by shipment or delivery from a point outside the Commonwealth after orders are sent outside the Commonwealth for approval or rejection are excluded from net income-based taxation. A list of activities constituting “mere solicitation” are set forth in Public Law 86-272. The tax rate on foreign corporate entities is presently in flux and will be decreasing in subsequent years. The Massachusetts corporate excise is calculated by reference to net income and either property or net worth, and it is recommended that foreign companies consult a local accounting firm or tax counsel prior to filing. For taxable years ending on or after December 31, 1988, the minimum corporate excise is \$456.