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SALES REPRESENTATIVE AND DISTRIBUTORSHIP CONTRACTS IN MARYLAND

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OVERVIEW OF MARYLAND

Maryland is located in the [Mid Atlantic region](#) of the [United States](#), bordering [Virginia](#), [West Virginia](#) and the [District of Columbia](#) to the south and west, [Pennsylvania](#) to the north, and [Delaware](#) to the east.

Maryland has a very diverse economy, with service-related industries including food production, life sciences and education, as well as manufacturing and mining. Services provided by Maryland companies notably include those related to transportation centered on the Port of Baltimore, as well as rail and trucking services. Due in part to its close proximity to the manufacturing centers of the Midwest, the Port of Baltimore has become the eighth largest port in the country. Maryland also has many companies, including an array of defense contractors, who provide services to the federal government. Maryland also has over 350 biotechnology firms, making it the third-largest such cluster in the nation. The Interstate 270 Corridor (which refers to the area surrounding Interstate 270, which runs approximately 35 miles from the northwest section of the Washington Beltway to Frederick, Maryland) is known for its high concentration of technology companies.

Maryland's agricultural industries focus on dairy and chicken farming and various crops. The manufacturing industry in Maryland does not have a specific focus; rather, Maryland companies manufacture a variety of goods such as electronics, computer equipment and chemicals. Maryland is also home to several large military bases and the headquarters or large offices of a number of federal government agencies and departments such as the National Institutes of Health, the Department of Agriculture, the Census Bureau, the National Oceanic & Atmospheric Administration, and the Social Security Administration.

FREEDOM OF CONTRACT

Under Maryland law, parties are generally free to set the terms and conditions of their agreement provided that all of the common law requirements for formation of a valid contract are present. However, a Maryland court will render a contract invalid if its terms are ambiguous, it is illegal or it conflicts with public policy. Maryland courts will not generally invalidate a contract based on a disparity between the parties in the benefits received; rather courts will only inquire as to whether the parties entered into the contract voluntarily. Generally, courts presume that the express terms of a contract are enforceable.

In the context of contracts between a sales representative and his or her employer, under the Maryland Wage Payment and Collection Law, as interpreted by Maryland courts, it is against public policy for the parties to use contractual language to eliminate a sales representative's right to receive commission-based compensation for services performed prior to such representative's termination of employment. *Medex v. McCabe*, 372 Md. 28, 42 (2002). This principal is also found in Maryland law governing wholesale

sale representatives, which requires, by statute, that an employer must pay a sales representative all commissions due under a contract that is terminated within 45 days of termination.

CHOICE OF LAW

Maryland courts will give effect to choice of law provisions in contracts provided that the state whose law is chosen has a substantial relationship to the parties or to the transaction or there is another reasonable basis for the choice of that state's law, and provided that the state law chosen is not against the public policy of the state whose law would apply absent the provision. In addition, a choice of law provision may not be enforced where it was induced by fraud or overreaching or the fundamental unfairness of a chosen law may deprive a party of a remedy.

RESTRICTIVE COVENANTS/EXCLUSIVITY

Maryland will generally enforce restrictive covenants (i.e., non-competition, non-solicitation, exclusivity, etc.). However, Maryland law requires that restrictive covenants meet certain criteria. In order for a restrictive covenant to be enforceable, it must be reasonable in scope (geographic scope and subject) and duration. That is, the non-compete provisions will be enforceable if the restraint (a) is confined within limits which are no wider as to area and duration than are reasonably necessary for the protection of the restraining party's business and (b) does not impose undue hardship on the restrained party or disregard the interests of the public.

Maryland courts have considered the following factors in determining enforceability of a non-compete provision:

- o whether the covenant is necessary to prevent the solicitation of customers or the use of trade secrets, assigned routes, or private customer lists;
- o whether there is an exploitation of personal contacts between the parties; and
- o whether an enforcement of the clause would impose an undue hardship on the restrained party or disregard the interests of the public.

If a court finds that an exclusivity requirement or a non-compete provision is unreasonable, the court may redraft or recast the provision (commonly known as "blue-penciling") in duration or geography so as to bring it within reasonable boundaries.

MANDATORY PROVISIONS

Pursuant to the Maryland Fair Distributorship Act, which applies to any agreement under which the commercial goods of a grantor of sales and distribution rights are sold or distributed in Maryland, a grantor is required to provide at least 60-days written notice (the contents of which must comply

with the Act) to distributors of its intent (a) not to renew an option contemplated in the agreement, or (b) to cancel an agreement that has not yet expired according to its terms.

However, grantors do not have to provide notice if the cancellation or non-renewal is a result of (a) non-payment by the distributor for goods received; (b) insolvency or bankruptcy of the distributor; (c) a danger to the public health or safety caused by the distributor; (d) the distributor abandoning the agreement for any other reason a court has found to be justified for early cancellation or non-renewal; (e) distributor conduct that is in violation of a written agreement and which materially affects the relationship between the grantor and distributor; (f) any conduct by the distributor which affects the commercial viability of the grantor's goods in the marketplace; or (g) bad faith, fraud, or illegal acts by the distributor.

Once a grantor cancels or does not renew the agreement, except for the reasons listed above, the grantor may repurchase (or must re-purchase, if the distributor requires it pursuant to the terms of the Act) all merchandise sold by the grantor to the distributor according to statutorily-prescribed terms.

SPECIAL TAX CONSIDERATIONS

Any time business is conducted with a sales representative and/or a distributor in Maryland there may be special income tax or sales tax considerations.

Maryland imposes a sales and use tax on a retail sale of tangible personal property in the state of Maryland, and the use of tangible personal property (or a taxable service) in Maryland. In general, the sales tax is imposed at the time of sale and it is incumbent on the sales representative or the distributor to collect the tax at the time of sale.

Out-of-state vendors are required to register with the Comptroller of Maryland and file sales and use tax returns if the vendor has sufficient nexus with Maryland. Nexus is generally established when the vendor (1) maintains or uses an office, sales or sample room, distribution, storage, or warehouse in Maryland for the sale of tangible personal property, or maintains a taxable service through an agent or subsidiary in Maryland, (2) maintains a sales representative in Maryland for the purpose of delivering, selling or taking orders for such property, or (3) the vendor enters Maryland regularly to service or repair the products being sold.

Corporations that purchase from sales representatives and distributors in Maryland that intend to purchase the items for resale must apply for a resale certificate with the Comptroller. The certificate must be given to the supplier at the time of sale so that sales tax is not imposed on the sale.

Regarding corporate income tax, corporations conducting interstate business will be subject to Maryland income tax only if the business is engaged in certain activities that are said to create nexus with Maryland. Examples of

such activities are employees soliciting and accepting orders in Maryland and maintaining a business location in Maryland. If a business has nexus with Maryland, Maryland applies an apportionment to trade or business carried on partially within and partially outside the state to determine the amount of income earned by the corporation that may be subject to Maryland corporate income tax.

The information contained here is not intended to provide legal advice or opinion and should not be acted upon without consulting an attorney. Counsel should not be selected based on advertising materials, and we recommend that you conduct further investigation when seeking legal representation. – Albert J. Mezzanotte, Jr., Managing Partner

ABOUT THE FIRM

With capabilities backed by over 75 years of experience, Whiteford, Taylor & Preston has grown to over 155 attorneys, with offices in Maryland, Virginia, Delaware, and Washington, D.C. We maintain a range of practice groups to meet the needs of businesses, governmental entities and individuals, including corporate, litigation, employee benefits, real estate, international, government contracts and bankruptcy. Our clients include businesses engaged in technology, finance, health care, insurance, transportation, communications, construction and real estate, securities and manufacturing.

In 2007, *Legalease's Legal 500* ranked our Technology & Intellectual Property Group among the top 18 IP firms in the nation, our practice groups were again ranked in *Chambers USA* by Chambers & Partners, and our Bankruptcy group received national acclaim in the *Wall Street Journal*. Our firm and attorneys are listed in Legal Media Group/Euromoney PLC's *Benchmark Litigation*, *Law360 Litigation Almanac* and Woodward White, Inc's *Best Lawyers in America*, among other publications. Additionally, one of our partners, Robert B. Curran, was recently named 2009 Baltimore Corporate Lawyer of the Year by Woodward/White's *The Best Lawyers in America*.

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