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## **SALES REPRESENTATIVE AND DISTRIBUTORSHIP CONTRACTS IN UTAH**

By: Akana K.J. Ma, Douglas D. Morris and Thomas M. Karnes

Similar to other jurisdictions in the United States, Utah's law of contracts is based on the common law principle of privity of contract, which is in turn supplemented by statute.

### **Freedom of Contract**

Utah law provides that the terms negotiated by the parties to an agreement should be enforced. One notable exception, however, is the Utah Sales Representative Commission Payment Act described below. Nonetheless, as a general statement, Utah's basic rule of contract interpretation instructs courts to first look to the writing of a contract to determine its meaning and the intent of the contracting parties. If the language within the "four corners" of the contract is unambiguous, then courts are to determine the parties' intent from the plain meaning of the contractual language.

Utah courts may look to extrinsic evidence in interpreting a contract only when the terms of the contract are ambiguous as to the parties' intent. Utah courts define "ambiguity" as instances where a contractual term or provision is "capable of more than one reasonable interpretation because of uncertain meanings of terms, missing terms, or facial deficiencies." Ambiguity can arise in two different settings: (i) "facial ambiguity" with regard to the language of the contract; and (ii) ambiguity with regard to the intent of the contracting parties. Only if a judge concludes that a contract is facially ambiguous will Utah courts admit parol evidence of the parties' intent.

### **Utah Sales Representative Commission Payment Act**

Although Utah generally allows parties to draft the specific terms of their contractual relationship as the parties deem appropriate, Utah's Sales Representative Commission Payment Act imposes a number of non-waivable requirements on contracts between manufacturers and sales representatives. The Utah Sales Representative Commission Payment Act will apply whenever: (i) a "principal" manufactures, produces, imports, sells, or distributes a product or service; (ii) the principal establishes a business relationship with a sales representative to solicit orders for such a product or service; and (iii) the principal agrees to compensate the sales representative, in whole or in part, by commission. Additionally, the sales representative must not place an order or purchase a product or service for its own account for resale. The Act can also apply to contracts between distributors and sales representatives.

If the above conditions are satisfied, the Utah Sales Representative Commission Payment Act imposes four primary requirements on manufacturers and distributors contracting with sales representatives in Utah, as well as a number of lesser obligations. First, the business relationship between a principal and sales representative must be codified in a writing signed by both parties. Second, the writing must set forth the method by which the sales representative's commission is to be computed and paid. Third, if the business relationship terminates, the principal must pay the sales representative within thirty (30) days after the termination all commissions due on the day on which the termination is effective. If the commission is due after the day on which the termination is effective, then the principal must pay the sales representative within fourteen (14) days after the commission becomes due. Fourth, the Sales Representative Commission Payment Act imposes certain limitations on, and prescribes payment procedures for, revocable offers of commission.

In addition to the above four requirements, the Utah Sales Representative Commission Payment Act also provides that the principal is subject to suit in Utah courts for any action arising under the Act. Similarly, the Sales Representative Commission Payment Act renders void any provisions in a sales representative agreement that: (i) requires the sales representative to waive any rights under the Act; (ii) purports to subject the sales representative to the laws of another state; or (iii) requires the sales representative to pursue a claim arising out of the sales representative agreement in a jurisdiction other than Utah. Furthermore, if a court finds that the principal failed to pay a commission as specified under the Act, the principal may be liable for three (3) times the amount of the commission due, plus reasonable attorney fees and court costs.

Utah's Sales Representative Commission Payment Act applies only to contracts involving sales representatives, not to contracts between manufacturers and distributors. Nonetheless, Utah also regulates certain types of arrangements between manufacturers and distributors. For example, a Utah statute imposes a number of requirements on agreements between manufacturers and distributors with respect to the distribution of alcoholic beverages.

Unlike certain jurisdictions outside the U.S., Utah does not impose any compensation payment requirements solely arising due to the termination of a sales representative or distributor.

### **Other Issues**

Utah law touches upon various other issues that are likely to arise in a typical sales representative or distributorship arrangement. First, sales representative and distributorship agreements commonly include noncompetition provisions. To be enforceable under Utah law, noncompetition agreements must protect the legitimate interests of the manufacturer, such as protecting trade secrets. In particular, noncompetition agreements must be: (i) supported by consideration; (ii) negotiated in good faith; (iii) necessary to protect the goodwill of the business; and (iv) reasonable in their restrictions as to time and geographic scope.

Second, depending on the financial and business arrangement between a manufacturer and a sales representative or distributor, that arrangement could constitute a franchise or business opportunity. Although Utah has a handful of statutes regulating automobile and other power vehicle franchises, Utah does not have a general franchise statute. That being said, manufacturers should still examine whether their relationship with a sales representative or

distributor constitutes a franchise under federal statutes and Federal Trade Commission regulations. Stated generally, a business arrangement may qualify as a franchise under federal law if the franchisor: (i) provides a trademark or other commercial symbol; (ii) exercises significant control or provides significant assistance in the operation of the business; and (iii) requires a minimum payment during the first six months of operation.

In addition to federal franchise laws, manufacturers should also consider whether their arrangement with a Utah sales representative or distributor constitutes an “assisted marketing plan” under Utah’s Business Opportunity Disclosure Act. Assisted marketing plans, otherwise known as “business opportunities,” are the sale or lease of any products, equipment, supplies, or services to the purchaser upon an initial payment of \$300 or more in order to enable the purchaser to start a business. The seller must also make a number of representations to the purchaser regarding sales and marketing assistance, repurchase agreements, and expected income. If an arrangement qualifies as an assisted marketing plan, the seller of such a plan must comply with a number of registration and disclosure requirements. A seller that fails to satisfy those registration and disclosure requirements may incur a variety of civil penalties and liabilities.

Third, manufacturers should assess the possible state and local tax implications associated with entering into sales representative and distributorship arrangements in Utah. Utah’s primary entity level taxes are the corporate franchise tax and the corporate income tax. Utah’s franchise tax is a tax on the privilege of doing business in Utah and is based on the net income of every corporation registered to do business in the state. By contrast, Utah’s corporate income tax is imposed on corporations that have net income from sources within the state, but are not otherwise subject to Utah’s corporate franchise tax. Utah also has a gross receipts tax that applies, in certain limited circumstances, to corporations that are not otherwise subject to Utah’s corporate franchise or income taxes. Corporations with income from inside and outside of Utah will apportion that income for purposes of ascertaining their Utah taxable income. Such apportionment may occur within a single corporation or within a “unitary group” in the case of two or more corporations that share certain common attributes.

Utah’s tax regime generally treats pass-through entities, such as limited liability companies, in a manner similar to the federal tax code.

Apart from Utah’s entity-level taxes, manufacturers should also evaluate whether their activities could trigger Utah sales and use tax obligations. Stated broadly, Utah levies its sales tax on the rental or retail sale of tangible personal property. The retailer is responsible for collecting the sales tax from consumers. Also stated broadly, Utah imposes its use tax on amounts paid or charged for purchases of tangible personal property where the Utah sales tax was due but not collected. Utah’s sale and use taxes overlap each other so that items purchased for use in Utah are subject to either the state’s sales tax or use tax, but not both.

Finally, sales representative and distributorship arrangements can raise a number of issues with respect to Utah’s antitrust laws. Courts generally treat the Utah antitrust laws as mirroring the federal antitrust regime. The most common antitrust issues presented by sales representative and distributorship arrangements include resale price maintenance (i.e., the seller and reseller agree

that the reseller will charge a particular price for the goods on resale), territorial and customer restrictions, exclusive-dealing and requirement contracts, and tying arrangements.

The above issues can be complex, and conclusions with respect to those issues will vary significantly depending on the facts of each unique situation. Manufacturers that are interested in pursuing a sales representative or distributorship arrangement in Utah are advised to assess such issues with local counsel.

### **Utah Resources**

- **Utah State Tax Commission:** <http://tax.utah.gov/>. The Utah State Tax Commission is responsible for collecting Utah state taxes. The Commission's website offers a number of tax related publications and forms.
- **Utah Department of Commerce:** <http://www.commerce.utah.gov/>. The Utah Department of Commerce is responsible for enforcing the Utah business opportunity and franchise statutes. In particular, the Utah Division of Consumer Protection, <http://www.consumerprotection.utah.gov/index.html>, offers a number of resources regarding the Utah business opportunity statutes and regulations.
- **Utah Attorney General:** [http://attorneygeneral.utah.gov/my\\_mission.html](http://attorneygeneral.utah.gov/my_mission.html). The Attorney General is responsible for enforcing the state's antitrust laws. The AG's website offers some helpful resources describing recent antitrust enforcement efforts.
- **Utah Governor's Office of Economic Development:** <http://business.utah.gov/>. The Governor's Office of Economic Development (GOED) was created to support and promote Utah industries. The GOED website offers resources describing various state government programs available to Utah businesses.