CARLTON FIELDS

Using Independent Sales Representatives to do Business in the United States

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Domestic and foreign manufacturers and suppliers that sell their products at wholesale in the United States may benefit from contracting with local independent sales representatives in the United States to help promote sales of their products. However, many states have laws governing the engagement of independent sales representatives in the United States. Failure to comply with such laws could expose a manufacturer to civil penalties amounting to double or triple damages, plus the attorneys' fees and court costs of an aggrieved independent sales representative. **Statutory Framework** Currently, 35 states in the United States and Puerto Rico have enacted independent sales representative laws aimed at protecting local sales representatives' rights. These laws typically apply to manufacturers or principals that sell their products in the United States at wholesale, and hire independent sales representatives to solicit wholesale orders in a particular state or states. Many of these laws were enacted during a U.S. recession in the late 1980s and early 1990s. They were intended to insure that independent sales representatives were paid commissions in a timely fashion as regular employees would be paid salaries by an employer. Typically, state sales representative statutes require that: (i) the contract be in writing, signed by both parties, and that receipt is acknowledged by the sales representative; (ii) the contract contain a provision as to how commissions will be computed and when they will be deemed earned, due, and payable; (iii) the sales representative be paid earned commissions within the time limits specified in the contract or as otherwise provided under applicable state law; (iv) each commission payment be accompanied by an accounting of the orders for which payment is made along with a written statement of the rate and method used to calculate those commissions; and (v) upon termination of the sales representative contract, all earned commissions must be timely paid to the sales representative in accordance with the terms and provisions of the contract, or as otherwise provided under applicable state law.

Complying with Applicable Statutes

- **Restrictions on Contracting Parties' Rights.** Certain states allow a principal and sales representative to agree in the contract as to how commissions will be calculated (e.g., on either invoiced or paid amounts) and when commissions are deemed earned, due, and payable to the sales representative. Other states mandate that commissions be paid to the sales representative within a certain time period; regardless of what the parties agreed to in the contract. For example, New Jersey mandates that a sales representative receive commissions on goods ordered up to and including the last day of the contract even if such orders are accepted by the principal and delivered and paid for after the end of the agreement. Commissions on such orders must be paid to the sales rep within 30 days after payment would have been due under the contract had the contract not been terminated.

- **Penalties for Violation.** Several states make a principal liable to a sales representative for the payment of two or three times the amount of any unpaid commissions (together with attorney's fees and costs) due to the principal's failure to timely pay a sales representative its commissions. These penalties apply to a principal's failure to timely pay commissions both during and after the expiration or earlier termination of the contract.

For example, the New York sales representative statute provides that commissions shall be paid to a sales representative within five business days after commissions are deemed earned during the contract and after termination and makes a principal liable for two times the amount of the commission owed plus the sales representative's attorneys' fees and costs of suit in the event of the principal's failure to timely pay earned commissions. The Massachusetts sales representative law provides that if a principal willfully or knowingly fails to comply with the statute, the principal can be liable to the sales representative for the amount of the commission owed plus an additional amount equal to three times the amount of the commission owed along with the sales representative's attorneys' fees and costs of suit.

- **Restrictions on Termination and Non-Renewal.** The right of a principal to terminate or not renew a contract with a sales representative may also be affected by applicable sales representative laws. For example, the Minnesota statute prohibits a principal from terminating a contract unless "good cause" exists for termination and the sales representative is given 90 days prior written notice setting forth the reason for such termination and is given a period of 60 days to cure any such default. The Minnesota statute also imposes certain restrictions on the renewal of a contract and requires a principal to give the sales representative at least 90 days written notice in advance of the expiration of the contract of its intention not to renew the contract. A principal's failure to properly give such notice could result in the inadvertent renewal of a sales representative contract in Minnesota.

- **Choice of Law and Forum Selection Clauses.** Several states, including California, Maryland, and Pennsylvania, have statutes that make any provision in a written contract purporting to waive any of the sales representatives rights under such statute void and contrary to public policy, and make a foreign principal who enters into a contract regulated by a sales representative statute subject to the jurisdiction of the courts in that state. Certain state statutes prohibit contractual provisions limiting the sales representatives' rights to initiate litigation in their home state, or making the laws of another state or country applicable to the contract.

Planning Considerations Given the foregoing regulations, a foreign manufacturer should identify and carefully evaluate the requirements and restrictions imposed by all applicable U.S. sales representative laws prior to appointing a U.S. sales representative. Special consideration should be given to the following issues.

- **Exclusivity or Non-Exclusivity of the Appointment.**

- **Territory; Multi-State Appointments.** If the "territory" to be covered by a sales representative agreement involves several states, the principal should review the laws of each state in the territory and draft the contract to comply with the requirements of the most stringent state statute to insure compliance with multi-state sales representative laws, facilitating contract administration.

- **Computation and Payment of Commissions.** The contract should specify how commissions will be determined (e.g. invoice sales versus paid invoices), when commissions are deemed earned or accrued, and when and how they are payable both during and after the contract's expiration or earlier termination.

- **Term and Termination.** Generally, parties are free to contract and agree on the specific duration of the sales representative agreement. A principal may want to consider negotiating a one-year contract term with the right of either party to terminate the agreement at any time, without cause, on 30 or 60 days prior written notice to the other party to insure maximum flexibility in the event the business relationship does not work out.

Conclusion To avoid potential legal and commercial pitfalls, a foreign principal should carefully review and evaluate the requirements imposed by applicable U.S. sales representative laws prior to entering into any local sales representative relationships. A principal's failure to comply with applicable U.S. sales representative laws could result in the imposition of double or triple damages, payment of attorney's fees and costs, and the inadvertent renewal of an unwanted sales representative relationship. However, careful planning should help insure a successful commercial and legal relationship with a U.S. sales representative.

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