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Law Report

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Vendor Contracts and Termination Rights

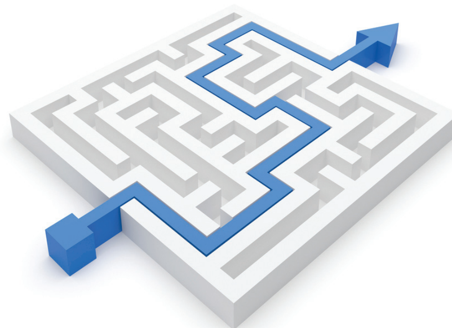
Ask a general counsel what is the first legal term to look for when reviewing a vendor contract, and the lawyer likely will answer "termination rights." Chances are, at some point during the term of a vendor contract between your company and a third-party vendor, your business team will ask, "How do we get out of this contract?" If your vendor fails to materially perform its obligations under your contract or is otherwise in default, then you may have the right to stop payment and terminate the contract under contract law. But what if the vendor is performing its obligations (more or less) and your team simply is not satisfied with the level of service, the cost, or otherwise is looking to move to a different vendor? If termination rights are spelled out in the vendor contract, your company will be well-prepared for this scenario.

J.J. Sherman

Termination Rights Vary.

A standard form vendor contract that runs for a set term may not give the customer the right to end the contract before its expiration. Instead, it may provide that, except to the extent set forth in the agreement, neither party has the right to cancel or terminate the agreement, and the parties remain fully responsible for all obligations and amounts payable under the agreement for the entire term. To preserve an exit strategy, it is important for a customer to negotiate an express right to terminate prior to the expiration of the term.

Negotiated clauses will vary depending on the size and nature of the vendor contract. Some allow either party to terminate upon 30 days' notice; others



permit the customer to terminate with notice to the vendor and upon payment of a termination fee. Customers also bargain for an express right to terminate if the vendor fails to meet certain performance standards or if certain unacceptable events occur. For instance, in a co-location agreement between a data center and a customer, the customer will negotiate

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the right to terminate if there is a physical breach of the licensed space, a theft of the customer's equipment or similar security breach. Ultimately, it is essential that the business team and the lawyer negotiating the vendor contract on behalf of the customer work together to clearly define what events or service failures should trigger a termination right.

Request an Orderly Transition.

If you're negotiating an express termination right, ask the vendor to assist with an orderly transition to the new vendor upon exercise of your termination right. Your vendor's cooperation will prevent unnecessary business disruption during the transition period to your new vendor.

Seek a Release.

You and your vendor may grant each other a mutual release from any further obligations under the vendor contract effective upon termination, except, of course, for transition assistance and any indemnity that might survive termination.

While negotiating your next vendor contract, seek termination rights if you wish to preserve an exit strategy. ◆

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Dealing with Contract Overflow? Law Offices of J.J. Sherman, P.C. is available to assist in-house counsel with the creation of standard form agreements as well as the review and negotiation of vendor contracts and sales contracts. We also can provide coverage to an in-house legal team when a lawyer takes a leave of absence.

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Endorsements in Social Media

In this digital age, employers expect their employees to use social media for personal and professional purposes and also assume their employees are likely to make statements online about their company's products or services. Indeed, many employees working in marketing and business development actively promote their company's products and services through social media outlets. With this in mind, now is a good time to review the Federal Trade Commission's (FTC) Guidelines Concerning the Use of Endorsements and Testimonials, which applies to all media including blogs, message boards, remark boards, list servs and other forms of social media.

The FTC Guidelines preach three basic truth-in-advertising principles: (1) Endorsements must be truthful and not misleading; (2) If the advertiser doesn't have proof that the endorser's experience represents what consumers will achieve by using the same product or service, the advertisement must clearly and conspicuously disclose the generally expected results in the depicted circumstances; and (3) If there is a connection between the endorser and the marketer of the product or service that is likely to affect the weight or credibility given to the endorsement, the connection must be disclosed. This means that employees who comment on their employer's products or services via social media should disclose their employment relationship.

The FTC defines an "endorsement" as any advertising message (oral or written) that consumers are likely to believe reflects the opinions, beliefs, findings or experience of a party other than the sponsoring advertiser, even if the views expressed by that party are identical to those of the sponsoring advertiser. Here are some examples that might occur in the workplace based on guidance and rulings from the FTC:

Example 1: An employee's Facebook page identifies the company where the employee works. Is the employee required to make additional disclosure when the employee writes on Facebook about how terrific the company's products or services are? According to the FTC, the answer is "yes." The reader might not realize that the products or services endorsed by the employee on Facebook are sold by the employee's company.

Example 2: An online message board designated for discussions of retail trends in Southern California is frequented by those involved in the Southern California retail industry. An employee of a leading retailer posts messages on the discussion board promoting the company's stores, without disclosing a connection to the retailer. Is disclosure of the relationship required? According to the FTC, the answer is "yes." Knowledge of this person's employment likely would affect the weight or credibility of the endorsement. Therefore, the person should clearly and conspicuously disclose the employment relationship to readers of the message board.

Example 3: A public relations firm is hired to promote the brand of a retailer with several locations in Washington, D.C. As part of its campaign, the firm's employees pose as ordinary consumers and post online reviews of the retailer's brand. Is this permitted? According to the FTC, the answer is "no." The employees of the public relations firm are not average consumers; they must disclose the material connection between the public relations firm and the retailer.

To avoid potential liability... educate your employees and the companies promoting your goods and services about the FTC's Guidelines Concerning the Use of Endorsements and Testimonials.

What amount of disclosure is required?
The FTC does not mandate specific language, but it does give general guidance. The language does not need to be "legalese." It can be as simple as "I work for this company" or "This company hired me to promote their product." The FTC does say disclosure of the material connection should be part of the message or endorsement. Accordingly, a "click through" button that says "Legal Disclosure" is not sufficient. Similarly, general disclosure on a home page such as "I have been hired to promote many of the products I discuss on this site" is not sufficient. In a platform like Twitter, where the message is limited to 140 characters, drafting disclosure that is part of the message can be difficult. According to the FTC, for Twitter, a short hashtag such as #paid ad or #paid or #ad might be effective to give people the disclosure they need.

Best Practices for Endorsements in Social Media. To avoid potential liability for misleading or unsubstantiated representations and for failure to disclose a material connection, educate your employees and the companies promoting your goods and services about the FTC's Guidelines Concerning the Use of Endorsements and Testimonials. In addition, review your company's social media guidelines. Often, they require any employee commenting on his or her employer and the products or services offered by the employer to say, "These are my opinions and do not represent the company's positions, strategies or opinions." ◆

Supplier Diversity Announcement

As a 100 percent woman-owned business certified by the Women's Business Enterprise National Council (WBENC), we are proud to serve as a diversity supplier and help our clients achieve their commitment to diversity. We recognize that businesses gather strength from difference.

Law Offices of J.J. Sherman, P.C. is on the Minority and Women-Owned Law Firm Outside Counsel List of the FDIC.

Spotlight on the Retail Lease

Gross Sales

A retail tenant negotiating a letter of intent for a new lease will focus on the percentage rate of "net sales" it must pay as percentage rent to the landlord once the annual breakpoint is reached. During lease negotiations, it is equally important for the retail tenant to pay attention to the definition of "net sales." To avoid paying percentage rent on amounts that the retail tenant does not actually receive, amounts that the retail tenant is not entitled to keep or amounts that are unrelated to the merchandise or services sold, the tenant will need to add exclusions to the landlord's definition of "net sales." Some common exclusions include: cash or credit refunds to customers; tenant's accounts receivable consisting of bad checks and bad debts on credit sales and credit card charges; sales, use, excise, retailers, occupation or similar taxes imposed on the sale of merchandise or services; charges paid to credit card companies by tenant; and gift certificates until redeemed. ◆

The Confidentiality Agreement

It's standard procedure. A prospective buyer considering the purchase of a property or a business will ask the seller for information relating to the property or business that the seller considers confidential. Similarly, a landlord contemplating a lease with a new tenant will ask the potential tenant for its financial statements, which the tenant may consider confidential. Before you provide confidential information to a potential counterparty, if you wish the recipient to keep the information confidential, ask them to enter into a confidentiality agreement. Here are some of the points commonly addressed in a confidentiality agreement:

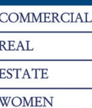
1. **Agree to keep information confidential.** A recipient should agree that all confidential information it receives will not be disclosed to any other person or entity and will be treated by the recipient as confidential and with the same degree of care that the recipient bestows upon its own confidential information.
2. **Exceptions when disclosure is permitted.** Generally, recipients are permitted to disclose confidential information to employees and representatives (including attorneys, accountants and financial advisors) who have a "need to know" the confidential information, so long as those individuals undertake to keep the information confidential. Recipients also are allowed to disclose confidential information in response to a valid court order or as required by law, so long as the disclosing party is notified and provided an opportunity to seek a protective order against the disclosure. In addition, disclosure is permitted if the recipient can show that the confidential information is generally available to the public, was in the recipient's possession prior to the disclosure by the disclosing party or was developed by the recipient independently.
3. **The disclosing party controls the confidential information.** At the request of the disclosing party, the recipient should return all copies of the confidential information it received (including electronic files) or destroy all copies it received and confirm in writing that the confidential information has been destroyed.
4. **Not a license to use the confidential information except to consider whether or not to do the deal.** A confidentiality agreement does not grant a license or rights in or to the confidential information, except for the limited right of the recipient to use the confidential information to evaluate the potential deal. Generally, the confidential information is provided "as is" and the disclosing party makes no representation or warranty of any kind, with respect to suitability, accuracy or non-infringement of third-party rights.
5. **No obligation to close the deal.** The purpose of a confidentiality agreement is to allow the parties to exchange information necessary to evaluate a potential transaction. The parties should be under no obligation to proceed with any business relationship.
6. **Right to injunctive relief.** Since the disclosing party will be irreparably injured if the confidential information is disclosed, the recipient should agree that money damages would not be a sufficient remedy for any breach and that, in the event of a breach for disclosure of confidential information, the disclosing party would be entitled to injunctive relief, specific performance and any other equitable remedy without the posting of a bond, in addition to any other legal or equitable remedies.

Check with your attorney to understand what you should include in, or exclude from, your confidentiality agreement for any particular transaction. ◆

FIRM NEWS

Firm Expansion!
We actively are working with clients doing business in California and are expanding our practice into the Washington, D.C. market in order to cater to clients doing business on the East Coast.

Commercial Real Estate Women!
Law Offices of J.J. Sherman, P.C. is proud to serve as a 2012 Sponsor of CREW-LA and a 2012 Sponsor of CREW DC. ◆



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Copyright Update

Rising star writers, songwriters and composers, early in their careers, will assign the copyright in their original works to publishers at less than stellar economic terms. Years later, they may wish they owned the copyrights to their works. That's where Section 203 of the Copyright Act comes into action. Beginning January 1, 2013, authors of copyrighted works may terminate copyright grants signed after January 1, 1978 if 35 years have passed. Section 203 of the Copyright Act permits authors to terminate "exclusive or non-exclusive grants of transfer or license of copyright" that were signed by the author on or after January 1, 1978, after 35 years.

Termination rights must be exercised in a 5-year window period. Use it or lose it.

Under Section 203, an author can terminate a grant at any time during a 5-year period beginning at the end of 35 years from the date of execution of the grant, or if the grant covers the right of publication, beginning at the end of 35 years from the date of publication of the work or at the end of 40 years from the execution of the grant, whichever term ends earlier. To exercise termination rights, the author must deliver a statutory termination notice to the copyright holder at least 2 years (and not more than 10 years) before the termination date, and the termination notice must be recorded with the U.S. Copyright Office.

For example, if an author signed a copyright grant on April 15, 1980, the termination period would run between April 15, 2015 and April 15, 2020, and the author would be required to deliver a termination notice no earlier than April 15, 2005 and no later than April 15, 2018. If an author fails to deliver a termination notice in the statutory termination period, the copyright remains with the grantee.

Section 203 does not apply to works made for hire, grants made by will or derivative works made prior to the termination date. It also does not affect foreign rights in a copyrighted work. Termination rights under Section 203 are not waivable; they can't be contracted away.

If you are an author considering your termination rights, check the dates of your initial copyright grants. Your window period is limited, and the statutory notice provisions must be followed to the letter. If you are a publisher, be prepared to negotiate (again) for some of your key catalogue works in the coming years and watch for works that may be on the market beginning in 2013. ◆

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