Food Contract Manufacturing Agreements: Six Things To Know

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Here are 6 things to consider when creating a food contract manufacturing agreement.

1. What is a food contract manufacturing agreement?

Contract manufacturing (co-manufacturing) is a common contractual arrangement between a brand owner and a manufacturer that produces food on behalf of the brand owner (sometimes called a co-man or contract manufacturer). This is commonly referred to as a co-man agreement.

2. How should it be structured?

There's no one single answer. A single, standalone agreement may be appropriate if only one product is being produced. A standalone agreement will typically be structured to override any purchase orders, sales confirmation, or other communication between the parties. If multiple products will be produced, it would be best to use a master agreement that addresses all terms except for delivery dates, delivery locations, and quantities.

3. Should it be exclusive?

It depends – if the product is private-labeled, the contract manufacturer may want to be the exclusive producer of the product. The brand owner may want to restrict the co-man from making and selling the product to other customers. If the product is custom-made to the brand owner's specifications, the brand owner may wish to protect its specifications by restricting the co-man from producing the same product or a similar one. If the product is off-the-shelf, then neither party is likely to desire exclusivity.

If exclusivity is desirable, the parties should assess whether such exclusivity introduces any antitrust implications.

4. How is quality control handled?

Quality control should be thought of holistically and carefully addressed through a number of interrelated provisions – product specifications, warranties, process and facility audit and inspection rights, as well as terms governing the inspection and acceptance of goods.

5. How is intellectual property protected?

The specifics of how best to protect intellectual property rights will depend on the particular situation. As you make this assessment, it can be helpful to categorize the intellectual property rights into background IP (IP that existed when the parties entered into the agreement) and foreground IP (IP developed or incorporated unto the product during the term of the

agreement). Certain information will constitute trade secrets (the buyer's formulas and recipes and the co-man's formulas, manufacturing processes, and recipes) and due care in drafting the contract, and during the commercial relationship, must be taken to keep such information confidential through confidentiality terms and security practices.

6. What happens if something goes wrong?

Your agreement should contain standard provisions, including indemnification, limitation of liability, and public announcements, that will define the legal parameters in the event something goes wrong with the commercial relationship. In addition, the product warranties provisions should define whether the buyer and/or the co-man has the right of obligation to institute a recall if widespread problems are discovered with the product.

To learn more about creating a robust food contract manufacturing agreement, contact Dan Wilcox.