

## **The Contract Manufacturing Agreement: What Food Makers Need to Know**

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In considering outsourcing elements of their production, food manufacturers may feel overwhelmed by the array of practical and legal considerations. This is understandable as the process, while offering important benefits particularly to the bottom line, is pocked with potential pitfalls.

Before taking the outsourcing plunge, it is critical that businesses commit to processes that ensure the safety of consumers, the security of their intellectual property and compliance with food safety laws. By taking the following steps, food manufacturers can protect their brand reputation as they reap the material benefits of a more streamlined set of operations and reduced overhead.

It's hard to unbreak an egg. That's why it is so crucial that manufacturers take their time and perform their due diligence as they seek out a reputable and experienced

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contract manufacturer. The most effective tool for vetting potential business partners is their track record. Focus on finding a contract manufacturer who has proven credentials. Any time you feel inclined to rush forward, imagine the harm to consumers and your business should safety be compromised.

In order to ensure you feel comfortable with your partner, don't outsource your preliminary investigations. Assign a trusted member of your team to visit each potential contract manufacturer's areas of operations as it's important to assess the factory's cleanliness, workforce and working conditions firsthand. Similarly, be certain that all of your potential partner's purported certifications are valid and up-to-date. Consider your co-manufacturer to be just that — an important part of your business that should share your values and objectives.

Once you've determined that you've found the right fit, it's important to document the terms of the arrangement carefully. While you should make every effort to ensure, as discussed above, that your contract partner is competent, trustworthy and experienced, a carefully worded contract will guard against the unforeseen. Think through the hardest questions, such as who will be responsible in the event of a recall or harm to consumers? In drawing up the contract, consider two goals: first, prevent the development of any problems and second, provide clear terms to dictate liability should problems arise.

In service to these two goals, be sure you've enumerated in concrete and specific terminology the quality, consistency and sourcing of inputs and other products, along with guidelines about competitive pricing, which often will take into account the changing prices of inputs and discounts based on volume of products purchased. This will go a long way toward shielding your reputation and enabling you to plan your finances. Of course, the most important bulwark for your brand is the protection of your most valuable commodity — your consumers.

Whether you manufacture domestically or overseas, you are bound by the same web of U.S. regulations. These regulations provide a framework to evaluate the operations of your contract manufacturers. Be certain that you and your counsel understand the ins and outs of the Foreign Corrupt Practices Act; California Proposition 65, which prohibits companies from selling products containing certain chemicals; and the California Transparency in Supply Chains Act, which requires some companies to publicly report their efforts to eradicate human trafficking and slavery. If this is your first time outsourcing manufacturing, you'll do well to sit down with counsel and understand the implications of these laws before you start searching for a contract manufacturing partner. Additionally, make sure the contract reserves the right for your staff to do spot inspections of the partner's production plant. The larger the ambit of supervision, the easier it will be for you to ensure that everything is up to snuff.

Having laid out the details of the agreement that apply to consumer safety, your next priority is to protect your valuable intellectual property. The easiest way to safeguard trade secrets is to avoid giving the contract manufacturer every piece of the puzzle. You may do this by taking the most valuable part of your recipe, be it a proprietary sauce or spice mix, and manufacturing it in your own plant. Be sure to

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investigate whether the co-manufacturer has any clients for whom similar products or formulas may be useful. If this is so, exercise caution and, in addition to prohibiting the use or disclosure of trade secrets in the contract, understand the processes the co-manufacturer will use to protect your trade secrets.

Another common method of protecting trade secrets is to split up work among several contract manufacturers, each of whom may be responsible for some portion of the recipe. By diversifying your co-manufacturing sources, you won't only avoid intellectual security breaches - you'll also sidestep the supply chain difficulties that come with relying on sole-source manufacturers.

The final step to producing a successful contract involves clearly outlining when and how the relationship ends. Termination terms need to be delineated both for common circumstances, such as an uncured breach, and for more unusual circumstances, such as a natural disaster.

Of course, in ideal circumstances, your contract will be an academic exercise. How? By cultivating a strong relationship with your co-manufacturer, one that is rooted in consistent expectations and diligent management. The very best contracts are the ones that collect dust.

### *About the Author*

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