

## DIGEST

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## DIGEST

SB 263 Reengrossed

2015 Regular Session

Thompson

Present law provides for the repurchase of farm, industrial, and lawn and garden equipment by a wholesaler.

Present law applies to written contracts or oral agreements of definite or indefinite duration between any person, firm, or corporation engaged in the business of selling, distributing or retailing farm, construction, heavy industrial material handling, utility and lawn and garden equipment, engines, implements, machinery, attachments and repair parts for such equipment and any wholesaler, manufacturer or distributor of such equipment and repair parts, whereby the retailer agrees with the wholesaler, manufacturer or distributor to maintain a stock of such parts, or complete equipment or machines, or attachments. Any successor in interest of the manufacturer, wholesaler, or distributor shall include any purchaser of assets or stock, any surviving corporation resulting from merger or liquidation, any receiver or assignee, or any trustee of the original equipment manufacturer, wholesaler or distributor.

Proposed law provides that the provisions of present law shall apply to forestry contracts or agreements.

Present law defines certain terms and phrases.

Proposed law defines "forestry equipment" and "dealer agreement" and includes forestry equipment dealer in the definition of "dealer". Provides for exclusions to the definition of dealer.

Proposed law provides that "dealer" does not include a person, firm, or corporation when: (1) Such person, firm, or corporation has purchased new equipment from a single construction equipment manufacturer that constitutes at least 75% of the person's, firm's or corporation's new equipment calculated on a net cost basis, and (2) New equipment includes 1 or more of each of the following: (a) Longwall and highwall mining equipment; (b) Large, 3000 brake horsepower, commercial marine propulsion engines; (c) Large, 5000 brake horsepower, natural gas driven industrial engines; (d) Asphalt pavers; (e) Self-propelled soil and asphalt compaction equipment; (f) Heavy duty tow trucks defined as a "Class 8 vehicle" in Title 55, Part I of the Louisiana Administrative Code.

Proposed law provides that dealers have a choice of remedy. The remedies provided by law are in addition and supplemental to remedies provided in any dealer agreement. A dealer may elect to pursue its contract remedy, the remedies provided by law, or both.

Proposed law provides that an election by the dealer to pursue remedies as provided in the dealer agreement shall not preclude or prohibit the dealer from exercising his rights to any other remedies provided by law.

Proposed law provides that any provision included in an agreement between an agent and a dealer that attempts to limit or otherwise preclude or prohibit a dealer from exercising any rights or protections provided by law shall be null, void, and unenforceable.

Present law provides that no agent may terminate, cancel, fail to renew, or substantially change the competitive circumstances of a dealership agreement or contract without good cause.

Proposed law retains present law and adds that in addition to good cause an agent must have failed to act in good faith in order to terminate, cancel, fail to renew, or substantially change an agreement or contract.

Proposed law provides that an agent shall bear the burden of proof that it has acted in good faith and that there was good cause for the termination or cancellation of any dealership agreement or contract.

Present law provides that good cause exists whenever:

- (1) An individual proprietor, partner, or major shareholder of the dealership has withdrawn.
- (2) There has been a substantial reduction in interest of a substantial partner or major stockholder.
- (3) The dealer has filed or had filed against it a petition in bankruptcy that has not been discharged within 60 days after the filing, has been sold a substantial part of the dealer's assets related to the equipment business, or has commenced dissolution or liquidation.
- (4) The dealer has changed its principal place of business without prior approval of the agent, which shall not be unreasonably withheld.
- (5) The equipment dealer has substantially defaulted under chattel mortgage or other security agreement between the dealer and the agent, or there has been a revocation or discontinuance of a guarantee of a present or future obligation to the agent.
- (6) The equipment dealer has failed to operate in the normal course of business for 14 days.
- (7) The dealer has pleaded guilty to or has been convicted of a felony substantially affecting the relationship between the dealer and the agent.
- (8) The dealer has engaged in conduct which is substantially injurious or detrimental to the dealer's customers or to the public.
- (9) After receiving at least 12 months' notice from the agent of its specific and achievable requirements for reasonable market penetration based on the agent's contemporaneous experience in other comparable marketing areas, the dealer has consistently failed to meet the agent's reasonable market penetration requirements.

Proposed law provides that good cause exists whenever:

- (1) An individual proprietor, partner, or major shareholder who owns more than 25% of the dealership has withdrawn from the dealership, and a replacement individual proprietor, partner, or major shareholder, who meets the qualifying criteria typically applied by the agent, in approving new dealers and agrees to be bound by the terms and conditions of the manufacturer's standard dealer agreement, has not previously been identified or is not identified within a reasonable time frame.
- (2) There has been a substantial reduction in interest of a substantial partner or major stockholder, and such interest is not being transferred to one or more replacement partners or major shareholders, each of who meets the qualifying criteria typically applied by the agent in approving new dealers.
- (3) The dealer has filed or had filed against it a petition in bankruptcy that has not been discharged within 60 days after the filing, has sold a substantial part of the dealer's assets related to the equipment business outside of the ordinary course of business, or has commenced dissolution or liquidation.
- (4) The dealer has changed its principal place of business without prior approval of the agent, which shall not be unreasonably withheld.

- (5) Except as due to force majeure, the equipment dealer has failed to operate in the normal course of business for 14 days.
- (6) The dealer has pleaded guilty to or has been convicted of a felony substantially affecting the relationship between the dealer and the agent.
- (7) The dealer has engaged in conduct which is substantially injurious or detrimental to the dealer's customers or to the public.
- (8) The dealer has substantially defaulted under chattel mortgage or other security agreement between the dealer and the agent, or there has been a revocation or discontinuance of a guarantee of a present or future obligation to the agent.
- (9) After receiving at least 12 months' notice from the agent of its specific and achievable requirements for reasonable market penetration based on the performance standards that are applied uniformly to similarly situated dealers, the dealer has consistently failed to use commercially reasonable efforts to meet the agent's reasonable market penetration requirements and the agent can demonstrate that the dealer's failure is a result of the dealer's sole efforts or lack of efforts in its markets and not a result of the agent's efforts or lack of efforts in the market. However, good cause shall not exist if in the dealer's market share penetration meets or exceeds 80% of the agent's North American average in the 24 months immediately preceding the agent's attempt to terminate, cancel, fail to renew, or substantially change the competitive circumstances of a dealership agreement or contract.

Present law provides the procedure by which an agent may terminate, cancel, or fail to renew a dealership agreement.

Proposed law provides except as otherwise provided by law, an agent shall provide a dealer with at least 90 days' written notice of termination, cancellation, or nonrenewal of the dealership agreement. The notice shall state all reasons constituting good cause for the action and shall provide that the dealer has 60 days in which to cure any claimed deficiency, specifying the action that must be taken in order to cure the deficiency. If the deficiency is rectified within 60 days, the notice is void. Except as otherwise provided by law, the notice and the right to cure provisions are not required if the reason for termination, cancellation, or nonrenewal is a violation of certain provisions of law.

Proposed law provides that notwithstanding the terms of any dealer agreement, each agent shall indemnify and hold harmless its dealers against any judgment for damages, including but not limited to court costs and reasonable attorney fees of the dealer, arising out of complaints, claims or lawsuits, including but not limited to strict liability, negligence, misrepresentation, express or implied warranty, or rescission of sale, if the judgment arises out of an alleged defective or negligent manufacture, assembly, design, or modifications or alterations made by dealer, who was authorized by an agent to make such modifications or alterations, of farm equipment, construction equipment, forestry equipment, material handling equipment, utility equipment, lawn and garden equipment, parts, attachments, or accessories, or other functions by the agent, which are beyond the control of the dealer.

Proposed law provides that in no event shall a dealer be liable to an agent through the terms of any dealer agreement between them for the gross negligence or willful misconduct of any third party.

Proposed law provisions shall not apply to any contractual provisions in effect on the effective date of proposed law but shall apply to subsequent amendments and modifications of the contract made after such date.

Proposed law provisions provide for certain retroactivity, applicability relative to unilateral agent amendments, and applicability relative to modification of certain existing agreements.

Effective August 1, 2015.

(Amends R.S. 51:481(A) and (B)(1) and (3), and 482; adds R.S. 51:481(B)(5), 481.1, 483.1, and 490.1)

Summary of Amendments Adopted by Senate

Committee Amendments Proposed by Senate Committee on Agriculture, Forestry, Aquaculture, and Rural Development to the original bill

1. Make technical amendments only.

Senate Floor Amendments to engrossed bill

1. Make technical amendments.
2. Clarify the provision relative to terminations or cancellations of an agreement or contract when one fails to act in good faith.
3. Specify which agreements or contracts are subject to the provisions of this Act.

Summary of Amendments Adopted by House

The Committee Amendments Proposed by House Committee on Commerce to the reengrossed bill:

1. Exclude a person, firm, or corporation from the definition of "dealer" when certain conditions apply relative to the respective purchase of certain new equipment from a single construction equipment manufacturer, and such new equipment is at least 75% of the person's, firm's, or corporation's new equipment calculated on a net cost basis.
2. Make changes relative to good cause necessary to be shown by an agent for termination of a dealer agreement or contract.
3. Provide for retroactivity relative to unilateral amendments to dealer agreements made on behalf of an agent. Require dealers to agree in writing to such unilateral amendments subject to retroactivity.
4. Provide for applicability of proposed law to a dealer agreement that: (1) has no expiration date or (2) grants the agent the unilateral right to amend the dealer agreement.
5. Provide for applicability of proposed law to the entirety of an existing dealer agreement from the date the existing dealer agreement is modified, if such agreement is modified after the effective date of proposed law.