

Management Alert



Subscription Services, Beware

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2018 Amendment to California's Auto-Renewal Law Adds New Requirements for Promotional Offers and Cancellation Mechanisms

Often cited as one of the most aggressive efforts to curb automatically recurring charges to consumers, California's Auto-Renewal Law (Cal. Bus. & Prof. Code § 17600 *et seq.*) has become a popular tool for both plaintiff's lawyers and government regulators. The California Auto-Renewal Law ("ARL") applies, with limited exceptions, to any arrangement in which a paid subscription or purchase agreement is automatically renewed until the consumer cancels.

The ARL sets forth five main requirements for compliance—which apply not only to online subscriptions, but also to those procured through hard copy and audio methods, such as subscriptions obtained via mailers or telemarketing calls:

1. Clear and conspicuous disclosures. The offer to enroll and key terms of the subscription agreement must be disclosed in a manner that clearly calls attention to the auto-renewal language *and* must be in visual proximity (or temporal proximity for audio offers) to the request for consent. The following terms must be disclosed in type or font that is larger than or otherwise in contrast with surrounding text (or, for audio disclosures, in a volume and cadence sufficient to be readily audible and understandable):

The nature of the subscription or purchasing agreement as one that will continue until the consumer cancels; how to cancel the offer; the recurring amounts that will be charged to the consumer's payment account; that the amount of the charge may change; the amount to which the charge will change, if known; the length of the automatic renewal term; and any minimal purchasing obligation(s).

2. Retainable acknowledgment. The business must provide to the consumer an acknowledgment that provides the terms of the automatic renewal of continuous service, the cancellation policy, and how to cancel. The acknowledgment must be provided in a manner that is capable of being retained by the consumer (e.g., in writing).

3. Affirmative consent. The business must obtain affirmative consent from the consumer before charging the consumer's debit or credit card on a recurring basis. The consent may be given orally or in writing.

4. Mechanisms for cancellation. The business must provide a cost-effective, timely, and easy-to-use mechanism for cancellation (e.g., a toll-free number, email address).

5. Notice of material change(s). The business must provide to the consumer clear *and* conspicuous notice of any “material” change in the terms of the subscription, as well as written information about how to cancel the offer if already accepted.

Remedies

The ARL’s available remedies have made it attractive for the plaintiffs bar. The statute does not limit any civil remedies that are available for claims based on violations of the statute. **Further, any goods or other products sold without the requisite disclosures are considered an unconditional gift.** In other words, consumers may be entitled to refunds (including shipping and handling costs) without having to return their purchases.

The July 2018 Amendment a.k.a. the “Gift Provision”

The amendment to the ARL, originally introduced as California Senate Bill 313 and effective as of July 1, 2018, extends the ARL’s requirements (summarized above) to promotional offers, such as those including free trials or special pricing, that are followed by automatic charges.

Specifically, “[i]f the offer also includes a free gift or trial, the offer shall include clear and conspicuous explanation of the price that will be charged after the trial ends or the manner in which the subscription or purchasing agreement pricing will change upon conclusion of the trial.” Cal. Bus. & Prof. Code § 17602(a)(1). The business must also disclose in the *acknowledgement* how to cancel, and allow the consumer to cancel before the consumer pays for the goods or services. Cal. Bus. & Prof. Code § 17602(a)(3).

The amendment further requires businesses that allow for the acceptance of offers online to provide for the termination of the service online as well. As an example, the statute states that a business may provide to consumers a pre-formatted termination email that requires no additional information.

Takeaways for Businesses

Businesses may minimize exposure by continuing to use strategies available before the 2018 amendment, such as ensuring good faith efforts to comply with the ARL requirements and requiring consumers to sign arbitration agreements with class action waivers. In addition, remedies under the ARL’s newly amended Gift Provision may be more limited than those available under the other provisions of the ARL.

As the market for subscription-based businesses continues to grow, so does the importance of compliance with the ARL’s requirements. Subscription-based businesses, especially those with predominantly online operations, should carefully assess their disclosures and business procedures and seek the advice of competent counsel.

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