

Insights

RETAILERS FACE CLASS ACTION LAWSUITS BASED ON AUTOMATIC RENEWAL OF FEE-BASED LOYALTY PROGRAMS

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Retailers are being targeted by class action lawsuits alleging that automatic renewal of loyalty programs requiring an annual fee violates California law. In the past year and a half, more than 100 lawsuits have been filed alleging violation of California's Automatic Renewal Law, or ARL.¹

The ARL took effect July 1, 2018 and prohibits automatic renewal of subscription or service fees without first presenting consumers with certain terms, and obtaining their affirmative consent.²

Retailers therefore should ensure that prior to charging a consumer a loyalty program fee, they should:

- Obtain affirmative consent of the consumer to "automatic renewal offer terms" that are presented in a "clear and conspicuous" manner.³
- Automatic renewal offer terms include (1) that the subscription will continue until the consumer cancels; (2) the description of the cancellation policy that applies; (3) the recurring charges that will be charged as part of the automatic renewal, and that the amount of the charge may change, if that is the case, and the amount to which the charge will change, if known; (4) the length of the automatic renewal term, unless the length of the term is chosen by the consumer; and (5) the minimum purchase obligation, if any.⁴
- "Clear and conspicuous" means in larger type than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same size, or set off from the surrounding text of the same size by symbols or other marks, in a manner that clearly calls attention to the language.⁵

In addition, retailers should also do the following:

- Provide an acknowledgment that includes the automatic renewal offer terms, cancellation policy, and information regarding how to cancel in a manner that is capable of being retained

by the consumer.⁶ This acknowledgment can be sent following the consumer's entry into the loyalty program.

- Provide a toll-free telephone number, electronic mail address, postal address if the retailer directly bills the consumer, or another cost-effective, timely, and easy-to-use mechanism for cancellation that is described in the automatic renewal terms.⁷
- If a consumer can accept the automatic renewal terms online, they must be allowed to terminate the automatic renewal online.⁸ This may include a termination email formatted and provided by the retailer that the consumer can send to the retailer without additional information.
- If there is a material change in the automatic renewal terms, the retailer must provide consumers with a clear and conspicuous notice *prior to* the change, and information on how to cancel the subscription.⁹
- If the loyalty program includes a free gift or trial, the terms must disclose how to cancel, and allow the consumer to cancel, before the consumer is charged for the free gift or trial, 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.¹⁰ (a)(1) and (3).

Any goods or services provided without first obtaining affirmative consent to these terms will be considered under the law as a gift to the consumer.¹¹ Violation of the ARL can also require restitution of the amounts paid.

BCLP has extensive experience advising our clients as to advertising and marketing, including as to compliance of loyalty programs with applicable laws. For questions or more information, contact the author.

1. Business & Professions Code § 1701, *et seq.*
2. Business & Professions Code § 1702(a).
3. Business & Professions Code § 1702(a)(1) and (2)
4. Business & Professions Code § 1701(b).
5. Business & Professions Code § 1701(c).
6. Business & Professions Code § 1702(a)(3).
7. Business & Professions Code § 1702(b).
8. Business & Professions Code § 1702(c).

9. Business & Professions Code § 1702(d).
10. Business & Professions Code § 1702(a)(1) and (3).
11. Business & Professions Code § 1703.

RELATED CAPABILITIES

- Retail & Consumer Products

MEET THE TEAM



Merrit M. Jones

San Francisco

merrit.jones@bclplaw.com

[+1 415 675 3435](tel:+14156753435)

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