



How Big Retailers Can Avoid Newest Wave of Deceptive Price Advertising Lawsuits



Los Angeles City Attorney Mike Feuer last week announced the filing of four lawsuits against some of the largest retailers in the United States, accusing them of misleading customers by advertising a “sales price” alongside an inflated “original price.” The complaints, brought on behalf of the People of the State of California, claim that four major department stores violated California Business and Professions Code sections 17200, et seq. (Unfair Competition Law) and 17500, et seq. (False Advertising Law) by seeking to increase their sales through this “false reference pricing” scheme.

The complaints seek civil penalties of \$2,500 for each violation based on the advertising of *thousands of products* and ask the court to enjoin the defendants from engaging in the unlawful, unfair and fraudulent business acts and practices, and false advertising in violation of the Unfair Competition Law and the False Advertising Law.

Regular, Original, Former and List Price Advertising

The lawsuits cite specific advertisements, products, dates, prices and price tags as examples of the defendants’ use of false reference pricing. They allegedly misled consumers by advertising a false “original price” and a “sales price” so consumers mistakenly believe they are enjoying greater savings. In other words, the “regular price,” “original price,” “former price” or “list price” is not regular at all, and consumers are induced to purchase the products because of a false discount.

Importantly, even when the advertised “regular price” truly was an actual price, California law prohibits advertising a former price unless it “was the prevailing market price . . . within three months [prior to] the advertisement” or unless the date of the “former price” is clearly stated in the advertisement. Cal. Bus. & Prof. Code §1701.

The complaints state that despite an active plaintiff’s bar, the retail industry continues to employ false reference pricing. Indeed, two of the department stores were both sued previously and entered into settlement agreements whereby they agreed not to engage in pricing practices that would violate federal or California law, including California’s price-comparison advertising statutes. Therefore, the complaints allege, it is necessary for the People of the State of California (through the city attorney) to bring these actions.

What Retailers Can Do During the Holidays and Beyond

Because of the emphasis on discounts and sales which started on Black Friday, retailers should take note that the lawsuits set forth specific sales data gathered over several months—meaning regulators (and plaintiff attorneys) are keeping a careful eye on retail sales pricing. This scrutiny is not limited to in-store pricing but extends to online sales; after all, it is easier to monitor pricing from one's office than traveling to the mall every day. How to mitigate the risk of a lawsuit? It is imperative that companies, for both their in-store and online sales:

1. carefully prepare legally-compliant policies and procedures that comply with state, federal and local pricing laws,
2. train key personnel responsible for setting prices as well as those responsible for marketing and advertising,
3. regularly monitor and audit actual sales practice, and
4. maintain detailed records of advertisements and sales tags.

In the midst of this holiday shopping season, retailers need to avoid becoming the targets of the plaintiff's bar or government enforcers. To prevent negative publicity, costly litigation and civil penalties, they should scrutinize sales practices to ensure that they are truthful and not misleading, keep records to substantiate advertising claims, avoid "perpetual sales prices" that could negate the validity of a "former price," and confirm "list prices" or "original prices" have actually been used within the past three months in California and other periods as applicable under state, federal and local laws.

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