



Sign Me Up? Using a Subscription-Based Business Model



FROM MEAL PLANNING to a candy, jerky or coffee-of-the-month club, the subscription-based business model is everywhere in the food and beverage industry and it is here to stay.

As more companies adopt this model, states around the country have enacted laws requiring detailed disclosures that businesses must follow. The California Automatic Renewal Law (ARL) is one example—and it just got a makeover. California enacted Senate Bill No. 313, effective July 1, 2018, which further clarifies the disclosure requirements for free gift or trial offers and promotional or discounted price subscriptions, and also requires online cancellation mechanisms for online subscription services.

AVOIDING LAWSUITS IN CALIFORNIA

In recent years, several lawsuits have been filed in California under the ARL. A frequent allegation in these complaints is that a business failed to provide automatic renewal or continuous service terms in a clear and conspicuous manner. Other allegations include the failure to provide the terms in visual proximity to the request for consent, failure to provide acknowledgement of the terms and failure to provide an easy mechanism for the consumer to cancel the subscription service. While there are often significant defenses to such claims, exposure can also be significant: settlements can be in the tens of millions of dollars.

To avoid claims, companies should follow the ARL, which generally requires companies to adhere to the following:

- Make sure the initial offer terms are **clear and conspicuous**. Companies must disclose the material terms of the automatic renewal or continuous service in a “clear and conspicuous” manner. If there is a material change to the terms, this change must also be made clear to consumers prior to implementation.
- Acquire the consumer’s **consent** before charging the consumer.
- Make the terms **comprehensive**. Companies should inform consumers of everything they need to know: what they are being charged for, how much they will be charged, how often they will be charged, how long the automatic renewal term will last (or that the term will continue until the consumer cancels), the minimum purchase obligation (if any), and how and when they can cancel.
- Provide a mechanism that allows a consumer to **cancel online** if your company makes the offer online.
- Place the terms **close by**. Automatic renewal terms must also be displayed to consumers before a subscription or purchase agreement is fulfilled, and the language must be near the request for consent to the offer.
- Confirm the terms with the consumer by providing an **acknowledgment**; for example, an email receipt with all the relevant terms. Companies must give the consumer a copy of the automatic renewal terms, a copy of the cancellation policy and instructions for how to cancel, all in a manner that consumers can retain for their records.
- All the above requirements also apply if your company offers a free trial or gift, or is providing a promotional or discounted price offer. For example, the initial offer should clearly and conspicuously state when and how consumers can cancel prior to getting charged and how much they will be charged after the promotional rate is over.

As the number of cases under the ARL (and similar statutes in other states) rises, companies with a subscription-based business model should be vigilant in ensuring that the disclosure of their automatic renewal terms complies with the law to reduce their vulnerability to a claim. Recent cases indicate that the most common allegation is failure to clearly and conspicuously disclose the automatic renewal offer terms. Should a company be targeted under the ARL, a number of potentially broad defenses exist. If you have questions about this statute and its implications for your clients, please contact experienced counsel.

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