

U.S. State Laws Impose New Obligations for Businesses Offering Subscription-Based Goods and Services

Insights

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Changes to state-specific Automatic Renewal Laws (ARLs) impose enhanced consumer notice, consent, and cancellation requirements on companies offering goods and services under automatic billing plans

Key Takeaways:

- Recent updates to state ARLs—including California, Colorado, Delaware, and Illinois—require business-to-consumer (B2C) companies offering goods and services on an automatic renewal or continuous subscription service basis to provide enhanced notice, consent, reminder, and cancellation procedures to consumers.
- In addition to the existing requirements under the California ARL, effective as of July 1, 2022, any company that offers a subscription with a term of one year or more, or a free trial period of greater than 31 days, must send the consumer a reminder notice prior to renewal. Several similar state ARL requirements have also come into effect on January 1, 2022.
- This client alert covers best practices with respect to compliance with most state ARLs but note that, while there are similarities across state ARLs, some states impose additional or different requirements. B2C companies are advised to

implement and maintain a multi-state ARL compliance strategy to account for variances across state ARLs.

Subscription-based goods and services offered on a recurring basis have become an increasingly popular option for consumers, especially as more businesses and marketing operations move online. Federal and state laws have long imposed limitations on whether B2C companies may interpret a consumer's failure to take an affirmative action (e.g., reject an offer or cancel an agreement) as consent to be charged for the goods or services. This category of transactions is broadly referred to as "negative options" and may include continuous service subscriptions, automatic renewals, membership clubs, free-to-paid trial offers, and other promotional conversions. Negative option billing plans typically appear in the following forms:

- ***Automatic renewals***, which means paid subscriptions that automatically renew at the end of a defined term for a subsequent term, unless the consumer affirmatively cancels the service before the renewal term.
- ***Continuous services***, which means paid subscriptions that remain in effect, unless the consumer affirmatively cancels the service.
- ***Free-to-pay trials or promotional offer conversions***, which means a subscription or special deal that automatically begins charging a fee (or a raised fee) after a certain promotional period, unless the consumer affirmatively cancels or rejects the service or good.

At the federal level, goods and services offered under such negative option billing plans are regulated by the Federal Trade Commission (FTC) under the Restore Online Shoppers' Confidence Act (ROSCA). In recent years, at the state level, consumer protection concerns have inspired various states to separately enact or bolster existing ARLs impose additional requirements on automatic payment clauses in consumer contracts. More than half of the U.S. states currently have an ARL in place. The remaining states without ARLs, such as Indiana, Kentucky and Massachusetts, continue to propose bills in a concerted effort to broadly regulate such consumer contracts.

What best practices should we implement to comply with state ARL requirements?

Although ARL requirements vary by state, there are nine states including California and New York that impose more arduous requirements than others. To comply with

most state ARLs, B2C businesses offering goods or services under such negative option billing plans should provide:

1. ***Clear and conspicuous notice of offer terms.*** Before purchase of the good or service is made, the terms of the offer must be presented “clearly and conspicuously.” The offer terms must be displayed in stark contrast to the surrounding text in the contract (e.g., contrasting type, font, color, etc.) and in visual proximity from wherever the consumer is provided the option to accept the terms of the offer (e.g., above the “I accept” button). The offer terms should include the following:

- a. The contact information for the business;
- b. Whether the service automatically renews or remains in effect until the consumer affirmatively cancels the service;
- c. The length, and any additional terms of, any applicable renewal period (including, e.g., the recurring amount that will be charged and any changes to such amount);
- d. Any minimum purchase obligations (if applicable); *AND*
- e. Description of the cancellation policy.

With respect to *free-to-pay trials or promotional offer conversions*, in addition to the above, the offer must include:

- a. The price that will be charged after the promotional period ends; *AND*
- b. Description of the cancellation policy.

2. ***Affirmative consent.*** An opt-in mechanism for the consumer to affirmatively consent to the automatic renewal clause must be presented *before* the consumer is initially charged for the services. Consent can be obtained via checkbox, signature, or some other affirmative opt-in placed near the clear and conspicuous negative options disclaimers. For example, a checkbox next to the automatic renewal offer terms may be sufficient, provided that the checkbox is not “pre-checked,” and such consent remains separate and distinct from the consumer’s consent to any other purchase-related terms.

3. ***Post-sale acknowledgment.*** After the consumer has provided affirmative consent, the consumer should receive a post-sale acknowledgment that contains the material terms of the automatic renewal offer in a digestible format that consumers can readily retain. Such terms should include:

- a. The offer terms;
- b. Description of the cancellation policy; *AND*

c. Information on how to exercise cancellation options.

4. **Cancellation options.** A description of the cancellation policy in the initial notice of offer terms, as well as one or more methods by which the consumer may cancel the service. The cancellation mechanism should be simple and consumer-friendly, which may be:

a. If the business directly bills the consumer, a toll-free telephone number, email address, or postal address.

b. If the consumer initially accepted the subscription offer online, the business must offer the consumer an accessible method of cancellation that is available exclusively online. To comply with amended ARL requirements, this online cancellation method must allow the consumer to cancel at will, and should be provided as:

i. A prominent link or button, which may be provided in the consumer account profile; *AND/OR*

ii. A pre-formatted termination email that the consumer can send to the business without including any further information.

Further, with respect to *free-to-pay trials or promotional offer conversions*, the consumer must be offered the option to cancel the service before the consumer is charged.

5. **Clear and conspicuous notice of changes to terms.** Before any material changes to the renewal terms or cancellation policy are made effective, the consumer must be notified of such changes in a “clear and conspicuous” manner and should be provided with a reminder of the cancellation options.

6. **Reminder notices.** The consumer must be notified of any payments prior to being charged.

a. If a consumer agreed to a free trial period longer than 31 days, companies should send the consumer a reminder notice between three to 21 days before the end of the trial period.

b. If a consumer agreed to a subscription with an auto-renewal period that extends the agreement beyond an initial term of one year, companies should send the consumer a reminder notice no less than 30 days before the applicable renewal term or cancellation deadline, whichever is earlier.

In each case, the reminder notice should clearly and conspicuously detail:

- a. That the subscription will automatically renew unless the consumer cancels the subscription;
- b. Length and any additional terms applicable to the renewal term;
- c. One or more methods by which the consumer may cancel the service;
- d. The contact information for the business; *AND*
- e. If the notice is sent electronically, a reasonably accessible electronic method that directs the consumer to the appropriate cancellation process, such as a link to a cancellation form.

With respect to the foregoing best practice guidance, please see below for an example checkout process that is generally compliant with ARL requirements:



Payment Information

Card number

MM / YY / CVC

Street address

Apt, unit, suite, etc. (optional)

United States

City

State

Zip code

☐

I understand and agree that my subscription will automatically renew, and authorize automatic charges for the above subscription fees (plus taxes, if any).

☐

I acknowledge that I have read and agree to the Terms of Use, Cancellation Policy and Privacy Policy.

PURCHASE SUBSCRIPTION

Subscription Plan

You have selected the [insert subscription plan name and description].

[After your trial period ends on [insert date] / Starting today], you will be charged [\$] on a [recurring basis (e.g. annual, monthly, etc.)]. You may cancel or change your plan at any time in your account settings, or by contacting us at [insert contact method].

If you do not cancel your subscription before [renewal date], you agree that you will automatically be charged the subscription fee of [\$] per [recurring basis] until you cancel the services. Please refer to our Cancellation Policy for more information.

Have there been any recent changes?

California, Colorado, Delaware and Illinois have each enacted enhanced ARLs that take effect in 2022 and require companies to provide consumers notice of renewal within specified periods and simple at-will cancellation options. Notable changes are as follows:

- **California (AB 390).** Effective as of July 1, 2022, California will require companies to issue a reminder notice 15 to 45 days before the date of any renewals that extend the contract term beyond a year. For free trials or discounted pricing offers that extend beyond 31 days, subject to certain limited exemptions, companies must provide a reminder 3 to 21 days before the expiration of the trial period. Further, as described in the best practices guidance above, consumers must have the right to terminate at will and without engaging in any further steps that could delay the consumer's ability to terminate immediately. Although companies may ask consumers to provide reasonable authentication requirements details prior to cancellation, companies must also offer another method of cancellation (e.g., toll-free number or mail) to any consumers who are unwilling or unable to provide such account authentication information.
- **Colorado (HB 1239).** Effective as of January 1, 2022, and similar to other states, Colorado requires companies to send consumers a reminder notice 25 to 40 days prior to any renewal period that extends the subscription beyond an initial one-year term. Notice may be provided by mail, email, or another form of communication previously authorized by the consumer (including, e.g., text messages if consent has been provided).
- **Delaware (SB 93).** Effective as of January 1, 2022, for any renewal period that extends the contract term beyond an initial one-year term, Delaware requires companies to issue a reminder notice 30 to 60 days before the renewal period or cancellation deadline. The updated Delaware ARL imposes cancellation requirements that closely mirror other state ARLs. However, although similar in scope to other state ARLs, the Delaware ARL is notably less burdensome than other states, because it provides businesses an opportunity to cure any violations before a consumer can file suit under the ARL. To exercise the private right of action, a consumer must first provide notice to the company of the alleged violation and submit a request to cancel contract prior to any extension or renewal. No lawsuit may be initiated if the company cures the violation within 30 days and sends a copy of a statement of remediation to the consumer and the director of consumer protection. A company can avoid liability if: (1) as part of its routine business practice, it has established and implemented written procedures to

comply with the law and enforces compliance with the procedures; and (2) it can show that any failure to comply with the law is the result of an error; provided that, in the event of an error, the company must provide a full refund or credit to the consumer for the amount paid from the renewal date until the date of termination (or subsequent notice of renewal, whichever occurs first).

- **Illinois (HB 3955).** Effective as of January 1, 2022, Illinois also requires companies to issue a reminder notice 30 to 60 days before any cancellation deadline or renewal period that extends a contract beyond an initial one-year term. Similar to other states, under the amended Illinois ARL, any company that permits consumers to sign up online must also offer consumers an accessible online method to cancel the subscription.

What are the penalties for failure to comply with ARLs?

With the rise in prevalence of auto-renewing services, there has been a marked uptick in consumer class action litigation based on state ARL violations. Failure to comply with state ARLs, even minor infractions, could result in significant liability and penalties, including:

- Settlements for consumer class action lawsuits brought under any state ARL where there is an alleged violation. Notably, California has become a hotspot for class action litigation, with recent cases reaching multi-million dollar settlements.
- The violating good or service may be considered an “unconditional gift” that allows the consumer to seek full compensation for all amounts paid.
- The state Attorney General may issue an injunction or seek other injunctive relief, and courts may impose additional penalties. For example, in New York, courts may impose up to \$100 for a single violation (and up to \$500 for multiple violations) resulting from a single incident; or up to \$500 for a single violation (and up to \$1000 for multiple violations) resulting from a single incident where the business was aware that it was committing a violation.

Many states allow for a “good faith exception” as a defense to ARL violations, so a good faith effort to comply with ARL-imposed requirements may insulate a business from liability. To minimize legal exposure under state-specific ARLs, any business offering such auto-renewing services should re-examine their purchase and order acknowledgment process, presentation of offer terms, and service cancellation procedures.

What action steps can we take now?

Clients will need to revisit their exposure under federal and state laws governing negative option plans. In doing so, it is important for clients to evaluate current processes with respect to presentation of renewal terms, content of purchase acknowledgments, content and timing of renewal notices, and cancellation methods and authentication requirements.

How can GD help?

Compliance with automatic renewal regulations requires a nuanced analysis of the current measures put in place by your business and our specialists in the [Licensing, Strategic Partnering & Commercial Transactions Group](#) are here to help. For assistance with this review, or if you have any questions regarding this client alert, please reach out to your Gunderson Dettmer team.

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