

Navigating the Subscription Maze

Staying on Top of Auto-Renewal Legislation in 2024

If you're operating a subscription-based company in 2024, strap in for a wild ride through the maze of auto-renewal laws!

- From coast to coast, **states** are tightening their grip on the increasingly popular (yet often murky) world of automatically renewing plans.
- But that's not all – the **FTC** is waiting in the wings with sweeping [proposed revisions to the Negative Option Rule](#), threatening to pack an even mightier punch against deceptive subscription practices and too-hard-to-cancel renewals while also seeking every avenue to assess civil penalties against [violators](#).

If you're struggling with how to comply with the current patchwork of laws in a world where it seems new legislation is being passed or proposed every day, you're not alone.

What do I disclose, how do I disclose, and what does "affirmative consent" really mean?

Do I have to provide subscription "acknowledgments"?

What does it have to say, and what does it mean to be "retainable" by the consumer?

Are acknowledgments different from renewal reminders?

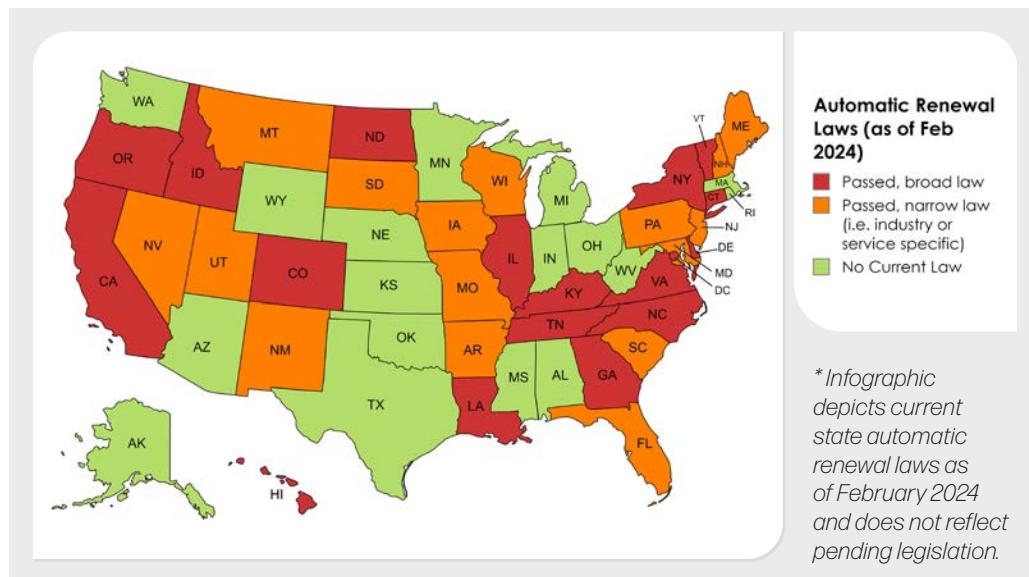
What about "immediate cancellation"?

OK, "immediate" means "immediate."

But are you telling me I really can't try and "save" consumers?

We have a business to run!

First, let's zoom out on the current status of state laws:



While **California's** automatic renewal law continues to be famously strict, companies can no longer rely on compliance with this law as a lowest common denominator and call it a day. And unhelpfully, the **FTC's** proposed updates to the **Negative Option Rule** provide that if a state law is more stringent than the federal rule, a company will have to comply with the state requirement. With all that in mind, where should companies allocate their dollars to audit their subscription programs and make changes that comply with both existing law while keeping a pulse on where the law is going – minimizing the need to make further changes weeks, months or years down the road?

Let's consider some of the questions we most frequently encounter and break down the key pain points and compliance considerations.

What do I disclose, how do I disclose, and what does "affirmative consent" really mean?

What to Disclose

Companies should clearly and conspicuously disclose the *material terms* of an automatic renewal program. Under the **Restore Online Shopper's Confidence Act (ROSCA)** and the laws of “early adopter” states such as **California**, these disclosures are required, at a minimum, to be made clearly and conspicuously at the point of acceptance before billing the consumer.

"Material terms" include items such as the amount and frequency of future recurring charges, that the plan will continue until the consumer cancels, any minimum purchase obligations, deadlines by which the consumer must act to stop further charges and how to cancel.

How to Disclose

"Clear and conspicuous" generally means virtually unavoidable by the consumer. State laws, including **California's** law and **Connecticut's** recently enacted law, require that disclosures be presented in text that is either larger than the surrounding text or the same size as the surrounding text but in a typeface, font or color that contrasts with such surrounding text or is set off from such surrounding text by symbols or other marks that draw the consumer's attention to such disclosure. In the case of an offer conveyed by voice, the disclosure must be made in a volume and cadence that is readily audible to, and understandable by, the consumer.

Obtaining Affirmative Consent

Note that merely providing a disclosure is not sufficient. Consumers need to provide "affirmative consent" to these material terms. What does "affirmative consent" mean in this context? First, the **FTC** has interpreted this requirement under **ROSCA** to mean that sellers must obtain consumers' express, informed consent to a negative option feature *separately* from any other part of a transaction. That means that sellers cannot obtain simultaneous consent to charges for a one-time purchase and to accept a subscription feature.

With respect to the form of consent itself, an unchecked check box is a best practice and may be the best way to thread the needle given the somewhat unsettled current guidance. In its proposed federal updates, the **FTC** posits that an unchecked checkbox would "likely satisfy" the affirmative consent requirement (and notes that certain states, like **Vermont** and the **District of Columbia**, may expressly require one in certain situations), but has declined to specifically require it. That said, in an instructive recent \$240,000 settlement between the **California Automatic Renewal Task Force** and online flower delivery company Bouqs, the State *specifically* required Bouqs to obtain affirmative consent through a mechanism that the customer affirmatively selects to provide consent to the terms (i.e., checkbox, signature, express consent button) and to place any autorenewal terms immediately adjacent to the request for consent.

If in doubt, keep the outcome of this case and these increasingly aggressive state trends in mind when designing sign-up flows. For example,

- Think about whether the pages prior to the checkout page clearly state the terms of the program before the consumer gets too far down the line.





- Evaluate whether the sign-up language expressly signifies the consumer's binding agreement to the automatic renewal program.
- For example, a button stating "purchase now" with a light-colored, insufficient disclosure below the button is unlikely to fulfil this requirement, whereas a button stating "I agree, start my subscription" with a clear disclosure above the button stating that the consumer understands that by clicking the button, they expressly agree to the terms of an automatic renewal program, may pass muster.

Don't Forget about Other States

In terms of 2024 trends, more and more states are jumping on the bandwagon to track these requirements.

- **Connecticut, Hawaii and Kentucky**, for example, have introduced laws requiring businesses to disclose clearly and conspicuously automatic renewal terms.
- **Tennessee** introduced a bill that would track **California's** requirement to disclose the terms of any prices offered at a promotional or discounted price for a certain period of time. The bill would also add a specific definition of "affirmative consent" to the statute.

Do I have to provide subscription "acknowledgments"? What does it have to say, and what does it mean to be "retainable" by the consumer?

Under existing federal and state laws, subscription-based businesses should provide each consumer with an acknowledgment after subscribing to the program that includes the automatic renewal program terms, including the cancellation policy and information on how to cancel before incurring obligations "in a manner that is capable of being retained by the consumer." That's generally an email notification - not just a pop-up that later disappears. In another action brought by the **California Automatic Renewal Task Force**, the State alleged that the *Los Angeles Times* failed to provide customers with post-subscription purchase confirmations that clearly and conspicuously disclosed the autorenewal terms. As part of the settlement, the newspaper must prospectively provide a post-order confirmation that includes the autorenewal terms, cancellation policy and any details regarding their cancellation mechanisms in such a retainable manner.

Note that state laws are increasingly becoming stricter on the specific information that must be disclosed in the acknowledgment; historically, acknowledgement notices were required to reiterate the material terms of the offer and include details on how to cancel. But recently, for example, **Illinois**



amended its law to expressly require the acknowledgement to include a *mechanism* for cancelling the contract in the fair course of business dealing, along with applicable cancellation deadlines. **Nebraska** introduced a similar bill that would require autorenewal acknowledgments to include an actual live link to the cancellation process (or another similarly easy method if a link is not possible).

Are acknowledgments different from renewal reminders?

A number of state laws – including **California, New York, Vermont** and **District of Columbia** – expressly require that renewal reminders for annual (but not monthly) plans be sent to consumers 30-45 days in advance of the cancellation deadline. But now state laws are getting trickier, with laws like **Delaware's** and **Colorado's** potentially covering month-to-month subscriptions that then continue to be into effect more than 12 months after the initial purchase. Note that the proposed federal law would track that requirement, requiring annually issued reminders for even month-to-month subscriptions for digital services.

What about “immediate cancellation”?

California has historically led the charge on requiring that companies offer consumers “immediate” cancellation options – and specifically requiring that if a consumer accepts the offer terms online, the consumer must be given an exclusively online, immediate method of cancellation (e.g., a prominently located direct link or button or immediately accessible termination email.) **Georgia's** new law, effective 2024, essentially mirrors this requirement – down to the permissible methods of immediate cancellation.

States such as **Vermont, Tennessee, Connecticut** and **Idaho** require that consumers should be able to cancel through the same means as sign-up. On the **federal level**, the proposed updates to the **Negative Option Rule** would mandate a cancellation mechanism that is immediate and as simple as the mechanism to sign up for the services – espousing the principles of “click to cancel” and “mirror cancellation.” (PSA: Avoid a cancellation flow laborious enough to evoke Homer's “Iliad”). In general, avoid any multistep cancellation flows that require subscribers to review retention offers, complete online questionnaires or feedback surveys, or otherwise complete a series of actions before cancellation.

Ok, “immediate” means “immediate.” But are you telling me I really can't try and “save” consumers? We have a business to run!

This is likely to be a controversial issue, especially in the wake of the **FTC's** Jan. 16, 2024, **Informal Hearing on Proposed Amendments to the Negative Option Rule**. The **FTC's** proposed rule would require that sellers first obtain a consumer's unambiguously affirmative consent to receive additional offers before confirming their cancellation (e.g., “Would you like to consider a different price or plan that



could save you money?”). If consumers do not provide consent, the marketer cannot attempt more “saves” and must cancel the negative option arrangement immediately. If consumers accept, the marketer can pitch alternative offers.

Notably, disconnects (e.g., in a chat) or hang-ups must be treated as cancellations. As if that weren’t enough, don’t forget about “dark patterns” that use color and shading and other design tactics to try and lure or trick consumers down a certain path (e.g., suddenly changing the color of the “cancel” button to trick someone into retaining their subscription). That’s why it is so important to audit every step of your subscription process, taking copy and disclosures into account in the context of design, shading, color and placement.



Take Action Now: The Decisions Ahead

- Subscription-based programs are going to be under the regulators' microscope in 2024. Now is the time to examine your entire purchase process and analyze your risk exposure.
- Take a fine toothcomb to your customer service processes and cancellation mechanisms, including call center scripts, cancellation and refund policies and how your user flow appears on both mobile devices and desktops.
- Remember that if a regulator is looking at your negative option program - they're looking at all of your marketing practices. Take time now to work with counsel on these issues to avoid the potential regulatory scrutiny and significant financial exposure.

For More Information

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