

What's in Your 2024 Legal Cart?

Top 10 Retail Law DEVELOPMENTS

The retail and e-commerce sector will continue its dynamic transformation in 2024, as industry giants and startups alike leverage cutting-edge technologies and innovative marketing strategies.

All the while, the Federal Trade Commission (FTC) and state attorneys general are busy restocking the legal shelves with new rules and regulations in efforts to ensure every transaction and tactic meets the evolving fairness and transparency standards.

This means drilling down to apply existing laws and regulations while also proposing new rules to crack down on specific practices. These include use of **“dark patterns,” “junk fees,” sustainability claims, influencer marketing, consent in purchasing flows, artificial intelligence (AI)** and more.

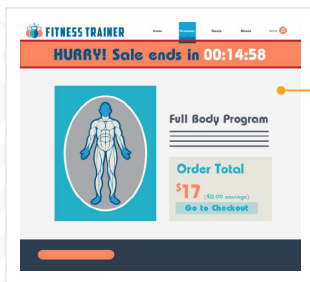
Here are the **10 key issues** for retailers and e-commerce companies in 2024 to manage compliance and legal risk.

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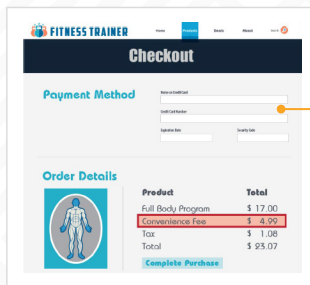
| 1 | Dark Patterns

Regulators remain focused on [dark patterns](#), broadly defined as manipulative design elements that trick users into making decisions they would not otherwise make.

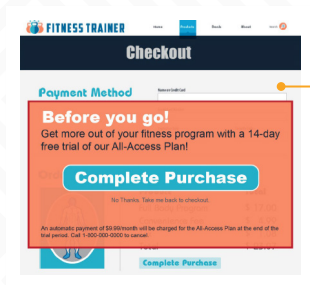
These include:



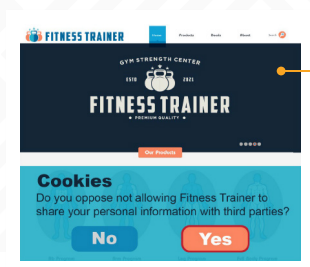
Dark patterns that manipulate consumer choice by inducing false beliefs, such as a baseless countdown timer that pressures users to buy immediately (but the clock just goes away or resets when it times out).



Dark patterns that operate by hiding or obscuring material information from consumers, such as key limitations and fees (i.e., drip pricing).



Dark patterns that obscure the material terms of a subscription, mislead consumers into providing consent, and/or discourage or prevent cancellation.



Dark patterns that obscure or subvert consumers' privacy choices, such as confusing choice options.

As seen in the FTC's Staff Report "Bring Dark Patterns to Light" September 2022

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In the wake of its highly publicized enforcement action [against Amazon last year](#), the FTC shows no signs of slowing down in 2024. This year, the FTC required online cash provider [FloatMe](#) to provide \$3 million for consumer refunds and halt use of dark patterns used to impede cancellation. The FTC also filed a

complaint against California-based lead generator Response Tree for operating websites designed to trick consumers into providing personal information to receive illegal telemarketing calls.

The National Advertising Division (NAD) [issued several instructive decisions](#) regarding dark patterns. For example, NAD found that Pier 1 Imports Online Inc. failed to disclose the material terms of a subscription-based customer loyalty program constituted a dark pattern when the subscription was automatically added to a consumer's cart (and required that consumers affirmatively uncheck a prechecked-box to remove the membership).

| 2 | Automatic Renewal Programs

More and more states are enacting broad automatic renewal laws, which would apply to a wide-range of subscription-based retail services. This year:

- Georgia's automatic renewal law takes effect. It tracks some of the requirements of California's famously strict law, including the requirement that consumers who accept an automatic renewal offer online can cancel online, at will, and without engaging any further steps that obstruct or delay the consumer's ability to cancel the automatic renewal or continuous service **immediately**.
- Connecticut, Hawaii and Kentucky introduced laws requiring businesses to disclose clearly and conspicuously automatic renewal terms.
- Tennessee introduced a bill that would follow California's requirement to disclose the terms of any prices offered at a promotional or discounted price for a certain period of time.

Enforcement activity is at an all-time high. Instructively, the California Automatic Renewal Task Force recently reached a \$240,000 settlement with online flower delivery company Bouqs, requiring Bouqs to obtain affirmative consent through a mechanism that the customer affirmatively selects (i.e., checkbox, signature, express consent button) and to place any autorenewal terms immediately adjacent to the request for consent.



Extra! Extra! Read All about It!

- 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 cancellation mechanisms in such a retainable manner.

In light of the explosion of subscription-based programs, the FTC also proposed updates to the federal Negative Option Rule, which would impose additional disclosure, consent and cancellation requirements

(i.e., “mirror cancellation” or “click to cancel” requirements), and also would require that sellers first obtain a consumer’s unambiguously affirmative consent to receive additional offers or upsells before confirming their cancellation (e.g., “*Would you like to consider a different price or plan that could save you money?*”). For a deep dive into these state and federal laws, read a previous Davis+Gilbert [alert here](#).

| 3 | Junk/Hidden Fees & Surcharges

While the FTC already considers “junk fees” to be a dark pattern, it didn’t hesitate to propose yet another rule specifically regulating this practice and enabling it to seek additional civil penalties for violating the rule. The FTC’s proposed rule to ban junk fees targets:

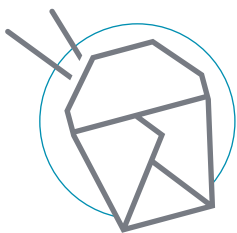
- Hidden Fees, or bait-and-switch pricing tactics that hide mandatory fees and deceive consumers about the price and
- Bogus Fees, where sellers misrepresent fees and fail to disclose upfront the amount and purpose of the fees and whether they are refundable.

If enacted, this ultimately means that the total price advertised by a retailer for a particular product or service should include all charges a consumer must pay for a good or service (which would include surcharges), and the nature and purpose of any optional amounts a consumer may pay that are excluded from the total price (e.g., shipping charges, government charges, optional fees, voluntary gratuities, and invitations to tip) must be disclosed upfront. Generally, businesses will be prohibited from misrepresenting the nature and purpose of fees by using vague descriptions.

The FTC’s bottom line is that when the initial contact with a consumer (whether through a banner ad, billboard, or other advertising) shows a lower or partial price without disclosing the total cost, it violates the FTC Act even if the total cost is later disclosed.

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Tell me, Is the Surcharge on the Side or Incorporated?

As an example, if a restaurant is charging a service fee:

- The restaurant checkout page cannot include one price for an item with a separate disclosure (even if in **BIG BOLD PRINT**) stating that there will be a 1% service fee added to a consumer’s purchase price.
- The 1% service fee must be added to the price for the individual item so that a \$10 item is now priced at \$10.10.
- Before the consumer completes the purchase, it should be disclosed to the consumer that the price includes a 1% service fee and ideally detail the purpose of this service fee.

On **February 11, 2024**, a new law took effect in New York establishing important limits and rules for surcharging. The new statute has a price disclosure component, detailing how surcharge prices are communicated, and a surcharge price cap component.

Never one to be left behind, California recently amended the California Consumers Legal Remedies Act to generally ban “drip pricing,” commonly equated with “junk fees,” (advertising a price that is less than the actual price that a consumer will pay for a good or service and sneaking in the additional costs later). The Act notes that these practices and other forms of bait and switch advertising are prohibited by existing statutes, including the Unfair Competition Law and the False Advertising Law. The law goes into effect on **July 1, 2024**. Retailers need to keep on top of state developments as more states introduce surcharge-related legislation – and don’t forget about the strict rules set by major card networks.

| 4 | AI Applications to Retail

While “generative AI” was the buzzword of 2023, this year is seeing a deeper technical application of machine learning to retail. We are bound to see AI integration in customer interfaces, supply chain and logistics, behavioral and personalized marketing, and customer engagement. With this explosion of technical change, retailers need to keep privacy and transparency considerations top of mind. For example, AI algorithms could be used to personalize advertising to consumers based on browsing data. In addition, the FTC has already opined that AI could be used to propagate misleading advertising outside of the actual user journey, such as by generating fake reviews, endorsements or testimonials.

On the heels of these concerns, the FTC is seeking public comment on a supplemental notice of proposed rulemaking that would prohibit AI use to impersonate individuals, e.g., AI-generated “deepfakes.” The FTC is also seeking comment on whether the revised rule should declare it unlawful for a firm, such as an AI platform that creates images, video or text, to provide goods or services it knows, or has reason to know, is being used to harm consumers through impersonation. In the words of FTC Chair Lina Kahn, “[W]ith voice cloning and other AI-driven scams on the rise, protecting Americans from impersonator fraud is more critical than ever.”

The FCC also announced the unanimous adoption of a Declaratory Ruling that recognizes calls made with AI-generated voices are “artificial” under the Telephone Consumer Protection Act (TCPA). The ruling clarifies the FTC’s intent to further regulate the use of voice cloning technology used in connection with robocall scams targeting consumers under the Telephone Consumer Protection Act (TCPA).



Be Warned!

→ Retailers engaging in telemarketing need to closely track these federal and state developments, as regulators and the class action bar will not hesitate to take action.

| 5 | Promotions & Gift Cards

Somewhat surprisingly, while 2024 is seeing an explosion of sophisticated technology, good old gift cards continue to be a hot topic in the class action and regulatory landscape. Gift cards are regulated not only by the federal Credit Card Accountability Responsibility & Disclosure (CARD) Act, but also various state laws governing dormancy fees, redemptions for cash and expiration dates.

Gift card sellers should remember:

- Both federal and state laws restrict expiration dates on gift cards (with some states prohibiting these outright) and require certain disclosures to be provided on the card itself.
- Certain states have “escheat” laws providing that gift cards are presumed to be abandoned after a certain period of inactivity, and, upon such abandonment, their stored value must be transferred to the state. Determining whether escheat laws apply can be a complex determination.

Related promotional practices, such as loyalty and reward programs, have unique disclosure obligations under the CCPA. To opt-in to the program, a potential participant generally must provide personal information, such as name, email and phone number. The CCPA requires that any business that offers such financial incentives for participating in a program provide a formal Notice of Financial Incentive so that consumers can make informed decisions about whether to participate.

| 6 | Sustainability & Environmental Marketing

The FTC is continuing to review, and potentially revise, its Green Guides for the Use of Environmental Claims. Last year, the FTC received public comments on potential updates to the Guides and held a [workshop on recyclability claims](#). It is likely that updated guidance will be released this year and, along with it, an uptick in enforcement.

States continue to be active in this area. In particular, California passed the “Voluntary Carbon Market Disclosure Act,” which will require companies making carbon-reduction claims include certain disclosures on their websites (including how interim progress toward the stated goal is being measured).

California is also preparing for its new recyclability law to take effect. The law will require that, to be considered recyclable, items must be collected by recycling programs that serve at least 60% of the state’s population and sorted by facilities that serve at least 60% of statewide recycling programs. CalRecycle presented its preliminary findings during a public workshop last month and is preparing a final report. The new requirements will go into effect on the date CalRecycle publishes its report, and the law provides an 18-month grace period for companies to come into compliance following the publication of the report.

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This is a highly active area of enforcement, especially with respect to aspirational claims.



Green Claims or Greenwash? Unpacking the Beef

- The National Advertising Review Board (NARB) recently affirmed a NAD decision concerning JBS, the second-largest food company and the largest animal protein producer in the world.
- NAD found that JBS' commitment "*to be net zero by 2040*" was unsupported, as the claim communicated that JBS was already in the process of implementing a documented plan that had been evaluated and found to have a reasonable expectation of achieving the stated goal.
- Earlier this month, the [New York Attorney General filed a lawsuit against JBS](#), alleging that it is continuing to deceptively advertise its 2040 net zero goal, and that this goal cannot feasibly be attained given JBS' current plans and business goals.

| 7 | Updated FTC Endorsement Guides

Last year, the FTC released its new Endorsement Guides, finally updating the prior guidance issued in 2009. [The Endorsement Guides](#) make several important and sweeping revisions to the prior Endorsement Guides, focusing on:

- Deceptive review practices, such as suppressing negative reviews or otherwise manipulating reviews to distort what consumers think of a product through boosting, upvoting, downvoting, editing or other tactics;
- How to handle incentivized reviews and reviews by employees, including "seeding" fake competitors' reviews;
- What it really means to make a "clear and conspicuous" disclosure on social media - which may not be achieved by using a platform's built-in disclosure tool;
- Expanding the definition of what an "endorsement" is - which now expressly includes the use of virtual influencers, tags and fictionalized reviews in social media;
- The relative liability of advertisers, agencies, intermediaries and even endorsers themselves;
- Child-directed advertising, which is now its own new section of the Endorsement Guides.

Importantly, the updated Guides now require that disclosures be made in the same medium as the endorsement – meaning that audio disclosures should be used for video content. Moreover, the brand should specifically be identified if there is any ambiguity about the sponsoring advertiser.

The FTC is likely to ramp up enforcement of the Guides. The FTC announced that it sent a warning letter to an industry group and several individual influencers for engaging in an influencer campaign without sufficient disclosures – for example, some video content did not include audio disclosures, and the sponsoring advertiser was not clearly disclosed in all posts.

| 8 | Use of Consumer Reviews

Just one day after relating its updated Endorsement Guides, the FTC released a proposed Trade Regulation Rule on the Use of Consumer Reviews and Testimonials. The proposed rule would prohibit:

- the creation, purchase, dissemination or sale of fake consumer reviews and testimonials
- repurposing reviews for substantially different products
- buying positive or negative reviews
- using insider consumer reviews and testimonials without clear disclosure
- misrepresenting company-controlled websites
- suppressing negative reviews
- the sale, distribution or purchase of false indicators of social media influence.

The proposed new rule would allow the agency to impose significant civil penalties (up to \$51,744 per violation), which is intended to deter companies from engaging in prohibited acts involving consumer reviews.

The rulemaking process is ongoing, and it is critical that retailers evaluate how they collect and manage consumer reviews to avoid catching the ire of the FTC.

| 9 | Developments for Online Marketplaces & Retailers

Last year saw the introduction of the INFORM Consumers Act, which applies to online marketplaces that enable third-party merchants to sell goods to consumers. The law requires online marketplaces to obtain information from certain “high-volume third-party sellers” and to ensure that information about those sellers is clearly disclosed. The law is intended to make online transactions more transparent and to deter the online sale of stolen, counterfeit or unsafe merchandise.

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Determining whether the INFORM Consumers Act impacts you as a seller depends on whether you sell on a platform that meets the law’s definition of an “online marketplace,” whether you sell merchandise that meets the law’s definition of a “consumer product, and whether you meet the definition of a “high-volume third party seller.”

There is also the potential introduction of the Credit Card Competition Act (CCCA). Spearheaded by a bipartisan group of legislators, the CCCA targets the largest card-issuing financial companies. The law would give every merchant the choice of a second network to process transactions, potentially helping to drive down swipe fees and benefit consumers.

| 10 | Enforceability of Terms of Service

There is a considerable uptick in challenges to the enforceability of online terms and conditions, with significant activity in the U.S. Ninth Circuit Court of Appeals. Historically, retail industry practice is to present assent to Terms of Use by including disclosures above a button that requires consumers to take an affirmative action to give consent (e.g., clicking “continue”). Recent cases indicate that this alone may not be enough.

In *Berman v. Freedom Financial Network*, the Ninth Circuit found that the plaintiff was not bound by linked terms despite disclosures that were directly above the “continue” button, in part because the notice did not explicitly explain the legal significance of the action the consumer must take to enter into a contractual agreement, such as “*By clicking the Continue button, you agree to the Terms & Conditions.*”

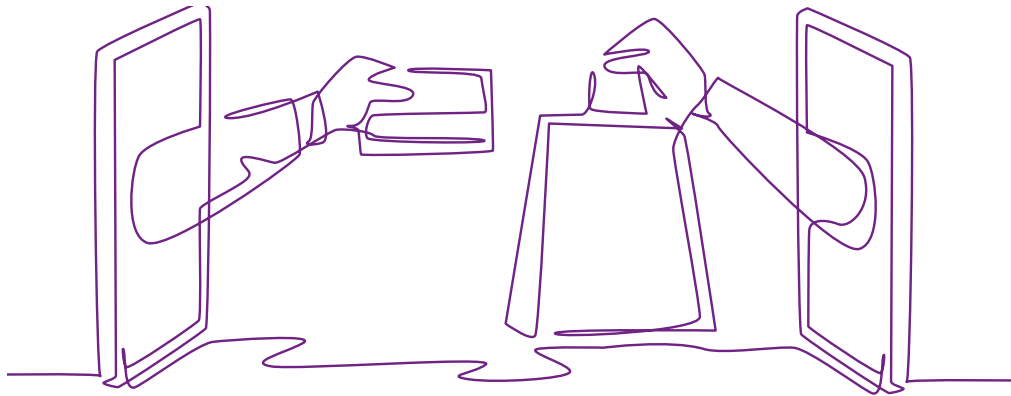
Moreover, while retailers have historically provided notice to users of a material amendment to terms via email without requiring affirmative acknowledgement or consent to the amendment, this approach may now present a heightened risk.

- In *Sifuentes v. Dropbox, Inc.*, a 2022 decision from the Northern District of California, the court ruled that Dropbox’s method of mass-emailing users to provide notice of amendments to Dropbox’s terms of service, without requiring some other “action, such as clicking a button or checking a box”, was insufficient to find that the user agreed to the amendment.
- Similarly, in 2023, in *Jackson v. Amazon*, the 9th Circuit also declined to enforce updated terms against a consumer, despite Amazon sending notice by email (Amazon failed to show that the email “provided [Jackson] individualized notice of the agreement’s existence and contents adequate to demonstrate that [he] agreed to the [updated] TOS.”)



“Signed, Sealed, Delivered”

→ To ensure terms and conditions are enforceable, retailers should consider obtaining affirmative consent to online terms – both when initially presented, and when later updated.



Conclusion

As the digital marketplace continues to evolve, staying ahead of the curve in legal compliance and risk management is more crucial than ever for retailers and e-commerce companies. The 10 key issues highlighted for 2024 underscore the importance of diligent oversight and proactive strategies in navigating the complex web of regulations.



What Can Be Done?

→ By keeping a close eye on these developments and partnering with advertising and marketing law attorneys, businesses can not only avoid potential pitfalls but also seize new opportunities to innovate and thrive in an increasingly regulated online retail world.

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