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# California's Automatic Renewal Law Tightens Regulations on Free Trials and Online Subscriptions

**U.S. TECH LAW UPDATE**[1]
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## 1. Introduction.

Over 20 states have laws regulating auto-renewal contracts, but with the recent passage of California's Senate Bill 313,[2] one of the strictest states[3] will soon implement even more stringent regulations. The Senate Bill, which updates California's current auto-renewal law ("ARL"), passed California's Senate last summer and was signed into law in September. The new regulatory requirements of the updated ARL come into effect on July 1, 2018, and add additional requirements relating to free trial offers, temporary promotional pricing and online subscriptions.

When compared with Federal law, California's original ARL was already broader and more detailed than the requirements of the Restore Online Shoppers' Confidence Act ("ROSCA"),[4] which is enforced by the Federal Trade Commission ("FTC"). The stricter California rules come at a time where there has been a significant increase in the amount of class action litigation on behalf of consumers under the original statute, including a multimillion dollar judgment against EHarmony two weeks ago.[5] Under the ARL, a company that enters into an auto-renewal contract with a California consumer can be held liable for violations; therefore, businesses offering goods or services on an auto-renewal basis in California should comply with the updated ARL rules. In particular, companies with free trial or promotional pricing models should revise their pre- and post-purchasing disclosures to comply with the new requirements.

## 2. The Original ARL.

The original ARL, which is codified within section 17600 of the California Business and Professional Code,[6] came into effect in 2010. The law required businesses that sell goods, products, or services on a recurring basis to: 1) disclose their terms clearly and conspicuously;[7]

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[2] See the Full Text of Senate Bill 313 here: "SB-313 Advertising: automatic renewal and continuous service offers," posted by California Legislative Information on November 28, 2017.

[3] See March 3, 2017 Senate Judiciary hearing on SB 313 at "03/17/17-Senate Judiciary."

[4] See Restore Online Shoppers' Confidence Act, 15 U.S.C. § 8401-05 (2010). See the Full Text of ROSCA here: "CHAPTER 110—ONLINE SHOPPER PROTECTION."

[5] See *People of the State of California v. eHarmony Inc.*, Case No. 17-cv-03314, in the Superior Court for the State of California, County of Santa Cruz (Jan. 8, 2018).

[6] See Automatic Purchase Renewals, California Business and Professions Code § 17600-06 (2010). See the Full Text of the ARL here: "Automatic Purchase Renewals"

[7] See California Business and Professions Code § 17602(a)(1).

2) obtain affirmative consent prior to charging the consumer;[8] and 3) provide an acknowledgment capable of being retained by the consumer that includes terms, a cancellation policy and information on how to cancel.[9] In addition, if the business offers a free trial, the business must disclose the cancellation procedure to the consumer before the paid portion of the subscription begins, with it being sufficient to make the disclosure at the time of the free trial offer rather than immediately before the paid portion begins.[10]

The statute also indicates what constitutes "clear and conspicuous" disclosures. Specifically, disclosures must be written "in a manner that clearly calls attention to the language," either by using a different type, font, or color than surrounding text; a larger font; or by setting the disclosure off with symbols or other marks. Audio disclosures must be sufficiently loud and in a cadence that is easy to understand.

Recently, there has been some important judicial guidance on what constitutes "affirmative consent" under the ARL. In both *eHarmony* and *Beachbody*, California courts have taken the position that affirmative consent under the ARL must be obtained through an "express act" by the consumer to consent to the terms of the automatic renewal contract.[11] This "express act" should be obtained through a mechanism such as a checkbox or signature, but it should not be part of a larger transaction such as a checkout button. Companies looking to ensure compliance with the ARL should therefore include a separate checkbox to consent to the terms of the automatic renewal contract.

### 3. The Recently Amended ARL.

Senate Bill 313 amended section 17602 of the California Business and Professional Code, adding new requirements to the original ARL. The new requirements increase consumer protections regarding automatic-renewal contracts that contain free trial and promotional pricing, and subscription agreements entered into online.

The amended statute requires new pre-purchase disclosures for offers that include a free trial or promotional discount. Specifically, an offer that includes a free trial must also contain a clear and conspicuous explanation of any change to the price or purchase agreement after the free gift or trial concludes.[12] In addition, affirmative consent must be obtained prior to charging the consumer a non-discounted or promotional price.[13] The legislative comments made by the assembly committee on privacy and consumer protection make it clear that a second standalone

[8] See California Business and Professions Code § 17602(a)(2).
[9] See California Business and Professions Code § 17602(a)(3).
[10] This is made clear from legislative history and the original version of SB-313, where the author explicitly included the requirement for a second standalone disclosure. This requirement was later stricken from the SB-313 and is no longer required under either the old ARL or the amended ARL.
[11] In the final judgment against Beachbody, the court held that "consent is obtained by an express act by the consumer through a check-box, signature, express consent button or other substantially similar mechanism that consumers must select to give their consent. This mechanism cannot relate to consent for anything other than the automatic renewal or continuous service terms." For more information, see *People of the State of California v. Beachbody LLC*, Case No. 55029222, Superior Court for the State of California, Los Angeles County (Aug. 24, 2017). Similarly, in the final judgment against eHarmony the court reiterated this position stating that "consent is obtained by an express act by the consumer through a check-box, signature, or other substantially similar mechanism that consumers must affirmatively select or sign to accept the AUTOMATIC RENEWAL OFFER TERMS and no other part of the transaction." For more information, see *People of the State of California v. eHarmony Inc.*, Case No. 17-cv-03314, in the Superior Court for the State of California, County of Santa Cruz (Jan. 8, 2018).
[12] See California Business and Professions Code Amended § 17602(a)(1) (contained within SB-313).
[13] See California Business and Professions Code Amended § 17602(a)(2) (contained within SB-313).

notice right before the end of the free trial offer or promotion is not required.[14] The original version of Senate Bill 313, which was modified before adoption, included requirements for a separate authorization and a mandatory second notice three to seven days prior to the auto-renewal pricing change.[15]

Businesses that allow consumers to enter into auto-renewal agreements online are now required to provide an exclusively online method of cancellation.[16] As a result, businesses may no longer allow consumers to enter into auto-renewal agreements online, but then only permit those same consumers to cancel the agreement by phone. At a minimum, the exclusive online cancelation method requires businesses to provide a formatted termination email that a consumer can send without adding information.

**4. California's ARL Compared to the Federal ROSCA.**

ROSCA regulates auto renewal contracts at the Federal level. Section 8403 imposes specific requirements on negative option features.[17] The FTC's Telemarketing Sales Rules defines a negative option feature as an offer or agreement where the customer's silence or failure to cancel is interpreted by the seller as acceptance.[18]

Although ROSCA does not specifically mention automatic renewals, in 2007 the FTC held a workshop on negative option marketing. The report summarizing the workshop provided four examples of negative option marketing: 1) pre-notification negative option plans; 2) continuity plans; 3) automatic renewals; and 4) free-to-pay or nominal fee-to-pay conversion offers.[19]

ROSCA's negative option provision requires business to: 1) clearly and conspicuously disclose the material terms of the transaction prior to obtaining billing information; 2) obtain the consumer's express consent before charging the consumer; and 3) provide simple mechanisms for a consumer to stop recurring charges. The workshop panelists provided guidance on what constitutes "clear and conspicuously" under ROSCA. They recommended that marketers: 1) place negative option disclosures in locations on their websites that are likely to be seen; 2) highlight the importance and relevance of the information by labeling disclosures or links to disclosures; and 3) format disclosures in fonts, colors, and against backgrounds to make the text easy to see and read onscreen. In addition, the panelists discouraged disclosures worded in "legal jargon" or labeled with headings such as "More Info."[20]

Since ROSCA came into effect, there has been some judicial guidance on what constitutes clear and conspicuous disclosure. In *FTC v. One Technologies, LP.*, the FTC alleged

[14] In the July 18, 2017 hearing on SB-313 by the Assembly Committee on Privacy and Consumer Protection, the author offered the following changes to "Strike the standalone notice: In recognition of the concerns raised with the imposition of a second standalone notice, the author proposes to delete the new standalone notice contained in 17602(a)(2) in its entirety." For more information see: "07/17/17- Assembly Privacy And Consumer Protection."
[15] See the original SB-313 here: "SB-313 Advertising: automatic renewal and continuous service offers."
[16] See California Business and Professions Code Amended § 17602(c) (contained within SB-313).
[17] See Restore Online Shoppers' Confidence Act, 15 U.S.C. § 8403 (2010).
[18] See FTC's Telemarketing Sales Rules, 16 U.S.C. §310.2(w) (2010). See full text here: "§310.2 Definitions."
[19] See the full text of the report here: "Negative Options, A Report by the Staff of the FTC's Division of Enforcement," posted by Federal Trade Commission (2009).
[20] *Id*.

that the terms of a negative option offer, including a recurring monthly charge, were not adequately disclosed even though they were presented on several pages of the website: at the top of the home page ("Free 7 Day Trial when you order your 3 Free Credit Scores. Membership is then just $24.95 per month until you call to cancel."); on an inside page, via a link to "Offer Details" which the consumer agreed to by clicking to continue the enrollment process; and on the signup page in an "Offer Details" box adjacent to the credit card fields.[21] The court issued a stipulated order in which they stated that disclosures made through any interactive electronic medium must be unavoidable and above the order button. The company's disclosures were considered not conspicuous enough to be unavoidable, and the company settled the case for $22 million.

Hyperlinks to disclosures within online terms of service or disclosures "below the fold" (requiring the user to scroll down) are also unlikely to satisfy the unavoidability standard. In *FTC vs. JDI Dating, Limited*, the FTC alleged that JDI failed to meet the clearly and conspicuous standard when the required disclosures could only be accessed by clicking a hyperlink to a terms and conditions page.[22] In the stipulated injunction against JDI the court again reiterated that the disclosures had to be unavoidable.

Similar to the court decisions in California, a recent ROSCA decision appears to require a separate checkbox to obtain affirmative consumer consent. In *FTC v. AdoreMe*, the court held that for written offers affirmative consumer consent should be obtained through a checkbox, signature or similar methods which consent to only the negative option feature and no other portion of the offer.[23] Companies should, therefore, include a separate checkbox to comply with both ROSCA and California's ARL.

Although ROSCA came into effect after California's original ARL statute, ROSCA is not as stringent as the ARL. ROSCA contains many of the same essential requirements as the ARL, but ROSCA lacks the original ARL's acknowledgment requirements and the required disclosures for free trials. While there has not been a similar level of judicial guidance on whether disclosures made "below the fold" or in hyperlinks are acceptable in California, given the policy objectives of the ARL clear and conspicuous disclosures requirement, it is likely that these kinds of disclosures would also be insufficient under the ARL. Also, ROSCA does not contain provisions included in the newly amended sections of the ARL regarding additional free trial, promotional discount disclosure, and online cancellation. Moreover, California sets a higher standard for a disclosure to be considered "clear and conspicuous," requiring text with type that contrasts with surrounding text. Hence, companies that already comply with ROSCA most likely need to take additional measures to comply with California's ARL.

[21] See *Federal Trade Commission, et al. v. One Technologies, et al.*, Case No. 3:14-cv-05066, in the U.S. District Court for the Northern District of California (Nov. 21, 2014).
[22] See *Federal Trade Commission, v. JDI Dating, Limited*, Case No. 1:14-cv-08400, in the U.S. District Court for the Northern District of Illinois (Oct. 30, 2014).
[23] See *Federal Trade Commission, v. AdoreME, Inc.*, Case No: 1:17-cv-09083, in the U.S District Court for the Southern District of New York (Nov. 30, 2017).

## 5. **Surge of Litigation**.

ARL's update comes at a time when class action litigation under the statute is growing. Many prominent technology firms have faced litigation, including Spotify,[24] Google,[25] Apple,[26] Yahoo,[27] Hulu[28] and Blizzard.[29]

Although courts have held that the statute only applies to California consumers, any Californian consumer who enters into an auto-renewal or subscription agreement may bring an action under the ARL. Therefore, companies that offer their goods or services on an automatic renewal basis in California should comply with the ARL.

One of the most common allegation in ARL-based complaints is that a business failed to provide automatic renewal or continuous service terms in a clear and conspicuous manner. Other frequent 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. Exposure under the ARL can be quite substantial, with settlements in the tens of millions of dollars.[30]

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[24] Spotify has faced two class action lawsuits under California's Auto-Renewal Law. In the first suit, plaintiffs alleged that Spotify failed to provide a hyperlink to required terms when checking out with the Premium Plan, and didn't provide any terms when checking out with the unlimited Plan. The lawsuit was dismissed to arbitration. For more information see *Melissa Bleak v. Spotify USA Inc.*, Case No. CGC-13-535309, in the Superior Court of the State of California, County of San Francisco (Apr. 25, 2014). In the second case, the plaintiffs allege that the webpages on which Consumers subscribed did not clearly and conspicuously reflect required terms, and the terms were not in visual proximity to the request for consent. Specifically, plaintiffs allege that Spotify sought to minimize the visual presence of the terms through the use of small font, and shaded coloration on pages already containing multiple more prominent colors. In this case, a federal judge denied Spotify's motion to force arbitration, ruling that many of the "substantively unconscionable provisions" that form part of the arbitration provision could not be severed from the agreement, rendering it unenforceable. This case is still ongoing. For more information see *Gregory Ingalls and Tony Hong v. Spotify USA Inc.*, Case No. 4:16-cv-3533 (Filed June 23, 2016).

[25] Class action lawsuit where plaintiffs alleged that Google's provided terms did not meet the clear and conspicuous standard. Specifically, plaintiffs alleged that not all necessary disclosures were made, and the disclosures that were made were either contained within a hyperlink to a 30 page Terms of Service document or in a smaller font than the rest of the webpage. This case was dismissed because the court found that the ARL does not give rise to a private right of action. For more information see *Mayron v. Google*, No. 1-15-CV-275940, 2016 WL 1059373 (Cal. Super. Ct. Feb. 26, 2016).

[26] Class action lawsuit where plaintiffs alleged that Apple's provided terms did not meet the clear and conspicuous standard. Specifically, the plaintiffs alleged that Apple's legal agreements did not disclosure required terms as it did not include that the subscription would continue until canceled, and did not state the amount of the charges. Additionally, plaintiffs allege that the disclosures that were made were on page 12 of a 16 page legal agreement which was presented at the time of account creation not checkout, and were not bolded. This case is still ongoing. For more information see *Siciliano et al. v. Apple, Inc,*. Case No. 1-13-cv-257676 (Cal. Sup. Ct. Santa Clara Cty.) (Filed June 15, 2016).

[27] Class action lawsuit where plaintiffs alleged that Yahoo failed to present the terms in a clear and conspicuous manner, and failed to obtain affirmative consumer consent. Specifically, plaintiffs allege that the disclosures were not in visual to proximity to acceptance, and not anywhere on the page where consumers completed the registration. Additionally, the disclosures that were buried in a lengthy Terms of Service agreement were not bolded or presented in a manner that called attention to them. This case was dismissed because the plaintiff was not a California consumer. For more information see *Wahl v. Yahoo! Inc.*, Case No. 17-cv-02745-BLF (CA N.D. Court) (Sept. 15, 2017).

[28] Class action lawsuit where plaintiffs alleged that Hulu did not present the terms in a clear and conspicuous manner. Additionally, plaintiffs alleged that the terms were not in visual proximity to the point of acceptance, and failed to obtain affirmative consumer consent. Specifically, plaintiffs alleged that the disclosures that Hulu did make were hidden in a "vague and ambiguous document" available via a small hyperlink at the bottom of the hulu.com webpage. This case was dismissed to arbitration. For more information see *Kruger v.Hulu,*, L.L.C., L.A. Super. Ct. Case No. BC540053 (Aug. 8, 2015).

[29] Class action lawsuit where plaintiffs alleged Blizzard did not present the terms in a clear and conspicuous manner. Additionally, plaintiff alleged that Blizzard failed to obtain affirmative consumer consent. This case was dismissed and the dismissal is currently sealed. For more information see *Abrego v. Blizzard Entertainment, Inc.*, Case No. 3:15-cv-00230, (CA Southern District Court) (Aug. 4, 2015).

[30] Class action against LifeLock, where plaintiffs alleged that Lifelock did not present any of the required terms on the checkout page. Additionally, plaintiffs alleged that Lifelock did not obtain affirmative consent. The case ended in a $2.5 million class action settlement. See *Etan Goldman v. LifeLock Inc.*, Case No. 1-15-cv-276235, in the Superior Court of the State of California, County of Santa Clara (Feb. 5, 2016).]Another class action settlement was against McAfee. Plaintiffs alleged McAfee made pricing misrepresentations in their auto-renewal contract. Additionally, plaintiffs alleged that McAfee has failed to provide clear and conspicuous notice of this material change in the pricing of the auto-renewal contract in violation of the ARL. The case ended in settlement for $11.50 per class member, where the class size was between 7.53 and 8.85 million members. See *Williamson v. Mcafee*, Inc., No. 5:14-cv-00158-EJD, 2016 WL 4524307, at *6 (N.D. Cal. Aug. 30, 2016).

## 6. Arbitration Clause Might Not Help

While decisions in cases against Spotify and Hulu have shown that arbitration clauses may be a successful in dismissing ARL class actions to arbitration, under a recent California Supreme Court decision arbitration clauses may no longer help. Generally, arbitration clauses are enforceable for online contracts, but the legal climate in California on the enforceability of consumer arbitration agreements is complex. The state has a history of finding California "public policy" to preclude the enforcement of arbitration agreements under the Federal Arbitration Act ("FAA"),[31] which seems to run counter the Supreme Court's stance in *ATT Mobility v. Conception* and *American Express Co v. Italian Colors*.[32] And the California Supreme Court's recent decision in *McGill v. Citibank* complicates matters further. In *McGill*, the court held that arbitration provisions that waive a plaintiff's right to public injunctive relief under consumer protection statutes are unenforceable as a matter of public policy.[33]

This latter decision is particularly important to ARL cases since the ARL does not create a private cause of action, and thus most complaints are brought under California's unfair competition law and other consumer protection statutes. Thus, post *McGill*, ARL plaintiffs are likely to include public injunctive relief claims to avoid arbitration. Companies should therefore utilize an arbitration clause, but know they may be severely limited in preventing ARL litigation post *McGill*.

## 7. A Compliance Checklist.

| Requirement | Issues | Citation |
|---|---|---|
| **1. Disclose** | ☐ that the subscription will continue until the consumer cancels;<br>☐ the cancellation policy;<br>☐ the amount of the recurring charges;<br>☐ the length of the automatic renewal term or that the service is continuous until cancelled;<br>☐ the minimum purchase obligation, if any; and<br>☐ in the case of a free gift or trial, an explanation of the price that will be charged upon conclusion of the trial | California BPC § 17601(b) & § 17602(a) |

[31] See *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal.4th 348, 359 (2014). (which held, among other things, that an employer's arbitration agreement cannot require employees to waive representative claims under California's Private Attorneys General Act of 2004 ("PAGA"), Cal. Labor Code §§ 2698–2699.5 (2004), as a condition of employment.) See *Cruz v. PacifiCare Health Systems, Inc.* (2003) 30 Cal.4th 303, 315-316 (*Cruz*); See *Broughton v. Cigna Healthplans* (1999) 21 Cal.4th 1066, 1077 (*Broughton*).

[32] In *AT&T Mobility v. Concepcion*, the Supreme Court held that California state contract law, which deems class-action waivers in arbitration agreements unenforceable when certain criteria are met, is preempted by the Federal Arbitration Act. For more information, see: *AT&T Mobility v. Concepcion*, 563 U.S. 333 (2011). In *Italian Colors* case, the Supreme Court rejected state "public policy" as any kind of exception to the sweeping preemption of the Federal Arbitration Act ("FAA"). For more information see: *American Express Co. v. Italian Colors Restaurant*, 559 U. S. 1103 (2010).

[33] To comply with *McGill* Arbitration clauses contained in a Terms of service should at least contain a severability clause. For more information see *McGill v. Citibank*, 2 Cal.5th 945, 2017 Cal. LEXIS 2551. (2017).

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| **2. Proximity** | ▫ place the terms in close proximity to the point of acceptance (e.g., the separate checkbox in an online form, or right before asking a consumer to agree to the transaction over the phone)<br>▫ do not place the terms "below the fold" or in hyperlinks | California BPC § 17602(a) |
| **3. Affirmative Consent** | For written offers include a mechanism to accept the terms of the automatic renewal offer that is not part of the larger transaction. This can be:<br>▫ a separate checkbox<br>▫ signature<br>▫ or similar mechanism | See *People of the State of California v. Beachbody LLC*<br><br>See *Federal Trade Commission, v. AdoreME* |
| **4. Clear and Conspicuous** | Ensure the written terms are clear and conspicuous by using:<br>▫ a larger font than the surrounding text; or<br>▫ a type, font, or color that contrasts with the surrounding text; or<br>▫ symbols or other marks that set off the disclosure.<br><br>Ensure that audio disclosures are clear and conspicuous by:<br>▫ recording audio disclosures in a volume and cadence that is easily heard and understood | California BPC § 17601(c) |
| **5. Acknowledgment** | Provide the consumer with a retainable acknowledgment that includes:<br>▫ the terms of the subscription offer;<br>▫ the cancellation policy;<br>▫ a cost-effective, timely, easy-to-use mechanism for cancellation (e.g., a cancellation button on the website, toll free phone number, or email address) and instructions on how to cancel.<br>▫ an explanation detailing how the consumer can cancel a free trial prior to being charged for the goods or services. | California BPC § 17603(a) & § 17603(b) |

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| **6. Online Offer** | If offering an online renewal service, include an exclusively online method of cancelation, e.g., by means of:<br>▫ a button on an account page of the company website that allows users to cancel the agreement<br>▫ or at a minimum, a termination email formatted and provided by the business that a consumer can return without adding information. | California BPC § 17602(c) |