

# Automatic Renewal State Laws

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**A Practice Note on state automatic renewal laws focusing on consumer subscription services and negative option offers. This Note discusses overall differences between federal and state regulation and distinctions in how states regulate automatic renewals (extensively, generally, or narrowly). It also provides certain compliance best practices and discusses litigation and settlements involving automatic renewal laws, with a focus on California because it is the state in which automatic renewal laws have been most heavily litigated.**

Automatically renewing contracts have benefits for both sellers and consumers:

- Sellers can stock inventory more efficiently and predict future revenue because they can ship products and deliver services on a predetermined schedule.
- Consumers can receive uninterrupted service and may bypass re-submitting purchase information.

(See Negative Options: A Report by the Staff of the FTC's Division of Enforcement, 2009 WL 356592, at \*7.)

Despite these benefits, regulators have noticed the potential harm automatically renewing contracts may pose to consumers. Several states historically regulated automatic renewals, but those laws typically focused on a particular product or service, such as home alarm products, health club memberships, or home repair services. Now many states have broadened the reach of their automatic renewal laws beyond specific contract types to consumer contracts more generally.

Before the recent rise in broader automatic renewal laws, state and federal regulation in this area was focused on protecting consumers from unknowingly entering into subscription agreements that

automatically renew via a “negative option.” The term “negative option” broadly refers to a category of offers in which sellers interpret a customer’s silence or failure to take an affirmative action (such as rejecting an offer or canceling a subscription agreement) as assent to be charged for goods or services.

The Federal Trade Commission (FTC) has been regulating sellers who capitalize on consumers’ silence for decades. For example:

- In 1974, the FTC promulgated the “Negative Option Rule,” which applies only to a pre-notification negative option plan, defined as a contractual plan or arrangement where a seller periodically sends to subscribers an announcement which identifies merchandise it proposes to send to subscribers and the subscribers are thereafter billed for the merchandise, unless the subscribers tell the seller that they do not want to receive the merchandise (16 C.F.R. § 425.1(c)(1)). It requires sellers to clearly and conspicuously disclose the terms of an offer before consumers could subscribe to purchasing goods (16 C.F.R. § 425.1).
- The Telemarketing Sales Rule, enacted by the FTC in 1995, applies to all forms of negative option marketing that occurs over the telephone (16 C.F.R. §§ 310.1 to 310.9).

The more recent state regulation in this area, however, focuses on the disclosures made to a consumer when he or she chooses to sign up for an ongoing service or subscription – in contrast to a traditional “negative option,” which is triggered by the consumer doing nothing. The states generally refer to their laws in this area as “automatic renewal laws,” using automatic renewals in the broadest sense. This contrasts with the FTC’s continued use of the older term “negative option” (see FTC Blog: Acc-cen-tuate the negative?, but also see below regarding potential updates to the FTC’s definition). This Note focuses on these newer and more broadly applicable automatic renewal states. Certain types of very narrowly-focused state automatic renewal laws, such as those dealing with leases of personal or business property, are briefly referenced but are generally beyond the scope of this Note.

All of the state automatic renewal laws discussed in this Note set out:

- What must be disclosed to the consumer.
- At what point in the transaction the information must be disclosed.

The more comprehensive state regulations also frequently require:

- Specific formatting requirements for disclosures.
- Express consumer consent to the automatic renewal terms.
- A written acknowledgment of the terms to be later transmitted to the consumer.

Sellers need to stay apprised of and understand these changing laws because the penalties for failing to comply can be severe, including:

- Rendering the subscription contract null and void.
- Deeming any product provided under such a contract a gift.
- Establishing a violation of a state's more general consumer protection laws.

This Note:

- Gives a brief overview of federal and state regulation of automatic renewals.
- Outlines the various types of state laws regulating automatic renewals in the US, which can be:
  - extensive;
  - general; or
  - narrow.
- Discusses best practices for companies wanting to implement automatic renewal provisions in consumer contracts.
- Highlights litigation and settlements involving automatic renewal laws, including a discussion of the "good faith exception" that is part of the law in a number of states.

For a companion Chart listing all state automatic renewal laws, including the District of Columbia, see Practice Note, Automatic Renewal State Laws Charts: Overview ([W-020-5738](#)).

## REGULATORY AND LEGAL FRAMEWORK

Both the federal government and individual states, as well as the District of Columbia (DC), have passed legislation governing how sellers must structure automatic renewals and similar negative option offers.

These types of offers can be made in several different ways:

- **Pre-notification negative option plans.** Under these plans, such as the book or music clubs that became popular in the 1980s, sellers send periodic notices offering goods. If consumers take no action, sellers send the goods and charge consumers.
- **Continuity plans.** For these plans, consumers agree in advance to receive periodic shipments of goods or provision of services, for which they are charged at regular intervals and which they continue to receive until they cancel the contract.
- **Automatic renewals.** With these plans, a company may automatically renew a consumer's subscription when it expires and charge for it unless the consumer affirmatively cancels the subscription.
- **Free-to-pay or nominal-fee-to-pay trial offer conversions.** In these plans, consumers receive goods or services for free (or at a nominal fee) for a trial period. After the trial period, sellers automatically begin charging a fee (or higher fee) unless consumers affirmatively cancel.

## FEDERAL REGULATIONS

On the federal level, companies should think about both:

- The Negative Option Rule promulgated by the FTC (16 C.F.R. § 425.1).
- The Restore Online Shoppers' Confidence Act (ROSCA) (15 U.S.C. §§ 8401 to 8405).

Guidelines published in January 2009 by FTC staff members offer recommendations for the industry in complying with Section 5 of the Federal Trade Commission Act (FTC Act) when making online negative option offers (see Negative Options: A Report by the Staff of the FTC'S Division of Enforcement, 2009 WL 356592, at \*24-26). The guidelines include the following five key principles to maximize a seller's likelihood of compliance:

- **Disclose the offer's material terms in a manner that is understandable to the consumer.** This must include the existence of the offer, the offer's total cost, whether the consumer's billing information will be transferred to a third party, and how to cancel the offer. Sellers should avoid making disclosures that are vague, unnecessarily long, or contain contradictory language.
- **Clearly and conspicuously display the disclosures.** The disclosures must be in locations where they are likely to be seen, and the disclosures, and any links to them, must be labeled with language indicating the importance and relevance of the information. The text should be easy to read whether in print or online.
- **Disclose the offer's material terms before consumers pay or incur a financial obligation.** Any disclosures should occur **before** a consumer agrees to an offer online by clicking a "submit" or "purchase" button.
- **Obtain consumers' affirmative consent to the offer.** Consent requires that consumers take an affirmative step to demonstrate consent to an online automatic renewal offer. A pre-checked box should not be relied on as evidence of consent.
- **Do not impede the effective operation of promised cancellation procedures.** Sellers should not engage in practices that make cancellation burdensome for consumers, such as requiring consumers to wait on hold for an unreasonably long period of time.

In late 2019, the FTC took public comment on potentially amending the Negative Option Rule (see Rule Concerning the Use of Prenotification Negative Option Plans). The FTC is considering using its rulemaking authority under the FTC Act to expand the scope and coverage of the existing Negative Option Rule.

In December 2010, Congress passed ROSCA, which imposes specific requirements on online negative option plans and automatic renewals. ROSCA expressly prohibits a seller from charging or attempting to charge a consumer for goods or services over the internet through a negative option or other recurring contract unless the seller:

- Clearly and conspicuously discloses the material terms of the transaction before obtaining the consumer's billing information.
  - Obtains the consumer's "express informed consent" before charging the consumer.
  - Provides "simple mechanisms for a consumer to stop recurring charges" from occurring.
- (15 U.S.C. §§ 8401 to 8405.)

A violation of ROSCA is considered an unfair or deceptive act or practice under section 18 of the FTC Act, which subjects sellers to penalties. State attorneys general may bring an action against a seller alleging a ROSCA violation. (15 U.S.C. §§ 8401 to 8405.)

The FTC has issued its own challenges against sellers for alleged violations. For example:

- In 2014, the FTC issued its first challenge against a seller in *FTC v. Health Formulas, LLC*, and the defendants ultimately agreed to stop certain business practices related to “free trials,” and return more than \$9.8 million to consumers (see 2017 WL 11231042 (D. Nev. Feb. 22, 2017); see also FTC Press Release).
- In February 2019, the FTC filed a complaint against a Puerto Rico-based defendant and the eight companies he owns and operates for multiple violations of ROSCA, including the defendant’s failure to disclose that consumers would be automatically charged for products unless they canceled (see FTC Press Release).
- In April 2019, the FTC reached a settlement with a company who offered a “free” trial of its snack boxes on its website for a nominal shipping and handling fee. The company, however, did not adequately disclose key terms of the offer, including that they would charge consumers the total amount owed for six months of shipments if they did not cancel in time. (See FTC Settlement Press Release; see also FTC Refund Check Press Release.)
- In May 2019, the FTC settled with a group of companies who were alleged to have operated a worldwide negative option “scam” in which various products were marketed and sold online via a “RISK FREE” trial. Customers who purchased the products ended up being charged a significantly higher amount than they had been told, and they were also enrolled in additional negative option plans. The companies had to turn over more than \$9 million in assets and were required to comply with all applicable disclosure laws, including ROSCA. (See FTC Settlement Press Release.)

For more information on these federal regulations, see Practice Note, *Positive Practices for Negative Option Features: Negative Option Rule* ([W-013-3440](#)) and *Restore Online Shoppers’ Confidence Act* ([W-013-3440](#)).

## STATE REGULATIONS

States have passed automatic renewal laws that cover all types of negative option programs, some of which go beyond the types of plans the FTC regulates. As used at the state level, automatic renewal is often used in the broadest sense of the term and not in the narrow sense as used by the FTC to describe a specific form of negative option plans. Where federal and state regulation overlap, the federal standards set the minimum bar for compliance but states can impose stricter laws. For example, California has adopted some of the broadest and strictest requirements under its automatic renewal law, and a few other jurisdictions have followed suit. Other states have also decided to regulate automatic renewal contracts, but with different or less extensive compliance regimes.

Although ROSCA gives state attorneys general a cause of action under the FTC Act, states may also bring actions under their own consumer protection laws. In fact, several states similarly consider violations of their automatic renewal laws to be per se violations of their unfair and deceptive acts or practices laws, including Hawaii,

Illinois, Nevada, New Hampshire, New Mexico, North Dakota, Vermont, and Virginia (see *Automatic Renewal State Laws Charts: Overview* ([W-020-5738](#))).

The laws across states differ significantly in how they regulate automatically renewing contracts. Broadly speaking, states typically either:

- Extensively or generally regulate virtually **all** consumer contracts containing automatic renewal provisions (see *States with Extensive Automatic Renewal Laws* and *States with General Automatic Renewal Laws*).
- Only regulate certain **narrow** categories of automatic renewal contracts, for example, dance studio, home alarm, or health club contracts (see *States with Narrow Automatic Renewal Laws*). This narrow category also includes state automatic renewal laws that are outside the scope of the FTC negative option plans and this Note (for example, any state law dealing with automatic renewals of property leases, examples of which include Ark. Code Ann. § 4-86-109 and R.I. Gen. Laws § 6-13-14).

For more information about individual state laws, see Practice Note, *Automatic Renewal State Laws Charts: Overview* ([W-020-5738](#)).

While many states and the District of Columbia have passed legislation concerning automatic renewals relating to consumer subscription services and negative option offers, a number of states have not (as of July 2020), including: Alabama, Alaska, Arizona, Delaware, Idaho, Indiana, Iowa, Kansas, Kentucky, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Jersey, Ohio, Oklahoma, Pennsylvania, Rhode Island, Texas, Washington, West Virginia, and Wyoming.

However, many of these states with either no laws or narrow laws have initiated bills to join the growing number of states that regulate automatic renewals more extensively. For example:

- Alabama’s HB 296, currently in committee as of June 2020, would enact an automatic renewal compliance regime that is akin to California’s.
- The West Virginia State Senate passed a similar bill, SB 253, in 2019, but the bill did not make it past the State House.
- The New Jersey State Assembly, as of June 2020, is considering a bill (AB 2462) that would supplement P.L. 1960, c. 39, and require disclosure of the automatic renewal program terms, although not affirmative consumer consent to the terms.

In addition, some states have increased their enforcement efforts (for example, California has been particularly active in this area; see *Litigation and Settlements* and Practice Note, *Positive Practices for Negative Option Features: State Enforcement* ([W-013-3440](#))).

In addition, certain state attorneys general have joined together to prosecute sellers for violations (see *Litigation and Settlements*).

A few states have passed laws that impact automatic renewal provisions in business-to-business contracts (see, for example, Wis. Stat. § 134.49, regarding the enforceability of these provisions). Other states have statutory restrictions around automatic renewals of real property leases, which are generally beyond the scope of this Note.

Therefore, states' automatic renewal laws generally fall into three categories:

- **Disclosure with extensive requirements.** These automatic renewal laws generally apply to all consumer contracts and have extensive compliance requirements regarding clear and conspicuous disclosure, consent, and confirmation (see States with Extensive Automatic Renewal Laws).
- **Disclosure with some additional, general requirements.** These automatic renewal laws generally apply to all consumer contracts and require clear and conspicuous disclosure of automatic renewal terms. However:
  - some states just require clear and conspicuous disclosure (for example, Louisiana); and
  - other states (for example, Connecticut, Illinois, Maine, and Hawaii) require both clear and conspicuous disclosure and notification to the customer of the automatic renewal within a certain period of time before the first automatic renewal occurs. Hawaii defines "clear and conspicuous," but Connecticut, Illinois, and Maine do not. Sellers in Connecticut, Illinois, Maine, and other states that require but do not define "clear and conspicuous" disclosures should look to the guidance the FTC guidance on clear and conspicuous disclosures (see Practice Note, Advertising: Overview: Clear and Conspicuous Disclosures ([2-501-2799](#))). Sellers may also look to the laws of those states that do define "clear and conspicuous," such as California and Hawaii, for suggestive (but not binding) guidance.

(See States with General Automatic Renewal Laws.)

- **Disclosure with additional requirements, but applicable only to certain contracts.** These automatic renewal laws impose similar requirements to those in the extensively regulating states, but only apply to specific types of contracts such as dance studios, gym memberships and alarm systems (see States with Narrow Automatic Renewal Laws). Of these states, only New Hampshire, New Mexico, and South Carolina define "clear and conspicuous."

For more information on all state automatic renewal laws, see Practice Note, Automatic Renewal State Laws Charts: Overview ([W-020-5738](#)).

## STATES WITH EXTENSIVE AUTOMATIC RENEWAL LAWS

There are six jurisdictions that impose extensive requirements on sellers who offer automatically renewing contracts to consumers:

- California (see California).
- North Dakota (see North Dakota).
- Oregon (see Oregon).
- Vermont (see Vermont).
- Virginia (see Virginia).
- Washington, DC (see District of Columbia).

California's law was the first to come into effect, in December 2010, and sets out detailed requirements on:

- Presenting the offer to the consumer.
- Obtaining the consumer's affirmative consent to the offer.
- Sending a subsequent acknowledgment of the automatic renewal terms to the consumer that clearly states the cancellation terms.

- Providing, through its most recent update, that a consumer who signs up online must be able to cancel online, as well as additional requirements for free trials.

North Dakota, the District of Columbia (DC), Oregon, Vermont, and Virginia have laws that were modeled after the California law, but have slight nuances or differences. While it is important to understand each of these laws, following the best practices under California law generally reflects the best practice overall for companies operating nationwide because it typically incorporates the toughest standards for automatic renewal. One item California does not address, however, which certain other states do, is the length of the automatic renewal term. For example:

- North Dakota's law limits any renewal period to 12 months or less (see North Dakota).
- DC's law only applies to contracts that renew for a period of one month or more (see District of Columbia).

## CALIFORNIA

California's automatic renewal law broadly covers "any plans or arrangements in which a paid subscription or purchasing contract is automatically renewed at the end of a definite term for a subsequent term" (Cal. Bus. & Prof. Code § 17601(a)). The intent of the law was to end the practice of ongoing charges to consumer credit or debit cards or other payment accounts for ongoing product shipments or services without the explicit consent of the consumer (Cal. Bus. & Prof. Code § 17600.)

Some specific types of contracts are exempt from the law, such as alarm company operators and franchise arrangements (Cal. Bus. & Prof. Code § 17605). The statute applies to automatic renewals related to products and services, and it includes free trials as well.

A business making an offer to a consumer in California containing an automatic renewal must meet specific requirements relating to:

- The content of the terms (see Content of Terms).
- The presentation of the terms (see Display of Terms).
- The consent of the consumer to the offer (see Affirmative Consent to Offer).
- The acknowledgments provided to the consumer (see Consumer Acknowledgment).
- The cancellation of the subscription or trial (see Cancellation Method).
- The notice necessary to convey a material change to the automatic renewal terms (see Notice of Material Change).
- The disclosure that any free gift or trial will convert to a paid subscription, if applicable (see Offer with Free Gift or Trial Period and Conversion to Paid Subscription).

For more information on California's automatic renewal laws, see Practice Note, Automatic Renewal State Laws Charts: Overview: California ([W-020-5738](#)).

### Content of Terms

California's statute requires the following to be disclosed clearly and conspicuously before the consumer's acceptance of the offer:

- That the subscription or purchasing agreement will continue until the consumer cancels.

- The cancellation policy that applies to the offer.
- The recurring charges that will be charged to the consumer's credit or debit card or payment account with a third party as part of the automatic renewal plan, and that the amount of the charge may change, if that is the case, and the amount to which the charge will change, if known.
- The length of the automatic renewal term or that the service is continuous, unless the length of the term is chosen by the consumer.
- The minimum purchase obligation, if any.

(Cal. Bus. & Prof. Code § 17601(b)(1)-(5); see *Hall v. Time, Inc.*, 2020 WL 2303088, at \*4 (C.D. Cal. Mar. 13, 2020) (finding defendant's disclosures provided the required terms).)

### Display of Terms

The California statute requires any automatic renewal contract, plan, or subscription to clearly and conspicuously present the above terms before the purchase is made.

Specifically, the automatic renewal offer terms must be presented to the consumer both:

- **Before** the purchasing contract is fulfilled, and in "visual proximity" (or in the case of an offer conveyed by voice, in temporal proximity), to the request for consent to the offer (Cal. Bus. & Prof. Code § 17602(a)(1)).
- **Clearly and conspicuously**, defined by the statute as one or more of the following:
  - in larger type than the surrounding text;
  - in contrasting type, font, or color to the surrounding text of the same size; or
  - set off from the surrounding text of the same size by symbols or other marks in a manner that clearly calls attention to the language.

(Cal. Bus. & Prof. Code § 17602(a)(1); see *Hall*, 2020 WL 2303088, at \*3 (finding defendant's disclosures clear and conspicuous).)

Best practices include the following separately or in combination with one another:

- Using bold, highlighted, all-capitalized, or different-colored text for the automatic renewal terms.
- Putting a heavy-line box around the terms.
- The terms should notify the consumer that unless the consumer cancels before the next billing period, the contract will automatically renew:
  - for the specified time period; and
  - at the specified price.
- On a webpage, the automatic renewal terms should appear next to or immediately above the button that the consumer clicks to complete the purchase (for example, the "submit order" button). The terms should not appear below the purchase button or via a link.

### Offer with Free Gift or Trial Period and Conversion to Paid Subscription

The California statute requires any automatic renewal plan with a free gift or trial period to clearly and conspicuously disclose the

price that will be charged after the trial ends or the way in which the subscription will change after the trial. (Cal. Bus. & Prof. Code § 17602(a)(1).)

For free gifts or trials, sellers should also follow the best practices described in Display of Terms.

### Affirmative Consent to Offer

Under the California statute, a business must ensure that it obtains the consumer's affirmative consent to the contract containing the automatic renewal offer terms (Cal. Bus. & Prof. Code § 17602(a)(1)).

A best practice includes adding an "I agree" check box (not pre-checked) next to the specific automatic renewal terms on a seller's order page, in addition to (and separate from) the seller's Terms and Conditions and any check box for those Terms and Conditions.

### Consumer Acknowledgment

The California statute requires a business to send an acknowledgment to the consumer covering specific items. A business must provide the consumer a retainable acknowledgment of:

- The automatic renewal offer's terms.
- The cancellation policy.
- The information about how to cancel.

(Cal. Bus. & Prof. Code § 17602(a)(3).)

If the offer includes a free trial, the acknowledgment must disclose how the consumer can cancel the automatic renewal before the consumer is charged for the good or service (Cal. Bus. & Prof. Code § 17602(a)(3)).

Best practices include:

- Sending an email with the required information after the initial order is completed.
- In addition to or in lieu of a confirmation email, including a hard-copy notice with the same information in the first shipment, if the contract is for a product.
- For an automatic renewal following a free trial period, sending the consumer an email that arrives at least 7-10 days before the commencement of the automatic renewal contract and the first charge to the consumer's payment account.

### Cancellation Method

The business must provide and disclose an easy cancellation method that is cost-effective, timely, and easy-to-use, such as one of the following:

- A toll-free telephone number.
- An email address.
- A postal address, if the business directly bills the consumer.

(Cal. Bus. & Prof. Code § 17602(b).)

It is important to note that California's law was updated in 2018 to **require** businesses to allow consumers to terminate the offer exclusively online if the offer was accepted online. The statute specifically states that this may "include a termination email formatted and provided by the business that the consumer can

send to the business without additional information” (Cal. Bus. & Prof. Code § 17602(c)).

A best practice for compliance with this provision would be to include a sentence in the automatic renewal terms that states, “You may cancel at any time by contacting [SELLER] at [PHONE NUMBER], [MAILING ADDRESS], or [EMAIL OR SPECIFIC WEBSITE ADDRESS FOR CANCELLATION].” The latter option must be included if the automatic renewal program was entered into online.

### Notice of Material Change

Under the California statute, before implementing any material change to the automatic renewal terms that were accepted by the consumer, the business must provide the consumer with both:

- Clear and conspicuous notice of the change.
- Information regarding how to cancel, in a form that is retainable by the consumer.

(Cal. Bus. & Prof. Code § 17602(d).)

A best practice would include sending all consumers participating in automatic renewal programs a notice via email or as a highlighted posting on the business’s website in which the change in the automatic renewal terms is featured prominently and set apart in some manner from the rest of the notice (for example, bold text, colored text, boxed, or all caps).

### Penalties

The penalties for violating California’s statute are particularly consumer friendly. For example, consumers may:

- Demand restitution of all funds paid for the product or service, including shipping (because a violation results in the good or service being deemed “an unconditional gift”).
- Pursue “all available civil remedies” under state law that may apply, including injunctive relief and relief via California’s consumer protection laws.

(Cal. Bus. & Prof. Code § 17604; see also *Litigation and Settlements*.)

It is important to note that a number of California courts have held that a lawsuit alleging violations of the automatic renewal law must be brought in conjunction with another California statute, based on a determination that California’s automatic renewal law does not provide a private right of action (see *Litigation and Settlements*).

The statute also contains an exception allowing the business to avoid liability if it can demonstrate that it complied with the law in good faith, although the nuances of this defense have yet to be meaningfully litigated (see *Good Faith Exception*).

### DISTRICT OF COLUMBIA

In 2019, DC enacted the Automatic Renewal Protections Act (ARPA) (D.C. Code §§ 28A-201 to 28A-221). The ARPA is similar to state laws requiring a business to notify its consumers of the automatic renewal within a certain period of time before the first automatic renewal occurs, but it also shares some similarities with the California law. The ARPA applies only to contracts of a certain length (12 months) that automatically renew for a term of one month or more (D.C. Code § 28A-203(a), (b)). A business making an offer to a consumer for these automatically renewing contracts must:

- Notify the consumer of the first automatic renewal (and annually thereafter) by:
  - first class mail;
  - email; or
  - another easily accessible form of communication, such as text message or a mobile phone application (if the consumer specifically authorizes the person to provide notice in that form).
- Send the notice to the consumer between 30 and 60 days before the cancellation deadline, and it must clearly and conspicuously disclose:
  - that the contract will automatically renew unless the consumer cancels;
  - the cost of the goods or services for the term of the renewal;
  - the deadline by which the consumer must cancel the contract to prevent the contract from automatically renewing;
  - the methods by which the consumer may obtain details of the automatic renewal provision and cancellation procedures (including by contacting the business at a specified telephone number, email address or by another easily accessible form of communication); and
  - if the automatic renewal offer includes a free gift or trial, the price that will be charged after the trial ends or the manner in which the price will change following the trial.

(D.C. Code § 28A-203.)

If a business offers a free trial of a good or service lasting a month or more, merely notifying the consumer of the consumer’s ability to cancel before being charged is not enough. ARPA differs from other state laws, including California, because a business must both:

- Notify the consumer of the automatic renewal at least 15 and no more than 30 days before the expiration of the free trial period.
- Obtain the consumer’s affirmative consent to the automatic renewal before charging the consumer.

(D.C. Code § 28A-203(c)(1), (2).)

Any business offering nationwide or multi-state free trials lasting a month or more must take into account this special concern for any DC consumers (for example, consider having the free trial in DC last less than a month to avoid the ARPA requirements).

Like the California statute, the ARPA also provides a definition for clear and conspicuous (D.C. Code § 28A-202(1)). For more information on the ARPA, see Practice Note, *Automatic Renewal State Laws Charts: Overview: District of Columbia* ([W-020-5738](#)).

### NORTH DAKOTA

In 2019, North Dakota enacted a law whose provisions apply to contracts entered after July 31, 2019. It applies generally to all sales or offers to sell merchandise for a specified period under an agreement containing a provision for automatic renewal with a few limited exceptions (N.D.C.C. § 51-37-03). No renewal period may exceed 12 months (N.D.C.C. § 51-37-02(5)). The North Dakota law is similar to ROSCA, California law’s, and DC’s law, as it requires sellers to:

- Present the terms of the automatic renewal offer in a clear and conspicuous manner before a subscription or purchasing agreement is fulfilled and in proximity to the offer.

- Provide an acknowledgment that includes the terms of the automatic renewal offer and information regarding how to cancel in a manner which is capable of being retained by the buyer.
- Provide a cost-effective, timely, and simple procedure for cancellation which must be described in the required acknowledgment.
- When the renewal period is longer than six months, provide a clear and conspicuous written notice to the buyer (first-class mail, email, or other easily accessible form of communication) that includes the procedure for canceling the contract before the contract renews or terminates.

(N.D.C.C. § 51-37-02(1).)

The North Dakota law also defines clear and conspicuous in a manner similar to California (N.D.C.C. § 51-37-01). It uniquely, however, requires agreements that contain a provision for automatic renewal for a period of **more than six months** at the end of the time period specified in the agreement to provide a clear and conspicuous written notice to the buyer stating the buyer may cancel the contract and avoid automatic renewal. The written notice:

- Must be provided by:
  - first-class mail;
  - electronic mail; or
  - any easily accessible form of communication, including text message or a mobile application, if the consumer specifically authorizes the person to provide notice in that form.
- Must include the procedure for canceling and must be given at least 30 days and not more than 60 days before the date on which the agreement will be renewed or the expiration of the period for cancellation.

(N.D.C.C. § 51-37-02(2).)

If there is a material change in the terms of an agreement that contains a provision for automatic renewal, the seller must provide the buyer with both:

- Clear and conspicuous notice of the material change.
- Information regarding how to cancel in a manner which is capable of being retained by the buyer.

(N.D.C.C. § 51-37-02(3).)

A seller may not make or submit any charge to a buyer's credit card, debit card, bank account, account with a third party, or other financial account, unless the person has both:

- Complied with the automatic renewal law requirements.
- Obtained the buyer's affirmative consent to the agreement containing the terms of the automatic renewal.

(N.D.C.C. § 51-37-02(4).)

Like in California, any violations of the automatic renewal law subjects a seller to not just action from the state attorney general, but also private individuals, who can seek not only restitution, but also recover costs, expenses, and reasonable attorneys' fees (N.D.C.C. §§ 51-37-05 and 51-37-06). Many of the best practices recommended for compliance under California law apply in North Dakota (see California).

For more information on North Dakota's automatic renewal law, see Practice Note, Automatic Renewal State Laws Charts: Overview: North Dakota ([W-020-5738](#)).

## OREGON

Oregon's statute is similar to California's in its application and is almost identical in its requirements and corresponding best practices for compliance (see California). The statute applies to any automatic renewal or continuous services offer to a consumer, and the requirements mirror the requirements of California, except that there is no requirement to either:

- Clearly and conspicuously disclose a free trial in the terms of the offer.
- Provide for exclusive online termination for contracts entered into online.

(Or. Rev. Stat. § 646A.295.)

For more information on Oregon's automatic renewal law, see Practice Note, Automatic Renewal State Laws Charts: Overview: Oregon ([W-020-5738](#)).

## VERMONT

The Vermont statute, effective July 1, 2019, is similar to the DC statute in its application, but with a slight nuance. It applies to contracts between a consumer and seller with an initial term of one year or longer that automatically renews for a subsequent term that is longer than one month (9 V.S.A. § 2454a). Therefore, if the contract automatically renews for only one month or less after the initial term, the Vermont statute does **not** apply. The business making the offer to a consumer for these automatically renewing contracts must:

- **Clearly and conspicuously disclose the automatic renewal terms.** The automatic renewal terms must be in plain, unambiguous language in bold-faced type. Vermont is the only state to specifically require the use of bold-faced type.
  - **Require opt-in and acceptance of the contract terms.** The consumer must affirmatively opt-in to the automatic renewal provision in addition to accepting the other terms of the parties' contract or terms and conditions. Vermont is the only state to require this second, separate opt-in solely for the automatic renewal terms, although a separate consent to the automatic renewal terms is suggested as a best practice for compliance with California's and similar laws. In Vermont, the seller must ensure that there is a separate check box or similar consent indicator for the automatic renewal terms distinct from any check box for the parties' contract, terms and conditions, and/or purchase of the offer.
  - **Provide written notice.** The seller must provide the consumer with written or electronic notice between 30 and 60 days before the earliest of the automatic renewal date, the termination date, or the date by which the consumer must provide notice to cancel the contract. The written or electronic notice must include:
    - the date that the contract will terminate, and a clear statement that the contract will renew automatically unless the consumer cancels the contract on or before the termination date; and
    - the length and any additional terms of the renewal period.
- (9 V.S.A. § 2454a(a).)

As of July 1, 2020, two provisions were added to Vermont's law that make it even more similar to California's. Now, a seller or lessor providing an automatic renewal offer subject to Vermont's law must also:

- Provide to the consumer a toll-free telephone number, email address, a postal address if the seller or lessor directly bills the consumer, or another cost-effective, timely, and easy-to-use mechanism for canceling the contract.
- If the consumer accepted the contract online, permit the consumer to terminate the contract exclusively online, which may include a termination email formatted and provided by the seller or lessor that the consumer can send without additional information.

(9 V.S.A. § 2454a(b).)

A violation of the Vermont statute is considered an unfair and deceptive act in commerce in violation of Section 2453 of Vermont's Consumer Protection Act (9 V.S.A. § 2453).

For more information on Vermont's automatic renewal law, see Practice Note, Automatic Renewal State Laws Charts: Overview: Vermont ([W-020-5738](#)).

## VIRGINIA

The Virginia law is similar to the California statute in its application and almost identical to the California statute in its requirements and corresponding best practices for compliance (Va. Code Ann. §§ 59.1-207.45 to 59.1-207.49; see California). The statute:

- Applies to any contracts for goods or services, or both with an automatic renewal or continuous service offer to a consumer.
- Mirrors the requirements of California, except that there is no requirement to provide for exclusive online termination for contracts entered into online.

Virginia, however, takes the penalties for violation of its statute a step further than California. Businesses in violation may be subject to both:

- Civil penalties (up to \$5,000 per violation).
- Damages under a private right of action from consumers.

(Va. Code Ann. § 59.1-207.49.)

Virginia also provides that a business is not subject to civil penalties or damages if the business makes a good faith effort to comply with the statute's requirements (see Good Faith Exception).

For more information on Virginia's automatic renewal law, see Practice Note, Automatic Renewal State Laws Charts: Overview: Virginia ([W-020-5738](#)).

## STATES WITH GENERAL AUTOMATIC RENEWAL LAWS

States with general automatic renewal laws fall into two categories:

- States that require disclosure of the automatic renewal terms with some additional requirements (see Disclosure with Some Additional Requirements; see also Automatic Renewal State Laws Charts: Overview: Connecticut, Illinois, Maine, North Carolina, and Hawaii ([W-020-5738](#))).
- States that require disclosure of the automatic renewal terms and/or cancellation information with no additional requirements (see

Disclosure with No Additional Requirements; see also Practice Note, Automatic Renewal State Laws Charts: Overview: Louisiana ([W-020-5738](#))).

For each category, the states broadly regulate consumer contracts for goods or services, or both, for contracts that automatically renew for a period **of more than one month**. The seller must provide the consumer with clear and conspicuous written notice that the consumer may cancel the automatically renewing contract, and there are typically penalties for failing to comply.

### DISCLOSURE WITH SOME ADDITIONAL REQUIREMENTS

These automatic renewal laws:

- Apply generally to all consumer contracts.
- Require not only clear and conspicuous disclosure of automatic renewal terms, but typically also require the customer to be notified of the automatic renewal within a certain period of time before the first automatic renewal occurs.

An example of a state that requires disclosure with some additional requirements is Connecticut. It has different requirements for contracts that are over 180 days in length versus contracts that are under 180 days (Conn. Gen. Stat. Ann. § 42-126b(a)). For contracts that are over 180 days, the clear and conspicuous written notice must both:

- Include the procedure for cancellation.
- Be given to the consumer at least 14 days (but not more than 60 days) before the earlier of:
  - the date that the contract will be renewed; or
  - the expiration of the time period that the consumer is allowed to cancel.

For more information on Connecticut's automatic renewal law, see Practice Note, Automatic Renewal State Laws Charts: Overview: Connecticut ([W-020-5738](#)).

Another state requiring disclosure with additional requirements is Illinois. Illinois requires that:

- The seller disclose the automatic renewal terms clearly and conspicuously in the contract, including the cancellation procedure (815 ILCS 601/10(a)).
- If the contract term is a specified term of 12 months or more and the contract automatically renews for a period of more than one month, the business must, no less than 30 days and no more than 60 days before the consumer's deadline to cancel the automatic renewal, send the consumer a written notice clearly and conspicuously stating:
  - that unless the consumer cancels the contract, it will automatically renew; and
  - the details about how the consumer may cancel the contract.

(815 ILCS 601/10(b).)

For more information on Illinois's automatic renewal law, see Practice Note, Automatic Renewal State Laws Charts: Overview: Illinois ([W-020-5738](#)).

The latest example of an automatic renewal law with disclosure and additional requirements is Maine's law, which was enacted in

2019 (10 M.R.S.A. §§ 1210-C and 1210-D). Maine's law requires any company offering an automatically-renewing online subscription service (for products like online magazines, apps, social networking services, software, and games) to disclose with the offer the methods the consumer may use to cancel the subscription. The consumer also must be able to effect the cancellation online. For any subscription that has a term of 12 months or more that automatically renews for a period of more than one month, the business must notify the consumer of the automatic renewal between 30 and 60 days before the cancellation deadline for the automatic renewal. This notice must disclose clearly and conspicuously both:

- That unless the consumer cancels the subscription, it will automatically renew.
- Where the consumer can obtain details regarding the renewal and the cancellation procedure.

(10 M.R.S.A. § 1210-C.)

If a seller violates the automatic renewal laws in these states, the statute deems the transaction a per se violation of the state's consumer protection statute (see, for example, 10 M.R.S.A. § 1210-D). It also treats the product or service as an unconditional gift to the consumer, meaning that the consumer will not be obligated to pay, or the seller will be required to refund amounts paid for the products or services after the date the seller is deemed to have violated the automatic renewal law.

For more information, see Practice Note, Automatic Renewal State Laws Charts: Overview: Maine ([W-020-5738](#)).

For additional examples of states that require disclosure with some additional requirements, see Practice Note, Automatic Renewal State Laws Charts: Overview: Hawaii and North Carolina ([W-020-5738](#)).

### DISCLOSURE WITH NO ADDITIONAL REQUIREMENTS

These automatic renewal laws similarly apply generally to most or all consumer contracts, but the seller must only clearly and conspicuously disclose the automatic renewal terms or at a minimum how to cancel. An example of a state that requires disclosure with no additional requirements is Louisiana (see Automatic Renewal State Laws Charts: Overview: Louisiana).

Louisiana's law requires only that a business seeking to engage a consumer in an automatically-renewing contract or program must clearly and conspicuously disclose both:

- The automatic renewal clause.
- How to cancel the contract.

(La. R.S. 9:2716(A), (B).)

For more information, see Practice Note, Automatic Renewal State Laws Charts: Overview: Louisiana ([W-020-5738](#)).

### STATES WITH NARROW AUTOMATIC RENEWAL LAWS

States with narrow automatic renewal laws typically regulate a subset of contracts for goods or services, but a few regulate leases of personal or business property, which are generally outside the scope of this Note and broader than negative option plans. The following are examples of what states with narrow automatic renewal laws regulate:

- Home alarm products, which are regulated by Tennessee's law.
- Health club memberships, which are regulated by laws in California, Colorado, Iowa, Maryland, New Hampshire, South Carolina, and Pennsylvania (other states, like California, may also regulate health club memberships, but the automatic renewal provisions would be subject to the state's separate automatic renewal law).
- Dance studio contracts, which are regulated by Nevada's law.
- Service and maintenance contracts, which are regulated by laws in Florida, Georgia, New Mexico, New York, and Utah.
- Leases of property, either:
  - personal, which are regulated by laws in Arkansas, Missouri, and Rhode Island; or
  - business, which are regulated by Wisconsin's law.
- Other specific products or services, for example:
  - buyer's clubs, which are regulated by laws in Oklahoma; and
  - telecommunication contracts, which are regulated by laws in South Dakota.

The foregoing laws may have specific requirements, but they are only applicable to a particular good or service. For example:

- Some state's laws require that sellers in certain industries provide a right of rescission (right to cancel) within a certain number of days after the consumer enters the contract, like Colorado, Maryland, Nevada, and New Hampshire. For all states with this requirement, if the consumer wishes to exercise his or her right to rescind, the consumer must notify the seller in writing. Maryland and New Hampshire additionally require the seller to notify the consumer of the right to rescind in a boldface statement (of at least ten-point font).
- The narrowly-applicable automatic renewal laws in South Carolina and Georgia are drafted similarly to those in states with general automatic renewal laws (see States with General Automatic Renewal Laws). Each requires the seller to disclose the automatic renewal terms in a certain manner, with some acknowledgment from the consumer.
- Some states, including New Mexico, Georgia, and Utah, impose certain requirements on businesses in particular industries to provide notice to the consumer that the contract will automatically renew. A business must generally send notice to the consumer at least 30, but no more than 60 or 90 days, before the last day on which the consumer may give notice of intent to terminate.

For more information on individual states with narrow automatic renewal laws, see Practice Note, Automatic Renewal State Laws Charts: Overview ([W-020-5738](#)).

### COMPLIANCE BEST PRACTICES

Companies offering automatic renewal contracts must tailor them to both:

- Minimum federal standards (see Regulatory and Legal Framework).
- The laws of the individual states in which they do business.

An overarching requirement imposed by both federal regulations and states with applicable automatic renewal laws is the need for clear and conspicuous language. For more information and best practices on:

- Making clear and conspicuous disclosures, see Practice Note, Advertising: Overview: Clear and Conspicuous Disclosures ([2-501-2799](#)).
- And any specific “clear and conspicuous” requirements in each applicable state, see States with Extensive Automatic Renewal Laws, States with General Automatic Renewal Laws, and States with Narrow Automatic Renewal Laws.

Companies doing business across states must consider the strictest requirements in each, particularly if they are doing business in California (see California), DC (see District of Columbia), North Dakota (see North Dakota), Oregon (see Oregon), Vermont (see Vermont), or Virginia (see Virginia). For some suggestions for best practices in these states, particularly California which tends to have the strictest requirements, see States with Extensive Automatic Renewal Laws.

The laws of the individual states may spell out:

- What must be disclosed to the consumer.
- How consumer disclosures must be formatted.
- At what point in the transaction the disclosures must be made.
- Whether additional disclosures must be made after the consumer has accepted the contract or completed the purchase.
- In the case of a free trial period, whether the consumer must get an additional notification before the automatic renewal contract commencing.

Some states, like California and Oregon, further specify required cancellation procedures and disclosures (see California and Oregon). Other states may apply or exempt certain requirements based on the length of the automatically-renewing contract (see, for example, Illinois, Maine, and North Dakota ([W-020-5738](#))). It is important for companies to stay apprised of and understand these ever-changing regulations because the penalties imposed for violations can be severe.

Companies should also consider including in their terms and conditions dispute resolution provisions to the extent permitted by law in the jurisdictions in which they operate, such as mandatory binding arbitration and class/representative action waivers (see Standard Clause, Class Arbitration Waiver (US) ([3-518-9047](#)); see also Class Arbitration Waivers in the US: Case Tracker ([7-525-1136](#))). For more on arbitration in the US, see Practice Note, Understanding US Arbitration Law ([4-500-4468](#)). Some companies have had success in having automatic renewal lawsuits sent to arbitration under these clauses (see Litigation and Settlements).

Note that in the jurisdictions with the most stringent automatic renewal laws, businesses should not combine the action obtaining the consumer’s consent to the terms and conditions (such as a checkbox) with the consent to the automatic renewal terms. Two separate consents should be obtained. This is required in Vermont, and a best practice recommendation for California and any other states requiring affirmative consent.

Additional general information on best practices for negative option contracts can be found in the Practice Note, Positive Practices for Negative Option Features ([W-013-3440](#)) relating to:

- Terms and Conditions (see Practice Note, Positive Practices for Negative Option Features: Terms and Conditions ([W-013-3440](#))).
- Consent (see Practice Note, Positive Practices for Negative Option Features: Consent ([W-013-3440](#))).
- Confirmation (see Practice Note, Positive Practices for Negative Option Features: Confirmation ([W-013-3440](#))).
- Cancellation (see Practice Note, Positive Practices for Negative Option Features: Cancellation ([W-013-3440](#))).

## GOOD FAITH EXCEPTION

Several states’ automatic renewal laws contain a “good faith” exception, which provides an affirmative defense to alleged violations if the company can show it complied with the statute in good faith (see, for example, Practice Note, Automatic State Renewal Laws Charts: Overview: California, District of Columbia, Florida, Illinois, Louisiana, North Carolina, and Wisconsin ([W-020-5738](#))).

To date, in California, attempts to raise the defense at the motion to dismiss stage have been denied as premature or improper (see, for example, *Jenkins v. j2 Glob., Inc.*, 2014 WL 12687417, at \*5 (C.D. Cal. May 23, 2014); *Lopez v. Stages of Beauty, LLC*, 307 F. Supp. 3d 1058, 1073 (S.D. Cal. 2018); *Price v. Synapse Grp., Inc.*, 2017 WL 3131700, at \*7 (S.D. Cal. Jul. 24, 2017)).

A California defendant did successfully use the defense at the motion for summary judgment stage to create a genuine issue of material fact regarding its good faith compliance, which the court relied on (in part) to deny plaintiff’s motion for summary judgment (*Roz v. Nestle Waters N. Am., Inc.*, 2017 WL 6942661 (C.D. Cal. Dec. 6, 2017) (the defendant provided “evidence that it, in good faith communicated repeatedly with its customers. . . regarding the nature of their relationship, how to cancel, charges to their credit cards, and price changes”)).

Beyond these few cases, however, the good faith exception generally has not been litigated. Therefore, it is unclear what a court would consider exculpatory “good faith compliance.” In addition, the exception may create privilege issues, including potential waiver, to the extent a defendant may attempt to rely on the advice of counsel to demonstrate good faith compliance.

At this point in time, not enough case law exists on the good faith exception in the automatic renewal law context to provide sellers with a clear road map to successful use of the exception.

## LITIGATION AND SETTLEMENTS

The newer and more stringent automatic renewal laws have most frequently been litigated in California. These suits have involved both governmental and consumer actions. The following are some of the more notable litigations and results:

- Many companies have litigated and eventually settled automatic renewal lawsuits brought by consumers in California, often as class actions, including Apple, Guthy-Renker, LifeLock, Yahoo!, and McAfee. The settlements in these actions have typically

run into the millions of dollars, often in the form of payments or vouchers sent to class members.

- Frequently led by the Santa Monica City Attorney's office, various California city and county prosecutors have obtained settlements and consent judgments in automatic renewal enforcement actions against companies such as Beachbody, eHarmony, Dropbox, J2 Global, and Guthy-Renker, with the companies agreeing to pay millions of dollars in penalties and restitution and committing to updating their website and sales practices.
- In one California state court case, a superior court judge explicitly held at the summary judgment stage that the defendant had fully complied with the automatic renewal law, a rare judgment on the merits in the automatic renewal law context (see *Colucci v. Pristine Bay LLC*, 2017 WL 8940281, at \*1 (Cal. Super. Aug. 30, 2017)).
- The FTC brought an enforcement action for violations of the FTC Act and ROSCA against online retailer AdoreMe, which ultimately agreed to pay \$1.38 million and revise its automatic renewal practices. The FTC brought a similar enforcement action against Urthbox (see *In the Matter of URTHBOX, INC.*) for allegedly failing to adequately disclose key terms of its "free trial" automatic renewal programs, and the San Francisco-based company agreed to pay \$100,000 to the Commission to compensate consumers deceived by the trial offers. For more on FTC enforcement, see 2019 WL 967861 (F.T.C.).

In addition, a number of California courts have held that California's automatic renewal law:

- Does not provide a private right of action (see, for example, *Johnson v. Pluralsight, LLC*, 728 F. App'x 674, 676 (9th Cir. 2018); *Lopez v. YP Holdings, LLC*, 2019 WL 7905748, \*4 (C.D. Cal. Jan. 23, 2019); *Lopez v. Stages of Beauty, LLC*, 307 F. Supp. 3d at 1065-69; *Roz*, 2017 WL 132853, at \*3-5; *Mayron v. Google*, 2016 WL 1059373,

at \*2-4 (Cal. Super. Ct. Feb. 26, 2016); but see *Kissel v. Code 42 Software, Inc.*, 2016 WL 7647691, at \*7 (C.D. Cal. Apr. 14, 2016) (finding a legislative intent to provide a private right of action). Subsequent decisions have expressly disagreed with *Kissel* (see, for example, *Stages of Beauty, LLC*, 307 F. Supp. 3d at 1074).

- Limits relief to California consumers only (see, for example, *Wahl v. Yahoo! Inc.*, 2017 WL 4098884, at \*1 (N.D. Cal. Sept. 15, 2017) and *Noll v. eBay Inc.*, 2013 WL 2384250, at \*6 (N.D. Cal. May 30, 2013)). Other states' courts may hold similarly if their statute's language resembles California's.

While California courts have seen the vast majority of automatic renewal law litigation, other states' courts have adjudicated cases relating to automatically renewing contracts (for a list of cases, see 32 A.L.R.7th Art. 5). One prominent example is the 2014 Florida class-action lawsuit against Seaworld, where plaintiffs alleged that the automatically renewing contracts for annual park passes violated the Electronic Funds Transfer Act (15 U.S.C. §§ 1693 to 1693r) (see *Herman v. SeaWorld Parks & Entm't, Inc.*, 2015 WL 12859433, at \*1 (M.D. Fla. Oct. 6, 2015)). The case was settled in June 2018 when class members received a pro rata share of an \$11.5 million settlement fund (after attorneys' fees and service awards are paid) (see 2018 WL 8619586 (M.D.Fla.)).

Some companies have had success in having courts apply arbitration agreements to automatic renewal disputes (see, for example, *Bleak v. Spotify USA, Inc.*, Case No. 3:13-cv-05653 (N.D. Cal. Apr. 25, 2014) (entire case compelled to arbitration); *Habelito v. Guthy-Renker LLC*, Case No. BC499558 (Cal. Super. 2016) (class limited to shorter time period based on institution of arbitration provision)). However, these efforts are not always successful (see, for example, *Ingalls v. Spotify USA, Inc.*, 2016 WL 6679561 (N.D. Cal. Nov. 14, 2016) (denying motion to compel arbitration in automatic renewal context)).

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