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New Federal Law Prohibits Non-Disparagement Provisions in Form Contracts

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A new federal law provides protection for US consumers who post negative reviews online.[1] The Consumer Review Fairness Act of 2016 (the "Act") prohibits companies from including provisions in their form agreements that ban or impose penalties on consumers who post negative comments or reviews. The Act also restricts companies from requiring individuals to assign ownership of the intellectual property rights in such negative comments or reviews.

Application of act

The Act, which applies to written, oral or pictorial reviews, performance assessments, or other similar analyses of a person's or entity's goods, services or conduct ("Covered Communications"), defines a "Form Contract" as a contract with standardized terms that is (1) used by a person or entity in the course of selling or leasing its goods or services; and (2) imposed on individuals without a meaningful opportunity for them to negotiate the standard terms.

The Act makes the following types of provisions void, and provides that it is unlawful for a person or entity to include such clauses in Form Contracts in effect on or after March 14, 2017:

1. clauses that prohibit or restrict the ability of an individual who is a party to the Form Contract to engage in a Covered Communication;
2. clauses that impose a penalty or fee on an individual who is a party to the form contract for engaging in a Covered Communication; and
3. clauses that transfer, or require an individual who is a party to the Form Contract to transfer, to any third person any intellectual property rights in review or feedback content that the individual may have in any Covered Communication (collectively, the "Prohibited Clauses"). The Act does not, however, preclude clauses that require an individual to grant a non-exclusive license to such Covered Communications.

The Act does not prevent companies from including any provisions other than the Prohibited Clauses in their Form Contracts, and includes a list of provisions that are not affected by the Act, including clauses that prohibit (1) disclosure of trade secrets or privileged or confidential commercial or financial information; (2) disclosure of information where the disclosure would constitute an unwarranted invasion of privacy; or (3) content that (a) is unlawful, (b) contains the personal information or likeness of another person, (c) is libelous, harassing, abusive, obscene, vulgar, or sexually explicit, or (d) is inappropriate with respect to race, gender, sexuality, ethnicity or other intrinsic characteristics.

The Act does not protect individuals who post libelous reviews or publicly slander a company. It also does not affect any duty of confidentiality imposed by law, or a party's right to remove or refuse to display publicly on an Internet website or webpage owned, operated or otherwise controlled by such party any content that contains the personal information or likeness of another person, or is libelous, harassing, abusive, obscene, vulgar, sexually explicit or is inappropriate with respect to race, gender, sexuality, ethnicity or other intrinsic characteristics, is unrelated to the goods or services offered by or available at the person's or entity's website or webpage, or is clearly false or misleading. Finally, the Act includes a provision that preserves a party's right to establish terms and conditions for an employee's or contractor's creation of photographs or videos of such party's property when those photographs or videos are intended solely for commercial purposes by that party.

Enforcement

The Act directs the Federal Trade Commission ("FTC") to begin conducting education and outreach to provide businesses with non-binding best practices for compliance by February 12, 2017. Violation of the Act is treated

as a violation of Section 5 of the Federal Trade Commission Act, and beginning December 14, 2017, the FTC is empowered to investigate and enforce violations of the. In addition, if the FTC has not instituted a civil or administrative action with respect to a violation of the Act, the attorney general or other consumer protection officer of any state has the right to bring a civil action on behalf of its residents to obtain appropriate relief.

Practice pointers

To avoid violating the Act, companies should review all of their Form Contracts and remove any Prohibited Clauses in such contracts prior to March 14, 2017. For example, Prohibited Clauses are likely to be found in beta and other evaluation agreements ("Pre-Release Evaluation Agreements"), which may require participants to agree not to disparage pre-release versions of the products or services. Pre-Release Evaluation Agreements, as well as terms of use agreements, may also include feedback clauses, which may qualify as Prohibited Clauses if they require individuals to assign ownership of any intellectual property in the feedback they provide. In addition, websites that host consumer reviews should review their terms of use agreements and community guidelines to ensure they are in compliance with the Act.

Notes

1. The Act also protects comments and reviews that are not available on the Internet.

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