4 major legal issues facing online and traditional retailers

Editor's Note: The following is a guest post from law firm ***Davis & Gilbert****'s Advertising, Marketing and Promotions practice group's partner Joseph Lewczak and associate Louis DiLorenzo.*

The past decade has seen a dramatic shift in the way retailers engage with consumers. Although many brick-and-mortars have disappeared for e-commerce alternatives, retailers as a whole continue to face many of the same legal issues they've had for decades. However, trends like multichannel retailing, subscription plans and location tracking have introduced new wrinkles to these issues. Retailers should always consult legal counsel to review their marketing and promotional practices, but in the meantime, here are a few of the most common legal issues retailers might experience.

1.) If it's always on sale, it's never on sale

Advertising a sale or discount is an important tool for any retailer. Everyone rightly wants a deal, and customers are more likely to buy products if they think they're saving money. Though there's nothing wrong with promoting a sale in itself, retailers should think twice before trying to convince consumers they're saving more than they actually are.

Both online and in stores, retailers frequently tout discounts over an original, regular or competitor's price. Although a compelling marketing tool, using a reference price that's never or rarely offered to consumers is a violation of both state and federal law. State regulators have kept a watchful eye on the practice for decades — especially where it appears a retailer's products are always on sale — but the largest risk now comes in the form of consumer class actions.

Over the past few years, dozens of consumers have filed class actions alleging that some of the largest retailers and outlet stores, including Macy's, Hobby Lobby, Michal Kors and most recently J. Crew Factory, are deceiving consumers by inflating their reference prices. The suits are usually filed by consumers who say they purchased certain items believing them to be discounted and would not have bought them had they known they were actually paying the full price. For outlet stores, shoppers have said that they believed the reference price referred to the product's price at the main line store, whereas the product was actually manufactured to be sold at the outlet store in the first place.

Although there's uncertainty in many states over whether this is an actual injury since consumers are still getting what they paid for, these suits continue to be filed and are frequently settled for significant sums of money. For example, Kohl's settled a California class action last year for $6.5 million, and Michael Kors settled a similar one in 2015 for $5 million. Given the risks involved in using reference pricing, it's a small wonder that Amazon began to phase some of them out last year.

In order to minimize potential liability over these reference prices, retailers must ensure that they're tied to actual prices offered to the public. A helpful rule of thumb is to make sure the reference price is offered to consumers at least one-third of the time during any 90-day period, or that a significant number of actual sales are made at the reference price. Similarly, sales that offer percentages off store-wide purchases should only be advertised for limited amounts of time and should prominently include any exclusions or material terms and conditions so it's clear to shoppers before they get a surprise at the register.

2.) The first one's always free

Subscription plans — also known as "negative option" plans — are nothing new, especially for consumers old enough to remember the Columbia House record club. They have now become ubiquitous online, both for traditional products and services. Because of how easily a consumer can be unwittingly enrolled in a subscription plan, the federal government and several states have enacted legislation governing negative option marketing. Even for a retailer who's not trying to pull a fast one on its customers, strict compliance with these statutes can prove to be a challenge.

Most importantly, all of the key terms of the subscription plan must be prominently disclosed at the point-of-sale and should not be buried in the terms and conditions. This includes, among other things, a disclosure that the subscription will continue until terminated, as well as the amount that will be charged, the frequency by which the consumer will be charged and the duration of the automatic renewal term. Moreover, the consumer must affirmatively consent to being enrolled in the subscription plan and cannot simply agree to abide by the terms and conditions governing the plan.

There are a number of ways that subscription plans can run afoul of these laws. For example, in 2016, McAfee settled a class action suit for $80 million over allegations that its auto-renewal practices were misleading to consumers. When consumers agreed to enroll, McAfee allegedly promised that their subscriptions would auto-renew at the same prices that the developer was offering to the public. According to the plaintiffs, the developer actually auto-renewed at prices higher than was offered to the public and the suggested ones set for retailers.

In addition, free trial offers can lead to liability when used to enroll consumers in subscription plans. The Federal Trade Commission (FTC) in 2016 settled with various defendants for $280 million in suspended judgments over allegations that the defendants had enrolled consumers in supposed "trial memberships" for money-making and government grant opportunities, and then proceeded to charge them up to $59.95 for recurring fees. It's important to note, though, that not every case involves such flagrant misconduct. The Washington Attorney General recently settled with a cosmetics startup over allegations that it offered consumers a free welcome box, but did not adequately disclose that they would also be enrolled in subscription plans for between $19.99 and $24.99 per month.

3.) Read the fine print — even if consumers don't

Loyalty programs and other promotions can be useful for marketers who want to engage with their consumers and keep them coming back. The most common pitfall for loyalty programs typically comes in the fine print, also known as the terms and conditions.

Keep in mind that terms and conditions are not just a legal formality. They can communicate important limitations to the scope of a promotion, including end dates and limited quantity of redemption. Clothing company Sunny Co. recently experienced a marketing disaster when it offered users a free swimsuit merely for reposting an image and tagging the company. There were virtually no limitations, leading to massive over-redemption after the offer went viral on social media — so much so that the company wasn't able to stand by their offer for everyone that participated in the giveaway.

As a legal matter, the material terms governing loyalty programs must be disclosed to consumers and remain consistent in marketing materials. The New York Attorney General last year settled with Walgreens for $500,000 in part over allegations that it failed to provide clear information about its loyalty program and did not consistently offer consumers the opportunity to redeem their rewards points. Staples settled a similar class action for $2 million in December over allegations that it deceptively undercounted rewards points when customers redeemed coupons.

Retailers may also face liability when they change the terms of their loyalty programs without effectively notifying consumers. Last year, AutoZone was hit with a class action over allegations that after-the-fact changes to its loyalty program stripped consumers of incentives they previously earned. The company allegedly promised customers that they'd receive $20 in store credit once they made five purchases of at least $20. The plaintiffs said that after they earned the $20, AutoZone changed the policy so that the points expired after 12 months and the $20 reward expired after three months and did not adequately notify them of the change.

4.) Sharing isn't always caring

With the advent of big data, retailers are increasingly interested in who their consumers are and how to engage with them. Especially online, the ability to reconnect with consumers can return tangible dividends, including the ability to retarget consumers via display advertising and reconnect with consumers who abandon their carts before completing a transaction. However, consumers and privacy advocates continue to be concerned with how their data is being shared, and marketers should ensure they're are disclosing the various ways they collect, use and share private data.

The Facebook Beacon program provides an early example of the sensitivities around data use and collection. In 2007, the social media giant collected information about users' purchases from a number of online retailers without consent and then posted about those purchases on those users' Facebook walls. Among the people affected was a man who bought an engagement ring for his girlfriend ahead of a surprise proposal, which was spoiled when Facebook posted that he "bought 14k white gold 1/5 ct diamond Eternity Flower Ring from Overstock.com." After major backlash, the program was quickly discontinued, and Facebook later agreed to a $9.5 million settlement.

More recently, the FTC has taken an interest in the way marketers leverage location data. In 2016, it settled with mobile ad network InMobi for $950,000 over allegations that it was collecting users' location data without consent — even when consumers expressly opted out. Similarly, the FTC settled with retail tracking tech firm Nomi Technologies in 2015 after it tracked shoppers' Wi-Fi signals to determine how many people passed through a store, how long they stayed, how many repeat customers the store had and how many later visited other locations.

The FTC's main concern in the Nomi case was not that Nomi was collecting the data, but that its online privacy policy promised an in-store opt-out mechanism that did not exist. These are just a few examples of why it's imperative marketers comply with their privacy policies at all times, and only collect and share data to the extent it's disclosed.

So, what should you take away from these legal trends? First, be sure to have a valid reference price when advertising anything as "on sale." Second, negative option plans and free trial offers have special risks, so be sure to disclose all material terms and obtain the buyer's explicit consent before finalizing the sale. Third, be sure to include terms and conditions for any promotional offer, and then abide by them. Finally, disclose your privacy practices and adhere to those disclosures.