

Ad Law News and Views - March 21

March 21, 2024

WE ARE PLEASED TO ANNOUNCE...



Laura VanDruff recently accepted a new appointment as office managing partner for our Washington, D.C. location. Laura previously served as chair of the firm's Advertising and Marketing practice. Along with managing her legal practice, Laura will oversee day-to-day office management, implement operating and strategic plans, and preserve and advance the firm's reputation as a top workplace in the D.C. region.



Donnelly McDowell has succeeded Laura as chair of the firm's Advertising and Marketing practice. Donnelly looks forward to continuing to build on the group's proven track record of excellent client service and results, and further cementing Kelley Drye as a thought leader in advertising and privacy law.

Please join us in congratulating Laura and Donnelly!

UPCOMING WEBINARS

The Election Year Employment Law Update
March 28 | 12:30 p.m. - 1:30 p.m. ET

The countdown to the 2024 Presidential Election has begun and with it comes a whole host of legal challenges for employers. Some of the changes to the legal landscape in 2023 are still taking shape and employers need to be ready to navigate those challenges in the new year and beyond.

Join Kelley Drye Labor and Employment partner, [Barbara Hoey](#), for a review of the pressing employment laws and issues for this year. We will cover the following topics:

- Political speech in the workplace

- Religious accommodations post Groff
- The future of DEI and navigating reverse discrimination suits
- AI workplace regulations and trends.

This program is appropriate for in-house counsels, HR professionals and managers.

Register [Here](#).

State Restrictions on Data Broker Use of Consumer Information **May 8 | 4:05 p.m. - 5:20 p.m. ET**

Partner [Alysa Hutnik](#) will moderate George Mason University's Race to Regulate the Internet Conference on the panel "State Restrictions on Data Broker Use of Consumer Information." This session will cover a California law passed in October 2023 and how it has put a spotlight on potential restrictions regarding data broker's ability to assemble and sell information on individuals. Join this panel and learn about how this new law affects California residents and how this development could lead to similar action in other states or at the federal level.

Register [Here](#).

ABA's 2024 ANTITRUST SPRING MEETING

The American Bar Association's 2024 Antitrust Spring Meeting will take place April 10 - 12, 2024, at the Marriott Marquis in Washington, D.C. This conference is a gathering of international antitrust/competition, consumer protection, and data privacy enforcers and professionals. Several Kelley Drye partners will be speaking on and/or moderating several panels this year. If you are attending the 2024 Antitrust Spring Meeting, please stop and say hi!

Wednesday, April 10 - The Price is Right (Or is it?) - [Donnelly McDowell](#)

Wednesday, April 10 - Fireside Chat - [William MacLeod](#)

Thursday, April 10 - Protecting Kids, Privacy, and Free Speech - [Kate White](#)

Thursday, April 11 - Consumer Protection Year in Review - [Paul Singer](#)

Register [Here](#).

IN THE NEWS AND LATEST UPDATES

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[New York Weight Loss Supplement Law Has Stakeholders Scrambling But Faces Legal Challenges](#)

On October 25, 2023, New York enacted GBL 391-oo, which bans the sale of over-the-counter diet pills and dietary supplements intended for weight loss and muscle building to individuals under the age of 18. Covered products include diet pills and dietary supplements that are "labeled, marketed or otherwise represented for the purpose of achieving weight loss or muscle building." The law requires retailers, both physical stores and online vendors, to verify the age of individuals prior to

sale or at the point of delivery. At present, the law is set to take effect on April 22, 2024.

FTC Staff Doubles Down on Rejected Koscot Standard for Pyramidizing Claims, Challenges DSSRC IDS Guidance

Over the past two years, we have seen FTC staff express its opinions on the state of the law in multiple ways. In December 2022, for example, staff issued its Health Products Compliance Guidance, intended to supersede the FTC's 1998 guidance, "Dietary Supplements: An Advertising Guide for Industry," as we covered [here](#). We also have seen a slew of proposed guides and rules on endorsements and testimonials, junk fees, earnings claims, negative option and automatic renewal plans, and environmental marketing, among many others – all intended to explain FTC staff's view of the law as it currently sees it.

NAD Decision Addresses Influencer Disclosures

Last week, NAD announced a decision involving a challenge that a competitor brought against Wonderbelly involving (among other things) an influencer campaign.

NAD Provides Guidance on "Sustainable" Claims

Yesterday, we looked at an [NAD case](#) involving claims by Amyris Clean Beauty that it used "clean ingredients and clean formulas" and considered what lessons other advertisers who want to make "clean" claims should take away from the decision. As part of that same case, NAD also looked at various "sustainable" claims made by the advertiser. Today, we'll consider what lessons advertisers should take away from that part of the decision.

NAD Provides Guidance on "Clean" Claims

In a recent decision, NAD notes that "clean" claims are "ubiquitous in the beauty industry." Despite that, the term doesn't have a clear definition and reasonable minds can disagree over exactly what it means. That creates a challenge for advertisers who are generally required to be able to substantiate all reasonable interpretations of their claims. Although NAD doesn't take a position on what "clean" should mean, the decision provides some helpful guidance for advertisers who want to use the term.

Health Data Privacy: What We're Hearing

U.S. privacy developments are moving quickly, but *health* data privacy is racing forward. Companies that come into contact with consumers' health data need to track and respond to a variety of developments. Most notably, these include Washington's [My Health My Data \(MHMD\) Act](#), a similar law in [Nevada](#), "sensitive data" and "sensitive personal information" requirements under comprehensive state privacy laws, and FTC [enforcement actions](#) and [guidance](#) that assert that a broad range of health data is sensitive. How a company responds to these developments is likely to be iterative given the lack of clarity or harmonization with these requirements, and substantial resources required to implement changes.

TSR Updated to Expand Recordkeeping Obligations; Cover B2B Telemarketing Representations; May Expand to Inbound Tech Support Service Calls

The beginning of 2024 has brought with it a decided regulatory focus on telemarketing. In the past couple of months, we've written about several important FCC actions related to the Telephone Consumer Protection Act (TCPA), namely the adoption of a [one-to-one consent requirement](#), a ruling

that calls to consumers using [AI technologies](#) are considered “artificial or prerecorded” messages subject to regulation under the TCPA, and rule changes intended to [expand consumers’ ability to revoke consent](#) to receive calls and texts.

NY Attorney General Sues JBS Over Greenwashing

Last year, a trade association challenged aspirational claims that JBS – the world’s largest producer of beef products – was making about its commitment “to be net zero by 2040.” NAD [determined](#) that although the company had taken steps that may be helpful towards achieving its goal, those steps weren’t enough to support the implied claim that JBS was currently implementing a plan that would achieve that goal. On appeal, NARB [agreed](#) with NAD’s decision.

Senate Confirms New FTC Commissioners Holyoak and Ferguson; Reconfirms Slaughter

After nearly a year without a Republican Commissioner after [Christine Wilson’s resignation](#), the FTC will again have a full slate of five Commissioners – with two new Republican Commissioners in Melissa Holyoak and Andrew Ferguson confirmed last night. Shortly before the President’s State of the Union address, the Senate voted unanimously via voice vote to confirm Holyoak and Ferguson along with reconfirming current Democratic Commissioner Becca Slaughter to a new term.

FCC Adopts Changes to TCPA Consent Revocation Rules

At its most recent open meeting on February 15, 2024, the Federal Communications Commission (FCC or Commission) voted unanimously to adopt yet another round of rule changes related to the Telephone Consumer Protection Act (TCPA). These [rule changes](#), focused on expanding consumers’ ability to revoke consent to receive calls and texts, build on the FCC’s other recent TCPA actions – namely the adoption of a [one-to-one consent requirement](#), and a ruling that calls to consumers using [artificial intelligence technologies](#) are considered “artificial or prerecorded” messages subject to regulation under the TCPA.

What Comes Around...How Chanel’s Win May Help Brands Protect their Rights in the Resale Market

On February 6, 2024, Chanel emerged victorious in its trademark infringement and false advertising lawsuit against luxury reseller What Goes Around Comes Around (“WGACA”). A jury in the U.S. District Court for the Southern District of New York awarded Chanel a unanimous verdict on all counts of liability, plus \$4 Million in statutory damages for willful trademark infringement in connection with the sale of counterfeit bags that were never authorized for sale by Chanel. The case will now proceed for Judge Louis Stanton to decide what equitable relief Chanel may be entitled to, including a potential injunction and disgorgement of WGACA’s profits.

A Group of 19 State AGs Support the FTC’s Proposed Rule on “Junk Fees”

The FTC is in the midst of a months-long rulemaking targeting “unfair or deceptive fees” that would fundamentally alter the way businesses can advertise their prices to consumers. Recently, a bipartisan coalition of 19 state AGs (led by General Michelle Henry of Pennsylvania and General Josh Stein of North Carolina) filed a [comment letter](#) supporting the FTC’s efforts.

FCC Declares TCPA Restrictions Apply to AI-Generated Calls

On February 8, 2024, the Federal Communications Commission (FCC or Commission) released a [Declaratory Ruling](#) to clarify that telemarketing and other calls made to consumers using certain

types of artificial intelligence are subject to restrictions set forth in the Telephone Consumer Protection Act (TCPA), and therefore are unlawful unless the caller has the requisite consent from the consumer recipient.

New Jersey and New Hampshire Set the Pace with 2024 State Privacy Legislation

New Jersey and New Hampshire are the first states out of the gate in what promises to be another busy year in state privacy legislation.

On January 16, New Jersey Governor Phil Murphy signed the [New Jersey Data Privacy Act \(NJDP\)](#), making the Garden State the first to enact a comprehensive privacy law in 2024. New Hampshire is set to follow after [Senate Bill 255 \(SB255\)](#) passed the legislature on January 18 and is awaiting the governor's signature. Both pieces of legislation closely resemble frameworks established by other U.S. states, such as Colorado.

State AGs Focus on Social Media and its Impact on Youth

As we have [discussed](#), the NAAG President, Oregon Attorney General Ellen Rosenblum, formally announced her 2024 Presidential Initiative focusing on America's youth. As we noted, this was consistent with a broader priority for 2024 among many state attorneys general (AGs) across the country.