

Don't Like Negative Reviews? Read This Before You Delete Them

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Late last year, the Consumer Fairness Review Act became law, placing new restrictions on what companies can include in form contracts that impede consumers' ability to communicate honest reviews of products, services, and companies in any forum. Quietly last month, the Federal Trade Commission released non-binding [business guidance](#) on how organizations can comply with the Act. Given the widespread use of such terms in form agreements, such as online terms of use, it's a good idea to determine whether any of your company's contract terms are covered, and, if so, what changes you will need to make to such agreements.

Time is of the essence: as of March 14, 2017, the Act voids and makes unlawful such agreements containing the triggering terms. By December 14, 2017, the FTC and State Attorneys General and other state consumer protection officials can enforce such violations as unfair and deceptive trade practices.

Who Should Pay Attention?

The law applies to organizations that use form contracts when selling or leasing that party's goods or services, and do not provide the other contracting party with a meaningful opportunity to negotiate the terms of that contract. Standard term sheets and website agreements come immediately to mind, but given the broad scope of the law, the statute also could apply to various codes of conduct and other agreements that apply to commercial activity, both on- and offline.

What Kind of Form Contract Terms Are Prohibited?

The law prohibits and voids form contracts if they:

- Prohibit or restrict the ability of an individual who is a party to the form contract to engage in a covered communication;
- Impose a penalty or fee against an individual who is a party to the form contract for engaging in a covered communication; or
- Transfer or require the other party to the contract to transfer any intellectual property rights in review or feedback content except for certain non-exclusive licenses.

For example, if your website terms of use prohibits customers from posting a review of your product or service as a condition for using the Site, or cites a consequence if they do, such terms are prohibited by the law. It also pays to closely look at Site terms that allow the company to remove postings for any reason, and what type of criteria is used operationally to remove offensive reviews.

What Communications Are Protected?

The law's main intent is to protect honest reviews of goods, services, and the conduct of the contracting party. It thus broadly protects written, oral, or pictorial reviews, performance assessments of, or other similar analyses of the goods, services, or conduct of the party that issues the form contract in the course of selling or leasing the person's goods or services.

What Communications Are *Not* Covered?

The Act has a number of exemptions and does *not* apply to:

- Employer-employee or independent contractor contracts, including photographs or videos owned by a party that are subject to such contracts;
- False and misleading content;
- Content that is defamatory, libelous, slanderous, or similar;
- Content containing personal information, or another person's likeness;
- Content that is libelous, harassing, abusive, obscene, vulgar, sexually explicit, or is inappropriate with respect to race, gender, sexuality, ethnicity, or other intrinsic characteristic;
- Content that is unrelated to the goods or services offered by or available on the party's website; or
- Content impacting a party's duty of confidentiality imposed by law, including via agency guidance.

For websites that host online consumer reviews and comments, the Act also does not prohibit the website host from reserving the right to remove:

- Privileged or confidential trade secrets, commercial, or financial information;
- Personnel, medical, and similar files, which, if disclosed, would constitute an unwarranted invasion of privacy;
- Law enforcement records, which, if disclosed, would constitute an unwarranted invasion of privacy;
- Unlawful content; or
- Content that poses security risks, such as viruses or worms.

Does This Law Preempt State Laws?

Notably, the law does *not* preempt state laws, so businesses will still need to comply with states that regulate this space, such as California's [similar law](#), which lacks the long list of exceptions in the federal statute, and carries its own civil penalties for non-compliance.

Conclusion

Given the common use of these terms in a variety of agreements, a little Spring (contract) cleaning is in order for most organizations. Proactive efforts on this front can prevent expensive lawsuits and government investigations in the future.