

## New York Passes Revised Automatic Renewal Law

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This advisory outlines key takeaways from New York's new Automatic Renewal Law (ARL), which contains new provisions that make it more similar to California's ARL. ARLs have become increasingly more common in consumer class action lawsuits targeting businesses across the nation.

States across the country have enacted laws to address automatically renewing contracts. These state laws, typically referred to as "automatic renewal laws" (ARLs), have been the spotlight of a number of consumer class action lawsuits that have targeted businesses across the nation, particularly those that offer subscription-based products or services. Violations of such laws carry with them the threat of severe monetary penalties or settlements with high price tags. For example, California's ARL has been relied on by class action plaintiffs several times and is known for its breadth and oftentimes strict application.

New York is the most recent state to enact a new ARL. The new law — the purpose of which is to combat "false and deceptive practices" related to such contracts — contains a number of new provisions that depart substantially from the prior legislation (and that share similarities with California's comprehensive ARL). Below are some key takeaways from the new legislation, which goes into effect in February 2021.

- **Applies to Subscription and Purchasing Agreements:** The new law has been expanded to cover "subscription or purchasing agreement[s]" that are "automatically renewed." S. 1475A, to be enacted as Art 29-BB §§ 527 & 527-a. This is, of course, a substantial departure from New York's previous legislation that limited violations of its ARL to those contracts related to "real or personal property." N.Y. Gen. Oblig. § 5-903.
- **"Clear and Conspicuous" Terms of the Offer:** The new law requires businesses to present the key terms of the offer in a "clear and conspicuous" manner. Art 29-BB § 527-(a)(1)(a). The new law defines "clear and conspicuous" as either being in a larger or contrasting font from the surrounding text or set off from surrounding text by symbols or other marks. In the case of audio disclosures, it requires a "volume and cadence" that is audible and understandable. *Id.* Failure to meet this standard gives rise to an ARL violation. *Id.* The standard here, which was absent from New York's prior iteration of the law, is nearly identical to the "clear and conspicuous" standard in California's ARL. See Cal. Bus. & Prof. Code § 17602(a)(1).
- **Requires Affirmative Consent and Acknowledgement to Customers:** The new law also requires businesses to obtain customers' affirmative consent to the terms of the offer. Art 29-BB § 527-(a)(1)(c). A business' failure to do so would amount to an "unconditional gift" to the customer, meaning that the customer would owe the business nothing for the goods or services provided. Art 29-BB § 527-(a)(6). Separately, the law provides that a violation occurs where businesses fail to provide an acknowledgement that includes the core terms of the service (namely, the automatic renewal offer terms, the cancellation policy and information regarding how to cancel). Art 29-BB § 527-(a)(1)(c).

- **Increased Damages and New Defenses:** The new law provides that businesses can be penalized \$100 per violation, up to \$500 per single knowing violation, or up to \$1000 for multiple violations resulting from a single act or incident. Art 29-BB § 527-(a)(7). The law also carves out a “good faith” defense to liability if the business can show, by a preponderance of the evidence, that the violation was “unintentional” and resulted from a “bona fide” error that resulted despite the business’ efforts to comply with the new law. *Id.*

One provision of the new law could arguably narrow its application from the prior legislation. The provision states that the law applies to “consumer” contracts, and “consumer” is defined as any individual who enters these contracts for “personal, family, or household purposes.” Art 29-BB § 527-(a)(3).

It is unclear how New York courts will begin to interpret the new law’s requirements once enacted. However, it is likely that given the shared similarities with California’s ARL, the new law will more likely than not become the basis for a new wave of class action lawsuits against businesses targeting customers in New York.

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