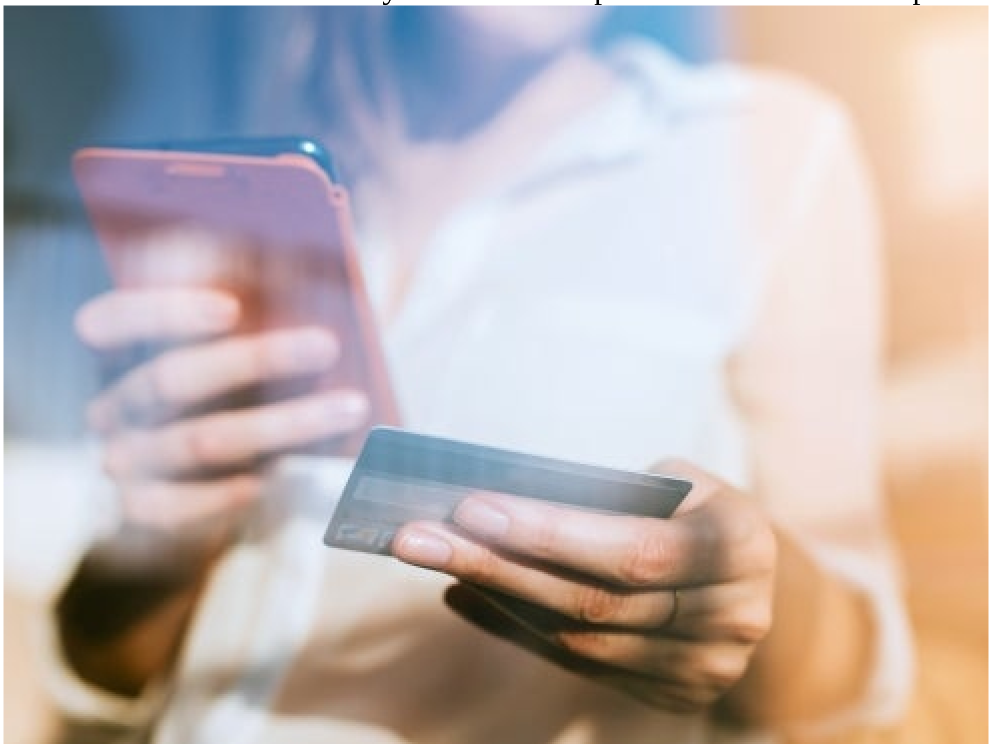
Updates
January 16, 2024
Great Cancellations: Kentucky’s New Subscription Law and FTC’s Expansion of the Negative Option Rule



As the subscription economy continues to grow towards a predicted $1.5 trillion by 2025, the number of laws and regulations with which a business offering subscriptions must comply also continues to grow.

The focus of these legislative and regulatory efforts continues to primarily be aimed at ensuring consumers have adequate notice of subscription terms before signing up and have easy means to cancel after doing so. A new study published by the Stanford Institute for Economic Policy Research, which posits that a significant driver of the subscription economy explosion is that consumer inattention to auto renewals can raise a business's revenues by more than 200%, helps explain this focus on notice and cancellation methods.

The latest additions to the patchwork of state and federal regulations with which businesses offering subscriptions must comply are a new Kentucky law governing subscriptions offered in that state and the Federal Trade Commission's (FTC) proposed amendments to its "Negative Option Rule."

**Kentucky's New Subscription Law**

Beginning with California in 2010, most states have now enacted laws regulating some aspects of automatically renewing subscription services. On January 1, 2024, Kentucky joined that growing body of states as its new law went into effect.

The Kentucky law largely copies or adopts elements of California's law. For example, Kentucky, similar to California, now requires businesses offering covered subscriptions to (1) clearly and conspicuously disclose certain recurring subscription terms at the point of sale, (2) obtain the customer's affirmative consent before charging for a subscription, (3) send an acknowledgement email to subscribers promptly after sign-up that includes certain subscription terms, (4) send subscribers a clear and conspicuous notice of any material changes to the subscription program, and (5) allow subscribers who enrolled in a subscription online to also cancel the subscription online. There are, however, some important differences in Kentucky's new law, including:

- **Narrower focus.** Kentucky's new law only applies to agreements that renew for a period of longer than one month. This means that, unlike in many states, Kentucky's requirements do not apply to subscriptions that renew monthly.
- **No requirement to send reminders.** Many states require businesses to send consumers subscription renewal reminders at regular intervals. Kentucky, however, has not followed this trend and does not require businesses to send reminders to Kentucky subscribers in advance of their subscriptions renewing.
- **Curing a first offense.** Businesses are given an opportunity to cure their first violation of the subscription law by correcting the error and providing a prorated refund to the injured party.
- **No private right of action.** While many states allow consumers to bring claims against businesses for violating the states' laws on automatically renewing subscription services, Kentucky leaves enforcement of its law to the state attorney general. The attorney general can seek restitution of the subscription fees paid by injured consumers, penalties of up to $500 per violation against a noncompliant business, and an injunction.

**FTC Expands Negative Option Rule**

On January 16, 2024, the FTC held a hearing on proposed amendments to its Negative Option Rule. The amendments, introduced last year, would set a national minimal standard for how businesses must disclose the terms of a subscription, how businesses must obtain consumer consent to enrollment in a subscription, what cancellation methods a business must offer, and when businesses must remind consumers that a subscription is about to renew for another term. The Negative Option Rule would not preempt state laws, meaning that businesses will still need to comply with state requirements that go beyond what the FTC would require.

**Takeaways**

Kentucky's recent legislation marks it as the 36th state to implement rules governing subscriptions. This is not a novel development; our previous posts have chronicled how the landscape of laws regulating automatically renewing subscription services is evolving rapidly, both in the United States and internationally.

Kentucky's new subscription law and the FTC's updated Negative Option Rule are unlikely to be the final words on subscription offerings in 2024. The UK's proposed Digital Markets, Competition and Consumers Bill (DMCC Bill), which is expected to be a legislative priority going into 2024, would introduce a new subscription regime for UK consumers backed by the potential for significant monetary penalties. Among the unique features of the draft DMCC Bill are more extensive pre-enrollment notice requirements and more extensive (and repeated) renewal reminder requirements.

The key takeaway for businesses operating in this space is the increasing importance of worldwide compliance. This trend is not confined to a few states or countries; it is part of a broader, global shift. Companies with international operations, particularly those offering subscription services, should be vigilant in adapting to these varying and expanding legal requirements to ensure their subscription practices remain in compliance.



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