

Are Your Agreements Enforceable?: Ensuring An Adequate Registration Process

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Most direct sales companies have arbitration agreements and class action waivers in their distributor and consumer agreements these days. Those provisions go a long way in making sure your company is protected from bet-the-business, expensive, and time-consuming class actions and other litigation. But a recent decision out of California, *Sellers et al. v. JustAnswer, LLC*, 289 Cal. App. 5th 444 (2021), underscores the importance of ensuring your company's registration process is appropriately structured, especially if your online registration processes involve click-wrap agreements.

Here, we provide some simple recommendations for you to consider to ensure your online registration processes are creating enforceable contracts with your distributors and consumers. The key is conspicuousness. Similar conspicuousness rules, of course, apply when you are dealing with written applications, so don't forget to look at your written applications as well.


Go Through Your Sign-Up Process: We often find that our clients have not reviewed their written applications or desktop and mobile sign-up processes in a long time. Often, a process is put in place and forgotten. So, as a starting point, we recommend that you work through your registration processes, both online and written, to ascertain precisely the language your distributors and customers are presented and how it is presented. In reviewing your processes, there are key factors to consider in ensuring your agreements are enforceable.

Does The Process Conspicuously and Directly Link to Your Active Agreements?: Typically, our clients have two (or maybe three) key contracts they require their distributors and customers agree to, including their policies and procedures, terms and conditions, and privacy policy. First, ensure that all three of those agreements are presented to the distributor during the registration process in a conspicuous manner. Consider: 1) the size of the text; 2) the color of the text as compared to the background it appears against; 3) the location of the text and, specifically, its proximity to any box or button the user must click to continue the registration process; 4) the obviousness of any associated hyperlink; and 5) whether other elements on the screen clutter or otherwise obscure the textual notice. And, importantly, make sure the active and operative version of the agreements are being presented (IT snafus happen more often than you think).

Are Your Agreements Presented Via Separate Hyperlinks with Individual "I Accept" Buttons?: Second, ensure that each of the individual contracts that you want to enforce is presented independently via a separate link for each

with an “I accept” or similar button right next to the link to the contract. If possible, you should require your distributor or customer to actually click on the link for the contract, scroll through the entire contract, and press an “I accept” button that is only accessible at the end of the scroll-through.

Do You Explicitly Call Out Your Arbitration and Class Action Waiver Provision?: Third, ensure that you explicitly call out the arbitration and class action waiver provision contained in the appropriate contract. For instance, if your policies and procedures contain an arbitration agreement and a class action waiver, the click box for the policies could look something like this:

 I HAVE READ AND AGREE TO BE BOUND BY THESE POLICIES AND PROCEDURES, INCLUDING BUT NOT LIMITED TO THE ARBITRATION AGREEMENT FOUND IN SECTION XX AND THE CLASS ACTION WAIVER FOUND IN SECTION XX.

Preferably, this click box would be presented at the end of the scrolled-through Policies and Procedures, but if that is not possible, you should certainly have a conspicuous link to [Policies and Procedures](#) in the language above that will direct the individual to the full policy.

Are You Keeping Clean Records of Assent?: Finally, although not necessarily pertinent to the discussion here, you should ensure that your IT department has clear records that show each and every time a distributor or consumer assents to your contractual agreements. You will need those records if you are ever in a situation where you are trying to enforce your contractual agreements in a dispute.

As litigators, we have seen all the tricks plaintiffs try to use to bust an otherwise enforceable arbitration agreement and class action waiver. The deficient click-wrap is a one of the favorite tricks plaintiffs’ lawyers like to use. Creating an enforceable click-wrap agreement is an easy fix that will help to keep you from falling prey to otherwise avoidable, expensive, and lengthy class action litigation. Please reach out to us if you have any questions or concerns regarding your click-wrap agreements.

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