

Retailers Should Start Preparing For Upcoming Legal Changes

By **Stephanie Sheridan, Meegan Brooks and Emily Jaye Johnson** (March 6, 2023, 5:19 PM EST)

It is hard enough for retailers to stay abreast of the many ways that new technologies and retail practices are being targeted under existing laws — just ask the many companies targeted by recent class actions for violating 50-year-old wiretapping laws for their use of session replay, chatbot and Facebook Pixel technology.

At the same time, retailers must also continually keep on top of the scores of new laws applicable to them. Below is a summary of some key 2023 regulations affecting the retail industry.

Bans on Intentionally Added PFAS In Food Packaging

Effective Jan. 1 in New York and California, and under New York's recently amended Hazardous Packaging Act and the California Safer Food Packaging Cookware Act, food packaging containing intentionally added perfluoroalkyl and polyfluoroalkyl substances can no longer be sold in California or New York.

On July 1, similar restrictions will take effect in Vermont and Hawaii, under S.20 and H.B. 1644, respectively. Connecticut will follow suit on Oct. 1, via Public Act 21-191.

Beyond food packaging, New York and California have both also banned intentionally added PFAS from apparel items, along with a similar ban relating to cosmetics in California. New York's ban took effect on Dec. 31, 2022, and California's takes effect in 2025.

Maine PFAS Reporting

Beginning Jan. 1, manufacturers of products containing intentionally added PFAS must report the intentionally added presence of PFAS in those products to the Maine Department of Environmental Protection.

For purposes of the law, a product's manufacturer is "the person that manufactures a product or whose brand name is affixed to the product."

The Maine DEP is working with the Interstate Chemicals Clearinghouse to develop a publicly available reporting database, but the fact that this system is not yet available does not affect a manufacturer's reporting obligations.

That said, many retailers and manufacturers have successfully obtained extensions to the reporting deadline. Beginning Jan. 1, 2030, all products containing intentionally added PFAS will be prohibited from sale in Maine.

Omnibus Data Protection Laws

The California Privacy Rights Act and Virginia Consumer Data Protection Act both took effect Jan. 1, setting forth onerous requirements on customer — and, in California, employee — data collected or



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processed within the respective states.

At a high level, covered businesses must:

- Provide an opt-out mechanism from the sale of an individual's personal information;
- Provide an opt-out mechanism from cross-contextual behavior advertising, e.g., targeted advertising;
- Obtain consent prior to collecting and processing sensitive personal data, e.g., demographics, biometric data, geolocation information, etc., or provide an opt-out mechanism from the collection and processing of sensitive personal data; and
- Not discriminate against an individual for exercising their new privacy rights under the new laws — including through the use of loyalty programs.

Additionally, under preexisting obligations, businesses in California and Virginia must provide specific, comprehensive notice of their personal data collection and processing practices at the time such data is collected, and provide individuals with specific privacy rights, such as the right to access their personal data or have their personal data deleted.

Similar requirements take effect in Colorado and Connecticut on July 1, and in Utah on Dec. 31.

While these laws all have some key similarities, they also each have nuances, especially concerning sensitive personal data, data privacy rights, audit requirements and the processing of a child's personal data.

Modernization of Cosmetics Regulation Act

The Modernization of Cosmetics Regulation Act, or MOCRA, was passed as part of the 2023 omnibus appropriations bill, and marks the first major update to the U.S. Food and Drug Administration's authority over cosmetics since 1938 — when the Federal Food, Drug and Cosmetic Act was signed into law.

MOCRA amends the FDCA to impose several new requirements on cosmetics companies, including facility registration and ingredient listing with the FDA, safety substantiation, adverse event reporting and record-keeping, additional labeling and Good Manufacturing Practice compliance, with applicable regulations to come no earlier than 2024.

Additionally, to enforce new and existing cosmetics regulations, MOCRA grants the FDA authority to order a mandatory recall of a cosmetic product, order a cosmetics manufacturing facility to cease distribution by suspending its registration, and access facilities' records.

The new legislation preempts state requirements for cosmetics to the extent they differ from MOCRA provisions relating to "registration and product listing, good manufacturing practice, records, recalls, adverse event reporting, or safety substantiation."

Given the scope of new requirements, companies should not wait to ensure they are prepared to comply before Dec. 31.

Federal INFORM Consumers Act

Enacted on Dec. 29, 2022, S.936 — the Integrity, Notification, and Fairness in Online Retail Marketplaces for Consumers Act, or INFORM Consumers Act — aims to increase transparency of third-party sellers in online retail marketplaces.

The federal law will require consumer-facing online marketplaces to collect and verify contact information, a bank account number, and tax identification number for any high-volume third-party sellers, defined as sellers who entered into 200 or more transactions and made \$5,000 or more in

gross revenue through the marketplace during a continuous 12-month period throughout the previous 24 months.

Online marketplaces must send a notice to these high-volume sellers at least once a year, verify that the information collected is accurate within 10 days of receiving it and suspend sellers who fail to comply.

Additionally, with some exceptions, for sellers that earn an aggregate total of \$20,000 or more in annual gross revenue, the marketplace must generally display the seller's name, address and contact information in a clear and conspicuous manner.

This information may be displayed either on the product listing page via hyperlink, or in the order confirmation message sent to the consumer and in the consumer's account transaction history.

Additionally, online marketplaces must disclose to consumers clearly and conspicuously on the product listing of any high-volume seller a reporting mechanism that allows for electronic and telephonic reporting of suspicious activity.

Over the last few years, at least 15 states have enacted similar laws, many of which have already taken effect, such as:

- Ohio, effective July 6, 2022;
- Florida, effective Oct. 2, 2022;
- Arkansas, effective Dec. 1, 2022;
- Colorado, effective Jan. 1; and
- Illinois, effective Jan. 1.

New Auto Renewal Laws in Tennessee and Idaho

On Jan. 1, 2023, new automatic renewal statutes went into effect in Tennessee and Idaho.

The Tennessee law largely mirrors California's original automatic renewal regime, requiring pretransaction disclosures, affirmative consent and post-transaction acknowledgment, as well as the ability to cancel subscription programs exclusively online that is cost-effective, timely and easy to use.

It does not include a notice and reminder provision or additional details as to methods of cancellation.

Idaho's law also imposes disclosure and online cancellation requirements, in addition to special notices for subscriptions where the renewal period is 12 months or more.

Unlike the Tennessee law, which applies to goods and services purchased both online and offline, the Idaho law only applies to automatic subscription renewal agreements entered into via the internet.

Violations of the Tennessee and Idaho laws constitute unfair trade practices in violation of the states' general consumer protection statutes, which each have private rights of action — and which, if predecessor laws in other states are any guides, will likely mean class actions against companies with allegedly noncompliant programs will follow.

Gender-Based Pricing Disparities

California's new so-called pink tax law — California Civil Code, Section 51.14 — prohibits charging a different price for any two consumer products that are substantially similar, based on the gender of the individuals for whom the goods are marketed and intended.

The law defines "substantially similar" as two goods for which there are no substantial differences in the materials used in production, the intended use is similar, the functional design and features are similar, and the brand is the same or both brands are owned by the same individual or entity.

Some of the most common examples are personal care products such as deodorant or razors, which, despite being substantially similar, are marketed very differently for women versus men — e.g., stereotypically feminine colors and packaging, with pink, purple, etc. versus stereotypically masculine colors and packaging, with black, blue, etc.

The new law does not prohibit price differences in services — e.g., salon or spa services such as haircuts or waxing, or dry-cleaning services for women's clothing versus men's clothing — or goods based specifically on any gender-neutral reasons including, but not limited to, different materials or manufacturing costs, e.g., a metal handle for a razor marketed toward women versus a plastic handle for razor marketed toward men, if the former was actually more expensive to manufacture.

California's new law broadens the scope of the state's existing gender-based pricing discrimination laws and follows a similar New York law that took effect in October 2020.

It does not expressly provide for a private right of action but provides for civil penalties of up to \$10,000 for an initial violation and \$1,000 for every subsequent violation — each instance of charging a different price for two substantially similar goods is considered a single violation — with the total penalty not to exceed \$100,000.

In New York, by contrast, penalties are capped at \$250 for the initial violation and up to \$500 per subsequent violation.

Similar laws may be on the horizon: In the last two years, the U.S. Congress, Connecticut, New Jersey and Minnesota have all proposed restrictions on gender-based pricing disparities.

Fur Ban in California

California is now the first state in the country to ban the sale and manufacture of new fur clothing and accessories.

The law defines "fur" as "animal skin or part thereof with hair, fleece or fur fibers attached thereto," including mink, sable, chinchilla, lynx, fox, rabbit, beaver, coyote and other luxury furs.

The law passed in 2019, but legislators delayed implementation until 2023 to give retailers time to unload their inventories.

The law allows retailers to continue to sell secondhand fur clothing or decor, and does not apply to leather, taxidermied animals, cowhides and the full skin of deer, sheep or goats.

The California Fish and Game Code, Section 2023 came on the heels of similar bans in several California municipalities: Los Angeles in 2018, San Francisco in 2018, Berkeley in 2017 and West Hollywood in 2013.

Pay Scale Transparency in California, Washington and Rhode Island

California and Washington employers with 15 or more employees must now include in each job posting the wage scale or salary range of the job, along with a general description of all of the benefits and other compensation offered.

California's S.B. 1162 was signed by Gov. Gavin Newsom on Sept. 27, 2022, and Washington's S.B. 5761, commonly known as Washington's Pay Transparency Law, was signed by Gov. Jay Inslee on March 30, 2022.

Both laws also require employers to provide existing employees who are promoted or offered a new position with the wage scale or salary range of the new position, upon request of the employee.

California's new law also imposes several new reporting requirements concerning demographics — such as requiring employers to submit pay data reports to the Department of Fair Employment and Housing, including the median and mean hourly rate for employees categorized by each combination of race, ethnicity and sex.

Likewise, Rhode Island's law — S0270A, signed into law July 6, 2022, by Gov. Daniel McKee — requires an employer to provide a wage range for job positions upon an applicant's request.

This requirement also applies to current employees. If an employee transfers to a new position within the company, the employer must provide the wage range for the new position during the transfer, even if the employee does not request it.

New York's Electronics Right to Repair Law

On Dec. 28, 2022, New York enacted one of the country's most comprehensive right-to-repair laws. Beginning on July 1, the Digital Fair Repair Act will require manufacturers of digital electronic equipment to provide owners and independent repair shops the manuals, parts, diagnostics and diagrams necessary to repair consumer devices.

While the law covers electronic devices purchased at retail — e.g., laptops, smartphones, tablets — it does not apply to large home appliances such as refrigerators and washing machines.

Proponents of the law have said they expect approximately 20 right-to-repair bills to be introduced in various other state legislatures in the coming months.

New York's Gift Card Fraud Law

On Dec. 22, 2022, New York Gov. Kathy Hochul signed legislation — A.266A/S.145B — amending the New York General Business Law to require that retailers selling gift cards post a conspicuous notice that:

- Cautions customers of gift card scams; and
- Provides information on what to do if they believe they may be a victim of such a scam.

The law authorizes courts to award civil penalties of \$1,000 per violation, in addition to an additional allowance to the attorney general of up to \$2,000 against each defendant, plus direct restitution.

This new law comes weeks after a new law in New York took effect Dec. 10, 2022 — S.3467-B/A.4629-C — prohibiting gift cards from expiring in less than nine years and requiring retailers to exchange gift cards with a balance of \$5 or less for cash, upon request.

New Jersey also has a relatively new law relating to gift card fraud.

On May 1, 2022, the New Jersey Stop the Fraud Bill — codified as N.J. Statute, Section 56:8-110.1 — took effect, requiring retailers that display gift cards for sale to train employees on how to identify and respond to gift card fraud.

California Law for Commercial Co-Ventures

On Oct. 7, 2021, Newsom signed into law A.B. 488, which amends the Supervision of Trustees and Fundraisers for Charitable Purposes Act in an attempt to regulate online platforms that solicit for, or allow others to solicit for, charities.

The California attorney general is in the process of promulgating regulations to fully implement the new law, and those additional regulations are expected to be effective Jan. 1, 2024.

Under the amended law, a company will be required to register as a charitable fundraising platform if:

- It hosts campaigns through which donations would benefit one or more named third-party organizations;

- The campaigns are conducted at least in part online;
- The campaigns are directed toward individuals in California; and
- The donations benefit six or more charitable organizations per calendar year.

In addition to registration, companies will be required to complete specific reporting requirements at the end of every calendar year.

Although registration is not yet required, certain provisions — including a requirement to ensure a charity is in good standing, a prohibition on misusing charitable funds and a requirement to make certain disclosures — are now in effect.

Conclusion

The plaintiffs bar has long enjoyed catching retailers off guard by springing lawsuits under newly enacted laws before the industry seems to have gotten the memo about what is applicable to its businesses.

To wit: In early 2007, almost 500 Fair and Accurate Credit Transactions Act class actions were filed across the country in short order against the retail industry because the Fair Credit Reporting Act had been amended requiring that credit card receipts stop printing expiration dates.

Retailers should make it a practice to routinely educate themselves about new legislation coming down the pike, not only to ensure that they are advised about developments in the laws that apply to their particular businesses, but also so that they are well-prepared in advance for proper compliance.

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