THOMPSON HINE

Privacy & Cybersecurity Update

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Virginia Creates New Requirements for B2C and B2B Auto-Renewal Contracts

On April 4, Governor Glenn Youngkin signed House Bill (HB) 744 into law, and Virginia joined the growing number of states requiring businesses to provide additional notifications to consumers prior to their contracts extending for another term pursuant to an automatic renewal clause or similar continuous service plan. Importantly, HB 744 differs from many other similar state laws because it applies to some business-to-business contracts as well as to business-to-consumer contracts. Businesses should reevaluate their contracting practices to ensure compliance with the new law, which will become effective on July 1, 2024.

Background: Key Terms

Virginia consumer protection law regulates how "suppliers" can use two distinct types of consumer contracts: "automatic renewal" and "continuous service" contracts. An automatic renewal contract is "a plan or arrangement in which a paid subscription or purchasing agreement is automatically renewed at the end of a definite term for a subsequent term of more than one month. A continuous service contract is defined as "a plan or arrangement in which a subscription or purchasing agreement continues until the consumer cancels the service."

The term "supplier" means "a seller, lessor, licensor, or professional who advertises, solicits, or engages in consumer transactions, or a manufacturer, distributor, or licensor who advertises and sells, leases, or licenses goods or services to be resold, leased, or sublicensed by other persons in consumer transactions."

Importantly, HB 744 expands the definition of "consumer," which Virginia law originally defined as "any individual who seeks or acquires, by purchase or lease, any goods, services, money, or credit for personal, family, or household purposes." The term has been amended to also include "any 'small business' that seeks or acquires, by purchase or lease, any goods, services, money, or credit for business purposes." In turn, a "small business" is defined as

> *a business that is at least 51 percent independently owned and controlled by one or more individuals, or in the case of a cooperative association organized pursuant to Chapter 3 (Section 13.1-301 et seq.) of Title 13.1 as a nonstock corporation, is at least 51 percent independently controlled by one or more members, who are U.S. citizens or legal resident aliens and, together with affiliates, has 250 or fewer employees or annual gross receipts of $10 million or less averaged over the previous three years. One or more of the individual owners or members shall control both the management and daily business operations of the small business.*

Accordingly, HB 744 applies to suppliers who engage in both direct-to-consumer transactions and business-to-business transactions with small businesses.

Existing Obligations

Under existing law, suppliers who provide goods or services using an automatic renewal or continuous service agreement are required to include in the agreement the following: (i) the automatic renewal or continuous service offer terms, (ii) the cancellation policy, and (iii) information regarding how to cancel in a manner that is capable of being retained by the consumer. The term "automatic renewal offer terms" means the following clear and conspicuous disclosures:

- That the subscription or purchasing agreement will continue until the consumer cancels
- The description of the cancellation policy that applies to the offer
- The recurring charges that will be charged to the consumer's credit or debit card or payment account with a third party as part of the automatic renewal plan or arrangement and that the amount of the charge may change, if that is the case, and the amount to which the charge will change, if known
- The length of the automatic renewal term or that the service is continuous, unless the length of the term is chosen by the consumer
- The minimum purchase obligation, if any

If the offer includes a free trial, the supplier must also clearly state in the contract how to cancel the free trial before the consumer or small business pays or becomes obligated to pay for the goods or services.

In addition, a supplier who enters into automatic renewal or continuous service contracts with consumers or small businesses is required to provide a toll-free telephone number, an email address, and a postal address when the supplier directly bills the consumer or "another cost-effective, timely, and easy-to-use mechanism for cancellation" that is clearly described in the contract. A supplier who provides automatic renewal or continuous service offers through an online website is required (under existing laws) to "make available a conspicuous online option to cancel a recurring purchase of a good or service."

HB 744 and New Obligations

As noted above, HB 744 requires businesses to provide their customers with additional notifications prior to their contracts extending for another term pursuant to an automatic renewal clause or similar continuous service plan. More specifically, it mandates that suppliers who engage in these types of transactions that "automatically renew after a period of more than 30 days and extend the automatic renewal or continuous service offer for a period of more than 12 months" must provide notice to consumers of their "option to cancel the automatic renewal or continuous service offer no less than 30 days and no more than 60 days before the cancellation deadline or the end of the current contract term." These notices must conspicuously disclose:

- That the automatic renewal or continuous service offer will automatically renew unless the consumer cancels
- The date by which the consumer must cancel to avoid automatic renewal or continuous service
- The method by which the consumer may cancel
- A copy of the automatic renewal or continuous service offer provisions

HB 744 also requires suppliers to present their automatic renewal terms in visual proximity, or in temporal proximity if an offer is conveyed by voice, to the request for consent to the offer before completion of the initial order for the automatic renewal or continuous service. Further, under HB 744, suppliers cannot (prior to the completion of the initial order for the automatic renewal or continuous service) charge the consumer's financial account for an automatic renewal or continuous service without first obtaining the consumer's affirmative consent to the agreement containing the automatic renewal or continuous service terms.

Clear and Conspicuous

As noted, under HB 744 and existing Virginia law, many businesses must provide certain contractual notices and disclaimers in a "clear and conspicuous" or "clearly conspicuous" manner. These two terms both mean "in larger type than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same size, or set off from the surrounding text of the same size by symbols or other marks, in a manner that clearly calls attention to the language." In the case of contract disclosures made through audio means, these terms mean "in a volume and cadence sufficient to be readily audible and understandable."

Recommendations

Businesses that have contracts with automatic renewal clauses should undertake several measures to ensure they are in compliance with HB 744 and other similar federal and state requirements such as:

- Identify whether they have customers who satisfy the definition of a small business under HB 744
- Reassess how their contracts are drafted to ensure they contain proper consumer protection-related clauses (e.g., notice disclaimers, font size)
- Identify what mechanism (e.g., email, mail) will be used to provide recurring notice to consumers to comply with state law, including how such mechanism will be documented and validated
- Address how the recurring contract opt-out notices will be drafted to ensure they are clear and conspicuous
- Ensure that opt-out contractual processes are properly established, operational, and verifiable

It is common for businesses to use automatic renewal clauses in their contracts, and, as we noted in a prior bulletin, these practices are facing greater scrutiny by federal and state regulators. Accordingly, companies should work with counsel to design an appropriate compliance strategy to address HB 744 and other similar federal and state law requirements.

FOR MORE INFORMATION

For more information, please contact:

Jennifer N. Elleman
937.443.6927
Jennifer.Elleman@ThompsonHine.com

Julie D. Honor
312.998.4246
Julie.Honor@ThompsonHine.com

Steven G. Stransky
216.566.5646
202.263.4126
Steve.Stransky@ThompsonHine.com
Certified Information Privacy Professional/Government (CIPP/G)
Certified Information Privacy Professional/United States (CIPP/US)