

Gag clauses outlawed

Protecting your reputation without using non-disparagement clauses

Businesses understandably care about their reputations, as negative publicity can drive away customer traffic. Many businesses have attempted to forestall negative feedback by putting non-disparagement clauses — also known as gag clauses — in their form contracts.

“However, a new federal law prohibits the use of non-disparagement clauses in certain form contracts entered into by consumers,” says Julia Richie Sammin, an attorney at Semanoff Ormsby Greenberg & Torchia, LLC.

Smart Business spoke with Sammin about non-disparagement clauses, the newly enacted Consumer Review Fairness Act of 2016 (CRFA), and the consequences of violations of the new law.

What is a non-disparagement clause?

Non-disparagement clauses prohibit customers from sharing their opinion of a seller's goods or services, for instance by forbidding a customer from leaving reviews on websites such as Yelp, Angie's List and TripAdvisor.

But this attempt to avoid negative publicity can backfire when a business sues a customer to enforce the contract provision, particularly where the review reflects the customer's honest assessment of a business's goods or services.

What is CRFA?

On Dec. 14, 2016, President Obama signed into law CRFA, a bill that received bipartisan support. Under CRFA, a provision in a ‘form contract,’ defined as a contract with standardized terms where the consumer does not have a meaningful opportunity to negotiate the terms and conditions, would be void from the inception of the contract if the provision:

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- Prohibits or restricts a consumer from making a statement assessing the seller's goods or services,
- Imposes a penalty or fee on a consumer for making such a statement, or
- Claims ownership of the intellectual property in such a statement made by a consumer.

CRFA will not invalidate the entire contract, just the offending provision. It also does not preempt state law — if a state law regarding non-disparagement clauses is even more protective of the consumer than CRFA, that state law will remain in effect.

CRFA is very broad, even encompassing contractual provisions restricting false and defamatory comments. However, CRFA does not prohibit a business from bringing a civil action for breach of confidentiality, defamation, slander or libel, or from removing reviews from its own site that are defamatory, harassing, obscene, false or misleading, or unrelated to the goods or services offered by the business. A business just cannot attempt to restrict the consumer's speech before such speech is made. Moreover, CRFA does not apply to employment or independent contractor agreements.

CRFA applies to non-disparagement clauses in effect on or after 90 days from the enactment of the new law, i.e. March 14, 2017, so businesses should act quickly to



remove any non-disparagement clauses from their form contracts.

What are the consequences of violating CRFA?

A violation of CRFA is considered a violation of the Federal Trade Commission (FTC) Act's prohibition against unfair or deceptive trade practices, which can result in a civil penalty of up to \$40,000 per violation, among other outcomes. If the violation is ongoing, each day that the conduct continues is treated as a separate violation. The FTC Act, however, does not allow a private right of action, so a consumer could not sue a business directly for a violation of CRFA.

How can a business protect its reputation without using non-disparagement clauses?

CRFA instructs the FTC to begin providing non-binding best practices to assist businesses in compliance with CRFA within 60 days after the passage of the new law. In the meantime, businesses can proactively encourage happy customers to leave public reviews and unhappy customers to contact the business privately. Businesses can also ask review websites to remove reviews that are false or misleading, harassing, obscene, etc. Finally, businesses can still sue for defamation, breach of confidentiality, and other claims that are allowed under CRFA. ●