Legal Matters®

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New threats to online retailers

As more and more companies sell things online, especially to far-flung customers, it can be difficult to keep track of the ever-changing legal rules that apply. Here's a look at just some of the issues on the horizon that online retailers should be aware of:

Is your website accessible to the disabled? You might be surprised at the idea that the federal Americans With Disabilities Act applies to online stores, but the U.S. Department of Justice has taken the position that it does, and is planning to issue rules soon for how retailers should comply.

It's likely the government will soon require retail websites to do some or all of the following:

► Make sure web pages are compatible with current user tools for the disabled, such as machines that convert text to speech;

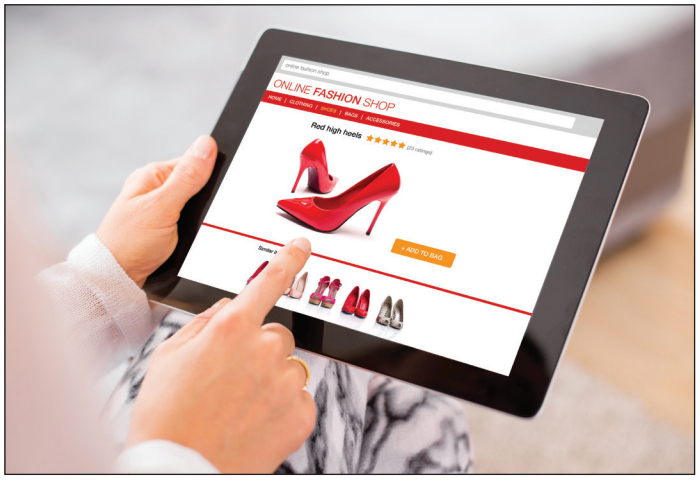
► Provide text equivalents for all visual and audio data, so blind and deaf users can understand the information;

► Make all functionality available from a keyboard; and

► Avoid flashing images or anything else that can trigger seizures.

There have already been some notable lawsuits for non-compliant websites. For instance, the National Federation of the Blind settled a claim against the Target retail chain for $9.7 million. And the Justice Department brought claims against tax preparer H&R Block and Internet grocer Peapod that resulted in major changes to the companies' web operations.

Many such suits are being filed by advocates for the disabled. A single blind man in Pennsylvania has sued some 35 banks, as well as dozens of retailers including Foot Locker, Brooks Brothers, Office Depot, and the Hard Rock Café.



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Are your sale prices really sale prices? It's not uncommon for online sellers to offer sale prices and show a discount from a regular, "valued at," or manufacturer's list price. But you can be in big trouble if you can't show that the item actually sells at a different price.

Joseph D'Aversa bought two sweaters online from J.Crew that were promoted as 30% off the "valued at" price. He later brought a class action under a state consumer protection law, claiming that the sweaters were never actually sold at the higher price because there was always

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Employee gets away with keeping confidential info

Anthony Leness was an executive at a company called EventMonitor. His contract stated that he couldn't disclose confidential information and that he would return all such information if he left the company.

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After six years, Leness was terminated. Shortly afterward, the company discovered that he had subscribed to an online data storage service and had uploaded a large number of the company's files to the service, including confidential data.

The company changed the status of his termination to "for cause," and cut off his severance payments.

Leness sued, and the Massachusetts Supreme Court sided with him. It said Leness couldn't be fired "for cause" because he didn't breach his contract in any significant way. It's true that he didn't return all the confidential information when he was let go, but the company couldn't prove that he ever disclosed the information or shared it with anyone else – and therefore, the company wasn't really harmed by his actions.

Note: Some businesses have been trying to deal with this issue by putting "liquidated damages" clauses in their employment contracts. These clauses acknowledge that it can be difficult to value the harm to a company caused by an employee keeping confidential data, so therefore employees agree that they will pay the company a certain specified amount of money as damages if it's discovered that they broke the rules.

It's not clear that these clauses will always be upheld in court – but the mere possibility of having to pay liquidated damages can often discourage employees from taking confidential information with them in the first place, which is the real goal.

Must you disclose notes from an HR investigation?

An employee complains about discrimination or harassment, and you conduct an investigation. The employee is still unhappy and sues. Can you be forced to turn over all your notes from the investigation as part of the court case?

The answer is not always clear – and it's an important issue you should be aware of.

As a general rule, any relevant documents that are created in the normal course of business are fair game to be turned over in a lawsuit. That includes documents that are created as part of a routine investigation by human resources personnel.

On the other hand, documents that are created "in anticipation of litigation" might not have to be turned over. Sometimes it's difficult to say whether a particular document qualifies under this exception – particularly if it only gradually became clear that a routine employee complaint was likely to end in a lawsuit.

And even if it's obvious that a document was created in expectation of a court case, it might still have to be turned over in certain circumstances. For instance, if a company's defense to a harassment claim is that it conducted a thorough and reasonable investigation, then it might have to turn over all documents related to the investigation, so a court can decide whether that defense is valid.

So what does this mean for you? For one thing, since it's often unclear whether HR notes will have to be turned over, you should probably always assume that they will be. It's important that written notes do not contain any stray comments, denigrating opinions, unproven assumptions, or anything else that you wouldn't want to be read by a jury.

Also, when an employee makes a complaint, it can be a good idea to open two completely separate files. One is for the factual investigation conducted by HR; the other is for conversations with your attorney about the legal consequences of those factual findings. While this isn't foolproof, having two separate files can make it easier to argue that the items in the second file shouldn't have to be turned over in a lawsuit.

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Legal developments pose threats to online retailers

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some sort of a deal being offered.

For instance, after the 30%-off sale ended, there was an "up to 50% off" sale, an "extra 30% off sale," and then a promotion where customers could enter a discount code. In each case, D'Aversa claimed, the sweaters ended up being sold at the exact same price.

The Justice girls' fashion chain recently agreed to pay more than $50 million to settle a similar class action, in which shoppers claimed that goods were advertised at 40% off but were never sold at a higher price.

The Federal Trade Commission has warned online retailers that they can claim a product is "on sale" only if it was offered to the public at a higher price in the regular course of business for a reasonable period of time in the recent past. The FTC also noted that "list prices" and "manufacturer's suggested retail prices" are often abused, and it's no defense to compare your price to a "list" price unless the product was actually regularly offered at the higher price.

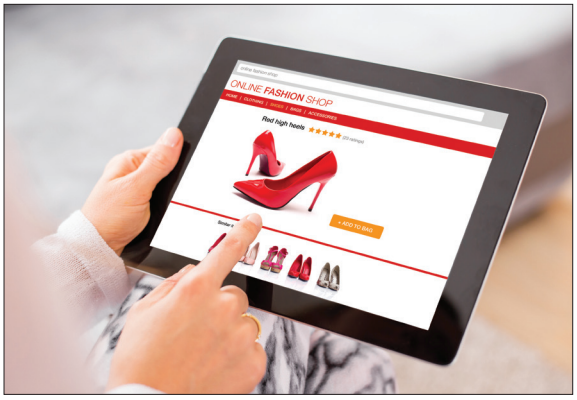
California has particularly strict laws against "phantom markdowns," which is important because even an online business that isn't located in California could potentially be sued under California law if it sells to consumers there.

'Terms of service' may be a problem. A law in New Jersey governing website terms of service could potentially trip up retailers.

Typically, retailers write broad terms of service that apply to the entire country, and then say that anything in the terms that violates a particular state's law doesn't apply in that state (in other words, it's "void where prohibited").

But New Jersey's law says that consumers can bring a class action lawsuit merely if they're offered illegal terms, and a "void where prohibited" clause won't protect the retailer unless it also specifies *exactly which terms are prohibited in New Jersey.*

What's more, consumers don't have to prove that they relied on the terms or that they were harmed in any way. They can collect $100 per violation (which can add up quickly in a large class action), plus attorney fees and costs.



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Do you charge sales tax correctly? Back in 1992, the U.S. Supreme Court decided that a company doesn't have to charge sales tax to a buyer in a state unless the company has a physical presence in that state. So online retailers can generally avoid charging sales tax to out-of-state buyers.

But recently, South Dakota adopted a law designed to force the Supreme Court to revisit the issue. The law says that out-of-state retailers must charge sales tax to South Dakota customers if they have $100,000 in South Dakota sales or 200 separate South Dakota transactions in a year. The state has been sending notices to retailers telling them to comply.

Should you? Probably not. Unless the Supreme Court changes its mind, the law is unconstitutional, and the law itself suggests that retailers won't be liable for retroactive taxes even if the Supreme Court upholds it.

But this is just one of many recent attempts by states to grab a share of online revenue, and it's wise to review the legal landscape periodically and make sure you're collecting sales tax correctly.

'List' prices and 'manufacturer's suggested retail prices' are often abused, and it may be illegal to say a product is on sale from the 'list' price unless the product was actually regularly offered at the higher price.

Government steps up audits of health care privacy

The federal government has begun a much more intensive program of auditing health care providers for violations of HIPAA, the federal law that protects patients' privacy.

For the first time, the government will be auditing not only health care providers but also related businesses to whom patients' information might be disclosed – including third-party administrators, accountants, attorneys, consultants, clearinghouses, transcriptionists and pharmacy benefits managers.

For this reason, it's important for all providers to understand the relevant obligations and take steps to minimize risks – and make sure their vendors do so as well.

Large fines are possible. Recently, a medical research facility in New York was fined $3.9 million after a laptop containing patient data was stolen from an employee's car. In a similar case in Minnesota, a hospital was fined $1.55 million after a laptop was stolen from an employee of a vendor that provided third-party billing and collection services.

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Employee 'tip pools' are limited by federal law

Businesses can require their tipped employees to participate in "tip pools," in which they contribute all their tips to a pot and then share them according to some formula.

As a general rule, a tip pool can only include employees who regularly receive tips. So for instance, a restaurant can require all its waiters to share tips among themselves, but it can't require them to share their tips with prep cooks and dishwashers.

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You should also know that a business can pay its tipped employees less than the federal minimum wage, as long as the employee makes at least the federal minimum once tips are taken into account.

One thing that has been unclear, however, is whether a business that pays all its employees at least the federal minimum – and thus doesn't force its workers to depend on tips to make that amount – can then legally require tips to be shared with untipped employees.

In the past, a federal appeals court had ruled that businesses could do so, but the Labor Department disagreed.

Just recently, though, the appeals court changed its mind and decided that the Labor Department was right after all. That means that waiters and other tipped employees can't be forced to share their gratuities with untipped workers, regardless of how much they get paid in wages.