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The Consumer Review Fairness Act: Protecting the Right to Yelp

Beginning on March 14, 2017, consumers will have an additional layer of protection for negative reviews they leave online. And businesses will have the corresponding limitation on their ability to respond. The Consumer Review Fairness Act, which was signed by President Obama in December 2016, voids non-disparagement clauses—otherwise known as ‘gag clauses’—in form contracts. As a result, provisions limiting a consumer’s ability to leave a review or imposing a penalty for a negative review will no longer be enforceable. Similarly, a business will no longer be able to require consumers to transfer their intellectual property rights in a review or feedback content to the business, thus preventing businesses from taking down unwanted reviews without a court order.

Importantly, the Act only applies to form contracts, which are consumer contracts that are not meaningfully negotiated such as a website’s terms of use or a business’s membership agreements. The Act does not apply to agreements with employees or independent contractors.

The Act also has some key exceptions. It does not prohibit a business from removing anything on its website that is (1) libelous, harassing, abusive, discriminatory, or obscene (among others); (2) unrelated to the business’s goods or services; or (3) clearly false or misleading. Additionally, the Act does not affect a business’s ability to enforce confidentiality provisions in a form contract or to sue a consumer for defamation, libel, or slander.

While the Federal Trade Commission (and sometimes a state’s attorney general) can enforce the Act, it is uncertain to what extent violations will be pursued. The most likely use of the Act is by consumers as a defensive tool if, for example, a business tried to sue over a bad review.

In response to the law's upcoming March effective date, you should review your consumer form contracts to determine if they contain a non-disparagement clause or otherwise violate the Act. The Act does not preempt state law, so compliance with those laws is still important. If your form contracts do not contain non-disparagement clauses, then you can look forward to the Act leveling the playing field by allowing consumers to Yelp and comment about your competitors freely.

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