

# Class Actions Alert

**Akin Gump**  
STRAUSS HAUER & FELD LLP

## Automatic Renewal Contracts: Changes on the Horizon for Service Contract Sellers and Other Businesses

November 10, 2021

### Key Points

- Service contracts allow retailers and manufacturers to offer service plans for consumer products, and sellers and administrators of such contracts are categorically exempted from California's ARL.
- Newly-enacted Assembly Bill 1221 imposes a new set of ARL-inspired requirements on service contract offerings that are otherwise exempt from the ARL.
- In addition, newly-enacted Assembly Bill 390 expands on the existing cancellation and notice-of-renewal requirements under the ARL.
- The varying requirements of these statutes, as well as the distinct enforcement mechanisms, may pose further challenges to businesses offering auto-renewal contracts, including service contracts, in California.

### Introduction

As the pandemic has confirmed, automatically renewing contracts and subscription services provide consumers with convenient, uninterrupted access to a broad range of goods and services, without the hassle of repeatedly submitting payment information. While California's Automatic Renewal Law (ARL)<sup>1</sup> imposed certain requirements on non-exempt business offering such contracts, Governor Newsom recently signed into law two bills that alter the law governing such offerings to California consumers: (1) AB 1221, which for the first time imposes automatic renewal rules on service contracts; and (2) AB 390, which adds new requirements to the ARL.

### Background

California's ARL requires that companies (1) present to consumers clear and conspicuous disclosures of automatic renewal offers and continuous service offers; (2) obtain consumers' affirmative consent to the agreement containing the renewal terms; (3) provide consumers with a post-transaction confirmation that sets forth the renewal terms, cancellation policy and information on how to cancel; and (4) provide

### Contact Information

If you have any questions concerning this alert, please contact:

**Michael J. Stortz**

Partner

[mstortz@akingump.com](mailto:mstortz@akingump.com)

San Francisco

+1 415.765.9508

**Marshall L. Baker**

Counsel

[mbaker@akingump.com](mailto:mbaker@akingump.com)

Los Angeles

+1 310.229.1074

**Shelly A. Kim**

Associate

[Shelly.kim@akingump.com](mailto:Shelly.kim@akingump.com)

Los Angeles

+1 310.728.3333

consumers with a clear and conspicuous notice of subsequent material changes to the agreement.<sup>2</sup>

The ARL contains several ambiguities and undefined terms. For example, the 9th Circuit recently rejected as “extra-textual” an interpretation of the ARL that would “require a consumer’s affirmative consent to the automatic renewal offer terms, separate from and in addition to ‘the agreement containing [such] automatic renewal offer terms.’”<sup>3</sup>

Despite these ambiguities, the statute clearly exempts certain classes of businesses and services from its requirements, including services provided by businesses under a franchise issued by a state political subdivision or pursuant to a license or other authorization by the California Public Utilities Commission (CPUC); services provided by a business or its affiliate, where either entity is regulated by the CPUC, the Federal Communications Commission, or the Federal Energy Regulatory Commission; and any entity regulated by the Department of Insurance. Alarm company operators, and banks and other licensed financial institutions are also exempt.<sup>4</sup> So too are service contract sellers and service contract administrators regulated by California’s Bureau of Household Goods and Service.<sup>5</sup>

### **AB 1221’s Requirements for Recurring Service Contracts**

AB 1221 amends sections of the Song-Beverly Consumer Warranty Act<sup>6</sup> relating to service contracts, imposing certain disclosure, consent and cancellation requirements on service contracts offered on a recurring and continual basis. Under AB 1221, companies offering continuous service contracts must:

- Disclose, in a clear and conspicuous manner, that the service contract shall continue until cancelled.
- Disclose alternatives to the automatically-wiring contract, including any fixed-term service contracts or other service contract that does not continue until it is cancelled.
- Provide, at a minimum, a toll-free number, email address, postal address and, if one exists, a website the buyer can use to cancel the service contract.

In addition, companies must obtain the consumer’s affirmative consent to the provision disclosing that the contract will continue until cancelled. Companies also cannot require the use of more than one method of cancellation, and customers who enter contracts online must have the option to cancel exclusively online.<sup>7</sup>

AB 1221’s requirements are consistent to some extent with the ARL. For example, both statutes require clear and conspicuous notice of the auto-renewal terms and cancellation policy.<sup>8</sup> Both statutes require an option to cancel the contract exclusively online if it was entered into online, without engaging in unnecessary steps that obstruct or delay consumers’ ability to cancel the contract.<sup>9</sup>

However, in contrast to the ARL, AB 1221 expressly defines key terms, such as “affirmative consent.”<sup>10</sup> AB 1221 specifies that affirmative consent under the statute does not include: “(i) Acceptance of a general or broad terms of use, or similar document, that contains descriptions of the coverages under the service contract

along with other, unrelated information. (ii) Hovering over, muting, pausing, or closing a given piece of content. (iii) Agreement obtained through the use of dark patterns.”<sup>11</sup>

Other key differences between the ARL and AB 1221 include that AB 1221 requires the service contract to contain a “clear description and identification of the covered product” or class of products.<sup>12</sup> AB 1221 also requires an automatically-renewing service contract to disclose “all alternatives that the seller offering the service contract offers, including any fixed-term service contracts or other service contract basis that does not continue until it is canceled.”<sup>13</sup>

AB 1221 applies to service contracts entered into on or after January 1, 2022. Since AB 1221 was enacted as an amendment to the Song-Beverly Act, its requirements will likely be subject to the private enforcement provisions of the Song-Beverly Act.<sup>14</sup>

### **AB 390’s Updated Cancellation and Notice-of-Renewal Requirements**

For entities or services that are not exempt from the ARL, AB 390 streamlines the online cancellation process under the statute. As with AB 1221, businesses that allow a consumer to accept an auto-renewal online must permit the consumer to terminate the automatic renewal or continuous service exclusively online, at will, and without engaging in any further steps.<sup>15</sup> Businesses must provide either a prominently located direct link or button which may be located within either a customer account or profile, or within either device or user settings; or an immediately accessible termination email formatted and provided by the business that a consumer can send to the business without additional information.

AB 390 also provides two mutually exclusive notice-of-renewal requirements: one for circumstances in which a consumer accepts an auto-renewal offer with a free gift or trial, or promotional or discounted price, that applies for more than 31 days; and another for circumstances in which a consumer accepts an auto-renewal offer with an initial term of one year or longer. In the former case, the bill would require the notice that the agreement will automatically renew to be provided no fewer than three days and no more than 21 days prior to the expiration of the promotion. In the latter situation, the notice must be provided between 15 and 45 days prior to the initial renewal of the service.<sup>16</sup>

The amendments to the ARL under AB 390 go into effect July 1, 2022. Although the ARL does not permit a private right of action, private plaintiffs may use an ARL violation as the basis for a claim under California Business & Professions Code section 17200, if they can satisfy Section 17200’s standing requirements.<sup>17</sup>

### **Implications**

Since each statute imposes distinct requirements, and is subject to different enforcement regimes, business should look closely at their continuous subscription services and similar automatically renewing contracts.

While service contract sellers and administrators remain exempt from the ARL, such businesses should closely review AB 1221, to the extent they offer automatically renewing service contracts. In particular, businesses should pay close attention to any changes that may be required to their online buy flow to conform to the affirmative

consent requirements of AB 1221, as well as the statute's disclosure and cancellation requirements.

Other non-exempt businesses offering auto-renewal contracts in California should familiarize themselves with the updated cancellation and notice provisions set forth in AB 390.

<sup>1</sup> Cal. Bus. & Prof. Code § 17600 *et seq.*

<sup>2</sup> *Id.* § 17602(a)-(d).

<sup>3</sup> *Hall v. Time, Inc.*, No. 20-55354, 2021 WL 2071991, at \*1 (9th Cir. May 24, 2021) (quoting Cal. Bus. & Prof. Code § 17602(a)(2)) (emphasis omitted).

<sup>4</sup> Cal. Bus. & Prof. Code § 17605(d)-(e).

<sup>5</sup> *Id.* § 17605(f).

<sup>6</sup> Cal. Civ. Code § 1790 *et seq.*

<sup>7</sup> *Id.* § 1794.4(c).

<sup>8</sup> Compare *id.*, with Cal. Bus. & Prof. Code § 17602(a).

<sup>9</sup> See Cal. Bus. & Prof. Code § 17602(d)(1); Cal. Civ. Code § 1794.4(c)(3)(A)(iv).

<sup>10</sup> Cal. Civ. Code §§ 1794.4(e)(2).

<sup>11</sup> *Id.* § 1794.4(e)(2)(B).

<sup>12</sup> *Id.* § 1794.4(c)(1).

<sup>13</sup> *Id.* § 1794.4(c)(3)(A)(ii).

<sup>14</sup> See *id.* § 1794.

<sup>15</sup> Cal. Bus. & Prof. Code § 17602(d)(1).

<sup>16</sup> *Id.* § 17602(b).

<sup>17</sup> See *Mayron v. Google, LLC*, 54 Cal. App. 4th 566 (2020).

[akingump.com](http://akingump.com)