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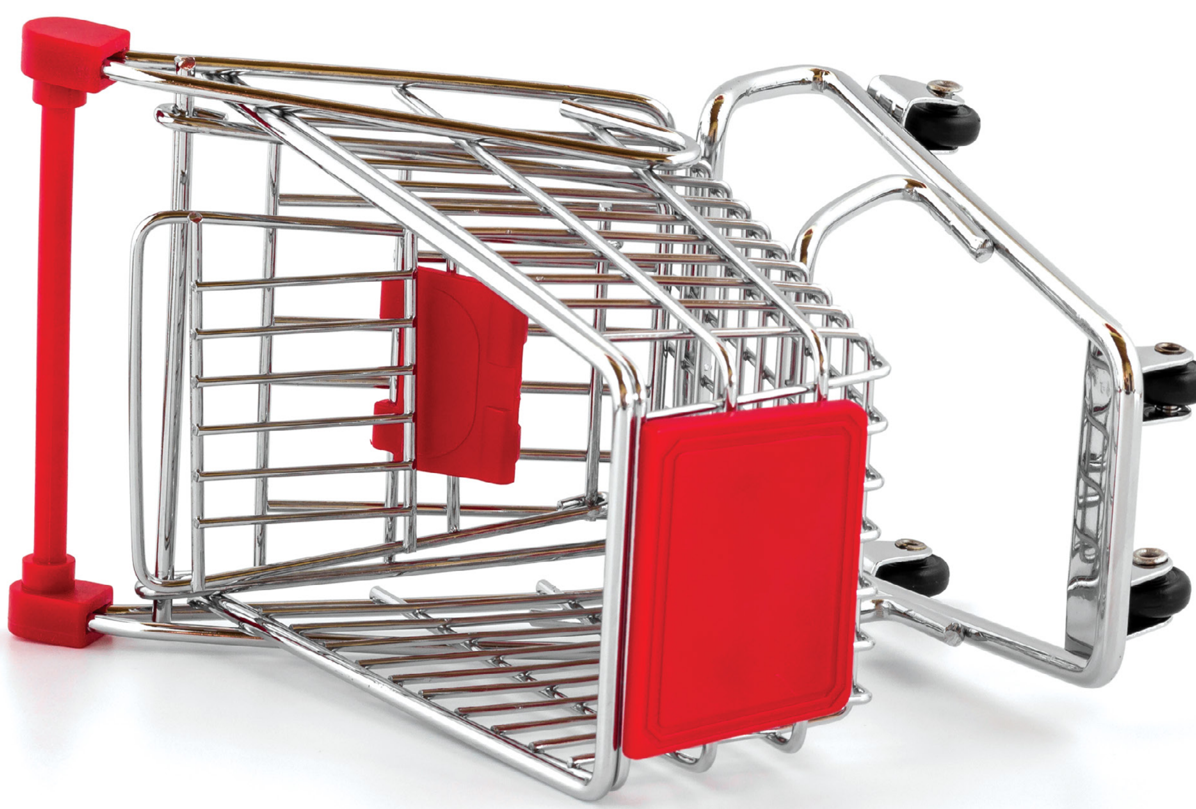
Litigation Risks for Retailers



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LITIGATION RISKS FOR RETAILERS

The New Wave of Class Actions in California

Given their high visibility and array of consumer-facing activities, retailers have become a primary target of class action lawsuits. In particular, a growing number of complaints have been brought in the California courts, where litigants seek to take advantage of the state's expansive consumer protection laws. To protect against significant litigation exposure and potential damages, retailers and their counsel must pay careful attention to numerous compliance requirements, implement best practices, and develop an aggressive and thoughtful litigation strategy.

Drinker Biddle Retail Class Actions Team

The retail industry is a minefield of regulation and litigation risk. Over the past few years, there has been a significant uptick in class action claims against retailers, especially in federal and state courts in California, which are notoriously plaintiff-friendly.

California's Unfair Competition Law (UCL) has been the weapon of choice for the largest and most sophisticated plaintiffs' class action firms, most of which have a presence in California. The broad interpretation of the UCL, when coupled with permissive class certification requirements and the fact that retailers are not required to have a physical, in-state presence if their e-commerce touches the state, has spawned a small industry built around aggregate consumer litigation in the California courts. Notably, however, the UCL is no longer the single driving force behind these lawsuits. Recently enacted privacy-related statutes carrying statutory damages are becoming popular because they fuel large aggregate damages claims.

Additionally, creative plaintiffs' attorneys are testing novel theories in the California courts in an effort to break new ground. Enterprising plaintiffs and attorneys are browsing retailers' shelves and scouring their websites for potential new lawsuits.

To mitigate litigation risk, it is critical for retailers to examine their compliance efforts and adopt current best practices. Key issues that retailers and their counsel should focus on include:

- Trends in deceptive pricing litigation targeting outlet and discount pricing models.
- Developments in gift card regulations and legislation.
- New requirements for product labels and warnings.
- Policies and practices affecting consumer privacy.
- Limits on retailer communications with customers.
- Website and mobile application (app) compliance with anti-discrimination laws.
- Heightened scrutiny of contracts between retailers and consumers.
- Potential employment-related disputes facing retailers, such as wage and hour or equal pay claims.

OUTLET AND DISCOUNT PRICING

There has been a significant increase in deceptive pricing litigation in the past few years as a result of the growth of outlet and discount store models, along with creative and often-manufactured lawsuits against prominent apparel and accessories retailers. Because of the heightened scrutiny given to pricing practices, retailers should conduct a comprehensive internal legal review of their advertising, marketing, and pricing practices.

Deceptive pricing lawsuits are typically brought under California's consumer protection statutes. Plaintiffs in these cases have characterized common retail marketing campaigns and pricing strategies as confusing, unfair, and deceptive. For example, plaintiffs have attacked practices involving:

- **"Compare at" and reference pricing.** These cases challenge comparative pricing techniques that plaintiffs allege are misleading, such as practices that suggest goods are from a past season or were once sold at higher prices in flagship stores.
- **Product discounting.** These cases target so-called "perpetual sales" and allegedly undisclosed exclusions from discount offers.
- **Shipping and handling charges for online purchases.** These cases allege that consumers are misled to believe that shipping and handling charges reflect the retailer's actual costs with no mark-up.

Many major retailers have been targeted in comparative pricing actions in California and New York courts with mixed results (see, for example, *Rubenstein v. Neiman Marcus Grp.*, 2017 WL 1381147, at *1-2 (9th Cir. Apr. 18, 2017) (reinstating comparative pricing claims that the district court had dismissed); *Russell v. Kohl's Dep't Stores, Inc.*, No. 15-1143 (C.D. Cal. Oct. 13, 2016) (following an unsuccessful motion to dismiss, settling claims for more than $6 million on a class-wide basis, with a class benefit comprised of $20 gift cards); *Gattinella v. Michael Kors (USA)*, 2016 WL 690877, at *1 (S.D.N.Y. Feb. 9, 2016) (settling claims on a class-wide basis for nearly $5 million early in the litigation)).

Notably, the Los Angeles City Attorney last year retained private counsel from the plaintiffs' bar to bring actions against Kohl's, J.C. Penney, Sears, and Macy's, asserting that these retailers violated California state law by including "list" or "regular" prices on merchandise tags where the goods allegedly were never sold for that value. According to these lawsuits, both J.C. Penney and Kohl's had agreed in California federal courts to change their pricing techniques, but failed to fulfill these commitments. The lawsuits seek to enjoin the retailers from continuing to use these reference pricing techniques and impose civil penalties of up to $2,500 for each violation. (See *California v. Kohl's Dep't Stores, Inc.*, No. BC643037 (Cal. Super. Ct. L.A. Cty. Dec. 8, 2016); *California v. J.C. Penney Corp.*, No. BC643036 (Cal. Super. Ct. L.A. Cty. Dec. 8, 2016); *California v. Sears Roebuck & Co.*, No. BC643039 (Cal. Super. Ct. L.A. Cty. Dec. 8, 2016); *California v. Macy's Inc.*, No. BC643040 (Cal. Super. Ct. L.A. Cty. Dec. 8, 2016).)

Retailers can invoke several arguments to defeat lawsuits alleging deceptive pricing at the pleadings stage, on the merits, and at class certification, should the cases proceed that far. For example, plaintiffs might face the following challenges, among others, when bringing their claims:

- **Standing and alleged harm.** In many of these cases, the plaintiff obtained the benefit of her bargain by choosing to purchase merchandise offered for sale at a certain disclosed price and then receiving the merchandise. In the absence of identifiable harm, such as a showing that the plaintiff paid a higher price than the listed price, a plaintiff lacks constitutional standing. Moreover, many of these plaintiffs are serial plaintiffs and cannot credibly allege to have been misled or injured.
- **Insufficient allegations.** Complaints in these cases often mischaracterize consumers' current outlet store experience or fail to sufficiently allege, for example, that:
  - the plaintiffs were misled;

- the retailer made a misstatement; or
- the plaintiffs received inferior quality goods.

- **Damages claims.** Because retailers disclose the price of merchandise and consumers agree to that price, plaintiffs might have difficulty identifying a viable damages theory. Where plaintiffs can establish damages as a result of their purchases, the damages will be limited to the plaintiffs' purchases. Plaintiffs cannot recover for damages based on alleged deceptive pricing of merchandise that the plaintiffs did not personally purchase.
- **Ascertainability, typicality, and other requirements of Federal Rule of Civil Procedure 23.** At the class certification stage (or in connection with an early motion to strike the class allegations), it will be challenging for plaintiffs to demonstrate class-wide confusion among all outlet or discount store shoppers, given the individualized nature of consumer expectations and experiences, as well as questionable damages calculations. Additionally, whether a shopper was induced to buy merchandise based on a pricing strategy is highly fact-intensive, presenting a challenge for plaintiffs seeking class certification, and in identifying adequate or typical class representatives.

Search Non-Statutory Grounds for Challenging Class Actions: Standing and Ascertainability for more on challenges to class actions based on lack of standing at the motion to dismiss and class certification stages in federal court.

Search Class Action Toolkit: Certification for a collection of resources to help counsel with class certification issues.

Retailers expect the Federal Trade Commission (FTC) to issue revised guidelines later in 2017, which should provide clearer direction on comparative pricing models. In the meantime, retailers should be thoughtful when advertising discounted prices and should:

- **Draft defensive policies.** Advertising and pricing policies that clearly explain the basis of pricing techniques used at outlet store locations can offer some predictability to retailers. These policies should be conspicuously reflected in all marketing media, including websites, in-store signage, and promotional materials.
- **Review labels and price tags.** Retailers should evaluate deviations from any listed manufacturer's suggested retail prices (MSRPs) and reference pricing, and retain information supporting their derivation.
- **Update training materials.** Sales personnel should be properly trained to provide accurate information about the outlet or discount store experience and the products offered.
- **Avoid perpetual sales.** Because of recent cases alleging that perpetual sales violate California law, retailers should ensure they sell goods at the regular or original prices for a period of time and frequently change their promotions.

GIFT CARDS

Gift cards are increasingly popular, with the total sales volume expected to exceed $160 billion by 2018 (see Gift Card Statistics, available at *giftcardgranny.com* (last visited July 1, 2017)). While gift cards have great appeal to retailers and consumers alike, they can create significant litigation risk for retailers, particularly in California.

The federal Credit Card Accountability Responsibility and Disclosure Act of 2009 (CARD Act) applies to general-use prepaid cards, gift certificates, and store gift cards (with limited exceptions). The CARD Act prohibits the imposition of certain fees or charges and regulates expiration dates, however, it does not preempt state laws that provide greater consumer protection (15 U.S.C. § 1693r; 12 C.F.R. § 205.12(b)). California was among the first states to regulate gift cards and certificates and enacted regulations containing some of the most consumer-friendly gift card rules in the country. It is therefore unsurprising that California is home to the most gift card-related litigation.

Search Key Provisions of the Credit Card Act for more on the CARD Act, and the resulting amendments to the Truth in Lending Act and its implementing Regulation Z.

Search Consumer Regulations Governing Prepaid Cards for information on the federal consumer laws and regulations that apply to the prepaid card product industry, which includes prepaid cards, gift cards, and payroll cards.

California law generally prohibits service fees on gift cards, but permits a dormancy fee if the following conditions are satisfied:

- The remaining value of the gift card is five dollars or less each time the fee is assessed.
- The fee does not exceed one dollar per month.
- The card has been inactive for 24 consecutive months.
- The holder may reload or add value to the gift card.
- The amount and frequency of the dormancy fee, as well as a statement that the fee is triggered by inactivity, is printed on the gift card in at least 10-point font in a location where it is visible to the purchaser before purchasing the card.

(Cal. Civ. Code § 1749.5(a)(2), (e)(5).)

California also prohibits imposing expiration dates on gift cards, subject to a few limited exceptions such as where gift cards are distributed as part of an award, a loyalty program, or a free promotional program (Cal. Civ. Code § 1749.5(d)).

Certain types of gift cards are excluded from the regulations, including "any gift card usable with multiple sellers of goods or services provided the expiration date, if any, is printed on the card" (Cal. Civ. Code. § 1749.45(a)). Therefore, general-use prepaid cards, such as Visa or American Express prepaid cards, do not fall under the purview of the regulations, while gift cards that can be used at only one retailer or its affiliates do.

Moreover, gift card redemption requirements vary from state to state, making it challenging for retailers to ensure compliance. For example, a gift card holder in California who has a card with a balance of less than $10 may opt to redeem it for cash (Cal. Civ. Code § 1749.5(b)(2)). Retailers must honor these requests regardless of any contrary corporate policy. In recent months, some plaintiffs' attorneys in California, after sending clients to shopping malls to investigate gift card redemption practices and set up potential claims, have been actively filing putative class actions alleging that retailers consistently fail to offer cash back for gift card balances under $10.

In light of these litigation risks, retailers should:

- Develop training materials for employees that take into account relevant state and federal requirements.
- Periodically audit gift card activity.
- Display clear disclosures in stores, such as placing them at registers, concerning cash redemption of low balance gift cards in applicable states.
- Routinely review gift card policies and practices.

WARNINGS, LABELS, AND DISCLOSURES

Labeling can be a high-risk area for retailers, particularly given the changing regulatory landscape. Businesses operating in California should be aware of requirements for:

- Warnings on products that contain certain chemicals listed in the Safe Drinking Water and Toxic Enforcement Act of 1986, typically known as Proposition 65.
- Labels indicating that products were made partially or entirely in the US.
- Disclosures made under the Transparency in Supply Chains Act (Supply Chains Act).

TOXIC CHEMICAL WARNINGS

Proposition 65 requires businesses to provide warnings to California consumers if their products or services might cause exposure to one or more of nearly 900 chemicals that the state determined can cause cancer, birth defects, or other reproductive harm (Cal. Health & Safety Code § 25249.6; Cal. Office of Envtl. Health Hazard Assessment, Proposition 65 List (July 7, 2017), available at *oehha.ca.gov*). The list of chemicals changes each year, and the law applies to every business in the manufacturing and distribution chain. Few (if any) industries are outside of the statute's reach, and retailers are often the most visible targets for enforcement actions. Proposition 65 is largely enforced through private civil lawsuits and permits prevailing plaintiffs to obtain statutory penalties, injunctive relief, and attorneys' fees (Cal. Code Regs. tit. 27, § 25249.7(a), (b), (f)).

New warning regulations are set to become effective on August 30, 2018. The most critical changes address the safe harbor provision in Proposition 65, which permits an entity to include a prohibited chemical in a product or service so long as the entity includes a "clear and reasonable" warning label to inform the consumer of the risks before exposure (Cal. Code Regs. tit. 27, § 25601). The new regulations will require warnings to have:

- **Greater specificity.** Many businesses currently provide generic warnings on product packaging as a prophylactic measure that would apply to chemicals listed as carcinogens or reproductive toxins. These warnings will not pass muster under the new regulations, which require entities to precisely determine which chemicals their products contain and use warnings that:
  - specify at least one chemical for which the warning is being provided (unless the warning is located on the product, in which case it may be truncated); and
  - specify at least one chemical in each category, if the warning is for both carcinogenicity and reproductive toxicity.

  (Cal. Code Regs. tit. 27, § 25601.)
- **A distinct appearance.** Warnings will need to conform with the new requirements for graphics and placement (Cal. Code Regs. tit. 27, §§ 25603, 25604; see *Box, Warning Labels*).
- **Bilingual options.** If the product packaging, labeling, or signage includes consumer information in a language other than English, the warning must be provided in that language, as well as in English (Cal. Code Regs. tit. 27, §§ 25602(d), 25607.1(d)).

Additionally, the new regulations:

- Clarify the responsibility of manufacturers, retailers, and others in the supply chain to provide warnings, and impose detailed requirements for transmission and recordkeeping (Cal. Code Regs. tit. 27, § 25600.2).
- Impose specific requirements on internet retailers who sell to California residents (Cal. Code Regs. tit. 27, § 25602(b)).
- Provide tailored guidelines on the content of the warnings and methods of transmission for specific product, environmental, and occupational exposures, including, among others, exposures related to foods and beverages, prescription drugs, furniture, amusement parks, and vehicles (Cal. Code Regs. tit. 27, §§ 25607.1 to 25067.31).

Businesses that fail to make necessary changes to their warning labels and signs run the risk of fines for non-compliance and enforcement litigation. Businesses should determine, during the next year, whether and how these new regulations will affect them and take proactive steps to ensure compliance.

"MADE IN USA" LABELS

The FTC requires that products labeled or marketed with an unqualified "Made in USA" claim must be "all or virtually all" made in the US. In other words, the product should contain, at most, a negligible amount of foreign content. (See FTC, *Complying with the Made in USA Standard*, at 4 (Dec. 1998).)

Search Made in USA Claims for more on FTC guidance about legal US origin claims in advertisements and product labels.

Unlike the FTC, California prohibits an entity from using a "Made in USA" label if a product, or part of the product, "has been entirely or substantially made, manufactured, or produced" outside of the US. The prohibition does not apply if either:

- All components and parts of the product that are obtained from outside the US comprise less than five percent of the final wholesale value of the manufactured product.
- The manufacturer can demonstrate that it cannot produce the components or parts within the US or obtain them from a domestic source, and all components and parts of the product that are obtained from outside the US comprise less than ten percent of the final wholesale value of the manufactured product.

(Cal. Bus. & Prof. Code § 17533.7.)

The statute was amended in January 2016 and relaxed the previous requirements that prohibited a "Made in USA" label if

WARNING LABELS

After the new warning regulations become effective on August 30, 2018, warnings on products containing toxic chemicals must contain an image of a black exclamation point encompassed by a yellow equilateral triangle with a bold black outline. The warning also must display the word "WARNING" in bold and all capital letters, though if the display method is not printed using the color yellow, the symbol may be printed in black and white. Regardless, the pictogram must appear on the left of the warning and in a size no smaller than the height of the word "WARNING," as shown below. (Cal. Code Regs. tit. 27, § 25603.)

OLD	NEW
WARNING This product contains chemicals known to the State of California to cause cancer and birth defects or other reproductive harm.	⚠**WARNING** This product can expose you to chemicals including [name of chemical(s)], which [is/are] known to the State of California to cause cancer, and [name of chemical(s)], which [is/are] known to the State of California to cause birth defects or other reproductive harm. For more information go to *P65Warnings.ca.gov.*

any portion of the product was made outside of the US, without exception. Although the current version has been in effect for over a year, the question of which version applies for injuries alleged to have occurred before its effective date is currently before the Ninth Circuit (see *Fitzpatrick v. Big Heart Pet Brands*, No. 17-15047 (9th Cir. Jan. 10, 2017); *Fitzpatrick v. Tyson Foods, Inc.*, No. 16-17038 (9th Cir. Nov. 4, 2016)). Until the Ninth Circuit rules definitively, the pre-2016 version of the statute might still provide a colorable basis for a plaintiff to bring suit.

Search California Reduces Requirements for "Made in USA" Labeling for more on the January 2016 amendments.

Two class action complaints have been filed under the current version of the statute (see *Claiborne v. Church & Dwight Co.*, No. 17-0746 (S.D. Cal. Apr. 13, 2017); *Dashnaw v. New Balance Athletics, Inc.*, No. 17-0159 (S.D. Cal. Jan. 26, 2017)). These cases are still in the pleading stage so it remains to be seen how courts will interpret the new standards.

SUPPLY CHAINS ACT DISCLOSURES

The Supply Chains Act requires certain retailers and manufacturers to disclose on their websites any efforts taken to eradicate human trafficking and slavery from their direct supply chains. The Supply Chains Act applies to entities that have more than $100 million in worldwide gross receipts and "conduct business" in California, which includes most retailers of meaningful size. An entity conducts business in California if, in a single tax year, it either:

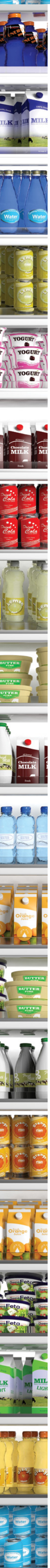
- Has sales in California that exceed $500,000 or 25% of its total sales, whichever is less.
- Has retail property and tangible personal property in California that exceeds $50,000 in value or 25% of its total property value, whichever is less.
- Pays compensation in California that exceeds $50,000 or 25% of the total compensation it pays, whichever is less.

(Cal. Civ. Code § 1714.43(a)(2)(A); Cal. Rev. & Tax Code § 23101(b).)

Entities that are subject to the Supply Chains Act must post the required disclosures on their websites "with a conspicuous and easily understood link to the required information" on the home page (Cal. Civ. Code § 1714.43(b)). This link should be clearly labeled and easy for consumers to locate without requiring them to click on multiple links (typically, the top or bottom of a website's home page is the best placement). The disclosures must provide specific details on the extent to which the entity undertakes efforts to combat human trafficking and slavery in the following five categories:

- **Verification.** This disclosure identifies whether and how the entity verifies its product supply chains to evaluate the risks of human trafficking and slavery.
- **Audits.** This disclosure focuses on whether and how the entity audits its suppliers' compliance with company standards for human trafficking and slavery.
- **Certification.** This disclosure discusses whether and how the entity requires suppliers to certify that materials are produced in compliance with the laws on human trafficking and slavery in the countries where those suppliers do business.
- **Internal compliance standards.** This disclosure addresses whether and how the entity maintains internal accountability standards, as well as the procedures for employees or contractors who fail to meet the standards.
- **Employee training.** This disclosure speaks to whether and how the entity provides training on human trafficking and slavery to employees and managers responsible for supply chain management, particularly with risk mitigation.

(Cal. Civ. Code § 1714.43(c).)



The exclusive remedy for violating the Supply Chains Act is an action by the California Attorney General for an injunction (Cal. Civ. Code § 1714.43(d)). Nevertheless, plaintiffs have attempted to rely on alleged violations of the statute as predicates for liability under California's consumer protection statutes. To date, plaintiffs have been unsuccessful on this theory and no cases have proceeded beyond the dismissal phase.

However, some district courts have left open the possibility that an inadequate Supply Chains Act disclosure could form the basis for a successful challenge under the consumer protection statutes if both:

- The company's disclosures are inadequate.
- The consumer actually relied on those disclosures when making her purchasing decisions.

(See, for example, *Sud v. Costco Wholesale Corp.*, 2017 WL 345994, at *4-6 (N.D. Cal. Jan. 24, 2017), appeal filed, No. 17-15307 (9th Cir. 2017); *McCoy v. Nestle USA, Inc.*, 173 F. Supp. 3d 954, 971 (N.D. Cal. 2016); see also *Hodsdon v. Mars, Inc.*, 162 F. Supp. 3d 1016, 1028-29 (N.D. Cal. 2016) (questioning whether the Supply Chains Act applies to allegations of forced labor, in addition to allegations of slavery or human trafficking).)

> The dramatic increase in consumers' app use has sparked a number of lawsuits challenging the collection and sharing of consumer data.

Several other courts have suggested, by contrast, that an entity's compliance with the Supply Chains Act may operate as a safe harbor to defeat claims under the consumer protection statutes (see, for example, *Wirth v. Mars, Inc.*, 2016 WL 471234, at *6-9 (C.D. Cal. Feb. 5, 2016); *Barber v. Nestlé USA, Inc.*, 154 F. Supp. 3d 954, 959-62 (C.D. Cal. 2015) (finding that the Supply Chains Act determined the level of disclosure required by the defendant)). The limits of any safe harbor defense will be tested in the future as these cases proceed before the Ninth Circuit.

PRIVACY POLICIES AND PRACTICES

Consumer privacy continues to be a complicated and highly regulated and litigated area for retailers. Recent class actions have involved:

- The terms and conditions retailers use in their mobile apps.
- The collection of personally identifiable information (PII) from customers.

MOBILE APP TERMS & CONDITIONS

Many retailers have invested significant resources to ensure that consumers, who increasingly shop with their smartphones and tablets, can download branded mobile apps to their personal devices. The dramatic increase in consumers' app use has sparked a number of lawsuits challenging the collection and sharing of consumer data, based on both:

- Federal statutes, such as the Federal Wiretap Act and the Children's Online Privacy Protection Act (COPPA).
- State laws, such as the California Online Privacy Protection Act (CalOPPA) and the California Invasion of Privacy Act (CIPA).

App privacy cases are part of a broad wave of privacy litigation that has been targeting the retail sector, including cybersecurity and data breach class actions under a variety of state statutes and biometrics cases under the Illinois Biometric Information Privacy Act (BIPA).

Search Privacy and Data Security Toolkit for a collection of resources to help counsel create, implement, and review privacy and data security compliance programs and Internet, Mobile, and Marketing Privacy Compliance Toolkit for a collection of resources to help counsel create, implement, and review marketing privacy compliance programs, including internet and mobile activities.

Search Data Breach Toolkit for a collection of resources to help counsel navigate data breach incidents and litigation and Biometrics Litigation: An Evolving Landscape for information on the legal landscape surrounding the collection and use of biometric data, including more on the Illinois BIPA.

Retailers with mobile apps might face allegations that their apps collect consumer data either in violation of the provider's written privacy policy or in a manner that is inconsistent with the consumer's expectations. Plaintiffs have alleged, for example, that mobile apps improperly tracked users' locations and recorded their conversations in violation of the Federal Wiretap Act (see *Satchell v. Sonic Notify, Inc.*, 2017 WL 760786, at *7-8 (N.D. Cal. Feb. 13, 2017); *Rackemann v. LISNR, Inc.*, No. 17-0624 (S.D. Ind. Jan. 23, 2017)).

Additionally, app providers have been sued for state consumer protection statute violations, intrusion upon seclusion, and breach of contract, based on allegations that they shared customer-specific data collected by their apps, contrary to consumers' expectations or agreements (see, for example, *Zak v. Bose Corp.*, No. 17-2928 (N.D. Ill. Apr. 18, 2017)). Counsel for retailers should expect similar lawsuits to be filed in California in the near future.

A key defense in these cases is consumer consent to collecting and sharing data through the app's terms and conditions. However, consumers often counter that those terms and conditions are vague, overbroad, and deceptive (see, for example, *Cooper v. Slice Techs., Inc.*, No. 17-2340 (N.D. Cal. Apr. 26, 2017) (alleging that, although the defendant's privacy policy stated that it may sell anonymized, aggregate customer data to third parties, the policy did not adequately disclose how the defendant would use the data and exceeded the limited consent granted by customers)).

In light of this type of litigation risk, retailers should carefully review their privacy policies and app terms and conditions to ensure that they clearly and

conspicuously disclose the extent to which customer data is collected and used.

Search Mobile App Privacy: The Hidden Risks for more on privacy considerations and best practices in the mobile app context.

COLLECTION OF PERSONALLY IDENTIFIABLE INFORMATION

In *Pineda v. Williams-Sonoma Stores, Inc.*, the California Supreme Court held that ZIP codes constitute PII (246 P.3d 612, 616-17 (Cal. 2011)). This is notable because California's Song-Beverly Credit Card Act of 1971 (Song-Beverly Act) prohibits retailers from requiring a consumer to provide PII as a condition of a credit card purchase and recording that information during the transaction. Following *Pineda*, major retailers faced a wave of significant litigation from putative class action plaintiffs alleging that the retailers were collecting consumers' ZIP codes and other forms of PII in connection with in-store transactions at the point of sale in violation of the Song-Beverly Act (see, for example, *Doan v. Cort Furniture Rental Corp.*, No. 30-2017-00904345 (Orange Cty. Sup. Ct. Feb. 21, 2017); *Le v. LA Furniture*, No. BC645110 (L.A. Cty. Sup. Ct. Dec. 27, 2016)). Most cases alleging these types of violations are resolved through class-wide settlements that provide retail gift cards as the class benefits.

The Song-Beverly Act does not impose an absolute prohibition on requesting PII. Instead, there is a range of potentially actionable conduct under the statute, from obvious violations involving a retail employee informing a customer that a ZIP code is required for payment, to more subtle violations involving salespeople walking around the floor and asking shoppers to sign up for the retailer's mailing list (see, for example, *Gass v. Best Buy Co.*, 279 F.R.D. 561, 570-72 (C.D. Cal. 2012) (presenting a range of potential scenarios implicating the statute)). The critical inquiry in determining whether a violation has occurred is "whether a consumer would perceive the store's 'request' for information as a 'condition' of the use of a credit card" (*Florez v. Linens 'N Things, Inc.*, 108 Cal. App. 4th 447, 451 (Cal. Ct. App. 4th Dist. 2003)).

The statute provides a complete defense to a retailer that can show both:

- The violation is the result of a bona fide error.
- The retailer maintains procedures designed to avoid such an error.

(See, for example, *Harrold v. Levi Strauss & Co.*, 236 Cal. App. 4th 1259, 1268 (Cal. Ct. App. 1st Dist. 2015) (denying class certification after finding that no violation occurs where PII is requested following a credit card transaction because a customer could not reasonably understand that the PII was required to process the transaction, as required to find a statutory violation); *Yeoman v. Ikea U.S.A. W., Inc.*, 2014 WL 7176401, at *6 (S.D. Cal. Dec. 4, 2014) (decertifying a class where the court found a persistence of individual questions and that the retailer's policy of having cashiers inform customers that they were requesting ZIP codes on a voluntary basis to determine where to build new stores did not violate the Song-Beverly Act), vacated and remanded sub nom. *Medellin v. IKEA U.S.A. W., Inc.*, 672 F. App'x 782, 783 (9th Cir. 2017) (reversing and remanding in light of the US Supreme Court's decision in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016)).)

To guard against this type of litigation, retailers should train sales associates to:

- Wait until after a credit card transaction is complete before requesting a customer's PII.
- Make clear to customers that their disclosure of PII is on a voluntary basis.

COMMUNICATIONS WITH CONSUMERS

The methods retailers use to contact consumers are heavily regulated and often the subject of litigation. Retailers must ensure that they comply with:

- California's CIPA statute, specifically when attempting to record any communications with consumers.
- The federal Telephone Consumer Protection Act (TCPA), particularly when launching any new marketing or informational consumer outreach campaigns that involve sending text messages.

CALL RECORDING

CIPA prohibits a party from intercepting or recording any calls between landlines, cordless phones, cell phones, or any combination of the three, unless both parties have consented to recording. When at least one cell phone is involved, CIPA prohibits recording regardless of any expectation of confidentiality. (Cal. Penal Code § 632(a); see also *Kight v. CashCall, Inc.*, 231 Cal. App. 4th 112, 129, 132 (Cal. Ct. App. 4th Dist. 2014) (noting that a plaintiff must show an "objectively reasonable expectation" of confidentiality to establish a violation when two landlines are involved).) In addition to providing for civil penalties, the statute includes a private right of action allowing for $5,000 in statutory damages per violation (Cal. Penal Code § 637.2(a)(1)).

CIPA applies both within and outside of California. Specifically, it applies to:

- California businesses calling or being called by non-California residents (see *Carrese v. Yes Online Inc.*, 2016 WL 6069198, at *4 (C.D. Cal. Oct. 13, 2016)).
- Non-California businesses calling or being called by California residents (see *Kearney v. Salomon Smith Barney, Inc.*, 137 P.3d 914, 930 (Cal. 2006)).

Given the statute's broad reach and the potential for significant financial exposure, the number of CIPA class actions is on the rise.

The easiest way to comply with CIPA and avoid litigation risk is to obtain consent to record calls. Consent may be based on many factors, including whether:

- **The business used a recorded or scripted warning at the outset of the call with a customer.** Recent cases have focused on companies' outbound calls, where scripted warnings are less frequently used (see, for example, *Saulsbery v. Meridian Fin. Servs., Inc.*, 2016 WL 3456939, at *14 (C.D. Cal. Apr. 14, 2016) (rejecting the argument that CIPA prohibits only the non-consensual recording of incoming calls)). Other cases have focused on unscripted personal calls by call center employees which are automatically recorded (see, for example, *Lal v. Capital One Fin. Corp.*, 2017 WL 1345636, at *8 (N.D. Cal. Apr. 12, 2017) (rejecting the argument that the employer has not "intentionally" recorded calls without consent when an employee makes personal calls on the company's recorded line)).

- **The customer agreed to the terms of use on a company's website.** Courts have found that a consumer's agreement to the terms of use offered on a website constitutes consent to record a subsequent telephone call with that consumer where the terms of use include a recording notification (see, for example, *Maghen v. Quicken Loans Inc.*, 94 F. Supp. 3d 1141, 1145-46 (C.D. Cal. 2015), aff'd in relevant part, 680 F. App'x 554 (9th Cir. 2017)).

TEXT MESSAGE PROGRAMS

Many retailers have promotional text messaging programs that provide consenting consumers with exclusive offers and discounts and information about new products. Retailers also increasingly use text messages to relay shipping and delivery notifications, share order confirmations, and conduct post-delivery customer service surveys. Plaintiffs have used each of these activities as the basis for litigation under the TCPA, making careful navigation and clear communications by retailers critical when initiating contact with consumers.

Over the past few years, as a result of a series of implementing regulations and orders issued by the Federal Communications Commission (FCC), the scope of the TCPA has been broadly expanded to include all telemarketing calls and text messages, as well as non-telemarketing, informational calls and text messages. Additionally, the FCC's broad interpretation of the term "automatic telephone dialing system" (ATDS), a required element of a TCPA claim, is presently the subject of an appeal pending in the DC Circuit, which could significantly impact the way these cases are litigated.

The TCPA has become a focus of the plaintiffs' class action bar, given the complicated structure of the regulatory scheme and the availability of significant damages that can be aggregated with no cap. The statute provides for minimum statutory damages of $500 for each violation, which can be increased to $1,500 where the defendant's conduct is shown to have been willful (47 U.S.C. § 227(b)(3)).

Given the significant financial exposure from even unintended violations of the statute, retailers must proactively manage TCPA litigation risk. Consent is the cornerstone of the TCPA and should be a primary focus of any compliance strategy. Vigilant vendor management is critically important. Key issues to consider include whether:

- The call or text is made for telemarketing versus informational purposes, which will dictate whether the requisite consent must be:
  - in writing, for telemarketing texts; or
  - made verbally, for informational texts.
- Consent was given by the actual intended recipient of a call, as opposed to someone to whom the phone number was reassigned.
- The consumer properly revoked her consent. Indeed, some plaintiffs deliberately use ineffective means of revoking consent to set up claims over "post-revocation" texts.

Search TCPA Litigation: Key Issues and Considerations for more on ensuring compliance with the TCPA and defending against TCPA claims.

ADA-COMPLIANT WEBSITES AND MOBILE APPS

The Americans with Disabilities Act (ADA) requires that "places of public accommodation" ensure equal access to the goods and services they offer. Advocacy groups and private citizens in California have been particularly aggressive in filing lawsuits under the ADA and state-specific laws against retailers based on their websites. Generally, plaintiffs have argued that websites are places of public accommodation under Title III of the ADA and, therefore, must be equipped so that individuals with disabilities are equally able to navigate the websites.

However, there is a split in authority on this issue. Courts in the First and Seventh Circuits have held that websites are places of public accommodation, while courts in the Third, Ninth, and Eleventh Circuits require both:

- A nexus between the website and the goods and services the website provides.
- A physical brick and mortar location (for example, eBay is not a place of public accommodation but Walmart is).

While no California court has yet addressed the issue, the US District Court for the Southern District of Florida recently hosted the first website accessibility trial. In that case, the court found that a regional supermarket's website was a place of public accommodation because it is heavily integrated with its physical stores. The court further found that the website violated the ADA because it was not sufficiently accessible to visually impaired customers. As a remedy for this violation, the court issued injunctive relief that included a requirement that the defendant ensure:

- Its website conforms to the criteria set out in the Web Content Accessibility Guidelines 2.0 (WCAG 2.0).
- Any third-party vendors who interact with the defendant's website also follow the WCAG 2.0.

(*Gil v. Winn-Dixie Stores, Inc.*, 2017 WL 2547242, at *8-9 (S.D. Fla. June 12, 2017).)

The court's adoption of the WCAG 2.0 is significant. The ADA regulations set by the Department of Justice (DOJ) do not specify the standards that websites and mobile apps must meet to comply with federal antidiscrimination laws. The DOJ has suggested that a website is accessible if it complies with the WCAG 2.0 framework, which was created by the World Wide Web Consortium (W3C), an international body where member organizations and the public work to develop web standards (see W3C, WCAG 2.0, available at *w3.org*), but the DOJ has not formally adopted these guidelines as the applicable standard.

Websites typically fall short of the recommended standards because of one or more of the following defects:

- Controls that cannot be accessed with a keyboard.
- The lack of text alternatives for images.
- Form controls that are not coded correctly.
- Buttons that have no programmatic name.
- The lack of a page structure, including headings.

The DOJ's failure to formally adopt the WCAG 2.0 framework and provide specific guidance on its application has provided a defense in some ADA website compliance lawsuits (see, for example, *Robles v. Dominos Pizza LLC*, 2017 WL 1330216, at *5-9 (C.D. Cal. Mar. 20, 2017)).

Although to date the plaintiffs' bar has primarily brought website accessibility lawsuits on behalf of the visually impaired community, emerging cases will likely address other disabilities, including hearing impairments, learning disabilities, cognitive limitations, mobility limitations, speech disabilities, and photosensitivity.

With the number of website accessibility complaints increasing, businesses should:

- Conduct accessibility audits.
- Develop accessibility policies.
- Post accessibility statements on their websites.
- Train employees, including product managers, marketing staff, website designers, and developers, on accessibility policies and relevant standards.

Search Discrimination: Overview for more on litigation under the ADA.

CONSUMER CONTRACTS

Few jurisdictions are more protective of consumer contracts than California. Common areas of dispute include automatic renewal agreements and arbitration and class waiver provisions. To ensure their agreements with consumers are enforceable, retailers should be aware of the state's legislation and case law in these areas.

AUTOMATIC RENEWALS

California's robust Automatic Purchase Renewals Statute (CAPRS) touches most individual consumer contracts where the terms, goods, or services are continued on a recurring basis (Cal. Bus. & Prof. Code §§ 17600 to 17606). The statute applies when an entity institutes a "subscription or purchasing agreement" that is "automatically renewed at the end of a definite term for a subsequent term" or that "continues until the consumer cancels the service" (Cal. Bus. & Prof. Code § 17601).

For an automatic renewal program to be enforceable, the entity must:

- Present the automatic renewal offer terms in a clear and conspicuous manner and in proximity to the request for consent to the offer.
- Receive affirmative consent from the consumer on the terms of the renewal.
- Provide the consumer with an acknowledgement that identifies:
  - the automatic renewal terms;
  - the cancellation policy; and
  - information on how to cancel the agreement.
- Provide the consumer with a clear and conspicuous notice of subsequent material changes to the agreement.

(Cal. Bus. & Prof. Code § 17602(a)-(c).)

Where an entity sends products to a consumer as part of an automatic renewal program without having first received the consumer's affirmative consent, the products are deemed to be "an unconditional gift" and the consumer "may use or dispose" of the products "in any manner he or she sees fit without any obligation whatsoever on the consumer's part to the business" (Cal. Bus. & Prof. Code § 17603; see also *Roz v. Nestle Waters N. Am., Inc.*, 2017 WL 132853, at *7 (C.D. Cal. Jan. 11, 2017) (finding that the delivery of certain water products violated CAPRS, rendering these products unconditional gifts, and holding that the class members were injured because they paid for gifts)).

Few jurisdictions are more protective of consumer contracts than California. Common areas of dispute include automatic renewal agreements and arbitration and class waiver provisions.

The law makes certain exceptions to these requirements. For example, one court held that a key provision of CAPRS might apply "only to tangible products that are shipped to a consumer, and not to intangible services" (*Johnson v. Pluralsight, LLC*, 2017 WL 661953, at *6 (E.D. Cal. Feb. 17, 2017)). Statutory exemptions also exist for certain entities in the public utilities, insurance, alarm, and banking industries (Cal. Bus. & Prof. Code § 17605).

CAPRS contains no private right of action, but plaintiffs may seek redress through other consumer protection statutes (see, for example, *Roz*, 2017 WL 132853, at *1). In the past year, retailers have faced significant litigation for automatic renewals, subjecting them to millions of dollars in potential exposure (see, for example, *Habelito v. Guthy-Renker LLC*, No. BC499558 (Cal. Super. Ct. L.A. Cty. Feb. 1, 2017) (preliminarily approving a $15.2 million class settlement and an attorneys' fee award of over $5 million for plaintiffs' counsel in a case challenging automatic renewals of skin care products under CAPRS and California's Consumer Legal Remedies Act and Unfair Competition Law)).

To avoid the consequences of running afoul of this strict law, retailers should:

- Review the language in their consumer contracts and ensure they make the requisite disclosures to consumers regarding automatic renewals.
- Monitor proposed legislation that would add new requirements for automatic renewal programs, such as the

proposed bill to heighten the consent requirements for free trials and limited-time discounted programs (S.B. 313, 2017-2018 Reg. Sess. (Cal. 2017)).

ARBITRATION CLAUSES AND CLASS ACTION WAIVERS

Despite US Supreme Court decisions approving the inclusion of arbitration provisions and class action waivers in agreements between retailers and their customers, California remains resistant to some of these types of agreements (see, for example, *McGill v. Citibank, N.A.*, 393 P.3d 85, 90-94 (Cal. 2017) (finding an arbitration agreement to be unenforceable because it waived the right to seek a public injunction and "a law established for a public reason cannot be contravened by a private agreement"); *Iskanian v. CLS Transp. L.A., LLC*, 327 P.3d 129, 135-36, 143-44 (Cal. 2014) (holding an arbitration agreement to be unenforceable where it waived the right to pursue claims under California's Labor Code Private Attorneys General Act (PAGA))).

Retailers seeking to enforce these agreements in California should give customers reasonable notice and an opportunity to review. This requires, among other things, that:

- **For in-the-box agreements, the provisions are located in a conspicuous and logical section.** For example, in a case involving a non-warranty claim brought by a consumer, the Ninth Circuit recently rejected the defendant's attempt to enforce an arbitration provision contained in a warranty brochure that had accompanied the merchandise. The court concluded that the plaintiff could not reasonably have been expected to look for an arbitration provision in the "Standard Limited Warranty" section of the "Product & Safety Warranty Information" brochure. (*Norcia v. Samsung Telecomms. Am., LLC*, 845 F.3d 1279, 1287-90 (9th Cir. 2017).)
- **For online agreements, the retailer adequately secured the consumer's assent to the provisions.** Retailers involved in e-commerce often use clickwrap or browsewrap agreements containing terms and conditions that govern consumers' purchase and use of products from the website. A clickwrap agreement requires a consumer to manifest assent by clicking a button to that effect, while a browsewrap agreement makes an agreement available through a separate link that is usually located in the footer of the page, but does not require consumers to manifest assent by doing anything other than using the site. While clickwrap agreements have been routinely enforced, courts have been less willing to enforce browsewrap agreements, at least when there is no independent evidence of actual knowledge of the agreement (see *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1178-79 & n.1 (9th Cir. 2014) (observing that, "in cases where courts have relied on the proximity of the hyperlink to enforce a browsewrap agreement," the websites "included something more to capture the user's attention and secure her assent," for example "a text warning near the button that stated 'By clicking and making a request to Activate, you agree to the terms and conditions.'")).

EMPLOYMENT DISPUTES

In addition to litigation involving consumers, retailers are increasingly subject to significant employment-related litigation, including:

- Wage and hour actions brought under PAGA, as well as individual, class, and collective actions.
- Pay inequality claims brought under California's Fair Pay Act.

WAGE AND HOUR ACTIONS

California has long been a popular jurisdiction for wage and hour claims and, given their large number of hourly (nonexempt) employees, retailers are among the biggest targets. Under PAGA, a private citizen may pursue civil penalties for Labor Code violations as a stand-in for the state on behalf of aggrieved employees. To bring a PAGA action, an employee must provide written notice to both the Labor Workforce Development Agency (LWDA) and the employer. Default penalties are provided by statute. Any resulting penalties are split between the LWDA (75%) and the employee (25%). Attorneys' fees and costs are also available. (Cal. Lab. Code § 2699(g), (i).)

Search California Private Attorneys General Act (PAGA): Overview for more on PAGA, including how civil penalties are assessed and distributed, notice and timing requirements for filing a PAGA action, and potential cure provisions available to employers.

Since its enactment in 2004, PAGA has been invoked in an overwhelming number of class and non-class, representative litigation against retailers and other employers. In recent years, plaintiffs' counsel have pursued increasingly technical and creative theories when bringing these actions. For example, for several years, retailers were targeted with class and representative actions alleging violations of suitable seating requirements codified in the Industrial Welfare Commission's Wage Orders (Cal. Code Regs. tit. 8, § 11070(14)(A), (B) (requiring that employers in the mercantile industry provide employees "with suitable seats when the nature of the work reasonably permits the use of seats")). Although the number of suitable seating cases declined for several years, retailers might see an uptick in litigation following the California Supreme Court's decision in *Kilby v. CVS Pharmacy, Inc.* (368 P.3d 554 (Cal. 2016)).

More recently, plaintiffs' counsel have targeted commissioned employee workforces. California recognizes a special overtime exemption for commissioned employees under which a commissioned employee is exempt if her earnings exceed one and one-half times the minimum wage and more than half of the employee's compensation is based on commissions (Cal. Code Regs. tit. 8, § 11070(3)(D)). Although the exemption provides an option for retailers looking to incentivize strong sales performance, complying with it can prove difficult, in part because of a recent decision holding that an employee's commissions may be allocated to only the pay periods during which they were paid (see *Peabody v. Time Warner Cable, Inc.*, 328 P.3d 1028, 1032-33 (Cal. 2014)). Moreover, a California Court of Appeal decision issued earlier this year requires employers to pay their hourly (nonexempt) commissioned employees separately for off-duty rest breaks (see *Vaquero v. Stoneledge Furniture LLC*, 9 Cal. App. 5th 98, 114-15 (Cal. Ct. App. 2d Dist. 2017)).

In addition to these more creative claims, the most common California employee claims allege that employers:

- Misclassified employees as being exempt from overtime.
- Failed to pay minimum or overtime wages (such as off-the-clock work).
- Did not comply with requirements for meal and rest breaks.
- Issued non-compliant wage statements.
- Failed to pay final wages in a timely fashion, resulting in so-called waiting time penalties.

The most effective and proactive steps employers can take to mitigate risk relating to wage and hour liability include the following:

- **Conduct regular wage and hour audits.** These audits are particularly effective in identifying problems with classification issues, off-the-clock work, overtime, wage statements, meal and rest breaks, and expense reimbursement.
- **Create employee hotlines.** It is important to provide employees with dedicated hotlines and other mechanisms to raise concerns and ask questions relating to wage and hour practices. Employers should promptly investigate and respond to complaints raised through these channels.
- **Ensure that job descriptions remain up to date.** To help prevent misclassification claims, an employer should regularly maintain job descriptions for each exempt position and implement safeguards to ensure that employees actually perform the work described in the job descriptions. These safeguards might include:
  - having each employee sign a form when starting her employment, acknowledging that she is supposed to perform work consistent with the job description; and
  - aligning performance reviews and evaluation criteria with the job description.
- **Develop systems to accurately record employee time.** To avoid liability for off-the-clock claims, employers should ensure that they have reliable methods to accurately record the time that nonexempt employees work, such as electronic clocks, which are typically the best method for recording time. Employers should also prevent employees from performing any work after punching out by:
  - notifying nonexempt employees and their supervisors, in writing (ideally on forms that they sign), that they are strictly forbidden from performing any work when they are not punched in; and
  - blocking nonexempt employees' access to the employer's computer system, including email, during non-work hours (where feasible) or, if access is necessary for business reasons, implementing a system for capturing that work time.

FAIR PAY CLASS ACTIONS

The California Fair Pay Act prohibits employers from paying an employee at wage rates less than the rate paid to an employee of a different gender, race, or ethnicity for "substantially similar" work, when viewed as a composite of skill, effort, and responsibility, and performed under similar working conditions. Several high-profile lawsuits have invoked the Fair Pay Act to shine a spotlight on disparate gender compensation practices (see *Ji-In Houck v. Steptoe & Johnson LLP*, No. 17-4595 (C.D. Cal. June 22, 2017); *Coates v. Farmers Grp.*, No. 15-1913 (N.D. Cal. Apr. 29, 2015)).

Without proper internal mechanisms in place to ensure that pay disparities are based on legitimate non-discriminatory factors other than gender, national retailers are uniquely prime targets for these types of class actions, which can involve thousands of plaintiff-employees across several jurisdictions.

To stay ahead of potential class actions based on pay inequalities, retailers should conduct internal payroll audits to determine what factors drive pay increases and promotions. As part of these audits, retailers should:

- Identify positions that have substantially similar work.
- Analyze the pay of workers performing substantially similar work by gender, race, and ethnicity.
- If any disparities in pay are found, determine what action must be taken to correct the disparities, or what defenses may apply based on non-discriminatory legitimate factors such as education, training, or experience.

Search Expert Q&A on the Impact of California's Fair Pay Act for more on complying with the Fair Pay Act.

DRINKER BIDDLE RETAIL CLASS ACTIONS TEAM

This article is the result of a collaborative effort by the Retail Class Actions Team at Drinker Biddle & Reath LLP, which comprises over 70 attorneys across the firm. The team includes litigators who represent leading retailers in significant consumer and employment class actions across the country and, along with the firm's regulatory attorneys, advise retailers on mitigating risk in an evolving legal and regulatory environment.

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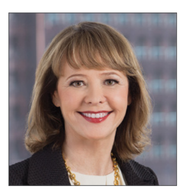

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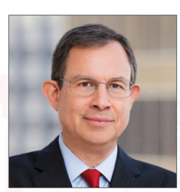

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