

Ten Common Mistakes When Conducting Sweepstakes or Contest Promotions on Social Media

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Many companies will be running sweepstakes and contests during the holidays and promoting them on Facebook, Instagram, and other social media platforms. If your company is planning a holiday promotion using social media, you should know it will be subject to various federal and state laws. And while these laws are fairly easy to comply with, they are frequently overlooked.

Whether you refer to it as a sweepstakes, contest, drawing, giveaway, or something else, there is an important legal difference between “sweepstakes” and “contests.” A “sweepstakes” is a game of chance (e.g., a random drawing). In contrast, a “contest” is a game of skill (e.g., a longest golf drive competition). Some state laws that apply to sweepstakes do not apply to contests. Although the line between a sweepstakes and contest can often be blurry, to keep things simple, we’ll use the term “promotion” to refer to both sweepstakes and contests.

In our experience, companies often make the same types of mistakes when offering these types of promotions; some are unique to social media promotions, but others apply more generally.

1. Whoops! We Forgot about the Rules.

For both sweepstakes and contests, most states require official rules. Specific content requirements vary by state and depend on whether the promotion is a contest or sweepstakes; however, they generally require the rules to include (i) start and end dates/times, (ii) eligibility requirements, (iii) entry instructions, (iv) how winners are chosen, (v) odds of winning, (vi) prize(s) and prize value(s), (vii) how to obtain a list of winners, and (viii) contact information for the sponsor and any administrator.

The official rules must also be readily accessible to entrants. For example, any advertisement and social media post description should include a hyperlink to the official rules. Simply saying “subject to official rules” or “official rules apply” without directing consumers to those rules is likely insufficient under many state laws.

In addition, many states require an abbreviated “short form” version of rules in every advertisement

for the sweepstakes or contest (including posts on social media). The content requirements for short form rules also vary by state, although they mirror many of the requirements for the full official rules. This can be challenging in the context of a social media post, but can be accomplished with some creativity and understanding of the law.

2. Don't Forget Official Rules can also Offer Protection

The official rules operate as a contract between your company and the entrants, and they may include more than what is just required by law. Accordingly, your company can and should consider including a number of other protections in the official rules, including (i) flexibility for running the sweepstakes and awarding prizes, (ii) requiring certain conditions to be met before a winner can receive a prize, such as submitting an affidavit of eligibility, a liability waiver, and a parental/guardian consent, (iii) dispute resolution provisions, and (iv) risk-shifting provisions (e.g., indemnification and limitations of liability). Carefully considering the risks relating to methods of entry, prizes, and any consumer-generated content can help inform the types of protection that should be baked into the rules.

3. What Does No "Purchase or Other Consideration Necessary" Really Mean?

If you are wondering what this means, you are not alone. One of the most common violations is not intuitive: for sweepstakes, you cannot require entrants to give any “consideration” for entry.

To start, this means that you can't require entrants to buy something to enter your sweepstakes. Be aware, though, that many states take a broader view. In some states, requiring an entrant to provide anything of value to enter violates the law. For example, you may be tempted to require entrants to: (i) share a social media post of your company, (ii) like or tag your company on social media, or (iii) sign up for marketing emails. What's wrong with that? In some states, these will be deemed to be consideration because they have value to the company.

To avoid the consideration problem, you should offer an additional “free” alternative method of entry. For example, you can permit entry by mail or email. However, to make sure this method of entry does not rise to the level of “consideration,” be sure to not use the personal information of any entrant who enters by mail or email for any purpose other than administering the sweepstakes. In other words, don't add them to your marketing list. In addition, those who use free alternative means of entry must have the same chances of winning from the same prize pool as those who entered via any other means.

4. Social Media Platforms Have Rules Too.

Apart from federal and state law, one important area that is easily overlooked is the social media platforms' own requirements for promotions run on their respective platform. These are updated from time to time and you should review them before using a platform for a promotion.

For example, as of the time of this alert, (i) Facebook and Instagram require clear releases of their platforms for any liability relating to the promotion, and (ii) Facebook, but not Instagram, prohibits using personal timelines or friend connections in any promotion (e.g., Facebook does not permit “share on your Timeline to enter,” “share on your friend's Timeline to get additional entries,” or “tag your friends in this post to enter”). In addition to privacy-related requirements imposed by law (see #10 below), Facebook's terms expressly require companies collecting content and information directly from users of the Facebook platform to clearly notify users of such practices and obtain their

consent.

5. User-Generated Content is Not Your Property.

The mere fact that a participant posts content (e.g., photos, written material, etc.) on social media or submits it to your company in the context of a promotion does not necessarily mean that the company can freely use that content for marketing or other purposes.

Accordingly, if your promotion contemplates entrants submitting content, or posting content on social media and tagging your company, you should consider if and how you would like to use that content, and include an appropriate license in your official rules. For example, if you would like to use the content in marketing materials outside of the promotion or the social media platform, you should include a clear, irrevocable license to do so.

Separately, to the extent the content contains an entrant's name, image, or likeness, you should know that the entrant has rights of privacy or publicity that prohibit your use without express permission. You can and should seek to secure this permission in the official rules. However, because some states require an individual's express written consent to grant that permission, you should also secure a right of privacy/publicity release separately and apart from the rules. Making this release a condition for receiving the prize is a good idea even if your company simply wants advertise who won your promotion.

6. Don't Forget to Require Any Influencers to Make Proper Disclosures and Encourage Entrants to do the Same.

In a previous [alert](#), we discussed how influencers must disclose to consumers any "material connections" to a brand whenever they make an "endorsement" of that brand. Accordingly, if a company uses an influencer to advertise a promotion, or the influencer otherwise receives any benefit to post about or endorse the promotion, that relationship should be disclosed to consumers.

What may be less obvious is that these requirements apply to anyone with a "material connection" to the brand, and "material connection" is interpreted broadly. In fact, a chance to win a prize could be considered a material connection between an entrant and your company. So, it's probably a good idea to make it easy for entrants to disclose their connection by requiring something more than a "like" whenever requiring an action on social media to enter. For example, you could require entrants to include something like #holidaysweepstakes as part of a means of entry. In any case, disclosure requirements should be contained in the official rules and short form versions of the rules.

7. Registration and Bonding of the Promotion may be Required in Some States.

Depending on prize value and promotion location, you may need to register the promotion in one or more states, and you may be required to obtain a bond. For example, New York, Florida, Rhode Island, and Arizona each have different registration requirements. Registration (including bonding, if applicable) is a pretty simple process, but can take a little time, so plan ahead.

8. Consider the Age of Entrants.

Do not overlook the age of entrants.

First, because a contract with a minor is voidable, many of the protections baked into your official

rules could become meaningless. For example, if a promotion includes submission of user-generated content, any license to use that content included in the rules could become voidable by an entrant under the age of majority.

Although companies may ultimately become comfortable with allowing minors to enter certain promotions, they should consider and seek to mitigate the risks and carefully consider the structure of the promotion when minors are involved. For instance, you could award prizes to the minor's parent or guardian, or require parent or guardian consent as a condition to receiving the prize.

Second, the federal Children's Online Privacy Protection Act (COPPA) imposes significantly stricter privacy requirements when commercial website operators or online services knowingly collect personal information from children under the age of 13. Because COPPA violations can result in steep penalties, take extra care to comply if your promotion allows children under 13 to enter.

9. Don't Forget Other Eligibility Requirements.

In general, it is permissible to establish eligibility requirements, such as limiting the promotion to certain states. However, eligibility requirements should not discriminate against people, including members of protected classes, such as race, color, religion, national origin, sex, age, or disability.

10. Remember to Comply with other General Advertising and Privacy Laws.

Although it may be obvious, if you publicize your promotion on social media, any such post will constitute "advertising" under state and federal law, and therefore be subject to general prohibitions against misleading, deceptive, and false advertising.

Accordingly, because social media posts (including shares of third-party posts) tend to be more informal, your company should be careful to not make any claims in social media posts or shares that would be prohibited in advertisements.

Similarly, because the promotion will likely involve collecting at least some of the participants' personal information (if not only for the purposes of administering the promotion), general privacy laws governing the collection and use of personal information apply and should not be overlooked.

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