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Customer reviews in the crosshairs

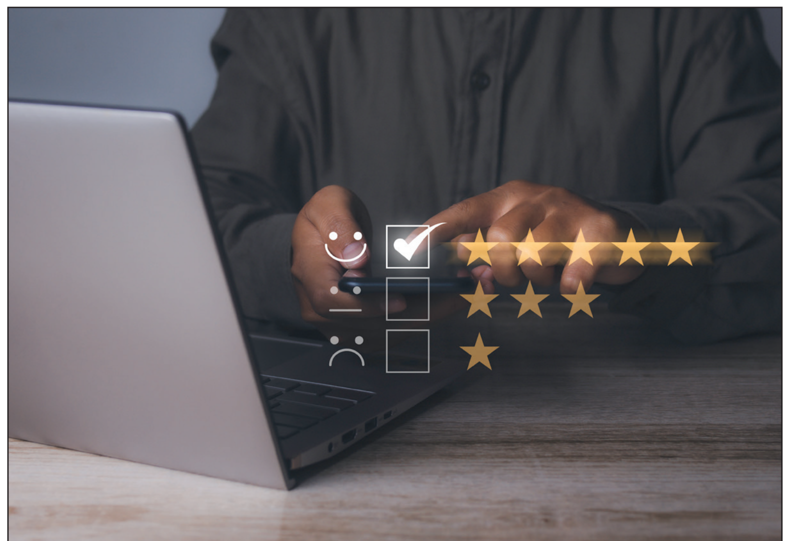
Does your company use reviews to promote its products? Whether customers can leave reviews on your website or a third-party platform, businesses should be aware that federal scrutiny is ramping up.

The Federal Trade Commission recently approved a final consent order against The Bountiful Company for manipulating reviews on Amazon product pages. That marks the agency's first enforcement action against "review hijacking," a marketing tactic that makes reviews for one product appear to belong to another.

According to the FTC complaint, Bountiful took advantage of an Amazon feature that allows vendors to create "variation relationships" for products that are similar but differ in relatively inconsequential ways like color, quantity, or flavor. Variation items share one product page but have different options customers can put in their cart.

The FTC alleges that Bountiful merged listings for its Stress Comfort supplements with other established company products, which had different formulations. In doing so, it "deceived customers into thinking that its newly introduced supplements had more product ratings, higher average reviews, and '#1 Best Seller' and 'Amazon Choice' badges," according to an FTC announcement.

The Bountiful Company agreed to pay $600,000 to settle the charge. In a statement to the Wall Street Journal, a spokesperson



said the settlement avoided a costly legal battle and that the company stands behind its products and its business practices.

FTC targeting fake reviews

In October, the FTC announced that it was exploring a potential rule to combat deceptive or unfair review practices.

"Companies should know by now that fake reviews are illegal, but this scourge persists," Samuel Levine, Director of the FTC's Bureau of Consumer Protection, said in a statement. "We're exploring whether a rule that would trigger stiff civil penalties for violators

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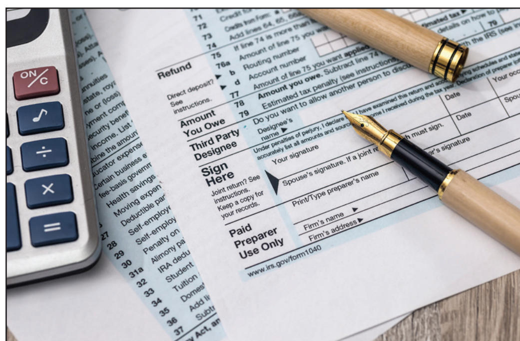
Businesses enticed to electrify commercial vehicles



Business owners can take advantage of a new tax credit for electric vehicles. The Inflation Reduction Act created an incentive for Americans to buy electric cars, trucks and other vehicles.

As of January 1, 2023, vehicles that weigh less than 14,000 pounds were eligible for up to $7,500, while heavier vehicles can qualify for up to $40,000 in tax credits. The latter applies mainly to Class 3 through Class 8 vehicles, or medium- and heavy-duty trucks and buses.

Calculating the credit

The Internal Revenue Code provides a tax credit for each "qualified commercial clean vehicle" acquired after December 31, 2022. The amount of the tax credit is the lesser of two calculations:

- For fully electric or fuel cell vehicles, 30% of the cost. For hybrid vehicles, 15% of the cost.
- The incremental cost of the vehicle over the price of a comparable vehicle fueled by gasoline or diesel.

Once the credit has been claimed, the cost basis of the vehicle must be reduced before depreciation. No double benefit is allowed.

As the benefit is structured as a tax credit, business owners need tax liability to benefit. However, tax-exempt entities may be able to receive their "credit" in the form of a direct incentive payment from the government.

Eligible vehicles

To be eligible for the commercial tax credit, the vehicle must meet the following requirements:

1. Be acquired for use or lease by the business
2. Be a depreciable asset
3. Have a battery capacity of at least 7 kWh, or 15kWh for vehicles over 14,000 pounds
4. Be charged by an external electricity source
5. Be made by a qualified manufacturer, with final assembly in North America (A list is available at https://afdc.energy.gov/laws/electric-vehicles-for-tax-credit.)

Generally, the credits will be easier for businesses to claim than consumers, as consumer credits are linked to household income as well as additional requirements for battery sourcing and manufacture. In addition, certain higher-cost consumer vehicles are ineligible, including sedans over $55,000 and vans, SUVs and trucks over $80,000.

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would make the market fairer for consumers and honest businesses."

In its request for public comment, the FTC outlined several practices that it considered to be "clearly deceptive or unfair," including:

Fake reviews: Reviews and endorsements by people who do not exist, have not used the product, or lie about their experiences.

Review reuse fraud: Hijacking or repurposing reviews from another product or service.

Paid reviews: Paying for positive reviews for a product, or negative reviews of competitors' products.

Insider reviews: Reviews written by a company's executives or solicited from its employees that don't mention their connections to the company.

Review suppression: Claiming to display all customer reviews when in reality the company suppresses negative reviews.

Fake review websites: Setting up a purportedly "independent" website or organization to review or endorse a company's own products.

Buying followers: Buying or selling followers, subscribers, views, or other indicators of social media influence.

Key takeaways for businesses

Businesses that leverage online reviews should take care to operate in an ethical and straightforward manner.

Leaders may want to bring in legal counsel to ensure the organization is operating according to FTC guidelines. Be certain that your team understands what constitutes a fake review. Audit existing marketing and product listings to determine whether reviews for different products have been lumped together into a single group.

Additionally, review social media and influencer practices. Make sure reviews that have been paid for, or otherwise incentivized, are clearly marked as ads or sponsored posts, in accordance with FTC guidelines.

New rule may allow outsiders during OSHA inspections

The Occupational Safety and Health Administration is expected to propose a rule that would allow third-party worker advocates to take part in facility inspections. Workers at nonunion facilities would have the right to designate a representative to take part in OSHA inspections, regardless of whether that representative is an employee.

Further, the proposed rule would clarify the role of representatives at a unionized workplace. It would allow any union representative — such as someone from the national office — to take part in an inspection, not just a union rep employed at the inspected facility.

If enacted, the effective date of the rule could be sometime in 2024, although it will likely be challenged in court.

Reviving an old rule

The proposed rule would revive a policy adopted during the Obama administration. In 2013, OSHA issued a letter of interpretation known as the "Fairfax Memo." Per the memo, workers at a company without a collective bargaining agreement could "designate a person affiliated with a union or a community organization to act on their behalf as a walkaround representative."

Critics said the memo contradicted OSHA's own regulations, which required the employee representative to be employed by the company being inspected. Further, they argued that the Fairfax Memo was an agency overreach in that it altered guidelines without going through the formal rulemaking process.

The Memo faced legal challenges and was rescinded in 2017 during the Trump administration.

If the proposed 2023 change is enacted, critics say it will be a boon to union organizers, providing access to facilities where they would generally not be admitted. Meanwhile, proponents say that having a third-party representative on hand could help workers speak more freely and overcome fears of retaliation.

Prepare for OSHA inspections

Strike activity and union organizing is expected to increase in 2023. In light of the current climate and potential rule changes, companies should review their procedures and plans for an OSHA inspection. Consider the following:

- **Who will serve as a point person during OSHA visits.** This person should accompany the inspector throughout the facility and document any photos or tests OSHA makes at the job site.
- **Whether third-party representatives will be admitted.** You have a right to deny an inspection and require OSHA to get a warrant. It's a good idea to seek legal counsel in advance if this is the planned response.
- **Which areas of the facility should be protected as a trade secret.** You may choose to deny third-party access to these specific areas. Additionally, any OSHA photographs in these areas should be appropriately labeled as "trade secret."

If you don't already have a safety committee in place, consider establishing one. That could increase the likelihood that any designated employee representative would come from your own employee group (i.e., a safety committee chair), rather than an outside party.

This newsletter is designed to keep you up-to-date with changes in the law. For help with these or any other legal issues, please call our firm today. The information in this newsletter is intended solely for your information. It does not constitute legal advice, and it should not be relied on without a discussion of your specific situation with an attorney.

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DOJ to incentivize voluntary self-disclosure

The Department of Justice has announced a new policy outlining the benefits a company may receive for voluntary self-disclosure (VSD) of criminal conduct.

A goal of the policy is to incentivize companies to come forward proactively when they discover internal misconduct.

The new Voluntary Self-Disclosure Policy sets a nationwide standard for how U.S. Attorney's Offices will determine whether a company has made a voluntary self-disclosure. It outlines the tangible benefits to a company that makes a VSD, cooperates, and remediates the conduct.

Benefits of VSD

Absent an aggravating factor, a company that is considered to have made a VSD would receive the following benefits:

- The government will not seek a guilty plea.
- The company could potentially avoid a criminal penalty, and in any event it will not receive a criminal penalty that is greater than 50% below the low end of the U.S. Sentence Guidelines fine range.
- The U.S. Attorney's Office will not require a third-party compliance monitor.

Conditions of a voluntary disclosure

A company can qualify for VSD benefits if the following conditions are met:

- It discloses facts of misconduct before such conduct is publicly reported other or otherwise known to the DOJ.
- It discloses all known relevant facts in a timely matter, prior to a threat of disclosure or government investigation.
- It fully cooperates and appropriately remediates the criminal conduct.

Aggravating factors

Under the VSD policy, the government may still seek a guilty plea if certain aggravating factors are present:

- The misconduct poses a grave threat to national security, public health or the environment.
- The misconduct is deeply pervasive throughout the company.
- The misconduct involved the company's current executive management.

However, per policy, the presence of an aggravating factor does not mean a guilty plea will necessarily be required. Rather, the relevant facts and circumstances will be considered.

In the instance of an aggravating factor, the company can still receive benefits under the VSD policy, including a reduction in the fine range. A third-party monitor will not be required if the company has implemented an effective compliance program.