



Legislative Briefs

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NEGATIVE OPTION PLANS

2005 Wisconsin Act 458, passed by the legislature and signed by Governor Jim Doyle on May 25, 2006, regulates “negative option plan” practices for consumer goods and services commencing on April 1, 2007.

Wisconsin law currently allows consumers to keep “unsolicited goods” as gifts without any obligation to the sender under Section 241.28, Wisconsin Statutes. However, this statute does not specifically apply to negative option plans.

BACKGROUND

A “negative option plan” is a business practice in which goods or services are provided automatically, with the assumption that the consumer will either pay for the goods or service, or specifically decline it in advance of billing. Negative option plans are widely used by various businesses including book clubs, record clubs, and mail order merchandisers. Problems may occur when consumers do not specifically decline unwanted goods or services, and are unknowingly billed for them by the seller.

According to the Wisconsin Department of Agriculture, Trade and Consumer Protection (DATCP), the department receives approximately 200 formal written consumer complaints annually relating to negative option billing practices. With the enactment of Act 458, the department projects that complaints regarding this issue will greatly increase.

2005 ASSEMBLY BILL 574

2005 Assembly Bill 574, enacted as 2005 Wisconsin Act 458, was introduced by Representative Suzanne Jeskewitz and 17 other representatives, and cosponsored by Senators Luther Olsen, Fred Risser, and Robert Wirsch. The drafting file for Act 458 indicates that it was a redraft of several earlier legislative proposals dating back to 1997 Assembly Bill 169. According to the drafting file for AB-169, DATCP was concerned over the lack of consumer protection regarding the problems associated with negative option plans.

On December 15, 2005, the assembly adopted Assembly Amendment 1 to AB-574, which deleted “lawn care services” from the bill, and passed the bill on a voice vote. On March 9, 2006, the senate adopted Senate Amendment 1 to AB-574 so the bill would not interfere with the Wisconsin Supreme Court rules governing attorney-client relationships, and concurred in the bill as amended on a voice vote. On April 25, 2006, the assembly concurred in the senate amendment by a vote of 93 to 0.

2005 WISCONSIN ACT 458

DATCP Responsibilities. DATCP is responsible for enforcing 2005 Wisconsin Act 458, and is authorized to investigate and bring action against persons violating this law. The department may commence action to restrain a violation by either a temporary or permanent injunction.

DATCP or a district attorney may commence action to recover a forfeiture to the

Reference Desk: (608) 266-0341

Web Site: www.legis.state.wi.us/lrb

Prepared by Clark G. Radatz, Senior Legislative Analyst

state of not less than \$100 nor more than \$10,000 for each violation of the law.

Prohibitions. Businesses offering consumer goods or services are prohibited from misrepresenting to a consumer that failing to reject or return a delivery of consumer goods obligates the consumer to make payment for the goods or services.

Sellers are not allowed to offer a consumer a prize or prize opportunity, or free or reduced-price goods or services which would commit the consumer to purchase additional goods or services, unless the seller or agent discloses the commitment at or before the time of purchase and the consumer has the opportunity to reject the offer.

Sellers are not allowed to bill a consumer for goods or services which:

- the consumer has not agreed to purchase or lease;
- are under an agreement that is no longer in effect; or
- are at a price that is higher than previously agreed upon, unless the consumer agrees to the higher price or is given the opportunity to cancel without penalty.

Exemptions. Certain contracts regulated under federal law are exempted by Act 458 (Title 16, Part 425, U.S. Code of Federal Regulations), and the act's definition of "consumer goods or services" excludes health care, motor vehicles, and cable and satellite television services.

Prohibited actions by the seller are not applicable if the agent or representative did

not know or have reason to know that its conduct violated the prohibitions.

Redress. Consumers are also allowed to initiate legal action. If successful, the consumer may recover twice the amount of their monetary loss or \$200, whichever is greater, for each violation, and costs including reasonable attorney fees.

Penalties. Violators are subject to civil forfeitures and criminal penalties (a fine of not less than \$25 nor more than \$5,000, imprisonment not to exceed one year, or both, for each violation).

FEDERAL LAW

The Federal Trade Commission (FTC) also regulates "prenotification negative option plans" (Title 16, Part 425, U.S. Code of Federal Regulations).

Under this federal law, the FTC requires that companies must inform the consumer:

- whether there is a minimum purchase obligation;
- how and when the consumer can cancel their membership;
- how many announcements and rejection forms the consumer will annually receive; and
- how to reject received merchandise.

FOR FURTHER INFORMATION

View a copy of 2005 Wisconsin Act 458 at www.legis.state.wi.us/2005/data/acts/05Act458.pdf.

Additional information on consumer issues, including negative option plans, is available at www.ftc.gov.