Consumer advertising law basics for the franchise industry

Erin R. Conway | Tuesday, December 15, 2020

Franchisors are subject to strict regulation when it comes to advertising to potential franchisees, but it's also important to give sufficient attention to advertisements directed to consumers and ensure they are compliant with relevant advertising laws.

The Federal Trade Commission is the primary agency responsible for regulating public advertisements under the FTC Act. Other federal and state agencies also regulate the advertising of specific types of goods and services. For example, the Alcohol and Tobacco Tax and Trade Bureau (TTB) regulates the labeling and advertising of beer, wine and spirits and the Food Drug and Cosmetic Act sets requirements and limitations for the advertising of foods, drugs, dietary supplements, cosmetics and medical devices. In addition, state attorneys generals, competitors and consumers can also bring lawsuits for false advertising and unfair competition under the federal Lanham Act, and for violation of other state consumer protection laws. The burden of compliance with these advertising laws generally falls on the entity disseminating the ad—whether that be a franchisor or franchisee. But, courts have in some cases found franchisors vicariously liable for the torts of their franchisees—including false advertising—under agency theories. So, best practice is to ensure that both the franchisor and franchisees are aware of their obligations and are in compliance.

Here is a non-exhaustive list of key concerns for complying with the various advertising laws:

All advertising must be truthful and not deceptive

The most basic tenet of advertising law is truthfulness. But, while an advertisement may be literally true, it can still run afoul of FTC regulations or other federal or state competition laws if it is likely to deceive consumers. According to the FTC, a statement is deceptive if it: (1) is likely to mislead consumers acting reasonably under the circumstances, (2) is "material," i.e. likely to affect to a consumer's decision to buy or use the product. Note that FTC will look at both affirmative statements AND omissions. So, consider whether leaving out a particular fact about your product or service might render the advertisement misleading to consumers.

Any claims about products or services must be substantiated

In addition, an advertiser must have a reasonable basis for all advertising claims about its products or services before dissemination. This is referred to as "substantiation." The specific type and degree of evidence necessary to substantiate a claim depends on the claim itself. For example, a health or safety claim must be supported by "competent and reliable scientific evidence," i.e., tests, studies, or other scientific evidence that has been obtained or conducted using methods that experts in the field accept as accurate and that that has been subjected to qualified evaluation.

At minimum, an advertiser must possess the evidence or data it claims to have. Thus, if your advertisement claims, whether expressly or by implication, a particular level of support, such as "9 out of 10 doctors agree" or "laboratory tests demonstrate," you must actually have that advertised level of substantiation.

Advertising cannot be unfair

FTC is also concerned with curtailing "unfair" sales techniques that may prevent consumers from effectively making independent purchasing or engagement decisions. An advertisement will be considered unfair if: (1) it causes or is likely to cause substantial consumer injury which a consumer could not reasonably avoid and (2) the potential injury to consumers outweighs the benefit. While "injury" will typically mean monetary loss, it can also include other types of harm, such as unwarranted health or safety risks or emotional harm. FTC is more likely to find unfairness where an advertisement targets vulnerable classes of consumers, like children, the elderly or the sick.

Comparative advertising must not cause consumer confusion

Sometimes an advertiser may also want to call out or compare their goods or services with those of a competitor. (Think: "*Domino's oven baked sandwiches beat Subway's in a national taste test 2 to 1,*" or "*Try Dove shampoo. No other shampoo has more natural ingredients.*").

In general, it is permissible to use another's trademark in an advertisement for the purpose of comparison and it will not be considered a violation of the Lanham Act, so long as use of the competitor's mark is not likely to cause consumer confusion. In fact, The FTC encourages the naming of competitors in comparative advertising, as long as it is truthful, not misleading, and substantiated (i.e., otherwise meets the requirements of the FTCA), because it can convey valuable information to consumers.

Whether a use of another's trademark in a comparative advertisement is considered "nominative fair use" and, therefore, not a trademark infringement depends on a number of factors. Most courts consider truthful use of another's trademark to refer to the trademark owner's actual goods and services associated with the mark as nominative fair use where: (1) the product or service in question is not readily identifiable without use of the trademark, (2) only so much of the mark as is reasonably necessary to identify the product or service is used and (3) use of the mark does not suggest sponsorship or endorsement by the trademark owner.

This list represents only a few of the general concepts implicated by the consumer advertising laws. We recommend consulting an attorney with specific compliance questions, or in the event of a dispute or enforcement action.

Erin R. Conway
Team member bio