

Small Business Notes

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U.S. Federal Trade Commission Adopts New Rule on “Made in USA” Claims in Product Labels

On July 1 the FTC adopted a new rule on “Made in USA” claims in product labeling and advertising. The rule, which was originally proposed in June of 2020, replaces the old labeling “standard” that did not have the force and effect of law and also gives the FTC the authority and ability to seek civil money penalties against violators.

Under the new rule, a product to be labeled “Made in USA” must meet three tests: all significant processing of the product and its components must occur in the United States; final assembly and processing of the product must occur in the United States, and all or virtually all of the components of the product must be sourced in the United States. On this last requirement, the commentary on the new rule stated that consumer perception testing consistently showed that consumers expected products labeled as “Made in USA” would have “...no more than a *de minimis* amount of foreign content.” The FTC rejected any percentage of content, bright line test noting that such a test “...could allow deceptive, unqualified claims in circumstances where the low cost of the foreign input does not correlate to the importance of that input to consumers.”

It is significant that the new rule defines “label” to include mail order catalogs and promotional material which it defines as “...any materials, used in the direct sale or direct offering for sale of any product or service, that are disseminated in print or by electronic means, and that solicit the purchase of such product or service by mail, telephone, electronic mail, or some other method without examining the actual product purchased.”

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State Attorneys General Support New Federal Legislation for Consumer Protection

In a June 28th letter to Congressional leaders, Minnesota Attorney General Keith Ellison joined twenty eight other attorneys general in asking that Congress swiftly pass H.R. 2668, Consumer Protection and Recovery Act which would restore the Federal Trade Commission's power to obtain equitable monetary relief, (i.e., restitution and disgorgement) from parties who have been enjoined from engaging in unfair and deceptive business practices. In April, 2021, the U. S. Supreme Court in its decision in AMG Capital Management, LLC, et al. v. Federal Trade Commission [141 S. Ct.1341 (2021)] held that the FTC did not have the power to seek such monetary relief, a decision which reversed forty years of FTC practice.

In their letter, the attorneys general made three major points:

- That unfair and deceptive trade practices are a “serious and pervasive problem” in the United States with consumers losing over \$3 billion to such practices in 2020.
- That failing to put in place financial consequences for violators enables them to keep their ill gotten gains and emboldens wrongdoers and incentivizes unlawful conduct.
- That the AMG decision left consumers without meaningful redress and threatened the availability of a fair marketplace while also reducing consumers' confidence in the ability of the FTC to protect consumers from harm.

The letter concluded that without such authority to seek equitable monetary relief “...consumers and businesses in the States will be deprived of what is rightfully theirs, wrongdoers will be allowed to retain the profits of their illegal conduct, and markets will become less competitive.”

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NFIB Survey Shows Increasing Small Business Concern with Inflation

Just after the Independence Day holiday the National Federation of Independent Businesses (NFIB) released its June “NFIB Small Business Economic Trends” reporting on results of a survey of business owners perceptions and experiences with various economic and business factors.

The report noted that while business optimism rose in June, it was still in negative territory with a net negative 12 percent of business owners expecting improved business conditions over the next six months. Significantly, inflation occupied second place in owners’ listing of the single most important problem (after taxes at number one and ahead of poor sales at number three).

Inflation has shown itself across prices in the economy as a whole including such continuing and non-transitory factors as food and energy and small business owners have responded with price increases for their own products. The survey showed that forty-seven percent of owners had raised their prices. That percentage is the highest in forty years. Those price increases have resulted in a decline in real average hourly earnings of workers (down 0.5 percent in June). If hourly wages continue to fall, workers’ demands for higher wages in an economy whose productivity is still damaged from the pandemic will exert even more inflationary pressure.

Current Federal Reserve policy sets a two percent inflation goal and it remains to be seen if the Fed will tighten the money supply through interest rate increases before January 2022.

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Minnesota Enacts Federal Tax Conformity for 2020 Paycheck Protection Program (PPP) Loan Forgiveness

Under federal law, amounts of loan forgiveness received under the federal Paycheck Protection Program for 2020 were exempt from federal income tax. Minnesota, however, failed to enact a law conforming Minnesota's tax treatment of those amounts with the treatment under federal law, so receipt of PPP loan forgiveness remained a taxable event for Minnesota recipients.

The 2021 Minnesota legislative session did enact retroactive conformity with federal law for the tax treatment of PPP loan forgiveness.

For businesses that filed a 2020 tax return that included PPP loan forgiveness amounts, the Minnesota Department of Revenue offers three possible outcomes:

- If the Department of Revenue can adjust the return, it will make the adjustment and inform the taxpayer by letter stating that the adjustment has been made and the effect of the change on any refund the taxpayer may receive as a result. The Department of Revenue indicates that it is committed to adjusting as many returns as possible.
- If a taxpayer will need to amend a return based solely on the new change to Minnesota tax law, the Department of Revenue will inform the taxpayer whether it can adjust the return or whether the taxpayer will need to file an amended return. Taxpayers should wait to hear from Revenue before filing an amended return.
- Taxpayers who have not yet filed a 2020 return, or who have filed for an extension, may use the new 2020 tax forms available on the Minnesota Department of Revenue web site to claim the PPP loan forgiveness income exclusion.

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U.S. District Court Dismisses Suit Against Employer Requiring Vaccination

In December 2020 and again in May 2021 the U.S. Equal Employment Opportunity Commission (EEOC) issued a guidance determination that employers could require employees to receive a COVID-19 vaccination as a reasonable condition of employment.

In April 2021 Methodist Hospital in Houston, Texas, required all of its non-managerial employees to be vaccinated by June 2021. A previous requirement for mandatory vaccination of all managerial staff had resulted in one hundred percent compliance. In June, 178 employees of the hospital were suspended for failure to obtain the required vaccination by the deadline date.

Jennifer Bridges, a nurse at the hospital, joined 116 other nurses in a lawsuit charging that the requirement of vaccination was unlawful. Among the plaintiffs' claims was that taking the vaccine could not be made mandatory since the Food and Drug Administration had given only emergency use authorization, not full approval, to the administration of the vaccine.

In dismissing the case, [*Jennifer Bridges, et al. v. The Methodist Hospital CAH-21-1744, 5th U.S. District Court*], the judge stated that provision of the federal law authorizing the FDA's actions "...neither expands nor restricts the responsibilities of private employers: in fact, it does not apply at all to private employers like the hospital in this case. It does not confer a private opportunity to sue the government, employer, or worker."

The plaintiffs have indicated they will appeal.

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