You may already be a winner: How to play by the rules

The widespread use of sweepstakes and contests in the marketing world may lead some to forget that these programs are highly regulated under both federal and state law. Failure to comply with applicable law can lead to regulatory inquiries, as well as civil and criminal penalties.

You need to consider some of the legal issues involved before conducting sweepstakes and contests.

Illegal lotteries: The first order of business is to ensure that the proposed event does not constitute a private lottery, which the gambling laws of all 50 states prohibit. Lotteries involve three elements: a prize, chance (luck, as opposed to skill) and consideration (the participants must give something of value to participate). Advertisers can avoid an illegal lottery by avoiding any one of these three elements. Because there is nearly always going to be a “prize,” avoid an illegal lottery by removing either “chance” or “consideration.”

Sweepstakes: Events that award prizes based solely on chance, but do not require the participants to give anything of value to participate, are sweepstakes. Sweepstakes avoid the illegal lottery problem by eliminating the element of consideration (e.g., “no purchase necessary to enter or win”).

Contests: Events that award prizes based on skill (e.g., best essay, best artwork, etc.) are contests. Contests avoid the illegal lottery problem by eliminating the element of chance.

Traps for the unwary

On the surface, compliance with legal requirements appears to be deceptively simple. In practice, however, there are many traps for the unwary, including the following:

• Some states require registration of sweepstakes and/or contests and may require reporting of results and bonding.
  • All sweepstakes and contests should have a carefully crafted set of rules that include specific information regarding the prize, the chances of winning and other aspects of the sweepstakes or contest.
  • It is often tricky to avoid the element of consideration. Some states take a broad view of consideration and will treat any significant expenditure of time (filling out detailed questionnaires) or effort (driving around town looking for clues) by the participant to be consideration, even if the participant is not required to buy something or to pay to participate.
  • Sweepstakes conducted online through Facebook, Twitter or other social networking sites must comply with the relevant “terms of use” for that website.
  • The sweepstakes should be limited to adults to avoid issues under the Children’s Online Privacy Protection Act of 1998. However, use caution, as the age of majority may vary from state to state.
  • A contest sponsor can inadvertently create chance in the contest if, for example, the contest results in a tie and the sponsor randomly selects a winner.

With care and proper legal counsel, you can conduct sweepstakes and contests successfully and in compliance with applicable law; however, doing so requires planning and attention to the legal details. It is always prudent to consult with qualified intellectual property counsel for guidance to ensure legal compliance.

The opinions expressed in this article are intended for general guidance only and are not intended as recommendations for specific situations. Readers should consult a qualified attorney for specific legal guidance.