

Make Your Online Terms of Service “Uber” Enforceable

Are your online Terms of Service enforceable? Businesses should review their account registration process in light of a recent court decision. In *Meyer v. Uber Technologies, Inc.*, the U.S. Court of Appeals for the Second Circuit upheld Uber’s Terms of Service and arbitration provision in the face of a challenge by an Uber user. The facts of the case are straightforward.

In 2014, Spencer Meyer registered for an Uber account. As part of the registration process, he was required to click a button labeled “REGISTER.” Below this button was the phrase, “[b]y creating an Uber account, you agree to the TERMS OF SERVICE & PRIVACY POLICY.” This was followed by a hyperlink to Uber’s Terms of Service.

Meyer subsequently brought a lawsuit against Uber alleging price fixing, and Uber filed a motion to compel arbitration. Uber argued that by creating an account, Meyer had agreed to Uber’s Terms of Service, which included a binding arbitration provision. Meyer argued that he was not aware of the Terms of Service and had never seen, read, or accepted it.

The district court held in Meyer’s favor, but on appeal, the Second Circuit held that by registering an account with Uber, Meyer had “unambiguously manifested his assent to Uber’s Terms of Service as a matter of California law.” The court came to this conclusion based on a few factors.

Of particular importance to the court was the fact that the phrase, “[b]y creating an Uber account, you agree to the TERMS OF SERVICE & PRIVACY POLICY” and the hyperlink to the Terms of Service were coupled with the “REGISTER” button both spatially and temporally. In other words, the relevant language appeared directly below the “REGISTER” button, was fully visible on an uncluttered screen, and was provided simultaneously with creating an account. The court therefore stated that “a reasonably prudent smartphone user would understand that the terms were connected to the creation of a user account.” The court further concluded that because the heading and relevant language of the arbitration provision in the Terms of Service were in bold, the arbitration provision was reasonably conspicuous and the user had made an unambiguous manifestation of assent by registering an account.

Why does this matter? Courts have routinely upheld “clickwrap agreements,” in which users are required to click a box affirmatively consenting to the company’s terms and conditions. However, Terms of Service that do not require a user’s affirmative consent (like Uber’s), are generally more susceptible to challenge. By holding that the facts of this case met the standards both for consenting to be bound by the Terms of Service and agreeing to the arbitration provision, the court has seemingly made it easier for other companies to bind users to Terms of Service and compel arbitration under similar circumstances.

Although Uber was ultimately victorious on appeal, it is likely Uber could have limited its exposure and possibly avoided litigation by requiring users’ affirmative consent (i.e., clickwrap agreements) to the Terms of Service at the time of registering an account. In light of this decision, companies should consider revising their registration pages to ensure that their terms and conditions are reasonably conspicuous and that all relevant information is closely coupled to the registration, both temporally and spatially. For an extra layer of protection, companies should require their users’ affirmative consent to the company’s Terms of Service.

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