

Bringing Your Business Online: Creating Enforceable Contracts

The current COVID-19 pandemic has forced many businesses online in order to survive. In many cases, businesses had no plans to be online. Others were forced to move online more quickly than planned. In order to assist these businesses, we are preparing a series of articles discussing some of the more important legal issues to address when moving your business online. [Article 1: Website Terms](#) discussed online terms and conditions to protect your business. [Article 2: Privacy Policy](#) discussed how your business collects, uses and discloses personal information of others. [Article 3: Third Party Content](#) discussed the risks of copying photos, music, videos, and other content created by third parties onto your website. [Article 4: E-Commerce Policies](#) discussed e-commerce policies that a website selling products or services should have in place.

Article 5: Creating Enforceable Contracts

Online businesses spend a lot of time and money preparing terms and conditions for their websites. These terms explain the rights and obligations to customers, and are supposed to protect the businesses. Yet, we see disputes time and time again over whether or not the online terms and conditions can be enforced against a user.

This isn't rocket science. If followed, basic contract law principles should maximize the likelihood that your terms can be enforced. These principles are not always followed, however. The result has been scores of lawsuits, many involving large companies with extensive legal resources, whose users successfully have challenged the enforceability of the online terms and conditions. Given that each side in a lawsuit can easily spend tens or hundreds of thousands of dollars, it makes sense to take steps to avoid this risk.

The best way to create an enforceable agreement is with what is commonly called a "click through" or "check the box" agreement. If your website is an e-commerce site, you have a couple of options:

- At the point of purchase, directly above the "Purchase" button, add a conspicuous sentence that says "By clicking the "Purchase" button, you agree to our terms of use" with a hyperlink to the terms of use page or document.
- Even better, at the point of purchase, directly above the "Purchase" button, you could add a blank check box (that the user needs to check) with the language "By checking this box, I acknowledge that I have read and that I agree to the terms of use" with a hyperlink to the terms of use page or document.

Even if your website is not an e-commerce site, it is relatively easy to form a "click through" agreement if you have an account registration process. Directly before the point where the user completes the registration, add a conspicuous sentence like "By creating an account, you agree to our user agreement" with a hyperlink to the user agreement page or document.

In both cases, you need to make sure that the user can print or save the terms of use if desired. You also need to make sure that the customer cannot complete the purchase unless the box is checked if you use that approach. For evidence purposes, your business also needs to maintain reliable records to show the agreement's terms on any specific date (for situations where the terms may change over time and the user disputes which version he or she agreed to) and what interactions (for example, check the box, clicking a button, etc.) were required technologically for the user to manifest his or her acceptance on that date.

If you have questions whether your website terms and conditions are enforceable, we would be happy to discuss your requirements and assist you. Partridge Snow & Hahn Partner [John Ottaviani](#) has over 25 years of experience bringing businesses online and can provide the guidance needed to make the transition as painless as possible. He can be reached at jottaviani@psh.com or 401-861-8253.

Date Created

March 12, 2020