

Vermont

Are mandatory arbitration provisions recognized in your state? If so, are there any limitations to its enforcement?

Yes, Vermont generally recognizes mandatory arbitration provisions.ⁱ However, the limitations on the enforcement of mandatory arbitration provisions in Vermont are among the strictest in the nation. These include:

- Mandatory arbitration provisions do not apply to labor interest arbitration or to insurance agreements.ⁱⁱ
- “No arbitration agreement shall have the effect of preventing a person from seeking or obtaining the assistance of the courts in enforcing his or her constitutional or civil rights.”ⁱⁱⁱ

Further, as of October 1, 2020, by statute “[t]here is a rebuttable presumption that the following contractual terms are substantively unconscionable when included in a standard-form contract to which only one of the parties to the contract is an individual and that individual does not draft or have a meaningful opportunity to negotiate the contract:

(1) A requirement that resolution of legal claims takes place in an inconvenient venue. As used in this subdivision, “inconvenient venue” for State law claims means a place other than the state in which the individual resides or the contract was consummated, and for federal law claims means a place other than the federal judicial district where the individual resides or the contract was consummated. Notwithstanding this subdivision, a standard-form contract may include a term requiring that resolution of legal claims takes place in a State or federal court in Vermont.

(2) A waiver of the individual’s right to a jury trial or to bring a class action.

(3) A waiver of the individual’s right to seek punitive damages as provided by law.

(4) [...] a provision that limits the time in which an action may be brought under the contract or that waives the statute of limitations.

(5) A requirement that the individual pay fees and costs to bring a legal claim substantially in excess of the fees and costs that this State’s courts require to bring such a State law claim or that federal courts require to bring such a federal law claim.^{iv}

It is worth noting that these laws were adopted after *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011) and were specifically designed to allow Vermont to place significant controls on arbitration clauses, despite the Court’s holding in *Concepcion* that the Federal Arbitration Act of 1925 preempts state laws that prohibit contracts from disallowing class-wide arbitration.

If a court determines that a contract violates the provisions of 9 V.S.A. § 6055(a), it may sever the contract in whole or in part, refuse to enforce the contract in whole or in part, and/or take other action to limit the application of the unconscionable term to avoid any illegal or unconscionable result.^v Further, the court may determine that the drafter of the contract committed an unfair and deceptive practice “and may order up to \$1,000 in statutory damages per violation and an award of reasonable costs and attorney’s fees,” with each term in the contract found to be unconscionable constituting a separate violation.^{vi}

What is your state’s law, if any, regarding gift cards, subscription services and loyalty programs?

GIFT CARDS/CERTIFICATES

Vermont has distinct and strict laws regarding gift cards (referred to as “gift certificates”) and loyalty programs, which are found in 8 V.S.A. §§ 2701-2711. If a gift certificate that contains provisions in violation of these laws, those provisions are considered void as contrary to public policy.

The provisions regarding gift certificates include:

- The paid value of a gift certificate sold or offered to be sold shall be valid for not less than five years after its date of issuance or after the date funds were last loaded onto the gift certificate, whichever is later.^{vii}
- The date of issuance and the expiration date shall be clearly identified on its face, or ... clearly printed upon a sales receipt ... or otherwise made available to the purchaser or holder of the electronic card through means of an Internet site or a toll free information telephone line.^{viii}
- Following the expiration date of the gift certificate, the unused portion of the paid value of the gift certificate shall be returned to the holder of the gift certificate, if requested by the holder of the gift certificate.^{ix}
- Dormancy fees, latency fees, issuance fees, redemption fees, or any other administrative fees or service charges in connection with a gift certificate are prohibited.^x
- If the remaining value of a gift certificate is less than \$1.00, the gift certificate shall be redeemable in cash for its remaining value upon the demand of the holder of the gift certificate.^{xi}
- The issuer of the gift certificate, at the holder’s request, shall inform the holder of the unused balance remaining on the gift certificate and the expiration date of the gift certificate.^{xii}

LOYALTY PROGRAMS

Loyalty programs must follow the provisions for gift certificates, as applicable, while also abiding by the additional provisions for loyalty programs.^{xiii} These include:

- A loyalty, award, or promotional gift certificate shall clearly and legibly set forth the following disclosures, as applicable:
 - (1) a statement indicating that the gift certificate is issued for loyalty, award, or promotional purposes, which shall be included on the front of the gift certificate;
 - (2) the expiration date for both the paid value of the gift certificate, if any, and the promotional value of the gift certificate, if any, which shall be included on the front of the gift certificate;

(3) the amount of any fees that may be imposed in connection with the gift certificate and the conditions under which they may be imposed, which shall be provided on or with the gift certificate; and

(4) if any fee is assessed against the gift certificate, a toll-free telephone number and, if one is maintained, a website address that a consumer may use to obtain fee information, which shall be included on the gift certificate.^{xiv}

The penalty for violating the provisions regarding gift certificates and loyalty programs is a \$1,000 administrative penalty per violation, plus restitution to any person damaged as a result of the violation, expenses, and attorney's fees at the discretion of the Commissioner of Finance and Management.^{xv} A violation of these provisions may also be considered a violation of the Vermont Consumer Protection Act.^{xvi} There are a number of exemptions to the provisions, notably including:

- Season passes, discount ski cards, or records sold for admission to any seasonal recreational activity^{xvii}; and
- Gift certificates donated to a charitable organization and used for fund-raising activities of a charitable organization, without any money or other thing of value being given in exchange for the gift certificate by the charitable organization, provided that the expiration date is clearly and legibly printed on the gift certificate.^{xviii}

Furthermore, loyalty, award, or promotional gift certificates where no money or other thing of value is given in exchange for the gift certificate are exempt from all these requirements except those specifically dealing with loyalty programs under § 2702.^{xix}

SUBSCRIPTION SERVICES

Vermont's law on subscription services, and specifically on automatic renewal of subscription services, is one of the most stringent in the nation. Vermont regulates subscription services separately from gift certificates and loyalty programs, with the relevant provision being 9 V.S.A § 2454a. Under this provision:

- A contract between a consumer and a seller or a lessor with an initial term of one year or longer that renews for a subsequent term that is longer than one month shall not renew automatically unless:
 - (1) the contract states clearly and conspicuously the terms of the automatic renewal provision in plain, unambiguous language in bold-face type;
 - (2) in addition to accepting the contract, the consumer takes an affirmative action to opt in to the automatic renewal provision; *and*
 - (3) if the consumer opts in to the automatic renewal provision, the seller or lessor provides a written or electronic notice to the consumer:
 - (A) not less than 30 days and not more than 60 days before the earliest of:
 - (i) the automatic renewal date;
 - (ii) the termination date; or
 - (iii) the date by which the consumer must provide notice to cancel the contract; *and*
 - (B) that includes:
 - (i) the date the contract will terminate and a clear statement that the contract will renew automatically unless the consumer cancels the contract on or before the termination

date; and

(ii) the length and any additional terms of the renewal period.^{xx}

If a consumer accepted the contract online, the seller or lessor must allow the consumer to terminate the contract exclusively online.^{xxi} A violation of these provisions is considered an unfair and deceptive act in commerce, which is punishable by a \$1,000 fine per violation.^{xxii}

The exemptions to Vermont's laws on subscription services are limited. However, they do not apply to insurance contracts or contracts with financial institutions.^{xxiii}

What is your state's law, if any, regarding safeguarding consumer credit card or other private data (i.e., cyber security)?

As a general matter, Vermont privacy law is grounded in the concept of fairness and consumer protection. Thus, in the absence of specific privacy provisions, Vermont looks to the Vermont Consumer Protection Act, which covers 'unfair methods of competition, unfair or deceptive acts or practices, and anti-competitive practices in order to protect the public and to encourage fair and honest competition'.^{xxiv}

The Security Breach Notice Act requires various notices to be given in the event of a 'security breach', which is defined as either an unauthorized acquisition of electronic data, or a reasonable belief of an unauthorized acquisition of electronic data, that compromises the security, confidentiality, or integrity of a consumer's private identification information or login credentials.^{xxv} A breach does not include a good faith but unauthorized acquisition of private identification information or login credentials by an employee or agent of a data collector that is for a legitimate purpose of the data collector, provided that the private identification information or login credentials are not used for a purpose unrelated to the data collector's business or subject to further unauthorized disclosure. For a definition of private identification information under the statute, see section 1 above, however, excluded from the definition of private identification information is publicly available information that is lawfully made available to the general public from federal, state, or local government records.

The Security Breach Notice Act defines 'login credentials' as 'a consumer's username or email address, in combination with a password or an answer to a security question, that together permit access to an online account'.^{xxvi}

Moreover, the Security Breach Notice Act outlines that if notice must be provided to more than 1,000 consumers for a breach, notice must also be promptly given to all national consumer credit reporting agencies of the timing, distribution, and content of the consumer notice.^{xxvii}

The Security Breach Notice Act is enforced under the same authority as the Consumer Protection Act. Enforcement actions under the Act by the Vermont Attorney General's office may seek injunctive relief and civil penalties of up to \$10,000 per violation per day. In addition to enforcement actions, a party experiencing a data breach is potentially subject to private lawsuits arising from compromised personal information.^{xxviii}

What is your state's law, if any, regarding the collection and handling of financial information?

The Document Safe Destruction Act requires businesses to take all reasonable steps to destroy or arrange for the destruction of a customer's records containing personal information that is no longer to be retained by the business by shredding, erasing, or otherwise modifying the personal information in those records to make it unreadable or indecipherable.^{xxix}

In accordance with the Financial Privacy Act, financial institutions and their officers, employees, agents, and directors are prohibited from disclosing any financial information relating to a customer, except as authorized

under the statute, and are required to adopt reasonable procedures to assure compliance. 'Financial information' is defined as an original or copy of, or information derived from:

- a document that grants signature authority over a deposit or share account;
- a statement, ledger card, or other record of a deposit or share account that shows transactions in or with respect to that deposit or account;
- a check, clear draft, or money order that is drawn on a financial institution or issued and payable by or through a financial institution;
- any item, other than an institutional or periodic charge, that is made under an agreement between a financial institution and another person's deposit or share account;
- any information that relates to a loan account or an application for a loan; or
- evidence of a transaction conducted by electronic or telephonic means.^{xxx}

The Financial Privacy Act enumerates 26 exceptions to the rule prohibiting disclosure, notably including customer opt-in.^{xxxi}

Moreover, § 10205 of the Financial Privacy Act sets forth the penalties for violation of the statute. Specifically, the Vermont Department of Financial Regulation's ('DFR') Commissioner ('the Commissioner') can take any of the enforcement actions provided under §§ 11601-11603 of Title 8 of the V.S.A, which includes administrative penalties, removal orders, other injunctive orders, and imposition of corrective action. The Commissioner may also impose a penalty of up to \$15,000 for each knowing violation of the regulation or order issued under it, for knowingly engaging in materially unsafe or unsound practices in connection with a financial institution, or for knowingly committing an act, omission, or practice that constitutes a breach of fiduciary duty to the financial institution. Violations of orders by the Commissioner may result in criminal penalties, including fines and imprisonment.

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ⁱ 12 V.S.A. § 5652:

(a) General rule. Unless otherwise provided in the agreement, a written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties creates a duty to arbitrate, and is valid, enforceable, and irrevocable, except upon such grounds as exist for the revocation of a contract.

(b) Required provision. No agreement to arbitrate is enforceable unless accompanied by or containing a written acknowledgment of arbitration signed by each of the parties or their representatives. When contained in the same document as the agreement to arbitrate, that acknowledgment shall be displayed prominently.

ⁱⁱ 12 V.S.A. § 5653(a).

ⁱⁱⁱ 12 V.S.A. § 5653(b).

^{iv} 9 V.S.A. § 6055(a).

^v 9 V.S.A. § 6055(c).

^{vi} 9 V.S.A. § 6055(d).

^{vii} 8 V.S.A. § 2702.

^{viii} *Id.*

^{ix} *Id.*

^x 8 V.S.A. § 2703.

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^{xi} 8 V.S.A. § 2704.

^{xii} 8 V.S.A. § 2705.

^{xiii} 8 V.S.A. § 2702a(1-4).

^{xiv} *Id.*

^{xv} 8 V.S.A. § 2706.

^{xvi} 8 V.S.A. § 2709.

^{xvii} *Id.* at § 2707(5)

^{xviii} *Id.* at § 2707(3).

^{xix} *Id.* at § 2707(1).

^{xx} 9 V.S.A § 2454a(a) (emphasis added).

^{xxi} 9 V.S.A. § 2454a(b)(2).

^{xxii} 9 V.S.A. § 2453.

^{xxiii} 9 V.S.A. § 2454a(d).

^{xxiv} 9 V.S.A. § 2451 et. seq.

^{xxv} 9 V.S.A. §2435.

^{xxvi} *Id.*

^{xxvii} *Id.*

^{xxviii} *Id.*

^{xxix} 9 V.S.A. §2445.

^{xxx} 8 V.S.A. §§10201-10206.

^{xxxi} 8 V.S.A. §§10204.