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# Legal Matters®

## What to do if a competitor lies in its ads

**Y**our competitor's advertising makes false claims about how great its products are – or worse yet, disparages your own products. What are your options?

You have a range of alternatives, from complaining to a private or government agency to filing a lawsuit. Here's a look at some of the choices.

If your competitor is saying things it shouldn't, the simplest approach is to complain to the Better Business Bureau's National Advertising Division, or NAD. The NAD has been around since 1971 and has adjudicated some 5,000 disputes over whether advertising was fair and accurate.

The big advantage of the NAD is that it's quick and inexpensive. The Division typically issues a decision in 60 to 90 days, and the process costs far less than bringing a complaint to a government agency such as the Federal Trade Commission.

The downside is that, unlike the FTC, the NAD has no enforcement power – it can't legally require a competitor to stop, and it can't award money damages. So if your competitor chooses to ignore an NAD decision, it can.

However, the NAD can refer cases to the FTC, and the FTC is more likely to take them seriously if they come as an NAD referral. As a result, many competitors fold and withdraw their advertising if the NAD tells them to stop.

Over the years, the NAD has come up with some general guidelines for acceptable advertising. For instance, if you advertise something as



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“new and improved,” you can only do so for six months (after which it's no longer new), and you must show a substantial and measurable improvement. You can't say a product is “on sale” unless you actually offer it at a higher price for at least half the year. And if you advertise savings “up to 50% off,” then at least 10% of the relevant merchandise must be 50% off.

In past NAD cases, Dyson challenged Oreck's claim that one of its vacuums “reduced up to 99.9 percent of bacteria in laboratory testing,”

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## Business gets salary back from ‘disloyal’ employee

Did you know that executives and other employees may have a legal obligation to be “loyal” to their companies? This means that they have to act in the company’s interest, and not deliberately harm

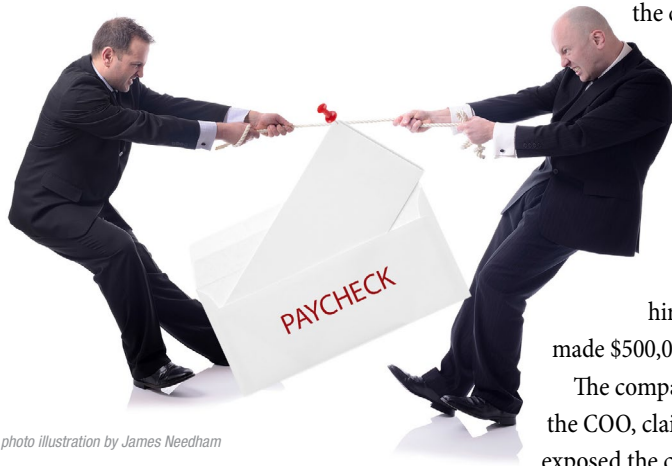


photo illustration by James Needham

the company or take advantage of it for their own interest.

This came up in a recent New Jersey case where a timeshare company hired a COO who made \$500,000 a year.

The company eventually fired the COO, claiming that he had exposed the company to poten-

tial liability by forging timeshare owners’ signatures on legal documents, misrepresenting the status of independent contractors, and sexually harassing two women.

The company then went further and sued the COO, demanding that he repay his salary.

A judge initially ruled for the COO. The judge said that repaying his salary was inappropriate because, while the COO may have exposed the company to a number of potential losses, the company didn’t actually suffer any direct economic harm.

But the New Jersey Supreme Court disagreed, and said that repayment of salary might be appropriate anyway. It said that even if a company doesn’t actually suffer any economic loss, the salary that employees receive during a time when they are disloyal doesn’t really belong to them, because they didn’t earn it.

## Company can’t require workers to buy its merchandise

The Abercrombie & Fitch clothing chain cannot require its salespeople to buy and wear Abercrombie & Fitch clothes in order to work there, says a federal court in California.

The court okayed a class-action lawsuit on behalf of 62,000 Abercrombie employees in the state, based on the claim that the company’s “look policy” required them to buy Abercrombie clothes – and then buy *new* Abercrombie clothes every time the company issued a new sales guide.

The “look policy” did contain a disclaimer saying that “Abercrombie employees are not required to purchase Abercrombie clothing.” But the workers who brought the lawsuit claimed that this disclaimer was ignored in practice, and that salespeople who

didn’t wear Abercrombie clothes were fired, given reduced hours, or sent home to change.

Of course, a company can require its employees to dress in a uniform. And whether employees have to pay for their own uniforms varies from state to state.

In general, a business can’t require an employee to pay for a uniform if doing so would bring the employee’s net pay below the minimum wage. Some states – such as California – say that if a company requires a uniform, the employer must pay for it. And some other states say that it matters whether the uniform could be worn off-hours – so an employee might have to pay for blue polo shirts and khaki pants, if those are required, but not for an apron that says “Joe’s Diner.”

## BUSINESS LAW BRIEFS

### Employment arbitration clauses can be a problem

A software company called TIBCO tried to protect itself by including a non-compete clause in its employment agreements. It also required that any disputes over the employment relationship go to arbitration rather than being tried in court.

When an employee left to work for a competitor, TIBCO filed a lawsuit and asked

for an emergency injunction so it could immediately stop the employee from competing against it.

But the court said – surprise! – that it couldn’t issue an injunction because, under the terms of the company’s own contract, the dispute had to go to arbitration.

Of course, both non-compete clauses and arbitration clauses are good things to have in employment contracts. But it could be wise

in to include an exception to the arbitration clause for enforcement of the non-compete provisions, so you don’t wind up in the same position as TIBCO.

### Federal contractors must provide paid sick leave

Starting in 2017, companies that have federal contracts must allow employees to earn up to seven paid sick days per year, under an executive order signed by President Obama.

Employees can earn one sick day for each 30 hours worked, up to seven days per year.

# What to do if a competitor lies in its advertising

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Cepacol disputed that Chloraseptic was “the strongest medicine you can get without a prescription,” and Dell questioned whether MacBooks are really “the world’s greenest family of notebooks.”

The NAD is very wary of comparative advertising. Recently it objected to an Eddie Bauer ad for a down jacket that said, “Lightest. Warmest. Guaranteed,” because the company hadn’t tested the jacket for lightness and warmth against at least 80% of competing products.

Even truthful statements can be misleading. In one case, the NAD rejected an ad that said a muffin mix had 50% more chips than a competitor. This was true – but the chips were so tiny that the mix actually had less chocolate than the competing brand.

The NAD also nixed a product label for a CVS hair health supplement that simply invited consumers to compare it to a name brand. According to the NAD, this was a problem because the CVS label didn’t give purchasers enough detailed information about the two products to make an adequate comparison.

You can, of course, go straight to the FTC with a

complaint, but the agency is choosy about the cases it pursues and the process takes a lot longer, so this route is better for very serious cases. Another option would be a complaint to the state Attorney General, if there’s been a violation of a deceptive trade practices law.

It’s hard to sue your competitor directly, unless your competitor is deliberately trying to undermine your business through fraudulent means, as opposed to improperly puffing its own products. What trips up false advertisers more often is a class action lawsuit brought by a disgruntled consumer.

For instance, questionable claims that a product had only “natural” ingredients resulted in recent class-action settlements in the millions of dollars against Tom’s of Maine toothpaste, Arm & Hammer deodorant, and Naked Juice products.

Products labeled “on sale” when they weren’t actually reduced from a regular price resulted in a \$50 million settlement against the parent of the Justice clothing store chain. And J.C. Penney recently announced a major settlement involving similar claims.

## We welcome your referrals.

We value all our clients. And while we’re a busy firm, we welcome all referrals. If you refer someone to us, we promise to answer their questions and provide them with first-rate, attentive service. And if you’ve already referred someone to our firm, thank you!

## Federal lawsuits might become less burdensome

Discovery” is the phase of a lawsuit before trial in which the two sides can demand information from each other. Sometimes, big companies try to “bury” little companies with endless discovery requests, hoping to find some stray helpful tidbit or simply pressure the little company to settle.

But starting in 2016, the federal court rules have been changed to limit this tactic. The

rules now say that discovery must be “proportional” to the needs of the case – taking into account the issues, the amount of money at stake, the importance of the information, the parties’ resources, and the burden involved.

This could make it easier to convince a court (at least in a federal case) that the other side’s endless requests for information are out of proportion and should be stopped.



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These days carry over from one year to the next, although an employee who quits or is fired without using them doesn’t have to be compensated for them.

Sick leave can be taken for an employee’s own illness, or to take care of a sick family member. It can also be used to deal with domestic violence, stalking or assault.

Companies cannot discriminate against a worker who takes sick leave, and cannot make sick leave dependent on the employee’s finding a replacement worker. Also, companies cannot demand a doctor’s note unless the

leave lasts three or more consecutive days.

## When is a competitor’s name too similar to yours?

Competitors can’t legally use the same name as your company – at least if you’ve properly protected it. But what if they use a similar name, or the same name for a different product?

This can be a tricky question, because it often turns on whether the public is likely to actually be confused.

In one recent case, a California company

called White Oak Vineyard & Winery brought a lawsuit against a Florida vodka distiller called White Oak Spirits.

The vodka company argued that wine and vodka are different products, and that no one would be confused by the two names, especially since White Oak Vineyard was not a nationally known brand.

But a California federal judge sided with the winery, and said the two alcoholic products were similar enough that consumers might be confused as to whether they were related.



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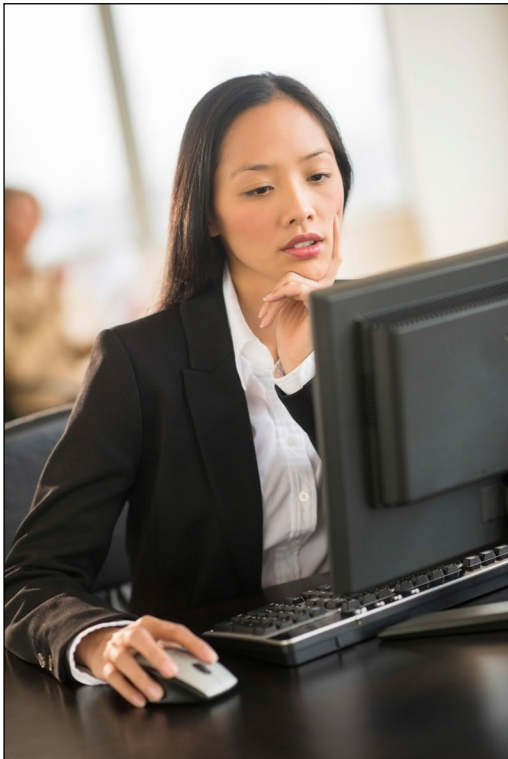


photo illustration by James Needham

## Clicking or e-mailing can create a binding contract

A New York company ran a loan-application website. As part of the application process, users had to click a box to get from one screen to the next. Above the box it said, “Clicking the box below constitutes your acceptance of ... the borrower registration agreement.”

The borrower registration agreement wasn’t on the page, but the words “borrower registration agreement” were a hyperlink to another page that included the complete contract. In fine print, the contract said that disappointed borrowers couldn’t sue in court and had to take all claims to arbitration.

Was this binding?

Yes, said a federal court. Even though the agreement wasn’t visible and could be accessed only via a hyperlink, it was still

a valid contract, and clicking on the box meant that borrowers gave up their right to sue.

In another case in Indiana, an LLC filed an insurance claim for storm damage, and the insurance company denied it, saying the damage occurred outside the policy period. After some e-mail negotiations, the LLC and the insurer agreed on settlement terms. An official of the LLC sent an e-mail saying, “Agreed. Go ahead and draft the paperwork.”

A short time later, the LLC changed its mind and reneged on the deal.

But a federal judge said the e-mail agreement was valid and could be enforced by the insurance company, since the two sides had agreed to all the terms.