

BEBCHICK LAW

Law Alert

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Welcome from Bebchick Law

Dear Clients, Colleagues and Friends,

This Alert is intended to briefly update you about recent legal developments ranging from Internet to employment law. We hope that you will find this Alert instructive, and we look forward to any feedback you might have.

Season's Greetings,

Baruch M. Bebchick

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Enforceability of Website Terms of Use

The Federal court for the Eastern District of New York recently ruled that a website's terms of use agreement was unenforceable, since website users were not provided with reasonable notice of its specific terms. This decision may signal a growing trend by courts to distinguish between the enforceability of (i) "clickwrap" website agreements, which require the explicit assent of their terms by website users (most commonly by means of a click-through mechanism), and (ii) "browsewrap" website agreements, where user assent is deemed to have occurred merely by website use (provided that the terms of use agreement includes notice of such a method of acceptance and there is a link to its text).

In *Hines v. Overstock.com*, the court found that the purchase of a product through a website operated by the defendant Overstock.com Inc. ("Overstock") was not subject to the website's terms of use agreement. The court based its decision on the fact that the website's terms of use agreement was accessible only via a link in the footer of each webpage. Since the plaintiff, Cynthia Hines ("Hines"), had not been required to scroll down to website's footer in executing her purchase, she was found to have had no actual notice of the agreement's provisions.

In addition to finding that Hines had no actual notice of the terms of use agreement, the court held that Overstock failed to show that Hines had constructive notice of such agreement. The decision reasoned that while some courts have upheld the validity of

Bebchick Law maintains a vibrant intellectual property and corporate law practice, with a focus on business formation & reorganization, IP management, Internet & e-Commerce, media, strategic ventures, licensing, marketing & advertising, employment, software, entertainment, and privacy. Our practice services a broad mix of businesses, from start-ups to public companies, in various stages of

"browsewrap" agreements where website users were made aware of the existence of a terms of use agreement regulating their use of the website, the only notice by Overstock of its terms of use was buried in the agreement itself. Since there was no way for a visitor to Overstock's website to learn of the agreement without scrolling to the bottom of a webpage and viewing a link to such agreement, the court found that constructive notice of such terms could not be assumed.

Thus *Hines v. Overstock.com* indicates that "browsewrap" agreements may only be found to be enforceable if notice of their terms are prominently placed on website pages with a link to their text. It is unclear from the decision precisely what type of placement of a terms of use agreement on a webpage constitutes reasonable notice. However, it is likely that a conspicuously placed link of such terms in a website's header, rather than in its footer, would be deemed to be sufficient. We note that Overstock's webpages were rather long, and if a link to the terms of use agreement had appeared in a footer that was readily viewable, the outcome of the case might have been different. To avoid doubt, however, the safest course for website operators would be to provide users with a "clickwrap" mechanism (such as a click-through consent) for accepting a terms of use agreement.

Website operators often are hesitant to provide their users with a "clickwrap" mechanism to secure assent to a website's terms and conditions, as doing so might be viewed as an undue imposition or may otherwise detract users from a smooth website browsing experience. However, it is curious that Overstock chose not to offer such a mechanism, since its customers anyway had to engage in a check-out process in order to purchase items. Thus, it would seem that also including a check-box for such customers to accept its terms of use agreement at check-out would not have imposed any real inconvenience.

Website terms of use agreements are an extremely important tool for website operators, as they enable operators to insulate themselves from potential liability and set ground rules for use of their websites. Website operators should consider carefully the appropriate placement of such terms (or a link to such terms) with prominent notice thereof so that the effectiveness of their terms of use agreements will not be questioned or, worse, be found to be unenforceable due to insufficient notice.

For more information about website terms of use agreements, Internet law in general or any of the other items discussed in this Alert, please contact Baruch M. Bebchick at (646) 688-4375 or [Email Us](#).

New Rules for New York Employers

An amendment to the New York Labor Law (Section 195(1)) requires employers to provide all new employees with certain written notices regarding their compensation. Specifically, New York employers must notify such employees in writing about (1)

development. We regularly counsel clients how to most effectively structure entrepreneurial ventures and commercially protect and exploit their intellectual property and other assets, and we negotiate and draft the full spectrum of agreements necessary to effectuate these and related transactions.

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their rate of compensation, (2) the standard payroll practices of the employer (i.e., on what days the employee will be paid), and (3) for employees eligible to receive overtime pay, the rates of their regular and overtime compensation. In addition, employers must also obtain a written acknowledgement from each new employee at the time of hire, confirming that such employee has received the required information.

The amendment is intended to ensure that employees have clear and full notice of their rates of compensation and their eligibility to receive overtime payments.

No implementing requirements have yet been set for this new form of notice, though employers will be required to adhere to any standards as to form and content which may be set by the Commissioner of Labor. For the time being, however, employers should seriously consider including notice of the required information in their written materials for new hires and requiring new employees to acknowledge in writing their receipt of this information. If employers do not usually distribute written materials to new hires, they should develop a means for providing the mandated information and securing written acknowledgment prior to or simultaneously with engaging new employees. The New York State Department of Labor offers a sample form of notice which can be found at [Form of Notice](#).

For more information about employment law matters, please contact Baruch M. Bebchick at (646) 688-4375 or [Email Us](#).

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Our core practice involves intellectual property and corporate matters, with a focus on business formation & restructuring, Internet & e-Commerce, media, licensing, marketing & advertising, strategic ventures, employment, software, entertainment and privacy. Bebchick Law regularly counsels clients about how to most effectively organize and reorganize, structure entrepreneurial ventures, and commercially protect and exploit their intellectual property and other assets.

We pride ourselves in bringing real value to our clients in an effective and efficient manner, by crafting practical solutions to legal and business problems and providing sound advice on minimizing risk and avoiding pitfalls.

We invite you to learn more about us at [Website](#).

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