

Presenting a live 90-minute webinar with interactive Q&A

New California Privacy Law: Key Compliance Challenges and Guidance for Corporate Counsel

Impact on Domestic and Foreign Companies, Considerations for Data Processing Agreements, Minimizing Claims and Penalties

WEDNESDAY, SEPTEMBER 26, 2018

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

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California Consumer Privacy Act of 2018

September 26, 2018

Tanya Forsheit, Frankfurt Kurnit Klein & Selz

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The Basics

- Signed into law June 28, 2018
- Technical amendments signed by Governor Brown September 23, 2018
- Takes effect January 1, 2020
- Compromise – tech industry and consumer lawyers – to convince Alistair McTaggart to drop ballot initiative
- Rushed through legislature in June

To What Organizations Does the Law Apply?

- Entities that have annual gross revenues in excess of \$25,000,000 **-OR-**
- Annually buy, receive, sell, or share *for commercial purposes*, alone or in combination, the personal information of 50,000 or more consumers, households, or devices **-OR-**
- Derives 50 percent or more of its annual revenues from selling consumers' personal information.

Whose Information is Protected?

- **All California residents including**
 - Customers
 - Employees
 - Visitors to a company Internet site or building
 - Contractors and independent contractors
 - Vendors



Scope

- Online AND offline –
- Not limited to information collected electronically or over the Internet.
- Applies to the collection and sale of *all* personal information collected by a business from consumers.



What is Personal Information?

- “information that identifies, relates to, describes, *is capable of being associated with*, or could reasonably be linked, directly or indirectly, with a particular consumer or household.”



Examples of Personal Information

- Identifiers such as a real name, alias, postal address, unique personal identifier, online identifier Internet Protocol address, email address, account name, Social Security number, driver's license number, passport number, or other similar identifiers.
- Any categories of personal information described in subdivision (e) of Section 1798.80.
- Characteristics of protected classifications under California or federal law.

Examples of Personal Information

- **Commercial information, including records of personal property, products or services purchased, obtained, or considered, or other purchasing or consuming histories or tendencies.**
- **Biometric information.**
- **Internet or other electronic network activity information, including, but not limited to, browsing history, search history, and information regarding a consumer's interaction with an Internet Web site, application, or advertisement.**

Examples of Personal Information

- **Geolocation data.**
- **Audio, electronic, visual, thermal, olfactory, or similar information.**
- **Professional or employment-related information.**
- **Education information, defined as information that is not publicly available personally identifiable information as defined in the Family Educational Rights and Privacy Act**

But wait . . . there's more

- **Personal information also includes inferences drawn from any of the information identified in this subdivision to create a profile about a consumer reflecting the consumer's preferences, characteristics, psychological trends, preferences, predispositions, behavior, attitudes, intelligence, abilities, and aptitudes.**

What's Not Personal Information?

- **“Personal information” does not include publicly available information or information that is lawfully made available from federal, state, or local government records**
- **As long as it is used in a manner consistent with the purpose for which it was collected**

What is “Deidentified” or “Aggregate”?

- Information that *cannot reasonably* identify, relate to, describe, *be capable of* being associated with, or be linked, *directly or indirectly*, to a particular consumer.
- Information that relates to a group or category of consumers, from which individual consumer identities have been removed, that is *not linked or reasonably linkable to any consumer or household, including via a device*.

Carve-out for Organizations Subject to GLBA

- Does not apply to personal information collected, processed, sold, or disclosed pursuant to the federal Gramm-Leach-Bliley Act (Public Law 106-102), and implementing regulations, or the California Financial Information Privacy Act (Division 1.4 (commencing with Section 4050) of the Financial Code).
- But a private right of action is still available to a consumer for a breach involving this kind of information under Section 1798.150.



Individual Rights Conferred

- **Right to know and access**
- **Right to deletion**
- **Right to opt out of sale**
- **Right to be free of discrimination**
- **Private right of action (limited)**
- **The right to say no to the sale of personal information.**
- **The right to equal service and price, even if individual exercises privacy rights.**

Financial Incentives

- A business may offer financial incentives for the collection, sale, and deletion of personal information.
- Must notify consumers and obtain opt-in consent.
- Must not discriminate against consumers that do not opt-in or who exercise their rights.



Transparency

- Businesses will have to inform consumers, **at or before the point of collection**, what categories of personal information they collect and the business's purpose in collecting that information.
 - Categories of data
 - Categories of sources of data
 - Purpose for collecting or selling the data
 - What PI was “sold” or disclosed (must be distinguished), for what purpose and to whom
 - Specific pieces of personal information the company has collected

Do Not Sell My Data

- A business must provide a clear and conspicuous link on the homepage titled “Do Not Sell My Personal Information,” which links to a section of the privacy policy that provides the required disclosures.



What Does “Sell” Mean?

- **Selling, renting, ...**
 - disclosing, ...
 - disseminating, ...
 - making available, ...
 - transferring, or ...
 - » otherwise communicating orally, in writing, or by electronic or other means, a consumer's personal information by the business to another business or a third party
- **for monetary or other valuable consideration.**

Even More on Right to Know and Right to Access

- **Businesses cannot use the data for a purpose not disclosed – additional disclosure will be needed.**
- **Businesses cannot collect additional categories of personal information without providing notice.**
- **Businesses will have to provide information about the personal information they have collected from a consumer upon receipt of a verifiable consumer request.**
- **A business cannot REQUIRE a consumer to create an account to obtain a copy of their data**
- **Which may mean that you have to provide the data to the individual in a “usable and portable format”**

Right to Deletion

However, businesses can refuse deletion requests when it is necessary for the business or service provider to maintain the consumer's personal information" to:

1. complete the transaction or a reasonably anticipated transaction;
2. find, prevent, or prosecute security breaches or illegal activity;
3. "debug to identify and repair errors that impair existing for by law," intended functionality"
4. exercise free speech (of the business or a third party) or "exercise another right provided for by law,"
5. comply with the California ECPA,
6. engage in certain types of research in limited cases,
7. "enable solely internal uses that are reasonably aligned with the expectations of the consumer based on the consumer's relationship with the business,"
8. comply with a legal obligation, or
9. "Otherwise use the consumer's personal information, internally, in a lawful manner that is compatible with the context in which the consumer provided the information."

Right to Deletion

- Deletion requests also apply to third party service providers that you share data with; and
- Third parties may be liable even if they do not qualify under the definition of a service provider



Record Keeping

- **You need to be able to track –**
 - “Do not sell” requests
 - Opt in authorizations (for under 16s)
 - Deletion requests
 - Access (copies) requests



Enforcement

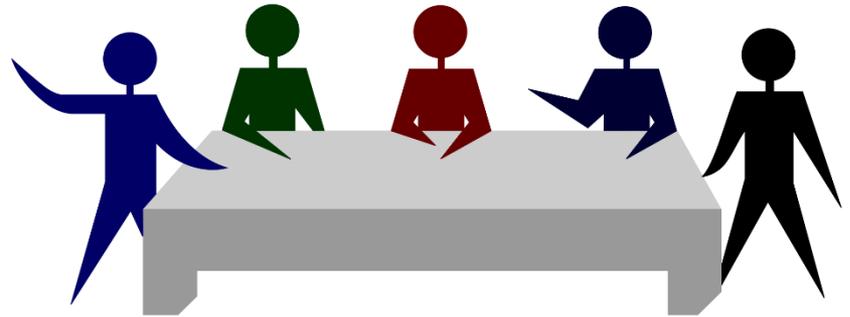
- **Civil penalties from an AG action up to \$2,500 per violation, and up to \$7,500 for intentional violations.**
- **Private right of action only where nonencrypted or nonredacted personal information is subject to “an unauthorized access and exfiltration, theft, or disclosure as a result of the business’s violation of the duty to implement and maintain reasonable security procedures and practices appropriate to the nature of the information to protect the personal information”**
 - statutory damages of \$100 up to \$750 per consumer, or actual damages, whichever is greater.
 - 30 days’ written notice specifying violation and opportunity to cure prior to seeking statutory damages.

CCPA v. GDPR: Key Differences

	CCPA	GDPR
Do Not Sell My Information	Button on website	Right to object to processing for marketing purposes but not explicit right to demand that information not be sold
Transparency Requirements	Requires that disclosures distinguish between information sold and information disclosed for business purposes	No such distinction – just requirement to disclose all data sharing of any kind and the purposes for same
Financial Incentives	Permissible as long as not discriminatory	No such concept or allowance for financial incentives for sharing data
Enforcement	AG and private right of action (class actions)	Data Protection Authorities and individual representative actions (e.g., Max Schrems' privacy lobby group None of Your Business)

Start Planning Today!

- **What You Should Be Doing Now**
- **Start planning for implementation by 1/1/2020; enforcement begins July 1, 2020, in some cases sooner (privacy provisions)**
- **Start budgeting for the implementation**



Questions and Answers

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