

Employee and other HR Data under the California Privacy Rights Act

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Challenges

- The “consumer” rights and business obligations that apply to HR data under the CPRA
- Completing a data inventory for HR Data and otherwise preparing for compliance in view of delayed regulations
- Balancing the obligations under the CPRA with a tangled web of California employment laws and regulations
- Preparing for the notoriously litigious employment plaintiffs’ bar to use CPRA rights as an alternative, pre-litigation discovery mechanism
- Lessons learned from GDPR employee data subject access requests, including regarding emails and unstructured data
- The scope of privilege and protection of other person’s privacy rights
- Status of pending legislation that would extend HR and B-to-B Data exemptions
- The scope of privilege, trade secrets and protection of other person’s privacy rights
- The potential distinction between business data and personal information
- How new purpose and retention limitations will help minimize access
- Use of self-serve access and focusing of requests to limit search parameters and of Section .145(h)(3)(formerly (g)(3)) to limit access
- Application of deletion exception retention purposes to HR data



CCPA and HR Data

History of CCPA / CPRA

- Jan. 1, 2020 – CCPA goes into effect, providing certain rights to “consumers” with respect to “personal information”
 - BUT—the CCPA contained an exemption for HR data until Jan. 1, 2021.
- CPRA passed as ballot initiative in Nov. 2020, extending the HR exemption until Jan. 1, 2023.
- Beginning Jan. 1, 2023, the CCPA’s requirements will apply to HR data, including notice requirements and consumer rights.



*In other slides, we reference CCPA and CPRA interchangeably. References to CCPA and CPRA in other slides each mean the CCPA as amended by the CPRA.

What about AB 2891 or AB 2871?

- California Assembly Bill 2891 and 2871 would extend the CCPA's existing HR exemptions to:
 - AB 2871 - indefinitely
 - AB 2891 – until Jan. 1, 2026
- HOWEVER—these bills would likely fail under constitutional scrutiny
- Under California Constitution Article II, Section 10(c):



“The Legislature may amend or repeal an initiative statute by another statute that becomes effective only when approved by the electors *unless the initiative statute permits amendment or repeal without the electors’ approval.*”

- The CPRA permits amendments without elector approval “provided that such amendments are consistent with and further the purpose and intent of this Act. . . .” and / or in the case of amendments that “enhance privacy and are consistent with and further the purposes” of the CCPA

Enforcement

- No private right of action, except for security incidents arising from failure to maintain reasonable security
 - Functionally, large data breaches involving numerous California consumers often result in allegations of failure to provide reasonable security
- Dual enforcement by AG and California Privacy Protection Agency
- Right to cure will no longer be required (but may be provided in administrative enforcement action)
- Penalties:
 - \$2,500 / violation
 - \$7,500 / intentional violation



CCPA vs. California Labor Code – Data Covered

Data	CCPA	California Labor Code
Identifiers	✓	✗
Data types identified in Cal. Civ. Code 1798.80	✓	✗
Characteristics of protected classifications under California or federal law	✓	✗
Commercial information	✓	✗
Biometric information	✓	✗
Internet or electronic network activity	✓	✗

CCPA vs. California Labor Code – Data Covered (cont.)

Data	CCPA	California Labor Code
Geolocation data	✓	✗
Sensory data (i.e., audio, visual, thermal information)	✓	✗
Professional or employment-related information	✓	Personnel records maintained by employer regarding employee's performance or grievances concerning the employee; and signed documents
Education information (as defined by FERPA)	✓	✗
Inferences	✓	✗
Sensitive personal information	✓	✗

Consumer Rights

Right	CCPA	California Labor Code
Notice (the right to know)	✓	✗
Access	✓	Personnel records only
Deletion	✓	✗
Correction	✓	✗
Opt out of processing of sensitive PI	✓	✗
Opt out of sale / sharing	✓	✗

Request Timing and Identity Verification

- Timing:
 - 45 days (+ 45 additional days, “when reasonably necessary,” as long as the consumer is notified of he extension within the initial 45-day period)
- Verification:
 - Accountholder verification
 - Non-account holders:
 - Rights to know, collect, and delete – high or reasonably high degree of certainty based on sensitivity of data
 - Reasonable – 2 data points
 - Reasonably high – 3 data points
 - May not be completed by requesting sensitive PI from consumer



Access

- Businesses need not provide PI in response to an access request in the following cases:
 - Privilege
 - Data is not in searchable or accessible format, is maintained for legal or compliance purposes only, and isn't sold or used for commercial purposes
 - If the information is particularly sensitive (i.e., Social Security numbers)
 - The information would reveal PI relating to another person
 - Manifestly unfounded or excessive (deny or charge reasonable cost)
 - Disclosing the PI would reveal trade secrets
 - Disproportionate effort (failure to data map or implement appropriate policies cannot be basis for disproportionate effort)



Deletion

- Permitted retention purposes:
 - **Complete a transaction, fulfill a warranty or product recall, provide a good or service requested by the consumer, or perform a contract with the consumer**
 - Help ensure security and integrity
 - Debug to identify and repair errors
 - Exercise free speech or another right provided by law
 - Comply with California ECPA
 - Engage in peer-reviewed scientific, historical, or statistical research
 - **Enable internal uses consistent with the expectations of the consumer and compatible with collection context**
 - **Comply with law**



Correction

- Accuracy may be based on “totality of circumstances,” nature of personal information (structured / unstructured), how obtained, documentation as to accuracy provided by consumer
- When business is not source and has no documentation supporting accuracy, consumer’s assertion of inaccuracy may be sufficient
- Correction right is the only right where unstructured data may be considered when determining whether honoring a request involves disproportionate effort
- What about correction with respect to inferences?



Limit the Use and Disclosure of Sensitive PI

- “Sensitive personal information” means PI revealing consumer’s:
 - Government issued identifier
 - Account log-in, financial account, debit card, or credit card number, with any security code or password required to access the account
 - Precise geolocation
 - Racial or ethnic origin, religious or philosophical beliefs, or union membership
 - Contents of communications
 - Genetic information
 - Biometric information



DISABILITY



RACE



SEX



COLOR



NATIONAL
ORIGIN



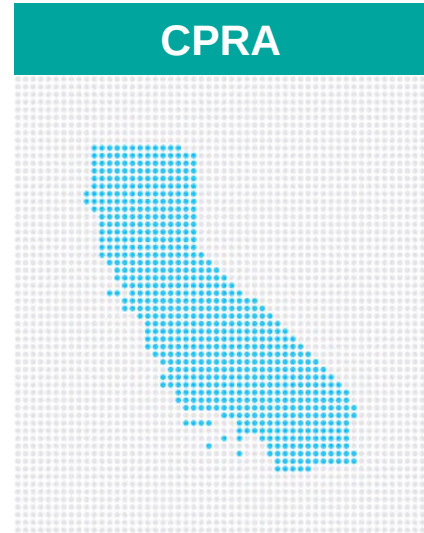
RELIGION



FAMILY
STATUS

Limit the Use and Disclosure of Sensitive PI

- CPRA gives consumers the right limit:
 - Business's use of sensitive PI to that which is necessary to provide the goods or services requested by the consumer
 - Disclosure of PI aside from that which is necessary to provide the goods or services requested by consumer
- Aside from limited internal uses (like debugging, securing, and improving the products or services) use or disclosure of sensitive PI would be restricted Right not written with HR in mind, but still applicable in the HR context
- CCPA does not limit a company's ability to comply with applicable law
 - Mandatory collection of sensitive personal information for EEO reporting permissible
 - Is processing of sensitive PI for non-mandatory diversity programs permissible under CPRA?



Notice Obligations

- Until 2023, notice requirements for HR consumers were truncated
- Full consumer privacy notice will be required for HR consumers beginning in 2023, including:
 - Categories of PI collected, processing purposes, and whether PI was sold or shared
 - Sensitive PI collected, processing purposes, and whether the sensitive PI was sold or shared
 - Retention period by category of PI
 - Manner by which consumer rights may be exercised
- Is it permissible for a business to have different notices for different categories of “consumers?”
 - For example, can an employer have different notices for employees, applicants, and consumers of the company’s products or services?

Data Minimization, Retention Requirements, and Purpose Limitation

- Data minimization:
 - Required by the CPRA beginning Jan. 1, 2023
 - Can assist with the burden of complying with consumer rights requirements
- Retention:
 - Retention period must be listed by category of PI in California privacy policy
 - Requires detailed data mapping and defensible destruction policy
- Purpose limitation:
 - Data uses must be reasonably necessary and proportionate
 - Notice and consent may not be enough for some use cases
 - What about employee monitoring?



Vendor Management Obligations

- Detailed vendor management obligations:
 - Due diligence
 - Specific contract terms
 - Processor obligations / restrictions
 - Contract must specify services / processing purposes
 - Auditing of vendors
 - Security / data protection
 - Safe harbor for service provider CCPA violations
 - Pass through of consumer requests
- Third-party collection
- Intentional disclosure / interaction exception for sales / sharing





European Perspective

Lessons from the GDPR

- DSARs – what challenges will you face?
- Employee surveys – separate information requirements under GDPR
- Retention periods – are your systems ready for automated deletion?
- HR reports – download and store everywhere, or view only on a dashboard?
- Data minimization – example: key card data
- Diversity programs
- Employee monitoring
- Note: EU Supervisory Authorities consider complaints from employees to be the most useful



Reviewing Data to Respond to a Request

- Consider treating like discovery requests
- Should you redact to protect:
 - PI regarding other individuals?
 - Intellectual property?
- Inferences are within the scope of “personal information”
 - What about inferences in evaluations?
- Remember – *no retaliation for exercise of rights!*

Archived: Mittwoch, 23. Februar 2022 16:35:33
From: [REDACTED]
Sent: Mon, 17 May 2021 13:58:55 +0000Authentication
To: [REDACTED]
Cc: [REDACTED]
Subject: RE: [REDACTED] rent increase
Sensitivity: Normal

[REDACTED]
Yes.
[REDACTED] spoke to me about this in the margins of the Board meeting. This is approved.
Many thanks,
[REDACTED]

From: [REDACTED]
Sent: 17 May 2021 13:17
To: [REDACTED]
Subject: [REDACTED] rent increase

Dear [REDACTED]

I hope this email finds you well.

Could you please let me know if there is an approval for [REDACTED]?

I look forward to hearing from you.

Kind regards, [REDACTED]

Key Takeaways

- The CPRA will expand the scope of employee rights with respect to PI in 2023
- To prepare, businesses should:
 - Map HR data
 - Understand PI use cases and consider new PI use limitations
 - Expand HR notices
 - Institute consumer rights response program, with rigorous review
 - Address HR vendors and third parties



CLE

For those of you who require CLE credits please note the following states have been approved for 1.00 hour of CLE in **AZ, CA, NJ and NY**.

Please write down the following affirmation code **CPRA614**

A couple business days after today's session you will receive an email with ***uniform certificate of attendance*** and ***program evaluation*** to complete and SUBMIT to my colleague, Robin Hallagan at robin.hallagan@squirepb.com. (This includes lawyers and HRCI/SHRM HR attendees)

Questions? Please let us know.



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