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California Passes Sweeping Consumer Privacy Legislation

Last week, the California legislature passed Assembly Bill No. 375, the California Consumer Privacy Act of 2018 (Act), which was signed into law by Governor Jerry Brown the same day. The Act will come into effect on January 1, 2020.

The Act, which is being generally acknowledged as one of the strictest privacy laws in the history of the US, and which is certain to impact businesses across and even outside the country, has been criticized for having been hastily drafted in order to forestall a contentious voter initiative for alternative legislation (i.e., a mechanism unique to California that enables citizens to enact laws or amend the state constitution without input from or cooperation from the state legislature).

The Act will apply broadly to any legal entity that (i) does business in California, (ii) is operated for the profit or financial benefit of its owners, (iii) collects consumers' personal information and determines the purpose and means of processing such information, and (iv) satisfies at least one of the following three conditions:

- Has an annual gross revenue of over $25 million
- Alone or in combination, annually buys, receives, sells or shares for commercial purposes the personal information of 50,000 or more consumers, households or devices, or
- Derives 50% or more of its annual revenues from selling consumers' personal information

The Act, which is aimed primarily at protecting the personal information of California residents and affords such residents a number of specific rights in this area, includes a broad, open-ended definition of "personal information" (PI): "… 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." The Act expressly excludes publicly available information from its scope.

The Act also broadly defines "collection" as the "buying, renting, gathering, obtaining, receiving, or accessing any personal information pertaining to a consumer by any means … [including] receiving info from the consumer, either actively or passively, or by observing the consumer's behavior." Thus, the protection of the Act is not limited to PI collected online.

Highlights of the Act

While the Act extends over some 20 pages, is dense, detailed and intricate, covering a number of related topics, some of its key highlights may be generally summarized as follows:

- **Disclosure Rights and Related Obligations:** The Act gives consumers the right to request that a business that collects a consumer's PI disclose to that consumer the categories and specific pieces of PI the business has collected. A consumer also has the right to request that a business that collects PI about the consumer disclose to the consumer the following:
  - Categories of PI it has collected about that consumer
  - Categories of sources from which the PI is collected
  - Business or commercial purposes for collecting or selling PI
  - Categories of third parties with whom the business shares PI
  - The specific pieces of PI it has collected about that consumer

  The Act requires businesses to establish a verification process so consumers can prove their identity when they submit a disclosure request.

  Additionally, a business that collects a consumer's PI must – at the or before the point of collection – inform consumers of the categories of PI to be collected and the purposes for which it will use the PI.

  The Act also includes a number of related provisions intended to facilitate the exercise of, and ensure compliance with, a consumer's disclosure rights. For example, businesses must make available to consumers two or more designated methods for submitting requests for information required to be disclosed, including, at a minimum, a toll-free telephone number and website address. The Act requires a business that receives a disclosure request to promptly take steps to disclose and deliver to the consumer, free of charge, the requested information in a portable and readily useable format. Also, businesses must disclose certain information regarding consumer's privacy rights in their privacy policies.
- **Deletion Right:** The Act gives consumers the right to request that a business delete any PI about the consumer that the business has collected from the consumer. Subject to various exceptions (e.g., use by the business of the consumer's PI internally and in a lawful manner compatible with the context in which the consumer provided the information), businesses are required to comply with such requests.

- **Right to "Opt Out" of the Sale of PI:** The Act gives consumers the right to opt out of the "sale" (broadly defined) of his or her PI. Businesses must comply with such a request and, additionally, must respect the request to opt out for 12 months before requesting that the consumer authorize the sale of PI. Further, to facilitate the exercise of this right, businesses are required to place a special "Do Not Sell My Personal Information" button on their websites.

  The Act sets forth various transactions that will not be deemed the sale of PI for purposes of the Act. These include the transfer of PI as part of a merger, acquisition, bankruptcy, or other transaction in which the third party assumes control of all or part of the business, provided the third party complies with various provisions of the Act.

- **Enhanced Protection for Minors:** The Act provides an opt in right, prohibiting a business from selling the PI of a consumer if the business has actual knowledge that the consumer is fewer than 16 years old unless the consumer, if between 13 and 16 years old, or the consumer's parents for consumers younger than 13, have affirmatively authorized the sale.

- **Non-discrimination:** Business may not discriminate against a consumer due to the consumer's exercise of his or her rights under the Act. Discrimination includes denying goods or services to the consumer, charging different prices or rates for goods or services and providing a different level or quality of goods or services to the consumer.

- **Private Right of Action:** Subject to certain mechanisms intended to protect business interests, the Act creates a private right of action for any consumer for data breaches, providing that "any consumer whose nonencrypted or nonredacted personal information…is subject to an unauthorized access and exfiltration, theft, or disclosure as a result of the business' violation of the duty to implement and maintain reasonable security procedures and practices appropriate to the nature of the information" may institute a civil lawsuit. The consumer has the right to recover the greater of actual damages or statutory damages of between $100 and $750 per consumer per incident, plus injunctive or declaratory or other relief. The Act does not provide any guidance as to what constitutes "reasonable security procedures."

- **No Waiver:** The Act provides that "[a]ny provision of a contract or agreement of any kind that purports to waive or limit in any way a consumer's rights under this title, including, but not limited to, any right to a remedy or means of enforcement, shall be deemed contrary to public policy and shall be void and unenforceable." This provision appears to prevent businesses from enforcing contractual arbitration clauses.

- **Preemption:** The Act provides that it "is intended to supplement federal and state law, if permissible, but shall not apply if such application is preempted by, or in conflict with, federal law or the California Constitution."

Additionally, the Act includes provisions regarding enforcement by the Attorney General, the right of businesses to seek guidance from the Attorney General on compliance issues and various other matters.

What to Look For

Under the Act, the California Attorney General is instructed to "solicit broad public participation to adopt regulations to further the purposes of" the Act. The Act will undoubtedly be the subject of significant commentary and debate, and fierce lobbying by industry and consumer protection groups, during the coming months, and may, indeed, be modified in various ways prior to coming into effect. During this period, we will be following developments closely and providing additional alerts, as appropriate.

If you have any questions or concerns regarding the Act, how it may apply to and impact your business, and what steps you will need to take to comply with its provisions prior to January 1, 2020, please contact one of the lawyers listed below.

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