

This is our Data Privacy & Cybersecurity Practice's first client alert in a series that will break down the major elements of the California Consumer Privacy Act (CCPA). This alert focuses on the CCPA's applicability.

California's new privacy law, the CCPA, goes into effect on January 1, 2020. It is the most expansive state privacy law in US history, imposing GDPR-like transparency and individual rights requirements on companies. The law will impact nearly every entity that handles "personal information" regarding California residents (with various partial exemptions outlined herein). An overview of the CCPA's applicability is set forth below.

Who Will the CCPA Impact?

Most of the CCPA's obligations apply directly to a "business," which is an entity that:

1. Handles personal information about California residents
2. Determines the purposes and means of processing that personal information
3. Does business in California **and** meets one of the following threshold requirements:
 - A. Has annual gross revenues in excess of **US\$25 million**
 - B. Annually handles personal information regarding at least **50,000** consumers, households or **devices**
 - C. Derives **50%** or more of its annual revenue from selling personal information

"Service providers" that handle personal information on behalf of a business and other third parties that receive personal information will also be impacted. As currently written, however, the CCPA does not apply to nonprofit organizations.

The CCPA's three threshold requirements seem relatively straightforward, yet upon examination, raise additional questions that will need to be clarified down the road. For example:

- Does the 50,000 devices threshold cover devices of California residents only, or apply more broadly?
- Is the US\$25 million annual revenue trigger applicable only to revenue derived from California or globally?

What is Personal Information as Defined in the CCPA?

The CCPA defines "personal information" broadly in terms of (a) types of individuals and (b) types of data elements. First, the CCPA applies to data about "consumers", which is defined as any California resident, with several exceptions outlined below. The law ostensibly includes website visitors, business-to-business (B2B) contacts and employees. However, due to two limited moratoriums (effective until January 1, 2021), B2B contacts and employee information are now partially exempt from the CCPA. These exemptions are discussed more fully below.

Second, the data elements that constitute personal information include nonsensitive items that historically have been less regulated in the US, such as internet browsing histories, IP addresses, product preferences, purchasing histories and inferences drawn from any other types of personal information described in the statute, including:

- Identifiers, such as name, address, phone number, email address
- Characteristics of protected classifications under California and federal law
- Commercial information, such as property records, products purchased and other consuming history
- Biometric information
- Internet or other electronic network activity
- Geolocation data
- Olfactory, audio and visual information
- Professional or educational information

Does the CCPA Have Any Exemptions?

The CCPA will apply to a broad number of businesses, covering nearly all commercial entities that do business in California, regardless of whether the business has a physical location or employees in the state. However, there are some nuanced exemptions.

As a general matter, the exemptions are based on the types of information that a business collects or on the type of individual from whom the information came, and not on the industry of the business collecting the information. These exemptions include information that is collected and used "wholly outside" of California; collected about employees; collected about B2B contacts; related to certain warranties and recalls; or subject to other state and federal laws.

Specifically, the excluded categories of personal information include:

1. Activity Wholly Outside of California

The CCPA does not apply to conduct that takes place wholly outside of California, although it is unclear how such an exemption will apply in practice. The statute provides that this exemption applies if:

- The business collects information while the consumer is outside of California
- No part of the sale of the consumer's personal information occurs in California
- No personal information collected while the consumer is in California is sold

Determining when a consumer is outside of California when his or her personal information is collected will be challenging for businesses. For example, given that an IP address is expressly included as personal information under the law, is a business supposed to do a reverse-lookup to determine whether an individual's IP address originates in California?

2. Employee Information

Certain CCPA obligations do not apply to information collected from employees, job applicants, owners, directors, officers, medical staff, members or contractors of a business (collectively referred to as “employee information”). Employee information is not subject to the obligation to provide training or the rights to access (including portability), deletion, opt-out and not be discriminated against. Businesses do still need to provide notice to employees at or before the point of employee information collection. Employees may also use the private right of action in the event of a data breach.

The exemption **only applies to employee information used solely in the context of the employer-employee relationship**. Employee information used outside of that context maybe subject to full applicability of CCPA.

3. Business-to-Business Information

Similarly, B2B contact information handled solely in the context of due diligence or situations where a product or service is provided or received is partially exempt from CCPA. Businesses will only need to provide the right to opt-out (if the business sells such information) and comply with the nondiscrimination provision. Additionally, B2B information will be subject to the private right of action for data breaches.

4. Warranty and Recall Information

Vehicle or ownership information retained or shared between a new motor vehicle dealer and the vehicle’s manufacturer is exempt from the sale opt-out requirements to the extent the information is being shared to effectuate a vehicle repair covered by a written warranty or recall, provided that the recipient does not sell, share or use that information for any other purpose. Additionally, businesses do not have to delete warranty or recall information in any industry (i.e., not just vehicles).

5. Data Subject to Other US Laws

While the CCPA exempts certain types of information subject to other laws, importantly, it **does not exempt entities** subject to those laws **altogether**. Entities subject to these laws are also not exempt from the CCPA’s statutory damages (i.e., no injury necessary) provisions relating to data breaches. Likewise, some types of information (clarified below) are not exempt from the data breach liability provision. At a glance, these exemptions appear helpful; however, they may end up making operationalizing the law even more difficult for certain entities. For example:

- **Protected health information (PHI) and “medical information.”** The CCPA exempts all PHI collected by “covered entities” and “business associates” subject to HIPAA, and medical information subject to California’s analogous law, the Confidentiality of Medical Information Act (CMIA). It also exempts any patient information to the extent a “covered entity” or “provider of healthcare,” respectively, maintains the patient information in the same manner as PHI or medical information. However, many of these entities and their business associates collect information beyond what is considered PHI, such as employment records, technical data about website visitors, B2B information and types of research data. This data may not be eligible for the CCPA exemption.
- **Clinical trial information.** The CCPA exempts information collected as part of a clinical trial subject to the Federal Policy for the Protection of Human Subjects, also known as the Common Rule.
- **Financial information.** Information processed pursuant to the Gramm-Leach-Bliley Act (GLBA) or the California Financial Information Privacy Act (CalFIPA) is exempt from the CCPA.

Much like the health-related exemption, this rule does not exempt entities subject to these laws altogether from its requirements to the extent an entity is processing information not expressly subject to GLBA/CalFIPA. This particular exemption does not apply to the data breach liability provision.

- **Consumer reporting information.** The CCPA exempts any activity involving the collection, maintenance, disclosure, sale, communication or use of any personal information subject to the Fair Credit Reporting Act (FCRA) so long as the activity is authorized by the FCRA. This exemption does not apply to the data breach liability provision.
- **Driver information.** The CCPA exempts data processed pursuant to the Driver’s Privacy Protection Act of 1994 (DPPA). Importantly, entities subject to this law are not altogether exempt and this exemption does not apply to the data breach liability provision.

Moreover, the differences in definitions of relevant terms (e.g., personal information under the CCPA versus nonpublic personal information under GLBA) are important to consider when assessing relevant obligations and could result in institutions being only partially exempt from CCPA compliance.

Do You Need Help or More Information?

Our Data Privacy & Cybersecurity Practice is happy to help you figure out whether, and to what extent, the CCPA will impact your business, as well as assist you in developing and implementing a compliance program.

Our [earlier blog posts](#) discuss the nuances of the CCPA and the possibility of a federal privacy framework.

The next alert in our series focuses on conducting gap assessments in preparation for CCPA compliance.

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