

Closing the CCPA loopholes – California approves Proposition 24

By William A. Tanenbaum, Esq., and Kiyong Song, Esq., *Moses & Singer LLP*

NOVEMBER 18, 2020

California consumers can opt out of data collection in a powerful way in 2023. On November 3, 2020, California voters passed the ballot initiative, Proposition 24, which (I) fortifies California consumers' rights to their data; (II) expands the covered business' obligation regarding consumers' data; (III) establishes the nation's first Privacy Protection Agency; and (IV) extends CCPA's Human Resources and Business-to-Business (B2B) exceptions to January 1, 2023.

Proposition 24, also referred to as the California Privacy Rights and Enforcement Act (CPRA), will go into effect on January 1, 2023, but will not be enforceable until July 1, 2023.

I. FORTIFIED CONSUMER RIGHTS

Proposition 24 revises the existing CCPA to the extent that it expands California consumers' rights over their personal information and sensitive personal information.

A consumer's data that a covered business must disclose or deliver upon a consumer's request is no longer limited to the data pertaining to 12 months preceding the request.

In addition to the consumer's rights to his/her data under the CCPA, Proposition 24 secures the consumer's right to "limit [a business's] use of the consumer's sensitive personal information to that use which is necessary to perform the services" an average consumer expects from the business.¹

California consumers can also request to correct inaccurate personal information.

II. EXPANDED BUSINESS OBLIGATIONS

Under Proposition 24, businesses also have greater obligations regarding collected consumers' data.

A consumer's data that a covered business must disclose or deliver upon a consumer's request is no longer limited to the data pertaining to 12 months preceding the request.

The CPRA not only expands the consumers' rights and the businesses' obligations, but also reinforces enforcement of the law.

Under CPRA, a consumer can request the disclosure of his or her data beyond the 12-month period, unless providing such data proves impossible or would involve disproportionate effort. However, this change applies only to personal information collected on or after January 1, 2022.²

III. CALIFORNIA PRIVACY PROTECTION AGENCY

The CPRA not only expands the consumers' rights and the businesses' obligations, but also reinforces enforcement of the law. Proposition 24 establishes the California Privacy Protection Agency, which is authorized to enforce any violations of the CPRA and promulgate enforcement regulations.³

Some of the changes in enforcement under CPRA include:

- *Inclusion of contractors as potential violators.* Section 1798.155(a) of the California Civil Code sets forth that "[a]ny business, service provider, contractor or other person that violates this title shall be liable for an administrative fine."
- *Change from "civil penalty" to "administrative fines."* Violators are assessed an administrative fine of not more than \$2,500 for each violation, or \$7,500 for each intentional violation or violation involving a minor consumer.⁴ Minor consumers are those under the age of 16.
- *Hearing on Suspected Violations.* The California Privacy Protection Agency has the authority to hold a hearing for a suspected violation.⁵ If the Agency determines at the hearing that there was indeed a violation, it may require the violator to cease and desist, pay administrative fines, or both.

IV. EXTENSION OF CCPA HUMAN RESOURCE AND BUSINESS-TO-BUSINESS EXEMPTIONS

The CCPA HR and B2B exemptions were recently extended to January 1, 2022 by Governor Newman. The CPRA further extends the sunset deadline to January 1, 2023.⁶

The CPRA is a much more robust consumer data privacy legislation than its younger brother.

Businesses may still enjoy the protection under HR and B2B exemptions for consumers' personal information collected within an employment relationship, and personal information involved in business to business communications or transactions, respectively.

- *HR Exemption.* Under the "employee" exemption, personal information of consumers within an employment relationship (e.g., job applicant, employee, owner, director and officers, contractors, etc.) is largely exempt from the CCPA requirements to the extent that the employees' personal information ("PI") is collected and used within the context of (i) the employment, (ii) maintenance of emergency contact on file, or (iii) administering benefits. The "notice" obligations of Section 1798.100(b) still applies to all businesses.
- *B2B Exemption.* Under the B2B exemption, PI involved in B2B communications or transactions where the consumer (the data subject) acts on behalf of a business, and the communications or transactions solely relate to the rendering or receiving of product/service from another business. Businesses under this exemption must still provide B2B consumers the right to opt out of the sale of their information.

The CPRA is a much more robust consumer data privacy legislation than its younger brother — CCPA. And while CPRA does not become effective until January 1, 2023, and enforceable until July 1, 2023, businesses must remain diligent in becoming CPRA-compliant.

For one, the HR and B2B exemptions will also set on January 1, 2023. Thus, covered businesses must heed the horizon for any amendments from the California legislature

or new regulations on enforcement from the California Privacy Protection Law.

Notes

¹ Cal. Civ. Code § 1798.121 (Consumers' Right to Limit Use and Disclosure of Sensitive Personal Information) ("A consumer shall have the right, at any time, to direct a business ... to limit its use of the consumer's sensitive personal information to that use which is necessary to perform the services or provide the goods reasonably expected by an average consumer who requests such goods or services[.]").

² Id. at § 1798.130(2)(B).

³ Id. at § 1798.155.

⁴ Id. at § 1798.155(a). It specifies that \$7,500 administrative fine may be assessed for each violation involving the personal information of a minor consumer that the violator knew was minor.

⁵ Id. at § 1798.199.55(a). Agency must determine that there is a probable cause for believing that there was a violation.

⁶ Id. at §§ 1798.145(m)(4), (n)(3).

This article was published on Westlaw Today on November 18, 2020.

ABOUT THE AUTHORS



William A. Tanenbaum (L) is a partner in **Moses & Singer LLP's** Healthcare, Privacy & Cybersecurity, Intellectual Property and Internet & Technology practice groups, bringing his experience to the intersection of health care, technology, IP and data. He can be reached at wtanenbaum@mosessinger.com. **Kiyong Song** (R) joined Moses & Singer in 2019 after working as a law clerk in 2018. He can be reached at ksong@mosessinger.com. Both of the authors are based in New York.

Thomson Reuters develops and delivers intelligent information and solutions for professionals, connecting and empowering global markets. We enable professionals to make the decisions that matter most, all powered by the world's most trusted news organization.