

The California Consumer Privacy Act of 2018 (“CCPA”)

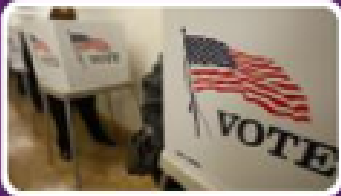
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Latest News on CCPA

- Barring any unexpected developments, California Governor Gavin Newsom is expected to sign five new amendments to the CCPA by or before October 13, 2019.
- Items in this presentation marked with an asterisk (*) reflect an assumption that the pending amendments will be signed.

How We Got Here



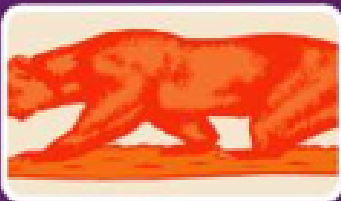
1972 California Constitution amended to include the right of privacy as an “inalienable” right



Between 1972 and 2018 California adopted numerous privacy laws, including Online Privacy Protection Act, Privacy Rights for California Minors in the Digital World Act, Shine the Light, and Data Breach Law



In March 2018 the Cambridge Analytica scandal highlighted potential privacy abuses domestically and abroad



In May 2018 Californians for Consumer Privacy announced it had obtained sufficient signatures to place the California Consumer Privacy Act on the November 2018 ballot

Who Is Subject to the CCPA?

The CCPA applies to certain for-profit entities

- Upon becoming effective on January 1, 2020, the CCPA will apply to any for-profit entity (e.g., sole proprietorship, LLC, corporation) that:
 - does business in California;
 - collects (or directs to be collected) consumer personal information, or determines the purposes and means of processing said personal information; and
 - satisfies any of the following three thresholds:
 - Annual gross revenue in excess of \$25 million (the CCPA does not specify whether the “gross revenue” is California only, nationwide, or global turnover);
 - Annually buys, receives, sells, or shares the “personal information” of 50,000 or more California residents; or
 - Derives 50% or more of annual revenues from selling consumer “personal information.”
- The CCPA defines “personal information” to include IP addresses, and thus the CCPA ostensibly applies to any business that receives visits from 50,000 California-related IP addresses per year on its website, which is only an average of approximately 137 unique visitors per day.

Who Is exempt from the CCPA?

The CCPA has several exemptions

- **Employee Information Safe Harbor (Until 2021):** The CCPA does not apply to personal information that is collected by a business about a California resident in the course of the person acting as a job applicant, employee, or contractor of the business is exempted if the business only used the information in that same context.*
- **Business-to-Business Safe Harbor (Until 2021):** The CCPA does not apply to personal information shared between a business and a California resident when that resident is acting as an employee of an entity, if the communication or transaction occurs solely within the context of the “business conducting due diligence regarding, or providing or receiving a product or service to or from such entity.”**
- **Health Information Exemption:** The CCPA exempts “protected or health information” collected by a covered entity or business associate pursuant to the Confidentiality of Medical Information Act (“CMIA”) or the Health Insurance Portability and Availability Act of 1996 (“HIPAA”).
- **Consumer Reporting Exemption:** The CCPA does not apply to the sale of personal information to or from a consumer reporting agency if that information is to be reported in, or used to generate, a consumer report as defined by 15 U.S.C. § 1681a, and that information is used pursuant to the Fair Credit Reporting Act (15 U.S.C. §§ 1681, et seq.).
- **Financial Entity Exemption:** The CCPA does not apply to personal information “collected, processed, sold, or disclosed” pursuant to the federal Gramm-Leach-Bliley Act (“GLBA”).
- **Driver’s Protection Act Exemptions:** The CCPA does not apply to personal information collected, processed, sold, or disclosed pursuant to the Driver’s Privacy Protection Act of 1994 (18 U.S.C. § 2721, et seq.).

Who Is a Consumer under the CCPA?

The definition of “consumer” is very broad

- The CCPA defines “consumer” as a natural person who is a California resident, as defined in 18 CCR § 1704, however identified, including by any unique identifier.
- This definition not only encompasses a “consumer” in the traditional sense (*i.e.*, someone that has purchased a product from a business), but also any “individual” in California who is a California resident, including:
 - individuals who enter into commercial transactions with other businesses; and
 - non-consumers of a particular business.

What Is Personal Information under the CCPA?

The definition of “personal information” is very broad

- “Personal information” includes all non-public information that “identifies, relates to, describes, is reasonably* capable of being associated with, or could reasonably be linked, directly or indirectly, with a particular consumer or household,” including the following if it identifies, relates to, describes, is capable of being associated with, or could be reasonably linked, directly or indirectly, with a particular consumer or household:
 - Identifiers such as 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 already described under California law;
 - Characteristics of protected classifications under California or federal law (e.g., race, religion, sexual orientation, gender identity, gender expression, age, etc.);
 - 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”;
 - Geolocation data;
 - Audio, electronic, visual, thermal, olfactory, or similar information;
 - Professional or employment-related information;
 - Education information (as defined in the Family Education Rights and Privacy Act); and
 - “Inferences drawn from any of the information identified” above “to create a profile about a consumer reflecting the consumer’s preferences, characteristics, psychological trends, preferences, predispositions, behavior, attitudes, intelligence, abilities, and aptitudes.”

New Consumer Rights

The rights are similar, but not identical, to GDPR

- **Right of Disclosure.** Consumers will be permitted to request that a business disclose both the categories and specific pieces of the personal information collected.
- **Right of Portability.** Consumers will be permitted to request that a business provide the consumer with a copy of his or her personal information in a readily usable format that can be transferred to another entity easily;
- **Right to Opt-Out.** Consumers will be able to request that a business not sell personal data to third parties; and
- **Right of Deletion.** The new right to deletion is described on the next page

New Consumer Right to Deletion

This right is subject to different exceptions than GDPR

- Consumers can request businesses to delete personal information they have collected about the consumer, including all data in the possession of the businesses' vendors. There are several exceptions to this right / obligation, including if the information requested to be deleted is necessary for the business or service provider to maintain in order to:
 - Complete the transaction for which the personal information was collected, provide a good or service requested by the consumer, or reasonably anticipated within the context of the business's ongoing business relationship with the consumer, or otherwise perform a contract between the business and the consumer;
 - Detect security incidents, protect against malicious, deceptive, fraudulent, or illegal activity, or prosecute those responsible for that activity;
 - Debug to identify and repair errors that impair existing intended functionality;
 - Exercise free speech, ensure the right of another consumer to exercise his or her right of free speech, or exercise another right provided by law;
 - Comply with a legal obligation (the CCPA does not define or limit the phrase "legal obligation");
 - To enable solely internal uses of the personal information that are "reasonably aligned" with the expectations of the consumer based on the consumer's relationship with the business; or
 - Fulfill the terms of a written warranty or product recall conducted in accordance with federal law.*

New Obligations for Businesses

These obligations are not triggered by consumer requests

- **“Data Brokers” must register with AG.** A data broker is a business that knowingly collects and sells to third parties the personal information of a consumer with whom the business does not have a direct relationship*
- **Duty of Disclosure.** Businesses must disclose to consumers “at or before the point of collection” the “categories of personal information to be collected and the purposes for which the categories of personal information” will be used.
 - Businesses cannot collect additional categories of personal information or use personal information collected for additional purposes without first providing consumers with notice consistent with this duty of disclosure.
- **Anti-Discrimination Provisions.** Businesses cannot discriminate against any consumer for exercising his or her rights under the new law.
 - This means, in practical terms, denying a consumer goods or services, charging different prices, or providing a lower quality of services or goods.
 - Businesses will, however, be able to offer a different price, rate, level, or quality of goods or services to the consumer if that price or difference is directly related to the value provided to the business by the consumer’s data.
 - The new law also allows businesses to offer consumers “financial incentives” for the collection and sale of their personal information.

New Business Obligations for Selling Information

Businesses that sell information have more duties

- Businesses must establish a “clear and conspicuous” link on their website entitled “Do Not Sell My Personal Information.”
 - This page will enable consumers to exercise the right to opt-out of the sale of their personal information.
 - If the consumer opts-out, the business must wait at least 12 months from the date the consumer opts-out before requesting the consumer again to authorize the sale of his or her personal data.
 - A business that collects personal information about consumers must also disclose the consumer’s rights to request the deletion of the consumer’s personal information.
 - That disclosure must include two or more designated methods for submitting requests for deletion, including at a minimum a toll-free telephone number, and if the business maintains a website, the website address.

Enforcement

The CCPA creates robust enforcement tools

- **AG Implementing Regulations.** The AG must implement enforcing regulations no later than July 1, 2020.
- **AG Enforcement** may not begin until six months after publication of implementing regulations or July 1, 2020, whichever comes first
- **Private Right of Action.** The CCPA allows for a private right of action only for a business's alleged failure to "implement and maintain reasonable security procedures and practices" that results in an unauthorized "access and exfiltration, theft or disclosure . . . of personal information"
 - A consumer bringing such action may seek the greater of actual damages or statutory damages (capped at \$750 per consumer, per incident), in addition to injunctive and declaratory relief if appropriate.
 - The consumer must give the business 30 days' notice before filing suit.
 - Information that is encrypted or redacted is not subject to the private right of action.
- **Civil Penalties:** The CCPA allows for the collection of civil penalties by the Attorney General up to \$2,500 for each violation or up to \$7,500 per intentional violation to be assessed pursuant to California's Unfair Competition Law ("UCL") at California Business and Professions Code § 17206.

Next Steps to Prepare for the CCPA

Actionable steps to help get a head start

- **Prepare data maps, inventories or other records** of all personal information pertaining to California residents, households and devices, as well as information sources, storage locations, usage and recipients, to prepare for data access, deletion and portability requests, and to prepare for opt-out requests to data sharing.
 - Consider consolidating databases to ensure the correct users have the necessary permissions to meet 45-day deadlines to respond to data requests.
- **Update privacy policies** with newly required information, including a description of California residents' rights.
- **Determine** whether the organization will sell (or continue to sell) customer's personal information to third parties.

Next Steps to Prepare for the CCPA

Actionable steps to help get a head start (Cont'd)

- **Prepare and implement new systems, templates and processes** to comply with the new requirements, including to:
 - Verify the identity and authorization of persons who make requests for data access, deletion or portability.
 - Respond to requests for data access, deletion and portability within 45 days.
 - Avoid requesting opt in consent for 12 months after a California resident opts out.
 - Provide a clear and conspicuous “Do Not Sell My Personal Information” link on the company’s homepage that will direct users to a web page enabling them, or someone they authorize, to opt out of the sale of the resident’s personal information.
 - Obtain parental or guardian consent for minors under 13 years and the affirmative consent of minors between 13 and 16; companies can try to obtain parental consent by providing a consent form to be signed by the parent and returned via mail, fax, or scan.

CCPA vs. GDPR

Similar but not the same

	GDPR	CCPA
Scope	EU personal data processed	California resident PI collected, used, sold, disclosed
Right to access	Right to access all EU personal data processed	Right to access California resident PI collected in last 12 months
Right to portability	Must export and import EU personal data in user-friendly format	Must export PI requested in user-friendly format, no import requirement
Right to correction	Right to correct errors in EU personal data processed	No right
Right to stop	Right to withdraw consent or stop processing	Right to opt-out of selling PI only
Right to stop automated decision making	Right to have human make decisions that have legal effect	No right
Right to deletion	Right to delete under certain circumstances	Same
Right to equal service	Required	Required
Private right of action	Yes	Yes
Regulatory Penalties	Ceiling of 4% of global turnover (revenue) or \$20m euros, whichever is higher	\$2,500 per violation, \$7,500 per intentional violation, no ceiling

Key Takeaways

The CCPA may be a sign of things to come in the US

- The law reflects concern about perceived data abuses by companies using personal information, but it seeks to address these concerns with more of an American sensibility than a European sensibility.
- The influence of California's actions likely will ripple throughout the rest of the country.
- The CCPA requires companies to know exactly why they are collecting data and how they will use it **before** they collect it, and they will have to disclose it to data subjects before collection.
- For the same reasons, the CCPA could also have a significant impact on how companies use cookies.
- Although it is too early to know whether the CCPA will be further amended, now is the time to prepare for the requirements of the CCPA and copycat statutes that additional states are likely to adopt.

Thank you

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