

PRIVACY TRENDS


February 9, 2023 | Joe Garibyan, Partner
2023 SW&M Hybrid Legal Update Seminar

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Overview

- State Privacy Laws that Took Effect in 2023
- CPRA Status & FAQs
- Chat Lawsuits



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STATE PRIVACY LAWS THAT TOOK EFFECT IN 2023



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State Privacy Laws Effective January 1, 2023

- California Privacy Rights Act of 2020 (Proposition 24)
- Colorado Privacy Act (SB 190)
 - Financial institutions & their affiliates are exempt
- Connecticut Data Privacy Act (SB 6)
 - Financial institutions exempt (may apply to CUSOs)
- Virginia Consumer Data Protection Act (SB 1392)
 - Financial institutions exempt (may apply to CUSOs)
- Utah Consumer Privacy Act (SB 227)
 - Financial institutions & their affiliates are exempt



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Active State Privacy Bills to Watch

- People's Privacy Act (HB 1616 – Washington)
 - No GLBA exemption
- New York Privacy Act (SB 365)
 - Similar to CCPA in its application to financial institutions
- Digital Fairness Act (S 2277)
 - This is in New York. No GLBA exemption.
- Mississippi Consumer Data Privacy Act (SB 2080)
 - No GLBA exemption
- Massachusetts Data Privacy Protection Act (SD 746)
 - No GLBA exemption
- Massachusetts Information Privacy and Security Act (HD 3263 & SD 1971)
 - Only GLBA exemption for information process "in compliance with GLBA"
- Hawaii Consumer Data Protection Act (SB 974)
 - Exemption on GLBA data, not financial institution. But there are two competing bills that exempt financial institutions, SB 1110 and HB 1497



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CPRA STATUS & FAQs



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1) What is the Status of CPRA?

- Effective as of January 1, 2023
- Draft regulations approved by California Privacy Protection Agency on February 3, 2023.
- Next step is to submit the regulations to the Office of Administrative Law.
- Commencement of rulemaking activity for:
 - Requiring businesses whose processing of PI presents significant risk to consumers' privacy or security to:
 - Perform cybersecurity audits on an annual basis
 - Submit to CPPA the risk assessments
- Issue regulations governing access and opt-out rights for use of automated decision-making technology



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2) Does CPRA change scope of covered businesses?



- Yes!
- Scope of covered businesses modified as follows:
 - \$25 million revenue threshold is based on calendar year
 - 50,000 consumer, household or devices threshold increased to 100,000
 - Devices removed from calculus

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3) How does CPRA expand consumer rights?



- It expands “right to know” – removes 12-month lookback period for information collected on or after January 1, 2022
- Opt-out rights now apply to “sharing” personal information (“PI”)
 - Sharing means transferring or making PI available to third-party or cross-context behavioral advertising
 - New website link must state “Do Not Sell or Share My Personal Information”
- Modifies “right to delete”
 - CPRA expands list of third-parties that must be notified of deletion request to contractors or other third-parties, unless this proves impossible or involves disproportionate effort
 - Service providers or other third-parties must comply with deletion request and direct downstream service providers to do same
 - Rejecting deletion request for fraud prevention must be based on assessment of necessity and proportionality of retaining PI versus deleting it
- Expanded right to data portability – consumer may request PI transferred to another entity if technically feasible

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3) How does CPRA expand consumer rights? (cont.)



New Rights:

- Right to Correct
- Right to Opt-Out of Sharing Personal Information
- Right to Restrict Sensitive Information Processing
 - CPRA introduces new category of “sensitive” PI and provides consumers right to opt-out of use and disclosure
 - Sensitive PI includes SSN, precise geolocation, account information, racial or ethnic origin, etc.
- Automated Decision Making
 - Right to opt-out
 - Right to know information about logic involved
 - Newly formed privacy agency will need to clarify this right through regulations

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4) What changes do we need to make to CCPA notices and policies?



Notice at Collection and Privacy Policy will need to describe:

- The retention period or retention criteria for each category of personal information collected
- Details regarding the processing of sensitive personal information
- The new correction right
- Whether personal information is sold or shared

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5) Do we need to revise contracts with service providers?



Yes, contracts must:

- Limit service provider's use of PI to limited and specified purposes
- Obligate service provider to maintain same level of privacy protection that CPRA requires
- Grant business audit rights over service provider's compliance with CPRA
- Require service provider to notify business if it can no longer comply with CPRA
- Grant business right to take reasonable and appropriate steps to stop and remediate unauthorized use of PI

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6) Does CPRA continue or modify B2B and workforce PI exceptions?



No. Just continues them through January 1, 2023

- Starting January 1, 2023, the CCPA, as amended by CPRA, fully applies to employees who reside in California and to individual residents of California associated with B2B communications
- The financial sector privacy law exceptions (i.e., GLBA) would generally not apply to this data
- For HR data requests, must process them in compliance with CCPA and Labor Code
- B2B exemption no longer applicable. Practically, this means information collected on individuals associated with business accounts and business loans may be subject to CCPA.

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7) What other significant requirements does CPRA impose?



- Data minimization and retention limitation
- CPRA explicitly requires businesses to implement reasonable security procedures and practices
- Businesses that process PI in a manner presenting “significant risk” to consumers’ privacy or security are required to obtain annual independent cybersecurity audits and submit an annual risk assessment to newly created California Privacy Protection Agency

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8) Does CPRA change private right of action?



Yes, but in an insignificant way

- New category of PI subject to private right of action includes email address in combination with password or security question that would permit access to email account
- Relatedly for Attorney General actions, the 30-day cure period has been removed. Attorney General can go after businesses that are not compliant right away

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9) What Agency will enforce the CPRA?



- California Privacy Protection Agency ("Agency" and California Attorney General)
- Agency will take rulemaking role from Attorney General
- Agency given until July 1, 2022 to issue final regulations but failed to do so. Finally approved regulations on February 3, 2023 and still has more rulemaking activity around cybersecurity risk assessments and automated decision making.

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CHAT LAWSUITS



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Chat Feature Litigation

- Applicable case: *Javier v. Assur. IQ LLC*, 2023 U.S. Dist. LEXIS 1866
- California Invasion of Privacy Act (Penal Code 631)
- Must get prior consent for monitoring and recording before chat engagement
- Software providers may be deemed a third-party eavesdropper
- Class action risk

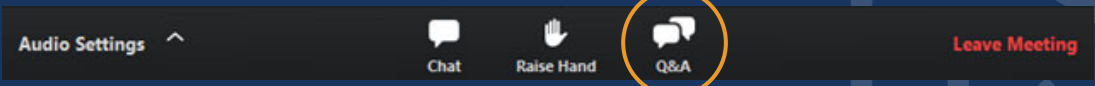


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QUESTIONS?

Please click the Q&A button on the bottom of your Zoom window to open the Q&A window;
Enter your question into the Q&A box, then click Send.



The screenshot shows the Zoom meeting control bar. From left to right, it includes: 'Audio Settings' with an upward arrow, 'Chat' with a speech bubble icon, 'Raise Hand' with a hand icon, 'Q&A' with a speech bubble and question mark icon (circled in orange), and 'Leave Meeting' in red text. A large, faint 'SW&M' logo is visible in the background on the right side.


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THANK YOU!

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