

POINT OF SALE

Updates from Benesch's **Retail, Hospitality & Consumer Products** Industry Group

California Dreaming Nightmare – The California Consumer Privacy Act

California may be a lot of things, but business-friendly is generally not one of them. Case in point, the California Consumer Privacy Act (“CCPA”) will take effect on January 1, 2020. A series of recent potential amendments are still in the works, which could impact key aspects of the legislation—from who is included in the definition of consumer to the operation of loyalty programs. However, and particularly given the private right of action and the likelihood that any business with a potential presence in California will be affected, companies should be prepared to get out in front of this law before the effective date.

Businesses must disclose—at or before the point of collection—the categories information collected and the purposes for which the information will be used.

In sum, the CCPA is a stateside form of the GDPR, providing consumers the ability to know what personal information businesses collect and the ability to delete and disclose any information businesses retain. And, as one would expect with any California legislation, the CCPA comes attendant with a private right of action for up to \$750 in statutory damages.

Even though the CCPA is a California state law, its enactment will impact businesses nationwide. Given the proliferation of the Internet and the ability of consumers to access websites anywhere and at an time, compliance with the CCPA cannot likely be avoided by most businesses. In short, businesses collecting consumer data should be ready to comply with this law in just a few short months, regardless of where the business resides.

The key takeaways are summarized here, and a detailed summary of the law is set forth in the chart below.

Update Your Policies and Procedures

Under the CCPA, a business that is collecting, selling or disclosing personal information must:

- (i) Disclose to the consumer the categories of personal information collected/sold, the categories of sources from which the information was collected, the purpose for collecting such information, the categories of third parties with which the business shares/sells the information and the specific information collected/sold.

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For more information, please contact



DAVID S. ALMEIDA

Chicago

T. 312.212.4954

dalmeida@beneschlaw.com

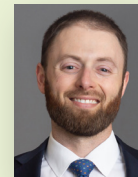


SUSAN M. ALTON DE ERASO

Chicago

T. 312.212.4977

saltondeeraso@beneschlaw.com



MARK S. EISEN

Chicago

T. 312.212.4956

meisen@beneschlaw.com

- (ii) Disclose to the consumer that they have the right to request that a business delete personal information.
- (iii) Disclose to the consumer that they have the right to direct businesses that sell personal information about the consumer not to sell it (known as the right to opt out).

This information must be provided pursuant to a “verifiable consumer request” up to twice in a 12 month period, and must be provided free of charge.

Businesses must disclose-at or before the point of collection-the categories information collected and the purposes for which the information will be used. This disclosure limits the categories of personal information collected and how it can be used.

To comply with the CCPA, businesses must make available two or more designated methods to submit requests for information that must be disclosed under the statute, including at least a toll-free number and web address (if the business has a website). To comply with the right to opt out, businesses must include on their homepage a clear and conspicuous link titled “Do Not Sell My Personal Information,” which must direct to a webpage that enables an opt out request. The consumers’ rights under the CCPA must be disclosed in any online privacy policy (or California-specific policy, if available) or elsewhere on the website if there is no privacy policy, and this information must be updated at least every 12 months.

The Private Right of Action

The private right of action is, for good reason, what most are concerned about. Importantly, notwithstanding the myriad obligations imposed by the CCPA, the private right of action applies only in instances of data breaches. There was a recent attempt to expand the private right of action, but has not yet passed and is expected not to pass, either. Keep in mind, however, that the CCPA does not actually require a large scale breach to bring suit; it simply requires unauthorized access or disclosure as a result of the failure to implement and maintain reasonable security procedures and practices. Expect Plaintiffs’ lawyers to push the envelope as to what constitutes “unauthorized access,” even in the absence of what is generally considered a data breach, and for California to become ground zero for data breach litigation.

Importantly, prior to initiating any action for statutory damages, the CCPA requires any consumer to notify the business. If the business is able to cure the alleged violation within 30 days and provides the customer with written notice that the violation was cured and no further violations shall occur, then the customer is barred from filing suit. However, no notice is required prior to an individual consumer initiating an action should that consumer suffer actual pecuniary damage for an alleged violation.

One unintended effect of this law is that it may actually make nationwide data breach class actions-and particularly class settlements-difficult to achieve. California residents are now potentially entitled to at least \$100, and have a claim that the remainder of the class does not have. This creates a set of interests that California plaintiffs may place ahead of the rest of the class, and creates an environment where any class and any settlement need to account for the rights and cause of action California class members now possess.

On a final note, a key provision in the private right of action actually helps defendants. The CCPA provides that it cannot be interpreted as serving as the basis for a private right of action under any other law. This is critical because the CCPA itself is not a fee-shifting statute. This prevents plaintiffs using a violation of the CCPA as the predicate for a violation of a consumer protection statute that is fee shifting. It also prevents plaintiffs from using the CCPA to create a duty to underlie a common law tort action.

Summary Chart

Section	Summary
<p>Cal. Civ. Code § 1798.140 (definitions)</p>	<ul style="list-style-type: none"> • This section includes over 20 definitions. The below is a brief overview of key definitions. • “Business” is defined to include (i) entities with gross revenues in excess of \$25 million, (ii) entities that annually buys, receives, sells or shares for commercial purposes the personal information of 50,000 or more consumers, or (iii) derives 50% or more of its annual revenue from selling personal information. • “Consumer” is limited to California residents. • “Personal Information” includes 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. Includes name, alias, address, personal identifier, IP address, email address, account name, social security number, driver’s license number, passport number, commercial information (including real property records and purchase histories), biometric information, internet activity (including browsing and search history), and geolocation data. Does not include publicly available information lawfully made available from federal, state or local government records, unless such information is being used for a purpose not compatible with the purpose for which the data was made available. • “Verifiable Consumer Request” includes a request made by a consumer (or on behalf of a consumer’s minor child) that the business can reasonably verify (pursuant to regulations adopted by the California attorney general) to be the consumer about whom the business has collected personal information.
<p>Cal. Civ. Code § 1798.100</p>	<ul style="list-style-type: none"> • Provides that consumers have the right to request that a business collecting personal information disclose the categories and pieces of information collected. The request must be a “verifiable consumer request.” • Provides that a business must-at or before the point of collection-inform consumers the categories of personal information collected and the purposes for which the information will be used. • Pursuant to a verifiable request, the business must promptly take steps to disclose and deliver, free of charge, the personal information collected. • Verifiable requests are limited to 2 per year. • A business need not retain personal information that is used for one-time transactions if that data is not sold or retained by the business to reidentify the consumer.
<p>Cal. Civ. Code § 1798.105</p>	<ul style="list-style-type: none"> • Provides that consumers have the right to request that a business delete personal information, and businesses must disclose this right to consumers. • Upon receiving a verifiable request to delete personal information, the business must delete the information from its records and direct any service providers to delete the information from their records. • Information need not be deleted if that information is needed to (i) complete a transaction or provide a good or service requested or would be reasonably anticipated to be needed within the context of the business relationship, (ii) for security purposes, (iii) enable internal uses or (iv) comply with a legal obligation (among other exceptions).

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Summary Chart (cont'd)

Section	Summary
Cal. Civ. Code § 1798.110	<ul style="list-style-type: none"> • Provides that consumers have the right to request that businesses that collect personal information disclose the following: (i) the categories of personal information collected about the consumer, (ii) the categories of sources from which the information was collected, (iii) the purpose for collecting or selling the information, (iv) the categories of third parties with which the business shares the information and (v) the specific information collected about the consumer. • Provides that the above information be disclosed to the consumer pursuant to a verifiable request.
Cal. Civ. Code § 1798.115	<ul style="list-style-type: none"> • Provides that consumers have the right to request that businesses that sell or disclose personal information disclose the following: (i) the categories of personal information collected about the consumer, (ii) the categories of personal information that the business sold about the consumer, (iii) the categories of third parties to whom the information was sold (and the categories of information for each third party to whom information was sold) and (iv) the categories of information the business disclosed for business purposes. • Provides that a business that sells or discloses personal information must, pursuant to a verifiable request, disclose (i) the categories of information sold (or the fact that none has been sold), and (ii) the categories of information it has disclosed for a business purposes (or the fact that none has been disclosed).
Cal. Civ. Code § 1798.120	<ul style="list-style-type: none"> • Provides that consumers have the right to direct businesses that sell personal information about the consumer not to sell it (i.e., the right to opt out). • Provides that businesses that sell consumer personal information to third parties must provide notice and notice of the right to opt out. • Provides that businesses cannot sell personal information of consumers if the business has actual knowledge that the consumer is less than 16 years of age, absent consent (and parental consent if less than 13 years of age). Willful disregard of age constitutes actual knowledge.
Cal. Civ. Code § 1798.125	<ul style="list-style-type: none"> • Provides that businesses cannot discriminate against a consumer for exercising rights under this statute, with limited exception.
Cal. Civ. Code § 1798.130	<ul style="list-style-type: none"> • To enable consumers to exercise their rights under this statute, provides that businesses must make available two or more methods for submitting requests for information that are required to be disclosed under §§ 1798.110, 115, including a toll-free number and web address. • Provides that businesses have 45 days to provide the required information, free of charge, pursuant to a verifiable request, subject to a one-time extension of 45 days. • Includes specific requirements for the production of information to consumers pursuant to verifiable requests. • Requires businesses to disclose in its privacy policy and any California-specific description of privacy rights (or, if neither of these exist, on its website)-and update every 12 months-(i) a description of consumer rights under this law, (ii) one or more methods for submitting requests, (iii) for § 1798.110, a list of categories of personal information collected in the last 12 months, (iv) for § 1798.115, two lists-one each of the list of categories of information sold and disclosed about consumers in the last 12 months.

Summary Chart (cont'd)

Section	Summary
Cal. Civ. Code § 1798.135	<ul style="list-style-type: none"> • To comply with § 1798.120, businesses must include on their homepage-in a reasonably accessible form-a link titled “Do Not Sell My Personal Information,” which takes consumers to a webpage to enable an opt out. Doing so cannot be predicated on creating an account with the company. • A description of the rights under § 1798.120 must be placed, along with the link, in the privacy policy and California-specific description of privacy rights. • Opt outs must be respected for at least 12 months before requesting that the consumer authorize the sale of their personal information.
Cal. Civ. Code § 1798.145	<ul style="list-style-type: none"> • Reconciles the CCPA with a variety of other state and federal laws and evidentiary requirements. • Provides certain exceptions and limitations, including (i) charging a reasonable fee or refusing to act where requests are unfounded or excessive, (ii) limiting liability of a business for the action of a service provider in violation of the CCPA, and (iii) clarifying that the CCPA does not require reidentifying or linking information that is not maintained in a manner that would be considered personal information.
Cal. Civ. Code § 1798.150	<ul style="list-style-type: none"> • Provides a private right of action to any consumer whose nonencrypted/nonredacted personal information is subject to an unauthorized access or disclosure as a result of the business’s violation of their duty to implement and maintain reasonable security procedures. • Provides statutory damages of not less than \$100 and not greater than \$750. • Prior to initiating an action for statutory damages only, the consumer must provide 30-days written notice, identifying the specific provisions of the CCPA the consumer alleges has been violated. If the business cures the problem within 30 days, and provides a written statement to that effect, no action can be initiated (unless the business continues to violate the CCPA despite the written statement). • A consumer must notify the state attorney general prior to filing suit, and the attorney general can take various actions to effectively step in for the consumer or prevent the action from proceeding. • Importantly, states that the CCPA cannot be interpreted to serve as a basis for a private action under any other law.
Cal. Civ. Code § 1798.155	<ul style="list-style-type: none"> • A business may seek the opinion of the California Attorney General for guidance on how to comply with the CCPA • The California Attorney General may impose a civil penalty in a civil action for the failure to cure an alleged violation within 30 days after receipt of notice of noncompliance. • Intentional violations of the CCPA may increase liability for any civil penalty up to \$7,500 for each violation, 20% of which will go to the Consumer Privacy Fund (see below), and 80% will go to the jurisdiction upon whose behalf the action is brought.

As a reminder, this Advisory is being sent to draw your attention to issues and is not to replace legal counseling.

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