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California Voters Can Expose Businesses to New Penalties for Data Privacy and Security Violations

In November, voters will decide whether to enact the California Consumer Privacy Act of 2018 (CCPA), which recently qualified as a ballot initiative. Contrary to recent interest, the CCPA would not impose a "European style" or "GDPR-like" data protection framework on companies doing business in California. Nevertheless, the act will impose obligations on many companies to update their privacy policies, strengthen their information security systems, and enhance their process for mapping organizational data flows. Perhaps most significantly, the act would empower plaintiffs to seek statutory damages for violations of new privacy rights and California's existing information security laws.

If the act becomes law, enforcement of four new rights would begin on August 6, 2019:

1. Within 45 days of receiving a consumer's "verifiable request," a covered business must disclose the categories of personal information that it has "collected" about that consumer.
2. Within 45 days of receiving a consumer's "verifiable request," a covered business must disclose the categories of personal information that the business sold, or otherwise shared for a "business purpose," about that consumer, as well as the identities of the third parties who received the information.
3. A consumer would have the right to direct a business not to sell the consumer's personal information (*i.e.*, to "opt out").
4. Businesses would be prohibited from providing a different level or quality of goods or services to consumers who opt out.

A violation of the act would constitute an "injury in fact," meaning consumers would not need to suffer a loss of money or property in order to bring a lawsuit individually or as a class. Consumers may recover statutory damages of $1,000, or actual damages if greater, for each violation. In the case of "knowing and willful violations," consumers may recover up to $3,000, or actual damages if greater, for each violation.

Finally, a business that suffers a data breach, as defined in California's existing information security law (Civil Code § 1798.82) would be deemed to have violated the act, and will be liable for statutory damages if it has failed to implement and maintain reasonable security procedures and practices.

Covered businesses would include any company doing business in California that:

(i) collect consumers' personal information; and
(ii) have annual gross revenues of more than $50 million, or annually sells the personal information of 100,000 or more consumers or devices, or derives 50 percent or more of its annual revenue from selling consumers' personal information.

If the voters pass the act into law, the Attorney General will have six months to adopt regulations that will hopefully provide more concrete guidance including, among other things, a meaningful definition of a consumer's "verifiable request." Covered businesses should be sure to account for any new legal obligations and exposures when conducting risk assessments and be prepared to modify compliance programs accordingly in advance of August 6, 2019 if the act is passed.

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