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CCPA Update: Amendments To Narrow Act's Scope Pass The Assembly Just In Time, While Effort To Expand The Private Right Of Action Dies In The Senate

In late May 2019, the California Assembly voted to approve several bills to amend the California Consumer Privacy Act (CCPA), which is scheduled to take effect on January 1, 2020. Two of those bills would meaningfully narrow or clarify the act's scope if passed by the Senate and signed into law by the governor, so companies working on compliance roadmaps should continue to monitor their progress. Meanwhile, a Senate bill that would have expanded the already severe consequences for violating the act failed to pass that chamber.

Amendment To Exclude Job Applicants, Employees And Contractors From Definition of "Consumer" Survives.

The CCPA defines a "consumer" as "a natural person who is a California resident." This broad language would appear to include employees, even though some of the structure and history of the act indicates that the legislature never intended to require businesses to extend the act's protections to their own employees.

Assembly Bill 25, which passed the Assembly on May 29, 2019, would eliminate some uncertainty, and reduce the compliance burden for many businesses, by clarifying that "'consumer' does not include a natural person whose personal information has been collected by a business in the course of a person acting as a job applicant to, an employee of, a contractor of, or an agent of the business, provided that such personal information is only used in the context of that person's role with the business. AB 25 also defines "contractor" as "a natural person who provides services to a business pursuant to a written contract."

Amendment To Preserve Consumer Loyalty Or Rewards Programs Advances.

Among the most controversial aspects of the CCPA is its mandate that a business shall not discriminate against a consumer by providing "a different level of quality of goods or services to the consumer" if they instruct the business not to sell, or to delete, their personal information. The act attempts to preserve "financial incentives" offered by business for collection of personal information, but specifies that any difference in price, level or quality of services must be "directly related to the value provided to the consumer by the consumer's data." This curious limitation has cast doubt on whether many popular loyalty programs may continue once the act is in effect.

Assembly Bill 846, which passed the Assembly on May 28, 2019, adds a new section to the act clarifying that a business may offer a different price, rate, level, or quality of goods or services to a consumer, “including offering its goods or services for now fee,” if, among other things, “the offering is in connection with a consumer’s voluntary participation in a loyalty, rewards, premium features, discounts, or club card program.” The Assembly noted that the inclusion of this section was based on studies that show 80% of adults belong to some kind of customer loyalty program, and 87% of customer loyalty program members say they are open to sharing personal information about their activity and behavior in order to receive more personalized rewards.

Amendment To Expand Consumers’ Right To Sue For Violations Is Dead (For Now).

The act establishes a private right of action for consumers to sue for statutory damages—up to \$750 “per consumer per incident”—in the event that their personal information is subject to unauthorized access, theft or disclosure “as a result of the business’s violation of the duty to implement and maintain reasonable security procedures and practices.” Senate Bill 561 would, among other things, have expanded the private right of action by giving consumers the right to sue for any uncured violation of the act, such as a business’s failure to provide adequate notices of consumers’ rights under the act, or a business’s failure to provide timely responses to verifiable consumer requests regarding personal information. Those types of violations will still be subject to civil penalties imposed through enforcement actions by the Attorney General, but because the Senate did not pass SB 561 by the May 30 deadline, consumers’ right to sue will be confined to violations of a business’s security duty when the act takes effect.