

Focus | Intellectual Property/Science & Technology Law

Are Your Clients Ready for CCPA's Jan. 1, 2020 Effective Date?

BY STEPHEN F. PINSON

What is CCPA?

The California Consumer Privacy Act (CCPA) becomes effective on January 1, 2020 and should give all in-house counsel and law firms cause for worry. CCPA is the widest sweeping privacy regulation to hit the U.S. since California's Breach Notification Law took the nation by storm in 2002. CCPA is a regulation that requires "businesses," "service providers," and "third parties" to protect the personal information and privacy of Californian "consumers" and "households" (the Consumer). The new legislation provides Consumers with private rights regarding how their data is used, and CCPA introduces a private right of action for Consumers who are harmed by a data breach. CCPA also affects business in other states and international business through its extraterritorial jurisdiction and scope.

Why Was CCPA Enacted?

CCPA was drafted to give the Consumer

more control over how their personal information is used within U.S. companies, such as large social media companies like Facebook and Google that sell and transfer information for advertising and tracking purposes. To stop this exploitation, CCPA followed what Europeans are now doing with their citizens data under the General Data Protection Regulation (known as GDPR).

Who Should be Preparing for CCPA?

Any "business," "service provider" or "third-party" who is collecting or using personal information (PI) of Consumers.

A "business" is any for-profit entity that does business in California, collects personal information about a Consumer and meets at least one of the following threshold criteria: (i) earns annual gross revenue above \$25 million, (ii) annually buys, sells or, for commercial purposes, receives or shares personal information of at least 50,000 California consumers, households or devices, or (iii) derives at least 50 percent of its annual

revenue from selling California consumers' personal information. See Cal. Civ. Code §1798.140(c)(1).

A "service provider" is a for-profit legal entity that processes information on behalf of a business and to which the business discloses a consumer's PI for a business purpose pursuant to a **written contract**. See Cal. Civ. Code §1798.140(w).

A "third party" is any individual or entity that is not a business or a service provider but receives PI from or on behalf of a business. It is important to note that a company can be a "business," "service provider" or "third party" in one context, and play another of these roles in another context. See Cal. Civ. Code §1798.140(w).

For example, a B2B service provider could be a business in relation to its website visitors, a service provider in relation to PI processed on behalf of its B2B customers, and a third party in relation to sales leads purchased from another business.

Why Should In-House Counsel and Law Firms be Concerned?

The fines for non-compliance can add up quickly for each record. Specifically, the California Attorney General may initiate civil actions against companies for violations per record with penalties reaching \$2,500 or up to \$7,500 per intentional violation. See Cal. Civ. Code §1798.155(b). As for a private right of action, if a breach occurs to Consumer data that was not encrypted as a result of a company's failure to implement reasonable security standards, individuals may each seek to recover the greater of: (i) actual damages or (ii) statutory damages up to \$750 per violation (or such damages may be sought in a class action).

To comply with the CCPA, businesses will need to consider implementing processes and procedures to authenticate and respond to verifiable Consumer requests. To do this, businesses must know what PI about Californians they have in their databases, and must "data map" the data, which is an arduous task that takes time. In addition, companies must update disclosures in their privacy policies at least annually. Any employees or contractors that handle Consumer inquiries related to the company's privacy practices must receive training.

Furthermore, CCPA requires "businesses" and "service providers" to include specific contractual language in their agreements—otherwise it's an infringement of the regulation subject to fines for non-compliance. See Cal. Civ. Code §1798.140(w)(2)(a-b).

How Prepared Are We?

A recent study from International Association of Privacy Professionals (the IAPP), a global leader in privacy, found that **only 2 percent of firms consider themselves fully compliant today**. Furthermore, *Security Magazine* has stated that more than 45 percent of U.S. employees are unaware of the CCPA. Enforcement by the California Attorney General does not begin until July 1, 2020.

These results indicate that businesses are not prepared. Any business not properly protecting this PI is at risk of a fine.

In the coming months, engaging legal counsel with expertise in privacy and security matters, including CCPA, will be key for U.S. companies to meet their legal compliance obligations.

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