California AG Revises Proposed CCPA Regulations

Insights
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On February 10, 2020, the Attorney General issued revisions to the proposed regulations to the California Consumer Privacy Act (the CCPA) which were originally published in October of last year. While the Attorney General cannot bring an enforcement action until July 1, 2020, these revisions indicate that the office is gearing up to start bringing CCPA enforcement actions in July. Further, while employers won a brief reprieve for their employee and applicant personal information due to an amendment to the CCPA, it is important to remember that this reprieve only lasts until January 1, 2021. As the law currently stands, employers have only had to comply with a small portion of the CCPA for their employees and job applicants. However, absent an additional amendment, employers will be required to comply with the full-scope of the CCPA *in less than a year*. CCPA compliance takes time, and as the AG continues to revise and finalize the proposed regulations throughout the first half of 2020, employers need to take note and keep apprised of the changes and trends to ensure they will comply next January. The following outlines a sampling of the key changes made by the Attorney General to the proposed regulations:

Employee & Applicant Personal Information and Notices

Preliminarily, it is important to note a new defined term included in these revisions, "employment-related information." This term is defined to mean personal information collected by a business about its employees, job applicants, independent contractors, etc., and that the collection of this information, such as for employment benefits, shall be considered a business purpose for purposes of the CCPA.

The regulations also now include § 999.305(e), which clarifies that the CCPA amendment that immunized employers from certain aspects of the CCPA still in fact requires employees and applicants be notified of their personal information being collected. This lingering requirement, to provide employees and applicants with notice of the collection of their personal information, now has greater clarity under these revisions.

Perhaps most notably, this new provision clears up the question of whether an employer is *required* to provide a link to an online privacy policy to employees and applicants as a method of notice – an employer is not. The revisions now clarify that employers can provide notice of personal information collected to employees and job applicants in paper form or via email, rather than through an online privacy policy. Additionally, employers are now explicitly allowed to provide a link to an online privacy policy tailored to employee and applicant data, rather than the general online privacy policy

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privacy policy tailored to employee and applicant data, rather than the general online privacy policy which deals with consumers as a whole, which may not currently cover employee and applicant data.

Finally, this provision confirms that it will "become inoperative on January 1, 2021, unless the CCPA is amended otherwise." This explicit revocation of a provision within the regulations indicates that employers need to be prepared to fully comply with these regulations for employment-related information, in the event the amendment to the CCPA is not extended or made permanent.

Overall, this new employment-related provision to the regulations, along with the new definitions, help clarify what your notice obligations are as an employer. Unfortunately, it also serves as an unwelcome reminder that come January 1, 2021, all other provisions of the CCPA will apply to employees and applicants absent a change to the law.

General Provisions & Definitions

The major difference to the general provisions is a new section entitled "Guidance Regarding the Interpretation of CCPA Definitions." This subsection adds guidance on whether information is considered personal information as defined by the CCPA. Specifically, whether information is considered personal information depends on whether the business maintains information in a manner that "identifies, relates to, describes, is reasonably capable of being associated with, or could be reasonably linked, directly or indirectly, with a particular consumer or household."

While this is not necessarily a new concept to the CCPA, the provision now explicitly provides an example that explains a point of confusion and concern businesses have faced as they attempt to comply with the CCPA. Where a business collects IP addresses of website visitors but does not link the IP address to a consumer or household (and could not reasonably link the IP address to a consumer or household) that IP address will not be considered personal information. This is good news as almost all website cookies automatically collect IP addresses (and other information), but not all businesses connect, or are capable of connecting, those IP addresses to consumers. For those businesses, the collection of IP addresses will not need to be disclosed to consumers as a category of collected personal information. The IP address example illustrates that for a piece of data to classify as personal information, the business must link that piece of data to a specific consumer.

Another addition to the general provisions adds clarifying language to the definitions of "Categories of sources" and "Categories of third parties." As we already knew, these two categories have to be described within a CCPA disclosure or privacy policy. Under the revisions, each category now needs to be "described with enough particularity to provide consumers with a meaningful understanding" of the type of person, entity, or third party. This practically does not change much by way of CCPA compliance. However, it does require companies to ensure that their categories of sources and third parties are sufficiently described within their disclosures and privacy policies to ensure that a reasonable consumer can have a meaningful understanding of where information is being collected from and who it is being disclosed to. Come January 1, 2021, employers will likely need to include

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from and who it is being disclosed to. Come January 1, 2021, employers will likely need to include employment-related information within their privacy policies, and as such should start compiling a list of sources and third parties for employment-related information obtained from employees and applicants to make the transition smoother.

Notice to Consumers

For online notice to consumers, the revised regulations provide additional guidance for accessibility compliance to consumers with disabilities. The revisions give needed clarity, and now specify that online notices to consumers must follow the generally recognized industry standards, such as the Web Content Accessibility Guidelines, version 2.1 of June 5, 2018, from the World-Wide Consortium. While clarity is good, the lack of ambiguity now gives less room for interpretation and covered businesses must ensure their website and CCPA policies are accessible.

The revisions also address a mobile application's collection of personal information. Specifically, the revisions provide guidance that a business which collects personal information through a mobile application may provide a link to the notice on the mobile application's *download page* and within the application, such as through the application's *settings menu.* Further, when a business collects personal information from a consumer's mobile device, for a purpose not reasonably expected by the consumer, the business must provide a "just-in-time notice" which summarizes the information being collected and provides a link to the full privacy page.

These additions to the regulations will create added concerns and compliance steps for companies who widely use mobile applications. The "just-in-time notice" could require, for example, a new pop-up when a consumer opens their mobile application. What will constitute a consumer's "reasonable expectations" is not defined and thus, business should err on the side of providing the "just-in-time" notice, rather than assuming a consumer reasonably expects you are collecting certain types of personal information from them. Finally, employers who use mobile applications within their employment practices, for example as the method their employees clock-in and clock-out, should also consider what notice obligations they may have when the full CCPA requirements kick-in for employees and applicants.

Finally, a bit of good news within the realm of providing notice to consumers, employees, and job applicants. Previously, the regulations stated that a business could not use a consumer's personal information for any purpose other than those disclosed within the notice without issuing a new/updated notice. However, that language has been tweaked a bit to only prevent the use for a purpose "materially different" than those disclosed within the notice. This change could be helpful moving forward as companies struggle to consistently roll-out changes to their notices to consumers, as well as their notices to employees. Now, those changes are not required unless a new purpose used by the company is materially different than what has previously been disclosed.

Privacy Policy

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While previously the regulations simply indicated that a privacy policy must explain how a consumer can designate an authorized agent, the regulations now require that a privacy policy "[p]rovide instructions on how an authorized agent can make a request" under the CCPA on behalf of a consumer. This will require careful tailoring of your privacy policy. Even if you already have a CCPA privacy policy online and active, it is worth taking a second look at it to ensure that you not only described the authorized agent process, but in fact provided instructions on how an authorized agent can go about making a consumer request.

Methods for Submitting Requests to Know & Requests to Delete

Another bit of a reprieve for some covered business – the regulations now only require certain businesses to provide an email address for consumer requests to know, rather than the prior requirement of two or more designated methods (a toll-free number and interactive web form). However, take note that this one-method email option only applies to a business that (a) operates exclusively online and (b) has direct relationships with the consumers they collect personal information from. If your business falls within those confines, establishing compliance for CCPA consumer requests just got easier.

Service Providers

The revised regulations also provide some needed clarity on obligations of a service provider. Moving forward, a service provider who receives a consumer request, can either (a) act on behalf of the business in responding to requests or (b) inform the consumer that it cannot act upon the request because the request should have been made to the company, not the service provider. This means that service provider agreements and addenda should specify a service providers' specific obligations upon receipt of a request, either (a) or (b), depending on the type of service provider and nature of their agreement with the company. For example, if a service provider used by a covered business does not have the ability to delete personal information, then the agreement with a service provider should require them to inform the consumer they cannot act upon the request.

Non-Discrimination

Finally, the non-discrimination provisions of the AG's regulations saw significant additions this month. Specifically, in the prior version of the regulations, a business is permitted to offer a financial incentive or price or service difference only if it is reasonably related to the value of the consumer's data. The revisions take this a step further, requiring that where "a business is unable to calculate a good-faith estimate of the value of the consumer's data or cannot show that the financial incentive or price or service difference is reasonably related to the value of the consumer's data, that business shall not offer the financial incentive or price or service difference."

This places an obligation to specifically calculate an estimation of a consumer's data, or show a reasonable relation, otherwise the company *cannot* offer financial incentive or price or service differences. This will come into play significantly with loyalty and rewards programs. For example

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differences. This will come into play significantly with loyalty and rewards programs. For example, where a grocery store offers a loyalty program (coupons) when a consumer provides their phone number, a consumer cannot lose the right to those coupons if they request their phone number be deleted, absent the company demonstrating that the value of the coupons is reasonably related to the value of the consumer date (the phone number) to the business or calculating an estimation of the worth of the phone number.

In preparation for the AG's ability to bring CCPA enforcement actions, covered businesses need to stay up to date on the proposed regulations, especially once they are finalized sometime in the next few months. All of the February changes to the proposed regulations can be found here: https://www.oag.ca.gov/sites/all/files/agweb/pdfs/privacy/ccpa-text-of-mod-redline-020720.pdf.

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