

Consumer Data Privacy – An Evolving Landscape

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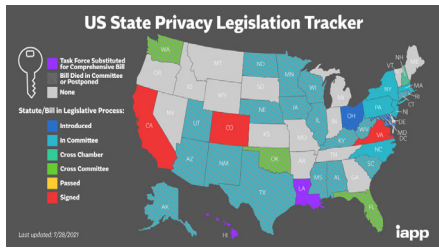
Agenda

- Overview of privacy laws in the US
- State laws, with an emphasis on the impact on HR data
- What's happening at the federal level
- International considerations
- Questions

US Data Privacy Law

- There is no one comprehensive federal law that governs data privacy
- Rely on a complex patchwork of sector-specific and medium-specific laws (COPPA, HIPAA, GLBA, FCRA, FERPA)
- With no consensus on how to legislate broadly, the states have taken up the charge

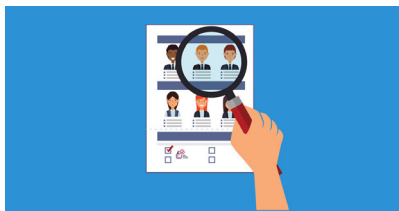
State Data Privacy Laws



State Data Privacy Laws

- **California** led the way in 2018 with the CCPA; amended in 2020 by the CPRA
- **Virginia** followed with the Consumer Data Protection Act
- **Colorado** became the third state with comprehensive legislation by passing the Colorado Privacy Act

What's the Applicability to HR Data?





California Consumer Privacy Act

- California Consumer Privacy Act
- Signed into law June 2018
- Replaced a more stringent ballot initiative
- Requirements took effect January 1, 2020

Application of the CCPA

- For-profit companies that both collect and process the Personal Information of California residents and do business in the State of California (physical presence not required in California); AND the company meets one of the following:
 - The company must generate annual gross revenue in excess of \$25 million,
 - The company must receive or share Personal Information of more than 50,000 California residents annually, or
 - The company must derive at least 50 percent of its annual revenue by selling the Personal Information of California residents.

HR Data Exempt Under CCPA?

- Exempts the data of employees, applicants, independent contractors, and members of a covered business' board of directors from most of its requirements until January 1, 2022
- Only two of the CCPA's provisions now apply to covered employers: (a) the requirement to provide a "Notice at Collection" and (b) a right to recover up to \$750 in statutory damages for data breaches

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California Privacy Rights Act

- Ballot initiative that passed in November 2020
- Effective January 1, 2021 (in part)
- Provides additional individual privacy rights, with consolidation of enforcement into a single agency
- Definition of "business" both narrowed and expanded

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HR Data Exempt Under CPRA?

- Extends the sunset date for the CCPA's exemption for HR data until January 1, 2023
- On that date, covered employers must comply with the full CPRA
- In short, the CPRA will not contain a carve-out for the data of HR Individuals.

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CPRA – Two Types of Notices

- Notice of Collection
 - Expanded to require disclosure of how an employer shares personal information, handles sensitive personal information, and retains personal information
- Privacy Policy

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In Summary...

- **CCPA** applies only in part to HR data
- **CPRA** will apply in full to HR data

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Virginia Consumer Data Protection Act

- Effective January 1, 2023
- Applies to entities that do business in Virginia or sell products/services targeted to Virginia residents, and:
 - Control or process personal data of 100,000 or more consumers; or
 - Control or process personal data of at least 25,000 consumers *and* early 50% of their revenue by selling personal information

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Virginia Consumer Data Protection Act

Grants six rights to Virginia residents:

1. The right to access the personal data a company processes
2. The right to correct data
3. The right to delete personal data provided by or obtained about the consumer
4. The right to data portability
5. The right to opt out of targeted ads the sale of personal data, and profiling in advertising
6. The right to appeal a company's denial to act within a reasonable time (45 days + 45 day extension)

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Colorado Privacy Act

- Effective July 1, 2023
- Applies to businesses that collect personal data from 100,000 Colorado residents or collect data from 25,000 Colorado residents and derive a portion of revenue from the sale of that data

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Colorado Privacy Act

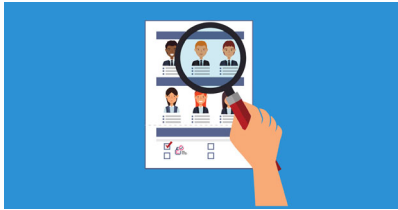
Grants five rights to Colorado residents:

1. The right to opt out of targeted ads, the sale of personal data, or being profiled
2. The right to access the data a company has collected
3. The right to correct data that's been collected
4. The right to request data be deleted
5. The right to data portability

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What's the Applicability to HR Data?



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VCDPA

- VCDPA does not apply to employees or business contacts
- Specifically carves out of the definition of "consumers" any individuals "acting in a commercial or employment context"
- Therefore, the rights provided to consumers within the law do not appear to extend to employees or those who are engaged in processing of personal data in a commercial (business-to-business) context.

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Colorado Privacy Act

- The CPA defines a "consumer" as "a Colorado resident acting only in an individual or household context" and explicitly omits individuals acting in "a commercial or employment context, as a job applicant, or as a beneficiary of someone acting in an employment context."
- Controllers do not need to consider the employee personal data they collect and process when evaluating applicability of the CPA

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What About Nebraska?

- LB746 - Adopt the Nebraska Consumer Data Privacy Act
- Introduced during the 2020 legislative session; indefinitely postponed
- Mirrored after the CCPA
- "Consumer does not mean a person acting in a commercial or employment context."
- "Personal information means...professional or employment-related information."

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Back to the Federal Side...



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Federal Trade Commission

- FTC has broad jurisdiction over commercial entities under the authority to prevent unfair or “deceptive trade practices”
- FTC uses its authority to issue regulations, enforce privacy laws, and take enforcement actions

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Federal Trade Commission

- Fail to implement and maintain reasonable data security measures
- Fail to abide by any applicable self-regulatory principles of the organization’s industry
- Fail to follow a published privacy policy
- Transfer personal information in a manner not disclosed in the privacy policy
- Violate consumer data privacy rights by collecting, processing, or sharing consumer information
- Engage in misleading advertising practice

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Federal Consumer Data Privacy Legislation???



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Federal Happenings

- Consumer Online Privacy Rights Act – introduced in 2019
- United States Consumer Data Privacy Act – introduced in 2019
- SAFE DATA Act – introduced in 2020/2021
- Bipartisan negotiations – goal of passing federal legislation by the end of 2022
- Series of roundtables

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International Privacy Legislation

- Doing business in other jurisdictions may bring international privacy legislation into play.
 - GDPR: European Economic Area
 - CIPEDA / CPPA: Canada
 - General Personal Data Protection Law: Brazil
 - APPI / Amended APPI: Japan

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Questions?

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