



Mastering E-Commerce and Data Law

Rossdale CLE

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Melissa Krasnow, VLP Law Group LLP, Minneapolis

Email: mkrasnow@vlplawgroup.com

Telephone: (312) 350-1082

Attorney bio: <https://www.vlplawgroup.com/attorneys/melissa-krasnow/>

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BREACH NOTIFICATION AND DATA SECURITY

50 states (plus the District of Columbia, Guam, Puerto Rico and Virgin Islands) have breach notification laws that require notification of a breach to affected individuals

More than:

- 40 state breach notification laws have risk of harm provisions
- 30 state breach notification laws require notification of a breach to a state attorney general or regulator in addition to notifying affected individuals

Interplay of state laws with federal laws

Keep incident response plan up-to-date and test this (e.g., tabletop exercises (TTX))

BREACH NOTIFICATION AND DATA SECURITY (CON'T)

More than 20 states have laws addressing data security procedures

- Massachusetts security procedures law requires a comprehensive written information security program (WISP)
 - oversight of third party service providers, including contract requirement
 - disclosure about WISP as part of Massachusetts breach notification

BREACH NOTIFICATION AND DATA SECURITY (CON'T)

Federal HIPAA / HITECH Act breach notification for covered entities and business associates regarding protected health information:

- has risk of harm provision
- requires notification of a breach to a regulator as well as the media in addition to notifying affected individuals

Federal HIPAA / HITECH Act addresses data security procedures

Will there be a comprehensive US federal breach notification and data security law?

Provisions in contracts and policies

BREACH NOTIFICATION AND DATA SECURITY (CON'T)

European Union's General Data Protection Regulation (GDPR) addresses:

- breach notification, including:
 - risk of harm provisions
 - notification of a breach to a competent supervisory authority in addition to data subjects
- data security

CONSUMER PRIVACY

California, Delaware and Nevada have laws addressing privacy policy requirements

Other state laws implicate privacy policies

Additional states are considering consumer privacy legislation in addition to the California Consumer Privacy Act (CCPA)

Will there be a comprehensive US federal consumer privacy law?

GDPR addresses data subject rights (including access, rectification, erasure, restriction of processing, data portability, objection, automated individual decision-making, including profiling) and privacy notices

ePrivacy Regulation not finalized yet

CALIFORNIA CONSUMER PRIVACY ACT (CCPA)

CCPA is scheduled to become operative January 1, 2020

- Interplay with state laws and federal laws and exceptions

California Attorney General:

- Must adopt regulations on or before July 1, 2020
- Anticipates publishing a Notice of Proposed Regulatory Action in fall 2019
- Will not bring an enforcement action until 6 months after publication of final regulations or July 1, 2020, whichever is sooner

CALIFORNIA CONSUMER PRIVACY ACT (CCPA) (CON'T)

CCPA applies to a business, a service provider and a third party

Business means a legal entity organized or operated for the profit or financial benefit of its owners, which:

- Collects consumers' personal information or on the behalf of which such information is collected and
- Alone, or jointly with others, determines the purposes and means of processing of consumers' personal information and
- Does business in California and

CALIFORNIA CONSUMER PRIVACY ACT (CCPA) (CON'T)

- Has annual gross revenues in excess of \$25 million or
- Alone or in combination, annually buys, receives for the business' commercial purposes, sells, or shares for commercial purposes, alone or in combination, the personal information of 50,000 or more consumers, households or devices or
- Derives 50 percent or more of its annual revenues from selling consumers' personal information

CALIFORNIA CONSUMER PRIVACY ACT (CCPA) (CON'T)

Service provider means a legal entity that is organized or operated for the profit or financial benefit of its shareholders or other owners, that:

- Processes information on behalf of a business and
- To which the business discloses a consumer's personal information for a business purpose pursuant to a written contract, provided that the contract prohibits the entity receiving the information from retaining, using or disclosing the personal information for any purpose other than for the specific purpose of performing the services specified in the contract for the business, or as otherwise permitted by the CCPA, including retaining, using or disclosing the personal information for a commercial purpose other than providing the services specified in the contract with the business

CALIFORNIA CONSUMER PRIVACY ACT (CCPA) (CON'T)

Third party is a person that is not either:

- a CCPA-defined business that collects personal information from consumers under the CCPA or
- a person to which the business discloses a consumer's personal information for a business purpose pursuant to a written contract, provided that the contract:
 - prohibits the person receiving the personal information from:
 - (i) selling the personal information,

CALIFORNIA CONSUMER PRIVACY ACT (CCPA) (CON'T)

(ii) retaining, using or disclosing the personal information for any purpose other than for the specific purpose of performing the services specified in the contract, including retaining, using or disclosing the personal information for a commercial purpose other than providing the services specified in the contract and

(iii) retaining, using or disclosing the information outside of the direct business relationship between the person and the business and

- includes a certification made by the person receiving the personal information that the person understands the foregoing restrictions and will comply with them

CALIFORNIA CONSUMER PRIVACY ACT (CCPA) (CON'T)

Consumer means a California resident

Personal information means information that identifies, relates to, describes, is capable of being associated with, or could reasonably be linked, directly or indirectly, with a particular consumer or household (the CCPA describes various types of personal information)

Consumer requirements include disclosure, access, deletion, antidiscrimination and opt-out, as well as website and privacy policy requirements under the CCPA

CALIFORNIA CONSUMER PRIVACY ACT (CCPA) (CON'T)

- Any business, service provider or other person that violates the CCPA is subject to an injunction and liable for a civil penalty of not more than \$2,500 for each violation or \$7,500 for each intentional violation
- After satisfying certain procedural requirements, a consumer may institute a civil action to recover damages for not less than \$100 and not greater than \$750 per consumer per incident or actual damages, whichever is greater, regarding their nonencrypted or nonredacted personal information that is subject to an unauthorized access and exfiltration, theft or disclosure as a result of the business' violation of the duty to implement and maintain reasonable security procedures and practices appropriate to the nature of the information to protect the personal information

RESOURCES

- <https://www.vlplawgroup.com/attorneys/melissa-krasnow/>
- <http://www.vlplawgroup.com/wp-content/uploads/2019/01/Domestic-Privacy-Profile-Minnesota-Jan-2019.pdf>
- <https://www.irmi.com/articles/expert-commentary/breach-notification-laws-state-attorney-general-or-regulator>
- <https://www.irmi.com/articles/expert-commentary/massachusetts-amends-breach-notification-law>
- <https://www.irmi.com/articles/expert-commentary/a-summary-of-ccpa-of-2018>

Thank You!



Melissa Krasnow
VLP Law Group LLP, Minneapolis
mkrasnow@vlplawgroup.com
(312) 350-1082