

Date of Hearing: April 23, 2019

ASSEMBLY COMMITTEE ON PRIVACY AND CONSUMER PROTECTION

Ed Chau, Chair

AB 25 (Chau) – As Amended April 12, 2019

SUBJECT: California Consumer Privacy Act of 2018

SUMMARY: This bill would clarify the definition of consumer under the California Consumer Privacy Act of 2018 (CCPA) to exempt a person’s personal information (PI) only to the extent that their PI is collected and used solely within their employee role, or in similar roles within the employment context, as specified. This bill would also reflect the Legislature’s intent to ensure that a business complies with a consumer’s request for specific pieces of information in a privacy protective manner, as specified. Specifically, **this bill would:**

- 1) Specify, within the CCPA’s definition of “consumer,” that a consumer does not include a natural person whose PI 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 on behalf of, the business, to the extent their PI is collected and used solely within the context of the person’s role as a job applicant to, an employee of, a contractor of, or an agent on behalf of, the business.
- 2) Provide that, for purposes of this definition, “contractor” means a natural person who provides services to a business pursuant to a written contract.
- 3) State the intent of the Legislature to clarify how a business shall comply with a consumer’s request for specific pieces of information in a privacy protective manner.
- 4) Make other technical and non-substantive changes.

EXISTING LAW:

- 1) Establishes the CCPA and provides various rights to consumers pursuant to the act. Subject to various general exemptions, a consumer has, among other things:
 - the right to know what PI a business collects about consumers, as specified, including the categories of third parties with whom the business shares PI, and the specific pieces of information collected about the consumer;
 - the right to know what PI a business sells about consumers, as specified, including the categories of PI that the business sold about the consumer and the categories of third parties to whom the PI was sold, by category or categories of PI for each third party to whom the PI was sold;
 - the right to access the specific pieces of information a business has collected about the consumer;
 - the right to delete information that a business has collected from the consumer;
 - the right to opt-out of the sale of the consumer’s PI if over 16 years of age, and the right to opt-in, as specified, if the consumer is a minor; and,

- the right to equal service and price, despite exercising any of these rights. (Civ. Code Sec. 1798.100 et seq.)
- 2) Generally requires under the CCPA that a business subject to the CCPA do all of the following, among other things: comply with the above requirements, provide various notices to those ends, and execute various requests upon receipt of a verifiable consumer request, as specified; and provide certain mechanisms for consumers to make their lawful requests, including a clear and conspicuous link titled “Do Not Sell My Personal Information” on the business’s internet homepage to enable consumers, or a person authorized by the consumer, to opt-out of the sale of the consumer’s PI. (Civ. Code Sec. 1798.100 et seq.)
 - 3) Prohibits a business from discriminating against a consumer because the consumer exercised any of the consumer’s rights under the CCPA, as specified. (Civ. Code Sec. 1798.125(a)(1).)
 - 4) Provides various definitions under the CCPA. The CCPA, of particular relevance for this bill, defines “consumer” to mean a natural person who is a California resident, as defined in the California Code of Regulations, as specified, however identified, including by any unique identifier. (Civ. Code Sec. 1798.140(g).)

FISCAL EFFECT: Unknown

COMMENTS:

- 1) **Purpose of this bill:** This bill seeks to: (1) clarify the definition of consumer to ensure it exempts an individual’s PI when collected by employers within the scope of employment; and, (2) ensure that businesses provide specific pieces of information pursuant to a verifiable consumer request in a privacy protective manner, given how PI can relate to a household or shared device. This is an author-sponsored bill.

- 2) **Author’s statement:** According to the author:

Since its passage, there have been numerous requests for further clarification on the rights, protections, and obligations established by the CCPA. Additionally, numerous stakeholders have urged further refinement of the law – ranging from suggestions on how to further clarify and address perceived workability issues from a business standpoint, to suggestions on how to strengthen the law from a consumer and privacy protections standpoint.

One issue that has been raised is the need to clarify that the definition of “consumer” does not include an employee acting within their scope as an employee. Many businesses have argued that because the current definition encompasses all California residents, the CCPA could be read to also apply to Californians in their capacity as employees, both to capture their employee data and to potentially capture business data of another business in the context of business-to-business interactions. For example, while we never envisioned this being an issue, it has been expressed that, as drafted, an employee accused of sexual harassment could request that complaints about them be expunged (pursuant to the right to delete, Civil Code Section 1798.105) from company files.

Another issue that has been raised is the concern that highly sensitive information, like credit card or social security numbers, could fall into the wrong hands when a request is

made for “specific pieces of information” (pursuant to the right to know, Section 1798.110) the business has collected about a consumer. This concern extends to the disclosure of personal information, such as a consumer’s browsing history with other household members or other users of a shared device – particularly where the information could land in the hands of an abusive spouse or parent, or in the hands of a roommate. While the CCPA requires that a business comply only upon receipt of a verifiable consumer request, the concern raised is that a business may need to collect additional information from the requesting consumer to make sure the personal, and potentially sensitive, information is sent to the right person, especially when a business has no direct relationship with the consumer, or in situations involving a shared household or device.

This bill would exclude from the definition of “consumer” a natural person whose personal information has been collected by a business in the course of a person acting as a job applicant or as an employee, contractor, or agent, on behalf of the business, to the extent their personal information is used for purposes compatible with the context of that person’s activities for the business as a job applicant, employee, contractor, or agent of the business. This would ensure that the same individual retains rights under the CCPA in their capacity as a consumer, as opposed to in their capacity as an employee.

[This bill] also states the intent of the Legislature to clarify how a business shall comply with a consumer’s request for specific pieces of information in a privacy protective manner.

- 3) **CCPA background:** Last year, the Legislature enacted the CCPA (AB 375, Chau, Ch. 55, Stats. 2018), which gives consumers certain rights regarding their PI, including: (1) the right to know what PI that is collected and sold about them; (2) the right to request the categories and specific pieces of PI the business collects about them; and (3) the right to opt-out of the sale of their PI, or opt-in in the case of minors under 16 years of age. The CCPA was the byproduct of compromises made between business interests on the one side, and consumer and privacy interests on the other, to provide a legislative alternative to a ballot initiative on the same subject.

The compromise is evidenced by how the CCPA incorporates increased consumer rights (such as the right of deletion, right to specific pieces of information, and the separate treatment of minors’ data through an “opt-in” right) that would not have been in the underlying ballot initiative that served as the impetus and starting point for the final legislation. It is further evidenced by how, in turn, certain items were not included in (such as a whistleblower provision), limited by (such as the private right of action, and a single public enforcement entity as opposed to enforcement by all public prosecutors), or added to (such as the authorization for businesses to seek guidance from the Attorney General) the CCPA to alleviate certain concerns that businesses had with respect to the ballot initiative.

Since the passage of the CCPA by way of AB 375 and SB 1121 (Dodd, Ch. 735, Stats. 2018), the preliminary “clean-up” legislation to the CCPA to address drafting errors and make other non-controversial clarifications, several concerns have been raised by stakeholders. One concern relates to key provisions added to the CCPA as compared to the initiative: the consumer’s right to specific pieces of information and the inclusion of households in the definition of PI. Another relates to the definition of consumer and how some businesses fear it might sweep in employee data due to its breadth.

- 4) **Drawing a clear line between consumers’ and employees’ PI for purposes of the CCPA:** The CCPA recognizes that a person’s PI can be collected in many different interactions with businesses. Businesses often collect a person’s PI when the person comes into direct contact with them as a customer or user of their goods or services. Businesses can even collect a person’s PI even where the person does not have a direct relationship, or any direct interactions, with them, such as in the case of data brokers. In each of those scenarios, the CCPA contemplated providing consumers greater access to and control over the use, collection, and sale of their own PI. To this end, the CCPA broadly defines consumer to capture any California resident. However, those same individuals who fall under this broad “consumer” umbrella, can also be employees of those same businesses. In the context of that employment, the business often collects, uses, or shares the individual’s PI for employment-related purposes – whether the PI is used in connection with personnel files, health benefits, or is necessary for other employment purposes which may require user IDs, email addresses, and so forth.

During the passage of the CCPA, there was recognition both of the intended breadth of the consumer definition, and of the fact that the CCPA was not intended to extend to individuals in their employment contexts wherein they could, for example, delete personnel files and the like. Writing in support of this bill, the American Staffing Association explains that “[t]he definition of ‘consumer’ does not account for the fact that certain exchanges of personal information take place wholly outside of the consumer context. The common understanding of a ‘consumer’ is an individual who buys goods or services. [...] The CCPA’s purpose is to give rights to consumers, protect their personal information, and prevent it from being shared or sold without notice and an opportunity to exercise choice. These purposes center on consumer transactions; they seek to prohibit businesses’ use of consumers’ information in ways that are outside the realm of their expectations and authorizations.”

Accordingly, this bill seeks to provide absolutely clarity on this issue by refining the definition of consumer to exempt an individual’s PI when collected and used by employers within the scope of employment (or in similarly situated contexts, such as those involving job applicants). The bill effectively recognizes that California residents retain CCPA rights in all contexts involving the collection and sale of their PI by businesses, except in a limited employee context where their PI is collected and used for that context. Stated another way: where the person’s “employee hat” is on, the CCPA rights do not apply. Where the same person’s “employee hat” is off, the CCPA applies.

Specifically, as recently amended to reflect ongoing negotiations with stakeholders ranging from consumer and privacy groups to business groups, this bill would provide that a consumer does not include a person whose PI has been collected by a business in the course of the person acting as a job applicant to, an employee of, a contractor of, or an agent on behalf of, the business, *to the extent* their PI is collected and used *solely within the context of the person’s role* as a job applicant to, an employee of, a contractor of, or an agent on behalf of, the business. (Emphases added.) If that same consumer had PI collected or used by a business, including their employer, for purposes that fall outside the context of their role as an employee of that business, they retain their CCPA rights for that information.

According to the author, this language is reflective of a work in progress based on discussion with entities such as the California Chamber of Commerce, Californians for Consumer Privacy, Common Sense Media, and the Internet Association. In discussions with the author

and Committee staff, some stakeholders have expressed that this language should include the person's "former role" as an employee, for example, to capture retirees who still have files with the business in connection with their pensions, and so forth. Arguably, allowing businesses to retain information for certain purposes after a person retires may be necessary and potentially outside the scope of the CCPA. At the same time, there should potentially be an end date or other limitations with respect to the duration and purposes for which that former employee's PI can be retained or used. Regardless, this issue warrants further discussion by all parties. Additionally, in these broader stakeholder meetings, it has been expressed by some stakeholders that the term "agent" must be included, separate and apart from "contractors." They argue that agents, like contractors, are authorized to act on behalf of the business and can cover accountants, lobbyists, attorneys, board of directors members, auditors, and the like. On the other hand, staff notes that there may be a legitimate question as to why such individuals would not be captured by the definition of "contractor," considering that most identified "agents" acting on behalf of the business would presumably be persons retained by contract. Potentially, the term should be stricken, or perhaps a clear definition should simply be provided. This, too, however, requires further discussion involving stakeholders. On the issue of "contractors," as well, discussion points should remain open for further dialogue. Some stakeholders believe that the definition of contractor should be limited by "*written* contract," but, arguably, any binding contract (whether oral or written) should potentially be included. These are some, but not all, of the issues actively being worked through by the author and stakeholders in the effort to provide clarity around the issue of employment-related PI.

As such, this bill, as recently amended, reflects a growing consensus and agreement to continue working on the precise wording around these and other issues, to avoid unintended consequences.

In support, the California Staffing Professionals (CSP) writes:

The staffing industry is uniquely impacted by the CCPA. Unlike restaurants, retail stores and other service providers, the primary function of staffing companies is placing workers in temporary and contract jobs that help both employers and employees. Given the nature of the work, CSP member companies must share the personal information of individuals to businesses to place them in jobs. The interactions of job applicants and staffing agency professionals are critical to put people to work and are not considered business transactions. Individual applicants searching for work do not pay staffing companies to help with job placement, reinforcing that the transfer of their information to businesses is solely in the employment context and does not constitute a sale. Individuals willingly provide their personal information with the expectation of it being shared with employers for employment, not consumer purposes. AB 25 rightfully modifies the definition of consumer to clarify that job applicants and employees are not included.

Similarly, the American Staffing Association writes in support:

ASA members place workers in temporary and contract jobs and help businesses fulfill their workforce needs. A natural component of our members' work requires them to share individuals' personal information with businesses so they may be considered for job opportunities. The CCPA's broad applicability threatens our members' business model and the staffing industry as a whole. Although the CCPA was enacted to empower

consumers, it fails to cabin its effects to individuals engaged in consumer transactions. As written, the CCPA's definition of "consumer" broadly includes any California resident, no matter the context in which the resident is acting. However, the interactions between job candidates, who are looking for employment to support themselves and their families, and staffing firms, whose purpose is to put people to work, are not consumer-business transactions. Individuals do not pay staffing firms for finding and placing them in jobs, so staffing firms utilize individuals' information in the employment, rather than the consumer, context.

We therefore urge you to adopt AB 25 to clarify that job applicants and employees do not constitute "consumers" under the CCPA. If the legislature does not pass AB 25, the staffing industry will face a significant compliance burden that will significantly impede the industry's ability to place people in jobs—hurting job growth and Californians who desire job opportunities.

- 5) **Specific pieces of information:** This bill seeks to preserve the consumer's right to specific pieces of information, as well as maintain the scope of PI to apply to households and shared devices when the particular information identifies, relates to, describes, is capable of being associated with, or could be reasonably linked, directly, or indirectly to a household. At the same time, the author seeks to ensure that businesses provide specific pieces of information pursuant to a verifiable consumer request in a privacy protective manner. This is of particular concern to when the PI, although associated with a household or device, has the ability to expose the PI of a particular member of that household or particular user of that shared device to other household members or device users in a manner that could violate the person's privacy. That being said, because stakeholders are only in preliminary discussions on this precise issue as the author attempts to find an approach from which consensus can be built, the language in the bill remains in its "intent" form at this time. If the author is able to build consensus on this issue with stakeholders moving forward and adds substantive language to this bill, the Committee may wish to rehear the bill.

The Californians for Consumer Privacy writes that it shares the author's "desire to ensure that specific pieces of information are conveyed to a consumer in a privacy protected manner. [...] [A] major element of the effort during the negotiations surrounding the CCPA was providing the consumer the right to access their specific pieces of information. This right is a significant positive for consumers. Ensuring the process to submit, verify and respond to a request is safe should be a priority for all stakeholders and we look forward to working with [the author] on this effort."

- 6) **Stakeholder input:** In its letter, Californians for Consumer Privacy writes that while the CCPA did not intend to impact the relationship between employers and employees, it understands the benefits of clarifying the issue. At the same time, the organization requests amendments to "ensure that this clarification narrowly addresses the issues raised and does not create new complications or result in an elimination of consumer protections under the CCPA. Specifically, we think the inclusion of 'agent' creates an overly broad loophole in the statute. At this time, it is wholly unclear what is covered by 'agent' that is not covered by 'contractor'. Until we better understand what is intended to be covered by "agent," we believe it should be removed from AB 25. If, after better understanding what 'agent' is intended to cover, it is evident that its inclusion is necessary in order to achieve the employer/employee clarity being sought, then it must be defined so as to not to create

confusion within the law. Removing a whole class of natural persons from the definition of ‘consumer’ with no constraints would be a significant diminution of consumer protection, and therefore we believe the clause must be redrafted in a more defined fashion.”

- 7) **Related legislation:** AB 288 (Cunningham) seeks to establish laws governing “social media privacy” separate and apart from the CCPA’s existing requirements for such companies that meet the “business” definition thresholds identified in the CCPA. Specifically, the bill would require a social networking service, as defined, to provide users that close their accounts the option to have the user’s “personally identifiable information” permanently removed from the company’s database and records and to prohibit the service from selling that information to, or exchanging that information with, a third party in the future, subject to specified exceptions. The bill would require a social networking service to honor such a request within a commercially reasonable time. The bill would authorize consumers to bring private right of action for a violation of these provisions, as specified. This bill has been referred to this Committee.

AB 523 (Irwin) seeks to address the sale of geolocation information by certain businesses, separate and apart from the CCPA’s existing requirements and restrictions governing companies that meet the “business” definition thresholds identified in the CCPA and seek to sell their consumers’ PI (which the CCPA defines to include geolocation information). This bill is pending hearing in the Assembly Communications and Conveyance Committee.

AB 846 (Burke) seeks to replace “financial incentive programs” provisions in the non-discrimination statute of the CCPA with an authorization for offerings that include, among other things, gift cards or certificates, discounts, payments to consumers, or other benefits associated with a loyalty or rewards program, as specified. This bill is pending hearing in this Committee.

AB 873 (Irwin) seeks to narrow the CCPA’s definitions of “PI” and “deidentified” and to revise the CCPA’s existing provision that prohibits the act from being construed to require a business to reidentify or otherwise link information that is not maintained in a manner that would be considered PI. This bill is pending hearing in this Committee.

AB 874 (Irwin) seeks to broaden the definition of “publicly available” for purposes of the PI definition, which excludes “publicly available” information. The bill would also correct a drafting error in the definition of “PI” to clarify that PI does not include deidentified or aggregate consumer information. This bill is pending hearing in this Committee.

AB 981 (Daly) would add numerous privacy protections to the Insurance Information and Privacy Protection Act (IIPPA), to reflect the CCPA. The bill would exempt entities subject to the IIPPA, as specified, from the CCPA, with the exception of the CCPA’s data breach section. This bill is pending hearing in this Committee.

AB 1035 (Mayes) seeks to require, under the Data Breach Notification Law, a person or business, as defined, that owns or licenses computerized data that includes PI to disclose any breach of the security of the system within 72 hours following discovery or notification of the breach, subject to the legitimate needs of law enforcement, as provided. This bill is pending hearing in this Committee.

AB 1138 (Gallagher) seeks to prohibit a person or business that conducts business in California, and that operates a social media website or application, from allowing a person under 16 years of age to create an account with the website or application unless the website or application obtains the consent of the person's parent or guardian before creating the account. This bill is pending hearing in this Committee.

AB 1146 (Berman) seeks to expand the CCPA exemptions to expressly exclude from the CCPA vehicle information shared between a new motor vehicle dealer and the vehicle's manufacturer, if the information is shared pursuant to, or in anticipation of, a vehicle repair relating to warranty work or a recall, as specified. This bill is pending hearing in this Committee.

AB 1355 (Chau) seeks to address a drafting error in the definition of PI to clarify that it does not include deidentified or aggregate consumer information. This bill is pending hearing in this Committee.

AB 1395 (Cunningham) seeks to prohibit a smart speaker device, as defined, or a specified manufacturer of that device, from saving or storing recordings of verbal commands or requests given to the device, or verbal conversations heard by the device, regardless of whether the device was triggered using a key term or phrase. This bill is pending hearing in this Committee.

AB 1416 (Cooley) seeks to expand the CCPA exemptions to specify that the act does not restrict a business's ability to comply with any rules or regulations. The bill would also expand the CCPA existing exemptions, which already include that the act does not restrict a business's ability to exercise or defend legal claims, to instead specify that the act does not restrict a business's ability to collect, use, retain, sell, authenticate, or disclose PI: (1) in order to exercise, defend, or protect against legal claims; (2) in order to protect against or prevent fraud or unauthorized transactions; (3) in order to protect against or prevent security incidents or other malicious, deceptive, or illegal activity; (4) in order to investigate, report, or prosecute those responsible for protecting against fraud, unauthorized transactions, and preventing security incidents or other specified activities; or, (5) for the purpose of assisting another person or government agency to conduct the aforementioned activities. This bill is pending hearing in this Committee.

AB 1564 (Berman) would revise a requirement in the CCPA for businesses to make available to consumers "two or more designated methods" for submitting requests for information to be disclosed pursuant to specified provisions of the CCPA, including, at a minimum, a toll free telephone number and, if the business maintains an internet website, a website address. This bill is pending hearing in this Committee.

AB 1760 (Wicks) would restate the CCPA rights using similar terminology, expand those existing CCPA rights to include new rights, and replace the "opt-out" rights of consumers 16 years and older with an "opt-in" right, among other things. This bill is pending hearing in this Committee.

8) **Prior legislation:** AB 375 (Chau, Ch. 55, Stats. 2018) *See* Comment 3.

SB 1121 (Dodd, Ch. 735, Stats. 2018) ensured that a private right of action under the CCPA applies only to the CCPA's data breach section and not to any other section of the CCPA,

as specified, corrected numerous drafting errors, made non-controversial clarifying amendments, and addressed several policy suggestions made by the AG in a preliminary clean-up bill to AB 375.

REGISTERED SUPPORT / OPPOSITION:

Support

Aclhic
Advanced Medical Technology Association (Advamed)
American Staffing Association
Association of National Advertisers
California Asian Pacific Chamber of Commerce
California Bankers Association
California Cable & Telecommunications Association
California Chamber of Commerce
California Hospital Association
California Land Title Association
California League of Food Producers
California Life Sciences Association
California Mortgage Bankers Association
California Restaurant Association
California Retailers Association
California Staffing Professionals
Card Coalition
Consumer Data Industry Association
Consumer Technology Association
CTIA-The Wireless Association
Email Sender And Provider Coalition
Entertainment Software Association
Insights Association
International Franchise Association
Internet Association
Investment Company Institute
National Payroll Reporting Consortium
Securities Industry and Financial Markets Association
Technet

Opposition

None on file

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