

SENATE JUDICIARY COMMITTEE
Senator Hannah-Beth Jackson, Chair
2019-2020 Regular Session

AB 1281 (Chau)
Version: June 25, 2020
Hearing Date: August 13, 2020
Fiscal: Yes
Urgency: No
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SUBJECT

Privacy: California Consumer Privacy Act of 2018

DIGEST

The bill extends the sunset dates on exemptions in the California Consumer Privacy Act (CCPA) for certain personal information collected by employers and collected in connection with business transactions and communications.

EXECUTIVE SUMMARY

The CCPA provides consumers a number of rights with regard to businesses' use of their personal information, as defined. Businesses that collect or sell a consumer's personal information, or disclose it for a business purpose, must provide notice and certain disclosures upon request by the consumer. This includes disclosing the categories of information the business has collected or sold, the categories of sources from which the information is collected, and the specific pieces of information collected about the consumer. The CCPA also allows consumers who are 16 years of age or older to opt out of the sale of their personal information with younger consumers needing to opt in before a business can sell their information. Consumers can also request that a business delete certain personal information that has been collected by the business from the consumer.

However, there are also numerous exemptions and exceptions within the CCPA. For instance, the CCPA provides that its obligations do not restrict a business' ability to comply with other laws or to collect, use, or sell deidentified or aggregate information. This bill extends the sunset dates on two exemptions in the CCPA, one for personal information collected by businesses in their role as employers and one regarding personal information collected in connection with certain business transactions and communications. This bill is author-sponsored and is supported by various business associations. There is no known opposition.

PROPOSED CHANGES TO THE LAW

Existing law:

- 1) Establishes the CCPA, which grants consumers certain rights with regard to their personal information, including enhanced notice, access, and disclosure; the right to deletion; the right to restrict the sale of information; and protection from discrimination for exercising these rights. It places attendant obligations on businesses to respect those rights. (Civ. Code § 1798.100 et seq.)
- 2) Provides consumers the right to request that a business that collects a consumer's personal information disclose to that consumer the categories and specific pieces of personal information the business has collected. A business must provide the information upon receipt of a verifiable consumer request. (Civ. Code § 1798.100(a), (c).)
- 3) Requires a business that collects a consumer's personal information to, at or before the point of collection, inform consumers as to the categories of personal information to be collected and the purposes for which the categories of personal information shall be used. A business shall not collect additional categories of personal information or use personal information collected for additional purposes without providing the consumer with notice, as specified. (Civ. Code § 1798.100(b).)
- 4) Provides consumers the right to request that a business delete any personal information about the consumer which the business has collected from the consumer. (Civ. Code § 1798.105(a).)
- 5) Provides consumers the right to request that a business that collects personal information about the consumer, or that sells that information, to disclose to the consumer certain specified details. (Civ. Code § 1798.110(a), 1798.115(a).)
- 6) Provides a consumer the right, at any time, to direct a business that sells personal information about the consumer to third parties not to sell the consumer's personal information. (Civ. Code § 1798.120.)
- 7) Provides that the CCPA, except as provided, does not apply to the following:
 - a) personal information that is collected by a business about a natural person in the course of the natural person acting as a job applicant to, an employee of, owner of, director of, officer of, medical staff member of, or contractor of that business to the extent that the natural person's personal information is collected and used by the business solely within the context of the natural person's role or former role as a job applicant to, an

- employee of, owner of, director of, officer of, medical staff member of, or a contractor of that business;
- b) personal information that is collected by a business that is emergency contact information of the natural person acting as a job applicant to, an employee of, owner of, director of, officer of, medical staff member of, or contractor of that business to the extent that the personal information is collected and used solely within the context of having an emergency contact on file; or
 - c) personal information that is necessary for the business to retain to administer benefits for another natural person relating to the natural person acting as a job applicant to, an employee of, owner of, director of, officer of, medical staff member of, or contractor of that business to the extent that the personal information is collected and used solely within the context of administering those benefits.
- 8) Provides that the above exemption becomes inoperative on January 1, 2021.
- 9) Provides that the CCPA, except as provided, does not apply to personal information reflecting a written or verbal communication or a transaction between the business and the consumer, where the consumer is a natural person who is acting as an employee, owner, director, officer, or contractor of a company, partnership, sole proprietorship, non-profit, or government agency and whose communications or transaction with the business occur solely within the context of the business conducting due diligence regarding, or providing or receiving a product or service to or from such company, partnership, sole proprietorship, non-profit, or government agency. This exemption becomes inoperative on January 1, 2021.

This bill extends the sunset dates on the exemptions for personal information of employees and certain business communications and transactions to January 1, 2022, contingent on the failed passage of any ballot propositions that amend Section 1798.145 of the Civil Code.

COMMENTS

1. Personal information of employees

The CCPA grants a set of rights to consumers with regard to their personal information, including enhanced notice and disclosure rights regarding information collection and use practices, access to the information collected, the right to delete certain information, the right to restrict the sale of information, and protection from discrimination for exercising these rights.

Since the passage of the CCPA, representatives of business, tech, and other industry groups have called for various changes, clarifications, and carve outs from the CCPA. One change strongly lobbied for by these groups was an exemption that exempted the personal information of employees from the protections of the CCPA. AB 25 (Chau, Ch. 763, Stats. 2019) provided that exemption, which held that the CCPA's protections and controls do not apply to personal information that is:

- collected by a business about a person in the course of the person acting as a job applicant to, an employee of, owner of, director of, officer of, medical staff member of, or contractor of that business to the extent that the person's personal information is collected and used by the business solely within the context of the person's role or former role as a job applicant to, an employee of, owner of, director of, officer of, medical staff member of, or a contractor of that business;
- collected by a business that is emergency contact information of the natural person acting as a job applicant to, an employee of, owner of, director of, officer of, medical staff member of, or contractor of that business to the extent that the personal information is collected and used solely within the context of having an emergency contact on file; and
- necessary for the business to retain to administer benefits for another natural person relating to the natural person acting as a job applicant to, an employee of, owner of, director of, officer of, medical staff member of, or contractor of that business to the extent that the personal information is collected and used solely within the context of administering those benefits. (Civ. Code § 1798.145(h).)

It essentially excluded from most of the protections of the CCPA any information an employer business collects from an employee consumer in the employment context. In addition, the bill also provided an exemption for so called "business to business" information. That exemption held that the CCPA, except as specified, did not apply to "personal information reflecting a written or verbal communication or a transaction between the business and the consumer, where the consumer is a natural person who is acting as an employee, owner, director, officer, or contractor of a company, partnership, sole proprietorship, non-profit, or government agency," as specified. (Civ. Code § 1798.145(n).)

Arguments in support of the exemptions warned of employees exploiting the CCPA or simply asserted that employees were not intended to be covered at all by the CCPA. However, a coalition of labor, privacy, and consumer groups wrote in opposition to AB 25. As this Committee's analysis of the bill indicated, they felt the exemptions went too far in eroding the rights of employees, especially with the increasing prevalence of workplace monitoring. They argued:

Workers' interest in data privacy is closely related to consumers' interest, and many of the same technology is used to monitor both. . . . This use of data by employers does not just threaten employee privacy, but can also

be used to discriminate against workers on prohibited bases.¹ For example, Amazon experimented with an artificial intelligence hiring tool, but the company was forced to scrap the project when it downgraded graduates from all-women's colleges and penalized resumes that included the word "women's," as in "women's chess club captain."²

Given the legitimate concerns raised, the author agreed to place a one-year sunset on the exemptions provided by AB 25. The intent was to allow further negotiations to determine how the personal information of employees would be protected under the law, rather than simply carved out. These exemptions are set to expire on January 1, 2021.

This bill extends the sunset dates for one year to January 1, 2022.

2. Stakeholder positions

The author argues:

Both sunset dates were intended to provide a one-year delay to give stakeholders time to negotiate an appropriate solution with respect to employee privacy rights and business-to-business communications. Since then, the uncertainty surrounding the COVID-19 pandemic has resulted in the Legislature shifting its focus to how to best serve the immediate needs of the State, while at a time navigating an increasingly complicated legislative process. Additionally, an initiative recently qualified for the November 2020 ballot that provides an additional two-year extension, until January 1, 2023, to the exemptions for employee and business-to-business data currently in the CCPA.

As a result of the complications experienced because of the pandemic, more time is needed to work on developing a comprehensive framework in law that deals with business-to-business communications and transactions and the collection of certain personal information by employers.

¹ Kim, Pauline, *Data-Driven Discrimination at Work* (April 19, 2017). William & Mary Law Review, Vol. 48, pp. 857-936 (2017); Washington University in St. Louis Legal Studies Research Paper No. 16-12-01, <https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=3680&context=wmlr>.

² Jeffrey Dastin, *Amazon scraps Secret AI Recruiting Tool that Showed Bias against Women* (October 9, 2018) Reuters, <https://www.reuters.com/article/us-amazon-com-jobs-automation-insight/amazon-scraps-secret-ai-recruiting-tool-that-showed-bias-against-women-idUSKCN1MK08G>.

A coalition of business groups in support of the measure write:

The agreement called for stakeholders to come together and develop a solution in 2020, but the COVID-19 crisis denied stakeholders the opportunity to engage on this issue. And though the California Privacy Rights Act of 2020 (CPRA) would itself extend the sunset date at issue if it passes in the November election; no allowance has been made to account for the possibility that CPRA does not pass in November. Accordingly, AB 1281 extends this sunset for the CCPA exemptions until January 1, 2022 but will not take effect if CPRA passes in the November election.

The extension is necessary because CCPA is broad enough to include employees and job applicants within its definition of “consumers.” But without a well-designed framework to deal specifically with employee data, the CCPA is ill-equipped to handle employee data and how that relates to workplace data.

As referenced, the bill’s sunset extensions will not apply should a ballot initiative, Proposition 24, pass in November 2020. That initiative would extend the exemptions even further.

SUPPORT

Advanced Medical Technology Association
Agricultural Council of California
Alliance for Automotive Innovation
American Benefits Council
American Council of Life Insurers
American Property Casualty Insurance Association
American Staffing Association
Association of California Life and Health Insurance Companies
Association of National Advertisers
Biocom
Bsa the Software Alliance
California Apartment Association
California Association of Collectors, Inc.
California Association of Health Facilities
California Association of Licensed Investigators
California Association of Realtors
California Bankers Association
California Beer and Beverage Distributors
California Building Industry Association
California Business Properties Association
California Cable & Telecommunications Association

California Chamber of Commerce
California Credit Union League
California Hospital Association
California Hotel & Lodging Association
California Land Title Association
California League of Food Producers
California Life Sciences Association
California Manufacturers & Technology Association
California New Car Dealers Association
California Professional Association of Specialty Contractors
California Restaurant Association
California Retailers Association
California State Council of SHRM
California Trucking Association
Cemetery and Mortuary Association of California
Civil Justice Association of California
CompTIA
Consumer Technology Association
CTIA
Email Sender and Provider Coalition
Entertainment Software Association
Equifax
Honda North America, Inc.
Insights Association
Interactive Advertising Bureau
Internet Association
Internet Coalition
Motion Picture Association
Mpa - the Association of Magazine Media
National Association of Mutual Insurance Companies
National Federation of Independent Business
National Payroll Reporting Consortium
Network Advertising Initiative
Orange County Business Council
Personal Insurance Federation of California
Plumbing Manufacturers International
Securities Industry and Financial Markets Association
Sempra Energy Utilities/SDG&E/SoCal Gas
Silicon Valley Leadership Group
Society for Human Resource Management
State Privacy and Security Coalition, INC.
Technet
The Spark Institute, Inc.
The Toy Association

OPPOSITION

None known

RELATED LEGISLATION

Pending Legislation: AB 713 (Mullin, 2020) creates additional exemptions in the CCPA, including for covered entities and business associates of covered entities. This bill is currently in the Senate Appropriations Committee.

Prior Legislation: AB 25 (Chau, Ch. 763, Stats. 2019) *See* Comment 1.

PRIOR VOTES:

This bill was gutted and amended into its current form on June 25, 2020. As such, all prior votes on the bill are irrelevant.
