

May 21, 2004

New California Privacy Laws To Take Effect

Two new California laws that regulate customer privacy will go into effect over the next eight months. If you collect personal information from any California residents, you need to comply with the requirements of these two new laws.

1. The Online Privacy Protection Act of 2003

California AB 68, which takes effect on July 1, 2004, requires commercial website and online service operators that collect personal information from consumers residing in California to conspicuously post privacy policies on their websites. These privacy policies must:

- identify the categories of personal information that the operator collects;
- identify the categories of third parties with which the operator may share the collected personal information;
- if the operator provides a mechanism for consumers to review and update their collected personal information, provide a description of this process;
- describe the process by which the operator will notify users of material changes to its privacy policy; and
- display the effective date of the policy.

The privacy policy, or a “conspicuous” link (e.g., different color) to the privacy policy, must be present on the home page or the first significant page after entering the website. Operators will violate this law if they knowingly and willfully, or negligently and materially, fail to comply with its requirements within 30 days of being notified of noncompliance, or if they fail to comply with their own posted privacy policy. The Act does not specify penalties for violations, but regulatory enforcement and civil suits under the state’s broad consumer protection laws are possible.

2. New Law Governing the Disclosure of Customer Personal Information

California SB 27, which goes into effect on January 1, 2005, requires businesses that disclose their customers’ personal information to third parties (which generally include affiliates) for marketing purposes to provide customers with information about those disclosures upon request. Unlike California AB 68, this law applies to customer personal information that is collected both online and offline, and applies to any business that:

- has disclosed personal information about a customer residing in California with whom it has an established business relationship (with or without consideration);
- disclosed the information to a third party;
- disclosed the information within the immediately preceding calendar year; and
- the disclosing business knows or reasonably should know that the third party used the personal information for direct marketing purposes.

The law defines "personal information" broadly to include everything from name, telephone number, and e-mail address to race, political party, education, products purchased, and bank and credit card information.

If a business discloses personal information in accordance with the above criteria, it must:

- designate a mailing address, e-mail address, or toll-free telephone or fax number that customers may use to request information about these disclosures;
- take action (by training employees, posting information on its homepage, or making the information available at every place of business in California) to notify customers of the designated means for them to request information about these disclosures; and
- provide free-of-charge and in writing (electronic mail suffices) within 30 days of a customer request –
 1. a list of the categories of personal information that it disclosed during the preceding calendar year; and
 2. the names and addresses of the third parties that received that information for direct marketing purposes.

Businesses may provide the information requested in a standardized form, and need only respond to one request per customer for any calendar year (although businesses with fewer than twenty employees are exempt from the requirements). Certain disclosures to third parties are also exempted from the law, including some instances in which the third party acts as an agent of the business or is jointly offering a product or service.

Opt-In/Opt-Out Exception

The disclosure requirements do not apply, however, to any business that gives its customers a free and upfront choice (either opt-in or opt-out) about the disclosure of their personal information to third parties for direct marketing purposes, as long as the business discloses this choice to customers in its privacy policy.

Enforcement

The law provides a private right of action for customers injured by violations and maximum statutory damages of \$3,000 for each willful, intentional, or reckless violation, and \$500 for each other violation. For all violations that are not willful, intentional, or reckless, a business may avoid liability and damages by providing the information required under the statute within 90 days.

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This information is not intended as legal advice, which may often turn on specific facts. Readers should seek specific legal advice before acting with regard to the subjects mentioned herein.

If you have any questions concerning the material discussed in this client alert, please call any of the following members of our privacy practice group:

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