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CCPA Amendment For Employee Data

AB 25 Proposes Limited Carve Out For Employee/Agent Data For One Year

By: Michael Hellbusch, CIPP/US, CIPP/E, CIPM

The California Consumer Privacy Act ("CCPA") becomes effective on January 1, 2020. The fate of a proposed amendment to the CCPA to clarify the scope of compliance for California employers became somewhat clearer following a vote on Assembly Bill 25 ("AB 25") by the California Senate Judiciary Committee on July 9, 2019. As amended and approved by the Senate Judiciary Committee, AB 25 would limit the scope of the CCPA's application to personal information collected in relation to the employment or contractor context, but only until December 31, 2020, at which time the provision sunsets. AB25 now heads to the Senate Appropriations Committee for further consideration.

In Its Current Form, CCPA Has Broad Applicability To Employment Data:

Currently, the CCPA treats personal information collected by a business about its employees, agents, job applicants, officers and directors the same as personal information collected about its consumers. This means that employers are required to provide their employees all of the rights afforded to California consumers, including the right to request deletion of their personal information and to opt-out of the exchange of their personal information for valuable consideration (a "sale"). Application of the CCPA to personal information that employers are required to process about their employees affects nearly every business process related to employees, including processing payroll, managing workers' compensation claims, providing company email, managing social media pages, and even ordering business cards. Absent passage of a carve-out for employers, come January 1, 2020, employers will be responsible for documenting and accounting for nearly every use of employer personal information fathomable.

AB 25's Narrowing Effect:

AB 25's carve out provision applies to a 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 (collectively referred to in this article as "Employee") 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 an Employee of that business.

AB 25 requires employers to provide Employees notice, at or before the time of collection, of how their personal information is to be collected and used by the employer. It also provides Employees a right to sue their employers for statutory damages in the event their personal information is subject to a data breach as defined in the CCPA. Significantly, the remaining aspects of the CCPA, including the right to request deletion and the opting out of the sale of personal information, would not apply to Employees.

For purposes of the amendment, the following definitions apply:

- "Contractor" means a natural person who provides any service to a business pursuant to a written contract.
- "Director" means a natural person designated in the articles of incorporation as such or elected by the incorporators and natural persons designated, elected, or appointed by any other name or title to act as directors, and their successors.

- "Medical staff member" means a licensed physician and surgeon, dentist, or podiatrist, licensed pursuant to Division 2 (commencing with Section 500) of the *Business and Professions Code* and a clinical psychologist as defined in Section 1316.5 of the *Health and Safety Code*.
- "Officer" means a natural person elected or appointed by the board of directors to manage the daily operations of a corporation, such as a chief executive officer, president, secretary, or treasurer.
- "Owner" means a natural person who meets one of the following:
    - Has ownership of, or the power to vote, more than 50 percent of the outstanding shares of any class of voting security of a business.
    - Has control in any manner over the election of a majority of the directors or of individuals exercising similar functions.
    - Has the power to exercise a controlling influence over the management of a company.

Specifically, AB 25 states that the CCPA does not apply to the following:

- Personal information that is collected by a business about an Employee to the extent that the Employee's personal information is collected and used by the business solely within the context of the Employee's role or former role as an Employee of that business.
- Personal information that is collected by a business that is emergency contact information of the Employee 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.
- Personal information that is necessary for the business to retain to administer benefits for another natural person relating to the Employee of that business to the extent that the personal information is collected and used solely within the context of administering those benefits.

AB 25 Is A Short Term Compromise:

Ever since the CCPA was passed pell-mell in June of last year, there has been an ongoing conflict between privacy advocates and businesses on whether and how to exclude personal information collected by a business about its employees, officers, and contractors from the broad reach of the CCPA. Employers argue correctly that existing laws already allow employees to access their personnel files and protect employees from invasions of intrusion into their personal spaces and domains. Moreover, they argue that providing employees the right to request deletion of their personal information could lead to abuse and needlessly complicate human resources administration.

On the other hand, employee advocates have argued that carve outs to the CCPA's application to employee data would not sufficiently protect workers from intrusive employer practices. During the July 9th hearing, Committee Chair, Sen. Hannah Beth Jackson (Dem. - Santa Barbara), expressed concern that AB 25 was not sufficient enough to protect employees against advanced surveillance technology she argued is increasingly used on employees. AB 25's sunset provision was included as a compromise in order to move the bill forward while further discussion about workers' privacy rights continue.

AB 25's passage out of the Senate Judiciary Committee marks a significant milestone for the bill's passage into law. Those waiting with bated breath on the fate of the bill should respire soon—the California Legislature is on recess until August 12, 2019, which leaves just one month until the September 13th deadline for any bills to pass during the regular session.

Michael Hellbusch is a privacy and technology attorney at Rutan & Tucker, LLP. He advises clients on privacy, data security, and consumer protection issues. He is co-chair of the Orange County KnowledgeNet Chapter of the International Association of Privacy Professionals. He can be reached at mhellbusch@rutan.com or (714) 662-4691.