



# ACC SOUTHERN CALIFORNIA IN HOUSE COUNSEL CONFERENCE

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Anaheim, California

sponsored by: **Ogletree, Deakins, Nash,  
Smoak & Stewart, P.C.**



#IHCC20

# CCPA History and Why it was Enacted

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## ■ Cambridge Analytica

- The Facebook–Cambridge Analytica data scandal was a major political scandal in early 2018, when it was revealed that Cambridge Analytica had harvested the personal data of millions of people's Facebook profiles without their consent and used it for political advertising purposes.



# California Legislature Responds

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- **“In March 2018, it came to light that tens of millions of people had their personal data misused by a data mining firm called Cambridge Analytica. A series of congressional hearings highlighted that our personal information may be vulnerable to misuse when shared on the Internet. As a result, our desire for privacy controls and transparency in data practices is heightened.” (AB 375, § 2, subd. (g).)**



# California Legislature Responds

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The Legislature's intent is to further Californians' right to privacy by giving *consumers* an effective way to control their personal information, by ensuring the following rights:

- (1) The right to know what personal information is being collected.
- (2) The right to know whether their personal information is sold or disclosed and to whom.
- (3) The right of say no to the sale of personal information.
- (4) The right to access their personal information.
- (5) The right to equal service and price, even if they exercise their privacy rights.



# Who Needs to Comply

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- Legal entity organized and operated for profit
- that collects consumers' personal information
- that does business in the State of California,
- and that satisfies one or more of the following thresholds:
  - Gross revenues over twenty-five million dollars (\$25,000,000)
  - Annually buys, receives, sells, or shares, the personal information of 50,000 or more consumers, households, or devices.
  - Derives 50 percent or more of its annual revenues from selling consumers' personal information.



# What is Personal Information under the CCPA?

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- Under the CCPA, “[p]ersonal 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 device.”



# Examples of PI, according to the CCPA:

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- **“Identifiers: real name, alias, postal address, unique personal identifier, online identifier, internet protocol & e-mail addresses, account name, social security, driver’s license, & passport numbers, or other similar identifiers.”**
- **“Characteristics of protected classifications under California or federal law.”**
- **“Commercial information: records of personal property, products, or services purchased, obtained, or considered, or other purchasing or consuming histories or tendencies.”**
- **“Biometric information.”**
- **“Internet or other electronic network activity information.”**



# More Examples of PI:

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- “Geolocation data.”
- “Audio, electronic, visual, thermal, olfactory, or similar information.”
- “Professional or employment-related information.”
- “Education information,” defined as “information that is not publicly available personally identifiable information....”
- “Reasonable inferences drawn from any of the information identified in this subdivision to create a profile about a consumer reflecting the consumer’s preferences, characteristics, psychological trends, preferences, predispositions, behavior, attitudes, intelligence, abilities, and aptitudes.”



# Information “Collected”

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- **Collecting personal information means “gathering, obtaining, receiving, or accessing any personal information pertaining to a consumer by any means.”**



# What is a Consumer?

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- The CCPA protects “consumers.”
- A “consumer” is a “natural person who is a California resident.”



# Are Employees Consumers?

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- This is where things get things get complicated.
- Not intended to apply to employment relationship.
- AB25 tried to solve this problem.



# Are Employees Consumers?

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- **The top three things that employers should know about AB 25 are:**
  - **An employer still has the obligation to inform job applicants, employees, owners, directors, officers, medical staff, or contractors (collectively, “employees”) about the categories of personal information to be collected.**
  - **An employee may still bring a private civil action against an employer that violates its duty to implement reasonable security procedures and practices if that failure results in the employee’s personal information being subject to unauthorized access and exfiltration, theft, or disclosure.**
  - **Sunsets on January 1, 2021. After that date, the entire CCPA is applicable unless the CCPA is amended again.**



# What Employer's Need to Do

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- **Provide notices to job applicants before personal information is collected**
- **Provide notices to employees (beneficiaries and emergency contacts) Creating/revising internal policies for the collection and handling of employee personal information**
- **Ensure that you are exercising “reasonable security” over the data**
- **Train people who handle employee personal information**
- **Review services contracts (payroll, benefits, etc.) and implementing addenda to those contracts to ensure personal information is being handled properly.**



# What Happens on January 21, 2021?

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- **Employees will have all the rights created by the CCPA including:**
  - Notice of the categories of information collected
  - Disclosure of the information collected
  - Delete the information collected?



# CCPA Exceptions

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- **The obligations imposed on businesses by the CCPA shall not restrict a business' ability to:**
  - **Comply with federal, state, or local laws.**
  - **Comply with a civil, criminal, or regulatory inquiry, investigation, subpoena, or summons by federal, state, or local authorities.**
  - **Cooperate with law enforcement agencies concerning conduct or activity that the business, service provider, or third party reasonably and in good faith believes may violate federal, state, or local law.**
  - **Exercise or defend legal claims.**
  - **The collection of the information takes place entirely outside of California.**



# Are employees from other businesses consumers?

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- Another unintended wrinkle.
- Legislature was able to fix this for one year via AB 1355, which has become known as the Business to Business Exemption.



# Business to Business Exemption

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## ■ AB 1355:

- The CCPA shall 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, nonprofit, 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, nonprofit or government agency.



# Business to Business Exemption

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- In summary, CCPA does not apply to:
  - Personal Information Reflecting a Written or Verbal Communication or Transaction
  - Between a Business and a Consumer Acting for Another Business
  - Regarding Providing or Receiving a Product or Service
- Sunsets January 1, 2021



# Publicly Available Information

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- **“Publicly available information” means information that is lawfully made available from federal, state, and local government records, or that is available to the general public.**
- **“Publicly available” does not mean biometric information collected by a business without the consumer’s knowledge.**
- **Information is not “publicly available” if that data is used for a purpose that is not compatible with the purpose for which the data is maintained and made available in the government records or for which it is publicly maintained.**
- **“Publicly available” does not include consumer information that is de-identified or aggregate consumer information.**



# Delay in Enforcement Actions

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- **“The Attorney General shall not bring an enforcement action under this title until six months after the publication of the final regulations issued pursuant to this section or July 1, 2020, whichever is sooner.”**
- **However, can look back on the 6 month period since January 1<sup>st</sup>.**



# Enforcement Actions - Penalties and Cure

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“A business shall be in violation of this title if it **fails to cure any alleged violation within 30 days** after being notified of alleged noncompliance. Any business, service provider, or other person that violates this title shall be subject to an **injunction** and liable for a civil penalty of not more than two thousand five hundred dollars **(\$2,500) for each violation** or seven thousand five hundred dollars **(\$7,500) for each intentional violation**, which shall be assessed and recovered in a civil action brought in the name of the people of the State of California by the Attorney General. The civil penalties provided for in this section shall be exclusively assessed and recovered in a civil action brought in the name of the people of the State of California by the Attorney General.”



# Actions by Consumers

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- Any consumer whose non-encrypted or non-redacted personal information is subject to an unauthorized access and exfiltration, theft, or disclosure.
- Due to a business' failure to implement and maintain reasonable security procedures and practices appropriate to the nature of the information.
- Can recover damages in an amount not less than \$100 and not greater than \$750, per consumer per incident or actual damages, whichever is greater.
- Injunctive or declaratory relief.



# Statutory Damages & Class Actions

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- Actions **pursuant to this section** may be brought by a consumer if, prior to initiating any action against a business for statutory damages on an individual or class-wide basis, a consumer provides a business 30 days' written notice identifying the specific provisions of this title the consumer alleges have been or are being violated. **In the event a cure is possible**, if within the 30 days the business actually cures the noticed violation and provides the consumer an express written statement that the violations have been cured and that no further violations shall occur, no action for individual statutory damages or class-wide statutory damages may be initiated against the business.
- **No notice** shall be required prior to an individual consumer initiating an action solely for **actual pecuniary damages** suffered as a result of the alleged violations of this title.
- If a business continues to violate this title in breach of the express written statement provided to the consumer under this section, the consumer may initiate an action against the business to enforce the written statement and may pursue statutory damages **for each breach of the express written statement**, as well as any other violation of the title that postdates the written statement.



# Considerations for Statutory Damages

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- **The Court shall consider: The nature and seriousness of the misconduct; the number of violations; the persistence of the misconduct; the length of time over which the misconduct occurred; the willfulness of the defendant's misconduct; defendant's assets, liabilities, and net worth.**



# What You Need To Do

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1. Identify the sources, location, and flow of PI.
2. Prepare required policies and notices, including any required notices and methods for consumers to opt-out of the sale of their information.
3. To the extent that you collect and sell personal information from individuals age 16 or younger, prepare all opt-in authorization.
4. To the extent that you provide financial incentives (such as discounts under loyalty programs) to consumers who provide personal information, prepare notices of financial incentive.
5. Prepare data subject access rights response procedures and documents to comply with the CCPA right to know and right to delete personal information requirements, including procedures to properly verify the requester's identity.



# What You Need To Do

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- 6. Prepare required notices to permit consumers to opt-out of the sale of their personal information and procedures to respond to such opt-out requests.**
- 7. Implement reasonable security measures for personal information.**
- 8. Prepare data breach notification procedures.**
- 9. Review, revise, or create agreements for all third parties and service providers.**
- 10. Update your policies and procedures.**
- 11. Train your employees on the new policies and procedures.**



# What You Need to Do

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- **Identify the sources, location, and flow of PI**
- **AKA - data mapping and data tracking**
- **Why is this important?**
  - Reasonable security
  - Disclosure obligation
  - Access obligation
  - Deletion obligation



# What You Need To Do

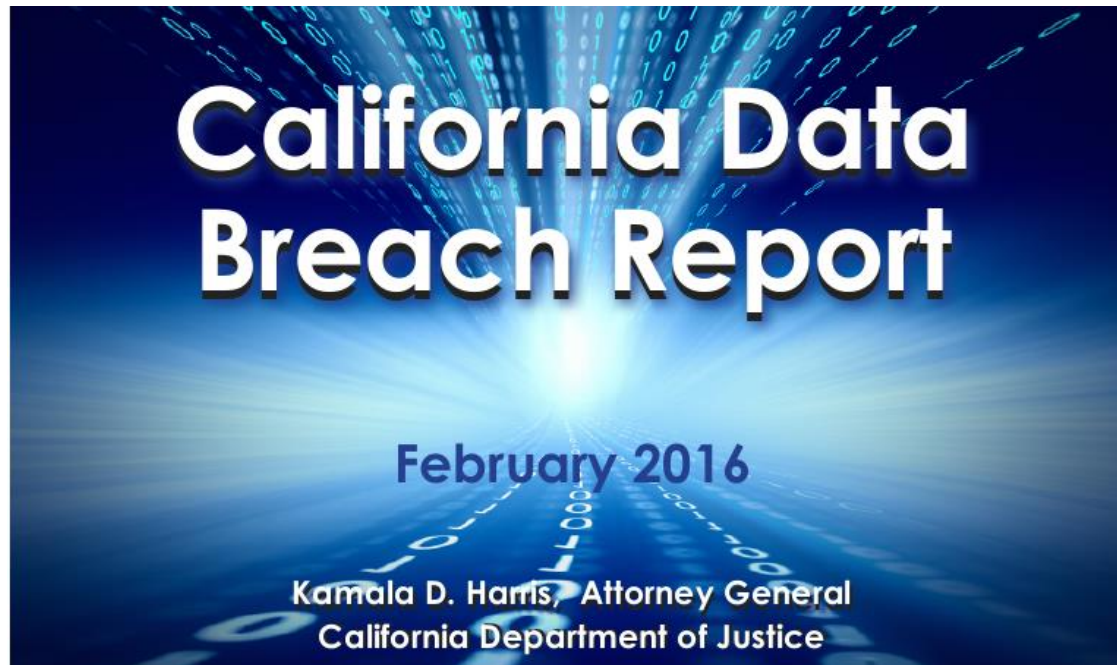
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- **Implement reasonable security measures for HR data systems**
  - **Center for Internet Security (CIS) Standards**
  - **Update data handling policies and procedures**
  - **Conduct training**



# Reasonable Security Measures

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# Reasonable Security Measures

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- 1) The 20 controls in the Center for Internet Security's Critical Security Controls identify a minimum level of information security that all organizations that collect or maintain personal information should meet. The failure to implement all the Controls that apply to an organization's environment constitutes a lack of reasonable security.



# Service Provider Agreements

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## ■ Definition of a service provider

- For profit entity/organization
- Receives and processes personal information
- Bound by a written contract that prevents it from retaining, using, or disclosing consumer personal information “for any purpose other than the specific purpose of performing the services specified in the contract.”



# Service Provider Agreements

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- Statute requires that businesses disclose data sharing and the purpose for such sharing
- Statute distinguishes between service providers and third parties
- Review contracts now
  - Distinguish service providers from third parties
  - Modify as necessary



# Service Provider Agreements

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## ■ Prohibit the service provider from:

- Selling personal information
- Retaining, using, or disclosing personal information:
  - for any reason other than to perform your organization's services; and
  - outside of the relationship with your organization.



# Service Provider Agreements

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## ■ Obtain written certification

- Service provider understands the contractual restrictions
- Will comply with contractual restrictions



# Attorney General Draft Regulations

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## ■ Privacy Policy

- **Purpose:** “provide the consumer with a comprehensive description of a business’ online and offline practices regarding the collection, use, disclosure, and sale of personal information and rights of consumers regarding their personal information.”
- **How:** Conspicuous link using the word “privacy” on homepage or landing page of a mobile application.



# Attorney General Draft Regulations

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## ■ Privacy Policy should include:

- Right to know about PI collected, disclosed, or sold;
- Right to request deletion of PI
- Right to opt-out of sale of PI
- Right to non-discrimination
- Authorized agent
- Contact for more information
- Date the policy was last updated



# ATTORNEY GENERAL DRAFT REGULATIONS

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## ■ Types of Notices and Disclosures

- Notice at or before the point of collection
- Notice of right to opt-out of sale
- Notice of financial incentives
- Privacy policy



# ATTORNEY GENERAL DRAFT REGULATIONS

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## ■ Notice Language

- Plain language that is understandable to an average consumer
- Avoid “technical or legal jargon”
- Shall be “available in the languages in which the business in its ordinary course provides contracts, disclaimers, sale announcements, and other information to consumers”
- Shall be “accessible to consumers with disabilities”



# ATTORNEY GENERAL DRAFT REGULATIONS

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## ■ Notice at or before the point of collection (content)

- A list of the categories of personal information about consumers to be collected;
  - Categories should provide a “meaningful understanding of the information being collected”
- The “business or commercial purpose” for the collection of PI;
- “Do Not Sell My Personal Information” link (if applicable); and
- A link to the business’s privacy policy.



# ATTORNEY GENERAL DRAFT REGULATIONS

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## ■ Notice at or before the point of collection (how)

### ■ Online:

- “conspicuous link to the notice” on the homepage, app download page, or on all webpages where PI is collected

### ■ Offline:

- “include the notice on printed forms that collect information”
- “provide consumer with a paper version of the notice”
- “post prominent signage directing consumers to the web address where the notice can be found.”



# Attorney General Draft Regulations

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## ■ Notice of right to opt-out of sale (how)

- A business is exempt from providing notice of right to opt-out if:
  - It does not sell PI
  - Its privacy policy states that it does not and will not sell PI



# Attorney General Draft Regulations

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## ■ Notice of right to opt-out of sale (how)

### ■ Online:

- Link: “Do Not Sell My Personal Information” or “Do Not Sell My Info”
- Opt-out notice should follow click on link above.

### ■ Offline (but only if “substantially interact”):

- “offline method that facilitates consumer awareness of right to opt out.”
- Examples: printing notice on paper forms that collect PI; paper version of notice; posting signage directing consumers to a website.



# Attorney General Draft Regulations

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## ■ Notice of right to opt-out of sale (content)

- A description of the consumer's right to opt-out of the sale of PI.
- The "webform" by which the consumer can submit their request to opt-out online, or the offline method.
- Instructions for other methods to submit request to opt-out.
- Any proof required when a consumer uses and authorized agent to exercise right to opt-out.
- A link or URL to the business's privacy policy.



# Attorney General Draft Regulations

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## ■ Notice of financial incentives

- Succinct summary of financial incentive
- Description of material terms
- How the consumer can opt-in
- Notification of right to withdraw and how to exercise that right.



# Questions?

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