

# Digital Content Next

Legal and Legislative Committee  
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McGUIREWOODS

# California Consumer Privacy Act of 2018

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# AB 375: California Consumer Privacy Act of 2018

- Enacted June 28, 2018
- Goes into effect on January 1, 2020
- Debated and passed in a single week in order to replace a similar but arguably broader sweeping California ballot initiative

# AB 375: Key Statutory Provisions

# AB 375: To whom does this apply?

- Any entity doing business in California that:
  - Has gross annual revenues in excess of \$25 million;
  - Deals in any way annually with personal information from 50,000 customers, households or devices; or
  - Derives 50 percent or more of its annual revenues from selling consumers' personal information.

# AB 375: What is Protected?

Personal information (PI) is 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 household. Includes, but is not limited to:

- Traditional PI such as name, address, SSN, online identifier Internet Protocol address, account name, email address, driver's license number, passport number
- Commercial information such as records of personal property, products or services purchased, obtained or considered, or other purchasing or consumer histories or tendencies
- Geolocation data
- Biometric data
- Professional/employment related information
- *Inferences drawn from any of the PI to create a profile about a consumer reflecting the consumer's preferences, characteristics, psychological trends, preferences, behavior, attitudes, intelligence, abilities and aptitudes.*

# AB 375: Key Provisions

- Right to know: what is collected, sold or disclosed and to whom
- Right to opt-out or “Say No”
- Right to opt-in (affirmative authorization needed for sale of PI of a consumer under 16 years old)
- Right to request deletion of PI
- No discrimination: Equal service and price, even if exercise privacy rights
- Data breach private right of action

# AB 375: Right to Know

- If collect PI, you must disclose to consumers *before the point of collection*, the categories of PI collected and the purposes for which the PI will be used.
- If requested, you must also disclose:
  - Categories of PI collected/sold/shared
  - Categories of sources from which PI is collected
  - Business or commercial purpose for collecting or selling PI
  - Categories of third parties with whom the business shares PI
  - Specific PI collected, but only upon receipt of a “verifiable consumer request”

# AB 375: Right to Opt-Out or Say No Right to Request Deletion

## Right to Opt-Out or Say No

- Applies only to businesses that “sell” information
  - Exceptions:
    - Intentional interaction
    - Business purposes pursuant to a written contract
- Must **provide** notice to customers of their right to opt-out
  - DO NOT SELL MY PERSONAL INFORMATION button
  - Minors require opt-in

## Right to request deletion of PI collected

# AB 375: No Discrimination for Exercising Rights

Cannot discriminate against a customer because the customer exercised their rights under this statute

BUT

Can charge a consumer a different price or rate or provide a different level of quality of goods or services if that difference is reasonably related to the value provided to the consumer by the consumer's data

# AB 375: Private Right of Action

Private right of action to consumer for the “unauthorized access and exfiltration, theft, or disclosure as a result of the business’s violation of the duty to implement and maintain reasonable security procedures and practices appropriate to the nature of information.”

- PI is defined more narrowly than AB 375
- Statutory damages or actual damages
- 30 day notice and opportunity to “cure”
- AG has first right of prosecution

AG can pursue civil penalties for violation of AB 375.

# AB 375 vs. GDPR

# Similarities to GDPR

- Expansive definition of “personal information”:
  - AB 375: “....information that identifies, relates to, describes, is capable of being associated with, or could reasonably be linked, directly or indirectly, with a particular consumer [natural person who is a California Resident] or household.”
  - GDPR: “...any information relating to an identified or identifiable natural person (‘data subject’); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person”

# Similarities to GDPR

- Right to “Know”:

AB 375	GDPR
Categories and specific pieces of PI collected	Whether or not PI is held by the controller and what it is
Purposes for which PI is used	Purposes for which PI is used
	Length of time it will be stored (or criteria for determining same)
Requires disclosure both of third party <u>sources from</u> whom PI is gathered AND those to whom it is sold or further disclosed	Disclosure of third parties (or categories of same) with whom PI is shared / disclosed <u>and their location (country)</u>
	Existence of any automated decision making/profiling

# Similarities to GDPR

- Right to be Forgotten
  - Under both AB 375 and GDPR, individuals have the right to request that their personal information be deleted, and the business must delete it and require the same of their vendors / subcontractors
    - Both statutes contain exceptions:
      - If the information is necessary to complete the transaction or provide the service for which it was provided
      - Compliance with law
      - Exercise of free speech
      - Scientific, historical or other research in the public interest (with caveats)
  - BUT: Additional exceptions under AB 375

# Key “Opt-In” and “Opt-Out” Provisions

- AB 375 creates two new rights for Californians:
  - The “Right to Opt In” is defined specifically as the need for affirmative opt-in consent from children between the ages of 13-16 or from parents or guardians of children under 13 for the sale of such children’s personal information
  - The “Right to Opt Out” is defined as the right of any consumer other than children (above) to opt out of having their PI sold.
- By contrast, GDPR has an affirmative requirement of “Opt In” by the data subject for any direct marketing to any person, and requires parental consent for any processing of any PI of children under 16.

## Other Notable Differences from GDPR

- Scope: The California statute has a minimum threshold under which it does not apply to small businesses; no such minimums under GDPR
- Exceptions to the Right to be Forgotten: More robust exceptions, including a catchall for internal use of the information by the business as long as it is compatible with the context in which it was provided
- Financial Incentives: Unlike GDPR, the California statute permits businesses to offer financial incentives to consumers who permit the collection, sale and/or deletion of personal information as long as they are clearly disclosed up front and the consumer opts into such uses.

# AB 375: What Next? What is the Impact?

# Questions or Comments?

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