

CPRA Law + Tech: Understanding Data, Decisionmaking, and Design

February 18, 2022

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About This Series

CPRA LAW + TECH SERIES

FEBRUARY AND MARCH 2022

Weekly Friday Webinars beginning February 18

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About This Series

What do privacy lawyers need to know about the **technologies and data practices** at the heart of emerging legislation? Informational webinars from Feb. 25 to Apr. 1 will bring academic, technical, and business experts to share **technological basics for privacy lawyers**.

	Topic	Dates (2022)
1	CPRA and Emerging US Privacy Laws	Today!
2	Sensitive Data: Health Conditions, Demographics, and Inferences	Friday, Feb. 25
3	Basics of Online Advertising	Friday, Mar. 4
4	“Dark Patterns” and Manipulative Design	Friday, Mar. 11
5	Universal Opt-Outs and Global Privacy Controls	Friday, Mar. 25
6-7	<i>Coming soon!</i>	Friday, Apr. 1

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CPRA and Emerging US Privacy Laws

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US Privacy Law Landscape

Fragmented and Rapidly Evolving

California Privacy Rights Act (CPRA)	Virginia's Consumer Data Protection Act (VCDPA)	Colorado Privacy Act (CoPA)
<ul style="list-style-type: none">• Effective Dec. 16, 2020• Most provisions become operative Jan. 1, 2023• Employee & B2B exemptions expire Jan. 1, 2023 (for now)• Enforcement begins July 1, 2023.	<ul style="list-style-type: none">• Effective Jan. 1, 2023.	<ul style="list-style-type: none">• Effective July 1, 2023.• Cure provision sunsets Jan. 1, 2025.• Attorney general must adopt rules outlining technical specifications for universal opt-out button prior to July 1, 2023.

Applicability

	CPRA	VCDPA	CoPA
Revenue	Annual gross revenues in excess of \$25 million in the preceding calendar year	N/A	N/A
Processing Threshold	Annually buys, sells, shares, or otherwise processes 100,000+ consumer or households	Controls or processes the personal data of 100,000+ consumers	Controls or processes the personal data of 100,000+ consumers during a calendar year
Sale of PI	Derive 50% or more of annual revenues from selling or sharing personal information	Controls or process personal data of 50,000 consumers AND derive 50%+ of gross revenues from selling personal data	Derives revenue or receives a discount on the price of goods or services from the sale of personal data AND processes or controls the personal data of 25,000+ consumers

Exemptions

	CPRA	VCDPA	CoPA
B2B	No (sunsets in 2023)	Yes	Yes
Employment related data	No (sunsets in 2023)	Yes	Yes
COPPA related data	No	Yes, as long as information is collected with verifiable parental consent pursuant to COPPA	Yes
Public Sector	Yes	Yes	No, but data maintained by government entities is exempt if used for noncommercial purposes
Non-profits	Yes	Yes	No
GLBA financial institutions	Yes	Yes	Yes
DPPA-covered information	Yes	Yes	Yes
FCRA covered data	Yes	Yes	Yes
HIPAA	Yes	Yes	No, but specific exemptions for health care controllers
FERPA	No	Yes	Yes

The California Privacy Rights Act of 2020

What's New?

**PROP
24** AMENDS CONSUMER PRIVACY LAWS.
INITIATIVE STATUTE.

SUMMARY

Put on the Ballot by Petition Signatures

Permits consumers to: prevent businesses from sharing personal information, correct inaccurate personal information, and limit businesses' use of "sensitive personal information," including precise geolocation, race, ethnicity, and health information. Establishes California Privacy Protection Agency. Fiscal Impact: Increased annual state costs of at least \$10 million, but unlikely exceeding low tens of millions of dollars, to enforce expanded consumer privacy laws. Some costs would be offset by penalties for violating these laws.

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CPRA: Key Definitions

1798.140(ae) “**Sensitive personal information**” means:

(1) Personal information that reveals:

- (A) A consumer’s social security, driver’s license, state identification card, or passport number.
- (B) A consumer’s account log-in, financial account, debit card, or credit card number in combination with any required security or access code, password, or credentials allowing access to an account.
- (C) A consumer’s **precise geolocation**.
- (D) A consumer’s racial or ethnic origin, religious or philosophical beliefs, or union membership.
- (E) The contents of a consumer’s mail, email, and text messages unless the business is the intended recipient of the communication.
- (F) A consumer’s genetic data.

(2)

- (A) The processing of **biometric information** for the purpose of uniquely identifying a consumer.
- (B) Personal information collected and analyzed **concerning a consumer’s health**.
- (C) Personal information collected and analyzed concerning a consumer’s sex life or sexual orientation.

Sensitive personal information that is “**publicly available**” pursuant to paragraph (2) of subdivision (v) shall not be considered sensitive personal information or personal information.

CPRA: Key Definitions

1798.140(k) “**Cross-context behavioral advertising**” means the targeting of advertising to a consumer based on the consumer’s personal information obtained from the consumer’s activity across businesses, distinctly-branded websites, applications, or services, other than the business, distinctly-branded website, application, or service with which the consumer *intentionally interacts*.

1798.140(ah)(1) “**Share**,” “shared,” or “sharing” means sharing, renting, releasing, disclosing, disseminating, making available, transferring, or otherwise communicating orally, in writing, or by electronic or other means, a consumer’s personal information by the business to a third party for ***cross-context behavioral advertising***, whether or not for monetary or other valuable consideration, including transactions between a business and a third party for cross-context behavioral advertising for the benefit of a business in which no money is exchanged...

CPRA: Key Definitions

1798.140(h) “**Consent**” means any **freely given, specific, informed, and unambiguous** indication of the consumer’s wishes by which the consumer, or the consumer’s legal guardian, a person who has power of attorney, or a person acting as a conservator for the consumer, including by a statement or by a clear affirmative action, signifies agreement to the processing of personal information relating to the consumer for a narrowly defined particular purpose. Acceptance of a general or broad terms of use, or similar document, that contains descriptions of personal information processing along with other, unrelated information, does not constitute consent. Hovering over, muting, pausing, or closing a given piece of content does not constitute consent. Likewise, agreement obtained through use of **dark patterns** does not constitute consent.

1798.140(z) “**Profiling**” means any form of **automated processing** of personal information, as further defined by regulations pursuant to paragraph (16) of subdivision (a) of Section 1798.185, to evaluate certain personal aspects relating to a natural person and in particular to analyze or predict aspects concerning that natural person’s **performance at work, economic situation, health, personal preferences, interests, reliability, behavior, location, or movements.**

CPRA: New Consumer Rights

<u>CCPA</u>	<u>CPRA</u>
<ul style="list-style-type: none">● Access, Delete, and Port information● Opt-out of the sale of personal information● Non-retaliation	<ul style="list-style-type: none">● Modified rights to Access, Delete, and Port information● Correct personal information● Opt-out of the sale <i>and sharing</i> of personal information● Limit the use and disclosure of sensitive personal information● Non-retaliation● Rights with respect to automated decisionmaking technology

CPRA: New Business Obligations

1. **Modified Transparency Requirements**
2. **Risk Assessments, Audits, and “Reasonable Security” Requirements**
3. **Data Minimization Requirements**
4. **New Contractual Requirements**
5. **Expiring Exemptions for Employment and B2B Data**

Next Steps: CCPA Rulemaking

CPRA on Rulemaking:

- Establishes the California Privacy Protection Agency
- Authorizes the adoption of rules “to further the purposes” of the Act
- Directs Rulemaking on 22 topics

Rulemaking Process:

- Invitation for Comment on Proposed Rulemaking (Sept. 2021)
- February 17 Board Meeting updates

Key Issues Raised in Public Comments

- Opt-out preference signals
- Automated Decisionmaking Technology

Opt-out preference signals

CPRA 1798.185(19)(A): Issuing regulations to define the requirements and technical specifications for an opt-out *preference signal sent by a platform, technology, or mechanism, to indicate a consumer's intent to opt out* of the sale or sharing of the consumer's personal information and to limit the use or disclosure of the consumer's sensitive personal information. The requirements and specifications for the opt-out preference signal should be updated from time to time to reflect the means by which consumers interact with businesses...

Request for Comments:

- What requirements and technical specifications should define an opt-out preference signal sent by a platform, technology, or mechanism, to indicate a consumer's intent to opt out...
- How businesses should process consumer rights that are expressed through opt-out preference signals.
- What businesses should do to provide consumers who have previously expressed an opt-out preference via an opt-out preference signal with the opportunity to consent to the sale or sharing of their personal information or the use and disclosure of their sensitive personal information.

Automated Decisionmaking Technology

CPRA: 1798.185(a)(16) Issuing regulations governing **access** and **opt-out rights** with respect to businesses' use of automated decision-making technology, including profiling and requiring businesses' response to access requests to include **meaningful information about the logic involved** in such decision-making processes, as well as a description of the likely outcome of the process with respect to the consumer.

Request for Comments:

- What **activities** should be deemed to constitute “automated decisionmaking technology” and/or “profiling.
- What **information** businesses must provide to consumers in response to access requests, including what businesses must do in order to provide “meaningful information about the logic” involved in the automated decisionmaking process
- The **scope of consumers’ opt-out rights** with regard to automated decisionmaking, and what processes consumers and businesses should follow to facilitate opt outs.

Protected Data: CPRA, VCDPA and CoPA

	CPRA	VCDPA	CoPA
Statutory Term	Personal Information	Personal Data	Personal Data
Defined as	Information that identifies, relates to, describes, is reasonably capable of being associated with, or could reasonably be linked, directly or indirectly, with a particular consumer or household Includes 12 designated categories of personal information	Any information that is linked or reasonably linkable to an identified or identifiable natural person	Information that is linked or reasonably linkable to an identified or identifiable individual
Definition excludes de-identified data	Yes, provided it cannot be reidentified	Yes, but special requirements apply to de-identified data	Yes, but special requirements apply to de-identified data
Definition excludes publicly available info	Yes	Yes	Yes
Definition excludes aggregated info	Yes	Not specified	Not specified

Heightened Protections – Sensitive Data

	CPRA	VCDPA	CoPA
Statutory Term	Sensitive Personal Information	Sensitive Data	Sensitive Data
Biometric data	Yes	Yes	Yes
Children's data	No	Yes	Yes
Citizenship status	No	Yes	Yes
Electronic communications	Yes, content of	No	No
Financial account info	Yes, credentials or access to	Yes	Yes
Genetic Data	Yes	Yes	Yes
Geolocation info	Yes. "precise"	Yes. "precise"	Yes
SSN, Government-issued ID	Yes	Yes	No, but specific exemptions for health care controllers
Marital status	No	Yes	Yes
Mental health	No	Yes	Yes
Physical health	No	Yes	Yes
Political opinion	No	No	No
Race/ethnicity	Yes	Yes	Yes
Religious beliefs	Yes	Yes	Yes
Sexual orientation	No	Yes	Yes
Union membership	Yes	No	No

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Covered Activities

	CPRA	VCDPA	CoPA
Processing	Any operation or set of operations that are performed on personal information or on sets of personal information, whether or not by automated means	Any operation or set of operations performed, whether by manual or automated means , on personal data or on sets of personal data, such as the collection, use, storage, disclosure, analysis, deletion, or modification of personal data	The collection, use, sale, storage, disclosure, analysis, deletion or modification of personal data and includes the actions of a controller directing a processor to process personal data
Selling	Selling, renting, releasing, disclosing, disseminating, making available, transferring, or otherwise communicating orally, in writing, or by electronic or other means, a consumer's personal information by the business to a third party for monetary or other valuable consideration	Exchange of personal data for monetary consideration	Exchange of personal data for monetary or other valuable consideration

Covered Activities

	CPRA	VCDPA	CoPA
Dark Patterns	A user interface designed or manipulated with the substantial effect or subverting or impairing or user autonomy, decisionmaking, or choice, as further defined by regulation	No	A user interface designed or manipulated with the substantial effect of subverting or impairing user autonomy, decisionmaking, or choice
Targeted Advertising/Cross-Context Behavioral Advertising	'Cross-context behavioral advertising': the targeting of advertising to a consumer based on the consumer's personal information obtained from the consumer's activity across businesses, distinctly-branded websites, applications, or services, other than the business, distinctly-branded website, application, or service with which the consumer intentionally interacts	Displaying advertisements to a consumer where advertisement is selected based on personal data obtained from that consumer's activities over time and across nonaffiliated websites or online applications to predict such consumer's preferences or interests	Displaying to a consumer an advertisement that is selected based on personal data obtained or inferred over time from the consumer's activities across nonaffiliated websites, applications, or online services to predict consumer preferences or interests
Profiling	Any form of automated processing of personal information, as further defined by regulations, to evaluate certain personal aspects relating to a natural person, and in particular to analyze or predict aspects concerning that natural person's performance at work, economic situation, health, personal preferences, interests, reliability, behavior, location, or movement	Any form of automated processing performed on personal data to evaluate, analyze, or predict personal aspects related to an identified or identifiable natural person's economic situation, health, personal preferences, interests, reliability, behavior, location, or movements	Any form of automated processing performed on personal data to evaluate, analyze, or predict personal aspects concerning an identified or identifiable natural person's economic situation, health, personal preferences, interests, reliability, behavior, location, or movements



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