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A New Year, A New Privacy Regulation for California: "Eraser Button" Law Goes into Effect January 1, 2015

By Matthew Savare, Esq. and Lori Bennett, Esq.

What better way to ring in the New Year than having to comply with yet another California privacy law? From the state that recently brought you amendments to the California Online Privacy Protection Act, requiring companies, among other things, to disclose in their privacy policies how they respond to do not track signals, California has done it again with its new "Eraser Button" law.

The Law

The new regulation, codified at Cal. Bus. & Prof Code § 22580 et seq., adopts a two-pronged approach to regulating the way online and mobile websites and applications interact minors (i.e., kids under 18). The law applies to operators of websites, online services, online apps, and mobile apps ("Operators") and (1) prohibits the online marketing of certain products or content ("Prohibited Categories") to minors; and (2) creates limited rights for minors who are registered users of a website, service, or application (collectively, a "Site") to have their information deleted from that Site.

Currently, there are no specific enforcement tools or private causes of action in the legislation, so it is unclear who has the jurisdiction to investigate and enforce the law.

Prohibition of Certain Marketing and Promotional Activities

The first prong of the statute applies to any Operator that directs services to minors who are California residents or has actual knowledge that a minor is using its Site. A service is "directed to minors" if it is created for the purpose of reaching an audience of minors. Importantly, the law expressly states that it does not apply to Sites created for general audiences. An Operator has "actual knowledge" only when a user self-identifies as being under 18. It is worth noting, however, that nothing in the California law requires Operators to ask or determine the age of its users.

Whether an Operator directs its services to minors or has actual knowledge of a minor's use of its Site, the Prohibited Categories are the same, including: alcohol, tobacco-related products, drugs, salvia, firearms and other weapons, dangerous fireworks, aerosol paint cans, UV tanning devices, dietary supplements containing ephedrine, lottery, permanent tattoos or body branding, and obscene matter.

However, the marketing prohibitions contained in the law differ somewhat depending on which situation applies to an Operator. If an Operator directs services to minors, that Operator may not: (1) advertise any of the Prohibited Categories on its Site; (2) knowingly use, disclose, or compile a minor's personal information ("PI") to market anything in a Prohibited Category; or (3) allow a third party to do either (1) or (2) on its behalf. There is a narrow safe harbor with respect to (3) if an Operator hires a third-party ad service to control the ads on its Site. In this instance, an Operator will be deemed in compliance with the law if

it gives the ad service notice that it directs its service to minors, but the law does not indicate what constitutes adequate notice.

If an Operator has actual knowledge that a minor is using its Site, that Operator cannot market or advertise Prohibited Categories to such minor based on his or her PI. The incidental placement of an ad from a Prohibited Category (as opposed to behavioral or targeted ads) does not violate the law. This provision also contains a safe harbor for the Operator if it takes reasonable actions in good faith to avoid such targeted marketing. In addition, an Operator with actual knowledge is prohibited from (1) knowingly using, disclosing, or compiling a minor's PI to market Prohibited Items; and (2) knowingly allowing a third party to do the same.

Eraser Component of the Law

The second prong of the Erasure Button law, and the one that gives it its nickname, requires Operators to allow minors who are California residents and registered users of the Operator's Site to remove content and information that the minor publicly posted to the Site. The Operator can do this by providing the minor with a technical tool or a process by which the minor requests removal (like an email address or hotline).

Operators must also give minors notice that the minor has this deletion right, how the minor can exercise the right, and that removal does not necessarily mean removal of all content or information. The law, however, offers no requirements or guidance as to what constitutes adequate notice.

An Operator does not have to remove content if: the law requires the Operator to maintain it; it is stored, posted, republished, or reposted by another (as with pins, shares, etc.); the content or information is anonymized; the minor does not follow the Operator's directions for deletion; the minor was compensated or received other consideration for the content or information; or the Operator hides the minor's content or information from public view and availability.

The Upshot

As it has done in the areas of financial and medical privacy, California is expanding its regulatory tentacles further and further into the digital world, especially in connection with children's online activities. This follows on the heels of the recent amendments to the Children's Online Privacy Protection Act and efforts from other states, such as Maryland, to pass their own versions of an eraser law for minors.

Complying with the panoply of such new laws – both federal and state – is a daunting task, and online service providers are well-advised to stay abreast of these recent developments.

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