

Privacy and Information Security Legal Update

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Norbert F. Kugele



- Norbert specializes in employee benefits and privacy and information security law
- Helps organizations understand and comply with state, federal and international privacy and information security laws, including HIPAA, FTC, consumer privacy requirements and breach notification laws
- Counsels organizations on responding to security breach incidents, develops privacy policies and counsels on the EU's General Data Protection Regulations and contracting for cross-border data transfers

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Kelly R. Hollingsworth



- Kelly focuses on general business and information technology industries
- Expert in cloud-based solutions and data privacy issues
- Helps clients with cybersecurity and data privacy concerns

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Alexandra E. Chitwood

- Alex focuses on general business and information technology industries
- Assists clients with data privacy issues and compliance with state and federal privacy and information security laws

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Lexi M. Woods

- Lexi is a recent real estate and general business associate
- Assists clients with data privacy issues and compliance with privacy and information security laws

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Overview

- State and Federal law recent trends
- State privacy law updates:
 - Michigan
 - New York
 - California
 - Nevada
- International Developments and the Privacy Shield
- Litigation and Enforcement



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State Law Trends

Breach Notification Laws

- All states now have one
- Expanding definition of sensitive information



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State Law Trends

Data Security Laws

- Requires protection of personally identifiable information
- Risk-based

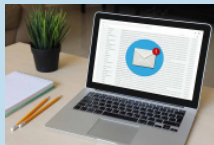


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State Law Trends

Consumer Rights

- Notification obligations
- Individuals rights (access, correction, deletion, opt-out, etc.)



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State Law Trends

Biometric Privacy Laws

- Restrict collection of biometric information without consent

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Federal Trends

Numerous sectoral laws—but no progress on comprehensive privacy bill

- Consent?
- State preemption?
- Individual right to sue?



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Federal Trends

National Institute of Standards and Technology

- Cyber Security Framework
- Other guidance on information security practices

Cybersecurity and Infrastructure Security Agency (CISA)

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Federal Trends

National Security

- Ban on Chinese network products
- TikTok and WeChat



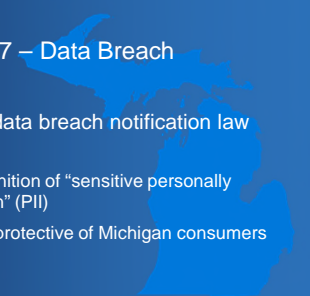
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State Privacy Law Updates

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Michigan – Enhanced Data Breach Notification Law

- House Bills 4186-87 – Data Breach Notification Act
- Replaces previous data breach notification law in its entirety
 - Expansion of the definition of “sensitive personally identifying information” (PII)
 - Intended to be more protective of Michigan consumers



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Michigan – Enhanced Data Breach Notification Law

- Currently with the Michigan Senate for further consideration
- Intent is to keep Michigan's data breach notification law consistent with those in other states

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New York – The SHIELD Act

- Two effective dates:
 - October 23, 2019 – changes to existing breach notification rules
 - March 21, 2020 – data security requirements
- Applies to “[a]ny person or business which owns or licenses computerized data which includes private information.”

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New York – The SHIELD Act

Previously effective:

- Expanded definitions of “private information” and “breach.”

Effective this year (March 2020):

- Data security requirements
 - Need reasonable safeguards and a data security program

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California - CCPA



- Final Implementing Regulations approved August 14
 - Need "Do Not Sell My Information" text
 - Removed provisions regarding explicit consent and offline requirements
- HR and B2B exemptions extended until January 1, 2022

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California - CCPA



- Enforcement began July 1
- Most AG enforcement focused on "do not sell" requirements
- Most private cases are class actions involving data breaches
 - Statutory damages rather than actual injury
- Other common claim is failure to notify

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California - CPRA



- California Privacy Rights Act on November ballot
 - Amends and expands CCPA
 - Limits amendments to those furthering consumer privacy
- Creation of California Privacy Protection Agency
- Broadens definition of sale, narrows definition of service provider
- Special treatment for sensitive personal information
- Additional individual rights

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California – Assembly Bill 713

- Prohibits re-identification of de-identified information under HIPAA
- Simplifies health care sector compliance with CCPA/CRPA
- Need to update privacy policy to include:
 - Notice regarding sale/disclosure of de-identified information
 - Specify method of de-identification
- Contractual requirements for sale/license of de-identified information effective January 1, 2021

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Nevada – Internet Privacy Law

- Applies to "Operators" meaning anyone who:
 - Operates a website for business purposes,
 - Collects and maintains "Covered Information" of Nevada residents who use or visit the website/online service, and
 - Does business in Nevada
- Requires certain website disclosure requirements similar to CCPA
- Provides right to opt out of sale
- Penalties of up to \$5,000 per violation, 30 day cure period for violations other than with respect to opt-out right

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International Developments and the Privacy Shield

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International Developments

- Comprehensive privacy laws becoming the norm
 - EU law generally the model
 - Data localization effect



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Schrems II & Privacy Shield

- EU-US Privacy Shield invalidated
- Other mechanisms left intact (for now)
- Implications for cross-border data transfers



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International Developments

- Brazil: LGPD
- India: PDPB
- Thailand: PDPA



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Litigation and Enforcement

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Litigation Trends



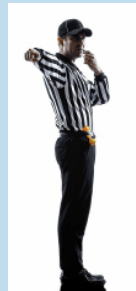
- Private litigation
 - Data breaches
 - Illinois Biometric Information Privacy Act
 - Fair Credit Reporting Act violations
 - Telephone Consumer Protection Act
- EU litigation over GDPR and cross-border transactions

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Enforcement Trends

Federal Enforcement

- Numerous HIPAA settlements with millions in penalties
- Privacy enforcement by FTC
 - Consumer privacy
 - Children's privacy



State and multistate actions

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New York - Enforcement Action

- NY Department of Financial Services (NYDFS)
- July 21, 2020: NYDFS filed its first enforcement action under New York's cybersecurity regulation, against First American Title Insurance Company
 - Alleges six violations of the Cybersecurity Regulation
 - First hearing is scheduled for October 26, 2020

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New York - Enforcement Action

- NYDFS alleges that First American failed to:
 - Perform adequate risk assessments
 - Maintain and implement data governance and classification policies
 - Appropriately limit user access privileges
 - Conduct periodic risk assessments of its cybersecurity program
 - Provide regular cybersecurity awareness training
 - Implement controls, including encryption

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Athens Orthopedic Clinic PA

- Hacker used vendor's credentials
- Demanded money in exchange for stolen data
- \$1.5 million penalty + corrective action plan



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Uber Data Breach



U.S. v. Sullivan

- FTC investigated 2014 hacking event at Uber
- During investigation, Uber suffered similar attack
 - Paid hackers to stay quiet
 - Did not disclose second event to the FTC

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Should You Pay a Ransom?

Treasury Department's Office of Foreign Assets Control (OFAC):

- Paying ransom may lead to charges of violating U.S. law.



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Questions?



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Conclusion



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