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No Need For Calif. Privacy Law To Cover Employee Data

By **Nathan Taylor** (June 10, 2019, 1:55 PM EDT)

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California is now one step closer to excluding information relating to employees from the scope of the California Consumer Privacy Act. On May 29, 2019, the California Assembly passed Assembly Bill 25,[1] which would narrow the CCPA's definition of "consumer" to exclude, among others, employees.

A.B. 25 now goes to the California Senate for its consideration. The Senate will have until Sept. 13, 2019, to consider and potentially pass A.B. 25 prior to the conclusion of the Legislature's 2019 term. As a result, how big of a step this represents, and how much closer we are to an amendment widely supported by companies across industries, remains to be seen.

The CCPA and its various consumer privacy rights (and corresponding business obligations), such as access and deletion, will apply with respect to personal information relating to any "consumer." In this regard, the CCPA defines a "consumer," in pertinent part, as "a natural person who is a California resident."[2] As a result, unlike privacy laws that may focus on information relating to specific individuals (e.g., children or patients) or specific types of information (e.g., consumer report information), the CCPA generally will apply with respect to any personal information relating to any California resident, regardless of the nature of a business's relationship or interaction with the individual (if any). For example, a business will be subject to the CCPA with respect to personal information relating to job applicants, employees and vendors who are California residents.

A.B. 25, however, would amend the CCPA to narrow the definition of "consumer" in certain employment and related contexts. Specifically, A.B. 25 would clarify that a "consumer" does not include "a natural person whose personal information has been collected by a business in the course of a person acting as a job applicant to, an employee of, a contractor of, or an agent on behalf of, the business," but only "to the extent the person's personal information is collected and used solely within the context of the person's role as a job applicant to, an employee of, a contractor of, or an agent on behalf of, the business."

If ultimately enacted, A.B. 25 would represent a significant amendment to the CCPA. The bill would allow companies to exclude from the scope of their obligations under the CCPA information relating to individuals who are job applicants or current or former employees, so long as that information is collected and used only for employment purposes. The bill also would allow companies to exclude information relating to contractors and agents to the extent the information is collected and used solely

in the context of those relationships.

It is important to note that A.B. 25 would define the term "contractor" broadly. Specifically, A.B. 25 would define a "contractor" as "a natural person who provides services to a business pursuant to a written contract." This definition does not specifically clarify whether the written contract must be between the business and the individual providing the services or whether the written contract may be with that individual's own employer.

In particular, A.B. 25 does not specifically state whether the exclusion would also cover personal information that a business handles relating to its vendor's employees (i.e., the individuals who actually provide the business with the relevant services) if it is used for vendor management purposes. Nonetheless, this would appear to be the most reasonable reading.

Every business subject to the CCPA that employs California residents or that has contractors or agents who are California residents would significantly benefit if A.B. 25 is enacted. In particular, being able to exclude systems that handle human resources and vendor data from scope would significantly narrow the impact of the CCPA for many businesses. Moreover, those businesses that handle personal information that is covered by other CCPA exceptions, such as the exception for personal information handled "pursuant to" the Gramm-Leach-Bliley Act or the exception for protected health information subject to the Health Insurance Portability and Accountability Act, would particularly benefit.

These businesses may conclude that they handle only limited personal information that would still be subject to the CCPA. For example, a financial institution whose business has a retail consumer focus may conclude that information relating to its consumer customers is covered by the GLBA exception and information relating to its own employees and vendors would be covered by the exception created by A.B. 25, leaving potentially limited data that is actually subject to the CCPA.

While A.B. 25 would represent a significant amendment to the CCPA, it would not address other areas where the application of the CCPA may lead to absurd results. For example, A.B. 25 would not exclude personal information collected by a business relating to individuals associated with the business's commercial customers (e.g., contact information relating to individuals associated with a commercial customer).

While business contact information, for example, may seem relatively inconsequential, a business that has to ensure that it can comply with CCPA requests with respect to such information (as limited as those requests are likely to be) would have to treat systems handling such information as "in scope," for purposes of developing its compliance plan and processes. For example, if a business is developing automated processes to be able to respond to California resident requests, building the technical capability to search and/or delete data from systems that handle business contact information is not inconsequential, regardless of whether the amount of information on those systems that is subject to the CCPA is limited.

Even though A.B. 25 may not be as broad as some would hope, it is a positive development. Moreover, the fact that the California legislature continues to consider sensible clarifications to what is a confusing and often poorly drafted statute is also welcome. While the legislative process appears to be a marathon and not a sprint, notwithstanding the CCPA's impending Jan. 1, 2020 operative date, any step forward is a positive one at this stage.

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[1] https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB25

[2] Cal. Civ. Code § 1798.140(g).