



# How to Comply with and Unpack the Wide Reach of Washington's My Health My Data Act

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## Overview

### My Health My Data Act

- Broad definitions for:
  - “consumer”
  - “regulated entity”
  - “Consumer Health Data”
- Creates new and unique consumer rights and obligations for business relating to collection, sharing, and use of “Consumer Health Data” (“CHD”)
- Impacts a wide range of personal data categories, entities, consumers, and business
- Well beyond Washington state





## Effective Dates

- Effective dates apply on a section-by-section basis
- The prohibition on **geofencing** around health-care facilities went into effect on **July 23, 2023**
- **Regulated entities** must comply with most provisions by **March 31, 2024**
- Effective date for **small businesses** delayed to June 30, 2024



## Who gets new rights and protections under the Act?


- Consumers who are either:
  - **Washington residents**; or
  - **natural persons whose CHD is collected in Washington** state, regardless of their residency or location
  - acting in an individual or household context
- Not consumers:
  - individuals “acting in an employment context”



## Who must comply with the Act's requirements?

- Regulated entities, processors and persons**
- Subject to some exceptions, a **regulated entity** is a legal entity that
    - **conducts business in Washington**, or produces or provides **products or services that are targeted to consumers in Washington**, and
    - alone or jointly with others, determines the purpose and means of collecting, processing, sharing, or selling of consumer health data
  - An entity that only stores data in Washington is not a regulated entity
  - Out-of-state entities that are **processors** for regulated entities or a small business
  - Note: consent to sell CHD and geofencing prohibitions apply to “**persons**”





## What data is Consumer Health Data (CHD)?

- **Consumer Health Data** is personal information that is:
  - linked or reasonably linkable to a consumer, and
  - identifies the consumer's past, present, or future physical or mental health status

# CHD Specifically Includes:

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- **Reproductive or sexual health information** (as defined by the Act)
- Individual health conditions, treatment, diseases, or diagnoses
- Social, psychological, behavioral, and medical interventions
- Health-related surgeries or procedures
- Use or purchase of prescribed medication
- **Bodily functions**, vital signs, symptoms, or measurements of the information expressly identified in the definition of CHD
- Diagnoses or diagnostic testing, treatment, or medication
- **Gender-affirming care information** (as defined by the Act, including “precise location information” and “efforts to research”)
- **Biometric data** (including keystroke/gait patterns)
- **Genetic data** (as defined by the Act)
- **Precise location information** (as defined by the Act) that could reasonably indicate a consumer’s attempt to acquire or receive health services or supplies
- Data that identifies a consumer **seeking “health care services,”** which is defined broadly as any service provided to a person to assess, measure, improve, or learn about a person’s mental or physical health
- Any information that a regulated entity, or its respective processor, processes to associate or identify a consumer with the data described above that is **derived or extrapolated from non-health information** (such as proxy, derivative, inferred, or emergent data by any means, including algorithms or machine learning)



# Exemptions

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- Data that is covered by:
  - **HIPAA (PHI)**
  - **Gramm-Leach-Bliley Act**
  - **Fair Credit Reporting Act**
  - Administrative Simplification provisions of the Social Security Act
  - Family Educational Rights and Privacy Act
  - Statutes and regulations applicable to the Washington Health Benefit Exchange
  - Certain privacy rules adopted by the Washington Office of the Insurance Commissioner
- **Deidentified data** (requires: measures; public commitment; contractual obligations)
- Collection, use, or disclosure of CHD to prevent, detect, protect against, or respond and prosecute in relation to security incidents, theft, fraud, harassment, malicious or deceptive activities, or any **illegal activity** under Washington or federal law
- Collection for preservation of the **integrity or security of systems**; or to investigate, report, or prosecute those responsible for any such action that is illegal under Washington or federal law



## What obligations are imposed by the Act?

- Regulated entities must:
  - Maintain a “**Consumer Health Data Privacy Policy**”
  - Obtain **consent** to collect or share consumer health data
  - Implement or amend data processing **agreements**
  - Collect valid **authorization to sell** CHD
  - Be prepared to grant consumer **requests**
  - Implement security **measures**
  - Not use **geofences**



## Prohibition on Geofencing

- Unlawful for any person to implement a “**geofence**” around an entity that provides in-person health care services **where such geofence is used to:**
  1. Identify or track consumers seeking health care services
  2. Collect CHD
  3. Send notifications, messages, or advertisements to consumers related to their CHD or health care services





## Consumer Rights

- **Confirm** whether a regulated entity is collecting, sharing, or selling the consumer's health data
- **Access** CHD, including a list of all third parties and affiliates with whom the regulated entity has shared or to whom it has sold the CHD and an active email address or other online mechanism to contact such parties
- **Withdraw** consent from the regulated entity's collection and sharing of CHD
- **Delete** CHD concerning the consumer
- **Appeal** a regulated entity's refusal to take action on a request



## AG enforcement and private right of action

- Any violation of the Act is a **per se violation** of the Washington Consumer Protection Act (**CPA**)
- Enforced by the **AG** as well as through **private action**
- To prevail on a CPA action (and thus an action under the Act), a plaintiff must establish 5 elements:
  - an unfair or deceptive act or practice
  - occurring in trade or commerce
  - impacting the public interest
  - injuring a plaintiff in his or her business or property
  - a causal link between the unfair or deceptive act complained of and the injury suffered



## Takeaways

- Assess which of your **activities** take place in WA state or impact WA consumers
- Determine whether you can rely on any **exemptions** or **exclusions**
- Inventory of **documentation** requirements that are applicable to your business' activities
- Prioritize **consent** for sale of CHD and **geofencing** prohibition compliance
- Operationalizing fulfillment of **consumer requests** (access and deletion)
- Consider whether existing or pipeline products or services require **design or engineering** modifications to comply



# thank you

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