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How the California Privacy Rights Act Impacts your Business in 2022

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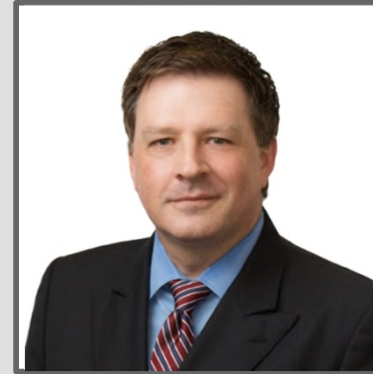
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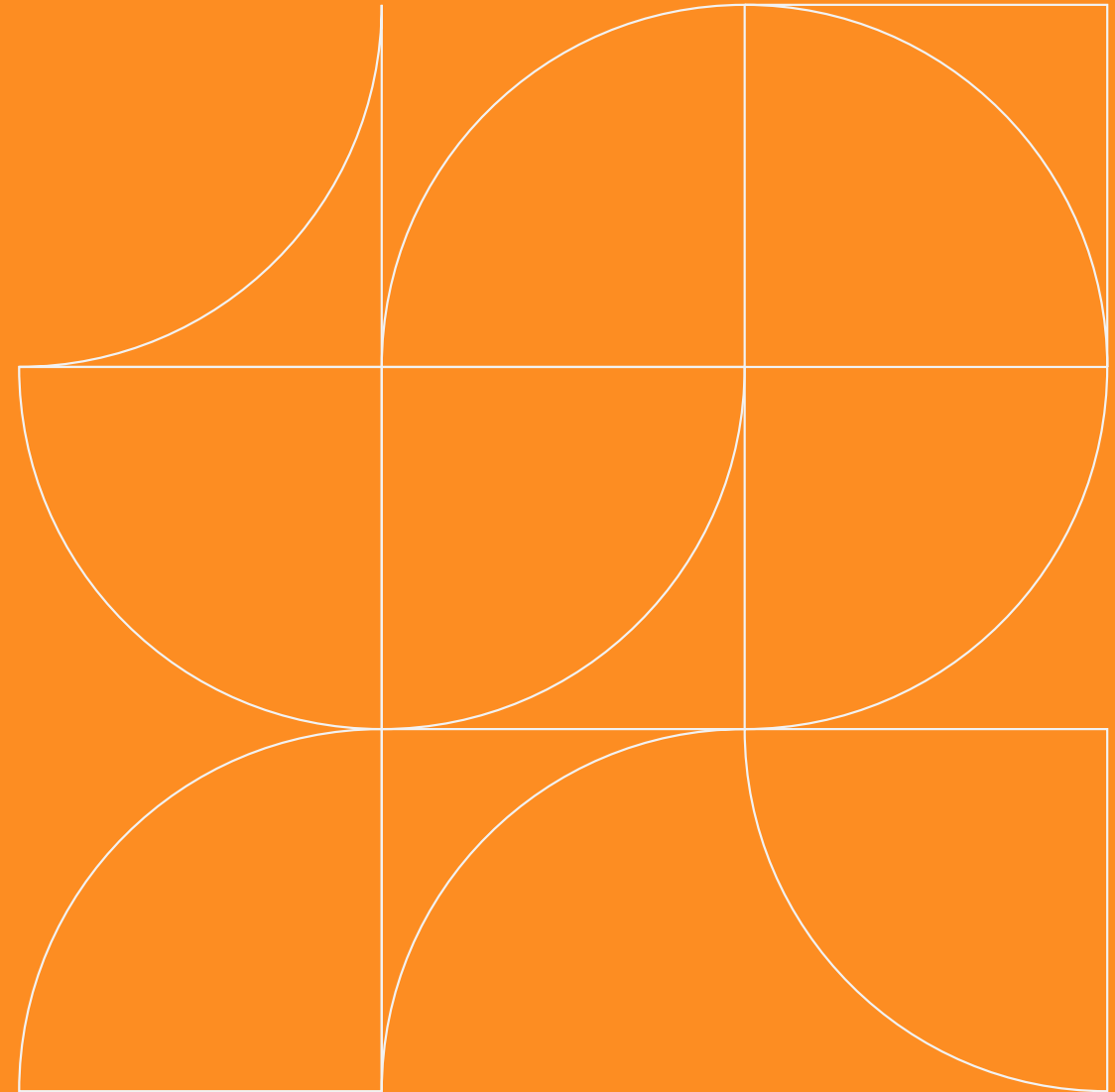
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Agenda

- 1 | Current Landscape
- 2 | What's Changed?
- 3 | Compliance

CCPA: Current Landscape

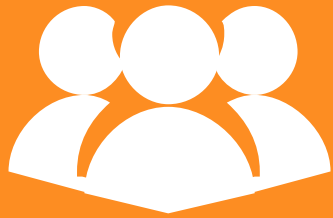


Business



- A (1) for-profit legal entity that (2) collects consumers' personal information and (3) determines the purposes and means of the processing of PI, that (4) does business in CA, and (5) that satisfies one or more of the following:
 - Has annual gross revenues in excess of \$25 million;
 - Alone or in combination, annually buys, receives for the business' commercial purposes, sells, or shares for commercial purposes, alone or in combination, the personal information of 50,000 or more consumers, households, or devices;
 - Derives 50% or more of its annual revenues from selling consumers' PI.

Consumer



- A natural person who is a CA *resident* however identified, including by any *unique identifier*.
- Resident is defined by the tax code
 - *Resident* means (1) every individual who is in the State for other than a temporary or transitory purpose, and (2) every individual who is domiciled in the State who is *outside* the State for a temporary or transitory purpose. All other individuals are nonresidents.

Basically, if you pay CA taxes, you are a Consumer

Personal Information

Any Information that identifies, **relates to**, describes, is capable of being associated with, or could reasonably be linked, directly **or indirectly**, with a consumer, **device**, or **household** such as:

- Identifiers
- Certain categories
- Protected classification characteristics
- Commercial Information
- Biometric Information
- Internet Information
- Geolocation Data
- Audio, electronic, visual, thermal, olfactory
- Inferences based on behavior (OBA)

Sale



- Means:
 - Selling, renting, releasing, disclosing, disseminating, **making available**, transferring, or otherwise communicating;
 - Orally, **in writing**, or by electronic or other means;
 - A consumer's PI by the business to another business or a 3rd Party;
 - For monetary or **other valuable consideration**.
- Not limited to on-line data collection
(Note: 3rd Party does **not** include service providers – usually)



Parties

- Business
 - The entity that has the direct relationship with the Consumer
 - Generally has the most obligations under CCPA
- Service Provider
 - Provides services to the Business
 - Value chain is just between Business and Service Provider
- Third Party
 - Entity not providing a service to the Business
 - Entity purchasing, or receiving for their own commercial purposes, personal Information



Consumer Privacy Rights

- The Right to Know what PI is being collected about them (and to request deletion)
- The Right to Know whether PI is sold or disclosed and to whom
- The Right to Opt-Out to the sale of PI
- The Right to Access PI
- The Right to Equal Service and Non-Discrimination



Business Obligations

- Organized into 3 General Areas
- Duty to Comply:
 - Post notice of Consumer Rights
 - Inform Consumers of Data Handling Practices
 - Respond to Consumers' Exercising their Rights
- Duty to Protect the Security of PI
- Duty to
 - Train Employees
 - Contract as Required



Privacy Rights Requests

- More often than not, these rights requests may be denied due to a competing legal interest that requires processing of the personal information:
 - Consent (however rights requests may be seen as a withdrawal of consent)
 - Contract
 - Legal Obligation
 - Legitimate Business Purpose(s)
- Procedures to respond to rights requests
 - Acknowledgement
 - Decision-making
 - Response
 - Documentation

General Obligations



General Rule

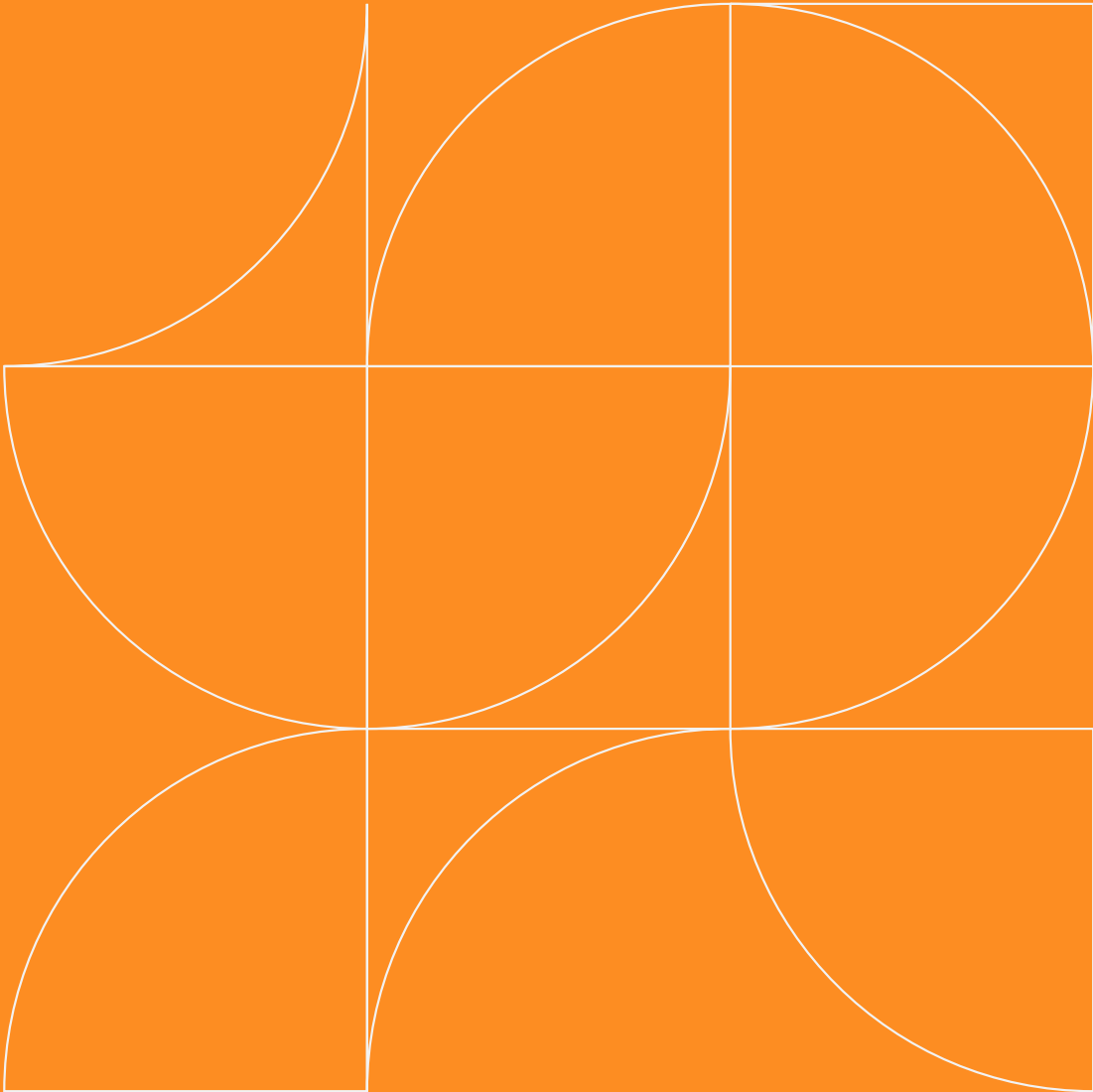
- Provide **notice** of business practice on-line (including consumer rights description and method to submit request) **and** list of categories collected, sold, or disclosed
- Provide **two** methods for consumers to submit requests (toll free # required)
- Receive **verifiable** request and confirm prior to responding.
- Business has 45 days to respond (extended to 90 total days upon reasonable notice to consumer during 1st 45 days)

Extra-Territorial Application & 'Doing Business' in CA

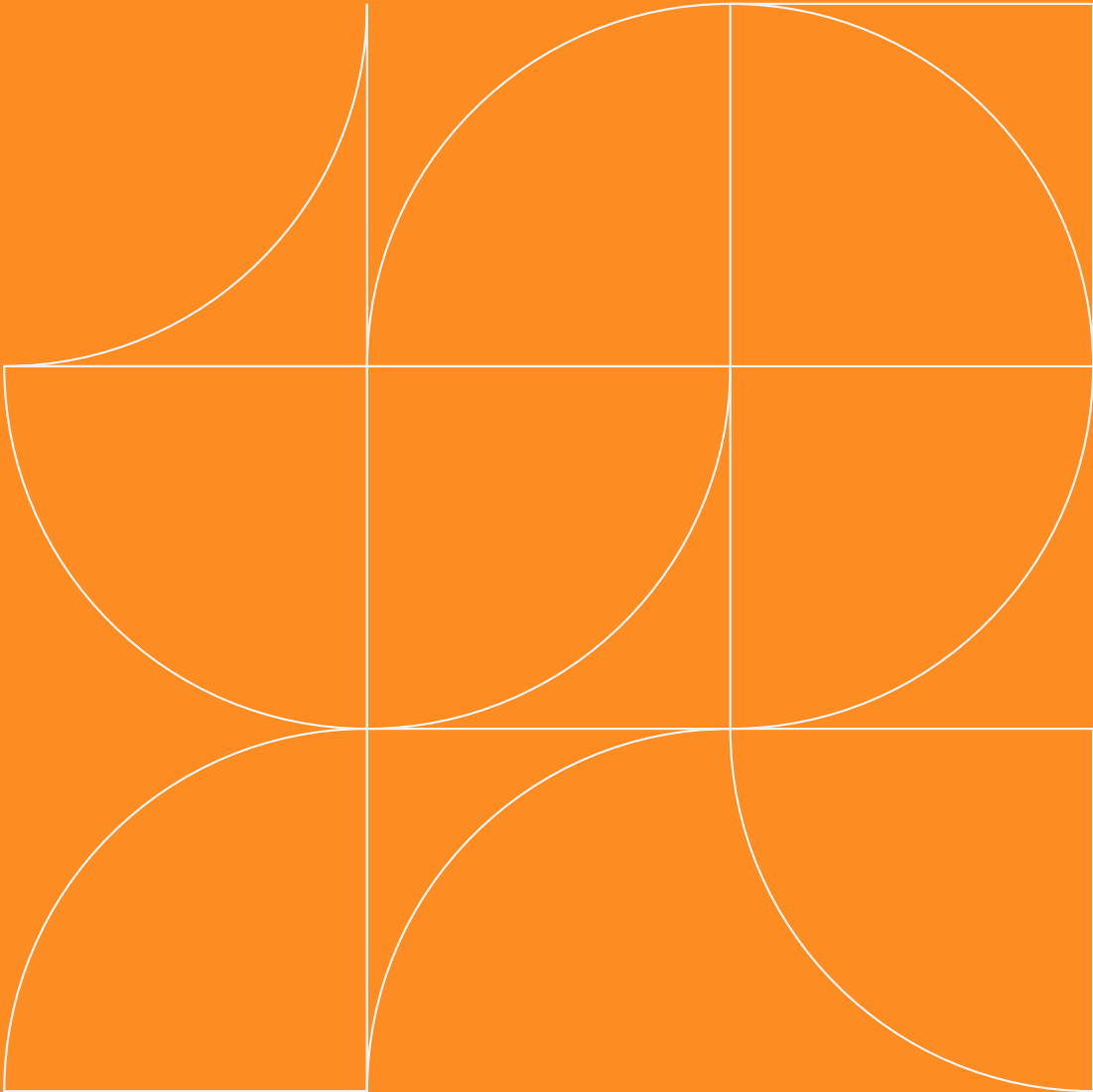


- The Act applies to **for-profit** entities doing **business** in CA (regardless of physical presence.) Data in the information age knows no borders
- “The provisions of this title are not limited to information collected electronically or over the Internet, but apply to the collection and sale of **all** personal information collected by a business from consumers.”

CLE



What Changed?





What's Not in the CCPA

- New Concepts
 - Sensitive Personal Information
 - Collection Limitation
 - Purpose Limitation
- Consumer Rights
 - No Right to Correct Incorrect Data
 - Right to Limit Use of Sensitive Data
- Business Obligations
 - No Secondary Use
 - Auditability of compliance program
 - Non-AG Enforcement



CCPA / CPRA Overview

- CCPA went into effect on June 28, 2018
 - Purpose: To further the CA Constitution’s 1972 amendment establishing the right to privacy as an **“inalienable right”**
 - Specify concrete Privacy Rights
(but really to kill Facebook)
- CPRA was passed on November 4, 2021
 - Took effect on December 16, 2021
 - Most provisions become operative on January 1, 2023
 - Purpose: To include components of Fair Information Practice Principles (“FIPPs”) that were missing from the current law



What's New?

- Additional rights for California consumers
 - Rectification and correction
 - Opt out of sharing for cross-context behavioral advertising (...but this isn't really new)
 - Limit use and disclosure of sensitive personal information
 - Opt out of the use of automated decision-making
- Heightened business regulations on the use of personal information (PI)
 - Sensitive Personal Information
 - Additional layer of control by the data subject (opt-in, correction)
 - Purpose and Collection Limitation
 - No more asking for everything because it might be nice
- New government agency for state-wide data privacy enforcement
 - California Privacy Protection Agency (CPPA)

Change to Scope



- For-profit entities that collect personal information from California residents and meet any of the following thresholds:
 - At least \$25 million in gross annual revenue
 - Buys, sells ~~or receives~~ **or shares** personal information ~~about at least 50,000~~ **of 100,000 or more** California consumers or householders ~~or devices for commercial purposes)~~
 - Derives ~~more than 50%~~ **or more** of its annual revenue from **selling or sharing** ~~the sale of~~ **California** personal information

Changes to Categories of Personal Information



- CCPA: 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
- CPRA defines and adds protections for “Sensitive Personal Information”
 - Social Security numbers (SSNs),
 - Driver’s license
 - Financial account or card numbers
 - Precise geolocation
 - Racial and ethnic characteristics
 - Religious and philosophical beliefs
 - Union membership
 - Contents of mail, email and text messages
 - Genetic and biometric data

Data Subject Rights



- Rights include:
 - Know
 - Access
 - Deletion
 - Opt out of sale (more broadly defined as the exchange of personal information for monetary or other valuable consideration)
 - Nondiscrimination
 - Data portability
 - *Rectification and correction*
 - *Opt out of sharing for cross-context behavioral advertising*
 - *Limit use and disclosure of sensitive personal information*
 - *Opt out of the use of automated decision-making*



Significant New Limitations

- Purpose Limitation
 - No “Secondary Use”
 - Only use Data for Specific Purpose Collected
- Collection Limitation
 - Only Collect Data that is “Necessary” & “Proportionate” for the Purposes
- Storage Limitation
 - When Purpose for Collection is Over → Delete
 - Affirmative Obligation to Delete Data



Children's Data

- Opt-In Rights
 - After a consumer under 16 years of age has **declined** to provide their consent to sell or share their personal information, a business must either wait for another 12 months or wait until the consumer turns 16 before requesting their opt-in consent again
- The CPRA has tripled the fines for the collection and selling of children's private information

Distinctions and “Differences”



- Contractors, Service Providers, and 3rd Parties
 - CCPA requires businesses to have contracts with “service providers” and “third parties” to whom the company does not sell data
 - CPRA adds a requirement to also establish contracts with “contractors” to whom the company makes available personal information for a business purpose
 - Contractor seems to be a broader definition – but is it?
- Selling vs Sharing
 - Seller derives independent economic benefit from the data itself (not a service performed for the business using the data)
 - Sharing is disclosure for the purposes of “cross contextual behavioral advertising”

Security and Audit Requirements



- Additional security requirement similar to that under GDPR:
 - A business that collects a consumer’s personal information **shall implement reasonable security procedures and practices** appropriate to the nature of the personal information to protect the personal information from unauthorized or illegal access, destruction, use, modification, or disclosure in accordance with Section 1798.81.5.
- CPRA expects regulations requiring cybersecurity audits and **risk assessments** for companies whose processing presents a significant risk to consumer privacy or security (reminiscent of a DPIA under GDPR)



Enforcement and Fines

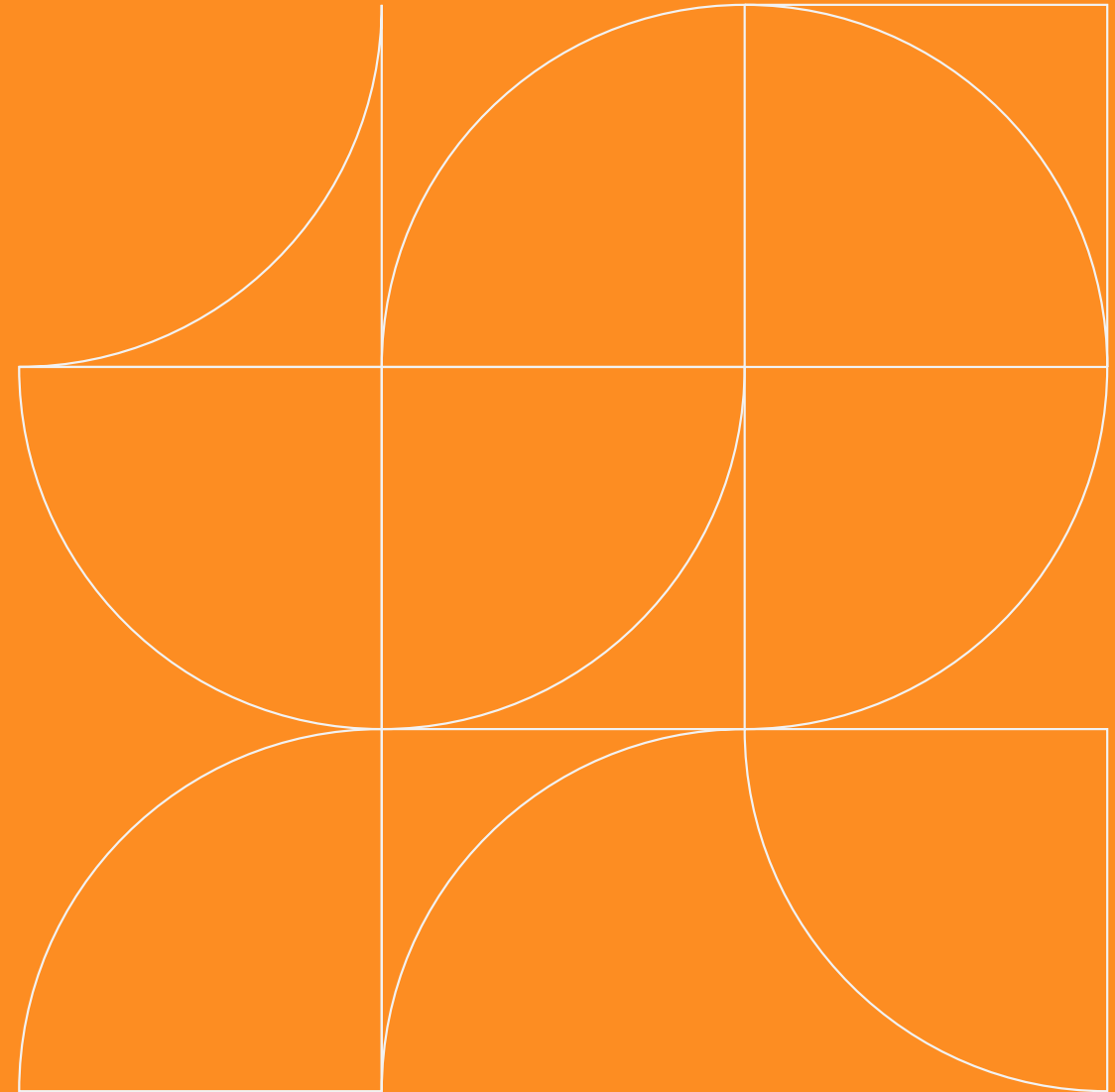
- **Enforcement**

- CCPA was enforced by the Attorney General
 - AG also was in charge of rulemaking
- CPRA will be enforced by the newly created CPPA
 - CPPA was supposed to come out with regulations in July 1, 2022
 - CPPA met in late February and reported that they do not expect to meet this deadline, and expects rules to be published as late as the Fourth Quarter of 2022

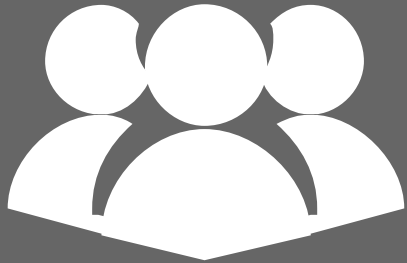
- **Fines**

- CCPA
 - Up to \$2,500 for each violation and \$7,500 for each intentional violation
 - Statutory damages from \$100-\$750 per violation
- CPRA
 - Keeps CCPA fines and adds \$7,500 fine for violations related to consumers under the age of 16
- CPRA also removes 30 day cure period

Who Does NOT Need to Comply with CPRA?



Exemptions



- HIPAA
 - FCRA
 - GLBA
 - Others
-
- Business to Business
 - Employees*
-
- *As of right now, the employee exemption under CCPA will expire at the end of 2022



The Potential Expiration of the Employee Exemption

- Currently there are two bills in the California legislature that propose to extend the Employee Exemption
 - Bill AB-2891 proposes to extend the exemptions until January 1, 2026
 - Bill AB-2871 would extend the exemptions indefinitely
- The last day to pass a bill in California is August 31, 2022
 - Does CPRA allow lawmakers to make exemptions?
 - The employee exemption is a trend we are seeing solely in the United States – but not elsewhere



What if the Employee Exemption Expires?

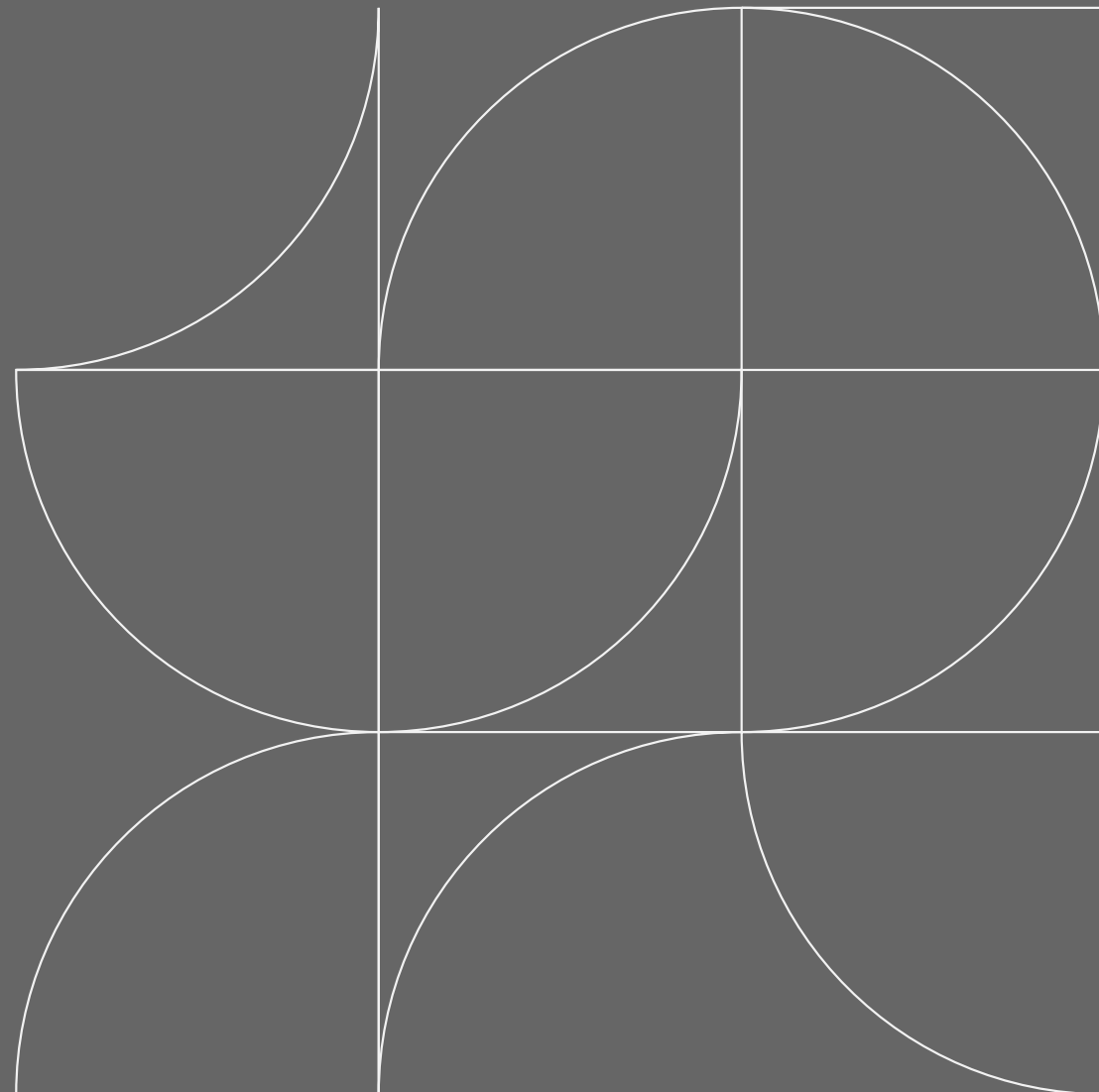
- The accountability requirements under CPRA are more akin to GDPR
- Employees will have all rights available to California consumers, assuming the business falls under the scope of CPRA
 - Employee Privacy Notices
 - Standards and Policies
 - Employee Data Inventory
 - Employee Rights Exercise Processes & Procedures
 - Collection and Use Limitations
 - Vendor and 3rd Party/Contractor contract review



Planning for the Coming Year

- Expectations
 - Employee Exemption
 - *The exemption does not cover reasonable security*
- What can you do now, prior to Regulations?
 - Data Inventory
 - Children's Data?
 - Records Retention
 - Consider Updates to Processes and Procedures
 - Audit and Risk Assessments
 - Data Portability
 - Rectification/Correction
 - Opt Out
 - Sensitive Personal Information
 - Contract Review

Questions?



Thank you

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