



Podcast Transcript

2023 DSIR Deeper Dive: State Privacy and Data Collection

Date: October 10, 2023

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Run Time: 10:00

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Kattman: Managing digital assets requires the efforts of the whole enterprise. The 2023 issue of the Data Security Incident Response Report, or the DSIR, includes more content than ever regarding the data ecosystem and how companies can best manage their digital assets as they move through the life cycle of data. The DSIR, of course, dives deep into the annual incident response trends and analytics our clients and friends depend on. It also covers topics such as global privacy, ad tech, the increase in litigation, healthcare privacy and compliance, and the latest in emerging technology. I'm Amy Kattman, and you're listening to BakerHosts.

We're back with the Deeper Dive series, covering key topics in this year's DSIR. On today's episode, we discuss state privacy and data collection. Our guest today is Justin Yedor, a partner with the Privacy Governance and Technology Transactions team. Welcome to the show, Justin.

Yedor: Thanks, Amy. I'm really glad to be back.

Kattman: To kick things off, Justin, can you tell us about the current trends in state regulation of data privacy?

Yedor: Sure. In a nutshell, the current trend is one of expansion, as it has been for some time now. In fact, by 2026, roughly 40% of the U.S. consumer population is slated to be covered by their state's comprehensive privacy law, which is frankly astonishing when you think that only in 2020 we were looking at the very first law of this type. At the same time, the states are also taking the lead in new privacy laws that regulate certain types of data practices relating to health data,

children's data, and related concerns. And we're all kind of waiting with bated breath to see if and when Congress might pass a federal comprehensive privacy law, really remains to be seen.

And I think it is a really interesting question in that as the state laws continue to expand, there may indeed be some in Congress who look at this and say, well, the states have already taken care of it. Meanwhile, others look at it and say, oh my gosh, this patchwork of laws really can't stand. We need to have something that is consistent and covers everyone in the same way across the whole U.S. So, a lot going on there and it raises a lot of really thorny and intricate questions, I think, in terms of where the legislation goes from here.

Kattman: How have businesses been impacted by the new privacy laws in California and Virginia?

Yedor: In several different ways. The surface level impact of, of course, Virginia with the VCDPA, the Virginia Consumer Data Protection Act, expanded rights available to consumers to additional population within the U.S. For businesses that were subject to the CCPA, they were in a position as of January 1 of this year where they were doing updates to account for the CPRA amendments and then also potentially expanding to Virginia as well if they were covered by that law.

There is enough similarity between the two that there are portions of compliance that could be leveraged for help with Virginia compliance. But at the same time, the laws are not identical. And sometimes getting into the details on things like how sensitive data might be managed or dealing with the nuances around processing of consumer rights, you run into some differences that need to be accounted for in how you are approaching your privacy compliance.

Kattman: In California specifically, what does the new California Age Appropriate Design Code Act, or AADC, aim to do, and how does it affect online businesses?

Yedor: This is a great question. The AADC is a really different breed of law from laws like the CCPA and the other state comprehensive privacy laws. In terms of what it aims to do, I think it is an open question as to whether the AADC is even first and foremost a privacy law. It aims to keep children safe online, and it is roughly modeled on a UK law, the UK Age Appropriate Design Code. But in doing so, it considers, what are the primary risks to children who may be likely to access an online service? And in many cases, those risks may not be directly privacy risks, and we start to get into questions of, is there a risk to children from the content of an online service, for example. And so, this is a law that is sort of a whole new breed of privacy adjacent. Perhaps some might call it a privacy law still, but it is a whole new type of law. Where it applies is, it is going to impact businesses whose online services are likely to be accessed by children. This in itself is a very different standard from what we're used to in this space in the United States.

So, businesses may be familiar with COPPA, the Children's Online Privacy Protection Act. COPPA is really about situations where a business knows that children are accessing its service or where it is directing its service to children.

The AADC will apply to those types of online services as well, but it also is going to apply to services that are general audience services. Websites, for example, made available to the general public where there may be children who access the service. Businesses will need to determine whether that is occurring, in what age groups are accessing the service, and then take detailed steps to comply. And compliance with this law also looks different. Compliance is a matter of determining the risks that are presented to children from the service and then making changes to the service itself in order to make it appropriate for children or taking reasonable measures proportionate to the risks to keep children off of the service.

So, there is a whole lot going on here. We could spend a whole lot of time talking about AADC, and I gladly would because I think it is fascinating. And I really want to help our clients to figure out how to deal with it. The other piece of this that I would mention, and I think we touched on this in the blog as well, is that it is currently subject to legal challenge in the courts on First Amendment grounds. And so, there is a bit of an unknown about, ultimately, does it take effect in its current form? I think right now we are planning for it to do so, but we're watching that litigation very closely to see what happens.

Kattman: Great information, Justin. As my final question for you, are there any other states following suit behind Virginia and California and their recent legislative efforts?

Yedor: Yes, Amy, several actually. And primarily, I would say they're following Virginia. We sort of have at this stage roughly two models for comprehensive privacy laws. There is the California model and the Virginia model. Now the states are not identical in how they have drafted their laws. There are differences that are pretty important across the laws, but roughly all of the other states that have passed comprehensive privacy laws have followed Virginia. And I think that is helpful to businesses that are trying to comply with multiple laws in that at least there is an archetype of statute that they're starting with and making modifications to. So, there is kind of a common core.

The states that are involved here are Colorado and Connecticut, where comprehensive privacy laws took effect on July 1 of this year, Utah, which will take effect December 31, and then over the next couple of years Florida, Texas, Montana, Iowa, Tennessee, Indiana, Delaware, many other laws. As well as there are also several bills that are still pending.

So, the trend again is toward more and more regulation at the state level. I think the good news is that there does seem to be a consensus emerging in terms of, for example, the privacy rights available to consumers. The common slate of rights that we're seeing under these laws are things like access, deletion, correction, the right to opt out of targeted advertising online. And it does seem that many of these states have been inspired by both the CCPA and the Virginia privacy law. But they're primarily following Virginia in how they're actually drafting the rules.

Kattman: Thanks so much for joining us today, Justin.

Yedor: Glad to be here, Amy.

Kattman: If you have any questions for Justin, his contact information is in the show notes. As always, thanks for listening to BakerHosts.

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