



Podcast Transcript

2024 DSIR Deeper Dive: State Comprehensive Privacy Laws

Date: December 17, 2024

Guest: Justin Yedor, Taylor Bloom **Host:** Amy Kattman

Run Time: 17:06

For questions and comments contact:



Justin T. Yedor

Partner
Los Angeles
T: +1.310.979.8405 | jyedor@bakerlaw.com



Taylor A. Bloom

Partner
Orange County
T: +1.714.966.8895 | tbloom@bakerlaw.com

Kattman: In the spring of this year, BakerHostetler's Digital Assets and Data Management Practice Group released its annual Data Security and Incident Response, DSIR, Report. This year marks the 10th anniversary of the report, which is now widely used by businesses all over the world to help develop their cybersecurity measures, incident response plans, and information governance practices. 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 take a deeper dive into recent developments in the U.S. Comprehensive Privacy Regulation. Our guests today are Justin Yedor and Taylor Bloom. Justin and Taylor are both partners in BakerHostetler's Privacy, Governance and Technology Transactions team. Welcome to the show, Justin and Taylor.

Yedor: Thanks, Amy. Really glad to be here.

Bloom: Hi, Amy. Yeah, this is going to be fun.

Kattman: Justin, let's begin with you. How have state privacy laws impacted consumer rights?

Yedor: So, I think the keyword here is expansion, and it is expansion both in terms of new states adding privacy laws of course, meaning more consumers have rights under their state's law. In some cases, there have been some new variations on rights, in particular opt-outs. There are some expansions there with new rights relating to things like sensitive data, for example, and consent, as well as some expansion in terms of opt-outs for targeted advertising that we've seen historically from the early days of the CCPA into this patchwork landscape we're now in where more and more states have privacy laws. But when we look at it in terms of numbers, overall, we are getting to a point where it is becoming much more the norm that consumers have rights under their state's law than that they don't. In fact, by January 2026, we will be right at about 50% of consumers in the United States with rights under their comprehensive privacy law. So, the U.S. is looking less and less like an outlier as compared to other countries in the world. But this is still evolving on a state-by-state basis.

Kattman: Taylor, are the privacy laws being passed by state legislators very similar to one another?

Bloom: Yes and no. The majority of these states do have significant overlap. For example, all the state privacy rights provide rights for consumers to request access to their data or deletion of their data, or to opt out of sales. However, there are nuances. And so, while there are easy ways to take a generalized approach for compliance, there are some specific instances where the states do differ. For example, Oregon, earlier this year provided a really interesting right to consumers that we hadn't seen anywhere before, where consumers can request a list of the specific third parties to whom a consumer's personal data had been disclosed to. This is very unique, not seen any other privacy law, and very specific to the Oregon privacy law. In addition, we see things coming out of Delaware that are also very unique that we haven't seen across the board. For instance, for Delaware, consumers are going to have the ability to request a list of categories of third parties to whom the business has disclosed that consumer's specific personal information. So, while we do see a lot of overlap, there are a few nuances. Another nuance that we've seen that is interesting is almost all the state rights provide a right to correct for consumers. However, Utah and Iowa do not provide that right. In all reality, it is generally more practical for businesses to provide these rights across the board when there is no real harm in not providing it. However, in certain states like Oregon, for example, that specific right that they have is a little bit more difficult to provide and we would generally sometimes recommend taking a more nuanced approach there. So, yes, there are similarities. Yes, there are differences. We do see some generalized approach like we were saying opt out of sales, opt out, provide deletion rights, access rights, but it is not uniform in any way.

Yedor: Those Oregon and Delaware rights you mentioned, Taylor, actually those are more good examples of this trend of expanding rights and as well an example of states somewhat sticking to the same script, but also trying to put their own special spin on things or evolve the model further as new states continue to pass these laws.

Bloom: I don't think it is stopping. We're going to continue to see states try to take unique approaches to privacy and try to have their own special instance of what makes their state privacy law different, and they truly do expect businesses to recognize these differences and respect them.

Yedor: Yeah, I agree. No way is this stopping. I've stopped trying to predict which states are going to pass them because I'm so bad at it. But what I am confident in and where I think I have a pretty good record of prediction, is saying that there will be more of them, and it sounds like you agree with that too.

Bloom: 100%. More coming. It is not stopping. While we have five more states coming to effect in January, more throughout the year, that is just the beginning.

Yedor: Yeah. Exactly. Certainly, more legislators are going to be taking up these bills as we get into 2025.

Kattman: Well, there is lots of change on the horizon. What do the state regulations currently look like, Justin?

Yedor: Yeah, Amy, it depends a little bit on the state. Not all of the states' privacy laws have rulemaking authority for whatever agency is tasked with writing the rules. So, typically that would be the state attorney general. However, in California, we also have the California Privacy Protection Agency, which has rulemaking authority under the CCPA. What we are seeing as a trend is that where there is rulemaking authority, the agencies are not necessarily considering their rulemaking a one-and-done task.

I think California is the best example of that. There have been many iterations of the CCPA regulations so far, and in fact we're in the very beginning stages of a formal rulemaking process right now in which five new sets of regulations are being considered. So, these are rules on cybersecurity audits, risk assessments, automated decision making, and some special exceptions for insurance companies. So, those four, which are essentially new topics on which we do not currently have CCPA regulations. But the CPPA, the California Privacy Protection Agency is also, meanwhile, in the same rulemaking package working on updates to existing CCPA regs. So, as Taylor talked about, there is a shifting landscape that is constantly evolving in terms of new laws but at the same time, even under existing laws, we have things that are new and changing and that we need to keep up with. So, it does add another layer of complexity to the rules that are at play here and we keep a close eye on that.

Colorado is also notable in terms of its regulations. Colorado in 2023 that the AG passed some very comprehensive regulations under the Colorado Privacy Act.

There are currently some rulemaking activities going on in Colorado. They're a bit more limited than the current California rulemaking. Primarily, they're focused on creating a process for issuing opinion letters and providing interpretive guidance for companies that are looking to comply with the Colorado Privacy Act and trying to get some more detailed guidance on some of the nuance.

So, it is a very different type of rulemaking from what is going on in California, in the sense that the regulations are far less tailored toward creating new rules that you have to comply with, but instead are really focused on creating a process that is hopefully going to help companies get answers to questions on how they comply with existing regs. Remains to be seen how all this shakes out, but we're watching it really closely, and this is another area where when we look back at this a year from now, it may be very different from what we're currently seeing in space.

Bloom: Very interesting to see where these, at least these new rounds for the CPPA land. And there is a lot of moving pieces right now and it could really impact companies' compliance efforts.

Yedor: Yeah, I agree. There is so much to be said on the CCPA regs and, in particular, and especially the regulations around automated decision-making technology and risk assessments. The automated decision-making regulations have been a source of tremendous debate amongst the. It is part of why the rulemaking process is ongoing now, even though the CPRA Prop 24 California Privacy Rights Act has been in effect now since 2023. There is massive debate amongst the board and amongst the public in terms of stakeholder opinion on what those regulations should look like, whether there is actually agency authority to draft them in the way that they've been proposed. And so, I think unlike with past rulemakings, that one may involve a little bit more back and forth between the agency and its responses to public comments than we've seen. I know Taylor and I are working on an article that dives into that a little bit deeper and certainly there is going to be a lot more to say about those regs in particular.

Bloom: Yes, I think specifically the pieces on behavioral advertising are going to have some very, very hotly debated provisions of what the true implications are, what was the intent here. They couldn't truly have intended to create a whole new regime around contextual advertising, but it does give some confusing impressions based on a strict reading of the regulations.

Yedor: Yeah, absolutely. And in addition to the challenges of the rulemaking authority, there are some ways in which those regulations actually seem to extend beyond true privacy issues and to start regulating artificial intelligence in novel ways that that maybe have not all that much to do with personal information.

Bloom: I'm really looking forward to where this lands. I think there is a lot that is going to need to be done if it, if they stay where they are and it is keeping everyone on their toes of where we land here and if there is a lot of change could require a lot of configuring and updates, but if it stays where they are, we're going to have a major shift in what is actually covered here from a data perspective.

Yedor: Yeah, I really hope they get around to reading the public comment that BakerHostetler submitted back in whatever that was, 2022. Early, early on we had submitted this comment on these issues, and it just sat there. Because there had been so much internal debate at the agency before even getting into the formal rulemaking.

Bloom: It is going to be a very interesting next few months.

Yedor: For sure.

Kattman: Well, Taylor, what are some key takeaways for companies regarding states' enforcement actions?

Bloom: I have quite a few, but I would focus on paying attention to consumer complaints. We've heard from all the regulators that the complaints can escalate to them when lots of times the consumer goes to the business first and has a complaint or an issue and the business doesn't take it seriously or disregards it or just moves along and then it goes forward, and they submit a complaint to the state AG's office and then an actual formal investigation or inquiry occurs. So, we will say that we know that the agencies are reading and paying attention to all the complaints they receive. And so, it is one of the reasons why I recommend extending appeal rights to residents in all states, even though not all states require an appeal right. I think providing that appeal right is just one other angle to think about of allowing consumers to come to you and say, hey, I have an issue with how you handled this, let's talk about it, versus going directly to these agencies and submitting a complaint. We know the CPPA mentioned that they've received over 3,000 privacy complaints, and the Texas AG's office mentioned that they received over 500 just in the first few months coming into effect. So, they truly are getting a lot of complaints, and they take each one of them into account and it can lead to an investigation. So, I would take these seriously and take them to heart and consider allowing consumers everywhere to appeal. I think it is a good way to open up that dialogue before it can turn into something more serious.

The other point I would stress is that we're seeing a lot of cross-agency collaboration. We just recently were having a talk with the state AG as part of an investigation. He mentioned that earlier that day he had been doing a training for the state AGs for a state that comes into effect in 2025. The state AGs are all working together. They're collaborating. They are in open communication. They also will get referrals from other agencies. So, you have a state AG has an issue in one state, and they say hey, you have a big consumer presence in your state from the same business. You should look into this too. So, a lot of cross-office collaboration and all talking about what they're seeing as issues. And you might see an investigation one state and then that leads to an investigation in another state. So, I think it is really important to just be aware that there is a lot of cross-agency collaboration.

Last thing I would say to be really top of mind is the awareness of these enforcers. These AGs are going after businesses that they see in their day-to-

day, or privacy policies they encounter, or cookie banners they see, and they say hey, that was a major dark pattern. Or being out at a retailer and maybe not seeing any notice at collection when you're out shopping in California, there is all these things they see day-to-day. They become top of mind. And so, I think these investigations can be triggered in any way, but we have seen a lot of reference that these government officials will just be out, and they have a poor privacy experience and that leads to an investigation. So, really important just to think about where these regulators might encounter your business.

Kattman: And, Justin, what about you?

Yedor: I think that this ties in well with everything that we've been discussing so far and, in particular, one thing we know about state enforcers is that they're looking for things that indicate that you have complied with their state's law. So, whether that is references to the state within the privacy policy, if that is appropriate in terms of the way it is drafted, or making sure you have all of the correct options available in web forms for consumers who reside in their states. Or just, as Taylor mentioned, making sure that you have interfaces that look and feel the way that they're expecting. It is those types of issues that can either indicate to a regulator that you are paying attention and you've done things the right way, or sometimes they start to raise red flags and cause the regulator to dig in a little deeper. So, where I think this all ties together, of course, is that while we are in this world in which all of these regulations are becoming more complex, at the same time, I think unfortunately the risks are increasing in terms of having more enforcers out there, but then those enforcers also are looking for a little bit more nuance than they probably were because there are more and more issues that they could be enforcing.

Kattman: Justin and Taylor, thanks so much for joining us today.

Yedor: Thanks, Amy. It is always great chatting with you.

Bloom: Thank you. This was a lot of fun. Thank you for having us.

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

Comments heard on BakerHosts are for informational purposes and should not be construed as legal advice regarding any specific facts or circumstances. Listeners should not act upon the information provided on BakerHosts without first consulting with lawyer directly. The opinions expressed on BakerHosts are those of participants appearing on the program and do not reflect those of the firm. For more information about our practices and experience, please visit bakerlaw.com.