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Application of the California Consumer Privacy Act of 2018 to Staffing Firm Services

Introduction

The California Consumer Privacy Act of 2018 applies to certain companies doing business in California that collect personal information from or about California residents. The CCPA affords these consumers the right to know about, access, delete, and opt-out of the sharing or selling of their personal information. The California attorney general may seek injunctive relief and impose civil penalties for violations, and consumers also may bring lawsuits for damages and injunctive relief if their personal information is compromised.

At the urging of the American Staffing Association and others, and in recognition that the CCPA could impede the recruitment and hiring of California workers, the California legislature passed Assembly Bill 25 in October 2019. AB 25 provided that until Jan. 1, 2021, many of the CCPA's requirements would not apply to certain personal information collected about job applicants and employees, so long as that information was used solely within that person's role or former role with respect to the business. More recently, the new California Privacy Rights Act extended the sunset period for the HR data exemption to Jan. 1, 2023. However, notably, businesses are still required to inform job applicants and employees of the categories of personal information collected and the purposes for which the information is used (e.g., through an employee privacy notice). Also, the private right of action for data breaches applies to employee and job applicant data.

The CCPA imposes certain obligations on entities that act as a "business" or "service provider" as those terms are defined in the CCPA. An entity designated as a "business" must provide consumers access to certain information upon request, enable consumers to delete personal information that the business collected from or about them, and allow consumers to opt out of "sales" of personal information about the consumer to third parties.¹ By contrast, service providers are not directly subject to most CCPA compliance obligations with respect to services they offer to businesses covered by the CCPA. An entity's designation as a "service provider" is important for establishing that the transfer of information to that entity is not a "sale" of personal information. The CCPA imposes strict requirements on the "sale" of personal information (e.g., an obligation to place a "Do Not Sell My Personal Information" button on website home pages), so the service provider designation can be critical.

This issue paper addresses the extent to which staffing firms may act as covered businesses or service providers when providing: (i) staffing services; (ii) direct

¹ The CCPA defines a "sale" as "selling, renting, releasing, disclosing, disseminating, making available, transferring, or otherwise communicating...consumer's personal information by the business to another business or third party for monetary or other valuable consideration." *Id.* at §1798.140(t)(1). There are a few exceptions that enable businesses to make disclosures of personal information that are not considered "sales." A disclosure made to a "service provider," for instance, is not considered a sale and is not subject to the related requirements such as providing an opt-out. Cal. Civ. Code at §1798.140(t)(2)(C).

hire/search services; (iii) recruitment processing outsourcing (RPO) services; (iv) managed service provider (MSP) services; and (v) outplacement services. While each staffing services scenario is fact-specific, when providing temporary staffing services, staffing firms are generally acting as a business with respect to the temporary staff member's personal information under the CCPA, and neither a business nor a service provider with respect to personal information processed by the temporary staff member in connection with their duties for the client. When providing direct hire/search services and outplacement services, staffing firms likely act as independent businesses from their clients under the CCPA. When providing RPO and MSP services, staffing firms do receive client personal information and likely act as service providers as a result. This is an important point for RPO and MSP service providers, as they must execute CCPA addenda which place limitations on the ways in which these entities may use the personal information that has been provided to them.

I. California Consumer Privacy Act—Overview

The CCPA defines “personal information” as information that identifies, is reasonably capable of being associated with, or could reasonably be linked—directly or indirectly—with a particular California consumer² or household.³ Some examples include a person's real name; alias; postal address; unique personal identifier; internet activity, including browsing history and information regarding interactions with websites, applications, or advertisements; geolocation data; and inferences drawn from any of the above listed information to create consumer profiles.⁴ Personal information does not include publicly available⁵ information as defined by the law.⁶ However, the CCPA defines “publicly available” as information made available from federal, state, or local government records, so it does not include information that is publicly available on career-focused sites such as LinkedIn. Notably, the newly passed California Privacy Rights Act expands the exception to “publicly available” information to cover information that a business has a “reasonable basis to believe is lawfully made available to the general public by the consumer or from widely distributed media”. While the California attorney general will publish clarifying regulations, this change likely means that information available on publicly available career focused sites is not “personal information.”

² Consumer is defined as “[a] natural person who is a California resident, as defined in Section 17014 of Title 18 of the California Code of Regulations, as that section read on September 1, 2017, however identified, including by any unique identifier.” Cal. Civ. Code § 1798.140(g).

³ Cal. Civ. Code § 1798.140(o)(1).

⁴ Cal. Civ. Code § 1798.140(o)(1).

⁵ The CCPA defines “publicly available” as information that is lawfully made available from federal, state, or local government records. “Publicly available” does not mean biometric information collected by a business about a consumer without the consumer's knowledge. Information is not “publicly available” if that data is used for a purpose that is not compatible with the purpose for which the data is maintained and made available in the government records or for which it is publicly maintained. “Publicly available” does not include consumer information that is deidentified or aggregate consumer information. *Id.* at § 1798.140(o)(2).

⁶ Cal. Civ. Code § 1798.140(o)(1).

The CCPA imposes various obligations depending on whether an entity functions as a “business,” “third party,” or “service provider.” A “business” is defined as a for-profit entity that collects personal information about California consumers and determines the purposes and means of processing such information, and satisfies one of the following thresholds: (i) has annual gross revenues in excess of \$25 million; (ii) annually buys, sells, or shares the personal information of at least 50,000 California consumers; or (iii) derives at least 50% of its annual revenue from selling California consumers’ personal information.⁷ Note that, similar to the broad definition in Europe’s General Data Protection Regulation, “processing” is defined in the CCPA as “any operation or set of operations that are performed on personal data or on sets of personal data, whether or not by automated means.”⁸

Any such “business” must provide consumers with access to certain information upon request, enable consumers to delete personal information that the business collected, and allow consumers to opt out of “sales” of personal information to third parties.⁹ A “third party” is a company that receives personal information from a business but is not a “service provider.”

A “service provider” is a for-profit entity “that processes information on behalf of a business and to which the business discloses a consumer’s personal information for a business purpose pursuant to a written contract.”¹⁰ The written contract must prohibit the service provider from selling the personal information and it must further restrict the service provider from “*retaining, using, or disclosing the personal information for any purpose other than for the specific purpose of performing the services specified in the contract for the business*” or as otherwise permitted by the CCPA.¹¹ The CCPA, however, does permit a service provider to use personal information received from a business for the service provider’s *own* operational purposes,¹² in addition to providing services to the disclosing business.

⁷ Cal. Civ. Code § 1798.140(v).

⁸ Cal. Civ. Code at § 1798.140(q).

⁹ The CCPA defines a “sale” to be “selling, renting, releasing, disclosing, disseminating, making available, transferring, or otherwise communicating...consumer’s personal information by the business to another business or third party for monetary or other valuable consideration.” Cal. Civ. Code at §1798.140(t)(1). There are a few exceptions that enable businesses to make disclosures of personal information that are not considered “sales.” A disclosure made to a “service provider,” for instance, is not considered a sale and is not subject to the related requirements like providing an opt-out. *Id.* at §1798.140(t)(2)(C).

¹⁰ Cal. Civ. Code at 1798.145.

¹¹ Cal. Civ. Code at 1798.140(v) (emphasis added).

¹² Operational purposes include:

- (1) Auditing related to a current interaction with the consumer and concurrent transactions, including, but not limited to, counting ad impressions to unique visitors, verifying positioning and quality of ad impressions, and auditing compliance with this specification and other standards.
- (2) Detecting security incidents; protecting against malicious, deceptive, fraudulent, or illegal activity; and prosecuting those responsible for that activity.
- (3) Debugging to identify and repair errors that impair existing intended functionality.

Importantly, data shared by a business with its service provider does not constitute a “sale.” Thus, a business is not required to offer an opt-out to personal information shared with its service provider, provided the service provider complies with CCPA-related contractual limitations in its written agreements with businesses and deletion requests that flow through those businesses.¹³ The CCPA regulations¹⁴ clarify that while a service provider may not use personal information “received either from a person or entity it services or from a consumer’s direct interaction with the service provider for the purpose of providing services to another person or entity,” it may “combine personal information received from one or more entities to which it is a service provider” to prevent fraudulent activity, or to detect data security incidents.¹⁵

An entity can be classified as both a business and a service provider depending on its relationships with entities from which it shares or receives personal information. For example, a staffing firm acts as a business when it collects personal information or has personal information collected on its behalf. A staffing firm also may act as a service provider if it receives personal information for the purposes of providing services to the entity that communicated the information.

Because different obligations will apply depending on whether the company acts as a business or service provider, it is essential that staffing firms understand how these classifications may apply to the various services they provide.

(4) Short-term, transient use, provided that the personal information is not disclosed to another third party and is not used to build a profile about a consumer or otherwise alter an individual consumer’s experience outside the current interaction, including, but not limited to, the contextual customization of ads shown as part of the same interaction.

(5) Performing services on behalf of the business or service provider, including maintaining or servicing accounts, providing customer service, processing or fulfilling orders and transactions, verifying customer information, processing payments, providing financing, providing advertising or marketing services, providing analytic services, or providing similar services on behalf of the business or service provider.

(6) Undertaking internal research for technological development and demonstration.

(7) Undertaking activities to verify or maintain the quality or safety of a service or device that is owned, manufactured, manufactured for, or controlled by the business, and to improve, upgrade, or enhance the service or device that is owned, manufactured, manufactured for, or controlled by the business.

Cal. Civ. Code at §1798.140(d)(1-7).

¹³ Cal. Civ. Code at §§ 1798.105, 1798.140.

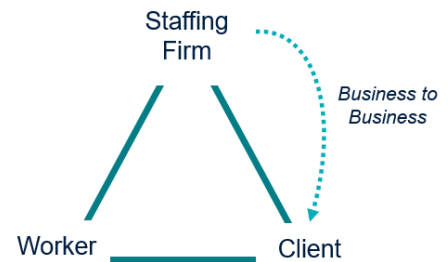
¹⁴ CCPA Regulations, Cal. Code Regs. tit. 11, §§ 999.300 – 341 (Aug. 14, 2020).

¹⁵ Cal. Code Regs. tit. 11 § 999.314(c).

II. Application to Staffing and Staffing-Related Services

a. Temporary Staffing Services

In a typical temporary staffing services arrangement, a temporary worker is employed by the staffing firm and assigned to perform work at and under the day-to-day supervision of the staffing firm's client.



The staffing firm receives and processes the personal information of temporary workers for its own purposes, such as selecting candidates for positions. The staffing firm also may share the personal information with its client, which may assess and process the information according to its own privacy policies. When staffing firms provide the personal information of temporary workers to the client, this disclosure is likely not a sale under the CCPA as the staffing firm is providing the personal information at the request of the temporary worker seeking placement for an assignment with the client. Given the relationship between the parties, each entity is likely a separate covered business under the CCPA. Importantly, each party independently determines the purposes and means of processing of the individual's personal information, which is core to determining an entity's designation under the CCPA.

The staffing firm is likely *not* a service provider to the client related to the temporary worker personal information because it does not process information on the client's behalf. Instead, the staffing firm collects and processes the information for its own purposes—not on the instructions of its client.

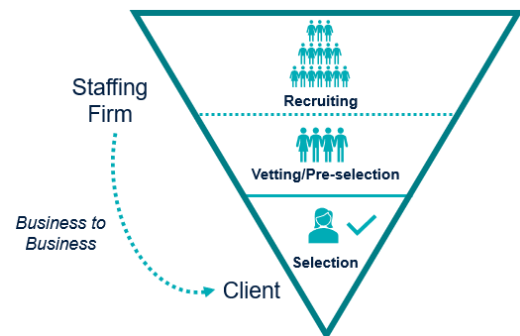
Separately, temporary workers of staffing firms may have access to personal information of the staffing firm's client. The client will determine what personal information the temporary worker will be permitted to access. Therefore, although temporary workers may have access to such information while working under the control and supervision of the client, the staffing firm itself will have no access to or knowledge of that information. Following the analogous interpretation of the GDPR's concepts of controller and processor issued by the European Data Protection Board—the governing body of European Union member state regulatory agencies—the staffing firm does not act as a business or a service provider with respect to the client's personal information accessed by assigned temporary workers. The temporary worker functions as an agent of, and subject to the direction and supervision of, the client—who acts as a controller. The staffing firm does not determine the means of processing of such information by the temporary worker. Moreover, the staffing firm does not receive access to the client's personal information or otherwise process such personal information. As a result, the staffing firm should not be considered either a business or a service provider under the CCPA.

While not directly bearing on the CCPA, the GDPR, after which the CCPA is patterned, features the concepts of a "controller" and a "processor," which are similar in nature to the concepts of a "business" and a "service provider," respectively, under the CCPA.

Under the GDPR, a controller is an entity which, alone or jointly with others, determines the purposes and means of the processing of personal data.¹⁶ A processor is an entity which processes personal data on behalf of the controller.¹⁷ According to guidance from the EDPB on the distinction between controllers and processors, temporarily employed staff are “not to be seen as processors since they will process personal data as a part of the controller’s entity.”¹⁸ Moreover, the temporarily employed staff is considered a part of the controller and not a third party insofar as they are processing personal data with the authorization of the controller.¹⁹ Under this guidance, to the extent a staffing firm is not receiving or otherwise processing personal data on its clients’ behalf, and any temporarily employed staff member is subject to the client’s (i.e., the controller’s) instructions, the staffing firm should not be considered a controller or a processor of the client’s personal data.

b. Direct Hire/Search

Direct hire/search services entail identifying, screening, and referring candidates to clients for hire and direct employment. These individuals are not hired or employed by the staffing firm.



When processing the personal information of candidates, the firm likely acts as a business under the CCPA because it determines the purpose and means of processing the information for its own vetting, selection, and presentation of candidates. When the client processes personal information of the candidates, the client also likely acts as a business entity because it determines the purpose and means of processing the information for its own selection and hiring process. The candidate information is shared through a business-to-business relationship where each entity is independently responsible for ensuring compliance with its obligations under the CCPA. When staffing firms provide the personal information of candidates to the client, this disclosure is likely not a sale under the CCPA as the staffing firm is providing the personal information at the direction of the candidate seeking employment with the client.

In providing direct hire/search services, staffing firms likely do not act as service providers because the staffing firm collects and processes the personal information of candidates for its own business purposes. In addition, in circumstances in which the

¹⁶ European Parliament and Council of European Union (2016) General Data Protection Regulation (EU) 2016/679 Art. 4.

¹⁷ General Data Protection Regulation (EU) 2016/679 Art. 4

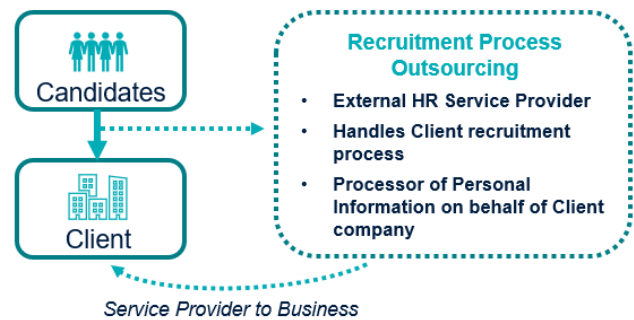
¹⁸ European Data Protection Board Guidelines 07/2020 on the concepts of controller and processor in the GDPR (Sept. 2, 2020) p. 76 (available at: edpb.europa.eu/sites/edpb/files/consultation/edpb_guidelines_202007_controllerprocessor_en.pdf).

¹⁹ European Data Protection Board Guidelines 07/2020 p. 86.

client provides the staffing firm with personal information of candidates (e.g., where an existing client employee wishes to apply for a role), the staffing firm retains its designation as a business with respect to this information.

c. RPO Services

In RPO, the client outsources all or part of its own recruitment process to the staffing firm as an external human resources service provider. In an RPO arrangement, the service provider handles the organization and coordination of the client's recruitment process on behalf of the client.

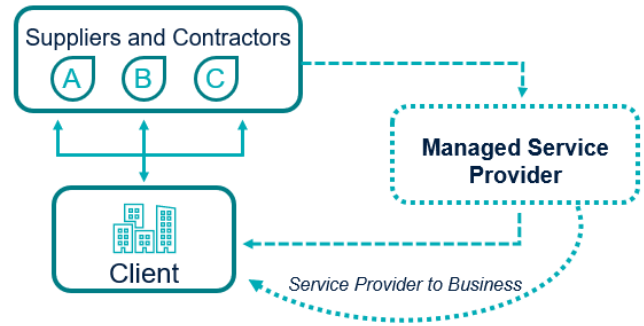


Because the RPO service provider processes personal information on behalf of the client and only on the client's direction, it arguably acts as a service provider to the business. RPO, as opposed to the direct hire/search arrangement, allows for the client to outsource all or part of its own recruitment activities to an external HR service provider. This means that the RPO service provider organizes and coordinates the client's recruitment process at the direction of the client (which acts as a "business" in this scenario). RPO service providers should expect the written contract between the client and the RPO service provider to prohibit the RPO service provider from selling, retaining, using, or disclosing the personal information for any purpose other than those specified in the parties' contract. In addition, the client may impose a contractual obligation on the RPO service provider to disclose the client's privacy policies to candidates according to the client's internal requirements. Whereas in the direct recruitment scenario staffing firms are directly involved in the recruiting, vetting, and application process of candidates for the benefit of the staffing firm for the purpose of establishing its candidate inventory of qualified, potential candidates to use across all clients, in RPO arrangements the candidate applies directly to the client company and all recruitment by the staffing firm is for the purpose of providing the client's internal recruiting function. The staffing firm, therefore, acts on behalf of the client, at the direction of the client, in the processing of personal information. For example, the client will direct what application forms or application process must be followed by job candidates and what type of screening of candidates should be performed, each of which involves the processing of personal information.

In certain circumstances, an RPO may provide to the client candidates sourced from its own database. In these cases, the RPO is acting as a business with respect to the candidate personal information in its own databases since this situation is the same as direct hire/search services (and its contracts should reflect this position accordingly).

d. MSP Services

An MSP supports clients in multiple aspects of workforce management, including the selection, alignment, and coordination of suppliers that provide workforce solutions to the client. Unlike the scenarios discussed previously, the MSP is not directly involved in the sourcing, selection, and placement of workers for or with the client. The MSP may contract with the staffing firm as purchasing agent for the client, or the client may elect to contract directly with the staffing firm. In either case, the MSP is acting on the instructions of a business and typically acts as a service provider.

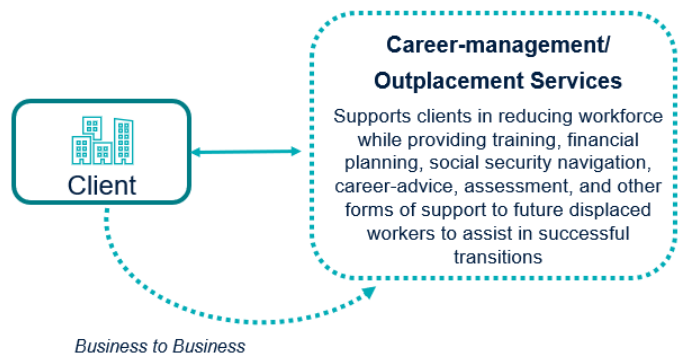


The suppliers independently determine the means and purposes of processing the information they disclose to the MSP. For example, a client that has directed the MSP to or has on its own engaged three different suppliers (A, B, and C) will direct its MSP to process information received from the suppliers. The suppliers, independent of the client, will transfer personal information to the MSP. Because the MSP processes this information on behalf of the client, it arguably acts as a service provider to the client, creating a business-to-service provider relationship. Thus, the written contract between the client and the MSP should prohibit the MSP from selling the personal information and further from retaining, using, or disclosing the personal information for any purpose other than those specified in the contract with the business.

e. Career Management/Outplacement

Career management/outplacement is a service designed to assist clients through processes such as downsizing and assist in transitioning (future) displaced workers to new positions through career advice and other tools and trainings. Workers may still be employed by the client when outplacement services are procured, and may continue once the employment contract between the client and the worker has been terminated.

In providing its career management/outplacement services to the client, the parties independently determine how to process personal information of the (future) displaced workers. Career management/outplacement services providers do not process information for the purpose of performing services on



behalf of their clients. Each party therefore acts as a “business” with respect to the personal information of the workers at issue.

In cases where career management services continue beyond the termination of the contract between the client and worker, the relationship between the client and the displaced worker no longer requires an agreement. The relationship between the career management service and the displaced worker continues as a direct relationship.

Conclusion

On Aug. 14, 2020, the California attorney general issued a Final Text of Regulations to provide guidance to businesses on how to comply with the CCPA.²⁰ While the final regulations were issued in August 2020, Jan. 1, 2020, was the CCPA’s compliance date. This means California residents had the right to start making requests under the CCPA on Jan. 1, 2020. The California attorney general’s office may now enforce any aspect of the CCPA.

For staffing firms, the exemption under the CPRA may provide businesses with some reprieve to certain aspects of the CCPA until the provisions of the CPRA become effective on Jan. 1, 2023, but notably, this temporary exemption is arguably narrow. Staffing firms, like all companies, should remain abreast of CCPA news that will help their business adapt efficiently to the new landscape as the CCPA and the regulations are finalized.

This paper is intended as information and not legal advice. Readers requiring legal or other advice regarding the matters discussed in the paper should consult with experienced legal counsel.

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²⁰ See State of California Department of Justice, California Consumer Privacy Act (CCPA), available at oag.ca.gov/privacy/ccpa.