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## Virginia's New Privacy Law Is Just Different Enough to Give Compliance Headaches

Virginia's Consumer Data Protection Act followed the California Consumer Privacy Act to become the second state-level privacy regulation to go into effect. However, with several other states actively considering similar legislation, businesses might find compliance to become an increasingly difficult target to hit due to the bevy of minute variations at play.

By Frank Ready | March 09, 2021



**(Photo: one photo/Shutterstock.com)**

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Last week, Virginia became the second U.S. state to launch its own consumer data protection legislation, known as the Consumer Data Protection Act (CDPA). While the broad strokes of the law may be very similar to the California Consumer Privacy Act (CCPA) and a host of other state privacy acts under consideration, there are enough minor differences to increase compliance burdens for impacted companies moving forward.

The basic data processing virtues codified in the CDPA should on the surface seem very familiar. "The Virginia law, they've taken a pretty similar approach to how we've seen [in] other data protection laws in the United States and abroad," said Steve Stransky, vice chair of privacy and cybersecurity at Thompson Hine. Like the CCPA, the CDPA also requires companies to give notice to consumers about how and why their data is being collected, as well as giving them the opportunity to "opt out" of having their data used to facilitate targeted marketing.

But there are still places where the Virginia law may be more narrowly tailored than its counterpart in California. For example, the CDPA protections exclude items such as employee data or other information that was collected during the HR process, which Stransky noted could make compliance "a little bit easier." California's CCPA, on the other hand, is set to terminate its employee data exemption on Jan. 1, 2023.

Other differences are more pronounced. The Virginia CDPA mandates that organizations undertake data protection and privacy impact assessments of processes involving sensitive data to determine if and where security can be enhanced. Per Stransky, that's a provision that hasn't been seen much in the United States. "I don't think it specifies how frequently [impact assessments] need to occur. It's generally going to be prior to when any processing occurs," he said.

Still, the Virginia law is just one of multiple state privacy regulations that has been under consideration since the CCPA went into effect in January 2020. Earlier this month, Oklahoma's proposed data privacy legislation was passed by the state's House of Representatives and will now be reviewed by the state Senate.

Meanwhile, the proposed New York Data Accountability and Transparency Act (NYDATA) would give (<https://www.law.com/corpcounsel/2021/02/24/privacy-compliance-is-no-longer-california-or-not-california-with-new-legislation-coming/>) residents the right to control, access and delete any information an organization has collected from them. Those principles are echoed in both the CCPA and now Virginia's CDPA as well.

But even the slightest of variations among the patchwork of U.S. privacy laws spanning the nation may force organizations to revisit their compliance posture. Amy Pimentel, a partner at McDermott Will & Emery, noted that how companies elect to respond may depend on the sophistication of their operation.

Some, for instance, may struggle to determine which state laws they are even triggering when interacting with consumers—or their data—online. "I think a huge struggle for most companies will be because they operate primarily online, especially now, it's really hard to tell where somebody's residence is unless they've got a traditional brick-and-mortar business or some kind of model that really depends on mailing or home addresses," Pimentel said.

The ability to successfully determine which state privacy laws are coming into play could become more urgent as the chasm between them grows wider and wider. Pimentel said the privacy bill that passed the Oklahoma Senate, for example, requires that consumers “opt in” to data collections, as opposed to the “opt out” approach taken by Virginia and California.

“I think that we’re going to have quite a headache on trying to figure out how to operationalize a compliance plan on any sort of consistent basis,” she said.

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