


The Cooley logo is displayed in white serif font on a solid dark blue background. The word "Cooley" is written in a classic, slightly stylized serif typeface.

Cooley

The right side of the image features an abstract background with overlapping translucent geometric shapes in shades of orange, red, and blue, creating a dynamic, crystalline effect.

State Mental Privacy Laws/Legislation May 2025

attorney advertisement

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Presenter

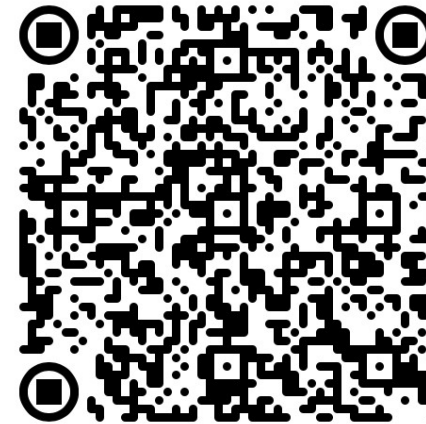


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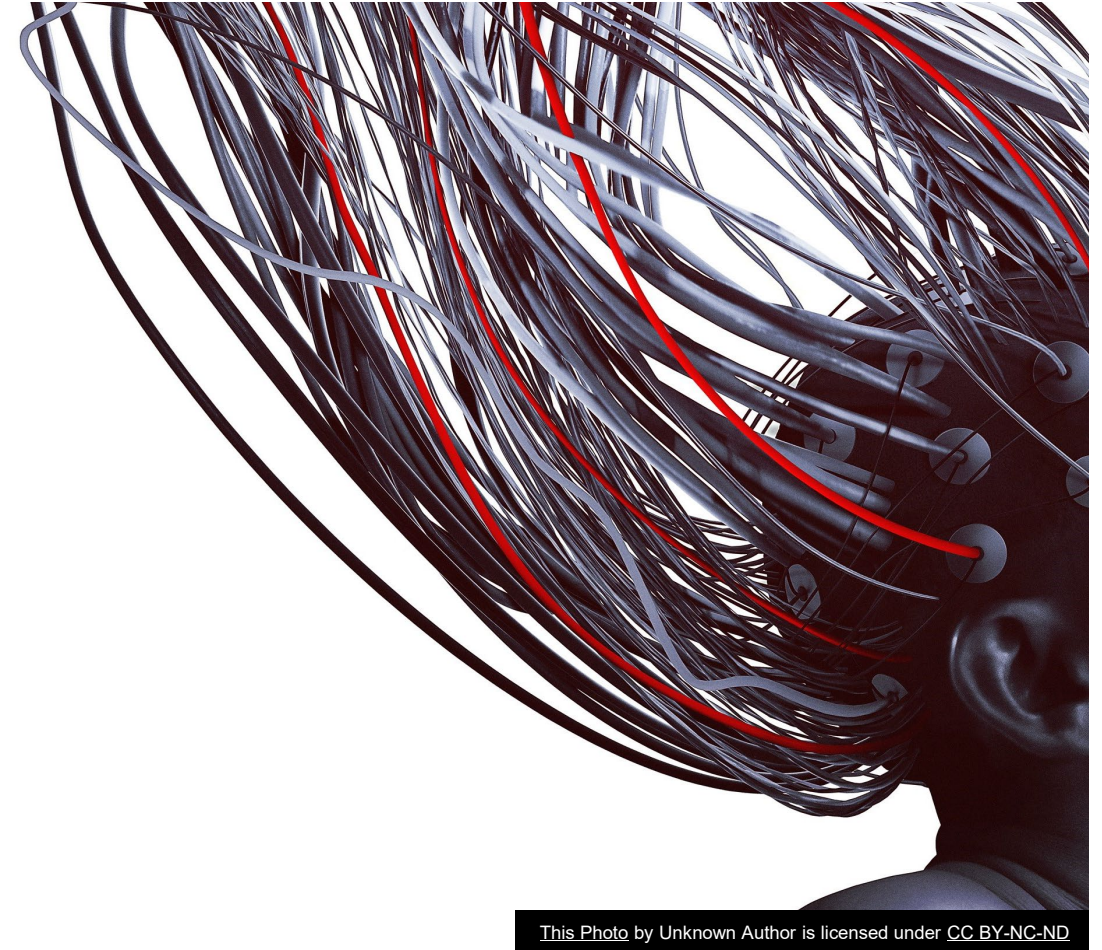
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Neurotech That Can “Read” the Mind

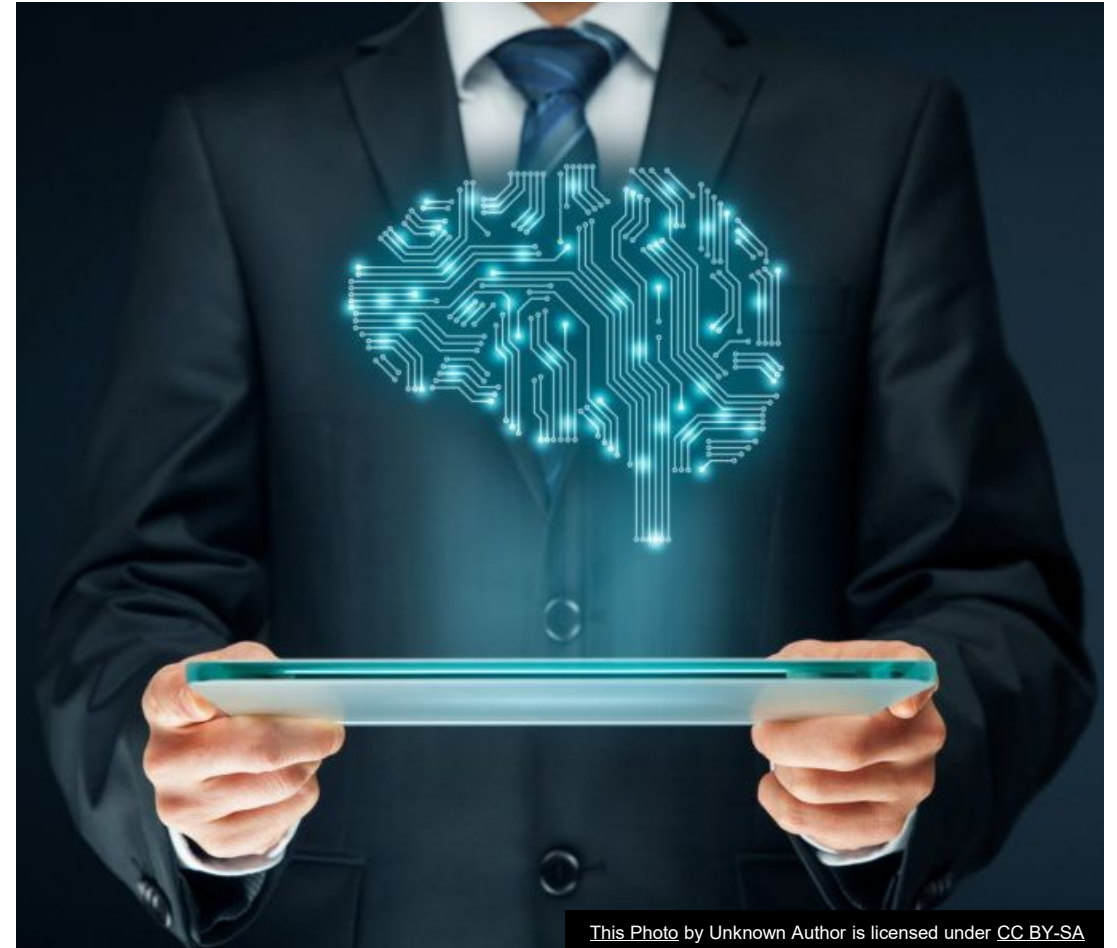
- Advancements in neurotechnology can read data from the brain, and AI can derive information about people from the data.
- Some devices are implanted in the brain with surgery.
- Some devices are wearable, such as headbands, helmets, earbuds, wristbands, and extended reality headsets.
- Some devices not only read data but also can stimulate the brain to cause an effect.



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Consumer Neurotech Privacy

- Devices detect data from central or peripheral nervous systems.
- Some devices are in R&D, and some are available for purchase now.
- More than 30 neurotech products are available for purchase by members of the public.



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Brain-Computer-Interfaces (BCIs)

- Coined in 1973, BCI refers to devices (electrodes) that are implanted into different areas of the brain, where different kinds of brain activity can be detected.
 - When implanted, the technology can detect more data from the brain than wearables.
- Various medical applications (e.g., paralysis, ALS, epilepsy).
- Mostly at the clinical trial stage; expected commercialization for medical purposes in about 5 years.

Neural Data Inferences

- Brain activities have the potential to reveal a lot about a person, such as their truthfulness, personal feelings, political leanings, propensity to spend money, sexual orientation, and risk tolerance.

Neural Data Inferences

- Information detected from the brain can be used to infer information about a person's mental states, such as their knowledge, understandings, emotions, desires, volitions and intentions.
 - Are they paying attention?
 - Are they engaged in work?
 - Do they like the product they are looking at?
 - Are they responding to this argument well?
 - Are they responding to this advertisement?
 - Have they seen this murder weapon before?

Medical Use Cases

- Help ALS and stroke patients and individuals with paralysis use their minds to control their environment, and even their limbs.
 - Keyboards
 - Cursors
 - Exoskeletons
 - Wheelchairs
- Enable a person to communicate using brain signals.
- Detect an oncoming epileptic seizure in advance.
- Treat depression and anxiety.



Business Use Cases



Direct customers to products they like (e.g., a fragrance selector)



Monitor employee engagement at work



Monitor employee attentiveness when driving a car or train, flying a plane, or on a dangerous factory floor or construction zone



Monitor student engagement in a classroom



Improve the results of advertising campaigns by detecting and adapting to viewer response



Use of brain data to uniquely identify a person

Consumer Use Cases

- Meditation training
- Sleep aid
- Managing stress, depression, anxiety, focus, and productivity
- “Neurogaming”



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Government Use Cases

- Law enforcement
 - Investigate crime by detecting a suspect's brain reaction to being shown a murder weapon
 - Detect truthfulness
- Military
 - Augmenting the physical and mental abilities of soldiers

Colorado H.B. 24-1058

- Amended the Colorado Privacy Act (“CPA”), including to add “Biological Data” to the definition of “Sensitive Data” within the meaning of the CPA
- Signed into law on April 17, 2024
- **Definitions:**
 - Neural Data: “information that is generated by the measurement of the activity of an individual’s central or peripheral nervous systems and that can be processed by or with the assistance of a device.”
 - Biological Data: “data generated by technical processing, measurement, or analysis of an individual’s biological, genetic, biochemical, physiological, or neural properties, compositions, or activities of an individual’s body or bodily functions, which data is used or intended to be used, singly or in combination with other personal data for identification purposes. ‘Biological Data’ includes ‘Neural Data’.”

Colorado H.B. 24-1058

A closer look:

- Biological Data: “data generated by technical processing, measurement, or analysis of an individual’s biological, genetic, biochemical, physiological, or neural properties, compositions, or activities of an individual’s body or bodily functions, ***which data is used or intended to be used, singly or in combination with other personal data for identification purposes***. ‘Biological Data’ includes ‘Neural Data’.”
- Ambiguous whether Neural Data is covered if it is not used for identification purposes.
- Numerous researchers are creating ways to use brain data to authenticate individuals.

Colorado Requirements for Sensitive Data

Post a privacy notice informing individuals about the neural data they collect and their use, retention and disclosure of this information, including each purpose for which each kind of personal information is used and the kinds of third parties they share it with.

Obtain clear, freely given, informed, specific, affirmative and unambiguous consent from an individual before collecting or using their neural data, which such consent must include a disclosure re the names of any third parties to which the information is sold.

Consent wording must inform individuals of the names of any third parties to which the business sells this information.

Refresh each individual's consent every 24 months, absent having interacted with the individual in the meantime, or provide a user-controlled interface for the individual to manage their opt-out preferences at any time.

Refrain from using dark patterns when obtaining consent from individuals.

Delete or de-identify this information when it is no longer necessary for the purpose for which it was collected, and in any event when an individual has withdrawn consent for its use.

Inform individuals of the purposes for which it uses this data and only collect such information that is reasonably necessary to fulfill, or that is compatible with, those purposes, absent additional consent.

Afford individuals the right and ability to access, correct and delete this information in the business's possession or control, and to opt out of the sale of this information or use for targeted advertising or to make important automated decisions.

Conduct data protection assessments addressing the collection, use, retention and disclosure of this information.

Do not use this data for unlawful discrimination.

Take reasonable measures to secure this data.

Colorado Practice Tips

- Colorado Privacy Act + Regulations + H.B. 24-1058 → must be read together.
- The Colorado Privacy Act's requirements biometric data, which includes biological data, apply to businesses *even if they do not otherwise meet the applicability requirements of the Colorado Privacy Act.*

California S.B. 1223

- Amended the CCPA, including to add “Neural Data” to the definition of “Sensitive Personal Information” within the meaning of the CCPA
- Neural Data: “information that is generated by measuring the activity of a consumer’s central or peripheral nervous system, and that is not inferred from nonneural information.”



California Requirements for Sensitive Personal Information

- Similar to Colorado's Privacy Act; however, notable differences include:
 - More granular consumer "right to know"
 - "Notice At Collection" of data
 - Rather than a requirement that individuals opt *in* to the processing of their SPI, the CCPA instead provides a right to opt *out* of the processing of such information other than for specified purposes.
 - However, consumers do *not* have the right to opt-out of the use and disclosure of SPI if the SPI is not used by the business to infer characteristics about them.
 - Privacy policy must state retention period or criteria for retention period of SPI.

California Practice Tips

- CCPA + Regulations + S.B. 1223 → must be read together.
- California's law applies to employee data, whereas the Colorado Privacy Act exempts employee data.

Montana's Senate Bill 163

- Montana was the third state to specifically protect neural data.
- Law added “neural data” to Montana’s Genetic Information Privacy Act.
- Neural data = information that is generated by the measurement of the activity of an individual’s central or peripheral nervous system, and that can be processed by or with the assistance of a device.
- Covers neural data of Montana residents.

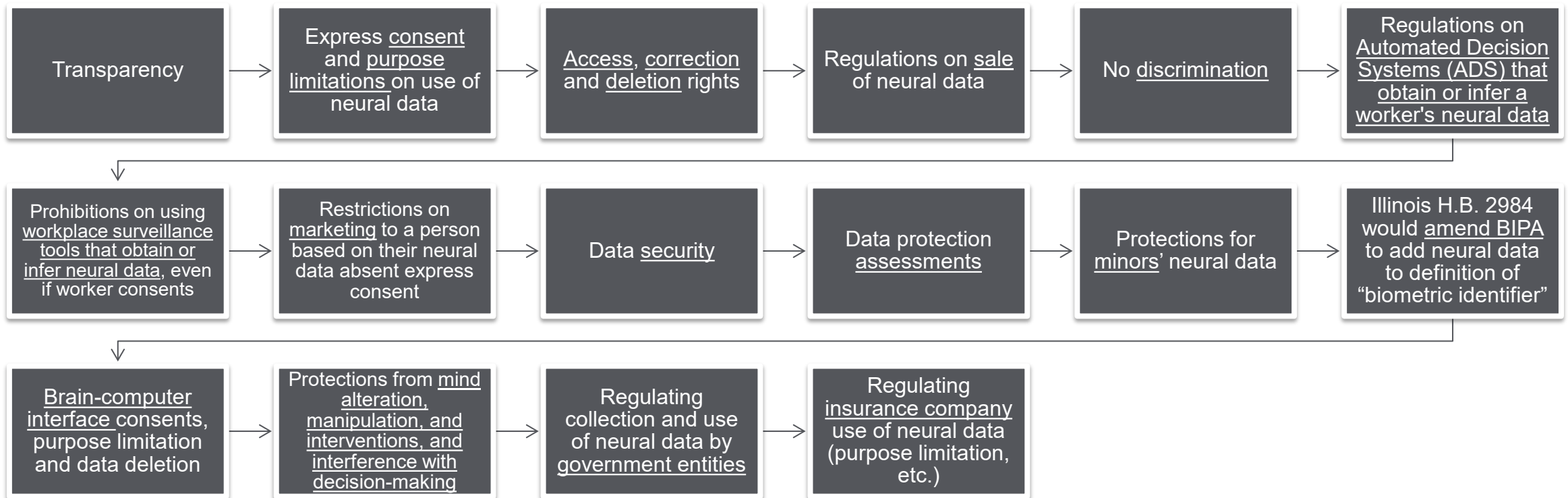
Montana Requirements on entities that handle neural data:

- Two different privacy policies.
 - One: A high-level privacy policy overview with basic essential information about the entity's collection, use and disclosure of neural data.
 - Two: A prominent publicly available privacy notice that includes, at least, information about the entity's data collection, consent, use, access, disclosure, transfer, security, retention and deletion practices for neural data.
- Obtain initial express consent for the collection, use or disclosure of a consumer's neural data. Such consent must specify how the entity may share the neural data.
- Obtain a consumer's separate express consent to transfer or disclose a consumer's neural data to any third party other than the entity's processors. This consent must include the name of the third party to which the neural data is transferred or disclosed.
- Obtain a consumer's separate express consent to use neural data beyond the primary purpose and inherent contextual uses.
- Obtain a consumer's informed express consent to transfer or disclose a consumer's neural data to third persons for research purposes.
- Obtain a consumer's express consent to market to the consumer based on the consumer's neural data.

Montana Requirements on entities that handle neural data:

- Obtain a consumer's express consent to sell the consumer's neural data in exchange for valuable consideration.
- Comply with applicable law requiring valid legal process before disclosing neural data to law enforcement or any other governmental agency, absent a consumer's express consent.
- Develop, implement and maintain a comprehensive security program to protect consumers' neural data against unauthorized access, use and disclosure.
- Provide a process for consumers to access and delete their neural data, and revoke any consent provided by the consumer with regard to their neural data.
- Neural data collected in Montana may not be stored within the territorial boundaries of any country currently sanctioned by the US or designated as a foreign adversary of the US.
- Neural data collected in Montana may only be transferred or stored outside of the US with the consent of the consumer.
- Entities may not disclose a consumer's neural data to any entity offering health insurance, life insurance or long-term care insurance, or to the consumer's employer, absent the consumer's express consent.

Fourteen Other Mental Privacy State Bills Pending



Cognitive Biometrics

- There is momentum for folding into these laws additional cognitive biometrics that are not strictly neural data, but can also be used to infer information about a person's mental states, such as heart rate and eye movement.



Thank You!

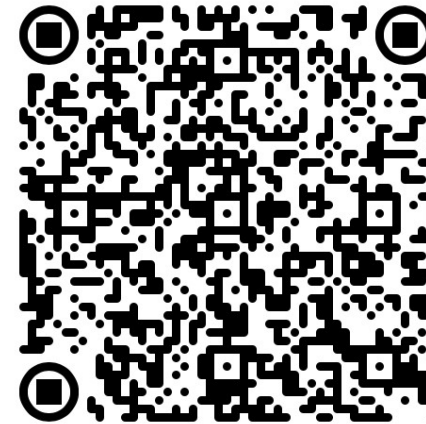


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