

Following California's Lead, Nevada Privacy Law Gives Consumers Right to Opt Out

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On May 29, Nevada passed a privacy law giving consumers the right to opt out of the sale of their personal information. The law, SB 220, contains provisions similar to the California Consumer Privacy Act (CCPA)'s new requirements to allow consumers to opt out of the sale of their personal information, although the Nevada law is much narrower. In contrast to European laws (such as the General Data Protection Regulation) that require businesses to obtain consumers' opt-in consent to specific uses of their personal information, the Nevada law continues the American trend towards protecting privacy by allowing consumers to opt out of certain uses of their personal information.

SB 220 takes effect on October 1, 2019 – three months earlier than the CCPA's effective date. While SB 220 exempts several categories of companies (described below), companies covered by both the CCPA and SB 220 will need to accelerate their efforts to comply with the CCPA's sale opt-out provisions or take separate steps to comply with SB 220.

Summary of SB 220's provisions and scope

SB 220 will allow "consumers" to direct "operators" "not to make any sale of any covered information the operator has collected or will collect about the consumer." The scope of this provision is circumscribed by four key terms: "consumer," "operator," "covered information" and "sale."

"Consumer." Under existing Nevada privacy law, a "consumer" is anyone who "seeks or acquires, by purchase or lease, any good, service, money or credit for personal, family or household purposes." Nev. Rev. Stat. § 603A.310. SB 220 does not change this definition. Unlike the CCPA, however, the Nevada law does not apply to employee information¹ or business contact information (e.g., a work email address that identifies a person's name and employer, like jane.doe@companyname.com).

"Operator." Existing Nevada privacy law defines an "operator" as any person who:

- (a) Owns or operates an Internet website or online service for commercial purposes
- (b) Collects and maintains covered information from consumers who reside in [Nevada] and use or visit the Internet website or online service
- (c) Purposefully directs its activities toward [Nevada], consummates some transaction with [Nevada] or a resident thereof or purposefully avails itself of the privilege of conducting activities in [Nevada]

Nev. Rev. Stat. § 603A.330(1). It does not include third parties that operate, host or manage a website or service, or process information for such a website or service, such as web hosts or other cloud infrastructure providers. Nev. Rev. Stat. § 603A.330(2).

SB 220 adds exceptions to the definition of "operator." In particular, it excludes financial institutions subject to the Gramm-Leach-Bliley Act, entities subject to the Health Insurance Portability and Accountability Act and manufacturers and servicers of motor vehicles. SB 220 § 1.6(2).

By contrast, the CCPA applies to a "business" that has (1) annual gross revenues above \$25,000,000; (2) handles data of more than 50,000 consumers, households or devices; or (3) derives at least 50% of its revenue from selling personal information. AB 375 (amending Cal. Civ. Code § 1798.140(c)). The range of covered businesses under the CCPA is narrower than the range of operators covered under SB 220.

"Covered information." "Covered information" is limited to "personally identifiable information" – including first

and last names, physical addresses, email addresses, phone numbers, Social Security Numbers, any "identifier that allows a specific person to be contacted either physically or online" and any other information that "makes the information personally identifiable." Nev. Rev. Stat. § 603A.320.

This is narrower than the CCPA definition of "personal information," which covers "information that identifies, relates to, describes, is capable of being associated with, or could reasonably be linked, directly or indirectly, with a particular consumer or household." AB 375 (amending Cal. Civ. Code § 1798.140(o)(1)). So, for example, under the CCPA, an IP address shared by a household might be considered "personal information." Under SB 220, however, "covered information" is limited to information that personally identifies a specific consumer.

"Sale." SB 220 defines sale to mean "the exchange of covered information for monetary consideration by the operator to a person for the person to license or sell the covered information to additional persons." This, too, is narrower than the CCPA definition, which covers exchanges for non-monetary consideration. AB 375 (amending Cal. Civ. Code § 1798.140(t)(1)) (defining "sale" to include transfers "for monetary or other valuable consideration").

SB 220 also carves out several exceptions to the definition of "sale." It does not include disclosure:

- To a person who processes information on the operator's behalf
- To a person with whom the consumer has a direct relationship for the purposes of providing a product or service requested by the consumer
- For purposes that are consistent with the consumer's reasonable expectations, considering the context in which the consumer provided the covered information to the operator
- To the operator's affiliates
- As an asset as part of a merger, acquisition, bankruptcy, or similar transaction

Overall, SB 220 imposes significant new restrictions on the ability of companies to sell information about their consumers. However, these restrictions are substantially narrower than the requirements of the CCPA.

Compliance guidelines for companies

Companies must develop compliance strategies on a case-by-case basis. In general, however, the following guidelines will likely apply to companies that fall within SB 220's scope:

- **Provide notice of information collection practices.** Each operator must continue to comply with the existing requirement to post a notice that:
 - Identifies the categories of information it collects and the categories of third parties with which it shares information
 - Identifies the process for users to review and request changes to their information
 - Describes how it will notify users of changes to the notice
 - Discloses whether third parties may collect information about a user's activities across the web
 - States the effective date of the notice

Nev. Rev. Stat. § 603A.340. However, there is no requirement to provide notice to consumers of their right to opt out of the sale of their information. This stands in contrast to the CCPA, which requires companies to provide a "clear and conspicuous" link on their homepage titled "Do Not Sell My Personal Information." AB 375 (amending Cal. Civ. Code § 1798.135(a)(1)).

- **Post an address where consumers can submit opt-out requests.** Each operator must "establish a designated request address" through which consumers may submit opt-out requests. A "designated request address" is "an electronic mail address, toll-free telephone number or Internet website."
- **Verify consumers' requests.** The bill does not specify how an operator should verify the authenticity of a consumer's requests. Rather, an operator must "reasonably verify the authenticity of the request and the identity of the consumer using commercially reasonable means."
- **Act on consumers' requests.** An operator has 60 days to respond to a request (plus a 30-day extension if "reasonably necessary" and with notice to the consumer). The operator must then "not make any sale of any covered information the operator has collected or will collect about the consumer." This rule applies even if the operator is not currently selling the

consumer's information. The operator must record the request and avoid selling the consumer's information at any point in the future.

Operators should be prepared to respond to consumers' requests when SB 220 goes into effect on October 1, 2019.

Enforcement

Like the CCPA's sale opt-out provisions, SB 220 does not provide for a private right of action.² Enforcement authority rests with the Nevada attorney general, who can bring legal action seeking injunctive relief or civil penalties of up to \$5,000 per violation.

Differences between SB 220 and the CCPA's sale opt-out provisions

The chart below summarizes the key differences between SB 220 and the CCPA regarding consumers' right to opt out of the sale of their information.

	SB 220	CCPA
Scope of covered information	Limited to personally identifiable information about a particular consumer	"[I]nformation that identifies, relates to, describes, is capable of being associated with, or could reasonably be linked, directly or indirectly, with a particular consumer or household"
Scope of sale	Limited to exchanges for monetary consideration	Includes exchanges for any type of valuable consideration
Application to employees and business contacts	Excludes employee information and business contact information	Includes employee information ³ and business contact information
Notice provisions	No requirement to provide notice to consumers of their right to opt out of the sale of their information	Website must post a "clear and conspicuous" link on its homepage titled "Do Not Sell My Personal Information"
Exclusion from definition of "sale"	Disclosure of information for purposes that are consistent with the consumer's reasonable expectations	No similar exclusion

	SB 220	CCPA
Enforcement	No private right of action; attorney general can seek injunctive relief or civil penalties of up to \$5,000 per violation	Limited private right of action for data breaches; attorney general can seek civil penalties of up to \$7,500 per violation
Effective date	October 1, 2019	January 1, 2020

Conclusion

In the absence of uniform federal legislation, SB 220 is the latest move in a trend towards state-by-state intervention in consumer privacy. For companies covered by both the CCPA and SB 220, there will be overlap between the measures that must be implemented to comply with each statute, but the deadline for compliance has advanced. Companies should be ready to respond to Nevada consumers' opt-out requests by October 1, 2019, and they should prepare to navigate an increasingly complicated patchwork of state privacy laws.

Notes

1. On May 29, 2019, the California Assembly passed a bill, AB 25, that if enacted would exclude employees from the definition of "consumers" protected under the CCPA.
2. The CCPA contains a limited private right of action for consumers whose information was exposed in a data breach. [AB 375](#) (amending Cal. Civ. Code § 1798.150).
3. As noted above, a pending amendment would exclude employee information.

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