



National Payroll Reporting Consortium

**AMERICAN
PAYROLL
ASSOCIATION**

**California Consumer Privacy Act Public Forum
February 5, 2019**

**Testimony of
The National Payroll Reporting Consortium¹ and
The American Payroll Association**

Privacy and protection of personal data are and always have been of paramount concern to payroll administrators and payroll service providers. We applaud the objective of the legislation and the efforts of policymakers to establish appropriate and balanced legislation that effectively protects consumers without unduly impeding the critical functioning of appropriately protected business activity. We appreciate the initiative of the Attorney General's office in seeking public input to inform the rulemaking process related to the California Consumer Privacy Act (CCPA), and the opportunity to offer comments today. Our comments are intended to highlight ambiguous and/or overly broad definitions and terms in the law; to point out a number of practical implications and to seek clarity in related regulations.

The Attorney General's website summarizes the Act as granting consumers:

"...new rights with respect to the collection of their personal information: a consumer can request that a business disclose what information it collects about the consumer, where it collected the information from, and with whom it has shared the information. Consumers may also request that their personal information be deleted and can opt-out of the sale of their personal information."

Thus, the CCPA creates new rights for California residents to access their personal information collected and maintained by the business; to have such information deleted and to opt out of the sale of their personal information.

¹ The National Payroll Reporting Consortium ("NPRC") is a non-profit trade association whose member organizations provide payroll processing and related services to nearly two million U.S. employers, representing over 36% of the private sector workforce.

The American Payroll Association (APA) is a nonprofit professional association representing more than 20,000 payroll professionals across the United States. APA's primary mission is to educate payroll professionals on the best practices associated with paying workers while complying with applicable laws and regulations. APA works with government to find ways to help employers with compliance, while minimizing the administrative burden on government, employers, and individual workers.

Our overarching concern is that the broad and ambiguous definitions of “sale,” “personal information,” and “consumer” may result in an inconsistent implementation of the law, which in turn could *decrease* privacy protections for individuals such as employees. For example, even a cursory internet search shows that there is widespread confusion and inconsistent analyses over whether employment-related records are regulated by the CCPA, with some commentators arguing that the law does not apply to employment-related records or that the law is superfluous due to conflicts with existing legal obligations, which may result in inconsistent application of privacy protections.

The Act does not apply where it would prevent compliance with federal or state law, and directs the Attorney General’s office to adopt regulations, including “establishing any exceptions necessary to comply with state or federal law.”

We recommend that any regulations clarify the definitions noted above, and establish any exceptions necessary to eliminate ambiguity.

Right to opt-out of the sale of personal information

The right to opt out of any “sale” (transfer) could prevent the normal functioning of routine business operations, including employer payroll operations. The CCPA defines “sale” to include any *data transfer* “for monetary or other valuable consideration.”

The right to “opt out” under the CCPA is triggered by a broad definition of “sale” that does not only apply to contemporaneous exchanges of data or money, but includes any data transfer “for monetary or other valuable consideration.” The definition of “sale” is ambiguous. It is not clear whether the monetary consideration must be received for the actual purchase of personal data, as opposed to another business arrangement where the data is not the subject of the exchange. Without additional clarity, the term may include many types of routine data sharing for businesses; for example, business arrangements where personal information is not the subject of the exchange, transfers to third parties to prevent fraud or other criminal activity to preserve the effectiveness of anti-fraud, sanctions, and money-laundering screening and identity verification functions and services; and benchmarking activities that provides invaluable analysis to businesses, including employers.

The breadth of these definitions appear to confer a right for an employee to opt out of a transfer of critical business-related information, which could be problematic and prevent the normal functioning of routine employer payroll operations.

Right to Access

While not in conflict with the Act, access to personal information in the employment context is already established in California law, which provides that employees have the right to access their personnel files and records, including payroll records².

The definition of “personal information” is ambiguous in that it does not have to identify a “consumer”, but could relate to, or be capable of being linked to, a particular consumer *or household*. The inclusion of “household” could, for example, be read to allow a spouse to gain access to

² Labor Code Sections 1198.5, 226(b)

employee records, even when that person is not entitled to do so under current law. Even the definition of “consumer” is very broad by not applying only to actual “consumers” who have purchased or received services directly from a covered business.

Right to request that personal information be deleted

The right to have personal employment records deleted would conflict with many federal and state laws. For example, the California Labor Code requires employers to maintain detailed records reflecting virtually all activity with respect to employment, from hiring, enrollment in employee benefits such as health insurance and retirement savings plans; documentation of hours worked, wages earned, deductions from pay, and many other related matters. It would be very problematic if any employer was led to actually delete personal, wage and/or tax records under the CCPA.

Similarly, federal and state tax laws require employers to maintain detailed records of every wage payment, amounts withheld, and periodic summary reports of earnings, such as new hire reports and quarterly wage reports filed with the Employment Development Department; Forms W-2 filed with the Social Security Administration; IRS Forms 941, which report aggregate employment tax liabilities, and so on. Employers must be able to substantiate all such activity, and therefore any request for deletion of employment records would be substantially limited to records not required by law.

These data processing activities are all necessary for payroll and employment services administration, and any changes, such as employees having rights to opt out of fraud prevention services or delete employment-related records, may conflict with employer responsibilities to comply with the applicable laws and to protect their workforce. For example, assuming that the current form of the CCPA does encompass employee related data, an employee determined to have engaged in sexual harassment could request the opt-out from effective screening mechanisms or the deletion of critical employment records. Actual findings of harassment should be preserved in performance records.

The Attorney General is given broad authority to write regulations to further the purposes of the CCPA. We believe that broad and ambiguous definitions may result in an inconsistent implementation of the law, which in turn could defeat its purpose. We urge the Attorney General’s office to clarify these points during rulemaking.

Again, we support California’s commitment to protecting the privacy and security of personal data, and we appreciate the opportunity to offer comments today.

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