2024 Privacy Updates: What Nonprofits Need to Know About Privacy Laws Now

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Agenda

- *State Privacy Laws: State of the States*
- *Colorado Privacy Act: A Case Study*
- *Capitalizing on Nonprofit Exemptions*
- *Litigation Risks Arising from New Applications of Old Privacy Laws*

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State Privacy Laws: State of the States

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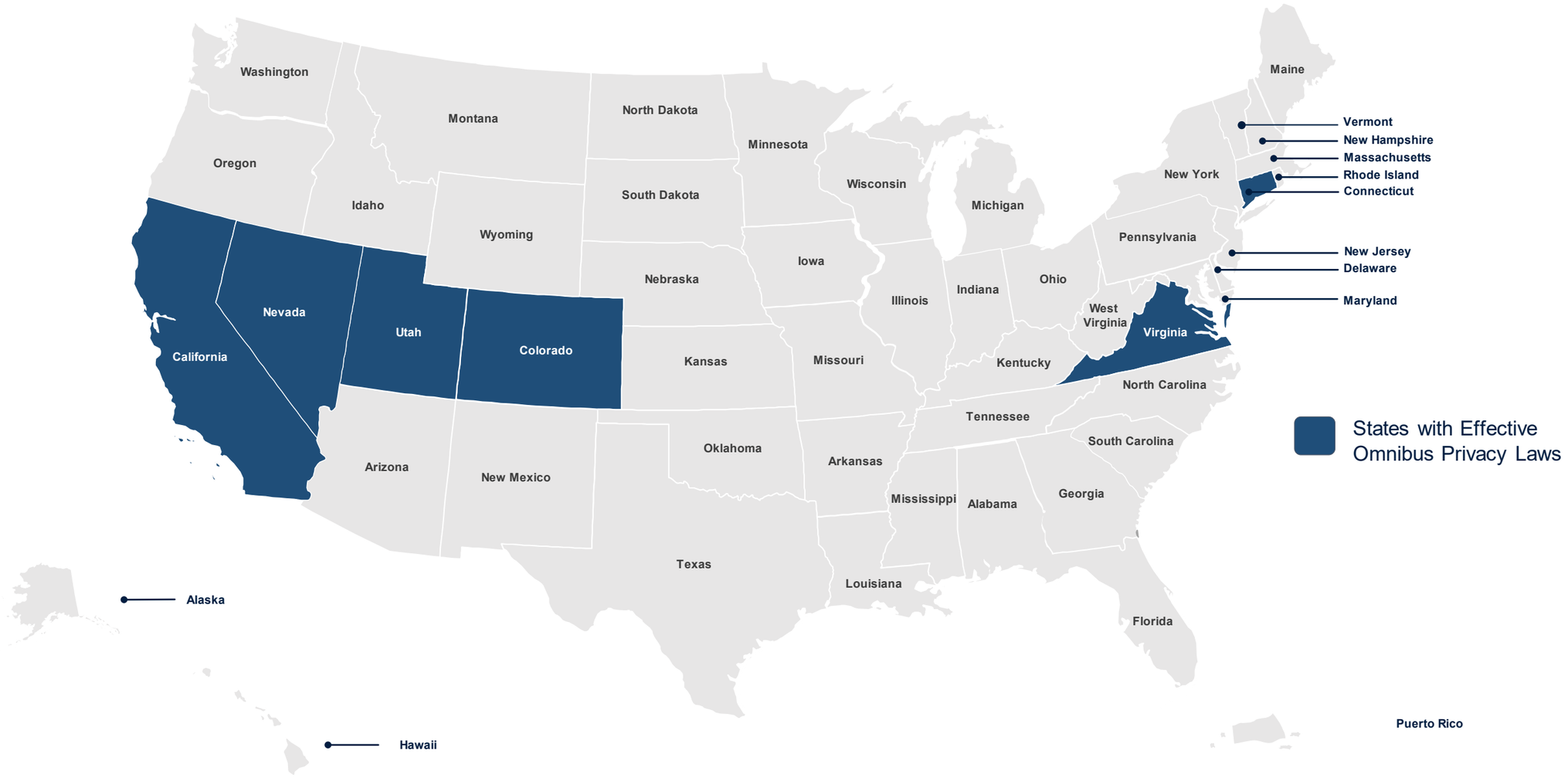
U.S. Privacy Landscape – One Year Ago



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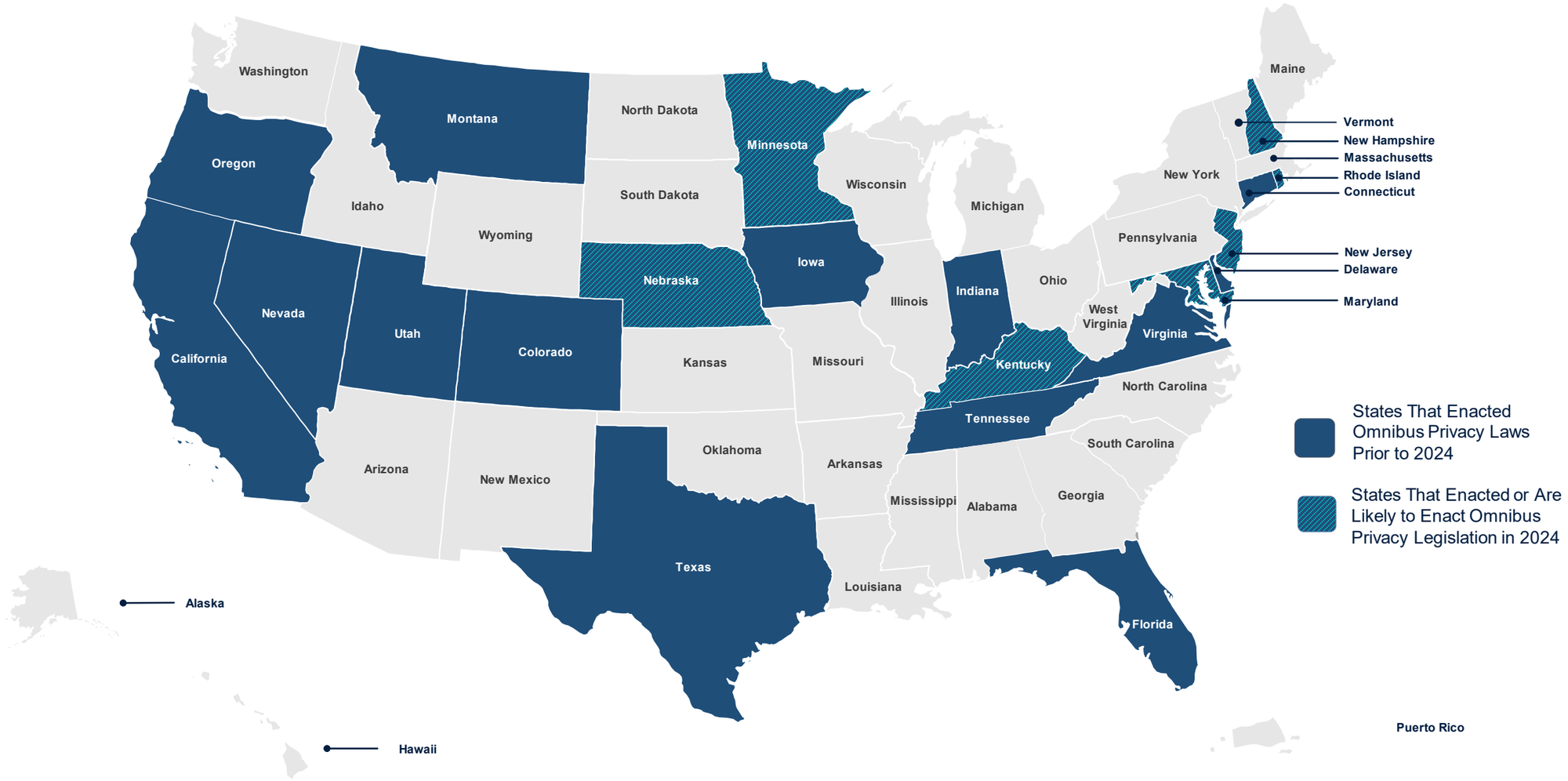
U.S. Privacy Landscape – Now



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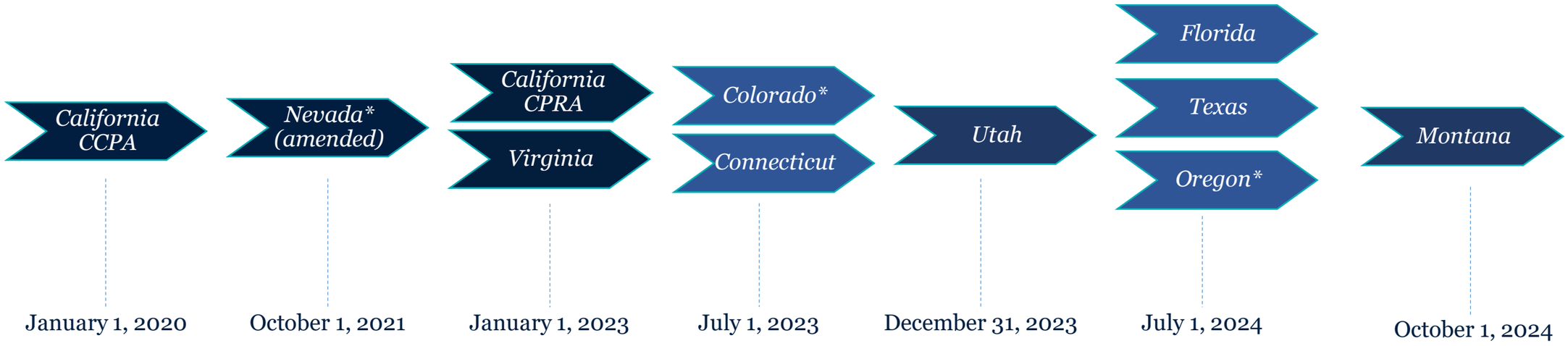
Timeline

State Privacy Laws: Currently in Effect



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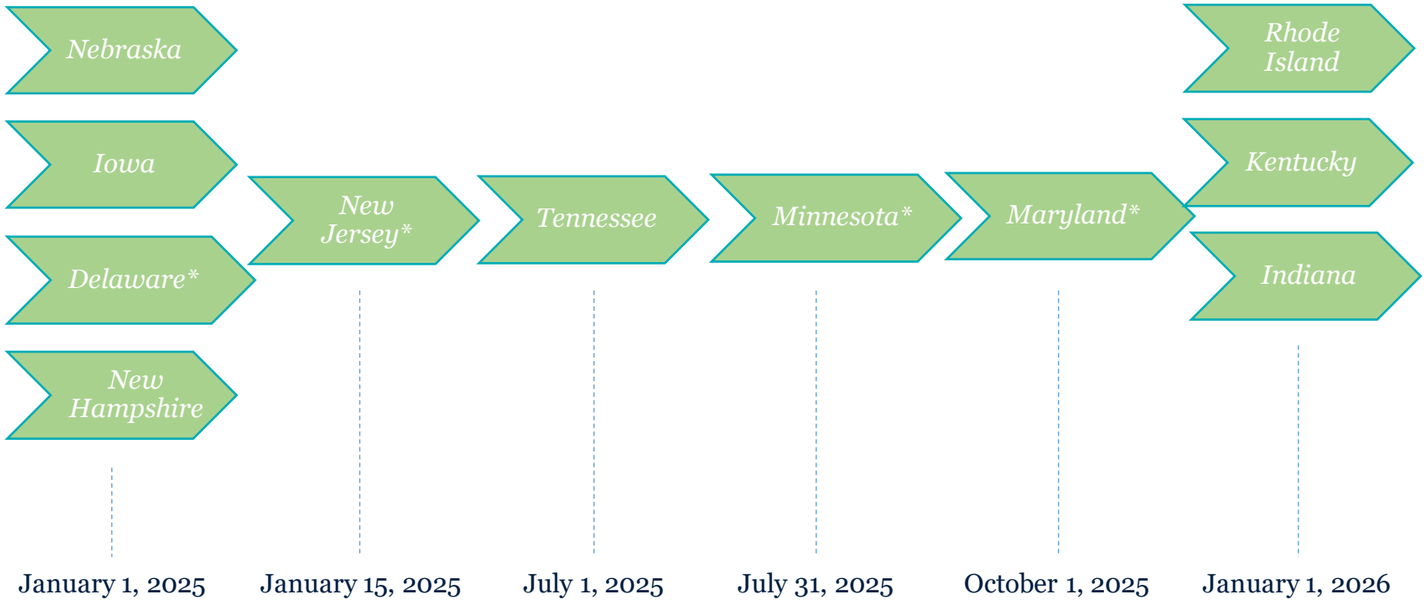
Timeline

Laws Coming into Effect Soon



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State Laws That Do Not Apply to Nonprofits

- **Most state consumer privacy laws** generally **exempt nonprofits** from their requirements:
  - California*
  - Connecticut
  - Florida
  - Indiana
  - Iowa
  - Kentucky
  - Montana
  - Nebraska
  - New Hampshire
  - Rhode Island
  - Tennessee
  - Texas
  - Utah
  - Virginia*

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State Laws That May Apply to Particular Nonprofits

- **Virginia** – Virginia Consumer Data Privacy Act (VCDPA)
  - VCDPA **exempts nonprofits organized under Virginia law, 501(c)(3), (6), and (12) organizations**, **political organizations**, and **subsidiaries or affiliates of utility providers**.
  - However, the VCDPA **does not exempt all 501(c)(4) organizations** (certain insurers providing information to authorized law enforcement are exempt).

- **California** – California Consumer Privacy Act (CCPA)
  - The CCPA directly **regulates "businesses."** A **nonprofit generally does not qualify** as a business **but may if another business "controls" the nonprofit** and the two entities **share personal information** and **"common branding**."
  - A nonprofit **may also qualify as a "service provider," "contractor," or "third party**" under the CCPA and be subject to certain contractual requirements or other requirements to assist a business in its compliance with the law.

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State Laws That May Apply Broadly to Nonprofits

- **Seven states** with consumer privacy laws **do not exempt nonprofits**.
  - Colorado
  - Delaware
  - Minnesota
  - Maryland
  - Nevada
  - New Jersey
  - Oregon

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Statutory Thresholds

If a nonprofit **meets the following thresholds**, it **may be subject to the respective state's consumer privacy law.**

Threshold Category	Colorado	Delaware	Maryland	Minnesota	Nevada	New Jersey	Oregon
1. Operating in the state	Conduct business or target CO residents with products/services	Conduct business or target DE residents with products/services	Conduct business or target MD residents with products/services	Conduct business or target MN residents with products/services	Fulfill 3 criteria to qualify as an "operator."	Conduct business or target NJ residents with products/services	Conduct business or target OR residents with products/services
2. Controls or processes the personal information of some number of consumers	100,000 consumers	35,000 consumers	35,000 consumers	100,000 consumers	N/A	100,000 consumers	100,000 consumers
3. Controls or processes consumer information plus percentage revenue from selling personal data	25,000 consumers + any revenue or discount from selling personal data	10,000 consumers + more than 20%	10,000 consumers + more than 20%	25, 000 consumers + more than 25%	N/A	25,000 consumers + any revenue or discount from selling personal data	25,000 consumers + more than 25%
Analysis	If 1 and either 2 or 3 are met, the law applies	If 1 and either 2 or 3 are met, the law applies	If 1 and either 2 or 3 are met, the law applies	If 1 and either 2 or 3 are met, the law applies	If 1 is met, the law applies	If 1 and either 2 or 3 are met, the law applies	If 1 and either 2 or 3 are met, the law applies

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The Colorado Privacy Act (CPA): A Case Study

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How Does CPA Apply to Organizations?

- The CPA is a **rights-based** law that gives consumers **rights to access**, **port**, **correct**, **delete, and opt-out of processing of** personal data.
  - **Personal data** is **information that is linked or linkable** to an identified or identifiable individual.
- If a nonprofit directs or controls the processing of personal data, the organization may be a **controller** and be **directly regulated** by the CPA.
- If a nonprofit instead processes personal data on behalf of another entity, the organization may be a **processor** subject to the CPA and **largely regulated through contractual terms**.
- The CPA **does not apply to employment records, job applicants, or business-to-business contacts**.

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Consumer Rights: Access, Correction, Portability, and Deletion

- For an authenticated **access request**, a controller must provide the personal data about the consumer that the nonprofit processes or maintains.
  - To the extent technically feasible, an organization must **provide the consumer with data the organization processes** about the consumer in a **format that could be transferred** to and readily used by another entity.

- For an authenticated **correction request**, a controller must correct inaccurate information about the individual.

- For an authenticated **deletion request**, a controller must delete personal data about the requester, subject to certain exempted purposes for retaining the data.

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Consumer Rights: Opt-Outs from Processing

- The CPA gives consumers **the right to opt out of the processing** of their personal data for the purposes of (A) **targeted advertising**, (B) the **sale** of personal data, or (C) **profiling** in furtherance of decisions that produce legal or similarly significant effects concerning a consumer.
  - "**Targeted advertising**" means **displaying to a consumer an advertisement** that is **selected based on personal data** obtained or inferred over time from the consumer's activities across nonaffiliated websites, applications, or online services to predict consumer preferences or interests.
  - "**Sale**" means exchanging personal data **for monetary or other valuable consideration**.
  - "**Profiling**" means any form of **automated processing of personal data to evaluate, analyze, or predict personal aspects** concerning an identified or identifiable individual's economic situation, health, personal preferences, interests, reliability, behavior, location, or movements.

- Businesses must provide a "**clear and conspicuous" method** to consumers **to exercise the right to opt out** of the sale of personal data or targeted advertising.

- Controllers that process personal data for targeted advertising or sales must **allow Colorado consumers to opt out** of such processing **through a user-selected universal opt-out mechanism**.

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Consumer Rights: Appeal

- If an organization **denies or refuses to act on** a consumer's rights request, the CPA requires the organization to explain the denial and provide **instructions for how to appeal** the decision.
- Upon receiving an appeal, an organization has **45 days to reply, with a possible 60-day extension** where reasonably necessary.
- A response to an appeal must **explain the decision** to approve, partially approve, or deny the appeal.
- For all appeals regardless of disposition, the response must **notify the appellant of their ability to contact the Colorado attorney general** with concerns.

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Sensitive Data

- A nonprofit **must not process** a consumer's **"sensitive data" without** first obtaining the consumer's **consent**.
  - Personal data revealing:
    - A mental or physical health condition or diagnosis
    - Sex life or sexual orientation
    - Racial or ethnic origin
    - Religious beliefs
    - Citizenship or citizenship status
  - Genetic or biometric data that may be processed to uniquely identify an individual
  - Sensitive data inferences, e.g., sensitive information inferred from
    - Precise geolocation data (like presence at a religious building)
    - Web browsing data, alone or in combination
- "**Consent**" means a **clear, affirmative act** signifying a consumer's freely given, specific, informed, and unambiguous agreement.

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Transparency Requirements

- The CPA **requires certain notices**, which may appear in an organization's **privacy policy** and include the following information:
  - Categories of personal data collected or processed
  - Categories of third-party recipients of personal data
  - Purposes for processing
  - How and where consumers may exercise their rights
  - If applicable, the fact that an organization sells personal data or processes it for targeted advertising plus how a consumer can opt out.

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Data Protection Assessments

- The CPA requires a controller to conduct a **data protection assessment** in the following instances:
  - Processing personal data for **targeted advertising**;
  - **Selling** personal data;
  - Processing personal data for **profiling with a reasonably expected risk of substantial injury** (including unfair or deceptive treatment; unlawful disparate impact; financial, physical, or reputational injury; or a reasonably offensive privacy invasion);
  - Processing sensitive data; and/or
  - Processing that otherwise presents a heightened risk of harm to individuals.

- Assessment goals: (1) weigh benefits and risks of processing; (2) identify safeguards; and (3) demonstrate that the benefits outweigh the risks offset by the safeguards.

- **At their discretion**, the Colorado attorney general may request an organization to produce an assessment.

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Who Enforces?

- **The Colorado attorney general and state district attorneys** will enforce the CPA.
- There is a **60-day cure period** that **sunsets on January 1, 2025**.
- The law grants the **Colorado attorney general rulemaking authority.**
- The statute does not provide explicit fines for noncompliance. However, violations of the CPA are **considered deceptive trade practices** as defined by the Colorado Consumer Protection Act. Noncompliant entities then can be **fined up to $20,000 per violation**.
- The CPA does **not include a private right of action**.

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Capitalizing on Nonprofit Exemptions

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Types of Nonprofit "Exemptions"

- ***Affirmative exemptions***
- ***Non-applications***
  - *Covered entity definitions, e.g.:*
    - *"Business"*
    - *"Controller"*
    - *"Covered Entity"*
  - *Activity definitions, e.g.:*
    - *"for commercial purposes"*
    - *"commercial availability"*
    - *"goods or services"*
- ***Immunities***

Examples

- **VCDPA: Affirmative exemption** (discussed earlier)
- **CCPA: Non-application via covered entity definition** (discussed earlier)
- **TCPA: Non-application via activity definitions**
  - "telephone solicitation" (which is limited to **commercial activity,** such as encouraging the **purchase or rental** of, or investment in, **property, goods, or services**)
  - "unsolicited advertisement[s]" (similar)
- **COPPA: Both affirmative exemption and non-application via covered entity definition**
  - "The term 'operator' … (B) does not include any **nonprofit entity** that would otherwise be **exempt** from coverage under section 45 of this title." 15 U.S.C. § 6501(2)
  - Operator limited to situations "where such website or online service is operated **for commercial purposes**, including any person **offering products or services for sale** through that website or online service." *Id.*
- **International Organizations Immunities Act: Immunity**

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Pitfalls When Relying on / Asserting Exemptions

- Liability risk from sparse caselaw (e.g., “doing business,” “products and services”)
- Liability risk for commercial arrangements
- Litigation risk/nuisance
- Reputation risk (i.e., the “you can’t touch me” dilemma)
- Constituent expectations
- Counterparty expectations (e.g., insurers)

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The Institutional Dynamics of Exemptions

Problem 1: Nuance Loss

Problem 2: Overreliance on “Market”

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Litigation Risks Arising from New Applications of Old Privacy Laws

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When Does the VPPA Apply to an Organization?

- Congress enacted the Video Privacy Protection Act (VPPA) in 1988 to afford consumers a narrow privacy right to control who could obtain their video viewing records from a video rental or retail store. The law **does not exempt nonprofit organizations.**
- The VPPA **prohibits the knowing disclosure of "personally identifiable information" (PII)** of a consumer **by a video tape service provider (VTSP)** to any person, subject to limited exceptions.
- VTSPs include anyone engaged in the business of renting, selling, or delivering prerecorded video cassette tapes or similar audiovisual materials. Courts have interpreted this term to **include video streaming services and other video content providers on the Internet.**
- PII means information that **identifies a person as requesting or obtaining specific video materials from a VTSP**. Courts have held that PII includes items like an individual's full name with a video title and generally agree that any information that would allow an ordinary person to identify a specific person as having watched a video would constitute PII.
    - Courts have generally found that a device identifier alone with a video title does not count as PII but could if it is combined with additional data elements (e.g., precise location information).

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VPPA Enforcement and Tracking Tools

- The VPPA is **enforced exclusively through private litigation**. With the growth in online video streaming services, the law has seen a resurgence in interest.
- The VPPA does **not generally exempt disclosures to service providers** and otherwise includes limited exceptions—e.g., to the consumer, to third parties with informed written consent that meets specific requirements, or in the "ordinary course of business" as narrowly defined by the VPPA.
- Consumers can bring **class action lawsuits for $2,500 per violation for violations of the VPPA**, which can easily cause costs to balloon when considering online audience sizes.
- The law generally does not apply to, and is not enforced against, recipients of PII.
- Additionally, lawsuits are beginning to **extend the VPPA to websites' tracking of online video viewing behavior.**
    - For example, if an organization's website embeds video content or services and uses tracking technologies—like session replay or even cookies and pixels—those technologies may collect identifiers combined with video information and share that information with third parties. Recent lawsuits allege that this collected information constitutes PII and that the sharing violates the VPPA.

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How Do Wiretapping Laws Apply to Online Tracking?

- All 50 states and the federal government have laws relating to wiretapping or surveilling communications.
- Taking the federal Electronic Communications Privacy Act (or "Wiretap Act") as an example, these laws **may apply to nonprofits** since they govern "persons" generally.
- The federal Wiretap Act refers to and regulates "**intercepting**" a communication, which is acquiring the contents of any wire, electronic, or oral communication via any electronic, mechanical, or other device.
- There is a split between all-party consent and one-party consent jurisdictions, referring to the necessary number of parties to a communication to legally justify a recording or interception. **One-party is the majority rule** among states, and the federal Wiretap Act also follows this rule.

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Enforcing Wiretapping Laws and Session Replay

- **Session-replay tools** allow a website operator to **record a user's interactions with the website**, including clicks, keystrokes, and search information.
- Recent **class-action lawsuits under wiretapping laws** have alleged that use of session-replay technology constitutes wiretapping and a violation of the relevant statute.
- Wiretap statutes, like the federal Wiretap Act, California Information Privacy Act (CIPA), and Florida Security of Communications Act (FSCA), may provide for **statutory damages**, raising the risk of costly litigation.
- These allegations pose a problem in all-party consent states where the operator's consent to the session-replay technology alone will not suffice if the technology is deemed to be wiretapping.
- In 2022, cases in the Third and Ninth Circuits raised but did not definitively answer the issue of **whether notice in a privacy policy would be sufficient** to avoid liability under wiretapping statutes. These cases also inspired dozens of plaintiffs' suits.

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What Does BIPA Cover?

- The Illinois Biometric Information Privacy Act (BIPA) **requires "private entities" to obtain consent prior to processing a consumer's "biometric information**," among other restrictions.

- The law defines a "**private entity**" to be any individual, partnership, corporation, limited liability company, association, or other group, however organized. Therefore, **BIPA applies to nonprofits**.

- "**Biometric information"** means "any information, regardless of how it is captured, converted, stored, or shared, based on an individual's biometric identifier (i.e., retina or iris scan, fingerprint, voiceprint, or scan of hand or face geometry) used to identify an individual."

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BIPA Enforcement and Litigation

- BIPA **grants a private right of action** for alleged violations. Damages may be up to the greater of
  - Liquidated damages of $1,000 or actual damages per negligent violation; or
  - Liquidated damages of $5,000 or actual damages per intentional or reckless violation.

- After the law went into effect in 2008, the first jury verdict under Illinois's BIPA was issued in 2022. That verdict resulted in a **$228 million judgment** against the Defendant.

- In February 2023, the Illinois Supreme Court ruled that **a separate claim accrues under BIPA each time an entity scans or transmits an individual's biometric identifier or biometric information**. *See Cothron v. White Castle Systems*, Inc., 2023 IL 128004 (Feb. 17, 2023).

- In response, in May 2024, the Illinois legislature passed an amendment to BIPA clarifying that **damages are limited to one violation per individual**, would not accrue each time biometric information is captured, collected, or disclosed.

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Thank You!/Questions/Contact Info

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