

MEMORANDUM

TO: ESPC

FROM: D. Reed Freeman, Jr.

Julie O'Neill

Patrick Bernhardt

DATE: September 26, 2013

FILE: 68223-0000001

RE: California Mandates 'Delete Button' and Restricts Certain Online Advertising to Minors

I write to update you on a significant new state law development.

Right on the heels of game-changing revisions to the federal rule implementing the Children's Online Privacy Protection Act, and almost immediately following [another change](#) to the California Online Privacy Protection Act ("CalOPPA")¹ regarding Do Not Track disclosures, California has passed a law that further complicates the landscape for companies' online interactions with children: on September 23, 2013, the state amended CalOPPA to include a section entitled "Privacy Rights for California Minors in the Digital World."²

Most significantly, the revised law will require an online company to permit a registered user who is under 18 to remove content that he or she has posted to the company's website or app. The law will also prohibit online companies from advertising "adult" products to minors and from collecting, using or disclosing minors' personal information for such advertising – or allowing others to do so. With these revisions, CalOPPA moves from being purely a disclosure law to actually imposing substantive requirements on certain companies that do business online.

As a practical matter, the revised law has nationwide reach because it applies to any "Internet Web site, online service, online application, or mobile application" (each, a "Site") that collects personal information about California minors and is "directed to minors" or has "actual knowledge" that a minor is using the Site.³ As a result, Site operators should be

¹ Cal. Bus. & Prof. Code §§ 22575 *et seq.*

² Cal. Bus. & Prof. Code §§22580-82.

³ Cal. Bus. & Prof. Code §§22580-81. Like CalOPPA's original provisions, the law does not apply to third parties that operate, host or manage, but do not own, online websites or applications.

aware of these developments and adjust their business practices to comply with the revised law before it takes effect on January 1, 2015.

CalOPPA's New Right to Remove Content

Perhaps the most significant new change to CalOPPA is its requirement that a Site operator permit a registered user who is under 18 to remove content that the user had posted to the Site.⁴

Specifically, a Site operator must:

- Permit covered minors to remove or to request and obtain removal of content or information “posted” (i.e., accessible to others) by the user on the operator’s Site;
- Provide clear instructions on how the minor may remove or request removal of the content; and
- Provide notice that the minor may remove or request removal of the content, but that the removal does not ensure complete or comprehensive removal of the content.

To this last point, the law’s scope is somewhat limited because it does not require removal of content posted or reposted to the Site *by third-party users*.⁵ Moreover, the law does not require a Site operator permanently to delete the content or information from its servers. Rather, the operator may comply by taking steps to disassociate the information from a particular user or to render the content invisible to other users while retaining the data on its server.

New Limits on Advertising to Minors

CalOPPA’s expansion also prohibits Site operators from advertising adult-oriented products, such as alcohol, tobacco and firearms, to minors *and* from collecting, using or disclosing minors’ personal information for such advertising – or allowing others to do so.⁶ Like the right to remove content, this provision will apply to any Site that is directed to minors or that has actual knowledge that the advertising will be targeted to a minor. Importantly, the revised law creates a safe harbor for Site operators that use advertising service providers to serve their advertising: if they notify their advertising service providers that the Site is

⁴ Cal. Bus. & Prof. Code §22581. The law explicitly does not require an operator to collect age information about users, but Site operators would still need to comply if the Site had actual knowledge that the user were under 18 or if the Site were created for the purpose of reaching an audience that is predominately comprised of minors and not intended for a more general audience comprised of adults.

⁵ Cal. Bus. & Prof. Code §22581(d).

⁶ Cal. Bus. & Prof. Code §22580. The full list of such products is: alcoholic beverages, firearms or handguns, ammunition, handgun safety certificates, etching creams or aerosol containers of paint that are capable of defacing property, tobacco and cigarette products, BB devices, dangerous fireworks, ultraviolet tanning services, certain dietary supplements, lottery tickets or shares, Salvia products, body branding or permanent tattoos, drug paraphernalia, electronic cigarettes, obscene materials and certain weapons.

directed to minors, then the responsibility to comply with the law is on the advertising service provider.⁷

What Do These New Protections for Minors Mean for Site Operators?

The revised law's effective date is not too far off. Site operators should therefore start thinking about whether they fall within the law's coverage and, if they do, what new procedures are necessary to come into compliance.

⁷ Cal. Bus. & Prof. Code §22580(h)(1)-(2).