From: **Freeman, D. Reed Jr. via ESPC Board** espc-board@espc.topicbox.com
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To: James Campbell campbell@espcoalition.org
Cc: ESPC-Board@listbox.com

Washington Privacy Bill Likelier to Pass, But Roadblocks Remain

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- Latest version removes controversial facial tech provision
- Lack of consumer right to sue could prove barrier to approval

Washington's latest iteration of a comprehensive privacy bill has a chance of following in California's footsteps and providing greater protections for consumer data, but roadblocks—including a lack of a private right of action for consumers to sue—remain to its passage, attorneys say.

Senate Bill 5062 removes a controversial facial recognition provision present in previous versions that could improve its odds. Still, consumers' inability to sue could once again prove a sticking point to its approval this session, which began Jan. 11.

If approved, the bill would give consumers the right to access, correct, and delete personal data collected by businesses. Companies would be tasked with issuing privacy notices and implementing reasonable security practices.

The business community largely backed last session's iteration and saw "the writing on the wall" that some sort of state privacy law would eventually pass in Washington, said Mike Hintze, a managing partner at Hintze Law PLLC in Seattle.

But there's growing momentum from privacy advocates who say the bill doesn't go far enough in terms of consumer protection.

"There's a desire to not have a piece of legislation that could be perceived as ultimately ineffectual," said Hunter Ferguson, chair of Stoel Rives LLP's privacy and data security practice. "How do you strike the right balance to make it something that delivers a meaningful sets of rights while not disproportionately raising costs on businesses?"

CCPA, GDPR Principles

The Washington bill doesn't allow consumers to sue companies directly and would, instead, rely on enforcement actions from Attorney General Bob Ferguson (D).

The California Consumer Privacy Act, by contrast, is enforceable by the California attorney general and contains a narrow private right of action for consumers to sue companies if their data was compromised in a breach or unauthorized disclosure stemming from weak security measures.

“The worry with a private right of action is a lot of companies really aren’t aiming to use data in a way that’s creepy or that consumers find to be infringing on their rights,” said Brandon Archuleta, an attorney at Lane Powell PC in Seattle, who noted that enterprising attorneys could use it to go after companies for minor, technical violations of the law that don’t harm consumers.

Still, a private right of action would give consumers the power to advocate for themselves, potentially deterring companies from using data in dubious ways, said Hayley Tsukayama, a legislative activist at the Electronic Frontier Foundation, a digital civil liberties group.

“If you don’t have good enforcement, it really has no teeth,” Tsukayama said. “The private right of action is one of the best sets of teeth you can give consumers.”

The bill in its current form offers only the “illusion” of privacy protections, and a private right of action is necessary for meaningful enforcement, said Jennifer Lee, the technology and liberty manager at the ACLU of Washington, during a Jan. 14 public hearing.

The bill would give businesses a 30-day cure period to remedy potential violations of the law and maintain compliance. Like Europe’s General Data Protection Regulation, it would also require companies to submit to data protection assessments, with those in the Washington bill covering activities such as targeted advertising and the sale of personal data.

“It forces companies to take that step back to look at how they’re doing things on paper,” Hintze said. “Adopting that approach is something that could be positive from a consumer protection standpoint.”

New to this year’s version are provisions related to contact tracing that would require companies to issue privacy notices and ask for consent before processing data in that capacity.

If the bill passes, companies will have to work to meet compliance hurdles just as they did with the CCPA. While some data principles used for CCPA compliance may be used to meet the Washington bill’s provisions, companies will also have to meet the particularities of this

the Washington bill's provisions, companies will also have to meet the particularities of this version, Archuleta said.

"Until we have some sort of federal response to this issue, there's a lot of consternation among businesses about having to comply with many different iterations of privacy law," Archuleta said.

Next Steps

Absent from the current bill is language, present in last session's version, that would've regulated facial recognition and required companies to seek consumer consent for its use. It was removed after some people expressed concern that the technology would be better addressed in a separate bill.

Ferguson, who supports a private right of action, previously warned that past iterations of the bill didn't give his office clear authority to implement the necessary provisions granting him the ability to make it enforceable.

"I support the right of all Washingtonians to access the legal system to enforce their rights—including their privacy rights," he said in a statement.

Although the lack of a private right of action will likely "remain a policy issue under extensive discussion" among lawmakers, "I'm very optimistic that we can get the 'yes' this year," said Washington Sen. Reuven Carlyle (D), who spearheaded the bill.

Carlyle said the latest version takes into account months of stakeholder feedback and provides Washingtonians with "fundamental new rights," including access to their data and greater control over how businesses use that data.

If approved, most of the bill's provisions would take effect July 31, 2022. It would not apply to institutions of higher education, air carriers, or nonprofits until July 31, 2026.

The state Senate passed previous privacy bill iterations two years in a row but were unable to reach consensus with their colleagues in the state House.

D. Reed Freeman | Partner | Venable LLP
t 202.344.4606 | f 202.344.8300 | m 703.304.2974
600 Massachusetts Avenue, NW, Washington, DC 20001
rfreeman@venable.com | www.Venable.com

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