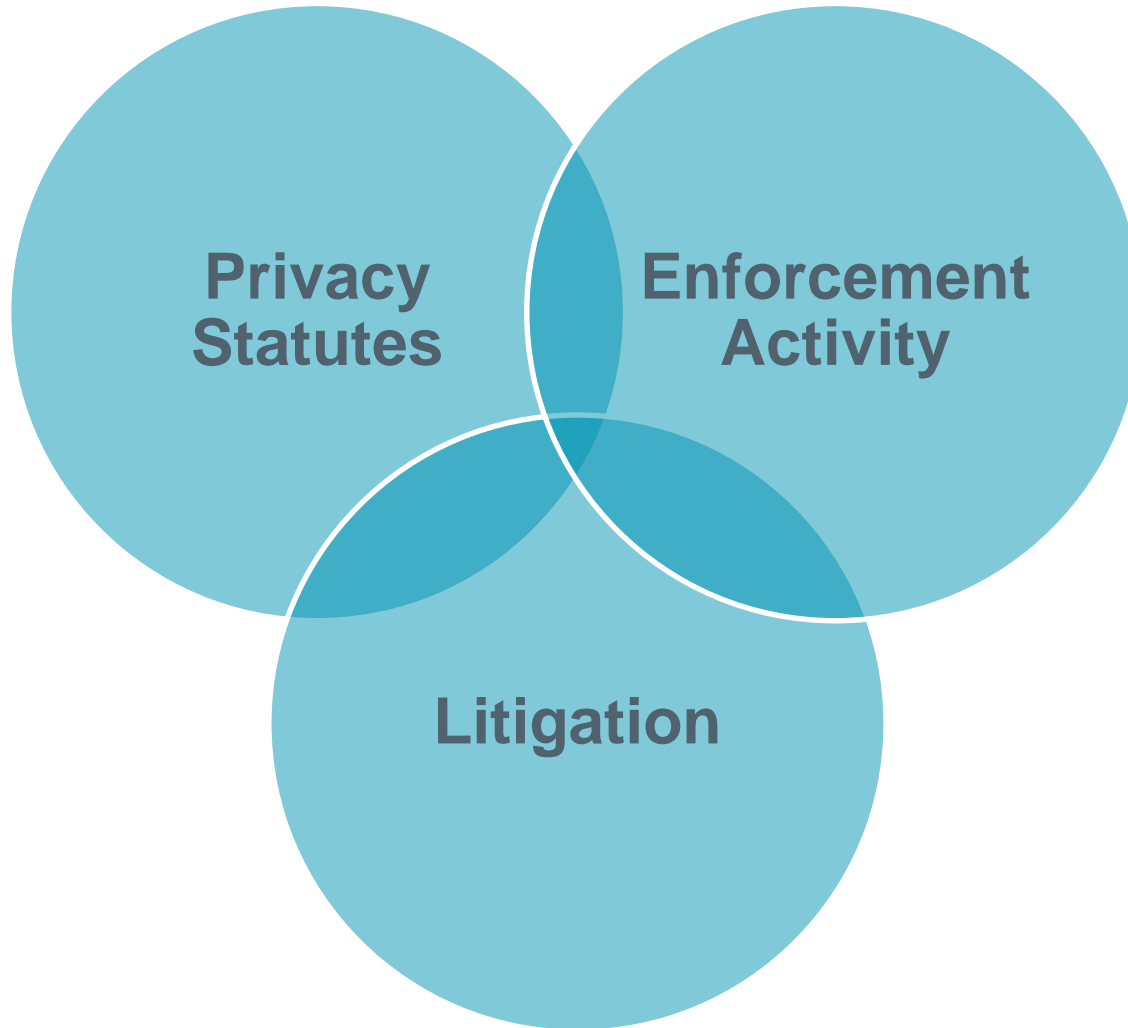


Learning from Litigation:

# Website and Privacy Compliance Amidst an Active Plaintiffs' Bar

Speakers: Tara C. Clancy & Michael J. Stortz

# Overview



# Agenda

- Regulatory Update
  - Key compliance issues
  - Assessments
  - Reasonable security measures
- Enforcement Overview
- Litigation Trends
- Risk Mitigation Strategies
  - Vendor Management
  - Consent
  - Website Terms
  - Privacy Policy

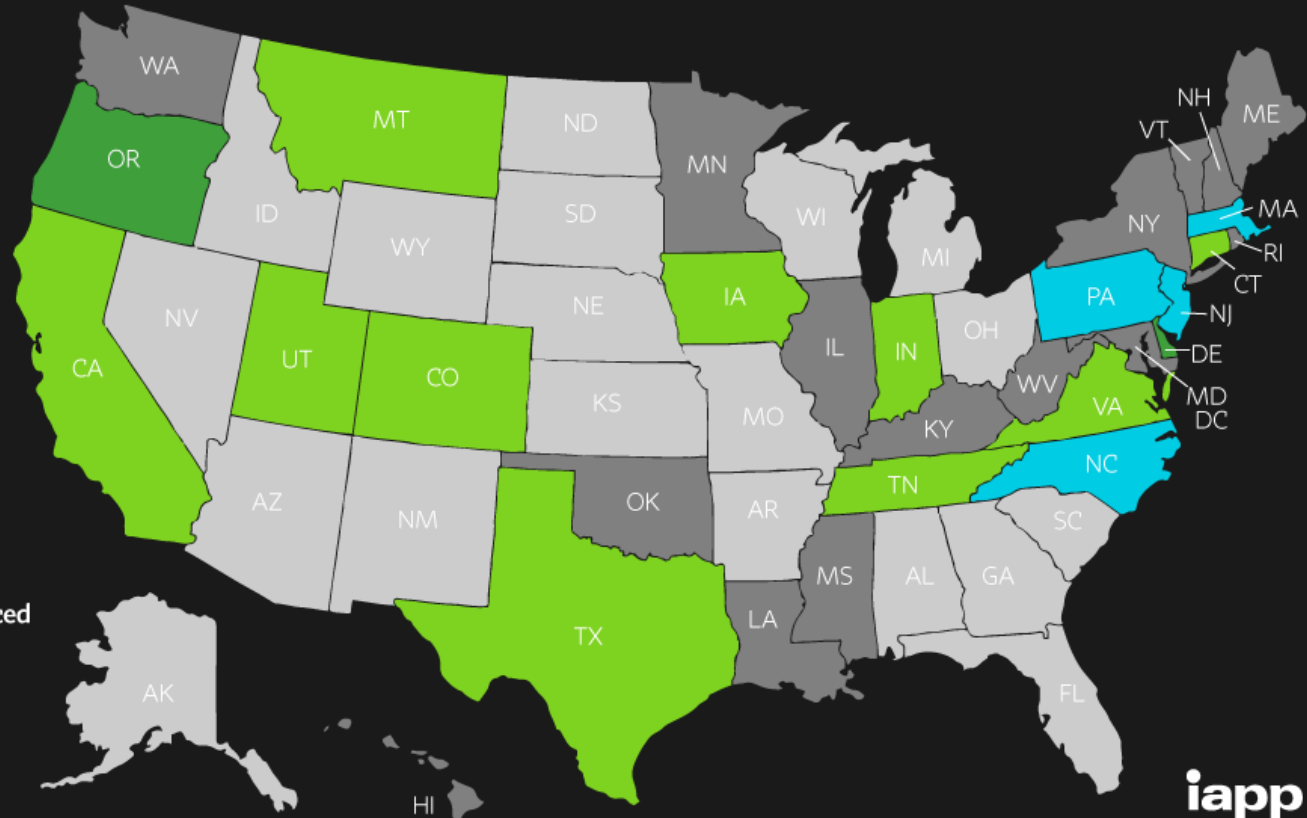
# Regulatory Update

# The Changing Regulatory Landscape

## US State Privacy Legislation Tracker 2023

### STATUTE/BILL IN LEGISLATIVE PROCESS

- Introduced
- In committee
- In cross chamber
- In cross committee
- Passed
- Signed
- Inactive bills
- No comprehensive bills introduced

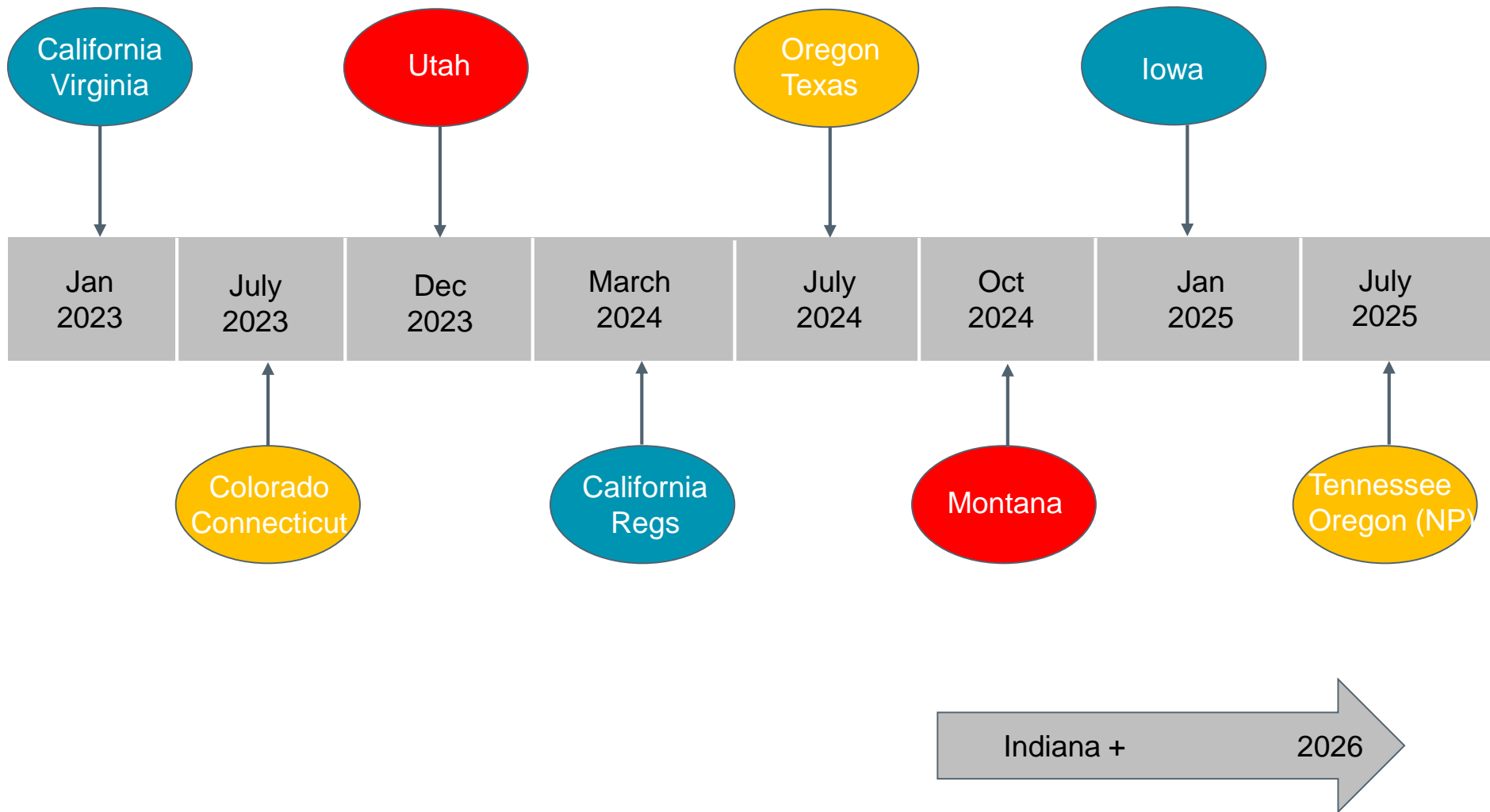


Last updated: 7/7/2023



See iapp, Resources, US State Privacy Legislation Tracker (July 7, 2023)

# Compliance Timeline



# On The Horizon



**Delaware Legislature Passes The Delaware Personal Data Privacy Act**

**Massachusetts, New Jersey, North Carolina, and Pennsylvania Have Active Privacy Bills in Committee**

**April 27, 2023: Washington Passes My Health, My Data Act**

**Oregon Consumer Privacy Act (OCPA) Signed Into Law on July 18, 2023**

# Federal Statutes

## Data Privacy Framework Program Launches New Website Enabling U.S. Companies to Participate in Cross-Border Data Transfers

New FTC Data Show Consumers Reported Losing Nearly \$8.8  
Billion to Scams in 2022

**A Bipartisan Move on Smart Home Regulation:  
Informing Consumers about Smart Devices Act is  
Moving through Congress**

July 12, 2023

**Revised American Data Privacy and Protection Act  
Due to be Released**

**Congress is considering bills that could regulate  
how advertisers interact with children**

**US House lawmakers keep federal  
privacy legislation top of mind**



# Enforcement Overview

# Enforcement Activity

FTC Enforcement Action to Bar GoodRx from Sharing Consumers' Sensitive Health Info for Advertising

**Use of Online Tracking Technologies by HIPAA Covered Entities and Business Associates**

**Tax Filing Platforms Shared Personal Data With Meta And Google**



FEDERAL TRADE COMMISSION  
PROTECTING AMERICA'S CONSUMERS

FTC "Apprise Patrol" visits Publishers Clearing House to challenge company's digital dark patterns

# State Enforcement

## Notice and Cure



## Enforcement Guidance

## Assessments/Security

- Controllers required conduct data protection assessments when “**heightened risk of harm**”
- Controllers required to implement and maintain “**reasonable administrative, technical and physical security practices**” or “**reasonable security practices**”

# Litigation Trends

# Litigation, Pre-Lit Demands and Arbitration



**Papa John's, Ulta, others face class actions over wiretapping, session replay software**

(Plaintiff's Law Firm)

Sent Via Email – Protected Settlement Communication

Re: Claimant's Settlement Demand

Pursuant to the Pre-arbitration Notice of Disputes see information below. We want to provide you with a the basis for the demand, as well as further settlement resolving this matter.

**Claimant's Information**  
 ("Claimant")

**Governing Statutes**

Under the Wiretap Act 18 U.S.C. § 2510 et seq. a person or procures any other person to intercept or endeavor communication is liable for the following damages:

- The greater of \$100 a day for each day of violation
- Punitive damages, pursuant to § 2520(b)(2);
- Reasonable attorney's fees and costs, pursuant to § 2520(b)(3).

Under CIPA Cal. Penal Code § 630 et seq., a person who reads, or contents are learned is entitled to the following:

- \$5,000 per violation, pursuant to Cal. Pen. Code § 630.9
- Section 631(a) is not limited to phone lines, but extends to computers, the internet, and email. See Mater v. ... (N.D. Cal. 2016)(CIPA applies to "new technologies" effectuate its remedial purpose of protecting privacy. 3798134 at \*5-6 (N.D. Cal. 2006) (CIPA governs)

Under California, claims for intrusion upon seclusion and privacy, so courts consider the claims together and a

8 Attorneys for Plaintiff

9  
 10 UNITED STATES DISTRICT COURT  
 11 NORTHERN DISTRICT OF CALIFORNIA

12  
 13 [Redacted] individually and on  
 14 behalf of all others similarly situated,

Case No. 4:22-cv-04423-JST

FIRST AMENDED CLASS ACTION COMPLAINT

15 Plaintiff,

DEMAND FOR JURY TRIAL

16 v.

17 [Redacted]

18 Defendant.

3 INTRODUCTION

4 1. This is a consumer privacy class action against [Redacted] the self-described "world's largest entertainment & gaming fan platform"—for violating the Video Privacy Protection Act ("VPPA" or "the Act") by disclosing its digital users' identities and video-viewing preferences to Meta Platforms, Inc. ("Meta") without proper consent. Meta owns the popular social media platforms Facebook and Instagram.

9 2. The VPPA prohibits "video tape service providers," such as [Redacted], from knowingly disclosing consumers' personally identifiable information ("PII"), including "information which identifies a person as having requested or obtained specific video materials or services from a video tape provider," without the person having expressly given consent in a standalone consent form.

# Website Tech Claims: 2022-23

## 2022 – The Doors Open on Appeal

- (*Javier v. Assurance IQ; Popa v. Harriet Carter Gifts*)

## 2023 – From Session Replay to Pixels

- Session Replay
  - (*Javier; Williams v. What If*)
- Website Chatbots
  - (*Licea v. AE/Cinmar; Byars v. Hot Topic*)
- Video Content – VPPA
  - (*Salazar v. Paramount*)
- Pixel
  - (*Doe v. UC Regents*)

# Legal Theories

- Federal Wiretap Act (18 U.S.C. § 2511)
- California Invasion of Privacy Act (CIPA)
  - Section 631(a) – wiretapping and derivative liability
  - Section 632.7 – unauthorized recording between telephones (cordless, landlines or cell)
- Other States
  - PA WESCA (18 P.A.C.S. § 5701)
  - NY/MO (one party consent statutes)
  - FL (session replay exemption)
- Invasion of Privacy/Intrusion Upon Seclusion
  - Constitutional/Restatement of Torts sections 652A-E



# Defenses

- No Interception
  - One party consent statutes
  - Party exemption
  - “Aiding and abetting”
  - Recorder v. Independent use
- Record information not actionable
  - Keystrokes vs. content
- Not In Transit
  - During transmission, not in storage
- Consent
  - Proof of consent
  - Scope of consent

# Risk Mitigation Strategies

# Vendor Management

- Industry Specific Requirements For Vendor Management
- Risk Management/Contractual Requirements
- Limiting Use of Data Obtained Through Website Visits

# Consent – Clickwrap v. Browsewrap

Jerry won't spam you with unwanted calls

## Let's confirm your phone number

We use this to confirm your identity and provide you custom quotes.

Continue

By clicking "Continue" you agree to receive a 4-digit code from Jerry to verify this phone number, updates about Jerry products, the Jerry [Terms of Use](#) and [Privacy Policy](#). Message frequency may vary. Message and data rates may apply. Reply HELP for help or STOP to cancel.

**Affirmative action required**

*(Hooper v. Jerry Insurance)*

**Notice: hyperlink to Terms, PP**

# Proximity

**Notice and Hyperlink**

1 item

Done? Complete your order and enjoy your day.

Place order

By placing your order, you agree to be bound by the [Terms of Service and Privacy Policy](#). Your credit/debit card will be temporarily authorized for \$55. Your statement will reflect the final order total after order completion. [Learn more](#)


A bag fee may be added to your final total if required by law or the retailer. The fee will be visible on your receipt after delivery.

[Learn more about pricing](#)

**Affirming consent**

# Chatbots

## Live Beauty Help

 Live Beauty Help

Hi there. Select a topic you would like help with and I can connect you with a Beauty Advisor.

Makeup

Skincare

Hair

Fragrance

Customer Service

**\_\_\_\_\_ may record this chat. For more information, see [our Privacy Policy](#).**

**Notice of recording  
Privacy Policy hyperlink**

**Affirming consent?**

**Terms?**

# Website Terms - Considerations

- Arbitration Provision and Class Waiver
    - Consider public injunctive relief issues
    - Arbitration providers
    - FAA v. state statutes (e.g., CA Arbitration Act)
  - Mass arbitration considerations (*MacClelland*)
  - Forum selection clause as alternative/adjunct
  - Link to Privacy Policy, AUP
    - Incorporate by reference
-

# Privacy Policy – Considerations

- Distinct from Terms
- Consider additional disclosures (beyond cookies)
  - “We, ***our partners***, our advertisers, and third-party advertising networks ***use various technologies to collect information***, including but not limited to ***cookies, pixels, scripts, and device identifiers***. . . .”
  - “***Our partners***, advertisers, and third-party advertising networks ***may use these technologies to collect information about your online activity*** over time and across different websites or online services.”
- Stand-alone notice and consent



The image features a central white horizontal band containing the text. The background above and below this band consists of overlapping, semi-transparent blue shapes in various shades, creating a dynamic, layered effect.

# Preview of Upcoming Sessions

The image features a central white horizontal band. Above and below this band is a blue abstract background composed of overlapping, semi-transparent, wavy shapes that create a sense of depth and movement. The colors range from a bright cyan to a deep, dark blue.

Q & A

K&L GATES