
DAVIS
GRAHAM &
STUBBS

DATA PRIVACY & EMPLOYMENT LAW

SEPTEMBER 23, 2020

A LexMundi Member

AGENDA

DAVIS
GRAHAM &
STUBBS

- Case Study #1
- Discussion
 - Rights under privacy law
 - Intersection between privacy and employment law
- Case Study #2
- Q&A

CASE STUDY #1: CURRENT EMPLOYEE
DEMAND LETTER, REQUEST FOR
PERSONNEL FILES AND DATA REQUEST

CASE STUDY #1: CURRENT EMPLOYEE

DAVIS
GRAHAM &
STUBBS

- Demand Letter from law firm, on behalf of Joanne Smith, writes “in relation to her potential legal claims against Company”
- Alleges sexual harassment, pay discrimination, and retaliation
 - Employee started employment in April 18, 2019
 - Paid lower than her male similarly situated counterparts
 - Rejected manager’s sexual advances during an out-of-town work-related trip in mid-June 2019
 - After rejecting sexual advances, was “ignored” and “excluded”
 - January 14, 2020, placed on a performance improvement plan (PIP)
- Requests copy of Smith’s personnel file and PIP documents

CASE STUDY #1: CURRENT EMPLOYEE

- Data Access Request
 - March 12, 2020, law firm, on behalf of Joanne Smith, writes “to make a data access request”
 - Requests personal data which:
 - “Relates to our client”
 - “Is contained in emails to or from the following persons”
 - [identifies specific names]
 - “To be clear, this request is concerned with all data which relates to our client.”

CASE STUDY #1: CURRENT EMPLOYEE

- Response to Demand Letter and Request for Personnel files
 - Is the response different in light of the data access request?
- Response to Data Access Request
 - Will written confirmation be required that attorney may act on Joanne Smith's behalf? (Identity verification)
 - What will be in-scope for the initial search?
 - Include daily business emails? Structured and unstructured data?
 - Request proposed search terms or keywords?
 - How does this search impact the response to the demand letter and request for personnel files?
- Challenges considering this is a current employee

DAVIS
GRAHAM &
STUBBS

RIGHTS UNDER PRIVACY LAW

Federal Level

- So far, the U.S. has taken a sectoral approach to regulating privacy
 - E.g., HIPAA, GLBA, COPPA, FCRA, TCPA, CAN-SPAM
- Increased push for U.S. federal comprehensive privacy legislation
 - Over 30 privacy-related bills introduced in this Congress session so far
 - Most recent bill introduced: the SAFE DATA Act
 - Combines three previously introduced bills and would provide new data rights, require consent for processing and sharing personal information, and require companies to appoint a data protection officer
 - Employee data excluded from definition of personal information as it relates to the employment relationship
 - Congressional hearings on privacy
 - U.S. Senate Committee on Commerce, Science and Transportation hearing 9/23/2020 on the Need for Federal Data Privacy Legislation

EVOLUTION OF PRIVACY REGULATION IN THE U.S.

DAVIS
GRAHAM &
STUBBS

- More legislative activity at the state level

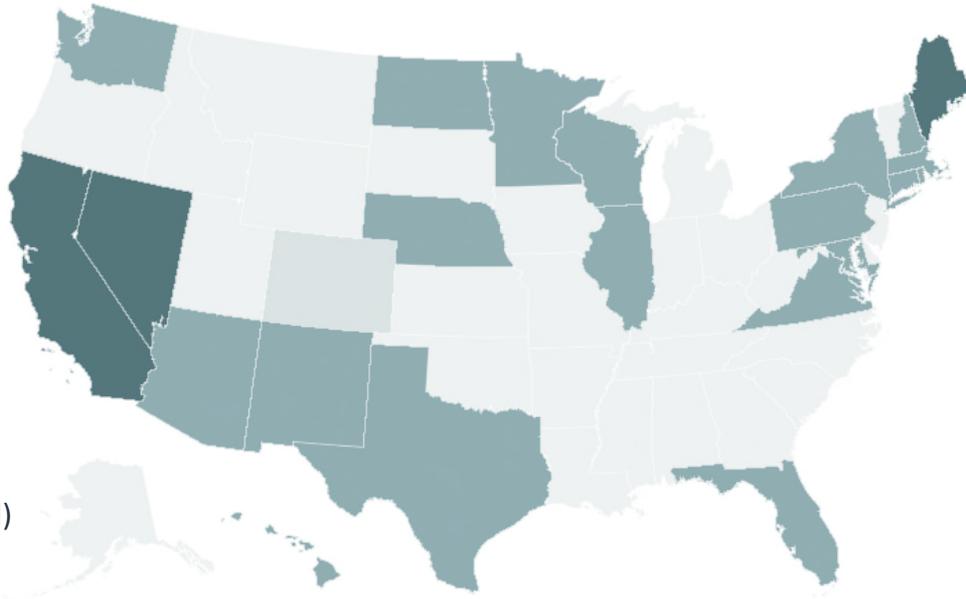
Laws Enacted:

- California - CCPA
- Maine - ISP
- Nevada - Sales opt-outs

Draft Bill:

- Colorado (not introduced)

State Level



Bills Introduced 2019/2020:

- Arizona
- Connecticut
- Florida
- Hawaii
- Illinois
- Maryland
- Massachusetts
- Minnesota
- Nebraska
- New Hampshire
- New Mexico
- New York
- North Dakota
- Pennsylvania
- Rhode Island
- Texas
- Virginia
- Washington
- Wisconsin

OTHER FACTORS INFLUENCING PRIVACY

- Private Right of Action and the plaintiffs' bar
 - Class actions under the Illinois Biometric Information Privacy Act (BIPA) against employers using finger scanning for time clocks
- Applicability of the EU General Data Protection Regulation
 - A model followed in multiple jurisdictions
 - Applies broadly to any information that identifies or can be used to identify an individual, including an employee
 - Applies to all private companies handling personal information, regardless of the company's size

PRIVACY RIGHTS

DAVIS
GRAHAM &
STUBBS

Access	<ul style="list-style-type: none">• Right to obtain a copy of personal information held by the company
Data Portability	<ul style="list-style-type: none">• Right to obtain copy of PI in portable and machine-readable format allowing transmission of PI to another company
Correction	<ul style="list-style-type: none">• Right to correct inaccurate personal information
Deletion	<ul style="list-style-type: none">• Right to delete personal information
Restrict/Limit Use	<ul style="list-style-type: none">• Right to restrict or limit the use of personal information
Objection	<ul style="list-style-type: none">• Right to object to the use of personal information
Opt-in / Opt-out	<ul style="list-style-type: none">• Requirements to provide the ability to opt in or out of the use of personal information
Profiling / Automated Decisions	<ul style="list-style-type: none">• Right not to be profiled or to have automated decisions made about the individual having significant legal effects without some sort of review

PRIVACY RIGHTS FEATURES / LIMITATIONS

DAVIS
GRAHAM &
STUBBS

Features

- Broad scope (broad definition of “personal information”)
- Time limits for responding (one month or 45 days, typically with some extensions allowed)
- Free of charge (unless overly burdensome or unreasonable)
- Requests can be made by an authorized representative

Limitations

- May apply to data collected after a specified date
- Exceptions may be provided by law
- If identity cannot be verified may be exempt from having to respond
- Limits on the number of requests in a year
- Impacts on the privacy of others

RESPONDING TO A REQUEST

DAVIS
GRAHAM &
STUBBS

Classify

- Classify the request – Access? Data portability? Something different?
- Look at jurisdictional requirements and potential limitations

Verify

- Verify identity; may need to ask for additional information
- If third party making request, ask to see copy of authorization signed by individual

Search

- Search for responsive information
- Compile data

Respond

- Prepare a response to the individual; be as transparent and clear as possible
- Watch timing

Log

- Log the request – date and nature of request, manner in which made, date of response, nature of response, and basis for denial (if applicable)

- Do you know where to search for responsive information?
 - A data inventory or record of processing activities may help
- Should you provide the actual data or a summary?
 - Impacts access rights
 - Case-specific determination
- Impact with litigation hold
 - Litigation hold: “reasonable anticipation of litigation” arises when a party knows there is a credible threat that it will become involved in litigation
 - i.e. demand letter, formal complaint, records subpoena, etc.
 - Data access request?

DAVIS
GRAHAM &
STUBBS

INTERSECTION BETWEEN
PRIVACY AND EMPLOYMENT LAW

ACCESS TO PERSONNEL FILES

DAVIS
GRAHAM &
STUBBS

- CO
 - Private employees in Colorado have a right to inspect and copy their personnel files
 - Current employees may inspect and copy at least once per year upon request
 - Former employee may make one inspection after termination of employment
- CA
 - Current and former employees may inspect and/or receive a copy of personnel files within 30 days from when employer receives a written request
 - Former employees have the right to inspect or copy once per year

- Multi-stakeholder input
 - Importance of HR, Compliance, and Privacy working together/communicating
- Thoughtful approach to responding
 - Coordinating approach
 - Standard templates may not be appropriate
 - Consider impact on potential litigation

DATA RETENTION

- Data minimization principles under privacy law
 - Privacy and data security risks associated with retaining too much data
- Retention obligations under state and federal employment laws
 - I-9s, W-4s, wage and payroll documents, personnel files, FMLA documents, UI, ERISA, retention of record while employment claim is pending
- Legal hold

CASE STUDY #2: FORMER EMPLOYEE EEOC CHARGE, DEMAND LETTER COMBINED WITH DATA REQUEST

CASE STUDY #2: FORMER EMPLOYEE

- Demand letter from counsel with copy of EEOC charge filed by Justin Johnson's attorney alleging age discrimination, violation of USERRA, and retaliation
 - Employee started employment in March 12, 2003
 - Terminated in RIF while out on USERRA leave and age 43
 - No performance or behavioral issues; termination was based upon business needs
 - Demand letter with EEOC charge requesting copy of Johnson's personnel file and leave documents
- Law firm also sends a Data Access Request separately
- Letter and Data Access Request go to separate departments of the Company

- Data Access Request
 - Law firm, on behalf of Justin Johnson, writes “to make a data access request”
 - Requests personal data which relates at all to Justin Johnson
 - Does not contain any further limitations

CASE STUDY #2: EXAMPLE OF SEARCH TERMS

DAVIS
GRAHAM &
STUBBS

Primary terms (variations of name)

- J. Johnson
- Justin
- JJ
- Justin J.

Terms relevant to the data request

- Reduction in force
- Separation
- Dismissal
- Leave
- Exit
- Depart
- Military
- Performance
- Restructure

CASE STUDY #2: FORMER EMPLOYEE

- Response to Demand Letter/EEOC Charge and Request for Personnel files
 - Coordinate and communicate internally
- Initial search for data generates more than 1 million files
 - Negotiation of search terms is important
- How does this impact documents that must be produced in response to the EEOC charge?
- How does this impact the legal hold?

DAVIS
GRAHAM &
STUBBS

QUESTIONS?

CONTACTS

DAVIS
GRAHAM &
STUBBS



Brett Painter

Partner

Davis Graham & Stubbs LLP



Lindsey Schultz

Counsel, Global Privacy
Visa



Camila Tobón

Of Counsel
Davis Graham & Stubbs LLP