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Proskauer on Privacy

A Guide to Privacy and Data Security Law in the Information Age

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In this supplement to *Proskauer on Privacy*, the editor, along with an array of industry experts from the government, academic, and legal sectors, has updated the treatise to provide you with the latest developments in privacy law and practice. Highlights include:

New chapter 17: Data Breach Litigation Involving Consumer Class Actions. This entirely new chapter outlines consumer plaintiff **common law theories of liability** (negligence, breach of contract, and fraud) and their requirement of **actual damages**; describes **common defense strategies**, examining challenges to Article III standing, failure to state a claim, and other motions; and discusses several **recent noteworthy settlements**.

A Brief History of Privacy Law. The treatise's introductory chapter has been **expanded and revised**, with new sections addressing recent developments in international privacy law, such as the invalidation of the EU Safe Harbor arrangement and the finalization of the EU's new **General Data Protection Regulation** (*new* §§ 1:4.4[D], 1:5.7[A]–[F]); new directions in Fourth Amendment jurisprudence (*new* § 1:5.2); the expansion of consumer privacy protections (*new* §§ 1:5.3[A]–[I]); the rise of data security law (*new* § 1:5.4); the launch and evolution of HIPAA (*new* § 1:5.5); and the coming of age of education privacy (*new* § 1:5.6).

The Foreign Intelligence Surveillance Act. The **USA FREEDOM Act**, introduced in the wake of the Edward Snowden disclosures and enacted in 2015, effectively **ends the bulk collection of telephone metadata** that was permitted by section 215 of the USA PATRIOT Act and section 1861 of FISA (*see* § 7:4.2[A]). It also adds provisions addressing **declassification of significant decisions**, orders, and opinions, and provides for the addition of five amici curiae to be appointed to the Foreign Intelligence Surveillance Court (*see* § 7:3.3).

Privacy and Homeland Security. An executive order signed in February establishes a **Federal Privacy Council**, with the aim of building on existing **interagency privacy efforts** and expanding and innovating government efforts to protect privacy (*see* § 8:3.1). The PCLOB continues to provide advice and oversight in the wake of the Snowden revelations, issuing reports in 2015 and

(continued on reverse)

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2016 assessing the **government's compliance** with various PCLOB recommendations (*see* § 8:3.2[B]).

Workplace Privacy Law. Updates include the latest in **gender-related protections**. *See, e.g.*, § 9:3.2[E], on the NYC Commission on Human Rights' December 2015 enforcement guidance on **discrimination on the basis of Gender Identity or Expression**, as well as a sample of recent **transgender discrimination cases** against employers, and a list of current state **statutes protecting transgendered individuals**. A new California law imposes **additional restrictions on that state's employers' use of the E-Verify system**. *See* § 9:2.6[D] for details of specific requirements and penalties for violations. Recent developments related to **employer wellness programs** address whether such programs violate GINA (*see* § 9:3.4) and the amount of incentive an employer can offer to encourage (but not coerce) participation in certain wellness program offerings (*see* § 9:3.6[A]). *New* § 9:4.2[C][2] looks at Fifth Amendment considerations in physical searches by private employers raised by a 2015 case in which an employer moved to compel the disclosure of certain employee passcodes for company-issued smartphones.

Commercial Communications. A 2015 FCC declaratory ruling addressing the implementation of the Telephone Consumer Protection Act of 1991 clarifies **what equipment may be considered an "autodialer"** (*see* § 10:3.5); adopts a broad view regarding **revocation of consent** or opt-out requests for receiving consumer text messages (*see* §§ 10:6.3[A][2] and [B][3]); and implements a **"one-call safe harbor" rule** for automated calls and text messages (*see* § 10:6.4).

Canadian Privacy Law. With the **2015 PIPEDA amendments** having received Royal Assent in June 2015, chapter 13 features several **new and expanded discussions**, including: a comparison of Canada's federal breach notification obligations with the Alberta model (*see* § 13:3.4[A]); a critique of the single-test threshold test and an examination of the components of the threshold test under PIPEDA (*see new* §§ 13:3.4[A][1]–[A][2]); examination of PIPEDA amendments related to third-party notification, recording obligations, and offenses (*see new* §§ 13:3.4[A][5]–[A][7]); and an overview of additional key amendments (*see new* §§ 13:4.1[A]–[H]). In 2016, the Ontario Superior Court created a **new invasion of privacy tort** premised on the "private disclosure of public facts," in a case involving the non-consensual disclosure of sexually explicit images (*see* § 13:1.2[A]).

Location Privacy. This chapter has been updated with the latest developments related to location information and privacy, including: the latest location-tracking technologies and indoor positioning systems, like **wireless charging technology** (*see* § 17:2.4[B]); two divergent circuit court decisions dealing with Fourth Amendment concerns raised by **government requests for CSLI** (*see* § 17:3.2[B]); recently enacted state legislation addressing **obtainment of GPS data and location records** (*see* § 17:4.1[A]); recent attempts—successful and otherwise—at **industry self-regulation** regarding collection and use of location data (*see* § 17:4.1[C]); the latest government policies on the **use of unmanned drones** by private companies and government agencies (*see new* § 17:4.3[C]).

In addition, the chapter dealing with **Privacy of Electronic Communications** and the treatise **Index** have been updated in this supplement.

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