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What To Know As Children's Privacy Law Rapidly Evolves

By **Susan Rohol** (July 29, 2024)

In a time of divided government, one thing all regulators seem to agree on is we must do more to protect children online.

This month, the Federal Trade Commission announced a groundbreaking enforcement action that bans a messaging app, NGL Labs LLC, from offering its service to users under age 18.[1] Alleging that the app failed to adequately protect young users from cyberbullying, the FTC also claims the company engaged in deceptive marketing to drive up subscriptions of teens and children.



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Many U.S. states have also passed kids' privacy laws in the last year, including New York, where Gov. Kathy Hochul signed two bills on kids' privacy and social media use in June.[2]

Texas, Florida, Georgia, Louisiana, Arkansas, Mississippi, Ohio, Tennessee and Utah have also passed laws banning social media use by children without parental consent.[3] Several states have prohibited targeted advertising to children and/or created obligations on publishers to consider the best interests of the child.[4]

While Congress is unlikely to pass much legislation between now and the election, two federal children's privacy bills have bipartisan support and have the potential to become law.

If your business hasn't been paying attention to this rapidly evolving area of law, it should. There is no sign of this slowing down anytime soon, and more aggressive enforcement actions from federal and state regulators are likely in the coming year.

The following are key themes of these laws:

- Teenagers are often covered, not just children under 13;
- Targeted advertising and profiling of children are banned or significantly restricted;
- An "actual knowledge" standard shifts to a constructive standard, e.g., "reasonably likely to be accessed" by a child, or "willfully disregarding" that the person is a child;
- Product and design features need to be tailored to reduce harms to children; and
- There are more obligations to obtain parental consent for social media and other uses.

States in the Lead

Many U.S. states are incorporating protections for minors into comprehensive privacy laws or enacting specific laws aimed at protecting children online. They generally fall into three categories: (1) bans on targeted advertising, data collection and personalization; (2) requirements to obtain

parental consent; and (3) product and design requirements, including restrictions on "addictive" designs.

Bans on Targeted Advertising, Data Collection and Personalization

States are passing laws that raise the age of a "child" from the long-accepted federal standard of under 13 set by the Children's Online Privacy Protection Act in 1998.[5]

In 2021, California became the first state to do this, when it created an obligation to obtain parental consent for all sales of data collected from children under the age of 16.[6] This effectively banned all targeted advertising to children under 16 in the state of California.

Since that time, Connecticut and Colorado have passed laws that create an obligation for minors to consent to data processing if they are under the age of 18; New Jersey sets the age at 17.[7]

Maryland has gone the farthest with a new bill that bans all targeted advertising of children under age 18, if the platform "knew or should have known" the person was a child. This law will go into effect in October 2025.[8]

Since the introduction of COPPA, the standard of actual knowledge has prevailed: A company is only liable for breaching its obligations if it directs a website or online service to a child and has actual knowledge that the child is under 13.

New state laws are shifting this standard to a more constructive approach and are using phrases like: "has actual knowledge, or willfully disregards a minor's age" or "likely to be accessed by a child." [9] This can be ambiguous and create confusion for businesses, particularly for operators of "general audience" websites that are not directed to children — such as news, sports, cooking, entertainment and other general interest websites.

Parental Consent for Social Media Use

Texas, Florida, Georgia, Louisiana, Arkansas, Mississippi, Ohio, Tennessee and Utah have passed laws banning social media use by children without parental consent, and some states, such as Texas, extend this ban to all teenagers under the age of 18.[10]

Many of these laws are being challenged in court on First Amendment grounds.[11] Advocacy groups are concerned that rather than making children safer, these laws will censor children's self-expression and limit their ability to access information that their parents may want to restrict, such as that related to LGBTQ+ or reproductive health support.[12]

Particularly troubling for freedom-of-speech advocates, such laws often ban minors from sites that contain material "harmful" to them, but the definitions of what is or may be harmful to children vary widely.[13] Most of these laws are focused on pornography and other adult content sites, but the definitions could be exploited to cover social media generally, particularly as many of them define harmful sites as those where at least one-third of the content is sexual in nature.[14]

Many of these laws create a private right of action for minors and parents if minors are able to access harmful online services, including social media sites.[15]

Product and Design Requirements

Some U.S. states have enacted age-appropriate design codes, following similar efforts in the U.K. California, Maryland and New York were the first to pass design codes, and Vermont's Legislature passed a similar bill that was ultimately vetoed by the governor this June.[16] Some states, like Connecticut and Utah, have also implemented design code provisions within other laws.[17]

California's age-appropriate design code introduces a constructive knowledge standard and creates further obligations on website operators, such as: (1) conducting a data protection assessment and estimating the age of young users with a reasonable level of certainty; (2) configuring privacy by default, i.e., automatic opt-outs; (3) imposing transparency standards, including notices drafted in plain and simple language appropriately suited to the age of the child-user; and (4) prohibiting profiling and geolocation unless certain guardrails or strict conditions are met.[18]

Maryland's age-appropriate design code, which will enter into force on Oct. 9, is similar to California's but arguably broader, as the law applies to online products reasonably likely to be accessed by children.[19] New York's Stop Addictive Feeds Exploitation, or SAFE, for Kids Act requires parental consent for minors to access "addictive feeds," unless the minors' social media feeds are configured to show only content the minor subscribes to or searches for.[20] The law also requires addictive social media apps to block notifications between midnight and 6 a.m. for minors.[21]

The California age-appropriate design code has been enjoined from enforcement pending litigation.[22] It is possible the Maryland and New York design code laws, and those of other states that implement discrete design requirements, will be challenged on similar grounds.

Will the FTC or Congress Act on Children's Privacy?

Congress is considering two privacy laws focused on children: The Children and Teens' Online Privacy Protection Act, referred to as COPPA 2.0, and the Kids Online Safety Act.[23] COPPA 2.0 would expand the current law to cover all children under age 18, which would be a huge shift. KOSA would cover children under age 17 and would require online platforms to prioritize the best interests of children when designing their products and services.

Both bills would ban targeted advertising and manipulative and deceiving practices aimed at children, and KOSA goes even further by requiring a third-party audit to assess risks to minors.

COPPA 2.0 would also establish data minimization rules and prohibit the collection of teens' personal information without their consent.

Both bills have been lobbied heavily, and have come very close to passing on several occasions.[24] It is still possible they could squeak through before the end of this legislative session, but a scheduled markup of both bills in late June was canceled, so time is running short as the election looms.

At the same time, the Federal Trade Commission is considering a revision to its rules on COPPA, publishing a far-reaching notice of proposed rulemaking in January, the comment period for which ended on March 11.[25] Some of the proposal's key provisions include separate verified parental consent for targeted advertising, required data minimization of children's data and prohibitions on push notifications for children.

If, and how, the FTC proceeds with this proposal will depend in large part on whether Congress takes up new children's privacy legislation, but it is likely we may see the FTC advance this rulemaking if such legislation is not enacted into law.

What Companies Can Do

There are several key takeaways for businesses that operate websites or apps, or that otherwise engage with children and teens online.

Assess Website and App Traffic

What do you know about the visitors and users of your product? Are you making inferences about their age? Are you using or showing cartoons or other content that may arguably attract children and/or teenagers? Is there an argument that you should have known you have teenagers on your website?

Consider Age Gates and/or Parental Consent

If you believe children use your products, what percentage of your users do you reasonably believe are children under the ages of 13, 16 or 18? Is there an argument that the number is de minimis? Or does it represent a substantial percentage? Are you making money off these children? If yes, you may want to consider an age gate to restrict users.

Data Minimization

If you currently hold data of children under the age of 16, and you do not have parental consent to have that data, consider deleting it. Take a close look as well at data you have of teenagers between 16 and 18, and whether you are buying or licensing data that may include children's data.

Assess Marketing of Your Products

Are your marketing teams promoting your product as having a teenage audience? Are you

intentionally targeting teenagers in your marketing materials? If yes, there may be an argument that you had a reason to know children were on your websites and apps.

Assess Advertising Campaigns

How critical is it that you target children and/or teenagers when offering advertising? Can you shift to contextual advertising if there is a substantial number of users under the age of 18 on your sites?

Design Improvements

Reconsider perpetual scroll, hyperpersonalized algorithms, auto-play of videos, and other product design features that are designed to keep children on the site.

Content Moderation and Monitoring

If you have user-generated content on your sites or you have a social media service, consider content moderation and monitoring systems that can track and remove content that could be harmful to minors.

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[1] See, e.g., <https://www.ftc.gov/news-events/news/press-releases/2024/07/ftc-order-will-ban-n-gl-labs-its-founders-offering-anonymous-messaging-apps-kids-under-18-halt>.

[2] Press Release, Kathy Hochul, Governor of N.Y., Governor Hochul Joins Attorney General James and Bill Sponsors to Sign Nation-Leading Legislation to Restrict Addictive Social Media Feeds and Protect Kids Online (June 20, 2024), <https://www.governor.ny.gov/news/governor-hochul-joins-attorney-general-james-and-bill-sponsors-sign-nation-leading-legislation>.

[3] Texas's HB 1181; Florida's HB 3; Georgia's SB 351; Louisiana's SB 162; Arkansas's SB 396; Mississippi's HB 1126; Ohio's HB 33 (pages 622-26); Tennessee's SB 2097/HB 1891; Utah's SB 89.

[4] See, e.g., California Consumer Privacy Act (as amended); Colorado's SB 24-041; Connecticut's SB 3; Maryland Online Data Privacy Act.

[5] 15 U.S.C. § 6501(1).

[6] California Consumer Privacy Act (as amended) § 1798.120.

[7] Colorado's SB 24-041; Connecticut's SB 3; New Jersey's Data Privacy Act.

[8] Maryland Online Data Privacy Act §§ 14–4607(A)(5), 4.

[9] See, e.g., Connecticut's SB 3 § 4; Maryland Age-Appropriate Design Code.

[10] Texas's HB 1181; Florida's HB 3; Georgia's SB 351; Louisiana's SB 162; Arkansas's SB 396; Mississippi's HB 1126; Ohio's HB 33 (pages 622-26); Tennessee's SB 2097/HB 1891; Utah's SB 89.

[11] NetChoice v. Griffin, No. 5:2023cv05105 (W.D. Ark. Aug. 31, 2023); Free Speech Coalition v. LeBlanc, No. 2:23-cv-02123 (E.D. La. Oct. 4, 2023); NetChoice v. Fitch, No. 1:2024cv00170 (S.D. Miss. June 7, 2024); NetChoice v. Yost, 2:2024cv00047 (S.D. Ohio Feb. 12, 2024); Free Speech Coalition v. Paxton, 95 F.4th 263 (5th Cir. 2024) (Texas); NetChoice v. Reyes, No. 2:2023cv00911 (D. Utah Dec. 18, 2023).

[12] See, e.g. Azadeh Moshiri, Utah is first US state to limit teen social media access, BBC (Mar. 24, 2023), <https://www.bbc.com/news/world-us-canada-65060733> ("There are so many children who might be in abusive households,...who might be LGBT, who could be cut-off from social media entirely.") (internal quotations omitted); Claire Cain Miller, For One Group of Teenagers, Social Media Seems a Clear Net Benefit, N.Y. Times (May 24, 2023), <https://www.nytimes.com/2023/05/24/upshot/social-media-lgbtq-benefits.html>.

[13] See, e.g., Florida's HB 3; Georgia's SB 351; Mississippi's HB 1126; Utah's SB 287.

[14] See, e.g., Florida's HB 3; Georgia's SB 351; Mississippi's HB 1126; Utah's SB 287.

[15] See, e.g., Florida's HB 3; Georgia's SB 351; Louisiana's Act 440; Mississippi's HB 1126; Utah's SB 89.

[16] California Age-Appropriate Design Code; Maryland Age-Appropriate Design Code; New York's Stop Addictive Feeds Exploitation (SAFE) for Kids Act; Neil Richards & Woodrow Hartzog, The Vermont veto is a step backward for privacy, IAPP (June 18, 2024), <https://iapp.org/news/a/the-vermont-veto-is-a-step-backward-for-privacy>.

[17] See, e.g., Connecticut's SB 3 § 9; Utah's SB 89 § 6.

[18] California Age-Appropriate Design Code.

[19] Maryland Age-Appropriate Design Code.

[20] New York's SAFE for Kids Act.

[21] *Id.* § 1502.

[22] *NetChoice, LLC v. Bonta*, No. 5:22-cv-08861 (N.D. Cal. Sept. 18, 2023).

[23] COPPA 2.0 Draft Text; KOSA Draft Text.

[24] A.W. Ohlheiser, Congress's online child safety bill, explained, *Vox* (May 30, 2024), <https://www.vox.com/technology/352251/kosa-congress-online-child-safety-bill-explained>; Rebecca Klar, Majority of battleground voters support kids' online safety laws: Poll, *The Hill* (June 17, 2024), <https://thehill.com/policy/technology/4722278-battleground-house-district-voters-kids-online-safety-laws-poll/>.

[25] 89 Fed. Reg. 2034 (Jan. 11, 2024).