



3 of 45 DOCUMENTS

Copyright 2009 ALM Media Properties, LLC
All Rights Reserved
Further duplication without permission is prohibited

CORPORATE COUNSEL

In-House Counsel (Online)

This article also appears in the following ALM publications:
Corporate Counsel

August 4, 2009 Tuesday

LENGTH: 1130 words

HEADLINE: Child-Proofing Your Ads: New Maine Law Restricts Marketing to Minors;
New Maine Law Restricts Marketing to Minors

BYLINE: Harry A. Valetk, Special to the special to law

BODY:

Marketers, stand down. In the wake of an increasingly socially networked, behaviorally advertised existence, Maine has quietly enacted a new law to put an end to predatory marketing practices against minors.

The new law, set to go into effect in September, broadly restricts using any personal information about minors for marketing products or services.

WHAT ARE THE NEW REQUIREMENTS?

Section 9552 of LD 1183 prohibits knowingly collecting or receiving "health-related information or personal information for marketing purposes from a minor without first obtaining verifiable parental consent." It also prohibits selling, offering to sell or otherwise transferring to another "health-related information or personal information about a minor."

"Health-related information" means any information about an individual concerning "health, nutrition, drug, or medication use, physical or bodily condition, mental health, medical history, medical insurance coverage or claims or other similar data." "Personal information" is broadly defined to include any individually identifiable information.

Child-Proofing Your Ads: New Maine Law Restricts Marketing to Minors; New Maine Law Restricts Marketing to Minors In-House Counsel (Online) This article also appears in the following ALM publications: C

Section 9553 prohibits using health-related or personal information about a minor for "marketing a product or service to that minor or promoting any course of action for the minor relating to a product." But, unlike 9552, this section doesn't mention obtaining verifiable parental consent at all. So, technically, LD 1183 allows businesses to collect, receive and sell a minor's information, as long as you have verifiable parental consent. But even with verifiable parental consent, the law still prohibits using any personal information (e.g., name, e-mail, mobile phone number) to market to minors.

To enforce the statute, LD 1183 gives private litigants the right to sue for injunctive relief to stop unlawful collection or predatory marketing. They may also recover actual damages of up to \$250 for each violation, plus reasonable attorney fees. Finally, civil penalties may be assessed to the tune of up to \$20,000 for first-time offenders.

PROTECTING 'TWEENS'

According to the legislative history, lawmakers in Maine reacted to studies showing how much sensitive personal content minors continue to post on social networking profiles, and how advertisers pay large sums for access to those files. A 2008 Harris Interactive study, for example, concluded that marketing to teens offers unique promise: One in three teens browse the Web on mobile phones, and six in 10 teens are willing to provide personal information.

In her testimony co-sponsoring LD 1183, Rep. Sharon Treat, D. Hallowell, acknowledged federal law already offers some protections to children under 13. But she noted that existing law doesn't go far enough.

"Direct-to-consumer advertising for prescription drugs has been permitted by the Food and Drug Administration since 1997, and there are no specific rules for marketing to kids and teens. The only law that regulates online marketing to children is COPPA. ... But there's no law that governs marketing to older teens."

And she's right. The Children's Online Privacy Protection Act ("COPPA") already requires Web site operators to obtain verifiable parental consent before collecting personal information online from children 12 years and younger. But LD 1183 goes further than COPPA in several ways.

First, COPPA only applies to children 12 years and younger. LD 1183 only refers to minors, and that, presumably, includes anyone under age 18.

Second, COPPA only applies to the collection of personal information online. LD 1183 doesn't distinguish between online and offline information collection.

Third, COPPA applies only to commercial Web site operators. LD 1183 broadly applies to "persons."

Finally, unlike COPPA, LD 1183 allows for a private cause of action with equitable and punitive relief, including attorney costs.

WHAT CHALLENGES DOES LD 1183 PRESENT?

Given its potentially broad prohibition against using any personal information to market to minors from Maine, LD 1183 could face a few challenges.

The law seemingly cuts off any Maine resident under 18 from receiving promotional material about college prep services, volunteer opportunities (e.g., Red Cross) or even military service. In today's marketplace, consumers commonly receive these materials through ordinary e-mail newsletters and loyalty programs.

LD 1183 also offers little guidance to the law enforcement community on key questions of scope. Thus, a broad spectrum of commercial and philanthropic programs may suddenly come under scrutiny. For example, are religious or other not-for-profit entities covered? What about colleges and government agencies?

Targeted ads to Maine's minors could also trigger legal liability. Many popular Web sites with registered users bar

Child-Proofing Your Ads: New Maine Law Restricts Marketing to Minors; New Maine Law Restricts Marketing to Minors In-House Counsel (Online) This article also appears in the following ALM publications: C

minors 12 years and younger. Take Facebook, for example. Users under 13 may not register for a profile. For registrants 13 and older, however, Facebook explains it may use personal information to offer services.

"We may occasionally use your name and email address to send you notifications regarding new services offered by Facebook that we think you may find valuable."

This type of activity directed at the "tween" demographic may suddenly fall within LD 1183's marketing restrictions.

Ironically, to comply with LD 1183 and evade fines or private claims, businesses may be forced to actually collect more information -- residence data and age information -- from users than previously required. How else could you reasonably exclude Maine's minors from receiving materials promoting a product or service?

CONCLUSION

Obviously, much remains uncertain about how Maine's LD 1183 will impact the interconnected, data-driven marketplace. Will other states pass similar laws? And it's unclear how courts will even interpret LD 1183's broad prohibitions on using personal information to market products or services, even with parental consent. Still, the compliance clock is ticking. And companies now using personal information to market products or services to Maine residents only have a few weeks to comply with LD 1183.

No doubt, protecting consumers -- especially minors -- from predatory information practices is appropriate. But rules prohibiting abusive practices must also be carefully tailored to stop the illicit behavior. LD 1183, as it is now written, goes far beyond just prohibiting predatory information practices. It may prohibit appropriate ones too.

Harry A. Valetk is an Internet safety and consumer privacy attorney in New York City. He has written extensively on privacy, social networking and other Internet-related topics. He is also a visiting scholar at Oxford University's Internet Institute, Fulbright Senior Specialist and a former trial attorney with the U.S. Department of Justice. Email: harry@valetk.com

LOAD-DATE: October 13, 2011