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Washington State Considers Comprehensive Data Privacy Act to Protect Personal Information

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Washington State is considering sweeping legislation (SB 5376) to govern the security and privacy of personal data similar to the requirements of the European Union's General Data Protection Regulation ("GDPR"). Under the proposed legislation, Washington residents will gain comprehensive rights in their personal data. Residents will have the right, subject to certain exceptions, to request that data errors be corrected, to withdraw consent to continued processing and to deletion of their data. Residents may require an organization to confirm whether it is processing their personal information and to receive a copy of their personal data in electronic form.

Covered organizations will be required to provide consumers with a conspicuous privacy notice disclosing the categories of personal data collected or shared with third parties and the consumers' rights to control the use of their personal data. Significantly, covered businesses must conduct documented risk assessments to identify the personal data to be collected and weigh the risks in collection and mitigation of those risks through privacy and cybersecurity safeguards.

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Washington's proposal follows the recent enactment of the California Consumer Privacy Act (see EBG's *Act Now Advisory* – California's Consumer Privacy Act What Employer's Need to Know). Washington's legislation, however, will grant rights beyond those contained in the California Act and is more closely aligned with the GDPR's framework. The heightened protections are grounded in the sponsors' recognition of the detrimental effect of data breaches and the resulting loss of privacy. The Act cites to the GDPR as providing for "the strongest privacy protections in the world" and adopts the GDPR's expansive definition of "personal data" – any information relating to any identified or identifiable natural person.

Businesses that process the personal data of more than 100,000 Washington residents are covered, as well as "data brokers" that derive 50 percent of their revenue from the brokered sale of personal information. Notably, "data sets" (*i.e.*, Protected Health Information ("PHI")) regulated by the federal Health Insurance Portability and Accountability Act of 1996, Health Information Technology for Economic and Clinical Health ("HITECH") Act, or the Gramm-Leach-Bliley Act of 1999 are not covered. Financial and health care institutions may need to comply as to other personal data not protected under these statutes. If a health care or financial institution collects or processes other personal data and meets the thresholds above, then it is likely covered.

Employers should take note that datasets maintained only for employment records purposes are excluded. Notably, the Act excludes from coverage "an employee or contractor of a business acting in their role as an employee or contractor." The Act will impact organizations that use facial recognition technology for profiling consumers with effects on "employment purposes" and "health care services" requiring human review prior to final decisions. Organizations who contract with facial recognition firms may see pass through contractual restrictions prohibiting use for unlawful bias.

There is no private right of action. Enforcement actions may be brought by the Attorney General to obtain

injunctive relief and to impose civil penalties. If enacted, the Act, scheduled to become effective December 31, 2020, will have wide-ranging impacts requiring significant advance planning, risk assessments and consideration of privacy and security by design principles.

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