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LEGISLATIVE EDUCATION STUDY COMMITTEE
BILL ANALYSIS
56th Legislature, 2nd Session, 2024

Bill Number	<u>SB68</u>	Sponsor	<u>Muñoz/Herndon</u>
Tracking Number	<u>.226938.4</u>	Committee Referrals	<u>SCC/STBTC/SJC</u>
Short Title	<u>Age Appropriate Design Code Act</u>		
Analyst	<u>Davalos</u>	Original Date	<u>1/29/2024</u>
		Last Updated	<u></u>

BILL SUMMARY

Synopsis of Bill

Senate Bill 68 (SB68) creates the Age Appropriate Design Code Act which would restrict the ability of for-profit online companies to collect personal data on children under the age of 18, including geolocation information, or use “dark patterns”—a user interface designed to subvert or impair user autonomy, decision making, or choice—to cause children to take any action that is not in their best interest. SB68 also requires for-profit online companies that target children to complete and maintain a data protection impact assessment that analyzes whether the product or service is in the “best interest of children.”

SB68 stipulates that covered entities that violate the Age Appropriate Design Code Act would be subject to injunctive relief or would be liable for civil penalties in the amount of \$2,500 per affected child for each negligent violation and \$7,500 per affected child for each intentional violation, with enforcement actions initiated by the New Mexico Attorney General (NMAG).

The bill specifies that the Age Appropriate Design Code Act applies to for-profit online companies that provide products, services, or features that are targeted to New Mexico residents with more than 100 thousand users, or with fewer than 100 thousand users but which earn more than 25 percent of their income from selling personal information. SB68 also creates exceptions for children who other deliberately seek out information, as well as for companies that collect health information and other generally protected data.

The effective date of SB68 is July 1, 2025.

FISCAL IMPACT

SB68 does not contain an appropriation. However, NMAG may have fiscal implications from additional resources.

According to NMAG, implementation of SB68 would require at least the following FTEs:

- One specialized investigator: \$94 thousand;

- One specialized attorney: \$115 thousand; and
- One support law clerk: \$80 thousand.

NMAG notes these approximate salaries are based on the State Personnel Office salary schedule, and that benefits would also be required.

SUBSTANTIVE ISSUES

5Rights Foundation, a nonprofit foundation working to enable children to access the digital world fearlessly, [presented](#) to LESC in July 2023 on how to protect children online. Online platforms use surveillance advertising and algorithms to generate large profits by selling personal data to outside advertisers. According to 5Rights Foundation, by the time a child turns 18 years old, it is estimated that there will be 70 thousand data points about them, and companies keep this information to share that information forever. Furthermore, social media platforms have policies against child sexual exploitation, sexual solicitation, threats of violence, and inappropriate content, however, children still experience many online harms, including addiction, mental health issues, sextortion, and so on. The Age Appropriate Design Code created by SB68 could protect the privacy and well-being of children who access online products and services.

Data Protection Impact Assessment. SB68 would require covered entities to complete a data protection impact assessment on or before July 1, 2025, for any online services that is reasonably likely to be accessed by children after June 30, 2025. Covered entities would also maintain and review documentation of the data protection impact assessment as long as the online services are reasonably likely to be accessed and as necessary to account for material changes to data processing pertaining to the online services.

SB68 would permit NMAG to issue written requests for a data protection impact assessment. Within five to seven business days, covered entities must provide a list of all completed data protection impact assessments. Information in data protection impact assessments are subject to attorney-client privilege or work product protections.

SB68 would also require covered entities to configure all default privacy settings to offer a high level of privacy and to publicly provide privacy information, terms of service, policies, and community standards in language suited to the age of children reasonably likely to access the online services.

Data protection impact assessments would identify the purpose of an online service, how an online service uses children's personal data, and determine whether the online service is designed and offered in an age-appropriate manner consistent with the best interests of children who are reasonably likely to access the online services. Data protection impact assessments must examine if the design of the online product could lead to children experiencing harmful contacts, witnessing features not in their best interest, or being exploited by a contact on the online platform.

Additionally, data protection impact assessments would examine whether algorithms; targeted advertising features; system design features to increase, sustain, or extend the use of online services; and whether, how, and for what purpose the online service collects or processes sensitive personal data of children are in the best interest of children likely to access the online product. When a covered entity identifies an online service that may be inconsistent with the best interest of children, the covered entity would include a detailed plan describing the steps they have taken

and will take to ensure the online service will be in compliance with SB68 in their data protection impact assessment.

Data protection impact assessments would be protected as confidential and would be exempt from public disclosure, inclusion pursuant to the [Inspection of Public Records Act](#).

Prohibited Practices. For-profit companies that provide online services would be prohibited from processing any personal data of a child that is not necessary to provide online services, as it is inconsistent with the best interest of children. SB68 would prohibit covered entities from profiling a child by default unless there are appropriate safeguards in place to ensure that profiling is consistent with the best interest of children or if the child is actively and knowingly engaged. Processing any geolocation information of children without providing an obvious sign that precise geolocation information is being collected is also prohibited. Further, SB 68 would prohibit covered entities from using dark patterns to cause children to provide personal data as it is not in the best interest of children.

SB68 defines the “best interest of children” as the use of a child’s personal data or the design of an online product, service or feature in a way that will not benefit the covered entity to the detriment of the child and will not result in physical or financial harm to the child, severe mental harm to the child, a highly offensive intrusion on the privacy expectations of the child, or discrimination against the child based upon race, color, religion, national origin, disability, sex or sexual orientation.

Violations, Enforcement, Penalties. Covered entities that violate SB68 would be subject to injunctive relief to cease or correct the violation or they would be liable for civil penalties for each affected child up to \$2,500 for each negligent violation and \$7,500 for each intentional violation. Enforcement actions would only be initiated by NMAG through written notice to the covered entity. However, SB68 states if a covered entity cures and provides written statement of the sufficient measures taken to prevent future violations, such as those identified in the notice provided by the attorney general, the covered entity would not be liable for a civil penalty for any violation cured.

Exceptions. SB68 does not apply to telecommunication services, the delivery or use of a physical product, or a covered entity that is governed by the privacy, security and breach notification rule issued by the United States.

ADMINISTRATIVE IMPLICATIONS

NMAG notes the bill would require the attorney general be charged with enforcement jurisdiction of the act in what is essentially a new consumer protection action. This could require the need for additional attorney and staff resources in what would be a new statutory responsibility.

TECHNICAL ISSUES

NMAG suggests defining the terms “highly offensive,” “device,” “valuable consideration,” and “material” for clarity.

The Office of Broadband Access and Expansion (OBAE) notes existing difficulties in determining the age of users online. OBAE also notes that data protection impact assessment vendors are not common in the United States.

OTHER SIGNIFICANT ISSUES

NMAG notes there is a federal lawsuit addressing a similar law in California. [In that lawsuit](#), industry companies (Amazon, AOL, Google, Meta, and TikTok) are challenging the enacted statute under the First Amendment. New Mexico has joined an amicus brief in that lawsuit detailing how it does not believe that there is a First Amendment violation. Additionally, in comparison to the California act, SB68 seems to make specific changes to the language to address the arguments raised in the California lawsuit.

RELATED BILLS

Relates to SB129, Cybersecurity Act Changes, which makes several changes to the Cybersecurity Act to implement cybersecurity policies based on the minimum standards issued by the National Institute of Standards and Technology.

SOURCES OF INFORMATION

- LESC Files
- Administrative Office of the Courts (AOC)
- Children, Youth and Families Department (CYFD)
- New Mexico Attorney General (NMAG)
- Office of Broadband Access and Expansion (OBAE)

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