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SENATE BILL 68

56TH LEGISLATURE - STATE OF NEW MEXICO - SECOND SESSION, 2024

INTRODUCED BY

George K. Muñoz and Pamela Herndon

AN ACT

RELATING TO BUSINESS; ENACTING THE AGE APPROPRIATE DESIGN CODE ACT; PROVIDING CIVIL PENALTIES.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

SECTION 1. [NEW MATERIAL] SHORT TITLE.--This act may be cited as the "Age Appropriate Design Code Act".

SECTION 2. [NEW MATERIAL] LEGISLATIVE INTENT.--It is the intent of the legislature that nothing in the Age Appropriate Design Code Act be construed to infringe on the existing rights and freedoms of children.

SECTION 3. [NEW MATERIAL] DEFINITIONS.--As used in the Age Appropriate Design Code Act:

A. "affiliate" means a legal entity that controls, is controlled by or is under common control with another legal entity;

1 B. "age-appropriate" means a recognition of the
2 distinct needs and diversities of children in the following age
3 ranges:

4 (1) up to five years of age;

5 (2) six to nine years of age;

6 (3) ten to twelve years of age;

7 (4) thirteen to fifteen years of age; and

8 (5) sixteen to seventeen years of age;

9 C. "best interest of children" means the use, by a
10 covered entity, of the personal data of a child or the design
11 of an online product, service or feature in a way that:

12 (1) will not benefit the covered entity to the
13 detriment of the child; and

14 (2) will not result in:

15 (a) reasonably foreseeable and material
16 physical or financial harm to the child;

17 (b) reasonably foreseeable and severe
18 psychological or emotional harm to the child;

19 (c) a highly offensive intrusion on the
20 reasonable privacy expectations of the child; or

21 (d) discrimination against the child
22 based upon race, color, religion, national origin, disability,
23 sex or sexual orientation;

24 D. "child" means a consumer who is under eighteen
25 years of age;

1 E. "collect" means buying, renting, gathering,
2 obtaining, receiving or accessing personal data pertaining to a
3 consumer by any means, including receiving personal data from
4 the consumer, either actively or passively, or by observing the
5 consumer's behavior;

6 F. "common branding" means a shared name, service
7 mark or trademark that the average consumer would understand
8 that two or more entities commonly own;

9 G. "consumer" means a natural person who resides in
10 New Mexico, however identified, including by a unique
11 identifier;

12 H. "control" or "controlled" means:

13 (1) ownership of or the power to vote more
14 than fifty percent of the outstanding shares of any class of
15 voting security of a covered entity;

16 (2) control in any manner over the election of
17 a majority of the directors or of individuals exercising
18 similar functions of a covered entity; or

19 (3) the power to exercise a controlling
20 influence over the management of a covered entity;

21 I. "covered entity" means a sole proprietorship,
22 partnership, limited liability company, corporation,
23 association, affiliate or other legal entity that is organized
24 or operated for the profit or financial benefit of the entity's
25 shareholders or other owners and that offers online products,

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1 services or features to individuals in New Mexico and processes
2 children's personal data;

3 J. "dark pattern" means a user interface designed
4 or manipulated with the purpose of subverting or impairing user
5 autonomy, decision making or choice;

6 K. "data protection impact assessment" means a
7 systematic survey to assess compliance with the duty to act in
8 the best interest of children;

9 L. "default" means a preselected option adopted by
10 a covered entity for an online product, service or feature;

11 M. "de-identified" means information that cannot
12 reasonably be used to infer information about, or otherwise be
13 linked to, an identified or identifiable individual, if a
14 covered entity that possesses that information:

15 (1) takes reasonable measures to ensure that
16 such information cannot be associated with an individual;

17 (2) publicly commits to process such
18 information only in a de-identified fashion and not attempt to
19 re-identify such information; and

20 (3) contractually obligates any recipients of
21 such information to satisfy the criteria set forth in this
22 subsection;

23 N. "derived data" means data that is created by the
24 derivation of information, data, assumptions, correlations,
25 inferences, predictions or conclusions from facts, evidence or

1 another source of information or data about a child or a
2 child's device;

3 O. "personal data" means any information, including
4 derived data, that is linked or reasonably linkable, alone or
5 in combination with other information, to an identified or
6 identifiable individual; "personal data" does not include
7 de-identified information or publicly available information;

8 P. "precise geolocation" means any data that is
9 derived from a device and that is used or intended to be used
10 to locate a consumer within a geographic area that is equal to
11 or less than the area of a circle with a radius of one thousand
12 eight hundred feet;

13 Q. "process" or "processing" means conduct or an
14 operation performed, whether by manual or automated means, on
15 personal data or on sets of personal data, such as the
16 collection, use, storage, disclosure, analysis, deletion,
17 modification or other handling of personal data;

18 R. "profiling" means automated processing of
19 personal data that uses personal data to evaluate certain
20 aspects relating to a natural person, including analyzing or
21 predicting aspects concerning a natural person's performance at
22 work, economic situation, health, personal preferences,
23 interests, reliability, behavior, location or movements;
24 "profiling" does not include the processing of data that does
25 not result in an assessment or judgment about a natural person;

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1 S. "reasonably likely to be accessed" means an
2 online product, service or feature is accessed or is reasonably
3 likely to be accessed by children based on any of the following
4 indicators:

5 (1) the online product, service or feature is
6 directed to children as defined by the federal Children's
7 Online Privacy Protection Act of 1998;

8 (2) the online product, service or feature is
9 determined, based on competent and reliable evidence regarding
10 audience composition, to be routinely accessed by a significant
11 number of children;

12 (3) the online product, service or feature has
13 advertisements marketed to children;

14 (4) the online product, service or feature is
15 substantially similar or the same as an online product, service
16 or feature subject to Paragraph (2) of this subsection;

17 (5) a significant amount of the audience of
18 the online product, service or feature is determined, based on
19 internal company research, to be children; or

20 (6) the covered entity knew or should have
21 known that a user is a child;

22 T. "sell" means selling, renting, releasing,
23 disclosing, disseminating, making available, transferring or
24 otherwise communicating orally, in writing or by electronic or
25 other means, a consumer's personal data by a covered entity to

1 a third party for monetary or other valuable consideration;

2 "sell" does not include:

3 (1) the disclosure of personal data to a third
4 party who processes the personal data on behalf of the covered
5 entity;

6 (2) the disclosure of personal data to a third
7 party with whom the consumer has a direct relationship for
8 purposes of providing an online product, service or feature
9 requested by the consumer;

10 (3) the disclosure or transfer of personal
11 data to an affiliate of the covered entity;

12 (4) the disclosure of data that the consumer
13 intentionally made available to the general public via a
14 channel of mass media and did not restrict to a specific
15 audience; or

16 (5) the disclosure or transfer of personal
17 data to a third party as an asset that is part of the completed
18 or proposed merger, acquisition, bankruptcy or other
19 transaction in which the third party assumes control of all or
20 part of the covered entity's assets;

21 U. "sensitive personal data" means personal data
22 that includes:

23 (1) data revealing racial or ethnic origin,
24 religious beliefs, mental or physical health condition or
25 diagnosis, sex life, sexual orientation or citizenship or

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1 immigration status;

2 (2) the processing of genetic or biometric
3 data for the purpose of uniquely identifying an individual; or

4 (3) precise geolocation data;

5 V. "share" means sharing, renting, releasing,
6 disclosing, disseminating, making available, transferring or
7 otherwise communicating orally, in writing or by electronic or
8 other means, a consumer's personal data by a covered entity to
9 a third party for cross-context behavioral advertising, whether
10 or not for monetary or other valuable consideration, including
11 transactions between a covered entity and a third party for
12 cross-context behavioral advertising for the benefit of a
13 covered entity in which no money is exchanged; and

14 W. "third party" means a person other than the
15 consumer of the covered entity.

16 SECTION 4. [NEW MATERIAL] REQUIREMENTS FOR COVERED
17 ENTITIES.--

18 A. A covered entity shall:

19 (1) complete a data protection impact
20 assessment for any online product, service or feature that is
21 reasonably likely to be accessed and maintain documentation of
22 the data protection impact assessment as long as the online
23 product, service or feature is reasonably likely to be
24 accessed;

25 (2) review all data protection impact

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1 assessments as necessary to account for material changes to
2 data processing pertaining to the online product, service or
3 feature;

4 (3) within five business days of a written
5 request by the attorney general, provide to the attorney
6 general a list of all data protection impact assessments the
7 covered entity has completed;

8 (4) within seven business days of a written
9 request by the attorney general, provide a data protection
10 impact assessment to the attorney general pursuant to such a
11 request; provided that the attorney general may, in the
12 attorney general's discretion, extend the time allowed for a
13 covered entity to produce a data protection impact assessment;

14 (5) configure all default privacy settings
15 provided to children by the online product, service or feature
16 to settings that offer a high level of privacy, unless the
17 covered entity can demonstrate a compelling reason that a
18 different setting is in the best interest of children;

19 (6) publicly provide privacy information,
20 terms of service, policies and community standards in a
21 prominent, precise manner and use clear language suited to the
22 age of children reasonably likely to access that online
23 product, service or feature; and

24 (7) publicly provide prominent, accessible and
25 responsive tools to help a child or, if applicable, the child's

1 parent or guardian, exercise the child's privacy rights and
2 report concerns.

3 B. The data protection impact assessment required
4 by this section shall identify the purpose of an online
5 product, service or feature and how the online product, service
6 or feature uses children's personal data and determine whether
7 the online product, service or feature is designed and offered
8 in an age-appropriate manner consistent with the best interest
9 of children who are accessing or reasonably likely to access
10 the online product, service or feature by examining at least
11 the following:

12 (1) whether the design of the online product,
13 service or feature could lead to children experiencing or being
14 targeted by harmful, or potentially harmful, contacts on the
15 online product, service or feature that would be inconsistent
16 with the best interest of children reasonably likely to access
17 the online product, service or feature;

18 (2) whether the design of the online product,
19 service or feature could permit children to witness,
20 participate in or be subject to conduct on the online product,
21 service or feature that would be inconsistent with the best
22 interest of children reasonably likely to access the online
23 product, service or feature;

24 (3) whether the design of the online product,
25 service or feature is reasonably expected to allow children to

1 be party to or exploited by a contract on the online product,
2 service or feature;

3 (4) whether algorithms used by the online
4 product, service or feature would be inconsistent with the best
5 interest of children reasonably likely to access the online
6 product, service or feature;

7 (5) whether targeted advertising systems used
8 by the online product, service or feature would be inconsistent
9 with the best interest of children reasonably likely to access
10 the online product, service or feature;

11 (6) whether the online product, service or
12 feature uses system design features to increase, sustain or
13 extend the use of the online product, service or feature by
14 children, including the automatic playing of media, rewards for
15 time spent and notifications, that would be inconsistent with
16 the best interest of children reasonably likely to access the
17 online product, service or feature; and

18 (7) whether, how and for what purpose the
19 online product, service or feature collects or processes
20 sensitive personal data of children and whether those practices
21 would be inconsistent with the best interest of children
22 reasonably likely to access the online product, service or
23 feature.

24 C. When a covered entity identifies an online
25 product, service or feature reasonably likely to be accessed by

1 children that may be inconsistent with the best interest of
2 children, the covered entity shall include in a data protection
3 impact assessment a detailed plan describing the steps the
4 covered entity has taken and will take to ensure that the
5 online product, service or feature will be consistent with the
6 best interest of children.

7 D. A data protection impact assessment is protected
8 as confidential and shall be exempt from public disclosure,
9 including pursuant to the Inspection of Public Records Act.

10 E. To the extent any information contained in a
11 data protection impact assessment disclosed to the attorney
12 general includes information subject to attorney-client
13 privilege or work product protection, disclosure pursuant to
14 Subsection A of this section shall not constitute a waiver of
15 that privilege or protection.

16 F. A data protection impact assessment conducted by
17 a covered entity for the purpose of compliance with any other
18 law complies with this section if the data protection impact
19 assessment meets the requirements of the Age Appropriate Design
20 Code Act.

21 G. A single data protection impact assessment may
22 contain multiple similar processing operations that present
23 similar risks only if each relevant online product, service or
24 feature is addressed.

25 H. A covered entity shall complete a data

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1 protection impact assessment on or before July 1, 2025 for any
2 online product, service or feature that is reasonably likely to
3 be accessed by children after June 30, 2025.

4 SECTION 5. [NEW MATERIAL] PROHIBITED PRACTICES.--A

5 covered entity that provides an online product, service or
6 feature that is reasonably likely to be accessed shall not:

7 A. process the personal data of a child in a way
8 that the covered entity knows, or has reason to know, is
9 inconsistent with the best interest of children reasonably
10 likely to access the online product, service or feature;

11 B. profile a child by default unless:

12 (1) the covered entity can demonstrate that
13 the covered entity has appropriate safeguards in place to
14 ensure that profiling is consistent with the best interest of
15 children reasonably likely to access the online product,
16 service or feature; and

17 (2) profiling is necessary to provide the
18 online product, service or feature requested, and only with
19 respect to the aspects of the online product, service or
20 feature with which the child is actively and knowingly engaged;
21 or

22 (3) the covered entity can demonstrate a
23 compelling reason that profiling is in the best interest of
24 children;

25 C. process any personal data that is not necessary

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1 to provide an online product, service or feature with which a
2 child is actively and knowingly engaged;

3 D. if the end user is a child, process personal
4 data for any reason other than a reason for which that personal
5 data was collected;

6 E. process any precise geolocation information of
7 children by default unless the collection of that precise
8 geolocation information is strictly necessary for the covered
9 entity to provide the online product, service or feature
10 requested and then only for the limited time that the
11 collection of precise geolocation information is necessary to
12 provide the online product, service or feature;

13 F. process any precise geolocation information of a
14 child without providing an obvious sign to the child for the
15 duration of that collection that precise geolocation
16 information is being collected;

17 G. use dark patterns to cause children to provide
18 personal data beyond what is reasonably expected to provide
19 that online product, service or feature, to forego privacy
20 protections or to take any action that the covered entity
21 knows, or has reason to know, is not in the best interest of
22 children reasonably likely to access the online product,
23 service or feature;

24 H. process any personal data that is not reasonably
25 necessary to provide an online product, service or feature with

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1 which a child is actively and knowingly engaged to reasonably
2 estimate age; or

3 I. allow a child's parent, guardian or any other
4 consumer to monitor the child's online activity or track the
5 child's location without providing an obvious signal to the
6 child when the child is being monitored or tracked.

7 SECTION 6. [NEW MATERIAL] VIOLATIONS--ENFORCEMENT--
8 PENALTIES.--

9 A. A covered entity that violates the Age
10 Appropriate Design Code Act shall be:

11 (1) subject to injunctive relief to cease or
12 correct the violation;

13 (2) liable for a civil penalty of not more
14 than two thousand five hundred dollars (\$2,500) per affected
15 child for each negligent violation; and

16 (3) liable for a civil penalty of not more
17 than seven thousand five hundred dollars (\$7,500) per affected
18 child for each intentional violation.

19 B. Enforcement actions pursuant to Subsection A of
20 this section shall only be initiated by the attorney general.

21 C. If a covered entity is in substantial compliance
22 with the requirements of Sections 3 through 5 of the Age
23 Appropriate Design Code Act, the attorney general shall provide
24 written notice to the covered entity, before initiating an
25 action pursuant to Subsection A of this section, identifying

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1 the specific provisions of that act that the attorney general
2 alleges have been or are being violated.

3 D. If a covered entity in compliance with
4 Subsection H of Section 4 of the Age Appropriate Design Code
5 Act cures the alleged violations identified in a notice
6 pursuant to Subsection C of this section and provides the
7 attorney general a written statement that the alleged
8 violations have been cured and sufficient measures have been
9 taken to prevent future violations, the covered entity shall
10 not be liable for a civil penalty for any violation cured
11 pursuant to this subsection.

12 E. Nothing in the Age Appropriate Design Code Act
13 shall be interpreted to serve as the basis for a private right
14 of action under that act or any other law.

15 SECTION 7. [NEW MATERIAL] EXCEPTIONS.--The Age
16 Appropriate Design Code Act does not apply to:

17 A. protected health information that is collected
18 by a covered entity associate governed by the privacy, security
19 and breach notification rules issued by the United States
20 department of health and human services, Parts 160 and 164 of
21 Title 45 of the Code of Federal Regulations, established
22 pursuant to the federal Health Insurance Portability and
23 Accountability Act of 1996;

24 B. a covered entity governed by the privacy,
25 security and breach notification rules issued by the United

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1 States department of health and human services, Parts 160 and
2 164 of Title 45 of the Code of Federal Regulations, established
3 pursuant to the federal Health Insurance Portability and
4 Accountability Act of 1996, to the extent the provider or
5 covered entity maintains patient information in the same manner
6 as medical information or protected health information as
7 described in Subsection A of this section;

8 C. information collected as part of a clinical
9 trial subject to the federal policy for the protection of human
10 subjects, also known as the common rule, pursuant to good
11 clinical practice guidelines issued by the international
12 council for harmonization of technical requirements for
13 pharmaceuticals for human use or pursuant to human subject
14 protection requirements of the United States food and drug
15 administration;

16 D. a telecommunications service as defined in 47
17 U.S.C. Section 153; or

18 E. the delivery or use of a physical product.

19 SECTION 8. [NEW MATERIAL] LIMITATIONS.--Nothing in the
20 Age Appropriate Design Code Act shall be interpreted or
21 construed to:

22 A. impose liability in a manner that is
23 inconsistent with 47 U.S.C. Section 230;

24 B. prevent or preclude a child from deliberately or
25 independently searching for, or specifically requesting,

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1 content; or

2 C. require a covered entity to restrict access to
3 online products, services or features based solely on age.

4 SECTION 9. APPLICABILITY.--

5 A. The Age Appropriate Design Code Act applies to
6 covered entities in New Mexico or persons that provide online
7 products, services or features that are targeted to residents
8 of this state and that during the preceding calendar year:

9 (1) controlled or processed the personal data
10 of not fewer than one hundred thousand consumers, excluding
11 personal data controlled or processed solely for the purpose of
12 completing a payment transaction; or

13 (2) controlled or processed the personal data
14 of not fewer than twenty-five thousand consumers and derived
15 more than twenty-five percent of the covered entity's gross
16 revenue from the sale of personal data.

17 B. The Age Appropriate Design Code Act does not
18 apply to an online product, service or feature that is not
19 accessible by the public after June 30, 2025.

20 SECTION 10. EFFECTIVE DATE.--The effective date of the
21 provisions of this act is July 1, 2025.