CARLTON FIELDS

Preparing for 2024: Encore to 2023's Cyber and Privacy Extravaganza

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Step right up as we discuss some of 2023's most notable cybersecurity and privacy regulatory and litigation developments and tips for keeping your program flying high. **Regulatory Activity** New regulatory requirements now in the center ring:

- Amendments to the New York State Department of Financial Services' Part 500 cybersecurity requirements. The amendments create an entirely new class of entity, enhance cybersecurity responsibilities for senior management and boards, and impose more prescriptive cybersecurity program requirements, annual compliance certifications, and enhanced cybersecurity event reporting requirements.
- Continued state adoption of the National Association of Insurance Commissioners' Insurance Data Security Model Law (Model Law 668). Almost half of U.S. states (most recently Pennsylvania and Illinois) have now adopted Model Law 668, which includes data security program management, cyber event investigation and response, annual reporting of cybersecurity events, and cybersecurity event notification obligations.

Upcoming Acts

- New and proposed rules from the SEC bringing new public company cybersecurity event reporting requirements and teasing climactic new acts via the SEC's reengagement with proposed cybersecurity risk management rules for investment advisers, registered investment companies, and business development companies and proposed amendments to Regulation S-P (see "SEC Stirs Its Pot of Cybersecurity Preparedness and Response Proposals," Expect Focus – Life, Annuity, and Retirement Solutions (May 2023)).

- Continuing efforts at the NAIC, including new drafts of both a cybersecurity event response plan for use by departments of insurance responding to licensees' cybersecurity events and a potential new privacy model, Insurance Consumer Privacy Protection Model Law (Model Law 674) (see "NAIC Privacy Working Group Goes All-in on New Draft Privacy Model," Expect Focus – Life, Annuity, and Retirement Solutions (September 2023)).

Class Action Litigation Like clowns from a car, privacy and cybersecurity class actions poured out of plaintiffs' firms, including data breach class actions and privacy claims related to everything from voice signatures to session replay technology and pixels, chatbots to digital advertising (both for targeting advertisements to consumers, as well as not targeting advertisements to protected classes of consumers). Claims spanned everything from violations of the Video Privacy Protection Act to wiretapping, discrimination, and invasion of privacy torts. A recent batch of cases has even challenged life insurers' ability to use family history to underwrite their policies. See our sideshow below on GIPA, "Lawsuits Alleging Violations of Illinois' GIPA Are Piling Into Court Like Clowns Out of a Circus Car." **Five Key Steps to Keep Your Program Flying High** With this funhouse of acts, here are a few recommendations for keeping your privacy and cybersecurity program flying high in 2024:

- Build internal awareness of privacy and cybersecurity developments to ensure your organization is keeping pace with the band.
- Ensure data maps and risk assessments are up to date and terms of use are using the latest in class action waivers and arbitration provisions.
- Inventory the data you hold and understand the legal obligations regarding such data (current and potential).
- Assess how current obligations are being met, and make adjustments as necessary (either due to new or impending legal changes or changed business practices).
- Harmonize state and regulatory requirements:
    - For privacy, evaluate consumer notices, opt-out rights, data disposal, limiting sharing with non-affiliates, and record-keeping obligations.
    - For cybersecurity, start with risk assessments, information security policies, annual cybersecurity program reviews, board involvement in, and oversight of, the cybersecurity program, an incident response plan, annual reporting to the regulator, and record-keeping.
- Revise your incident response plan to address new requirements and prepare for proposed changes.

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