Cybersecurity liability in the US: trends and perspectives

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Overview

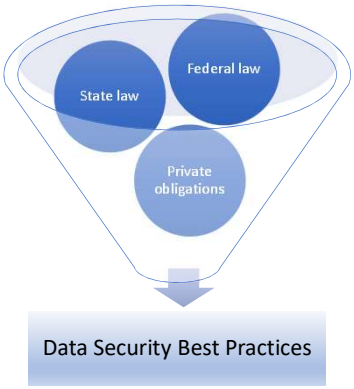
- Regulatory landscape
- Content of rules and obligations
- Hot topics and trends

The regulatory landscape

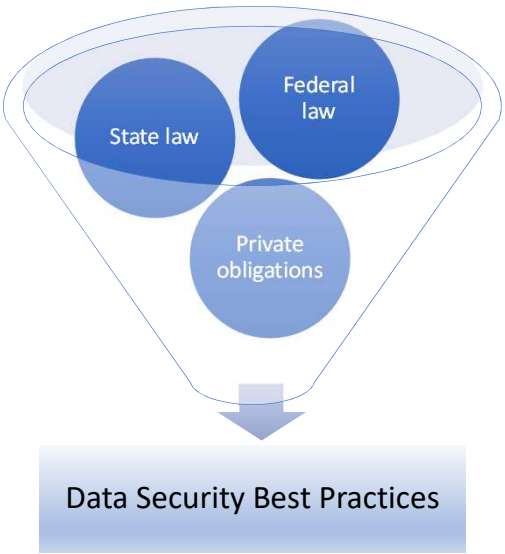
EU

GDPR

US



Sources of Data Security Obligations



Federal Law:
- FTC Act
- Sector-Specific Regulation
- Consent Decrees (FTC, FCC, CFPB, other)

State Law:
- Unfair & Deceptive Acts & Practices Acts (UDAP)
- Data Breach Notification Laws
- Data Security Laws (some sector-specific)
- Private Claims

Private Ordering:
- Voluntary Frameworks/Standards (some sector-specific)
- Certification Authorities
- Contracts

The Substance of Data Security Obligations: Federal Law

General

- FTC Act: Unfair or deceptive trade practices
- Consent Decrees: "Common Law" Best Practices

Sector-specific

- Data-intensive or sensitive industries
  - Health, Education, Finance
- Statutes and agency regulations

The Substance of Data Security Obligations: State Government Enforcement

- Data Breach Notification Laws*
  - All 50 states
  - Must notify consumers and Attorney General
  - Effects:
    - Reputational consequences
    - Risk of enforcement action
    - Result: internalization of costs
- Unfair & Deceptive Acts & Practices Acts (UDAP)
  - State Attorneys General – single lawsuits or multistate actions
    - Settlements: "assurance of voluntary compliance" agreements – best practices
- Specific Data Security Statutes and Formal Guidance (Massachusetts, California)

*precursors to GDPR

The Substance of Data Security Obligations: State Government Enforcement

Commonwealth of Massachusetts v. Equifax (April 3, 2018):

> "The Attorney General, unlike a private litigant … is required only to prove that unfair or deceptive acts or practices took place in trade or commerce; she is not required to prove or quantify resulting economic injury. … She is not required to allege or prove that any individual consumer was actually harmed ….."

The Substance of Data Security Obligations: Private Ordering Trends

- Best practices emerging from consent decrees and AVCs
- Voluntary frameworks/standards (e.g., NIST, CIS Controls)
- Certification authorities (e.g., CISSP) & licensure bodies
- Growing privacy bar; rise of Chief Privacy Officers

Hot Topics and Trends

- Standing
  - *Spokeo, Inc. v. Robins* – concrete injury required for standing
    - Tangible and possible intangible if recognized by law
    - Ongoing uncertainty in lower courts
- Harm
  - FTC: "substantial harm" required for FTC action.
  - States: more flexibility
- Keep Your Eye on the States!
  - Questions about FTC authority (*LabMD*) & political will
  - States as laboratories for progressive change

Keep Your Eye on the States!