

1 SENATE BILL 319

2 **56TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2023**

3 INTRODUCED BY

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10 AN ACT

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

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

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

17 SECTION 2. [NEW MATERIAL] DEFINITIONS.--As used in the Age
18 Appropriate Design Code Act:

19 A. "aggregate consumer information" means
20 information that relates to a group or category of consumers,
21 from which individual consumer identities have been removed and
22 that is not linked or reasonably linkable to any consumer or
23 household. "Aggregate consumer information" does not mean
24 individual consumer records that have been de-identified;

25 B. "child" means a consumer who is under eighteen

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1 years of age;

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

7 D. "consumer" means a natural person who resides in
8 New Mexico, however identified, including by a unique
9 identifier;

10 E. "controller" means a person that alone or
11 jointly with others determines the purpose and means of
12 processing personal data;

13 F. "dark pattern" means a user interface designed
14 or manipulated with the substantial effect of subverting or
15 impairing user autonomy, decision-making or choice;

16 G. "data protection impact assessment" means a
17 systematic survey to assess risks that arise from the data
18 management practices of the controller to children who are
19 reasonably likely to access the online service, product or
20 feature at issue that arises from the provision of that online
21 service, product or feature;

22 H. "default" means a preselected option adopted by
23 the controller for the online service, product or feature;

24 I. "de-identified" means information that cannot
25 reasonably be used to infer information about, or otherwise be

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1 linked to, an identified or identifiable individual, if the
2 controller that possesses that information:

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

5 (2) publicly commits to process such
6 information only in a de-identified fashion and not attempt to
7 re-identify such information; and

8 (3) contractually obligates any recipients of
9 such information to satisfy the criteria set forth in this
10 subsection;

11 J. "likely to be accessed by children" means it is
12 reasonable to expect, based on the following indicators, that
13 the online service, product or feature would be accessed by
14 children:

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

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

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

24 (4) the online service, product or feature is
25 substantially similar or the same as an online service, product

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1 or feature subject to Paragraph (2) of this subsection;

2 (5) the online service, product or feature has
3 design elements that are known to be of interest to children,
4 including games, cartoons, music and celebrities who appeal to
5 children; or

6 (6) a significant amount of the audience of
7 the online service, product or feature is determined, based on
8 internal company research, to be children;

9 K. "personal information" means information that is
10 linked or reasonably linkable to an identified or identifiable
11 individual; "personal information" does not include
12 de-identified information or publicly available information;

13 L. "precise geolocation" means data that is derived
14 from a device and that is used or intended to be used to locate
15 a consumer within a geographic area that is equal to or less
16 than the area of a circle with a radius of one thousand eight
17 hundred feet;

18 M. "process" or "processing" means an operation or
19 set of operations performed, whether by manual or automated
20 means, on personal data or on sets of personal data, such as
21 the collection, use, storage, disclosure, analysis, deletion or
22 modification of personal data;

23 N. "processor" means a person that processes
24 personal data on behalf of a controller;

25 O. "profiling" means automated processing of

1 personal information that uses personal information to evaluate
2 certain aspects relating to a natural person, including
3 analyzing or predicting aspects concerning a natural person's
4 performance at work, economic situation, health, personal
5 preferences, interests, reliability, behavior, location or
6 movements;

7 P. "sell" means selling, renting, releasing,
8 disclosing, disseminating, making available, transferring or
9 otherwise communicating orally, in writing or by electronic or
10 other means, a consumer's personal information by the
11 controller to a third party for monetary or other valuable
12 consideration;

13 Q. "sensitive personal information" means personal
14 information that includes:

15 (1) data revealing racial or ethnic origin,
16 religious beliefs, mental or physical health condition or
17 diagnosis, sex life, sexual orientation or citizenship or
18 immigration status;

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

21 (3) precise geolocation data;

22 R. "share" means sharing, 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 information by the

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1 controller to a third party for cross-context behavioral
2 advertising, whether or not for monetary or other valuable
3 consideration, including transactions between a controller and
4 a third party for cross-context behavioral advertising for the
5 benefit of a controller in which no money is exchanged; and

6 S. "third party" means a person who is not:

7 (1) the controller with whom the consumer
8 intentionally interacts and that collects personal information
9 from the consumer as part of the consumer's current interaction
10 with the controller pursuant to the Age Appropriate Design Code
11 Act;

12 (2) a service provider to the controller; or

13 (3) a contractor.

14 SECTION 3. [NEW MATERIAL] DATA PROTECTION IMPACT
15 ASSESSMENT--MITIGATION PLAN.--

16 A. Before any new online services, products or
17 features are offered to the public, a controller that provides
18 an online service, product or feature likely to be accessed by
19 children shall complete a data protection impact assessment for
20 any online service, product or feature likely to be accessed by
21 children and maintain documentation of this assessment as long
22 as the online service, product or feature is likely to be
23 accessed by children. A controller shall biennially review all
24 data protection impact assessments.

25 B. The data protection impact assessment required

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1 by this section shall identify the purpose of the online
2 service, product or feature, how it uses children's personal
3 information and the risks of material detriment to children
4 that arise from the data management practices of the
5 controller. The data protection impact assessment shall
6 address, to the extent applicable, all of the following:

7 (1) whether the design of the online product,
8 service or feature could harm children, including by exposing
9 children to harmful, or potentially harmful, content on the
10 online product, service or feature;

11 (2) whether the design of the online product,
12 service or feature could lead to children experiencing or being
13 targeted by harmful, or potentially harmful, contacts on the
14 online product, service or feature;

15 (3) whether the design of the online product,
16 service or feature could permit children to witness,
17 participate in or be subject to harmful, or potentially
18 harmful, conduct on the online product, service or feature;

19 (4) whether the design of the online product,
20 service or feature could allow children to be party to or
21 exploited by a harmful, or potentially harmful, contract on the
22 online product, service or feature;

23 (5) whether algorithms used by the online
24 product, service or feature could harm children;

25 (6) whether targeted advertising systems used

1 by the online product, service or feature could harm children;

2 (7) whether and how the online product,
3 service or feature uses system design features to increase,
4 sustain or extend the use of the online product, service or
5 feature by children, including the automatic playing of media,
6 rewards for time spent and notifications; and

7 (8) whether, how and for what purpose the
8 online product, service or feature collects or processes
9 sensitive personal information of children.

10 C. A controller that provides an online service,
11 product or feature likely to be accessed by children shall,
12 within three business days of a written request by the attorney
13 general, provide to the attorney general a list of all data
14 protection impact assessments the controller has completed.

15 D. A controller that provides an online service,
16 product or feature likely to be accessed by children shall,
17 within five business days, make a data protection impact
18 assessment available to the attorney general pursuant to a
19 written request.

20 E. A data protection impact assessment is protected
21 as confidential and shall be exempt from public disclosure,
22 including pursuant to the Inspection of Public Records Act.

23 F. To the extent any information contained in a
24 data protection impact assessment disclosed to the attorney
25 general includes information subject to attorney-client

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1 privilege or work product protection, disclosure pursuant to
2 Subsections C and D of this section shall not constitute a
3 waiver of that privilege or protection.

4 G. A data protection impact assessment conducted
5 by a controller for the purpose of compliance with any other
6 law complies with this section if the data protection impact
7 assessment meets the requirements of the Age Appropriate Design
8 Code Act.

9 H. A single data protection impact assessment may
10 contain multiple similar processing operations that present
11 similar risks only if each relevant online service, product or
12 feature is addressed.

13 I. A controller shall complete a data protection
14 impact assessment on or before July 1, 2024 for any online
15 service, product or feature likely to be accessed by children
16 offered to the public before July 1, 2024.

17 J. A controller that provides an online service,
18 product or feature likely to be accessed by children that has
19 documented any risk of material detriment to children that
20 arises from the data management practices of the controller
21 identified in the data protection impact assessment required by
22 this section shall create a timed plan to mitigate or eliminate
23 the risk before the online service, product or feature is
24 accessed by children.

25 SECTION 4. [NEW MATERIAL] ADDITIONAL REQUIRED ACTIONS BY

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1 CONTROLLERS.--A controller that provides an online service,
2 product or feature likely to be accessed by children shall:

3 A. estimate the age of child users with a
4 reasonable level of certainty appropriate to the risks that
5 arise from the data management practices of the controller or
6 apply the privacy and data protections afforded to children to
7 all consumers;

8 B. configure all default privacy settings provided
9 to children by the online service, product or feature to
10 settings that offer a high level of privacy, unless the
11 controller can demonstrate a compelling reason that a different
12 setting is in the best interests of children;

13 C. publicly provide privacy information, terms of
14 service, policies and community standards in a prominent,
15 precise manner and use clear language suited to the age of
16 children likely to access that online service, product or
17 feature;

18 D. if the online service, product or feature allows
19 the child's parent, guardian or other consumer to monitor the
20 child's online activity or track the child's location, provide
21 to the child an obvious signal when the child is being
22 monitored or tracked;

23 E. enforce published terms, policies and community
24 standards established by the controller, including privacy
25 policies and policies concerning children;

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1 F. publicly provide prominent, accessible and
2 responsive tools to help children, or, if applicable, their
3 parents or guardians, exercise their privacy rights and report
4 concerns;

5 G. consider the best interests of children when
6 designing, developing and providing online services, products
7 or features; and

8 H. prioritize the privacy, safety and well-being of
9 children over commercial interests if a conflict arises between
10 commercial interests of a controller and the best interests of
11 children likely to access an online product, service or
12 feature.

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

14 controller that provides an online service, product or feature
15 likely to be accessed by children shall not:

16 A. use the personal information of a child in a way
17 that the controller knows, or has reason to know, is materially
18 detrimental to the physical health, mental health or well-being
19 of the child;

20 B. profile a child by default unless:

21 (1) the controller can demonstrate it has
22 appropriate safeguards in place to protect children; and

23 (2) profiling is necessary to provide the
24 online service, product or feature requested, and only with
25 respect to the aspects of the online service, product or

1 feature with which the child is actively and knowingly engaged;
2 or

3 (3) the controller can demonstrate a
4 compelling reason that profiling is in the best interests of
5 children;

6 C. collect, sell, share or retain any personal
7 information that is not necessary to provide an online service,
8 product or feature with which a child is actively and knowingly
9 engaged, unless the controller can demonstrate a compelling
10 reason that the collecting, selling, sharing or retaining of
11 the personal information is in the best interests of children
12 likely to access the online service, product or feature;

13 D. if the end user is a child, use personal
14 information for any reason other than a reason for which that
15 personal information was collected, unless the controller can
16 demonstrate a compelling reason that use of the personal
17 information is in the best interests of children;

18 E. collect, sell or share any precise geolocation
19 information of children by default unless the collection of
20 that precise geolocation information is strictly necessary for
21 the controller to provide the service, product or feature
22 requested and then only for the limited time that the
23 collection of precise geolocation information is necessary to
24 provide the service, product or feature;

25 F. collect any precise geolocation information of a

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1 child without providing an obvious sign to the child for the
2 duration of that collection that precise geolocation
3 information is being collected;

4 G. use dark patterns to lead or encourage children
5 to provide personal information beyond what is reasonably
6 expected to provide that online service, product or feature to
7 forego privacy protections, or to take any action that the
8 controller knows, or has reason to know, is materially
9 detrimental to the child's physical health, mental health or
10 well-being; or

11 H. use any personal information collected to
12 estimate age or age range for any other purpose or retain that
13 personal information longer than necessary to estimate age; age
14 estimation shall be proportionate to the risks and data
15 practice of an online service, product or feature.

16 SECTION 6. [NEW MATERIAL] VIOLATIONS--ENFORCEMENT--
17 PENALTIES.--

18 A. A controller that violates the Age Appropriate
19 Design Code Act shall be:

20 (1) subject to injunctive relief to cease or
21 correct the violation;

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

25 (3) liable for a civil penalty of not more

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1 than seven thousand five hundred dollars (\$7,500) per affected
2 child for each intentional violation.

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

5 C. If a controller is in substantial compliance
6 with the requirements of Section 3 of the Age Appropriate
7 Design Code Act, the attorney general shall provide written
8 notice to the controller, before initiating an action pursuant
9 to Subsection A of this section, identifying the specific
10 provisions of that act the attorney general alleges have been
11 or are being violated.

12 D. If within ninety days of the notice required by
13 Subsection C of this section a controller cures alleged
14 violations identified in that notice and provides the attorney
15 general a written statement that the alleged violations have
16 been cured and sufficient measures have been taken to prevent
17 future violations, the controller shall not be liable for a
18 civil penalty for any violation cured pursuant to this
19 subsection.

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

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

25 A. protected health information that is collected

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1 by a covered entity or controller associate governed by the
2 privacy, security and breach notification rules issued by the
3 United States department of health and human services, Parts
4 160 and 164 of Title 45 of the Code of Federal Regulations,
5 established pursuant to the federal Health Insurance
6 Portability and Accountability Act of 1996;

7 B. a covered entity governed by the privacy,
8 security and breach notification rules issued by the United
9 States department of health and human services, Parts 160 and
10 164 of Title 45 of the Code of Federal Regulations, established
11 pursuant to the federal Health Insurance Portability and
12 Accountability Act of 1996, to the extent the provider or
13 covered entity maintains patient information in the same manner
14 as medical information or protected health information as
15 described in Subsection A of this section;

16 C. information collected as part of a clinical
17 trial subject to the federal policy for the protection of human
18 subjects, also known as the common rule, pursuant to good
19 clinical practice guidelines issued by the international
20 council for harmonisation of technical requirements for
21 pharmaceuticals for human use or pursuant to human subject
22 protection requirements of the United States food and drug
23 administration;

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

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

2 SECTION 8. APPLICABILITY.--

3 A. The Age Appropriate Design Code Act applies to
4 controllers in New Mexico or persons that produce services,
5 products or features that are targeted to residents of this
6 state and that during the preceding calendar year:

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

11 (2) controlled or processed the personal data
12 of not less than twenty-five thousand consumers and derived
13 more than twenty-five percent of their gross revenue from the
14 sale of personal data.

15 B. The Age Appropriate Design Code Act does not
16 apply to an online service, product or feature that is not
17 offered to the public on or after July 1, 2024.

18 SECTION 9. EFFECTIVE DATE.--The effective date of the
19 provisions of this act is July 1, 2024.