

# STATE OF NEW YORK

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2021-2022 Regular Sessions

## IN SENATE

May 13, 2021

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Introduced by Sen. GOUNARDES -- read twice and ordered printed, and when printed to be committed to the Committee on Finance

AN ACT to amend the executive law and the tax law, in relation to establishing the data economy labor compensation and accountability act

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

1 Section 1. Short title. This act shall be known and may be cited as  
2 the "data economy labor compensation and accountability act".

3 § 2. Legislative intent. a. The legislature finds that the commercial-  
4 ization of personal consumer data has wrought wholesale and disruptive  
5 transformations in our global markets, politics, psychology, socializa-  
6 tion, and the basic functioning of society;

7 b. The legislature further finds that, according to a 2016 Rockefeller  
8 Foundation study Data Financing for the Global Good, the "data economy,"  
9 in which millions of data points are endlessly gathered, organized, and  
10 exchanged by a series of vendors for the purpose of deriving value from  
11 accumulated information, has produced enough value in industrialized  
12 countries to equal 4% of their gross domestic product;

13 c. The legislature further finds that the consumers whose emails,  
14 texts, Internet searches, purchasing history, profile information,  
15 swipes, clicks, and more have produced such tremendous amounts of value  
16 do not receive the direct dividends of their labor;

17 d. The legislature further finds that large swaths of our global and  
18 national society have yet to benefit from the revolution wrought by such  
19 commercialization of their data and technology at large;

20 e. The legislature further finds that the proliferation of targeted  
21 advertising based on the sale, transfer, or licensing of personal  
22 consumer data has led to an exploitation of individual users' attention,  
23 leading to reduced productivity, mental acuity, and overall emotional  
24 and social well-being as well as overcrowding of digital spaces and  
25 depletion of the "common good" of limited user attention;

EXPLANATION--Matter in italics (underscored) is new; matter in brackets  
[-] is old law to be omitted.

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f. The legislature further finds that the collection and storage of vast amounts of personal consumer data carries an inherent risk of security breach if such data is compromised;

g. The legislature hereby declares that a levy on the gross receipts of commercial interests engaged in such commodification will erode the aforementioned negative externalities by incentivizing companies to collect fewer points of personal consumer data, to provide fair market value dividends directly to consumers in exchange for their productive labor, to proactively mitigate the security risks of data breaches, and to more judiciously preserve the commons of digital space and limited user attention;

h. The legislature further declares that a levy on the gross receipts of such commercial interests will redistribute the wealth created by the value of consumers from the shareholders who exploit this free labor back to the people who generate such labor;

i. The legislature further declares that the creation of a "data tax" will put New York on par with other domestic and foreign states such as Maryland, Vermont, and Austria who have similarly recognized the social, economic, and ethical justification for such tax.

§ 3. The executive law is amended by adding a new article 51 to read as follows:

#### ARTICLE 51

##### OFFICE OF CONSUMER DATA PROTECTION

##### Section 1004. Definitions.

##### 1005. Applicability.

##### 1006. Office of consumer data protection.

##### 1007. Annual report.

§ 1004. Definitions. For the purposes of this article, the following terms shall have the following meanings:

1. "Code of conduct" shall mean a set of written policies adopted by a data controller or processor in order to facilitate compliance with the provisions of this article and any regulations promulgated by the office of consumer data protection, taking into account the specific characteristics of the data controller or processor's data operations. All codes of conduct shall be approved by the office data protection. Either a code of conduct or the data protection certification described in subdivision eight of this section may be used to demonstrate compliance with the provisions of this article and with data protection regulations promulgated by the office of consumer data protection.

2. "Consumer" shall mean a natural person who is a New York resident.

3. "Data breach" shall mean a breach of security leading to the accidental or unlawful destruction, loss, alteration, unauthorized disclosure of, or access to, personal data transmitted, stored or otherwise processed.

4. "Data controller" or "controller" shall mean a natural or legal person which, alone or jointly with others, determines the purposes and means of processing of personal data. This includes but is not limited to any business, website, or platform that collects data while selling electronic advertising space on its platform tailored to any one or any aggregation of the items of personal data defined in this section. No data controller is exempt from the requirements of this article if they are processing pseudonymized data, whereby processing means any operation or set of operations that are performed on personal data or on sets of personal data, whether or not by automated means. For purposes of this subdivision "pseudonymized" or "pseudonymization" means the processing of personal data in a manner that renders the personal data no

1 longer attributable to a specific data subject without the use of addi-  
2 tional information, provided that the additional information is kept  
3 separately and is subject to technical and organizational measures to  
4 ensure that the personal data is not attributed to an identified or  
5 identifiable data subject. Any entity participating in real time  
6 auctions to facilitate the sale of digital advertising space, any entity  
7 collecting anonymized or aggregated data for the purpose of advertising,  
8 marketing, or transferring data to any party purchasing digital adver-  
9 tising space, and any company collecting the data of data subjects via  
10 an internet or phone-based platform, application or website registry  
11 that also markets or advertises products to consumers are considered  
12 data controllers under this article.

13 5. "Data operations" shall mean the collection, storage, transfer,  
14 sale, or licensing of personal data by a data controller or data proces-  
15 sor.

16 6. "Data processor" or "processor" shall mean a natural or legal  
17 person that processes data on behalf of the controller. Provided, howev-  
18 er, that when such natural or legal person is both a data controller and  
19 data processor, as defined in this section, such person shall be deemed  
20 one entity for the purposes of registration as described in paragraph  
21 (b) of subdivision two of section one thousand six of this article and  
22 taxation as described in section one hundred eighty-five of the tax law.

23 7. "Data protection audit" shall mean an audit conducted by the office  
24 or consumer data protection in order to assess whether a data controller  
25 or processor is in compliance with a data controller or processor's code  
26 of conduct, regulations promulgated by the office, and/or any relevant  
27 federal, state or local law. The office of consumer data protection  
28 shall adopt a rating system of "high assurance," "reasonable assurance,"  
29 "limited assurance," and "very limited assurance" to measure levels of  
30 compliance with such code of conduct, laws and regulations.

31 8. "Data protection certification" shall refer to a certification,  
32 created by the office of consumer data protection, which serves to  
33 demonstrate compliance with the provisions of this article and with data  
34 protection regulations promulgated by such office. Data protection  
35 certification shall be voluntary for all data controllers and process-  
36 ors. The office shall create the criteria for such certification.  
37 Successful certification may be demonstrated by a certificate, seal, or  
38 mark which data controllers and processors may conspicuously display.

39 9. "Data protection impact assessment" shall mean an internal evalu-  
40 ation which the office of consumer data protection requires data  
41 controllers and processors to carry out in order to evaluate the level  
42 of risk associated with such controller or processor's data operations.  
43 Such assessment shall examine the origin, nature, particularity, and  
44 severity of such risk. Where a data protection impact assessment indi-  
45 cates that a controller or processor's data operations involve a high  
46 degree of risk, as determined by the office of consumer data protection,  
47 which cannot be mitigated by appropriate measures, such controller or  
48 processor shall be obligated to receive express approval from the office  
49 of consumer data protection prior to commencing or resuming data oper-  
50 ations.

51 10. "Data subject" or "subject" shall mean a natural person for whom a  
52 data controller holds personal data, as defined in subdivision thirteen  
53 of this section, and who can be identified, directly or indirectly, by  
54 reference to such personal data.

55 11. "Newly established" shall refer to a limited history of data oper-  
56 ations as determined by the office of consumer data protection. Such

1 office may consider factors such as date of incorporation or other form  
2 of organization, whether in this state or another state, territory,  
3 district, province, nation or other jurisdiction, foreign or domestic,  
4 amount of capital raised, the entrepreneurial nature of a data control-  
5 ler or processor's business, or any other factor the office deems rele-  
6 vant in determining limited operating history and an initial date of  
7 data operations, provided that such office shall promulgate regulations  
8 with the guidelines used for determining such date and that such office  
9 shall adhere to such guidelines consistently when determining such date  
10 for all data controllers and processors required to register under para-  
11 graph (b) of subdivision two of section one thousand six of this arti-  
12 cle.

13 12. "Office" shall mean the office of consumer data protection estab-  
14 lished by section one thousand six of this article.

15 13. "Personal data" shall mean any computerized information about a  
16 data subject as set forth in this subdivision that is not made publicly  
17 available through federal, state or local government agencies or any  
18 publicly available information as it relates to a data subject's busi-  
19 ness license, status or profession, regardless of whether it is  
20 collected for the purpose of selling or transferring it to another enti-  
21 ty. Personal data shall mean information that identifies, relates to,  
22 describes or is reasonably linked to a particular data subject or house-  
23 hold, including but not limited to:

24 (a) physical address;  
25 (b) legal name;  
26 (c) alias;  
27 (d) unique personal identifier;  
28 (e) online identifier;  
29 (f) internet protocol address;  
30 (g) e-mail address;  
31 (h) account name;  
32 (i) social security number;  
33 (j) driver's license number;  
34 (k) passport number;  
35 (l) place of birth;  
36 (m) mother's maiden name;  
37 (n) date of birth;  
38 (o) phone number;  
39 (p) audio, visual, thermal or olfactory data;  
40 (q) profession or employment related information;  
41 (r) medical history, records of past medical treatment, or any diagno-  
42 sis of a physical or mental health condition, including diagnosis,  
43 treatment or referral for addiction or substance abuse;  
44 (s) educational information that is not already publicly available  
45 through a local, state, or federal agency;  
46 (t) real time geolocation data or stored geolocation history;  
47 (u) any unique biometric data, body measurement, technical analysis or  
48 measurements collected for the purpose of allowing a data subject to  
49 authenticate the subject on a device, internet application, or web-based  
50 platform;  
51 (v) names and identifying information of a subject's immediate family;  
52 (w) internet or any other electronic network activity, including  
53 browsing history, search history, and information regarding a subject's  
54 activity on a website or interaction with an electronic advertisement;

1 (x) any other information that alone, or combined with any of the  
2 information described in this subdivision, could be reasonably used to  
3 identify an individual data subject or household; and

4 (y) any inferences drawn from any of the combined forms of personal  
5 data that are used to create a profile of the data subject reflecting  
6 the subject's preferences, choices, characteristics, psychological  
7 trends, intelligence, aptitude, physical health or behavior.

8 "Personal data" shall also include any information which creates prob-  
9 abilistic identifiers that can be used to isolate, individualize, or  
10 identify a data subject or device to a degree of certainty more probable  
11 than not based on any item of personal information defined in this  
12 subdivision.

13 14. "Sale" or "sold" shall mean the disclosure, dissemination, making  
14 available, release, transfer, conveyance, license, rental, or other  
15 commercialization of data by a data controller to a third party, whether  
16 commercialization occurs via access to raw data or via use of platform  
17 interface rather than direct access to raw data. This definition shall  
18 include dissemination of data, orally, in writing, or by electronic or  
19 other means, for monetary or other valuable consideration, or otherwise  
20 for a commercial purpose, by a data controller to a third party.

21 15. "Third party" shall mean a natural or legal person, public author-  
22 ity, agency, or body other than the data subject, data controller, or  
23 data processor of the data controller.

24 § 1005. Applicability. 1. The provisions of this article shall not  
25 apply to a data controller or data processor who, as determined by the  
26 office, collects, processes, or sells personal data in a way that is  
27 deemed incidental to such controller or processor's ordinary course of  
28 business, taking into account the nature, context, scope, and purposes  
29 of such data collection, processing, or sale.

30 2. The office shall further be empowered to exempt from the provisions  
31 of this article any data controller or processor who, as determined by  
32 such office, derives no economic benefit from such controller or  
33 processor's data operations or whose data operations are required in  
34 order to comply with a legal obligation or in the exercise of official  
35 authority, or for any other purpose, as determined by the office, which  
36 serves to further the public interest.

37 § 1006. Office of consumer data protection. 1. (a) There is hereby  
38 created an office of consumer data protection, to be governed by a  
39 seven-member consumer data protection board. The board shall consist of  
40 a chairperson nominated by the governor with the advice and consent of  
41 the senate, with one vote, and six other voting board members. The  
42 governor shall have two additional appointments to the board with the  
43 advice and consent of the senate, and the temporary president of the  
44 senate and the speaker of the assembly shall have two appointments each.  
45 The members of the consumer data protection board shall engage in no  
46 occupation incompatible with their duties prescribed in this section,  
47 whether gainful or not, and shall take steps they deem necessary and  
48 proper to shield all decision making processes of the board from unwar-  
49 ranted and inappropriate communications and attempts to influence.

50 (b) The members of the consumer data protection board shall be subject  
51 to a duty of professional secrecy both during and after their terms on  
52 such board, with regard to any confidential information which has come  
53 to their knowledge in the course of the performance of their tasks or  
54 exercise of their powers. During their term of office, that duty of  
55 professional secrecy shall apply to reporting by natural persons of  
56 infringements of this article.



1 (c) A member of the consumer data protection board may be dismissed  
2 before the expiration of such member's term by such member's appointing  
3 authority only in a case of serious misconduct or if such member  
4 violates the terms of paragraph (a) or (b) of this subdivision.

5 (d) The consumer data protection board shall appoint an executive  
6 director of the office who shall supervise all day-to-day operations of  
7 such office. The executive director may appoint necessary deputies,  
8 counsels, assistants, investigators, and other employees in order to  
9 effectuate the provisions of this article.

10 (e) The consumer data protection board shall ensure that the office is  
11 provided with the human, technical, and financial resources, premises,  
12 and infrastructure necessary for the effective performance of its tasks  
13 and exercise of its powers described in subdivision two of this section.

14 2. The office shall retain the following administrative powers and  
15 responsibilities:

16 (a) The office shall promulgate any and all rules and regulations it  
17 deems necessary to properly safeguard personal data, including whether  
18 and how data subjects shall consent to the processing of such data,  
19 whether and how data subjects are granted access to personal data,  
20 whether and how data subjects can request erasure of personal data,  
21 whether and how data subjects can object to the processing of their  
22 personal data for commercial purposes, any steps that a data controller  
23 or processor must take to safeguard personal data, necessary disclosures  
24 that a data controller or processor must make to data subjects when  
25 there is a potential or likely data breach, or after a data breach has  
26 occurred, and any other policies which further the interest of the  
27 protection of personal data.

28 (b) (i) Each data controller and processor in this state shall be  
29 required to register with the office, on an annual basis, with a digital  
30 application developed and maintained by such office. Such application  
31 shall include the name of such data controller or processor, its phys-  
32 ical address, any e-mail address or website associated with such data  
33 controller or processor, whether such data controller or processor  
34 offers an opt-in or opt-out model for its data operations and the  
35 specific details of how a data subject can access either of these  
36 options, a statement specifying the methods used for data operations,  
37 databases maintained, and amount of data collected, processed, or sold  
38 of both all data subjects and data subjects who reside in New York, and  
39 annual gross revenues of such controller or processor.

40 (ii) Data controllers and processors shall pay an annual registration  
41 fee of two hundred fifty dollars, if such controller or processor has a  
42 gross revenue of eight hundred sixty million dollars or less, or four  
43 hundred fifty dollars, if such controller or processor has a gross  
44 revenue of over eight hundred sixty million dollars.

45 (iii) Any data controller or processor which fails to annually regis-  
46 ter as required by this paragraph shall be subject to a fine of between  
47 one thousand dollars and twenty thousand dollars per day. Any controller  
48 or processor found to have knowingly submitted false or incomplete  
49 information upon registration shall be subject to a fine of between ten  
50 thousand dollars and one hundred thousand dollars. All such fines shall  
51 be levied by the office, provided that the office shall consider factors  
52 such as gross income and assets of a data controller or processor and  
53 whether such controller or processor has made reasonable efforts to  
54 comply with the provisions of this paragraph when determining the amount  
55 of such fines to be levied.

1     (iv) The office shall determine which data controllers and processors  
2 have been newly established within the previous three years for the  
3 purposes of compliance with the reporting requirements of section one  
4 thousand seven of this article and with the tax imposed in section one  
5 hundred eighty-five of the tax law.

6     (c) The office shall promote public awareness and understanding of  
7 risks, rules, safeguards and rights in relation to data processing.

8     (d) The office shall advise on legislative and administrative measures  
9 relating to the protection of data subjects' rights and freedoms with  
10 regard to processing.

11     (e) The office shall provide, upon request, information to any data  
12 subject concerning the exercise of their rights under this act as  
13 created in the regulations described in paragraph (a) of this subdivi-  
14 sion.

15     (f) The office shall advise data controllers and processors of their  
16 obligations under this article.

17     (g) The office shall encourage the formation of codes of conduct by  
18 data controllers and processors and provide an opinion and approve such  
19 codes of conduct it deems to provide sufficient safeguards.

20     (h) The office shall establish a data protection certification mech-  
21 anism, approving all criteria for such certification and data protection  
22 seals and marks to indicate such certification. The office shall  
23 conduct a periodic review of certifications issued, where applicable,  
24 and shall deny or withdraw certifications if such criteria are not met  
25 or no longer met by a data controller or processor.

26     (i) The office shall establish and maintain a list of data controllers  
27 and processors who have completed data protection impact assessments and  
28 the results of such assessments.

29     (j) The office shall monitor relevant developments, insofar as they  
30 have an impact on the protection of personal data, in particular the  
31 development of information and communication technologies and commercial  
32 practices.

33     (k) The office shall process complaints lodged by data subjects about  
34 a data controller or processor, investigating the subject matter of such  
35 complaints and informing the complainant of the progress and outcome of  
36 such investigation within a reasonable time period.

37     (l) The office shall conduct data protection audits of data control-  
38 lers or processors upon a request from such controller or processor or  
39 from a data subject or as the office deems prudent and necessary.

40     (m) The office shall have the power to order a data controller or  
41 processor to provide any information it requires for the performance of  
42 the office's tasks described in this subdivision, including access to  
43 such controller or processor's premises and data processing equipment  
44 and means if needed.

45     (n) The office shall notify data controllers and processors when they  
46 are likely to infringe or have infringed upon a regulation such office  
47 has issued or such controller or processor's code of conduct. The office  
48 may order that such data controller or processor bring such controller  
49 or processor's data operations into compliance in a specified manner and  
50 within a specified time period. The office may further order a temporary  
51 or definitive ban on data operations or the rectification or erasure of  
52 personal data until such compliance is achieved. The office shall keep  
53 internal records of infringements by data controllers and processors of  
54 any infringements of its regulations or a controller or processor's code  
55 of conduct, and of measures taken in resolution.

1 (o) The office may order the suspension of data flows to a recipient  
2 in a third country or to an international organization.

3 (p) The office may impose administrative fines for the purposes of  
4 encouraging compliance with any infringement of this article or a regu-  
5 lation such office has issued or such controller or processor's code of  
6 conduct in addition to the fine described in subparagraph (iii) of para-  
7 graph (b) of this subdivision.

8 (g) The office may issue opinions to the state or other institutions  
9 and bodies as well as to the public on any issue related to the  
10 protection of personal data, on its own initiative or upon request.

11 § 1007. Annual report. The consumer data protection board shall  
12 produce and transmit, in conjunction with the office, an annual report  
13 to the temporary president of the senate, the speaker of the assembly,  
14 the chair of the senate finance committee, and the chair of the assembly  
15 ways and means committee, on or before January thirty-first of each  
16 year, pertaining to the data controllers and processors who have regis-  
17 tered with the office pursuant to paragraph (b) of subdivision two of  
18 section one thousand six of this article. Such report shall contain, but  
19 not be limited to, the number of data controllers and processors regis-  
20 tered, the number of data subjects residing in this state whose data is  
21 being collected, processed, or sold, both in the aggregate and per data  
22 controller or processor, and an analysis of the revenue generated from  
23 such controller or processor's data operations. Such report shall also  
24 be posted for public review in a clear and conspicuous manner on the  
25 office of consumer data protection's website.

26 § 4. The tax law is amended by adding a new section 185 to read as  
27 follows:

28 § 185. Additional tax on data controllers and data processors. 1.  
29 Notwithstanding any other provision of this chapter, or of any other  
30 law, for taxable years beginning on or after January first, two thousand  
31 twenty-two, an annual tax is hereby imposed upon every data controller  
32 or data processor, as defined in section one thousand four of the execu-  
33 tive law, which is required to register with the office of consumer data  
34 protection pursuant to paragraph (b) of subdivision two of section one  
35 thousand six of the executive law. The office of consumer data  
36 protection shall share a complete directory of all data controllers and  
37 processors registered with such office with the commissioner for the  
38 purposes of assessing the tax imposed by this section.

39 2. The tax shall be equal to two per centum of annual gross receipts  
40 from all domestic and foreign sources multiplied by the percentage of  
41 data subjects, as such term is defined in subdivision nine of section  
42 one thousand four of the executive law, who reside in this state. Such  
43 percentage shall be derived by (a) dividing the number of data subjects  
44 residing in this state whose data is being collected, processed, or sold  
45 by such data controller or processor by (b) such controller or process-  
46 or's total number of data subjects, as such controller or processor is  
47 required to report to the office of consumer data protection, and then  
48 multiplying the quotient by one hundred.

49 3. Data controllers and processors shall be exempt from such tax on  
50 gross receipts if:

51 (a) The controller or processor has been newly established within the  
52 previous three years, as determined by the office of consumer data  
53 protection in subparagraph (iv) of paragraph (b) of subdivision two of  
54 section one thousand six of the executive law; or

55 (b) Such controller or processor's gross receipts total less than five  
56 million dollars.



1     4. (a) All gross receipts of subsidiaries formed by a data controller  
2     or processor shall be considered assets of the data controller or  
3     processor for the purposes of determining the gross receipts threshold  
4     described in subdivision three of this section. Gross receipts of  
5     subsidiaries shall not be used in any way to offset, reduce, or discount  
6     the gross receipts of the underlying data controller or processor for  
7     the purposes of calculation of such receipts.

8     (b) Provided further, an initial date of registration with the office  
9     of consumer data protection by the subsidiary of a data controller or  
10    processor which is later than such controller or processor's initial  
11    date of registration shall not be used to delay such controller or  
12    processor's initial date. A data controller or processor and such  
13    controller or processor's subsidiary shall count as one entity for the  
14    purposes of determining the period of time after which the tax imposed  
15    by this section shall apply.

16    (c) "Subsidiary" as used in this subdivision shall mean a corporation  
17    of which over fifty percent of the number of shares of stock entitling  
18    the holders thereof to vote for the election of directors or trustees is  
19    owned by the data controller or processor which formed such subsidiary.

20    § 5. This act shall take effect on the one hundred eightieth day after  
21    it shall have become a law. Effective immediately, the addition, amend-  
22    ment and/or repeal of any rule or regulation necessary for the implemen-  
23    tation of this act on its effective date are authorized to be made and  
24    completed on or before such effective date.