STATE OF NEW YORK

5662

2023-2024 Regular Sessions

IN SENATE

March 13, 2023

Introduced by Sens. GOUNARDES, HOYLMAN-SIGAL, JACKSON -- 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:

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

§ 2. Legislative intent. a. The legislature finds that the commercialization of personal consumer data has wrought wholesale and disruptive transformations in our global markets, politics, psychology, socialization, and the basic functioning of society;

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

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

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

e. The legislature further finds that the proliferation of targeted advertising based on the sale, transfer, or licensing of personal consumer data has led to an exploitation of individual users' attention, leading to reduced productivity, mental acuity, and overall emotional

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

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and social well-being as well as overcrowding of digital spaces and depletion of the "common good" of limited user attention;

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

5. "Data operations" shall mean the collection, storage, transfer, sale, or licensing of personal data by a data controller or data processor.

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

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

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

9. "Data protection impact assessment" shall mean an internal evaluation which the office of consumer data protection requires data controllers and processors to carry out in order to evaluate the level of risk associated with such controller or processor's data operations. Such assessment shall examine the origin, nature, particularity, and severity of such risk. Where a data protection impact assessment indicates that a controller or processor's data operations involve a high degree of risk, as determined by the office of consumer data protection, which cannot be mitigated by appropriate measures, such controller or processor shall be obligated to receive express approval from the office of consumer data protection prior to commencing or resuming data operations.

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

11. "Newly established" shall refer to a limited history of data operations as determined by the office of consumer data protection. Such office may consider factors such as date of incorporation or other form of organization, whether in this state or another state, territory, district, province, nation or other jurisdiction, foreign or domestic, amount of capital raised, the entrepreneurial nature of a data controller or processor's business, or any other factor the office deems relevant in determining limited operating history and an initial date of data operations, provided that such office shall promulgate regulations with the guidelines used for determining such date and that such office shall adhere to such guidelines consistently when determining such date for all data controllers and processors required to register under paragraph (b) of subdivision two of section one thousand six of this article.

12. "Office" shall mean the office of consumer data protection established by section one thousand six of this article.

13. "Personal data" shall mean any computerized information about a data subject as set forth in this subdivision that is not made publicly available through federal, state or local government agencies or any publicly available information as it relates to a data subject's business license, status or profession, regardless of whether it is collected for the purpose of selling or transferring it to another entity. Personal data shall mean information that identifies, relates to, describes or is reasonably linked to a particular data subject or household, including but not limited to:

(a) physical address;

(b) legal name;

(c) alias;

(d) unique personal identifier;

(e) online identifier;

(f) internet protocol address;

(g) email address;

(h) account name;

(i) social security number;

(j) driver's license number;

(k) passport number;

(l) place of birth;

(m) mother's maiden name;

(n) date of birth;

(o) phone number;

(p) audio, visual, thermal or olfactory data;

(q) profession or employment related information;

(r) medical history, records of past medical treatment, or any diagnosis of a physical or mental health condition, including diagnosis, treatment or referral for addiction or substance abuse;

(s) educational information that is not already publicly available through a local, state, or federal agency;

(t) real time geolocation data or stored geolocation history;

(u) any unique biometric data, body measurement, technical analysis or measurements collected for the purpose of allowing a data subject to authenticate the subject on a device, internet application, or web-based platform;

(v) names and identifying information of a subject's immediate family;

(w) internet or any other electronic network activity, including browsing history, search history, and information regarding a subject's activity on a website or interaction with an electronic advertisement;

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

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

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

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

15. "Third party" shall mean a natural or legal person, public authority, agency, or body other than the data subject, data controller, or data processor of the data controller.

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

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

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

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

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

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

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

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

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

(b) (i) Each data controller and processor in this state shall be required to register with the office, on an annual basis, with a digital application developed and maintained by such office. Such application shall include the name of such data controller or processor, its physical address, any email address or website associated with such data controller or processor, whether such data controller or processor offers an opt-in or opt-out model for its data operations and the specific details of how a data subject can access either of these options, a statement specifying the methods used for data operations, databases maintained, and amount of data collected, processed, or sold of both all data subjects and data subjects who reside in New York, and annual gross receipts of such controller or processor. When disclosing such annual gross receipts, a data controller or processor shall detail (A) the amount of annual gross receipts from all foreign and domestic sources, (B) annual gross receipts from domestic sources only, and (C) annual gross receipts derived from the collection, processing, and/or sale of data subjects who reside in New York.

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

(iii) Any data controller or processor which fails to annually register as required by this paragraph shall be subject to a fine of between one thousand dollars and twenty thousand dollars per day. Any controller or processor found to have knowingly submitted false or incomplete information upon registration shall be subject to a fine of between ten thousand dollars and one hundred thousand dollars. All such fines shall be levied by the office, provided that the office shall consider factors

such as gross income and assets of a data controller or processor and whether such controller or processor has made reasonable efforts to comply with the provisions of this paragraph when determining the amount of such fines to be levied.

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

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

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

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

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

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

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

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

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

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

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

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

(n) The office shall notify data controllers and processors when they are likely to infringe or have infringed upon a regulation such office has issued or such controller or processor's code of conduct. The office may order that such data controller or processor bring such controller or processor's data operations into compliance in a specified manner and within a specified time period. The office may further order a temporary or definitive ban on data operations or the rectification or erasure of personal data until such compliance is achieved. The office shall keep

internal records of infringements by data controllers and processors of any infringements of its regulations or a controller or processor's code of conduct, and of measures taken in resolution.

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

(p) The office may impose administrative fines for the purposes of encouraging compliance with any infringement of this article or a regulation such office has issued or such controller or processor's code of conduct in addition to the fine described in subparagraph (iii) of paragraph (b) of this subdivision.

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

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

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

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

2. (a) The tax shall be equal to two per centum of the estimated annual gross receipts of a data controller or processor derived from the collection, processing, and/or sale of data subjects who reside in New York. The commissioner shall calculate such estimation by multiplying a data controller or processor's annual gross domestic receipts, as reported in subparagraph (i) of paragraph (b) of subdivision two of section one thousand six of the executive law, by a sum that is equal to the quotient of the gross domestic product of New York divided by the gross domestic product of the United States, and then multiplying such sum by one hundred. If a data controller or processor disagrees with the estimation of annual gross receipts described in this paragraph, such controller or processor shall have the opportunity to present to the commissioner an alternative estimation of such controller or processor's annual gross receipts derived from the collection, processing, and/or sale of data subjects who reside in New York based on such controller or

processor's internal records. If the commissioner accepts the alternative estimation so presented by such controller or processor, the commissioner shall impose a tax of two per centum of such alternative estimation on such controller or processor. As used in this subdivision, "gross domestic product" shall mean a monetary measure of the market value of all final goods and services produced and sold in a specific time period by a country or countries.

(b) Provided, however, the commissioner shall exempt the first five million dollars of the estimated gross receipts of a data controller or processor, as described in paragraph (a) of this subdivision, from the tax imposed by this section.

3. Data controllers and processors shall be exempt from such tax on gross receipts if the controller or processor has been newly established within the previous three years, as determined by the office of consumer data protection in subparagraph (iv) of paragraph (b) of subdivision two of section one thousand six of the executive law.

4. (a) All gross receipts of subsidiaries formed by a data controller or processor shall be considered assets of the data controller or processor for the purposes of determining the gross receipts exemption described in paragraph (b) of subdivision two of this section. Gross receipts of subsidiaries shall not be used in any way to offset, reduce, or discount the gross receipts of the underlying data controller or processor for the purposes of calculation of such receipts.

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

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

§ 5. This act shall take effect on the one hundred eightieth day after it shall have become a law. Effective immediately, the addition, amendment and/or repeal of any rule or regulation necessary for the implementation of this act on its effective date are authorized to be made and completed on or before such effective date.