Cybersecurity, Digital Privacy & Technology

Equifax Breach Affects 143M: If GDPR Were in Effect, What Would Be the Impact?

Aaron K. Tantleff | Sep 12

Foley & Lardner LLP - In the security breach announced by Equifax Inc. on September 7, 2017, the firm revealed that personal data of roughly 143 million consumers in the U.S. and certain U.K. and Canadian residents had been compromised. Had this event occurred under the General Data Protection Regulation (GDPR), the implications would be significant. This security event should serve as a sobering wake up call to multinational organizations and any other organization collecting, processing, storing, or transmitting personal data of EU citizens of the protocols they must have in place to respond to security breaches under GDPR requirements. Read More

Delaware GDPR Series: Creating and Reviewing Data Protection Policies Part 1 — Internal Facing Policies

Ann Bevitt | Sep 12

Cooley LLP - Many organizations already have a raft of policies and procedures dealing with data protection. These will need to be updated to ensure compliance with the requirements of the EU General Data Protection Regulation 2016/279 (GDPR). In addition, companies will be required to create policies to implement new obligations and rights introduced by the GDPR, such as the right to be forgotten and the right to data portability. This article looks at the changes that will need to be made to internal facing policies that are made available to employees. Read More

Big Data: German Antitrust Decision Regarding Facebook Expected in 2017

Till Steinvorth | Sep 13

Orrick, Herrington & Sutcliffe LLP - Government agencies around the world are grappling with whether and how to regulate "Big Data" in the context of social networking websites. This includes some competition authorities that are trying to expand their purview by using competition laws to regulate "Big Data" in the context of social media. The possibility that competition authorities around the world may try to become super regulators of "Big Data" should be of concern to all operators of social networking websites. A case in point is the German competition authority (FCO), which in March 2016 initiated proceedings against Facebook purportedly based on a concern that it may have infringed data protection rules. Read More

Data Breach Preparedness: A Critical Risk Management Priority for Small and Mid-Sized Businesses

Joseph J. Lazzarotti | Sep 13

Jackson Lewis P.C. - After hearing a lot lately about big companies suffering data breaches, it is important to remember that half of all cyberattacks target small to mid-sized businesses (SMBs). Based on a 2016 State of SMB Cybersecurity Report, CNBC reported that in the prior 12 months half of all SMBs in the U.S. had been hacked. This makes sense when one considers FBI reporting that an average of 4,000 ransomware attacks happen every day in the U.S. Clearly, SMBs need to address this significant risk to their businesses. Strong IT safeguards are part of the solution, but not a silver bullet. Read More

Regulation and Compliance

SEC Focuses on Initial Coin Offerings: Tokens May Be Securities Under Federal Securities Laws

Jeremy I. Senderowicz | Sep 12

Dechert LLP - On July 25, 2017, the SEC's Division of Enforcement issued a Report of Investigation Pursuant to

Section 21(a) of the Securities Exchange Act of 1934: The DAO. Based on facts and circumstances particular to The DAO, the SEC concluded that the DAO Tokens are securities within the meaning of the Securities Act of 1933 and the Securities Exchange Act of 1934. In reaching this conclusion, the SEC applied the Howey test of an "investment contract" in analyzing the DAO Tokens' nature. In SEC v. W.J. Howey Co. and its progeny, the U.S. Supreme Court defined an investment contract as "an investment of money in a common enterprise with profits to come solely from the efforts of others." Read More

New EU Securitization Regulations to Alter Securitization Markets

C. Mark Nicolaides | Sep 13

Latham & Watkins LLP - By year end, the European Commission (EC) is expected to publish two new EU regulations in the Official Journal of the European Union. The Securitization Regulations will change significantly the regulatory landscape for securitization transactions. The Securitization Regulation unifies the risk retention, due diligence, and reporting rules applicable to all institutional investors. Institutional investors have time to adopt to the new securitization rules, but the clock is now ticking. Read More

Equifax Data Breach: Preliminary Lessons for the Adoption and Implementation of Insider Trading Policies

Dorsey & Whitney LLP Staff | Sep 14

Dorsey & Whitney LLP - Insider trading allegations have surfaced at Equifax, a credit rating agency that last week announced a data breach that could potentially affect 143 million consumers in the United States. While all of the facts are not yet public, the situation as reported raises a number of fundamental questions. These questions and the developing circumstances at Equifax serve as a reminder for public companies to consider practices enumerated in the report when adopting or revising an insider trading policy. Read More

European Commission's Position on IP Rights

Eversheds Sutherland LLP Staff | Sep 11

Eversheds Sutherland LLP - On September 6, 2017, the European Commission published its position paper setting out the main principles it recommends be adopted by the remaining Member States in the Brexit negotiations concerning intellectual property rights. The position paper represents the first time the Commission has set out its viewpoint since Article 50 was invoked by the U.K. Government. The Commission acknowledges that Brexit will create uncertainty in respect of IP rights. The starting point is that unitary rights will no longer continue to have effect in the U.K. post-Brexit, thereby creating a significant lacuna in protection. Read More

FDA Announces Regulatory and Enforcement Policy Shift for Regenerative Medicine

Sidley Austin LLP Staff | Sep 13

Sidley Austin LLP - On August 28, 2017, FDA Commissioner Scott Gottlieb announced a significant shift in the way the Agency intends to regulate stem cell therapies and other types of regenerative medicine. The detailed announcement is focused on two parallel priorities: the creation of a new regulatory framework to ensure that promising regenerative therapies make it to patients quickly, and increased enforcement against those who "make hollow claims and market unsafe science" to promote illegal products. Read More

Fraud, Corruption & Enforcement Actions

Federal Judge Declares the Rule of Reason Will Apply in Criminal Antitrust Case and Dismisses the Case as Barred Under the Statute of Limitations

Kathryn Hellings | Sep 13

Hogan Lovells LLP - In United States v. Kemp, the Department of Justice (DOJ) filed a felony indictment in the U.S. District Court for the District of Utah against Salt Lake City-based heir-locator Kemp & Associates, Inc. and its co-owner and vice president, Daniel J. Mannix. On August 28, 2017, a Utah federal judge held that he will apply the rule of reason standard in a criminal prosecution against an heir-locator company for allegedly

colluding with its horizontal competitors to allocate customers. This ruling was a sharp departure from well-established precedent. Read More

Washington State AG Alleges Price Fixing and Sues to Break up Rapidly Expanding Health System

Bruce D. Sokler | Sep 11

Mintz, Levin, Cohn, Ferris, Glovsky and Popeo P.C. - After five years of growth through a series of acquisitions, the Washington State Attorney General's office filed a lawsuit to thwart and unwind the most recent expansion efforts of Franciscan Health System for violating both federal and state antitrust laws. The AG's office seeks to unwind CHI Franciscan's 2016 acquisition of WestSound Orthopaedics, P.S. for violation of Section 7 of the Clayton Act and the Washington Consumer Protection Act. The State also seeks to unwind multiple affiliation agreements from 2016 between The Doctors Clinic and CHI Franciscan for alleged price fixing. Read More

Corporate Law, Transactions & Governance

PRC Court Recognizes a U.S. Court Judgment for First Time Based on Principle of Reciprocity

Craig I Celniker | Sep 11

Morrison & Foerster LLP - On June 30, 2017, the Wuhan Intermediate People's Court issued a decision recognizing and enforcing a civil money judgment issued by the Los Angeles Superior Court arising out of a contractual dispute. Because there is no applicable treaty on the recognition and enforcement of judgments between the United States and the People's Republic of China, the Wuhan Court based its decision on the principle of reciprocity. This decision represents the first time that a PRC court has recognized and enforced a U.S. court judgment, and it is significant that the Wuhan Court acknowledged the existence of reciprocity between the U.S. and the PRC in deciding to enforce the U.S. court judgment at issue. Read More

NLRB: Employer's Side Letter Explaining NLRB Notice Breached Settlement Agreement and Warranted Default Judgment

Mark Theodore | Sep 12

Proskauer Rose LLP - One of the fundamental pillars of any remedy doled out by the NLRB is the agency's requirement that the employer (or union) post a "Notice to Employees," a bright blue poster detailing the misdeeds of the charged party. But what if an employer wants to put its spin communication right next to the NLRB's Notice to Employees? Does such an employer posting constitute a breach of an NLRB settlement agreement? If so, does such a breach warrant the entry of a default judgment pursuant to the default provisions of the agreement? In Outokumpo Stainless USA LLC, the Board answered both questions in the affirmative. Read More

Texas Supreme Court Enforces Forum-Selection Clause in Breach of Fiduciary Duty Case Arising From a Shareholder Agreement

David Fowler Johnson | Sep 14

Winstead PC - In Pinto Tech. Ventures, L.P. v. Sheldon, the Texas Supreme Court held that business tort claims, including breach of fiduciary duty, were subject to a forum-selection clause in a shareholders agreement. The plaintiffs, two shareholders, asserted business tort claims related to the alleged dilution of their equity interests against the majority shareholders and certain corporate officers. The shareholders agreement included a forum selection clause in which the parties agreed to resolve "any dispute arising out of this Agreement" in Delaware. The shareholders asserted no contract claims, and instead, asserted claims for fraud, breach of fiduciary duty, minority- shareholder oppression, Texas Blue Sky Law violations, and conspiracy. Read More

The European Court of Human Rights Sets out Criteria for Lawful Monitoring of Employees

Ropes & Gray LLP Staff | Sep 14

Ropes & Gray LLP - On September 5, 2017, in the case of Bărbulescu v Romania, the Grand Chamber of the European Court of Human Rights reversed a First Chamber decision and found that the Romanian

courts, in reviewing the decision of a private company to dismiss an employee after having monitored his communications on an online messaging service, failed to strike a fair balance between the employee's right to respect for his private life and correspondence enshrined in Article 8 of the European Convention on Human Rights on the one hand, and his employer's right to take measures in order to ensure the smooth running of the company on the other. Read More

Recent Pennsylvania Court Decision Highlights Enforceability of Non-Solicitation Agreements

Eric Athey | Sep 13

McNees Wallace & Nurick LLC - Every year, Pennsylvania's appellate courts seem to issue a handful of decisions addressing the enforceability of non-compete agreements. A non-solicitation agreement is the less restrictive cousin of the non-compete. Under a non-solicitation agreement, a former employee is permitted to work anywhere, including competitors of his or her former employer. A non-solicitation agreement merely prohibits a former employee from soliciting (or perhaps even contacting) the former employer's customers, prospective customers and/or employees. In Metalico Pittsburgh, Inc. v. Newman, the Superior Court of Pennsylvania recently addressed some fundamental points regarding enforcement of these less restrictive agreements. Read More

Compelling Evidence of Non-Obviousness May Not Be Enough

Vinson & Elkins Staff | Sep 08

Vinson & Elkins LLP - On September 7, 2017, the Federal Circuit, in a split opinion, affirmed the district court's summary judgment of obviousness in Intercontinental Great Brands (Kraft) v. Kellogg; despite what the district court called "substantial" and "compelling" evidence of objective indicia of non-obviousness. The Federal Circuit agreed that significant copying, increased sales volume, customer and industry praise, and long-felt need were not enough to overcome the prima facie case of obviousness. Read More