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# Employment Law

## Alert

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## **Businesses Are Required To Safeguard Against Identity Theft**

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In response to the increased risk of identity theft to the nation's consumers, both state and federal governments have responded with legislation designed to safeguard against this unlawful practice. On the federal level, the Fair and Accurate Credit Transaction Act of 2003 ("FACT") requires businesses to undertake "reasonable measures" to safeguard against unauthorized access to personal information derived from a consumer credit report, but gives small businesses significant leeway in determining what those measures are.

In contrast, New Jersey's Identity Theft Prevention Act ("ITPA") is far more comprehensive in its approach, placing significant burdens upon New Jersey businesses to protect confidential personal information from identity theft. Violations of ITPA requirements may subject a business to significant civil liability, including fines, actual damages, attorney fees, costs and injunctive relief.

Despite the passage of more than 4 years since ITPA was enacted, many New Jersey Businesses have yet to implement the mandatory measures imposed by the act to protect consumers from identity theft.

### **"Personal Information" Protected**

Whereas FACT only protects information derived from a consumer credit report, ITPA requires New Jersey businesses to undertake measures to protect *all* personal information relating to customers, employees and other individuals. "Personal information" is broadly defined to include any information that identifies, describes or is capable of being associated with an individual, including names, Social Security numbers, driver's license numbers, signatures, images, dates of birth, medical information, bank and credit card account numbers, and passwords and PINs that would permit access to an individual's financial account. Businesses should be aware that even dissociated data can constitute personal information under the act (e.g., an individual's last name combined with a driver's license number).

### **Prohibited Use and Displays of Social Security Numbers**

In recognition that Social Security numbers are the most fertile ground for identity theft, the Act places significant limitations on how businesses may utilize and display Social Security numbers on printed and electronic materials. Specifically, businesses cannot: (1) publicly post or display four or more consecutive numbers of a Social Security number; (2) print a Social Security number on materials sent to the individual unless otherwise required by law; (3) print a Social Security number on cards required for the individual to access the business's products or services; (4) disclose a Social Security number to the general public; (5) require an individual to transmit a Social Security number over the Internet, unless the connection is secure or the Social (*cont'd* →)

Security number is encrypted; or (6) require a Social Security number to access Internet web sites unless a password or other authentication device is also required for access.

### **Destruction of Records Containing "Personal Information"**

In response to corporate record destruction practices that do not protect personal information, ITPA mandates business to undertake special efforts to destroy personal information from its paper and electronic records when these materials are no longer being retained. In short, businesses must destroy or arrange for the destruction of personal information "by shredding, erasing, or otherwise modifying the personal information in those records to make it unreadable, undecipherable or nonreconstructable through generally available means." Therefore, it is critically important that corporations doing business in New Jersey have in place updated document retention policies that conform to ITPA requirements for access, retention and destruction of records containing personal information.

### **Obligation to Notify Law Enforcement and Customers of a Security Breach**

To address the risks associated with the retention of vast quantities of personal information stored in electronic databases, ITPA compels businesses to undertake reasonable security measures to protect that information from unauthorized access. In addition, in the event of a suspected breach of a database containing personal information, businesses must provide prompt notification to The New Jersey State Police and thereafter, subject to law enforcement approval, to any New Jersey resident whose information was reasonably believed to have been accessed by an unauthorized person. Notice of a security breach is not required if the business can establish that misuse of the personal information is not reasonably possible. If such a determination is made, it must be reduced to writing and retained for five years.

Notice to consumers can be made in writing and in certain circumstances, electronically. "Substitute notice" by way of email, conspicuous posting or media is permitted upon a showing that

the cost of notice would exceed \$250,000, or that the affected number of persons requiring notice exceeds \$500,000, or if it does not have sufficient contact information. If notification is to more than 1,000 individuals, businesses must also promptly notify all nationwide consumer reporting agencies. Notified consumers are permitted to place a "security freeze" on his/her credit report, prohibiting the agency from releasing credit information or changing the consumer's vital statistics.

### **Bottom Line**

As a result of the ITPA, businesses should review their policies and procedures to determine whether they have sufficient safeguards to protect the personal information they maintain for either employees, customers, or other individuals. These steps include the following:

- Implement or evaluate document retention and destruction policies and procedures to insure that personal information is properly identified and protocols are in place to ensure that this information is properly handled and disposed of.
- Provide appropriate training to employees about the handling of personal information and confidentiality.
- Develop confidentiality agreements and other protocols to limit access of personal information to those employees and third parties with a "need to know" the information.
- Develop policies and procedures for notification of law enforcement in the event of a breach of the company's electronic database.



*The information provided here is necessarily general and is not intended as legal advice or a substitute for legal advice. If you have any questions regarding this Alert, please contact Kathleen M. Connelly at [kconnelly@lindabury.com](mailto:kconnelly@lindabury.com) or Monica Vir at [mvir@lindabury.com](mailto:mvir@lindabury.com)*

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