

The Internet Store: Legal Concerns with Home Delivery



Angela A. Savino
614-431-1500

The Changing Face of Home Delivery

- ▶ Customer Choice Delivery Options
- ▶ Same day/ 2 hour Delivery Options
- ▶ Mobile Tracking
- ▶ Crowdsourcing (e.g. “Uber-like” deliveries)



Technology is
developing faster
than regulatory/legal
framework



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Federal Privacy Laws

No single, comprehensive regulation

- ▶ **The Federal Trade Commission Act** (15 U.S.C. §§41-58) (FTC Act)
- ▶ **The Financial Services Modernization Act** (Gramm-Leach-Bliley Act (GLB)) (15 U.S.C. §§6801-6827)
- ▶ **The Health Insurance Portability and Accountability Act** (HIPAA) (42 U.S.C. §1301 et seq.),
The HIPAA Omnibus Rule also revised the Security Breach Notification Rule (45 C.F.R. Part 164), known as **HIPAA HITECT Act (or HIPAA II)**
- ▶ **The Fair Credit Reporting Act** (15 U.S.C. §1681) (and the Fair and Accurate Credit Transactions Act (Pub. L. No. 108-159))
- ▶ **The Controlling the Assault of Non-Solicited Pornography and Marketing Act** (CAN-SPAM Act) (15 U.S.C. §§7701-7713 and 18 U.S.C. §1037) and the Telephone Consumer Protection Act (47 U.S.C. §227 et seq.)
- ▶ **The Electronic Communications Privacy Act** (18 U.S.C. §2510).
- ▶ **Judicial Redress Act of 2015**, Congress enacted the, giving citizens of certain ally nations (notably, EU member states) the right to seek redress in US courts for privacy violations when their personal information is shared with law enforcement agencies.

* Also in 2016, the Federal Communications Commission (FCC) announced a notice for proposed rule-making, seeking public comment on the best approach to protecting consumers' privacy when using broadband services.





Federal Privacy Laws –

Proposed by 115th Congress (2017)

- ▶ **Cyber Privacy Fortification Act of 2017** (HR 135, introduced 1/3/17) – seeking to amend criminal regs. to provide penalties for failure to provide notices of security breaches of computerized data
- ▶ **Email Privacy Act** (HR 387, introduced 1/9/17; passed by House 2/6/17) – to update privacy protections for electronic communications information that is stored by 3rd party service providers
- ▶ **State and Local Cyber Protection Act of 2017** (S 412, introduced 2/16/17 – requires state and local coordination on cybersecurity with national cybersecurity efforts)

. . . then there is House Resolution 53:

Expressing the sense of the House of Representatives that in order to continue aggressive growth in the Nation's telecommunications and technologies industries, the United States Government should "Get Out of the Way and Stay Out of the Way" (promoting investment through deregulation)

State Privacy Laws – Data Security Protections

Data Breach Regulation	States
Enacted Legislation that requires private or governmental entities to notify individual of security breach	Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New York, N. Carolina, N. Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, S. Carolina, Tennessee, Texas, Utah, Vermont, Virginia, Washington, W. Virginia, Wisconsin, Wyoming, DC, Guam , P.R., VI
States with NO security breach law	Alabama, New Mexico, South Dakota

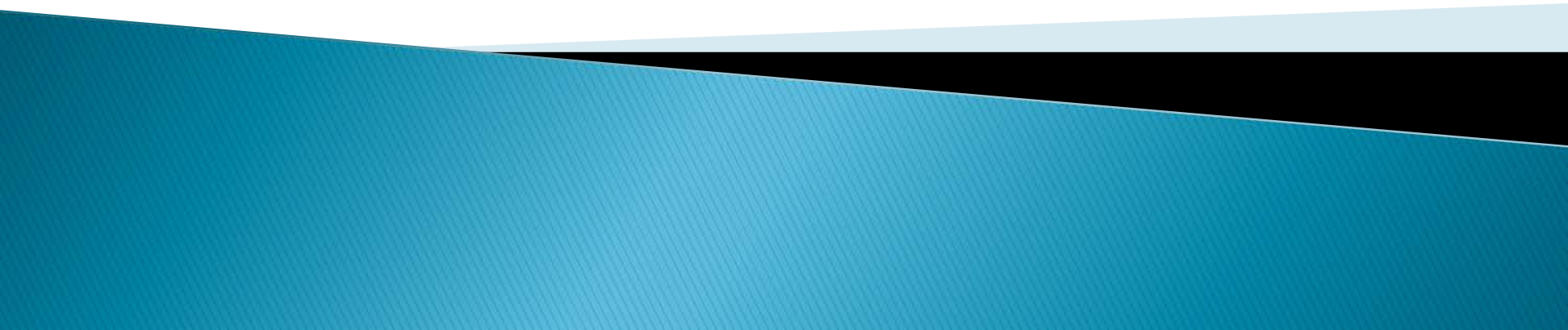
Data Source: National Conference of State Legislatures, *updated 2/24/17*

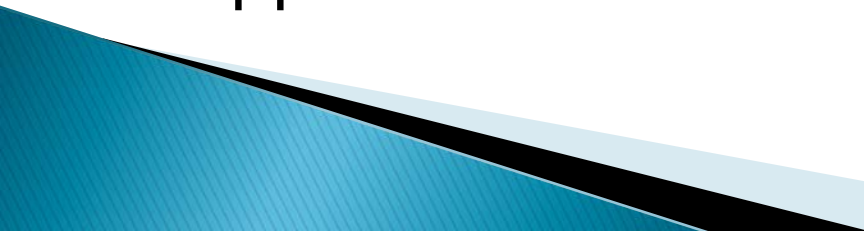
State Privacy Laws

States with Data Disposal Laws	States requiring Notice to Attorney General	States permitting a private cause of action	States with broad definition of PII
AK, AZ, AR, CA, CO, CT, DE, FL, GA, HI, IL, IN, KA, KY,	AK, CA, CT, FL, HI, ID, IL, IN, IA, LA, ME, MD, MS, MO, MT, NE, NH, NJ, NY, NC, ND, OR, PR, RI, SC, VT	AK, CA, LA, MD, MA, NV, NH, NC, OR, SC, TN, TX, VA, WA, DC, PR, VI	AK, AR, CA, CT, FL, GA, IA, IL, KA, ME, MD, MS, MO, MT, NE, NV, NH, NJ, NY, NC, ND, OH, OR, RI, SC, TX, VT, VA, WI, WY, DC, PR

Data Source: National Conference of State Legislatures, *updated 2/24/17*

**Privacy claims are
indifferent towards the
size, nature and
profitability of your
business.**



- ▶ **Henry Schein Practice Solutions, Inc.** settled with FTC for \$250,000 after software it licensed and sold to dental practices did not properly encrypt patient data (May 20, 2016).
 - ▶ **Blue Cross/Blue Shield.** Determined that proof of harm is not necessary for case to proceed because of the risk of future harm.
 - ▶ **Nieman Marcus.** Dismissed in lower court because no injury to individuals, but reversed on appeal due to the risk of future harm.
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Best Practices for Protecting PII

- **Limit the data** you are willing to receive to what is necessary for your business.
- Indemnification promises.
- Implement **policies** and procedures for protecting sensitive data (e.g. purging cycles, retention policies, encryption, password requirements, limits on BYOD).
- **Secure** physical and electronic information and share only with those who need to know.
- **Train** all employees on every employee should be trained in security AND privacy of PII.
- Evaluate the need for cyber **insurance**.



**The Independent
Contractor model
increases the risk of
privacy breach and
misclassification issues.**



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What is misclassification?

- **Employee misclassification** refers to a worker who is an employee under the law but is incorrectly classified as something other than an employee (usually an independent contractor). Most federal and state labor laws protect workers who meet the laws' definitions of "employee" – www.dol.gov/featured/missclassification/
- **U.S. Department of Labor:** "Even if you are a legitimate independent contractor under one law, you may still be an employee under other laws."
- DOL's website suggests misclassification is "**deliberate**" on the part of many employers.
- EEOC issued a statement that everyone should be an employee when looking at discrimination.
- Studies suggest that 10 to 30 percent of employers may misclassify their employees as independent contractors.




Legal Updates

- **2017 – Van Dusen v. Swift Transportation Co. Inc.** – US District Court of Arizona (federal judge determined that 5 drivers should have been considered employees of carrier (2017 WL 67521, U.S. Dist. AZ)
- **2016 – Chambers v. RDI Logistics, Inc.** – Massachusetts Supreme Court ruled in favor of furniture delivery drivers and rejected company’s argument that portions of MA’s misclassification statute was preempted by federal law.
- **2016 – Saravia v. Dynamex, Inc.** – in a case pending since 2013, California Court denied cross motions for summary judgment and order case to trial to determine if individual drivers are owed minimum wage and overtime compensation

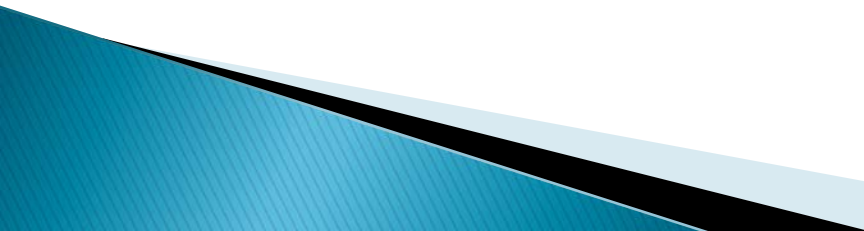


Do you retain the ability to control the particulars of the work.

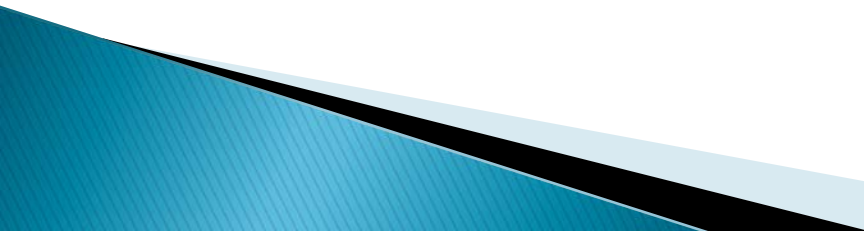
IRS 20-Factor Test

- ▶ **1. Instructions.** Required to comply with others' instructions about when, where, and how they are to work are ordinarily employees, and not independent contractors.
 - ▶ **2. Training.** Training indicates an exercise control over the means by which results are accomplished.
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IRS 20-Factor Test

- ▶ **3. Integration.** When the success or continuation of a business depends on the performance of certain services, the workers performing those services are subject to a certain amount of control by the owners of the businesses.
 - ▶ **4. Services rendered personally.** If services must be rendered personally, employers control both the means and the results of the work.
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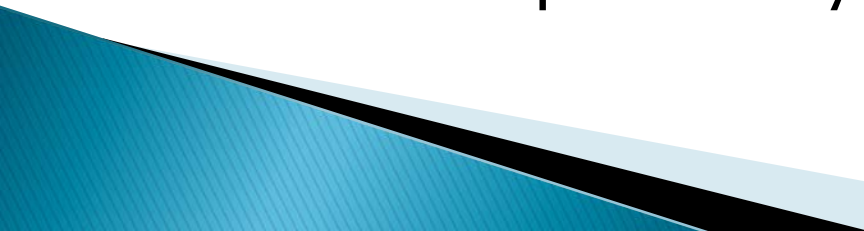
IRS 20-Factor Test

- ▶ **5. Supervising.** Control is exercised when work is supervised.
 - ▶ **6. Continuing relationships.** Ongoing and continuing relationships indicate that employer/employee relationships exist.
 - ▶ **7. Set hours of work.** The establishment of set or scheduled hours of work indicates control.
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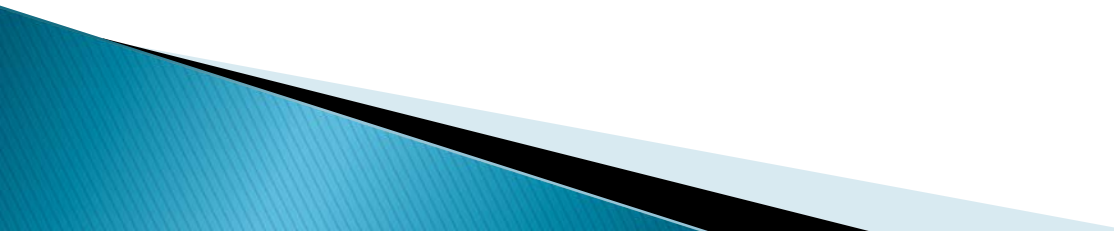
IRS 20-Factor Test

- ▶ **8. Full-time efforts.** If workers must devote full time to the business at hand.
 - ▶ **9. Doing work on “employers” premises.** Control is indicated if the work is performed on the premises.
 - ▶ **10. Order or sequences set.** Control is indicated if workers are not free to choose their own patterns of work but must perform services in the sequences set by the “employers.”
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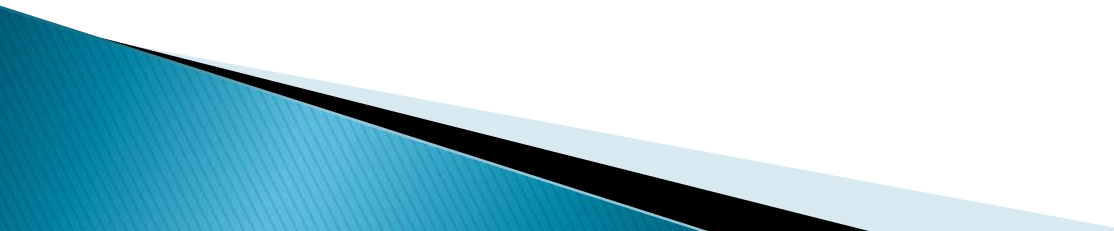
IRS 20-Factor Test

- ▶ **11. Oral or written reports.** Control is indicated if workers must submit regular oral or written reports, or designated paperwork.
 - ▶ **12. Payment by hour, week, or month.** Independent contractors are usually paid by the job or on straight commission.
 - ▶ **13. Payment of business and/or traveling expense.** Employers paying workers' expenses of this nature shows that employer-employee relationships usually exist.
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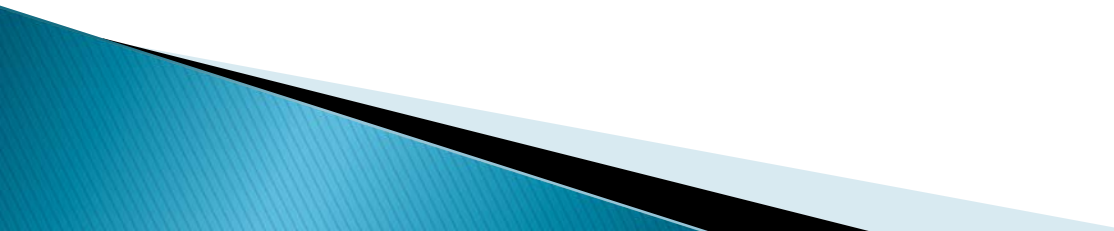
IRS 20-Factor Test

- ▶ **14. Furnishing tools and materials.** Independent contractors generally furnish their own tools, materials, and other equipment.
 - ▶ **15. Significant investments.** Workers are independent contractors if they invest in facilities that are not typically maintained by employees (such as an office rented at fair market value from an unrelated party). Employees depend on employers for such facilities.
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IRS 20-Factor Test

- ▶ **16. Realization of profits or losses.** Workers who can realize profits or losses (in addition to profits or losses ordinarily realized by employees) they are independent contractors.
 - ▶ **17. Working for more than one firm at a time.** If workers perform services for a number of unrelated persons at the same time, is a factor leaning towards independent contractors.
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IRS 20-Factor Test

- ▶ **18. Making services available to the general public.** Workers are usually independent contractors if they make their services available to the general public on a regular and consistent basis.
 - ▶ **19. Right to discharge.** The right of employers to discharge workers indicates that the workers are employees.
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IRS 20-Factor Test

- ▶ **20. Right to terminate.** Workers are employees if they have the right to end their relationships with their principals at any time without incurring liability.