NFIB
SMALL BUSINESS
LEGAL CENTER

1201 F St NW #200
Washington, D.C. 20004

1-800-552-5342
NFIB.

March 10,

Mr. Harvey Perlman, Chair
Ms. Jane Bambauer, Reporter
ULC Collection and Use of Personally Identifiable Data Committee
Uniform Law Commission
111 North Wabash Ave.
Suite 1010
Chicago, IL 60602

Dear Chair Perlman and Reporter Bambauer,

I am an Observer on the ULC Collection and Use of Personally Identifiable Data Committee. For 19 years I have also served as the Executive Director of the NFIB Small Business Legal Center. The NFIB Small Business Legal Center is a public interest law firm representing the interests of millions of small businesses across the country in our nation's courts and providing them with helpful legal resources.

I appreciate the tremendous work that you have put into improving this legislation and your efforts to make it more flexible for the regulated community than it initially was. That said, I remain concerned that for the small businesses of America this will be very burdensome legislation to implement.

As I noted in my April 2020 comments to you, for employers with ten employees or fewer it will be the small business owner him or herself who serves as the "data controller," "data processor," and the person charged with performing the "data privacy assessment" for the business. Of course, these new responsibilities will accompany their current job of running the business, complying with the myriad other laws on the books, handling human resource issues, marketing, and even taking out the trash.

Section 3 -- Scope of the Act

For the most part, I believe the only activities the typical small business owner undertakes that implicate the privacy interests of their customers or clients, will be any activities relating to the advertising of their business and the products or services they offer. As a result, when reviewing Section 3 concerning the Scope of the Act, I have one concern and one request for clarification:

I am very concerned that it will be extremely difficult, if not impossible, for a small business to determine under (a)(2) whether he/she receives 50 percent or more of gross revenues from activities conducted as a data controller or data processor. As previously mentioned, the typical small business owner will only use personal data to advertise to existing and potential customers. It would be very burdensome and difficult for them to determine and track how new customers and clients are coming in and the revenues generated from those encounters.

If I read (a)(4) correctly the types of activities the typical small business owner would undertake (advertising to clients/customers), would not be swept into this category. If I am correct, it would be helpful for that to be explicitly stated in the comments section. If it is not the case, I am very concerned that virtually all small businesses in America will be required to comply with this new regulatory structure, which would be a tremendous burden on them.

Section 7 – Compatible Data Practice

I am concerned that (c) is too broad. Specifically, the prohibition on the use of personal data for "decisional treatment." The typical small business owner, particularly those with an online presence, is constantly evaluating the location, size, and purchase history of many of their customers so they can tailor their marketing and products and grow their business. If the Committee does not intend for such activities to be captured in this section, I recommend they explicitly exclude such activities.

Section 9 -- Prohibited Data Practice

I am concerned words like "harassment" and "intimidated" are too subjective, even under the reasonable person standard. For example, would "too many ads" be considered harassment or intimidating? I would hope that would not be the case. However, I am concerned these subjective metrics will lead to frivolous litigation, particularly if a private right of action is included in the final Act.

Private Cause of Action

I strongly support the Committee using Alternative B in its final version of the Act. For the reasons articulated in my April 2020 letter, small business owners are particularly susceptible to "shake-down" lawsuits that are designed to primarily enrich plaintiff's attorneys.

For laws with a private cause of action it is common for a plaintiff, or his attorney, to travel from business to business, looking for violations of a law. In such cases, the plaintiff generally is not as concerned with correcting the problem as he or she is in extracting a settlement from the small business owner. In many instances the plaintiff's attorney will initiate the claim, not with a lawsuit, but with a "demand" letter. In my experience, plaintiffs and their attorneys find "demand" letters particularly attractive when they can file a claim against a small business owner for violating a state or federal statute that has a private cause of action.

The scenario works as follows: an attorney will send a one and a half to two-page letter alleging the small business violated a statute. The letter states that the business owner has an "opportunity" to make the whole case go away by paying a settlement fee up front. Time frames for paying the settlement fee are typically given. In some cases, there may even be an "escalation" clause, which raises the price the business must pay to settle the claim as time passes. So, a business might be able to settle for a mere $2,500 within 15 days, but if it waits 30 days, the settlement price "escalates" to $5,000. Legal action is deemed imminent if payment is not received.

If a private cause of action is ultimately enacted, a small business owner could unknowingly be in technical violation of the Act opening him/her up to the kind of lawsuit abuse I articulate above. As a result, I strongly recommend the Committee adopt Alternative B.

****

Thank you for your consideration of these comments.

Best regards,

Karen R. Harned

Karen Harned
Executive Director
NFIB Small Business Legal Center