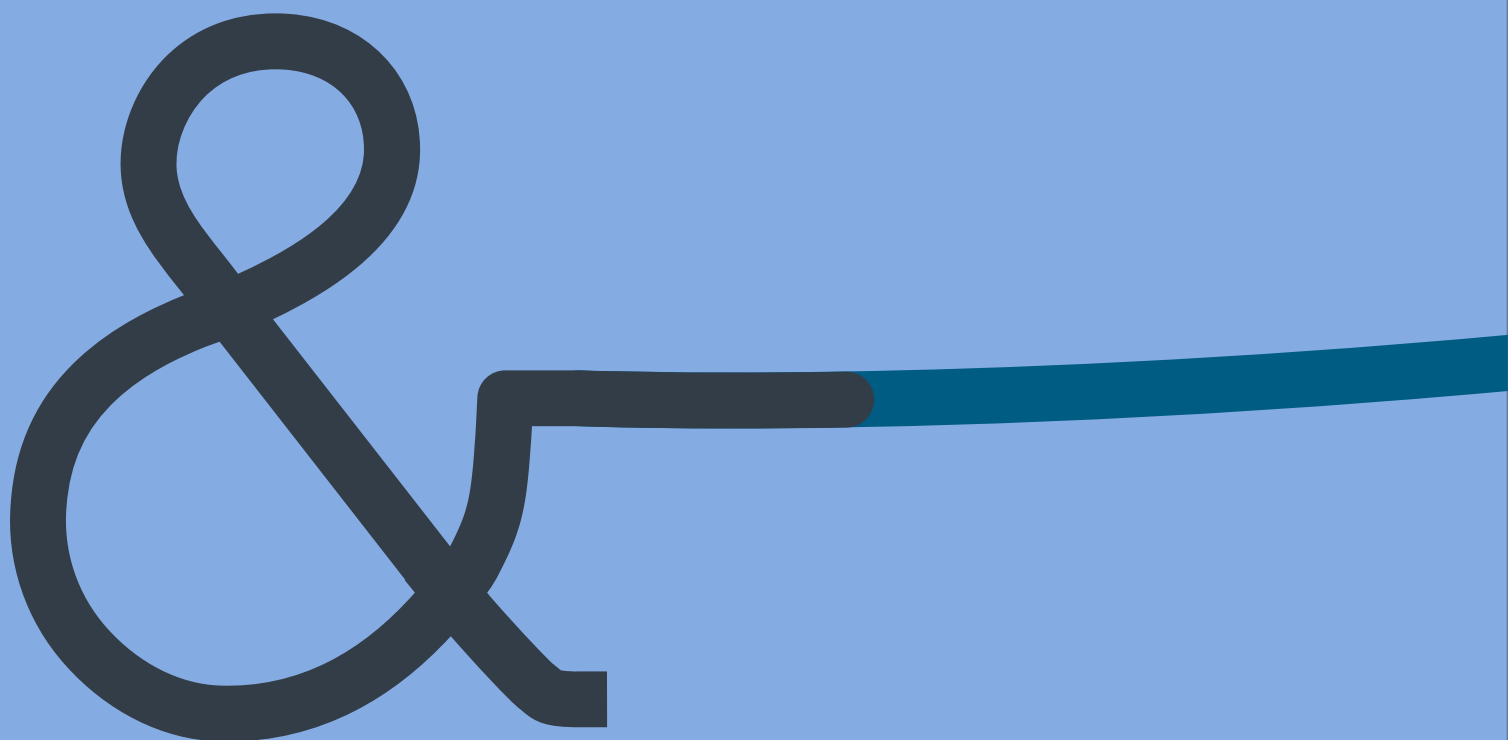


Bird & Bird

Global Cookie Review

US Supplement



Welcome to the US Supplement of the Bird & Bird Global Cookie Review

Welcome to the US Supplement of our Global Cookie Review.

The United States currently does not have a standalone law governing the use of cookies on the federal level. However, in recent years, several states have adopted their own privacy frameworks, with at least five of these (California, Virginia, Colorado, Connecticut, and Utah) in effect or expected to be in effect by the end of 2023. Policymakers in Iowa, Indiana, Montana, and Tennessee have likewise passed similar legislation that will enter into force in upcoming years.

While these laws diverge in important ways, they share many similar and interoperable features, including rules governing the use and deployment of cookies. All these laws consider unique identifiers like cookies to constitute personal data and impose corresponding processing obligations on their commercial use. They also set forth new transparency and disclosure requirements on organisations that use such technologies.

Under these legal frameworks, businesses do not need to receive consent from consumers or place opt-in banners on their websites to lawfully use cookies. However, organisations must give consumers a chance to opt-out of the sale or sharing of their personal data for purposes of online targeted advertising, which may be applied to cookies that are used for these purposes. There is notable variation in the way “sale” and “sharing” are defined across these laws, with some preferring a narrower interpretation of the terms than others. Despite this, the use of cookies in a behavioural advertising context will most likely trigger these opt-out requirements and impose new challenges for organisations operating in the U.S.

Additionally, current rules require organisations to provide consumers with a privacy notice at the point of data collection. This notice must describe the categories of personal data, the purposes of processing, and whether the information is sold or shared with third parties. Businesses must present this notice to consumers before deploying cookies on their websites. The form in which this notice must be presented is not prescribed or consistent across state privacy laws, however more clarity may emerge through enforcement or rulemaking. Indeed, California and Colorado have already begun to draft implementing regulations that will touch upon disclosure requirements and consumer opt-outs, particularly in relation to the use of dark patterns and other potentially manipulative design practices.

This supplement explores some of the key requirements in U.S. state privacy laws with respect to the use of cookies and outline important considerations for organisations as they adjust to these new rules. As new laws follow, both across new states and if a federal law is ever actually realised, we will update this supplement accordingly.

This supplement also forms part of the Bird & Bird Global Cookie Review, which you can access [here](#). This covers cookie-related legal frameworks and requirements across a broad array of jurisdictions in EMEA, APAC and LatAm.

United States

Summary

	California	Utah	Colorado	Virginia	Connecticut
1 - Can you place cookies without consent?	●	●	●	●	●
2 - Are cookie rules (whether specific or within general data protection laws) followed in practice?	●	●	●	●	●
3 - Are there any exemptions if consent is required?	●	●	●	●	●
4 - Can you place the following cookies automatically: i. Analytics cookies ii. Advertising cookies iii. Social media cookies	●	●	●	●	●
5 - Are you able to gain consent without a user ticking 'accept', i.e. imply consent from a user continuing to browse the site?	●	●	●	●	●
6 - Can you set cookies without a cookie notice?	●	●	●	●	●
7 - Can you set cookies without a cookie banner/ management tool?	●	●	●	●	●
8 - Are you able to use cookie walls?	●	●	●	●	●
9 - Is the local regulator currently enforcing decisions against breaches of cookie rules?	●	●	●	●	●
10 - Are there any current consultations relating to ad tech/cookies?	●	●	●	●	●
11 - Are there any anticipated changes to the rules and/ or have there been changes to the attitudes in the market (for example, case law or industry body decisions)?	●	●	●	●	●

● = Higher risk/be alert ● = Lower risk ● = See detailed answer

United States

Can you place cookies without consent? Summary

In general, yes.

Cookies can be placed without opt-in consent. Unlike other jurisdictions, the United States does not have specific cookie-related laws in effect at the federal or state levels.

However, there are five U.S. states that have enacted consumer privacy laws that are currently in effect or will take effect by the end of 2023. These laws generally consider unique persistent identifiers such as cookies to be regulated as personal data and impose corresponding obligations on businesses with respect to personal data. The states are California, Virginia, Colorado, Connecticut, and Utah.

Although consent is not required to place cookies under these state laws, businesses must provide a privacy notice at the point of data collection describing the categories of personal data collected, the purposes for which the information is collected or used, and whether that information is sold or shared (among other disclosures). The laws also generally require businesses to allow consumers to opt out of the sale of personal data or the sharing of personal data for purposes of online targeted advertising. These opt-outs must be applied to cookies that are used to facilitate the sale or sharing of data.

In sum, for cookie identifiers that constitute personal data under U.S. state privacy laws, businesses have obligations that include providing notice and an opportunity to opt-out of any sales or sharing of data.

U.S. State Laws

There is an emerging body of state privacy laws that impose obligations on businesses for the collection, use, and disclosure of personal data defined to include unique persistent identifiers such as cookies.

Five state privacy laws are currently in effect or will be in effect by the end of 2023:

- the California Consumer Privacy Act (CCPA);
- the Virginia Consumer Data Protection Act;
- the Colorado Privacy Act;
- the Utah Consumer Privacy Act; and
- the Connecticut Act Concerning Personal Data Privacy and Online Monitoring.

These state privacy laws apply only to entities doing business in the state when certain thresholds are met and only to personal data about residents of each state.

California

While there is no specific cookie-related law or regulation in force in the state of California, businesses subject to the CCPA must provide a notice at the point of data collection and allow consumers to opt out of the sale or sharing of personal data, which this law calls “personal information.”

“Personal information” generally means information that identifies or is reasonably capable of being associated with a particular consumer or household. This definition encompasses “unique identifiers,” which are persistent identifiers such as cookies that can be used to recognize a consumer, or a device that is linked to a consumer, over time and across different services. When processing personal information such as cookies, businesses must provide a notice at collection describing the categories of personal information collected, the purposes for which the information is collected or used, and whether that information is sold or shared (among other disclosures).

Under the CCPA, businesses are also required to provide consumers with the ability to opt-out of the sale or sharing of personal information. A “sale” generally means the disclosure of personal information to a third party for monetary or other valuable consideration. “Sharing” means making personal information available to a third party for purposes of cross context-behavioral advertising, whether or not for monetary or other valuable consideration.

In sum, businesses that intend to place cookies regulated by the CCPA do not need to obtain consent for the use of cookies, but must provide notice to consumers and the opportunity to opt out of the sale or sharing of personal information facilitated by cookies.

Virginia, Colorado, Utah, and Connecticut

As in California, there are no specific cookie-related laws or regulations in force in the states of Virginia, Colorado, Utah, and Connecticut. However, businesses subject to these states’ laws similarly must provide a notice at collection and allow consumers to opt-out of the processing of personal data about them for purposes of targeted advertising or sales.

While the definition differs slightly among jurisdictions, “personal data” generally means information that is reasonably linkable to an identifiable individual. Cookies are therefore considered personal data to the extent they are reasonably linkable to a particular individual.

When processing personal data such as cookies under these laws, businesses must provide a privacy notice similar to the notice required in California. Businesses are also required to provide consumers with an ability to opt out of the processing of personal data for targeted advertising or sales. “Targeted advertising” generally means displaying an advertisement to a consumer that is selected based on personal data obtained or inferred from the consumer’s activities over time and across non-affiliated websites or online applications to predict that consumer’s preferences or interests. A “sale” generally means the exchange of personal data for monetary or other valuable consideration.

Businesses that intend to place cookies that will collect personal data regulated by the Colorado, Connecticut, Virginia, or Utah laws do not need to obtain consent for the use of cookies, but must give notice to consumers and provide the opportunity to opt out of cookies that facilitate targeted advertising and the sale of personal data.

Are cookie rules (whether specific or within general data protection laws) followed in practice?

Yes.
Although there are no laws in the United States specific to cookies, state privacy law requirements are followed and enforced in practice.

Are there any exemptions if consent is required?

N/A
Opt-in consent is not required before placing cookies.

<p>Can you place the following cookies automatically:</p> <p>i. Analytics cookies</p> <p>ii. Advertising cookies</p> <p>iii. Social media cookies</p>	<p>Yes, as long as businesses provide notice of these practices and enable individuals to opt out of data sales and online targeted advertising facilitated by cookies.</p>
<p>Are we able to gain consent without a user ticking ‘accept’, i.e. imply consent from a user continuing to browse the site?</p>	<p>Yes.</p> <p>Opt-in consent is not required before placing cookies.</p>
<p>Can you set cookies without a cookie notice?</p>	<p>No.</p> <p>There are no specific U.S. federal or state laws requiring a separate cookie notice. However, the personal data practices associated with cookies must be addressed in the privacy notices described above.</p>
<p>Can you set cookies without a cookie banner/management tool?</p>	<p>Yes, but some companies choose to use cookie banners to fulfil certain privacy notice and/or opt-out requirements.</p>
<p>Are you able to use cookie walls?</p>	<p>Yes.</p> <p>There are no specific U.S. federal or state laws prohibiting use of cookie walls.</p>
<p>Is the local regulator currently enforcing decisions against breaches of cookie rules?</p>	<p>There are no enforcement decisions specifically relating to breach of cookie rules because there are no such rules in the United States. However, enforcement of privacy and data security laws more generally has been a priority for U.S. regulators.</p> <p>For example, the Federal Trade Commission (FTC), the primary federal agency on privacy policy and enforcement, recently announced the conclusion of two enforcement actions implicating the use of cookies or similar technologies. In February 2023, the FTC settled two separate cases resolving certain allegations (among others) that businesses misrepresented or inadequately disclosed to consumers that certain personal data collected through cookies, web beacons, or other similar technologies would be shared with advertising partners or other third parties. As part of the settlements, the companies agreed to monetary and injunctive relief.</p> <p>At the state level, the California Attorney General has been active in enforcing the state’s consumer privacy law since it became effective in January 2020. For example, in 2022, the Attorney General settled a case—the first public enforcement action under the state’s privacy law—with a large retailer for \$1.2 million. The case was based in part on allegations that the business’s use of third-party tracking technologies on its website constituted sales.</p>

Are there any current consultations relating to ad tech/cookies?

No, we are not aware of any such consultations.

Are there any anticipated changes to the rules and/or have there been changes to the attitudes in the market (for example, case law or industry body decisions)?

There are currently no specific rules on cookies in the United States.

As noted, the above states have passed laws that regulate personal data, generally defined to include unique identifiers such as cookies, and this trend is likely to continue in the absence of a comprehensive U.S. federal privacy law. The restrictions on sales and sharing under these state laws is driving increased scrutiny on cookie use in business partnerships and contract negotiations. While some organizations are willing to allow cookies on their digital properties that require an opt-out choice, other organizations are unwilling to allow such cookies.

While the U.S. Congress is considering privacy legislation and the Federal Trade Commission is considering a privacy rulemaking, either or both of which could impact cookies, there are no anticipated changes in the near future.

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Thank you

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