

Privacy Regulation: Is Your Company Prepared?

By D. Carlos Kaslow, Esq. SSA General Counsel

In 2008 Connecticut, Massachusetts and Nevada enacted consumer privacy laws that directly impact how businesses, including self storage operators, conduct their operations. These laws all regulate how businesses handle sensitive customer information. However, the laws are very different in their focus and the scope of the regulation they impose. These new laws are part of a trend that began five years ago when Texas and California enacted some of the first laws regulating how businesses that collect customer personal information maintain and dispose of it.

The Nevada law (NRS 597.970) is narrowly focused and regulates the transmission of customer personal information by electronic means. It simply requires that data containing customer personal information be encrypted when it is transmitted by any electronic means other than a fax. Self storage operators who transmit detailed customer information between facilities and home office should check with their vendor that their software encrypts data before it is transmitted.

The Connecticut law requires that businesses safeguard customer personal information from misuse by third parties while it is in the business's possession. The business must also make personal information unreadable prior to disposing of it. This would include the shredding of paper records and the permanent destruction of records in electronic form. The Connecticut law is similar in approach to the laws enacted by California and Texas.

Massachusetts Creates a Complex Regulatory Scheme

The Massachusetts law is a complex comprehensive regulatory scheme. The state has pushed back the implementation date twice because even the state's largest businesses have had difficulty complying with its requirements. It is now scheduled to go into effect on January 1, 2010. The Massachusetts Office of Consumer Affairs & Business Regulation has a number of guides for small businesses to aid them in their compliance efforts to comply. The law not only regulates Massachusetts businesses but any business with customers who are residents of the state. The Massachusetts law requires businesses that store or maintain customer personal information to:

1. Have a written data security program in place and a person responsible for maintaining and updating the data security program.
2. Have security measures to protect customer information when third-party contractors have access to it. For example, this could be your computer management software company.
3. Limit access to customer personal information to only those employees who need it to do their job.
4. Limit the collection of customer personal information to that necessary for business needs.

Any Massachusetts self storage business or facility that serves Massachusetts residents should go to the Office of Consumer Affairs & Business Regulation website and get copies of the "Small Business Guide For Formulating a Comprehensive Written Information Security Program".

What Is Personal Information?

The starting point for a business trying to comply with the consumer privacy laws is to determine if the business collects and maintains customer personal information. While definitions of "personal information" used in these privacy protection laws are not uniform, they are similar. First, the name address and telephone number of a customer is not personal information. The definition of personal information includes such items as the customer's social security number, driver's license number, credit or debit card number or other financial information when it can be associated with a specific person. For example, Connecticut privacy law defines personal information as follows:

As used in this section, "personal information" means information capable of being associated with a particular individual through one or more identifiers, including, but not limited to, a Social Security number, a driver's license number, a state identification card number, an account number, a credit or debit card number, a passport number, an alien registration number or a health insurance identification number, and does not include publicly available information that is lawfully made available to the general public from federal, state or local government records or widely distributed media.

Most self storage businesses will collect some of this information on some of their customers because they permit credit card payments and often require tenants to provide Social Security numbers and driver's license numbers as a form of identification. If a business collects any of these items, it will have to comply with these privacy laws and

we can expect more states to enact them. Michigan is considering legislation similar to Massachusetts. There is a clear evolving public policy: If you collect sensitive customer information, you had better be prepared to protect it; if you don't, you may be liable to your customers for any losses they incur. Even in states that do not regulate how businesses maintain and dispose of customer

personal information, a business could be civilly liable under a negligence theory if the information was stolen and a customer suffered a loss because of identity theft. So it is wise for storage operators in all states to consider their procedures for the maintenance, transmission and disposal of customer personal information and how this information can be reasonably protected. ❖

When Lienholders Arrive

By D. Carlos Kaslow, Esq. SSA General Counsel

Self storage operators around the country use a statutory lien when tenants fail to pay rent when due. If the delinquency persists they have a statutory right to sell the property. What storage operators may occasionally forget is that other parties may have rights in the tenant's property. In most states the self storage lien is not a first lien on the goods. A lienholder with a lien that was filed before the property was stored may have superior rights to which the self storage operator may have to defer. There are a few states, such as Texas, where the storage operator's lien rights are superior to all other lienholders, but this is a distinct minority of the lien laws. States like California and Delaware give self storage operators a lien that is superior to most other lienholders, except when the stored property is a vehicle or a boat.

For storage operators in states where the self storage lien does not have priority over other liens, what are an operator's rights when a lienholder calls claiming a right in the property? Let's be very clear here. Most property in self storage facilities is not subject to another lien. However, it does happen and is more common when the stored property is a vehicle or a boat. When a lienholder does contact a self storage operator and has clear documentation that they have a lien on stored property, the storage operator should not ignore this claim. The lien law in most states provides little guidance on what the storage operator should do when they are planning a lien sale and a lienholder shows up. The California and Washington lien laws are exceptions and do provide clear guidance on how to handle this situation. The only court opinion to consider this issue was by a Delaware trial court in a case decided in 2003.

In *Dover Federal Credit Union v. Liberto Mini Storage, C.A. No. 02-11-0151*, the trial court considered the Dover's right to take from the self storage facility a vehicle on which it had made a loan. The court first considered which party, Dover or Liberto Mini Storage, had superior lien rights. The court concluded that the Delaware self storage lien law was clear on this issue. The lien law states:

"The owner of a self-service storage facility and his heirs, executors, administrators, successors and assigns have a

lien upon all personal property located at a self-service storage facility for rent, labor or other charges, present or future, in relation to the personal property and for expenses necessary for its preservation or expenses reasonably incurred in its sale or other disposition pursuant to this chapter. The lien provided for in this section is superior to any other lien or security interest, except liens or security interests secured by motor vehicles titled pursuant to Chapter 23 of Title 21." [Underline added]

Credit Union Vehicle Lien Trumps Self Storage Lien

The court concluded that the self storage law clearly stated that the self storage lien must defer to the superior rights of a lien on a vehicle or boat. The court then ruled that the credit union was entitled to take the vehicle and had no obligation to pay the storage operator's unpaid storage charges. The court rejected the storage operator's claim that equity required they be paid reasonable storage charges from the Dover because they had provided the credit union value by storing the vehicle. While the storage operator was required to give the vehicle to the credit union, it still had the right to pursue the tenant for back rent and other charges and expenses. However, it is always questionable whether pursuing such a claim is worth the time and expense.

Storage operators need to read their state lien law so they know what their rights are with respect to other lienholders. For example, if the credit union had a lien on furniture instead of a vehicle, the Delaware lien law provides that the storage operator has the superior lien and the credit union would have been required to pay the facility owner's lien before taking the property. In most states the self storage operator must defer to the rights of other lienholders. It is very important to get copies of the lienholder's paperwork and make sure that the property described in the documents is the property they want to take. When in doubt you can always require that the lienholder get a court order that you turn specified property over to them. ❖