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New Laws and Proposals Target Government Use of Facial Recognition
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Over the course of the past two years, federal, state, and local lawmakers across the United States have increasingly turned their attention to government use of facial recognition technology. The technology has often been deployed for public safety purposes, and lawmakers have considered whether regulation should be enacted to address privacy or civil liberty concerns. With a range of legislation enacted in states and municipalities across the country, and several more proposed bills under consideration, a patchwork of regulatory approaches is emerging. This includes restrictions on specific uses of facial recognition technology, as well as moratoriums or bans on government use of the technology in certain cases.

Indeed, on March 31, 2020, Washington state became the first state to pass targeted legislation addressing government use of the technology, mandating certain requirements while permitting facial recognition to be deployed. Washington's law outlines one approach that states could take in regulating facial recognition, while at the same time, other states like Massachusetts have considered more restrictive approaches. In the absence of comprehensive federal legislation, individual states and municipalities are likely to continue to pursue regulation in this area.

State Regulation of Facial Recognition Technology

To date, Washington and California have passed legislation specifically directed at the use of facial recognition technology by government entities, with Massachusetts on the verge of following suit. California's law specifically bans the use of facial recognition

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technology in connection with police body cameras. By contrast, Washington's law governs the use of facial recognition by all local and state entities, and seeks to regulate the use of the technology without imposing any restrictive bans or moratoriums.

Washington's Facial Recognition Law. The findings in the Washington law, passed in March 2020 (effective July 1, 2021), both state that "unconstrained use of facial recognition services by state and local government agencies poses broad social ramifications," and that the technology can be used in a manner that benefits public safety. Washington lawmakers designed the law to address potential civil liberty concerns while creating a pathway for government entities to use the technology for public safety.

The Washington law mandates a series of requirements governing state and local use of facial recognition technology, including:

Notice of Intent: An agency seeking to use facial recognition services must file a notice of intent detailing the purpose for which it intends to use the technology.

Accountability Report: After filing a notice of intent, and prior to using a facial recognition service, the state or local agency must produce an accountability report. This report must include information such as the name of the facial recognition service provider, the service's capabilities and limitations, the types of data inputs used by the service, how the data is generated, the type of data likely to be generated, a description of the managing policies for the use of the service, ways in which the service might impact civil rights and liberties, and steps to mitigate said impacts. The agency must post the report 90 days before the service is launched, and a legislative authority must post the report to its public website.

Vendors: The agency must require vendors of the service to disclose any reported bias regarding the service, and it must follow all guidelines provided by the developer of the service.

Provider: The agency must require the provider of the service to make an Application Programming Interface (API) to enable reliable tests of the service for accuracy and unfair performance differences affecting protected classes.

Public Community Meetings: The agency must host three public hearings prior to filing the accountability report. These meetings are characterized as "public consultation meetings" and are meant to allow the public to raise issues concerning the use of the service.

Task Force: The legislation provides for the creation of a task force to include representatives from developers of facial recognition technology, law enforcement or other agencies, advocacy organizations, and legislative members. The task force is to address "potential abuses and threats posed by the use of a facial recognition service" as they relate to civil liberties, freedoms, privacy, and discrimination against protected classes. Finally, the task force is to present its findings to the governor no later than September 30, 2021.

<u>Human Review</u>: Human review entails oversight by one or more individuals who are trained to operate a facial recognition service, and is required of all services used to make decisions that could potentially result in the provision or denial of financial and lending services, housing, education enrollment, and criminal justice.

<u>Surveillance</u>: If the service is being used in a criminal context, criminal defendants must be notified of that use in a timely manner. Beyond this, surveillance cannot proceed indefinitely without a valid warrant, court order, or unless "[e]xigent circumstances exist."

Other State and Municipal Facial Recognition Legislation. Although Washington is the only state to pass comprehensive legislation regulating the use of facial recognition technology, as noted above, California has passed legislation prohibiting the specific use of the technology in connection with police officer body cameras or data collected by an officer camera. The California legislation enables individuals to bring an action for equitable or declaratory relief against any officer who violates the stated prohibition.

Several municipalities also have enacted bans and moratoriums on the technology. In May 2019, San Francisco became the first city in the U.S. to ban the use of facial recognition technology by local agencies, including law enforcement. The following month, Somerville, MA passed a similar ban on the use of facial recognition technology in police investigations and other programs. Likewise, in July 2019, Oakland, CA similarly banned the use of facial recognition technology by city departments, including the police department. In June 2020, the city council of Boston followed suit, unanimously voting to ban the use of facial recognition by the City of Boston or any city official.

Massachusetts is also close to enacting a state-wide moratorium on the use of facial recognition technology, which would ban state government use of the technology through December 31, 2021. The ban is part of an omnibus police reform bill introduced by the Massachusetts Senate Ways and Means Committee. The legislation – S.2800 – would also mandate the establishment of a special commission to study the use of facial recognition by the Massachusetts Department of Transportation and law enforcement agencies.

Federal Regulation of Facial Recognition Technology

While states and municipalities have moved forward on facial recognition regulation, various proposals have been introduced at the federal level in Congress. As one example, in June 2020, lawmakers proposed a prohibition on the use of biometric surveillance by any federal agency or federal official acting in an official capacity. The bill would prohibit the federal government's use of facial recognition technology without explicit statutory authorization, and would further require the federal government to withhold certain federal public safety grants from state and local entities that use the technology. The bill provides a private cause of action for any individual whose rights under the Act are violated by the federal government. Ultimately, federal privacy legislation has stalled over disagreements about private rights of action and federal preemption.

Given the prominence of debates around facial recognition technology, we will likely continue to see developments in the regulation of that technology, including on the state level. Companies should continue to monitor this area as the regulatory landscape develops.

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