

Utah Becomes the Second U.S. State to Establish Affirmative Defenses for Data Breach

Privacy, Cyber & AI Decoded Alert | 1 min read

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In enacting the [Cybersecurity Affirmative Defense Act](#), HB80, (Act) on March 11, 2021, Utah became the second state in the U.S. to create affirmative defenses for “persons” to certain causes of action arising out of a breach of system security.^[1]

“Persons” is defined to include individuals, associations, corporations, partnerships, and other business entities.

The Act provides protection to persons that create, maintain, and reasonably comply with industry-recognized cybersecurity regulations, like the NIST, ISO 2700, and the HIPAA Security Rule, among others identified in the Act. The written cybersecurity program must provide administrative, technical, and physical safeguards to protect personal information.

The Act establishes the following three (3) affirmative defenses to tort-based claims brought under Utah law in a Utah state court:

- A person that creates, maintains, and reasonably complies with written industry-recognized cybersecurity regulations that were in place at the time of the breach has an affirmative defense to a claim that the person failed to implement reasonable information security controls that resulted in the breach;
- A person that creates, maintains, and reasonably complies with their program and also had in place protocols for responding to a breach of system security at the time of the breach has an affirmative defense to a claim that the person failed to appropriately respond to a breach of a security system; and
- A person that creates, maintains, and reasonably complies with their program and also had in place protocols for notifying an individual about a breach at the time of the breach has an affirmative defense to a claim that the person failed to appropriately notify an individual whose personal information was compromised in a breach of a security system.

The affirmative defenses established in the Act are generally not available in circumstances where the person had notice of a threat or hazard.

The Act expressly states that it does not create a private right of action for failing to comply with its provisions.

[\[1\]](#) Ohio was the first state to establish affirmative defenses with the OH Data Protection Act in 2018.

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