

No Compliance, No Enforcement

What a State Attorney General Can Do About Ambient Biometric Devices While the Commission Will Not

The federal regulator did not give ambient biometric devices permission. It built a lane they cannot enter, then announced it would not police the other one.

WHAT HAPPENED

In February 2026 the regulator said it would not enforce

The competition and consumer regulator said it would not pursue businesses under the children's privacy rule where the only reason they gather someone's details is to establish that person's age.

Plenty of people took that as the regulator walking away from protecting children now that machines can read faces. They are mistaken, and the mistake has consequences.

THE CLAIM

A lane these devices cannot enter, and a road nobody is patrolling

Read it and the limits are everywhere. Only services aimed at general or mixed audiences qualify. Whatever is gathered must go to establishing age and to nothing besides. Deleting it quickly is a precondition. And an operator falling short elsewhere gets nothing.

An ambient biometric device meets none of that. Gathering is what it sells. Storing is what it sells. And the people it gathers from are passers-by who never signed up for anything.

The gap that results is an enforcement gap rather than a legal one, and state attorneys general already have the power to close it.

Read The Whole Statement

seven cumulative conditions, and the taxonomy that assumes a user



Nothing in its four pages mentions wearables, ambient devices, or bystanders at all.

HOW IT CAME ABOUT

A real tension, arriving from the opposite direction

It came after an open session at which the regulator's leadership conceded that two things do not fit together: a rule forbidding anyone to gather a child's details before a parent has verifiably agreed, and a class of tool that has to work on somebody's information in order to guess their age at all.

Two parties have now found the same collision by walking toward it from opposite ends. One side says nobody can obey the rule. The regulator says the rule ought not to frighten off a technology it thinks keeps children safer.

WHAT IT IS, FORMALLY

A statement of intention, not a change to the rule

The Commission chose to describe how it intends to exercise prosecutorial discretion while it evaluates amendments, rather than amend anything.

The document says so itself. It creates no substantive rights or entitlements, the Commission keeps the right to investigate and bring actions in individual cases, and it lasts only until final amendments are published or it is withdrawn.

WHO IT COVERS

The categories all assume somebody who came to you

Two sorts of business qualify: those serving everybody, and those serving a mix, meaning they are pitched at children but not chiefly. Anything aimed principally at children is shut out completely, and its position is untouched. Every person using it is treated as a child.

Look at what every one of those categories is built from. It is the relationship between an operator and the people who arrive at it. The covered mechanism is described as determining a user's age before that user interacts with the service.

Nobody walks up to an ambient device. Somebody caught in the lens of a pair of glasses fits neither of the two categories on offer, because neither category was built for a person who never chose to be there at all.

THE CONDITIONS

Six requirements, and a seventh sitting on top

1 Sole purpose

The information collected for age checking may not be used or disclosed for anything else.

2 Vetted onward disclosure

It goes to third parties only after reasonable vetting, under written assurances of confidentiality, purpose limitation and prompt deletion.

3 Prompt deletion

It is not kept longer than necessary, and is deleted promptly.

4 Notice, security, and accuracy

Clear notice to parents and children in the privacy policy, reasonable security safeguards, and reasonable steps to establish that the tool is likely to give reasonably accurate results about age.

AND THE SEVENTH

No relief unless you are complying with everything else

Above all six there is one more, covering everything: none of this applies at all unless the business is already satisfying every other requirement the rule imposes on children's information.

Practitioners flagged that clause as the practical outer limit of the whole thing, and it is fatal to an operator whose ambient collection is itself the unremedied violation.

WHY THE FIRST CONDITION ALONE IS FATAL

Sole purpose is not merely hard here. It is unavailable by definition.

Whatever such a device is for, identifying people, cataloguing them, answering appropriately to a situation, or improving the models underneath, is what the face and voice processing serves. Any age estimate that occurs at all is a passenger on a gathering that was happening anyway.

You cannot construct a scenario in which a passer-by's face is captured only to establish their age, because that face was going to be captured regardless.

The retention conditions fall with it. Something that keeps by design cannot promptly delete what it exists to hold on to. And the notice condition assumes somebody who could read the policy, which a person on the street is not.

The Trap In Footnote Nine

the passage no commentary picked up



The better the device estimates, the more knowledge its operator accumulates.

WHAT THE FOOTNOTE SAYS

Age checking is a way that actual knowledge arrives

Speaking to businesses that serve everybody, the regulator observes that running one of these tools can leave you actually knowing how old somebody is, and offers an illustration. A tool reporting that a person is eleven has just told the business, in the legal sense, that it is dealing with a child.

It is written as a warning to the very operators being relieved. These tools are one way, though not the only way, that actual knowledge turns up.

READ AGAINST A WEARABLE

That is not a caveat. It is the whole case.

Point age estimation at everything within range and you have done worse than fall outside the relief. Each child the models pick out hands the operator the very knowledge that triggers every duty the rule imposes, about somebody whose parent was never asked and could never have been asked beforehand.

By its own workings, the document converts age estimation from something that helps you comply into something that manufactures liability. Sharper estimates mean more of the knowledge that creates duties, and a concession drafted for websites reaches none of it.

WHAT FOLLOWS

Silence is not authorisation. It is absence.

So the statement does not weaken the impossibility argument at all. The argument stands precisely where it did, with one fact added. A regulator looked squarely at the clash between establishing an age and obtaining permission first, lifted a thin slice of it off one kind of business subject to seven stacked requirements, and left these devices where they were.

Across all four pages there is no mention of ambient devices, of wearables, or of bystanders.

The Instrument Cannot Find The Line

and the rule turns on exactly that line



Three different epistemic acts, folded into one defined term.

THREE ACTS, ONE WORD

Estimation, verification, and inference are not the same thing

The statement defines its subject in a footnote, and that footnote works harder than the operative text. As the document uses the phrase, it takes in anything that guesses an age or a bracket, anything that confirms one, and anything that works out a probable age from assorted clues.

Guessing, confirming and deducing are three separate ways of coming to know something, each going wrong differently, and all three have been packed into one phrase with no line drawn between them.

THE LINE THE RULE DRAWS

Thirteen, and the machine cannot see it

Anyone below thirteen falls inside the statute. What a business owes depends on whether whoever it gathered from is beneath that age, and the knowledge trigger takes for granted that this can normally be established. The Commission's own example presupposes exactly that: a mechanism identifying somebody as eleven.

If the instrument cannot reliably separate a child of twelve from a child of fourteen, then a rule turning on that boundary cannot be administered.

So take the premise seriously. If the measurement cannot find the line, move the line to somewhere measurement is not required.

What A State Can Do Today

one statutory obstacle, and the Commission has just removed it

IV

The only bar is a pending federal action, and there is none coming.

THE GRANT

States have had this power since 1998

Give a state's chief lawyer grounds to think a practice breaching the regulator's rule has harmed, or is threatening, the people who live there, and that state may go to federal court for them: to halt the practice, to force compliance, to recover money, restitution or other compensation, or to obtain whatever else the judge considers fitting.

The procedural conditions are light. Send the regulator written notice and the papers ahead of filing, or alongside them where doing it in advance is impractical. The regulator can join in, address the court, and appeal. None of it strips the state of its own powers to summon witnesses and demand documents.

THE OBSTACLE

Against all that, the statute names exactly one bar

So long as a case brought by the regulator, or on its behalf, is live, a state cannot sue anybody named in those papers about the same regulation. That is the entire restriction.

The February statement is a public representation that, for a defined class of conduct, no such action is coming. Where these sensing devices are concerned, a year and four months have passed since the amendments appeared and no case has been brought.

Any state lawyer worried about being pushed aside halfway through a case can look at the docket for reassurance. Yes, the regulator may change its mind. What it cannot do is retroactively create a case that was already running on the day the state filed.

IT HAS BEEN RUN BEFORE

New Mexico built the template, and its lessons cut both ways

That litigation against an app developer, embedded ad networks, and a platform produced the working model. Against the advertising networks the federal claim failed, because nobody had pleaded that they actually knew the apps were for children. Information travelling from a bundled toolkit into a network's servers does not on its own establish that. The rule sets it up that way on purpose: networks are judged on what they knew, whereas whoever builds an app for children is liable whatever they knew.

With the federal count gone for want of knowledge, the state counts went the same way. Holding identical behaviour to a tougher standard under state law than the federal rule applies would be exactly the clash the preemption provision rules out.

The lesson is pleading discipline. The knowledge element carries the complaint, in federal and state court alike.

WHY A WEARABLE IS DIFFERENT

The knowledge pleading is a different animal entirely

One of those defendants took in information through a toolkit somebody else had written, and had to be proved aware of what those apps were for. Whoever runs an ambient device manufactures the sensor, operates the models, and handles the feed on hardware it owns.

The whole function of the thing is to apprehend the people in front of it. Where an ad network had to be shown to know, this operator has designed a system whose output is knowledge about whoever is in range.

AND PREEMPTION DOES NOT REACH IT

Only inconsistent state law is displaced

Only state law that conflicts gets displaced, and nothing beyond that. A federal appeals court, with the regulator itself filing in support, has decided that a state claim forbidding exactly what the federal rule forbids does not conflict with it.

So a state claim tracking the federal standard survives. A state claim demanding more than the federal standard does not, which is precisely the trap New Mexico fell into.

THE CLAIM, RESTATED

An enforcement gap, not a legal one

The regulator looked at the collision, relieved websites from a narrow slice of it under seven cumulative conditions, and left ambient biometric sensing entirely outside. It never mentioned wearables or bystanders once.

That silence is not a licence. And the single statutory obstacle to a state acting instead is the pendency of a federal case, which the Commission has now publicly represented is not coming.

The Commission did not authorise ambient biometric collection. It built a lane these devices cannot enter, and then declined to walk down the other one.

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