

AMENDED IN ASSEMBLY MARCH 28, 2016

AMENDED IN ASSEMBLY MARCH 8, 2016

CALIFORNIA LEGISLATURE—2015–16 REGULAR SESSION

ASSEMBLY BILL

No. 1681

**Introduced by Assembly Member Cooper
(Coauthor: Assembly Member Gallagher)
(Coauthors: Senators Bates and Hall)**

January 20, 2016

An act to add Section 22762 to the Business and Professions Code, relating to smartphones.

LEGISLATIVE COUNSEL'S DIGEST

AB 1681, as amended, Cooper. Smartphones.

Existing law requires that a smartphone that is manufactured on or after July 1, 2015, and sold in California after that date, include a technological solution at the time of sale, which may consist of software, hardware, or both software and hardware, that, once initiated and successfully communicated to the smartphone, can render inoperable the essential features, as defined, of the smartphone to an unauthorized user when the smartphone is not in the possession of an authorized user.

This bill would require a ~~smartphone that is manufactured on or after January 1, 2017, and sold in California, to be capable of being decrypted and unlocked by its manufacturer or its operating system provider. The bill would subject a manufacturer or operating system provider that knowingly failed to comply with that requirement~~ *of a smartphone sold or leased in California on or after January 1, 2017, that is unable to decrypt the smartphone pursuant to a state court order to be subject to a civil penalty of \$2,500 for each ~~smartphone sold or leased.~~ instance*

in which the smartphone is unable to be decrypted. The bill would prohibit a manufacturer or operating system provider who has paid this civil penalty from passing any portion of the penalty on to purchasers of smartphones. The bill would authorize only the Attorney General or a district attorney to bring a civil suit to enforce these provisions. This bill would make findings and declarations related to smartphones and criminal activity.

Vote: majority. Appropriation: no. Fiscal committee: yes.
State-mandated local program: no.

The people of the State of California do enact as follows:

- 1 SECTION 1. The Legislature finds and declares all of the
2 following:
- 3 (a) Worldwide, human trafficking is a \$32 billion per year
4 industry.
- 5 (b) After drug trafficking and counterfeiting, human trafficking
6 is the world's most profitable criminal activity.
- 7 (c) Although previously believed to be an international problem,
8 current statistics show that human trafficking is increasingly a
9 domestic issue.
- 10 (d) According to estimates by the Federal Bureau of
11 Investigation (FBI), human trafficking or the commercial sexual
12 exploitation of children in the United States currently involves
13 over 100,000 children. The San Francisco Bay area, Los Angeles,
14 and San Diego metropolitan areas comprise three of the nation's
15 13 areas of "high intensity" child exploitation in this country, as
16 described by the FBI.
- 17 (e) Studies have estimated that anywhere from 50 to 80 percent
18 of victims of commercial sexual exploitation are, or were formerly,
19 involved with the child welfare system.
- 20 (f) Smartphones are increasingly becoming a weapon of choice
21 for criminals and criminal organizations involved in human
22 trafficking and sexual exploitation of children.
- 23 (g) In 2014, smartphones with full-disk encryption (FDE)
24 became available on the market.
- 25 (h) On smartphones with FDE, when a user creates a password,
26 that phrase generates a key that is used in combination with a
27 hardware key on a chip inside the phone, which blocks access to
28 all "data at rest" stored in the device.

- 1 (i) “Data at rest” on a smartphone is data that is parked, stored,
2 and no longer in motion, such as pictures and text messages.
- 3 (j) Only the password holder can unlock the FDE-equipped
4 smartphone and provide access to all “data at rest.”
- 5 (k) Before 2014, when smartphones without FDE were used in
6 crimes, law enforcement obtained and served a court order on the
7 phone manufacturer and was able to have access to “data at rest”
8 on the device, to aid in an investigation.
- 9 (l) In order to successfully access “data at rest” on smartphones
10 in a criminal investigation, law enforcement must have physical
11 possession of the phone.
- 12 (m) Since the introduction of FDE on smartphones in 2014,
13 “data at rest” on FDE-equipped smartphones has become virtually
14 impossible to access.
- 15 (n) A smartphone belonging to one of the shooters in the County
16 of San Bernardino mass shooting, which left 14 people dead and
17 many more injured, is equipped with FDE and has prevented law
18 enforcement from accessing the phone’s content for evidence.
- 19 (o) Since 2014, FDE in smartphones has created a public safety
20 crisis that has armed criminals and criminal organizations with a
21 powerful weapon to conduct illicit activities while simultaneously
22 providing a shield to conceal crimes and remain out of reach of
23 law enforcement.
- 24 (p) Since 2014, FDE in smartphones has rendered court orders
25 to access critical evidence on smartphones useless.
- 26 (q) Since 2014, FDE in smartphones has interfered with law
27 enforcement human trafficking investigations and prosecutions.
- 28 (r) Smartphones play an essential role in facilitating cases of
29 domestic minor sex trafficking. Human traffickers text logistical
30 information, such as time, place, pricing, types of services, and
31 descriptions of exploited minors using smartphones.
- 32 (s) Human traffickers rely on smartphones to communicate with
33 each other, organize, and advertise their illicit business.
- 34 (t) Technology-facilitated sex trafficking networks rely upon
35 anonymity of victims and traffickers in order to operate. Fully
36 encrypted smartphones, immune to search warrants, make this
37 possible.
- 38 (u) Individuals suspected of crimes are, upon the issuance of a
39 court order, subject to search of their homes, vehicles, and even
40 their bodies, but not their smartphones that are equipped with FDE.

1 SEC. 2. Section 22762 is added to the Business and Professions
 2 Code, immediately following Section 22761, to read:

3 22762. (a) For the purposes of this section, the following terms
 4 have the following meanings:

5 (1) “Smartphone” has the same meaning as in Section 22761.

6 (2) “Sold in California” has the same meaning as in Section
 7 22761.

8 (3) “Leased in California,” or any variation thereof, means that
 9 the smartphone is contracted for a specified period of time to an
 10 end-use consumer at an address within the state.

11 ~~(b) A smartphone that is manufactured on or after January 1,
 12 2017, and sold or leased in California, shall be capable of being
 13 decrypted and unlocked by its manufacturer or its operating system
 14 provider.~~

15 ~~(e)~~

16 ~~(b) A smartphone manufactured on or after January 1, 2017,
 17 that is not capable of being decrypted and unlocked by its
 18 manufacturer or its operating system provider shall subject the
 19 manufacturer or operating system provider of a smartphone sold
 20 or leased in California on or after January 1, 2017, shall be subject
 21 to a civil penalty of two thousand five hundred dollars (\$2,500)
 22 for each ~~smartphone sold or leased in California if instance in
 23 which the manufacturer or operating system provider of the
 24 smartphone knew at the time of the sale or lease that the
 25 smartphone was not capable of being decrypted and unlocked by
 26 the manufacturer or its operating system provider. is unable to
 27 decrypt the contents of the smartphone pursuant to a state court
 28 order.~~ A manufacturer or operating system provider who pays a
 29 civil penalty imposed pursuant to this subdivision shall not pass
 30 on any portion of that penalty to purchasers of smartphones. *This
 31 civil penalty shall not preclude the imposition of any other penalty
 32 pursuant to law.*~~

33 ~~(d)~~

34 ~~(c) The sale or lease inability of a smartphone manufactured on
 35 or after January 1, 2017, that is not capable of being decrypted and
 36 unlocked by its manufacturer or its operating system provider to
 37 decrypt the contents of the smartphone pursuant to this section
 38 shall not result in liability to the seller or lessor.~~

39 ~~(e)~~

1 (d) A civil suit to enforce this section may only be brought by
2 the Attorney General, for the sale or lease of a smartphone in
3 California, *General* or a district attorney for the sale or lease of a
4 smartphone in the county represented by the district attorney. A
5 manufacturer or operating system provider shall not be subject to
6 more than a single penalty *pursuant to this section* for each sale
7 or lease of a smartphone. *smartphone that it is unable to decrypt*
8 *pursuant to a state court order.*

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