



# Leave No Crumbs

## Practical Tips for Cookie Compliance and Litigation Defense



### **Sarah Smith**

Senior Counsel, Privacy and Cybersecurity | [ssmith@eventbrite.com](mailto:ssmith@eventbrite.com)

### **Emma Blaser**

Partner | 202.403.4694 | [erblaser@venable.com](mailto:erblaser@venable.com)

### **Jean-Paul Cart**

Partner | 415.653.3719 | [jpcart@venable.com](mailto:jpcart@venable.com)

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# Agenda

- Are cookie banners required?
- What are the latest litigation trends?
- What are best practices for cookie banners?
- What about the state law opt-out requirements?
- How can we get the business on board?



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**Questions Welcome!**

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# Are Cookie Banners Required?

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# Are Cookie Banners Required?

- There are currently no generally applicable U.S. laws that expressly require companies to obtain opt-in consent for cookies.
- However, there has been a flood of opportunistic lawsuits in recent years pushing for older privacy laws written for telephones to be applied to cookies.
- To help avoid these complaints, companies are implementing cookie banners.



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# What Are the Latest Litigation Trends?

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# Endless Wave of Demands and Complaints

- Two tiers of claimants and claimants' counsel
- Venue: *mostly* California
- Claims: CIPA, invasion of privacy, CDAFA, ECPA, UCL, unjust enrichment
- Defenses: consent, application of CIPA, personal jurisdiction
- Court decisions: plentiful and largely not great
- Strategic considerations: fight or flight

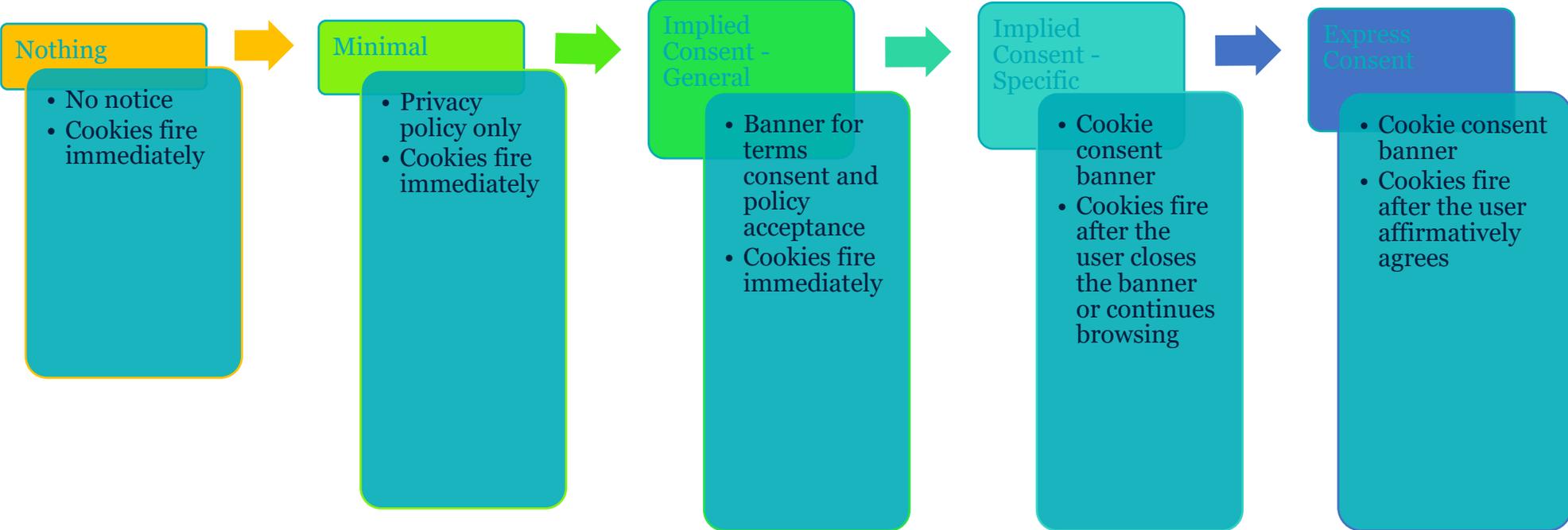


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# What Are Best Practices for Cookie Banners?

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# The Spectrum of Notice and Consent

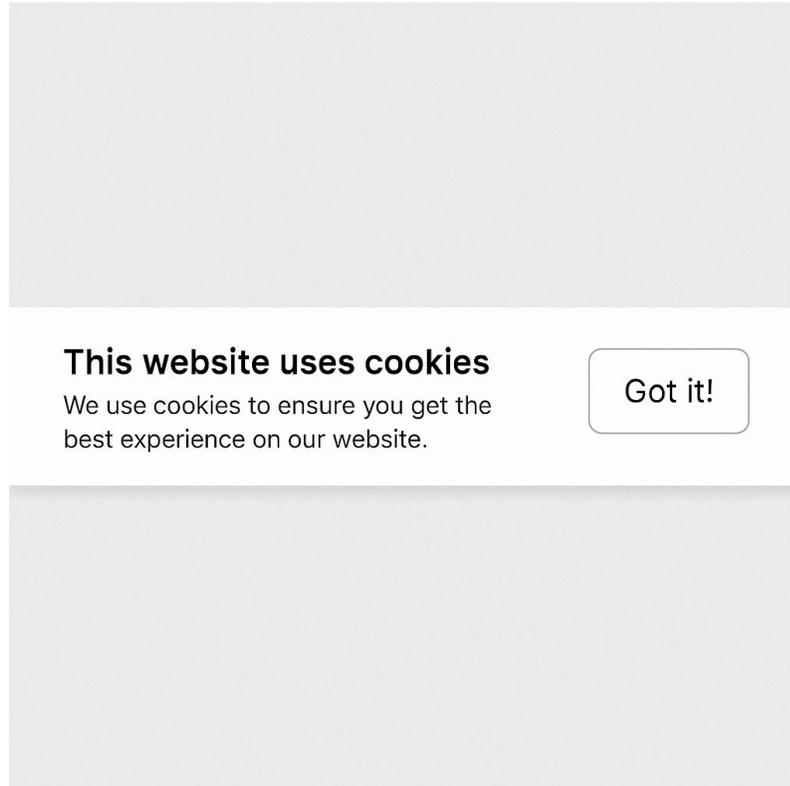


# Notice Content

- At a minimum, the notice should include:
  - A reference to third-party cookies.
  - An explanation of what action constitutes consent. (“By clicking, ‘Agree’,” “By continuing to use this site,” etc.)



# Surfacing the Notice



- The banner must be unavoidable so that consumers cannot credibly deny they had notice and provided consent.

# Types of Consent

Companies can choose to obtain express consent or implied consent.

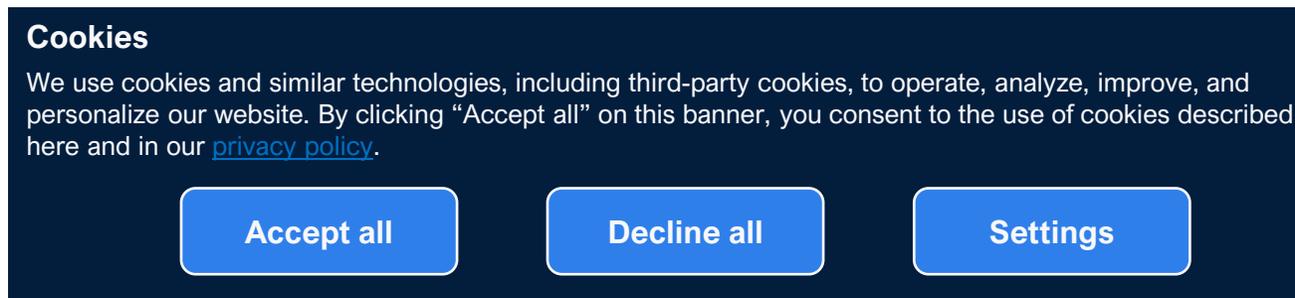
**Express consent** requires an affirmative action by the consumer, so it involves more friction.

**Implied consent** occurs when the consumer receives a meaningful advance notice and subsequently proceeds with the communication – such as when you hear a notice about call recording and continue with the call anyway.



# Options for Express Consent

Express consent requires an affirmative action by the consumer. Typically, this means clicking a button indicating agreement, such as “Accept” or “I Agree”.



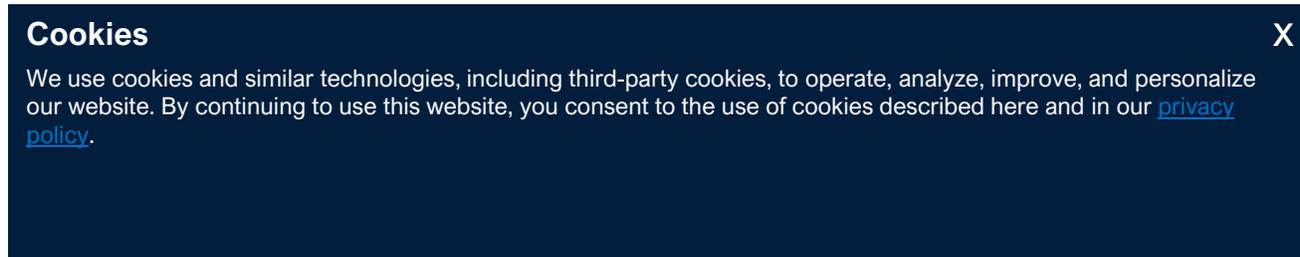
**Cookies**

We use cookies and similar technologies, including third-party cookies, to operate, analyze, improve, and personalize our website. By clicking “Accept all” on this banner, you consent to the use of cookies described here and in our [privacy policy](#).

Accept all   Decline all   Settings

# Options for Implied Consent

Implied consent requires that the user receive meaningful notice and proceed with their activity. For instance, if the consumer closes the banner or otherwise continues to use the site.

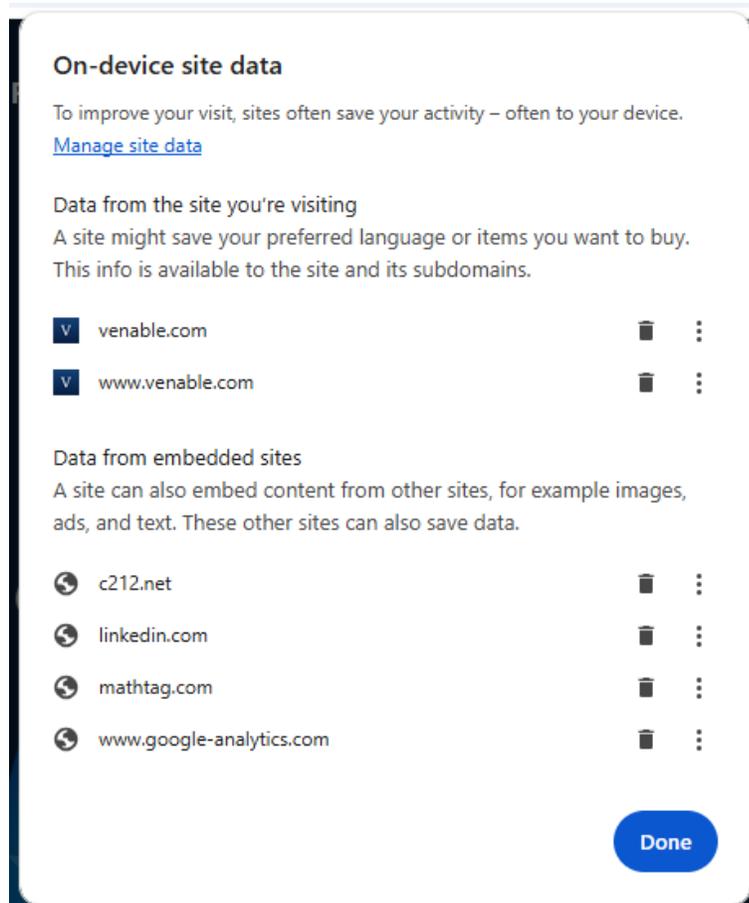


**Cookies** X

We use cookies and similar technologies, including third-party cookies, to operate, analyze, improve, and personalize our website. By continuing to use this website, you consent to the use of cookies described here and in our [privacy policy](#).

# Don't Forget to Test Your Banner!

- Once you've implemented your cookie banner, test it to make sure it's functioning as intended.
- Non-essential cookies should *not* drop before the consumer has consented.
- Most browsers have tools that let you see what cookies are dropping.
- Whatever cookies you can see, plaintiffs can see, too!



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# What About the State Law Opt-Out Requirements?

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# What About the State Omnibus Privacy Laws?

- Implementing a cookie banner does not obviate the need to offer an opt-out to consumers under the state omnibus privacy laws, but may impact the design of, and options available on, any cookie banner the business chooses to implement.
- State regulators increasingly expect symmetry of choice in cookie banners, so companies should consider offering a “Reject All” option if an “Accept All” option is presented.
- If using an implied consent banner, this consent does not override previous sales/sharing/targeted advertising opt-outs from the consumer.



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# How Can We Get the Business on Board?

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# Managing Concerns About Business Impact

- Include various teams: marketing, engineering, product.
- Explain the risks and focus on the potential benefits.
  - Giving your users control can build trust and confidence in your business.
  - Potential improvements in site performance.
- Work with stakeholders on banner configuration and design.
  - Test various options.
- Be flexible (within reason).

# Cookie Governance

- Create a process to review, categorize, and approve cookies.
- Consider incorporating cookie governance into other established processes (DPIA, vendor onboarding processes).
- Auditing your website's cookies is another great way to mitigate risk.
- Review the cookies on the site and confirm whether they add value for the business. If they don't, get rid of them!

# Vendor Selection

- Selecting the right tool can strengthen cookie governance and make compliance easier.
- Include the team who will implement and manage the tool in your selection process.
- Look for a tool that helps implement or even automates your cookie governance program.
  - Blocking / triage mode
  - Categorization suggestions
  - Assign teams and owners
  - Measure cookie activity levels
  - Assign review dates



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