

Biometric Privacy Act and Employment Class Actions in 2021: Recent Decisions on Damages and Union Lawsuits

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Today's faculty features:

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Seyfarth Shaw LLP

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Agenda

- 01** Introduction
- 02** Understanding The BIPA's Requirements
- 03** “Check the Box” Requirements
- 04** Causes of Action Under The BIPA
- 05** Deluge of Class Actions
- 06** Cutting-Edge BIPA Issues

Understanding The Illinois Biometric Privacy Act

- The legislative history surrounding the bill suggests that the statute was implemented to protect consumers, but most lawsuits have focused on workers.
- Motivated by the bankruptcy of Pay by Touch (largest fingerprint scan system in Illinois)
- Regulates the “collection, use, safeguarding, handling, storage, retention, and destruction of biometric identifiers and information.”
- An array of key appellate cases and an Illinois Supreme Court are pending for decision in 2021 on statute of limitations and workers’ compensation preemption defenses.

“Biometric Identifier” And “Biometric Information” Defined

- **Biometric Identifier** – Includes “a retina or iris scan, fingerprint, voiceprint, or scan of hand or face geometry.”
 - Excludes: writing samples, written signatures, photographs, human biological samples, demographic data, tattoo descriptions, and physical descriptions
- **Biometric Information** – Includes “any information, regardless of how it is captured, converted, stored, or shared, based on an individual’s biometric identifier used to identify an individual.”
- Much broader definition of biometric information which arguably acts as a “catch all”



BIPA Requirements

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Notice And Consent

- The BIPA requires a **Written Release**:
 - “Informed written consent”; or
 - In the employment context: “[E]xecuted by an employee as a condition of employment.”



Written Policy/Retention

- The BIPA requires a written, publicly available policy with a retention schedule and guidelines for “permanently” destroying the data.
- Requires data to be destroyed when the purpose for obtaining such data has been satisfied or within three years of the individual’s last interaction with the employer, whichever occurs first.
- The policy must be made available to the public.

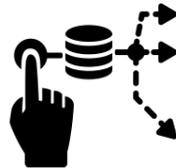


Disclosure To Third Parties

- The BIPA prohibits a company from disclosing biometric information unless:
 - It obtains consent from individual;
 - The disclosure completes a financial transaction requested by the individual;
 - The disclosure is required by law;
 - The disclosure is required by a warrant or subpoena.

Standard Of Care

- Exercise reasonable care to protect biometric data.
- Reasonable standard of care within the industry, and in a manner that is the same as or more protective than the manner in which the business stores, transmits, and protects other confidential and sensitive information (e.g., social security numbers, account numbers, passwords, drivers license numbers, etc.).



Cause Of Action

- The BIPA is the only biometric privacy law that provides a private right of action that allows for plaintiffs to recover liquidated damages and attorneys' fees.
- BIPA Penalties
 - Authorizes \$1,000 or actual damages (whichever is greater) for negligent violations.
 - Authorizes \$5,000 or actual damages (whichever is greater) for intentional or reckless violations.
 - Authorizes injunction and reasonable attorneys' fees and costs.



Current BIPA Litigation

BIPA Litigation (A Look Back)

- Uptick starting in 2017 – close to 100 BIPA cases filed
- Across all industries
- Companies sued alleged to NOT be compliant
 - No policy in place
 - No waiver obtained from employees
 - No retention/destruction protocols
- Also suing the Manufacturer/Provider of the Biometric System at issue
- Current key question – was an employee “aggrieved” by the alleged violation?



Overview of Primary Issues in BIPA Litigation

- Primary Issues Addressed In Litigation:
 - Whether the technology collects or captures “biometric information.”
 - Whether Plaintiffs must demonstrate actual harm (and not a mere technical violation) as required by *Spokeo Inc. v. Robins* and analogous state case law.
 - Whether Plaintiffs have “statutory standing,” e.g., the plaintiff is not an “aggrieved by” a violation of the statute and not authorized to sue.
 - Whether Plaintiffs must establish actual damages to be entitled to liquidated damages.
- Current Split of authority within the State
- One of the cases currently on appeal to Illinois Supreme Court

What Is The Meaning Of “Aggrieved?”

- The BIPA provides only a right of action to “[a]ny person aggrieved by a violation of this Act.”
 - Motion to dismiss for failure to state a claim.
- Similar argument as constitutional standing because Plaintiffs have not alleged actual injury and seek recovery for alleged technical violations of BIPA.
- On December 21, 2017, the Illinois Appellate Court issued a decision in favor of the employer, Six Flags. *Rosenbach v. Six Flags Entm’t Corp.*, 2017 Ill. App. LEXIS 812 (2d Dist. Dec. 21, 2017) (involved fingerprint scan in exchange for season pass – alleged a procedural requirements violation)
 - *Six Flags* oral argument was heard by IL Supreme Court on November 20, 2018
 - The subsequent Illinois Supreme Court ruling opened the floodgates for plaintiffs

**thank
you**

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Additional Current Issues

July 7, 2021



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(MOSTLY) RESOLVED ISSUES – Federal Pre-emption

- BIPA pre-empted by Federal Labor Law where a collective bargaining agreement – see ***Williams v. Jackson Park SLF, LLC***, 2020 WI 5702294, N. D. Illinois (BIPA claim brought by employee subject to collective bargaining agreement preempted)
- ***Miller v. Southwest Airlines, Co.***, 926 F.3d 898 (7th Cir. 2019) (under Railway Labor Act, employees had to raise disputes before adjustment board)
- Not necessarily pre-empted by Federal Railroad Safety and Interstate Commerce Commission Termination Acts – see ***Fluery v. Union Pacific***, Case No. 1:20-cv-00390, N. D. Illinois (claim by non-employee truck driver accessing UP yards not pre-empted)

(MOSTLY) RESOLVED ISSUES – Standing

- Standing and injury
 - State court cases
 - Resolved by ***Rosenbach v. Six Flags***
 - Federal court cases
 - ***Miller, supra*** (found Article III standing)
 - ***Bryant v. Compass Group USA, LLC***, 958 F.3d 617 (7th Cir. 2020)(standing for violation of Section 15(b), but not Section 15(a))
 - ***Fox v. Dakota Integrated Sys.***, 980 F.3d 1146 (7th Cir. 2020) (found Section 15(a) standing)
 - ***Thornley v. Clearview AI***, 2021 U.S. App. LEXIS 1006 (7th Cir. Jan. 14, 2021) (claim merely that procedure violated not enough; must be allegation of particularized harm)
 - ***TransUnion LLC v. Ramierz et al.***, U.S. Supreme Court, June 25, 2021 (limits standing to persons actually injured)

UNRESOLVED ISSUES – Statute of Limitations

Three options:

One year – invasion of privacy

Two year – statutory fines/personal injury

Five year – “catch all”

- ***Tims v. Black Horse Carriers***, Case No. 1-20-0563, Illinois Appellate Court, 1st Dist.
- ***Marion v. Ring Container Techs***, Case No. 3-20-0184, Illinois Appellate Court, 3rd Dist.

UNRESOLVED ISSUES

- Pre-empted by Workers Compensation Act?
 - ***McDonald v. Symphony***
 - Circuit Court—BIPA not pre-empted
 - Illinois Court of Appeals—BIPA not preempted
 - Illinois Supreme Court--pending
- Whether Contribution Act applies
 - Cook County Circuit courts have dismissed Contribution Act claims brought against vendors of time clocks using fingerprints; but
 - ***Gutierrez v. Senior Lifestyle Corporation***, Circuit Court of Cook County
- Whether fingerprint algorithms are biometric information

UNRESOLVED ISSUES (*cont'd*)

- Is every scan a separate violation of BIPA?
 - ***Cothron v. White Castle Systems, Inc.***, Case No. 19-cv-00382 (N. D. Illinois)
 - District Court held “a party violates BIPA Section 15(b) when it collects, captures or otherwise obtains a person’s biometric information without prior consent” and under Section 15(d) “each time an entity discloses or otherwise disseminates biometric information without consent.” Mem. & Op., August 7, 2020.
 - Certified question: “Whether a private entity violates Sections 15(b) or 15(d) of the Illinois Biometric Information Privacy Act, 740 ILCS 14/1 et seq., only when it is alleged to have first collected (§15(b)) or to have first disclosed (§15(d)) biometric information or biometric identifiers (“biometric data”) or an individual without complying with the requirements of those Sections, or whether a violation occurs each time that a private entity collect (§15(b)) or discloses (§15(d)) of the individual’s biometric data without complying with the requirement of the applicable subsection.”
 - Issue raised in the context of accrual of claim, not damages calculation

Partially resolved issues

- Constitutionality
 - ***Bryant v. Compass***, Case No. 19-cv-6622 (N. D. Illinois, November 29, 2020) – “the Illinois General Assembly’s decision to exclude governmental agencies and financial institutions was rationally related to BIPA’s legitimate government interest in protecting Illinois residents’ privacy.”
 - ***Stauffer v. Innovative Heights Fairview Heights***, S. D. Illinois — same
 - Other potential constitutional challenges
 - Void for vagueness?

INSURANCE ISSUES

- EPLI

- Principal source of coverage
- Potential exclusion for “fines or penalties imposed for violations of federal or state law”
 - But see, ***Standard Mutual Insurance Company v. Lay***, 2013 IL 114617 (Ill. 2013) (statutory damages under the Telephone Consumer Protection Act (TCPA) are insurable)

- CGL

- ***West Bend Mutual v. Krishna Schaumburg Tan, Inc.***, 2021 IL 125978, Ill. S. Ct., May 20, 2021.
 - Policy covered injury, other than bodily injury, arising out of an oral or written publication of material that violates a person’s right of privacy
 - Held that “publication” included transmitting biometric information to third party vendor and that publication violated a privacy right
 - Hence, BIPA violations are potentially “advertising injury”

SETTLEMENTS

- Fingerprint cases
 - Settlement ranges: \$900-\$1300 per employee
- Facebook case
 - Total settlement: \$650 million
 - Illinois residents received at least \$345

PENDING/CONTEMPLATED LEGISLATIVE ACTIONS – Illinois

- Illinois House Bill 559
 - Mathematical representation of biometric data excluded it cannot be used to recreate the biometric information
 - One year statute of limitations
 - Opportunity for employer to cure violations
 - No liquidated damages

OTHER JURISDICTIONS

- New York State
 - New York City Ordinance
- Virginia
- South Carolina

RECENTLY FILED CASES

- ***Barnett et al v. Apple, Inc.***, Case No. 2021 CH 03119, Circuit Court of Cook County, filed June 25 – alleged that Touch ID and Face ID captures and collects biometric information
- ***Carpenter v. McDonald's Corp.***, Case No. 21-cv-02906, N. D. Illinois – alleges that McDonald's collects voice data at drive-thrus in violation of BIPA

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Rich Winter is a commercial litigation attorney. He has tried cases in Illinois, Texas, Washington, Georgia, Nebraska and South Dakota and has appeared in federal and state courts in 20 additional states. Mr. Winter's experience includes litigation and resolution of disputes for clients involved in manufacturing, warehousing and distribution, insurance, healthcare, life sciences and transportation.

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