



PROGRAM MATERIALS
Program #32156
August 25, 2022

Biometric Privacy Laws and Employment Class Actions in 2022

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August 25, 2022

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 2022 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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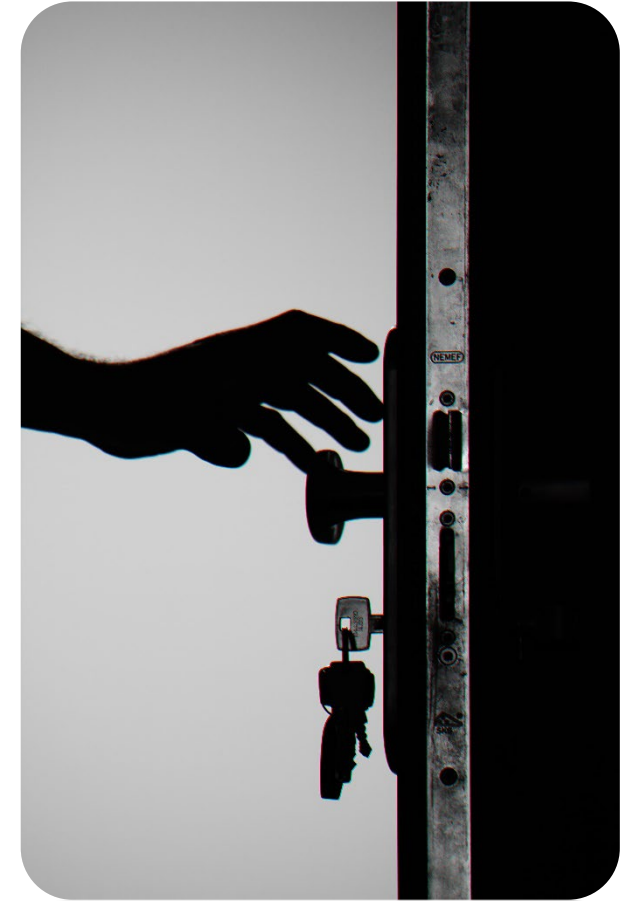
Notice And Consent

- The BIPA requires a **Written Consent**:
 - “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 the privacy of 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.).



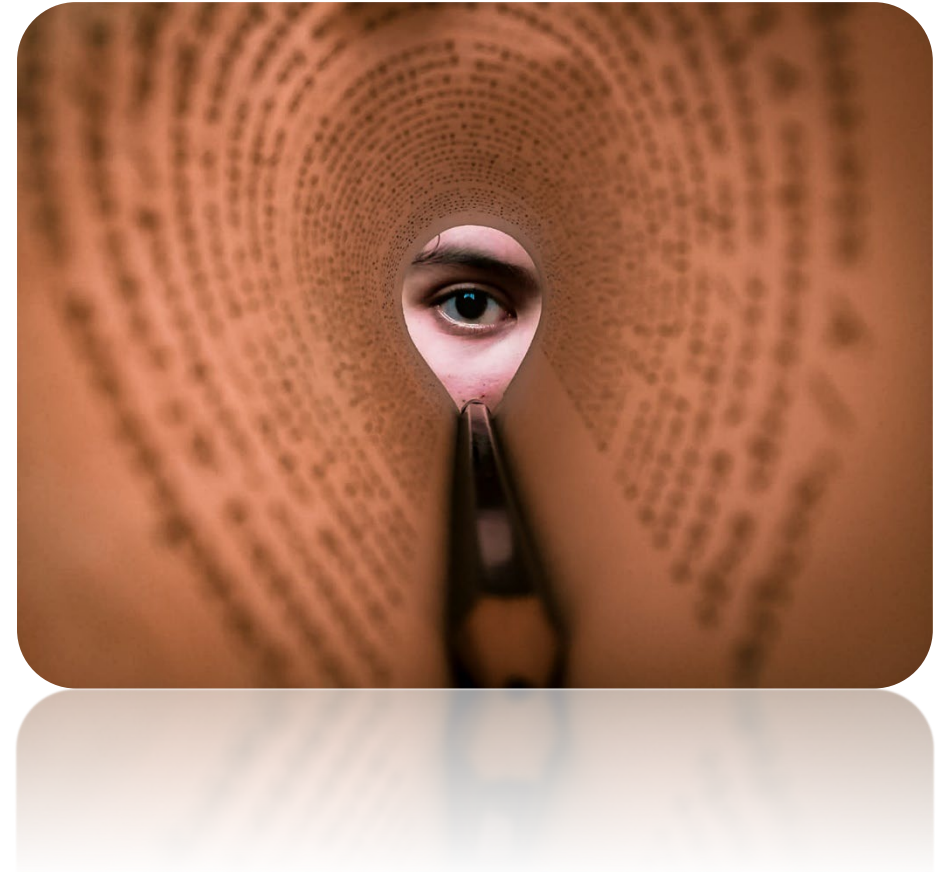
Cause Of Action

- 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 4,000 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
- 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



Landmark Settlements – BIPA Class Actions

- Top 5 Settlements Total **\$813 Million**
- \$650 Million – *In Re Facebook Biometric Privacy Litigation* (Jul. 22, 2020)
- \$92 Million – *In Re TikTok, Inc., Consumer Privacy Litigation* (Feb. 25, 2021)
- \$36 Million – *Rosenbach, et al. v. Six Flags Entertainment Corp.* (May 7, 2021)
- \$25 Million – *Kusinski, et al. v. ADP, LLC* (Oct. 8, 2020)
- \$10 Million – *Roach, et al. v. Wal-Mart Inc.* (Dec. 8, 2020)



Key BIPA Decisions – Illinois Supreme Court

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- *McDonald v. Symphony Bronzeville Park, LLC, et al.*, 2022 IL 126511 (Feb. 3, 2022)
- *West Bend Mutual Insurance Co. v. Krishna Schaumburg Tan Inc.*, 2021 IL 125978 (May 20, 2021)
- *Rosenbach, et al. v. Six Flags Entertainment Corp.*, 2019 IL 123186 (Jan. 25 2019)



Notable BIPA Cases To Watch – Illinois Supreme Court

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- *Cothron, et al. v. White Castle System, Inc.*, 2022 IL 128004
- *Tims, et al. v. Black Horse Carriers, Inc.*, 2022 IL 127801



thank you

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