PROGRAM MATERIALS
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Key Trends In Privacy Class Action Litigation

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5301 North Federal Highway, Suite 150, Boca Raton, FL 33487
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LIVE CLE WEBINAR

Key Trends In Privacy Class Action Litigation



Gerald L. Maatman

Celesq
October 2026

DuaneMorris®

TODAY'S SPEAKER



Gerald L. Maatman, Jr.
Partner
Chair, Class Action Defense Team
Duane Morris LLP
gmaatman@duanemorris.com

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TODAY'S KEY TOPICS

- Understanding The Technologies At Issue
- Key Trends In The Privacy Class Action Landscape
- 2026 Legislative Update
- Key Rulings & Cases To Watch

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Understanding The Technologies At Issue

Technologies At Issue

- Biometric technologies (facial recognition, thumbprint scanner, voice recognition)
- Website advertising technologies (“adtech”)
- Profiling and automated decision-making technologies/tools (“ADMT”)
- Generative AI (“gen AI”)
- Financial technologies (“fintech”)

Biometric Privacy

Existing Legislation / Key Laws

- Illinois Biometric Information Privacy Act ("") - 2008
- Texas Capture or Use of Biometric Identifier ("CUBI") Act - 2009
- Washington Biometric Privacy Law HB1493 – 2017
- New York City Biometric Identifier Law (Local Law 56) – 2021
- Colorado Privacy Act ("CPA") amended by HB 1130 – April 2024

Active Proposed Legislation

- Massachusetts (H.63 and S.195)
- Minnesota (SF 954 and HF 2532)
- Missouri (HB 1584 and HB 2594)
- New Jersey (A1488)
- New York (A1362, S4457, and S2390)
- Oklahoma (HB 3647)
- Pennsylvania (HB926)

Biometric Privacy

Current State Of Biometric Privacy Legislation

- Lawsuit filings of this nature have been the most common type of class action in Illinois by a wide margin over the past five years
- Over **5,000** lawsuits under the have been filed since 2017 – class actions under the are filed daily
- Since the ’s passage in 2008, other states have created their own laws to regulate an individual’s biometric data

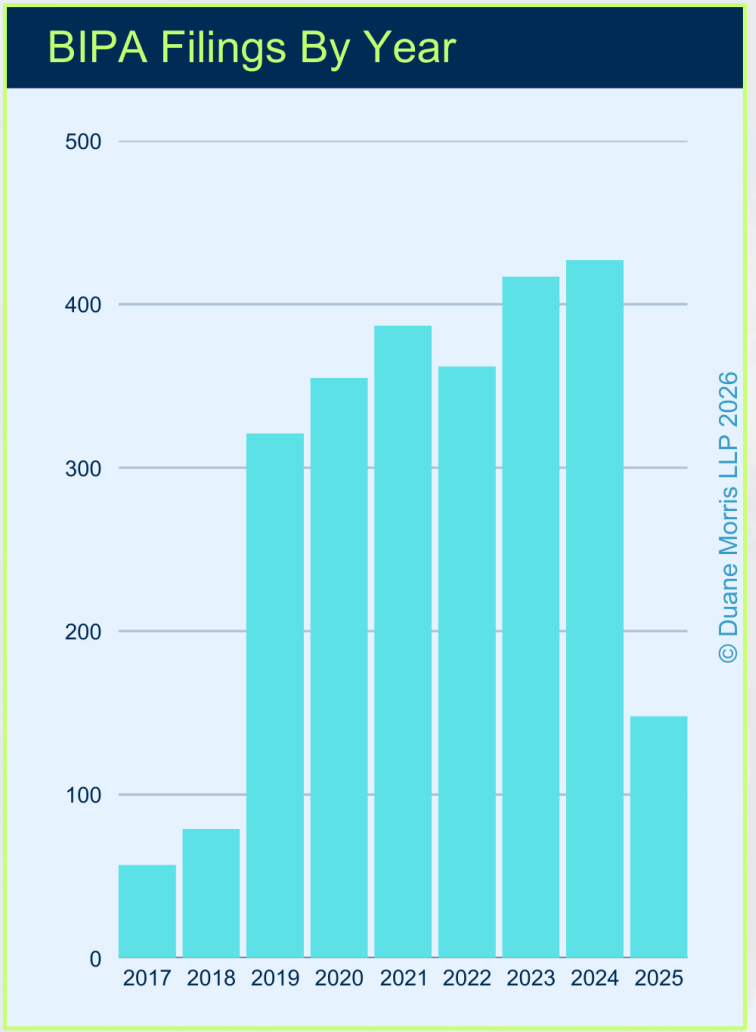
Second Generation Of Lawsuits

- Voiceprint technologies
- Virtual try-on claims
- Surveillance systems

Evolution of the BIPA

Illinois Biometric Information Privacy Act ("BIPA") – Legislative Developments

- On February 2, 2023, the Illinois Supreme Court held that a five-year statute of limitations applies to claims under the BIPA in *Tims v. Black Horse Carriers*, 2023 IL 127801 (Feb. 2, 2023).
- On February 17, 2023, the Illinois Supreme Court held that a claim accrues under the BIPA each time a company collects or discloses biometric information in *Cothron, et al. v. White Castle System, Inc.*, 2023 IL 1280004 (Feb. 17, 2023).
- On August 2, 2024, Illinois Governor J.B. Pritzker signed Senate Bill 2979, amending the BIPA and limiting plaintiffs to one recovery per person under §§ 15(b) and 15(d).



Telephone Consumer Protection Act ("TCPA")

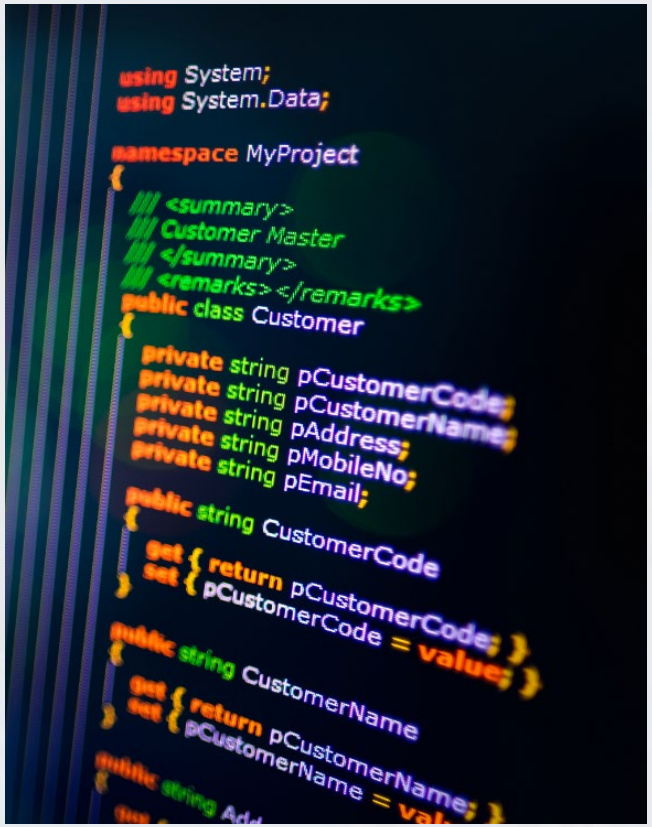
- For many years, the plaintiffs' class action bar has successfully asserted TCPA causes of action based on allegations that a defendant used an automatic telephone dialing system ("ATDS") to call or send messages to a cellphone without first obtaining prior express written consent.
  - In 2021, the U.S. Supreme Court issued its ruling in ***Facebook v. Duguid, et al***., 141 S. Ct. 1163 (2021), which adopted a narrow interpretation of what devices count as an ATDS
- The TCPA also empowers the **Federal Communications Commission ("FCC")** to "prescribe regulations to implement" the statute, and to create exemptions to statutory liability "by rule or order" 47 U.S.C. §227(b)(2)(B)
  - In July 2023, the FCC issued the **TCPA Exemptions Order** that introduced amendments to the TCPA's rules for placing calls made with artificial and prerecorded voices, such as robocalls to residential numbers.

Wiretapping

A new wave of class actions filed in in the past 24 months in California, Florida, Massachusetts, and Pennsylvania targeted companies that track user activity on their websites

- California Invasion Of Privacy Act ("CIPA")
- Pennsylvania Wiretapping And Electronic Surveillance Act ("WESCA")
- Florida Security Of Communications Act ("FSCA")
- The Federal Wiretap Act

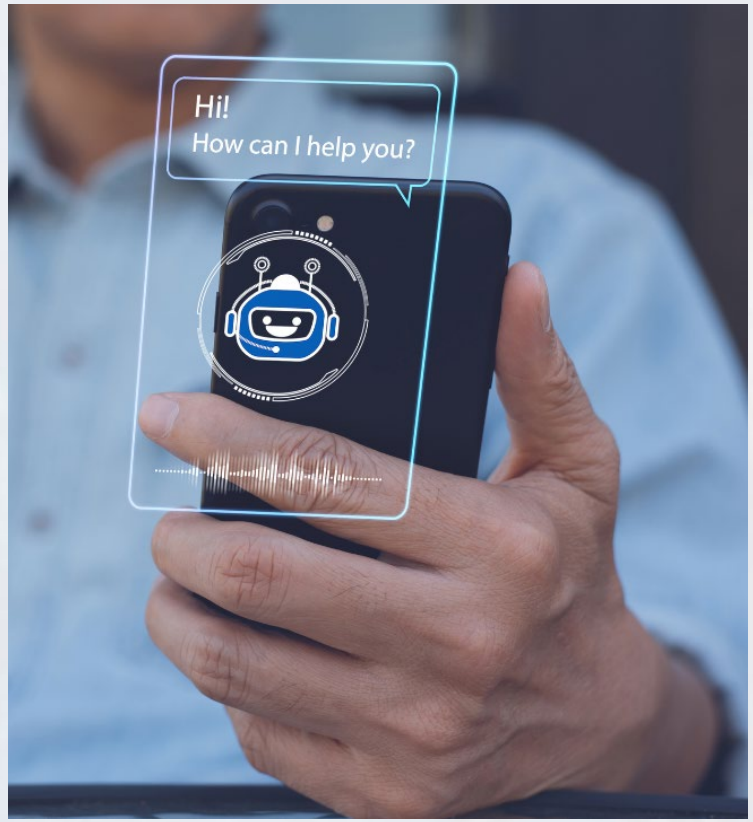
- The tracking technologies at issue:
  - **Session replay software** tracks a user's interactions with the website (clicking, scrolling, swiping, hovering, and typing)
  - **Coding tools embedded in chat features** create and store transcripts of a user's conversations with the website's chat feature



Session-Replay Software

Uptick in litigation involving **session-replay** technology, which allows a website to "replay" a site visit, including what the user viewed, clicked on, or hovered over

- Relatedly, plaintiffs are bringing "chatbot" cases, attacking websites' use of digital tools to have automated "conversations" with site visitors without using live customer service agents
- Plaintiffs allege that companies violate **wiretapping laws** by using session-replay or chatbot technology without explicit consent
- These newly-filed cases invoke the laws of the minority of states that require all-party consent



Video Privacy Protection Act ("VPPA")

Recent lawsuits against general-purpose websites using analytics code that tracks **visitor activity**

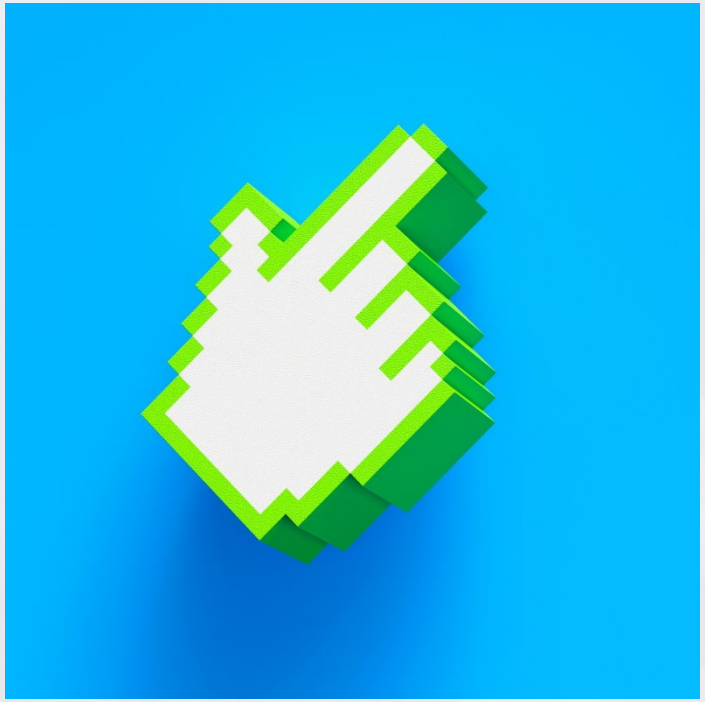
- Plaintiffs have lodged claims under the VPPA against websites embedded with streaming videos
- The VPPA, a 1988 law designed to prevent the "wrongful disclosure" of video tape sale and rental records, is now fuel for this recent wave of litigation



Pixel Tracking

Pixel tracking claims are the latest evolution in wiretapping litigation following the recent waves of session replay and chatbot claims

- A **website pixel** is a piece of html code embedded on a webpage that collects information about a visitor's interactions
  - This information is often collected and analyzed by third parties to improve marketing efforts
- Dozens of cases have involved the **Meta Pixel** tracking tool, a piece of code utilized to track the effectiveness of Facebook and Instagram ad campaigns
- Plaintiffs have asserted claims under privacy statutes in California, Florida, and Pennsylvania



Monitoring And Privacy

- Employers must balance productivity and misconduct prevention with employee privacy when monitoring electronic communications.
- Digital technology outpaces workplace law, and intrusive monitoring can create employee concerns.
- The Electronic Communications Privacy Act of 1986 (“ECPA”) prohibits unauthorized email interception and access to stored communications, including temporary, intermediate and backup storage.
- ECPA exceptions permit certain access authorized by an electronic communications service provider.

Employment Law And Discrimination

- Employers face new AI regulations, overlapping data protection and privacy laws, and heightened enforcement.
- Title VII prohibits employment discrimination based on race, color, religion, sex or national origin. Employers may face liability for facially neutral practices that disproportionately harm a protected class, including decisions made by AI systems.
- Illinois and Colorado laws target workplace algorithmic discrimination and prohibit discriminatory use of AI tools based on a protected class.

Key Trends In The Privacy Class Action Landscape

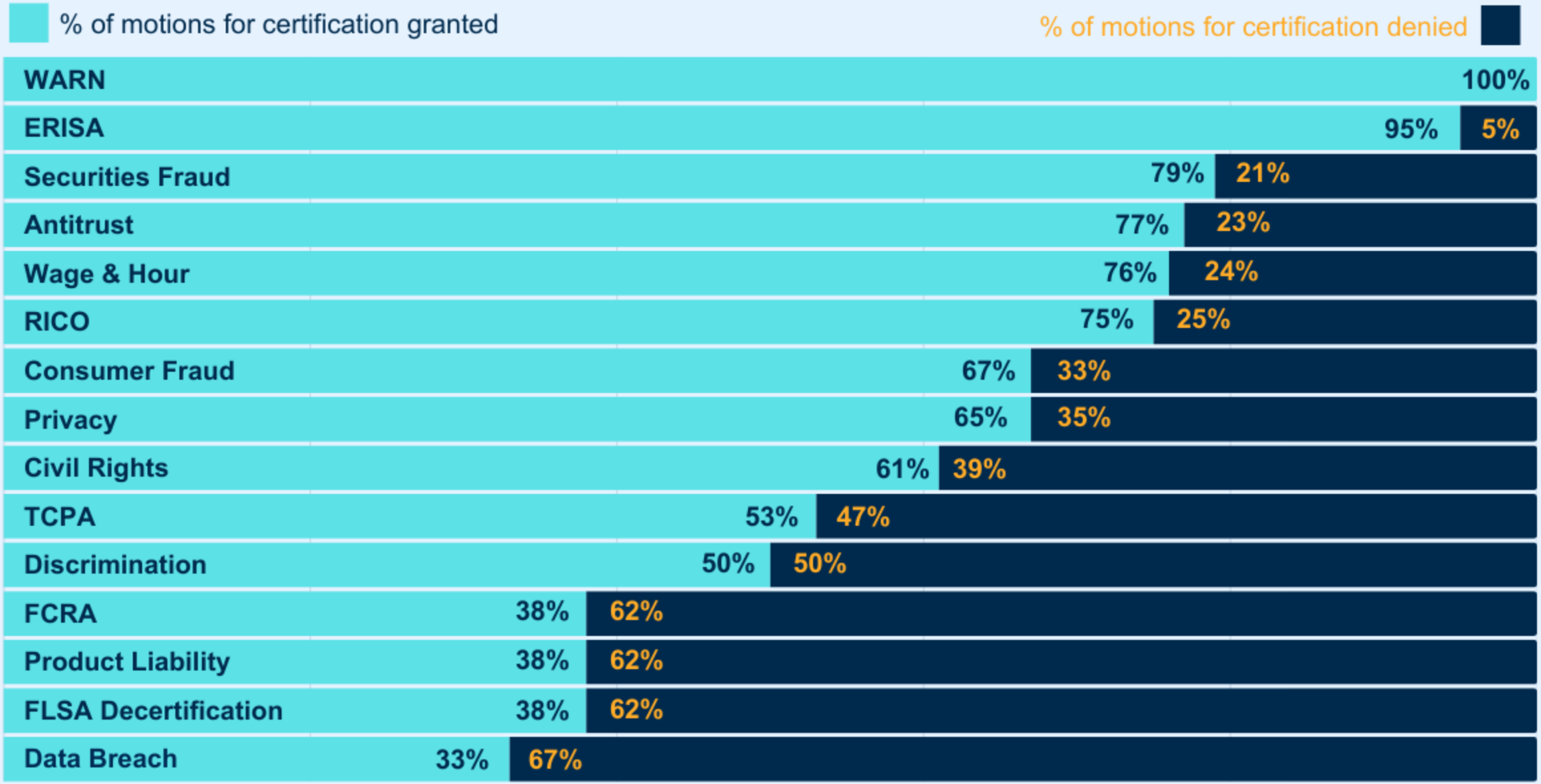


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Privacy Class Actions

- **Statutory ambiguity** has produced mixed outcomes under many of these statutes for plaintiffs and defendants.
- **High stakes** due to maximum statutory damages under the ECPA, CIPA, VPPA, , and GIPA ranging from $2,500 to $15,000 per violation, all with no proof of actual harm required, resulting in four- or five-figure multipliers times tens of thousands of website visitors, for example, results in mammoth requested damages.
- **Increased filings** as a result of the statutory ambiguity and high statutory penalties.
- **Divergent rulings** between and within jurisdictions on core issues.

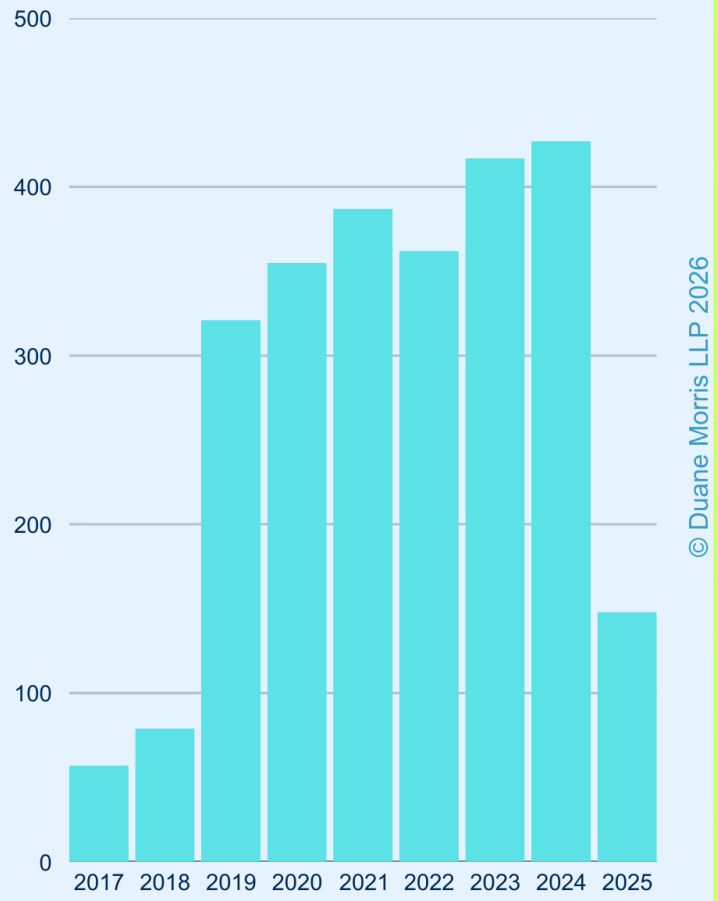
Certification Rates By Practice Area



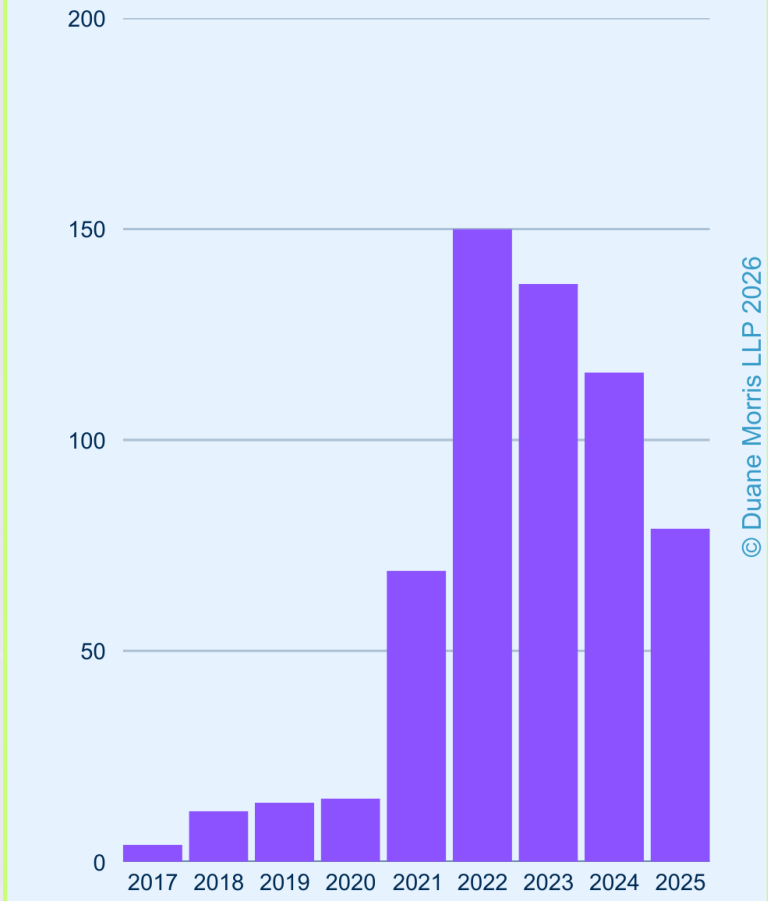
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Privacy Class Actions

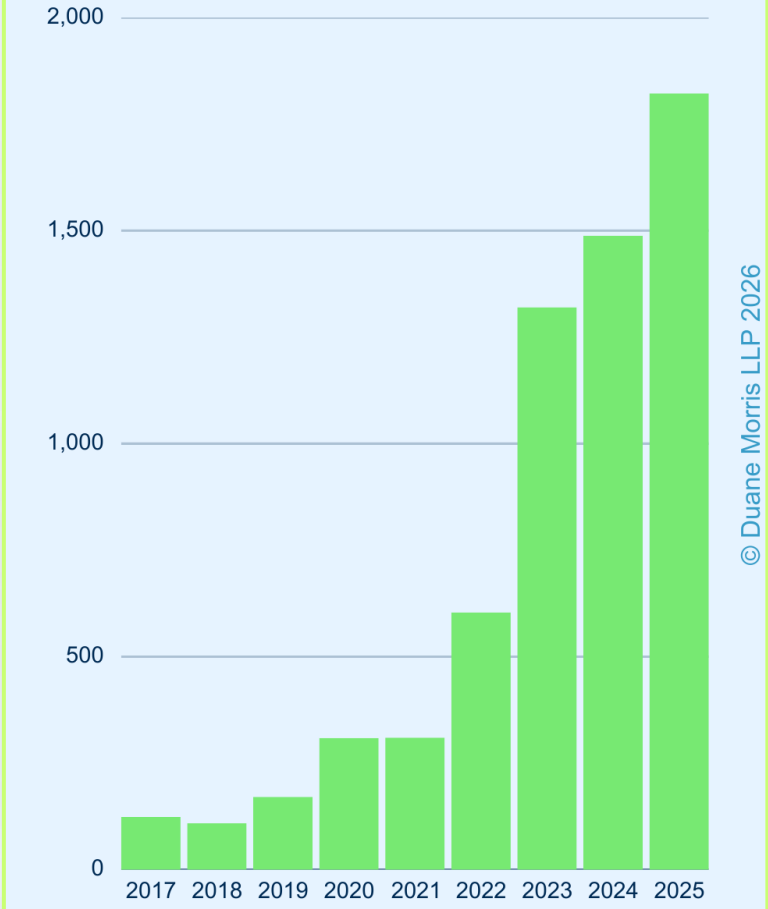
BIPA Filings By Year



VPPA Filings By Year



Data Privacy Filings By Year



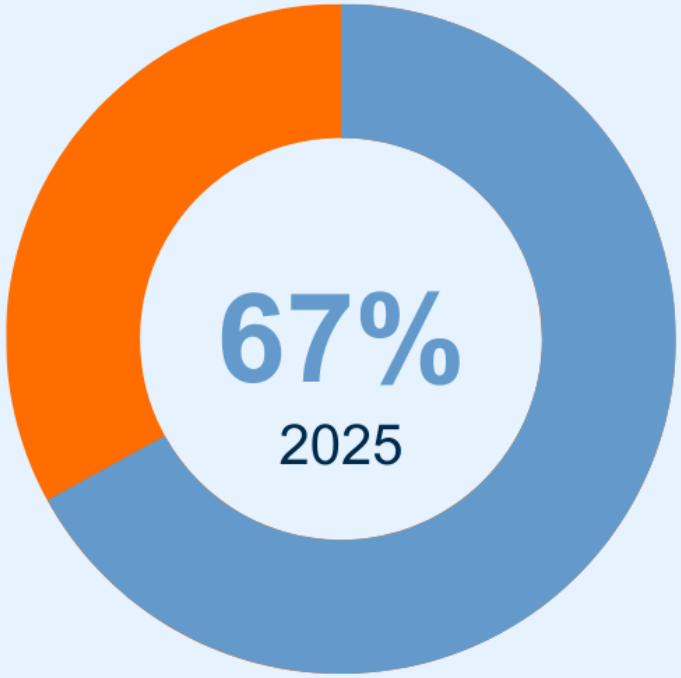
Privacy Class Actions

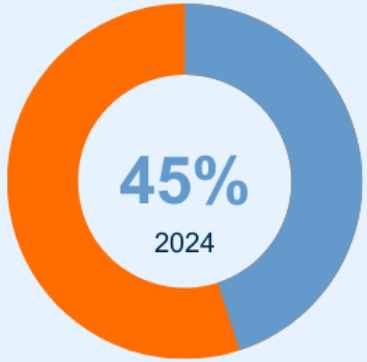
CLASS CERTIFICATION RATES IN 2025

Privacy

67%
of motions for class certification granted

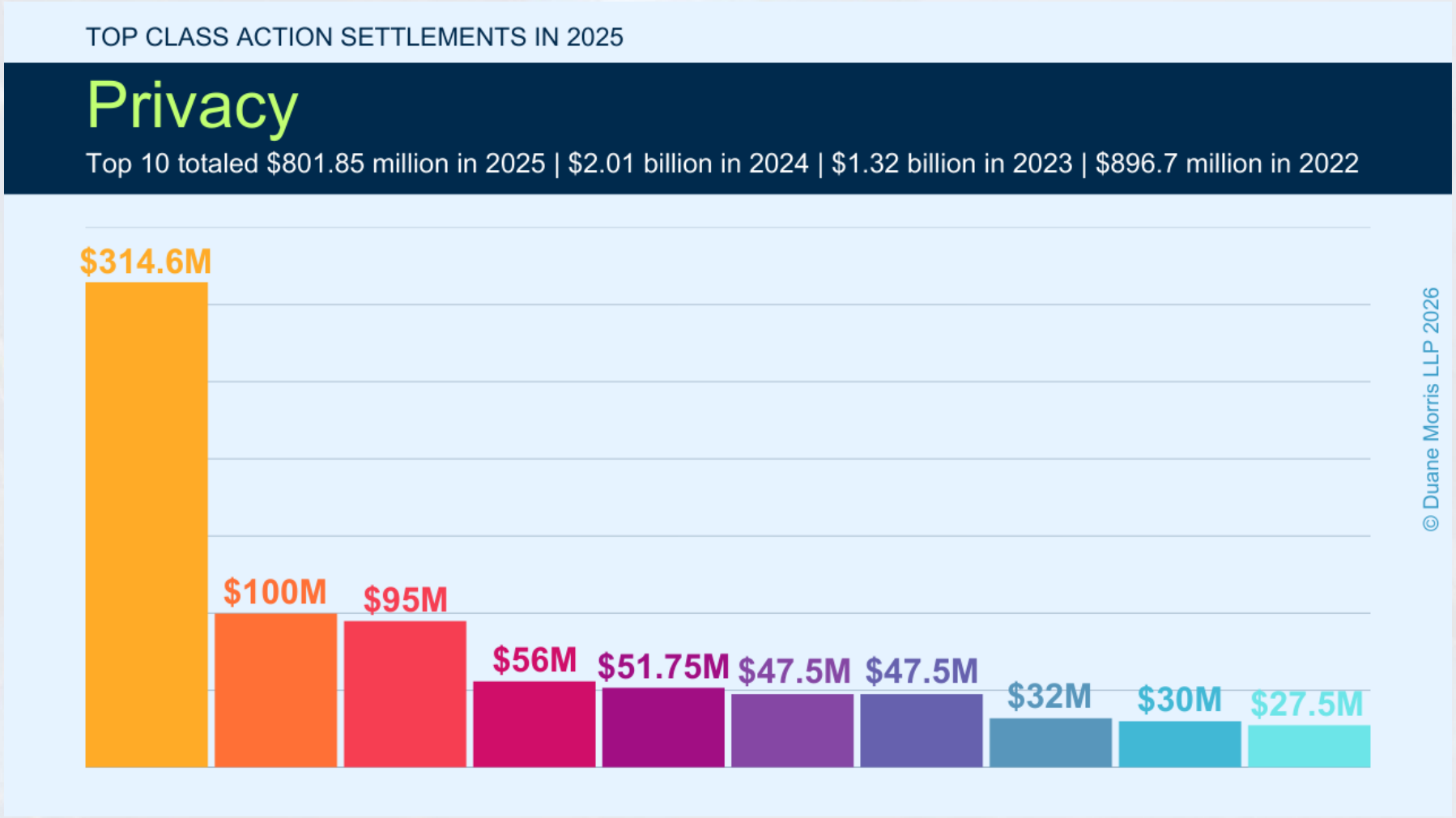
33%
of motions for class certification denied





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Privacy Class Actions



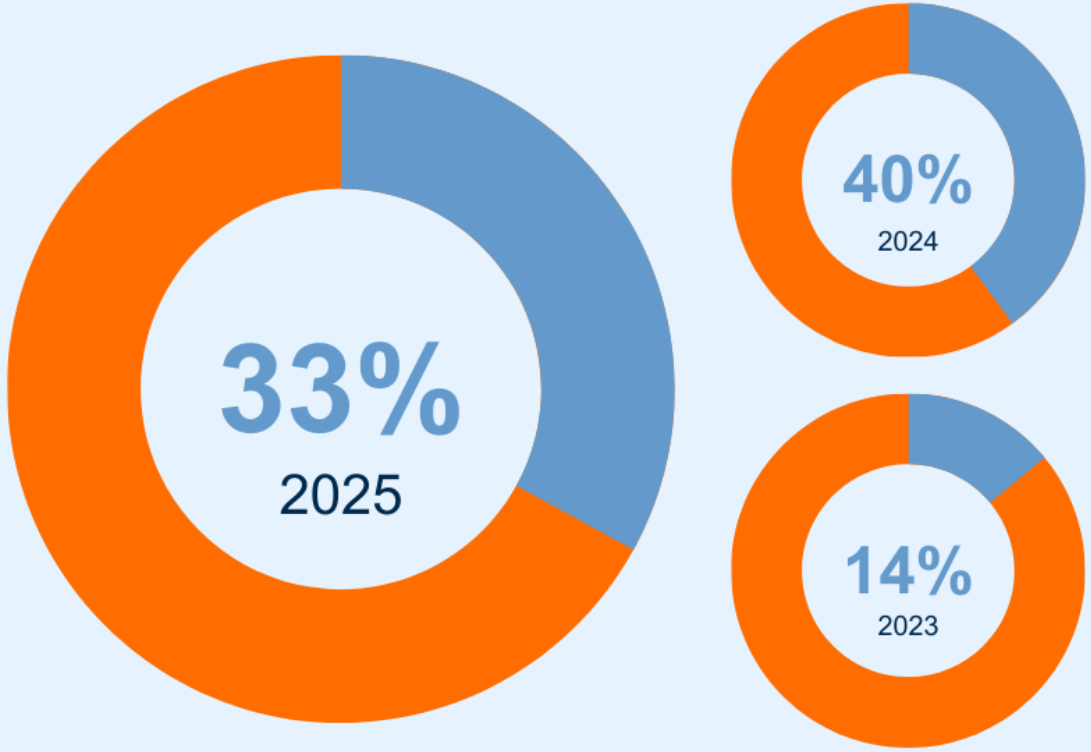
Data Breach Class Actions

CLASS CERTIFICATION RATES IN 2025

Data Breach

33%
of motions for class certification granted

67%
of motions for class certification denied



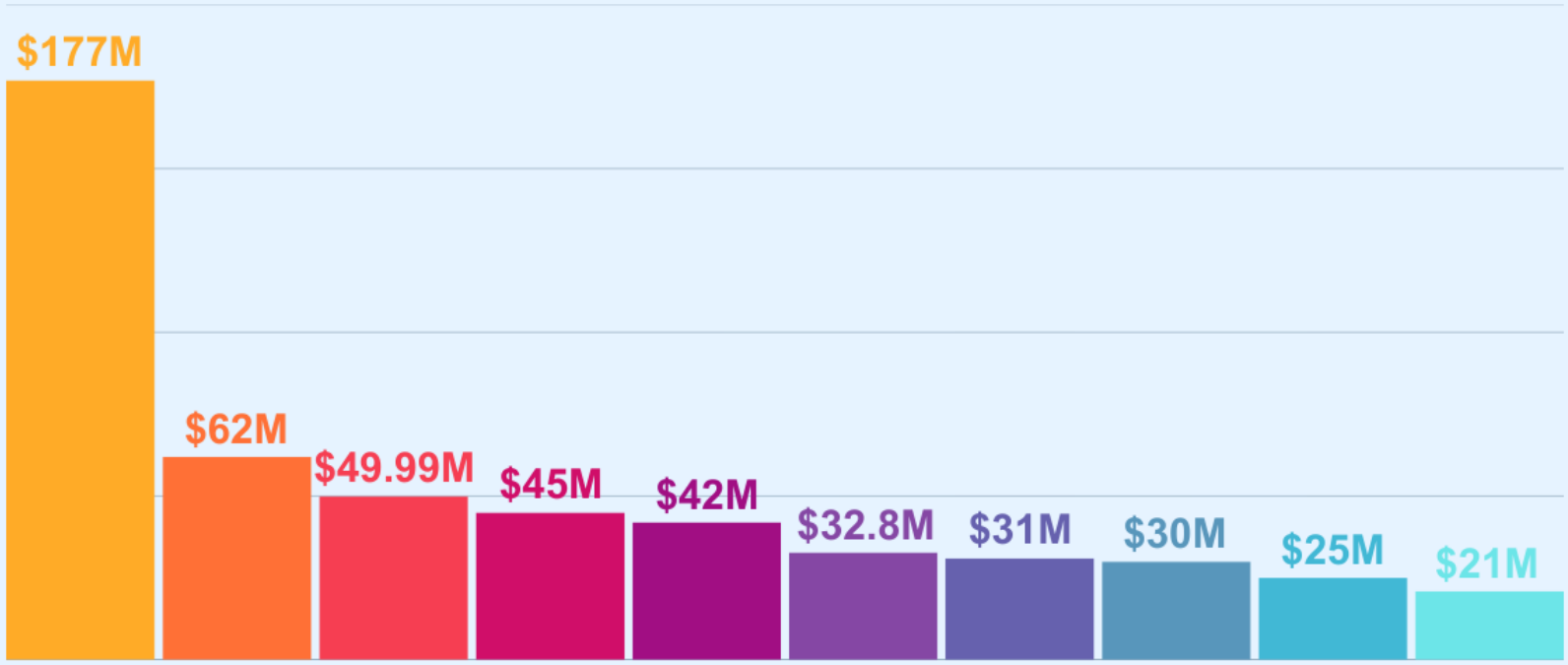
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Data Breach Class Actions

TOP CLASS ACTION SETTLEMENTS IN 2025

Data Breach

Top 10 totaled $515.79 million in 2025 | $593.2 million in 2024 | $515.75 million in 2023 | $719.21 million in 2022



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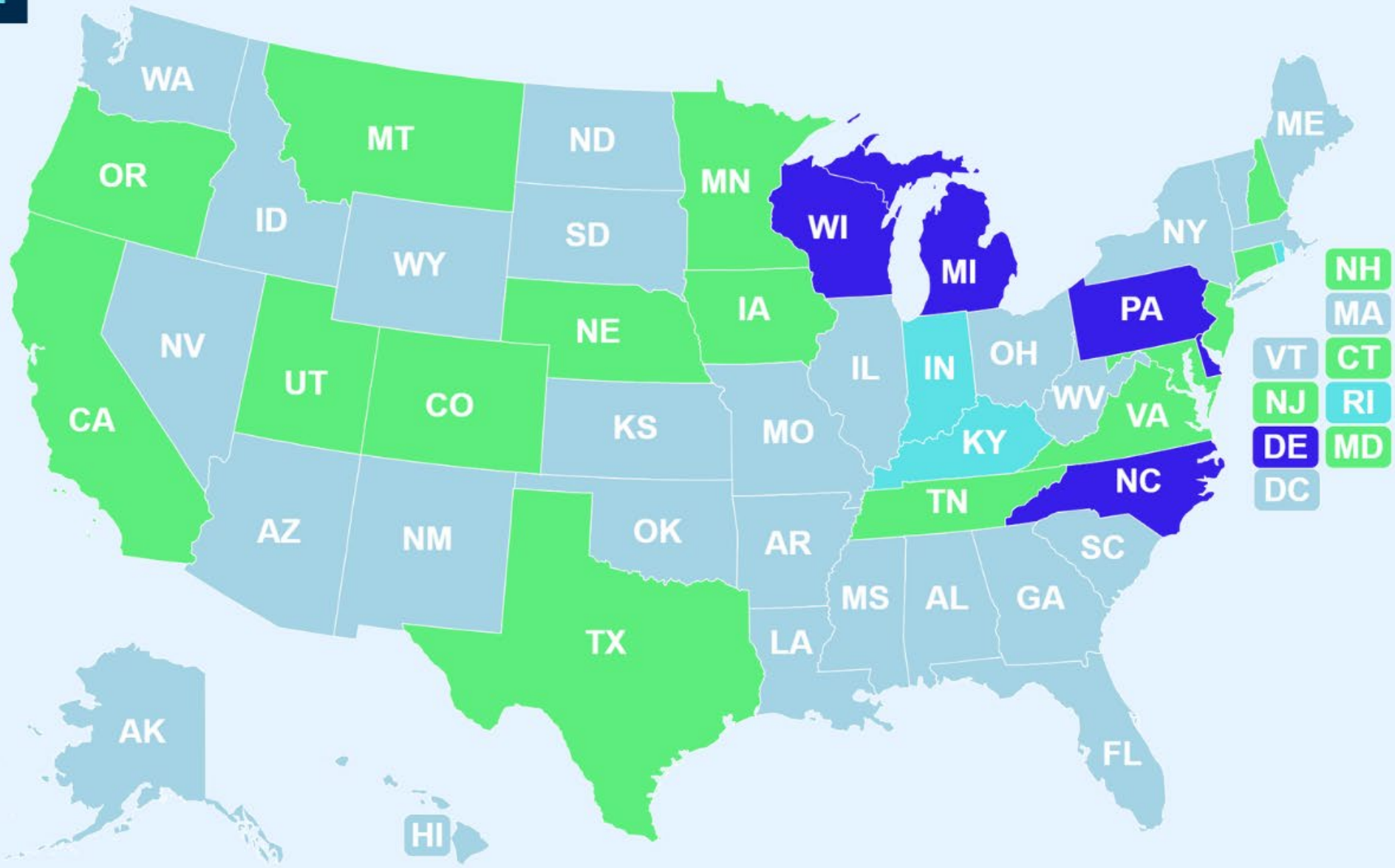
2026 Legislative Update

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2026 LEGISLATIVE UPDATE

STATE **PRIVACY** LAWS

- Enacted legislation
- Enacted legislation effective in 2026
- Proposed legislation
- No current legislation

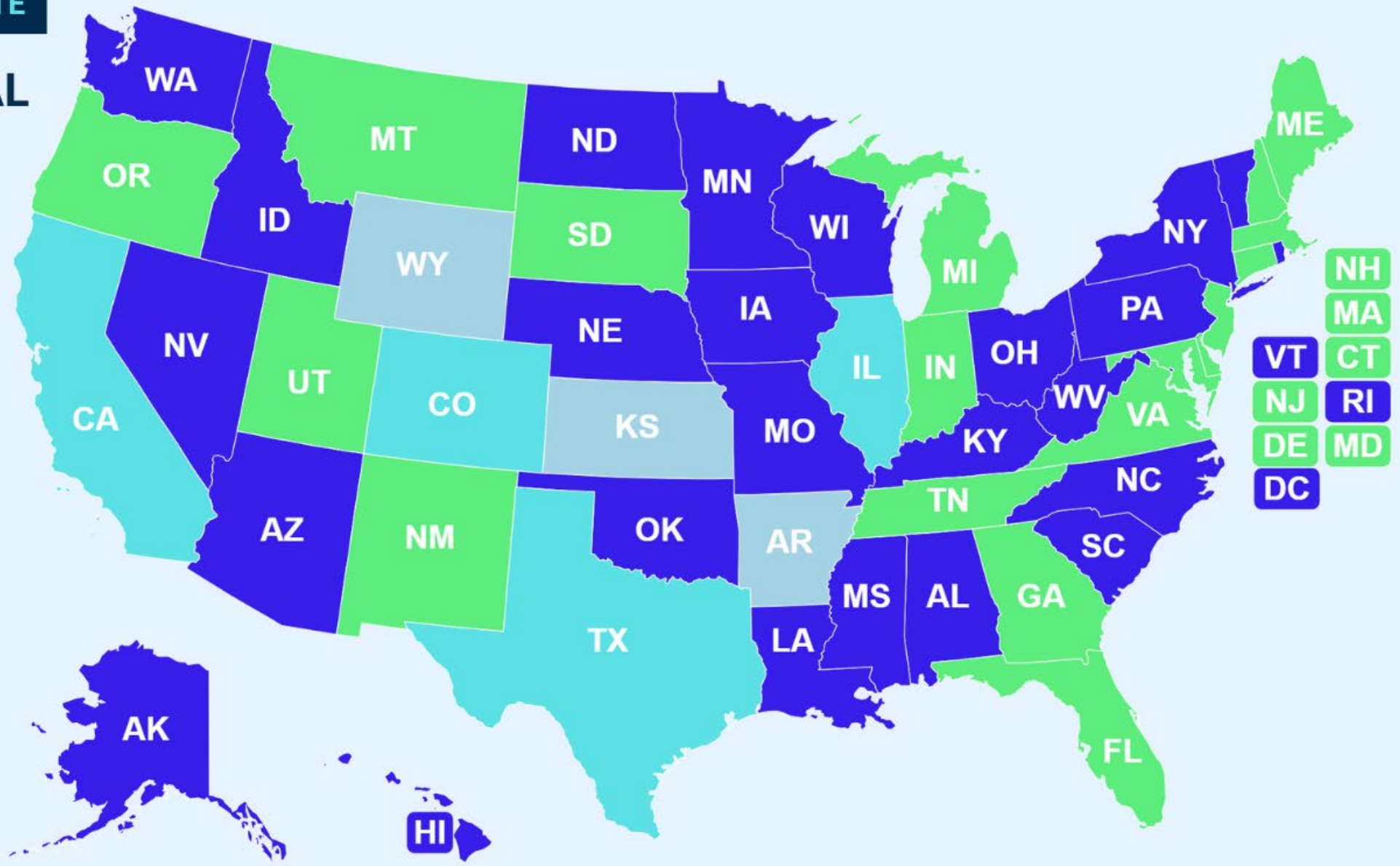


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2026 LEGISLATIVE UPDATE

STATE **ARTIFICIAL INTELLIGENCE** LAWS

- Enacted legislation
- Enacted legislation effective in 2026
- Proposed legislation
- No current legislation



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Government Enforcement Radar

U.S. Federal Laws

- Focus on R&D, funding, collaboration with business, training/education
- AI Bill of Rights
- Identifying Outputs of Generative Adversarial Networks Act ("IOGAN")
- National Artificial Intelligence Initiative Act of 2020 ("NAIIA")
- NIST AI Risk Management Framework (RMF) 1.0

Federal Agency Enforcement

- FTC enforcement relating to:
  - AI and deep fakes, fraud
  - AI and bias, discrimination, and advertising
- CFPB issued guidance for creditors using AI and other complex models in their consumer credit decision process

Government Enforcement Radar

America's AI Action Plan – July 2025

1. Accelerate AI Innovation
2. Build American AI Infrastructure
3. Lead in International AI Diplomacy and Security

Executive Order – December 2025

"Ensuring A National Policy Framework For Artificial Intelligence"

- AI litigation task force
- Evaluation of state AI laws
- Restrictions on state funding
- Preemption of state laws mandating deceptive conduct in AI models



Key Rulings & Cases To Watch

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Key BIPA Rulings

Face-related AI technologies not involving facial recognition:

- *Martell v. X Corp*., 2024 WL 3011353 (N.D. Ill. June 13, 2024) (porn filter)
- *Clarke v. Aveda Corp*., 2023 WL 9119927, at *2 (N.D. Ill. Dec. 1, 2023) (virtual try on)
- *Castelaz v. Estee Lauder Cos*., Inc., 2024 WL 136872, at *7 (N.D. Ill. Jan. 10, 2024) (virtual try on)
- *Daichendt v. CVS Pharmacy, Inc*., 2023 WL 3559669, at *2 (N.D. Ill. May 4, 2023) (passport photos)
- *Clark v. Microsoft Corp*., 688 F. Supp. 3d 743, 745 (N.D. Ill. 2023) (facial expressions)
- *Trio v. Turing Video, Inc*., 2022 WL 4466050, at *13 (N.D. Ill. Sept. 26, 2022) (COVID screening)

Facial recognition AI technologies:

- *In Re Facebook Biometric Info. Priv. Litig*., 2018 WL 2197546 (N.D. Cal. May 14, 2018)
- *Zellmer v. Meta Platforms, Inc*., 2024 WL 3016946 (9th Cir. June 17, 2024)
- *Tibbs, et al. v. Arlo Technologies, Inc*., No. 23-CV-5096 (N.D. Cal.)

Key Rulings – AI And Algorithmic Bias

***Tremblay v. OpenAI, Inc.*, No. 23-CV-3223 (N.D. Cal. June 13, 2024)**

- The Court ordered plaintiffs, a group of authors alleging copyright infringement, to produce information relating to pre-suit algorithmic testing

1. The Court held that the algorithmic testing results were not work product but "more in the nature of bare facts"
2. The Court determined that "even assuming arguendo" that the work-product privilege applied, the privilege was waived "by placing a large subset of these facts in the [complaint]"
3. The Court reasoned that the negative testing results were relevant to the AI company's defenses, notwithstanding the plaintiffs' argument that the negative testing results were irrelevant to their claims
4. The Court rejected the plaintiffs' argument that the AI company can simply interrogate the algorithm itself

Key Rulings

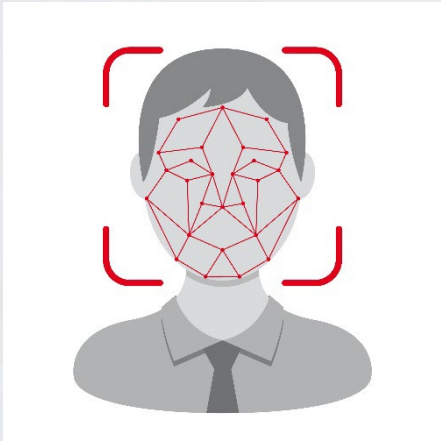
***Mobley v. Workday, Inc.*, Case No. 23-CV-770 (N.D. Cal. May 16, 2025)**

- Complaint concerning allegations that Workday's algorithm-based screening tools discriminated against applicants on the basis of race, age, and disability.
- This litigation has been closely watched for its novel case theory based on artificial intelligence use in making personnel decisions.
- On May 16, 2025, Judge Lin certified a collective of all individuals aged 40 and over who applied for job opportunities using Workday's platform and were denied employment recommendations.
- On April 10, 2026, Workday filed a Motion to Dismiss Third Amended Complaint, which is currently pending.

Key Cases – Illinois & AI

Facial Recognition AI Technologies

- *In Re Facebook Biometric Info. Priv. Litig.*, 2018 WL 2197546 (N.D. Cal. May 14, 2018)
- *Zellmer v. Meta Platforms, Inc.*, 2024 WL 3016946 (9th Cir. June 17, 2024)
- *Tibbs, et al. v. Arlo Technologies, Inc.*, No. 23-CV-5096 (N.D. Cal.)



Other Face-Related AI Technologies

- *Martell v. X Corp.*, 2024 WL 3011353 (N.D. Ill. June 13, 2024) (porn filter)
- *Clarke v. Aveda Corp.*, 2023 WL 9119927, at *2 (N.D. Ill. Dec. 1, 2023) (virtual try-on)
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- *Trio v. Turing Video, Inc.*, 2022 WL 4466050, at *13 (N.D. Ill. Sept. 26, 2022) (COVID screening)

Key Rulings

Brewer v. Otter.ai, N.D. California (Filed Aug. 15, 2025)

- Otter.ai has developed an AI-powered meeting assistant called Otter Notetaker, which engages in real-time transcription of Zoom, Teams, and Google Meet calls for the employers who subscribe to Otter's services
- On January 20, 2026, Otter.ai filed Motion to Dismiss, which is still pending, arguing:
  - Plaintiff has not provided sufficient detail about an injury-in-fact
  - Provided no detail about the recorded conversation other than the date
  - Otter is a "party" to the communication, and Federal Wiretap Act expressly permits one party consent
  - Loss of value in personal information is not a recoverable loss under Computer Fraud and Abuse Act
  - Plaintiff's personal information at issue does not constitute "property"

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CLASS ACTION REVIEW 2026

CHECK OUT THE **DUANE MORRIS CLASS ACTION REVIEW – 2026** E-BOOK:

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thank you

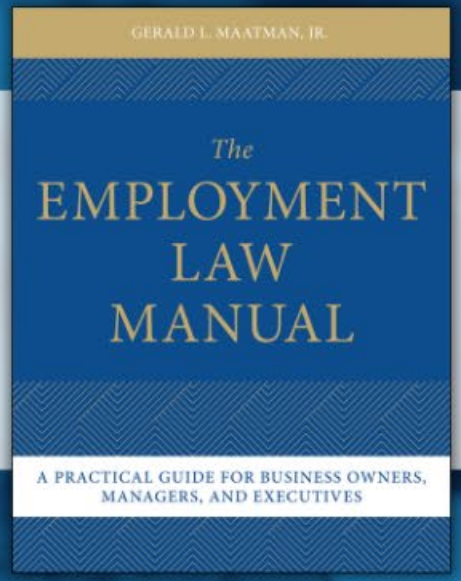


For more information please contact:

Gerald L. Maatman, Jr.

@g_maatman

gmaatman@duanemorris.com



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