

# LEGAL NEWS FROM DOHERTY & PROGAR



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## EMPLOYMENT PRACTICES AND DISCRIMINATION

### Illinois Biometric Privacy Act

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#### What is BIPA?

The Illinois Biometric Privacy Act (BIPA) was enacted in 2008 to address the growth of the use of biometrics in business and security screening. BIPA prohibits the collecting of an individual's biometric information without consent and other steps to be taken by a private entity. The scenario of a private entity collecting such information is most commonly seen in the labor and employment realm. Most often, the practice of collecting biometric identifiers and biometric information of employees is increasingly used by employers for data and timekeeping purposes.

BIPA defines a "biometric identifier" as "a retina or iris scan, fingerprint, voiceprint, or scan of hand or face geometry." BIPA also defines "biometric information" as "any information, regardless of how it is captured, converted, stored, or shared, based on an individual's biometric identifier used to identify an individual. Biometric information does not include information derived from items or procedures excluded under the definition of biometric identifiers."

According to BIPA, biometrics "are biologically unique to the individual; therefore, once compromised, the individual has no recourse, is at heightened risk for identity theft, and is likely to withdraw from biometric-facilitated transactions." While other states, Washington and Texas, also have laws regulating the collection and storage of biometrics, Illinois's Biometric Privacy Act is the only one of its kind to provide employees with a private right of action against their employer for violations. Even more concerning for employers is the Illinois Supreme Court's recent decision in *Rosenbach v. Six Flags*, which states that an individual can qualify as "aggrieved" by a violation of BIPA even if he or she has not alleged some actual injury or adverse effect beyond a violation of the statute.

#### What Exactly Does BIPA Prohibit?

BIPA provides that a private entity may not "collect, capture, purchase, receive through trade, or otherwise obtain a person's or a customer's biometric identifier or biometric information" without first:

1. Informing the subject in writing that a biometric identifier or biometric information is being collected or stored;
2. Informing the subject in writing of the specific purpose and length of term for which a biometric identifier or biometric information is being collected, stored, and used; and
3. Receiving a written release executed by the subject permitting the entity to collect and store the data for the stated purpose and term.

#### Potentially Catastrophic Results for Violations

A violation of the Act will subject an employer to statutory damages reaching \$1,000 for each negligent violation and \$5,000 for each intentional or reckless violation. These numbers can be exponentially damaging as many claims under the Act are brought as class actions and it will be argued by employees' attorneys that each collection is a

violation, thereby exposing the employer to astronomical damages per employee. The courts have yet to rule on this issue.

#### Advice For Employers

In order to fully protect themselves from potential claims arising out of the BIPA, employers in Illinois should always be sure to keep employees informed of their practices and assure that they have written consent from each and every covered employee. Please reach out to us for advice for advice on how best to inform employees of this practice as well as samples for a written release to provide to your employees.

Employers can also do the following to assure that they are in compliance with BIPA.

#### *Educate Your Employees*

It is best if your employees understand exactly what BIPA is and their rights under it. By providing employees with this information, they are more likely to acquiesce to the language provided in the release as set out in the statute.

#### *Do Not Collect Unnecessary Data or Store The Data Longer Than is Necessary*

Employers should limit both the amount and type of data collected. Only the specific type of data which is necessary to serve the employer's purpose should be collected. Employers should further collect and store the data only for as long as it is necessary. Excess data stored for an unnecessary amount of time will only increase the potential for an oversight and an unintentional violation by the employer.

#### *Transparency With Employees*

In addition to informing employees about BIPA, the collection and storage of biometric information, and obtaining their consent, employers should implement a sound strategy for destroying the data once the purpose for its collection has been fulfilled and also provide employees with information as to how this will be done. Keeping employees advised as to this information will go along way to deterring potential claims.

#### *Be Wary of Third-Parties*

It is often the case that employers will have individuals working at their job site who are actually employees of other clients, vendors, or staffing services. Many times, these borrowed employees may believe they work for the entity whose job site they report to. If their actual employer is collecting biometric information, the employee could mistakenly believe he or she has a claim against that entity. While such a suit should be easily dismissed, it still makes for costly and unnecessary litigation. Be sure to communicate with clients and other third-parties who provide employees to your workplace and ensure that their practices are in compliance with BIPA.

#### *Work With a Legal Professional*

Labor and Employment attorneys in Illinois are consistently staying up to date as this legislation continues to evolve. If you have any questions as

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to how to implement the practice of obtaining biometric information or whether your current system is in compliance with BIPA, please reach out to us for our advice and most importantly avoid costly litigation.

### **Potential Changes to BIPA**

Lawmakers in Illinois have recently introduced legislation to remove the private right of action to individuals. If passed, the amendment would halt the continued growth of litigation under BIPA and avoid future decisions like in the *Rosenbach* case.

Under the proposed amendment, a violation of BIPA would constitute a violation of the Illinois Consumer Fraud and Deceptive Business Practices Act and may be enforced by the Illinois Attorney General.

Also, the Illinois Department of Labor would be provided with BIPA enforcement authority exclusive to violations by employers. Any aggrieved employees would be able to file claims alleging violations of BIPA with the DOL by submitting a complaint within one year of the date of the alleged violation.

While the proposed changes would curtail future class action litigation in the Illinois courts, the amendment would not impact employers already facing such suits that are currently pending. While the amendment would greatly reduce exposure for violations of BIPA, employers should know that this legislation remains pending and until it becomes law, the potential damages for a violation will be extremely high.

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