

Legal Update

November 2018

UNCERTAINTY ON BIOMETRIC DATA RULES MEANS EMPLOYERS & BUSINESSES MUST BE EXTRA CAUTIOUS

By Carter S. Plotkin

As discussed in our [February newsletter](#), the Illinois Biometric Information Privacy Act (BIPA) limits private entities' collection and usage of biometric identifiers (such as facial geometry, irises, and fingerprints) and requires consent and certain disclosures for collection. The law allows a person to sue over BIPA violations and provides for at least \$1,000 in damages.

Since then, several courts have interpreted BIPA in significantly different ways. Businesses should be kept abreast of these developments to comply with BIPA and avoid the consequences of violating it.

[Rosenbach v. Six Flags Entertainment Corp.](#), discussed in our prior newsletter, held that the mere violation of the "notice and consent provisions" is insufficient injury for a plaintiff to recover under BIPA. A different District of the Illinois Appellate Court, however, held in [Sekura v. Krishna Schaumburg Tan, Inc.](#) that a person who did not receive the proper BIPA disclosures had sufficient "injury" to make a compensable claim under BIPA, even if that person voluntarily provided biometric data.

Meanwhile, federal courts nationwide have also differed in their interpretations of BIPA, producing disagreement and legal uncertainty in both the federal and state courts. Some federal courts agree with [Rosenbach](#), but others align with [Sekura](#). Additionally, a California federal court presiding over major litigation against Facebook for its use of facial recognition technology agreed with [Sekura](#). The court held in [Patel v. Facebook, Inc.](#) that the mere violation of the notice and consent procedures constituted sufficient injury to support a claim.

The Illinois Supreme Court and federal appellate courts have yet to resolve the uncertainty, although the Illinois Supreme Court is currently [considering](#) whether to overrule or affirm [Rosenbach](#).

What should businesses do?

Because plaintiffs may be able to take advantage of the legal confusion to obtain damages under BIPA, businesses should take extra care to comply with BIPA. During this uncertain and evolving period, a business using or considering biometric data (such as for customer accounts, employee timecards, or security devices) would be wise to consult a lawyer familiar with BIPA and privacy law to review policies, procedures, and disclosures controlling the collection and handling of biometric information. By doing so, they can reduce their risk of being the next target of a lawsuit.

FVLD publishes updates on legal issues and summaries of legal topics for its clients and friends. They are merely informational and do not constitute legal advice. We welcome comments or questions. If we can be of assistance, please call or write Carter S. Plotkin, 312-701-6819, cplotkin@fvldlaw.com, or your regular FVLD contact.

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