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## 2021 Update: Illinois Biometric Information Privacy Act

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## MEET YOUR PRESENTERS

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### **Mary Smigielski**

Partner  
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Partner  
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### **Kari Berman**

Partner  
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# What Is BIPA & Why Do We Care?

- Hotbed of litigation: Over 450 pending class actions in Illinois and nationally with more being filed daily
  - Who is getting sued?
  - Millions of dollars at risk for non-compliance
- BIPA overview
  - 740 ILCS 14, et seq.
  - Protects the collection, use and storage of *certain* biometric data
  - Impetus for BIPA: Pay By Touch
  - Illinois Legislature in **2008**: “Biometrics are unlike other unique identifiers that are used to access finances or other sensitive information. For example, social security numbers, when compromised, can be changed. Biometrics, however, are biologically unique to the individual; therefore, once compromised, the individual has no recourse. . . .”



# What Does BIPA Require?

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- Companies doing business in Illinois must comply with a number of requirements, including:
  - Notify employees and consumers if their biometric data, as defined by BIPA, is being collected, used or stored
  - Obtain **prior** written consent to do so
  - Have a publicly available written policy regarding the retention and destruction of biometric data
  - Securely store biometric identifiers
- “Biometrics” are used for timekeeping, building security, dispensing medication in hospitals, laptop security, POS systems, safes and lockboxes, commercial applications, and even school children paying for lunch

# BIPA Definitions

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- “**Biometric identifier**” means a retina or iris scan, fingerprint, voiceprint or scan of hand or face geometry
- “**Biometric information**” means any information, regardless of how it is captured, converted, stored, or shared, based on an individual’s biometric identifier used to identify an individual
- “**Written release**” means informed written consent or, in the context of employment, a release executed by an employee as a condition of employment
  - Must include that a biometric identifier or biometric information is being collected or stored and inform of the specific purpose and length of term for which the information is collected, stored and used

# No Actual Harm Required...

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- When can someone sue under BIPA?
  - Data breach?
  - Biometric information stolen?
  - No actual harm?
- *Rosenbach v. Six Flags Entertainment Corporation*, 2019 IL 123186 (January 25, 2019)
  - A unanimous Illinois Supreme Court held that a plaintiff does not need to plead actual harm or injury resulting from an alleged BIPA violation. A mere statutory violation is sufficient to proceed with litigation.
  - Unnecessary dicta in decision
    - *“This is no mere ‘technicality.’ The injury is real and significant.”*
    - *“The precise harm the Illinois legislature sought to prevent is then realized.”*

# Wait – You Said Millions Of \$\$\$ At Risk?!

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- BIPA provides for “per violation” statutory damages **or** actual damages plus attorneys’ fees and costs
  - \$1,000 for *each* negligent violation
  - \$5,000 for *each* intentional or reckless violation
- What is a “violation”?
  - Different sections of the statute?
  - Per scan
- The cash register rings quickly
  - Facebook’s \$650M settlement
  - Going rate for settlements \$1,000 per violation plus and now “per scan”



# Legal Issues

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- Threshold issue of whether the technology is covered by BIPA
- What does “violates a provision of this Act” mean?
- What is the statute of limitations?
- In the employment setting, does the Illinois Workers Compensation scheme preempt BIPA?
- What is the extraterritorial impact of BIPA? Companies outside of Illinois at risk.
- Constitutional challenges
- Arbitration agreements and Collective Bargaining Agreements
- Changing venue and removal – Majority of cases in Cook County, Illinois
- Third party liability and indemnification

# Illinois Workers' Compensation Preemption

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- Illinois Appellate Court opinion - *McDonald v. Symphony Bronzeville Park LLC*, 2020 Ill. App. LEXIS 627 - narrowed a key defense for employers facing lawsuits for violations of BIPA: preemption under the Illinois Workers' Compensation Act.
  - Plaintiff filed suit seeking statutory, liquidated damages under BIPA. Defendants filed a motion to dismiss arguing that the claims asserted were barred by the exclusivity provisions of the Workers' Compensation Act.
  - Opinion discussed BIPA allowing claims for pure *statutory* violations, while in contrast IWCA only remedies *actual* damages.
  - Therefore, the *McDonald* court held that the exclusivity provisions of the Workers' Compensation Act do not bar claims for statutory, liquidated damages under BIPA.
- Defendants in BIPA lawsuits involving claims for *actual* damages should continue to evaluate whether they may be able to assert a successful IWCA preemption claim.
- On review with Illinois Supreme Court

# Extraterritorial Impact of BIPA

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- In Illinois, a statute does not have extraterritorial effect absent clear intent from the express provisions of the statute
- Applies to non-Illinois companies for violations that occur in or substantially involve Illinois
- What about biometric data collected elsewhere but used or stored in Illinois?
  - Is there personal jurisdiction? Minimum contacts analysis

# It's Not Just Illinois...

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- Texas and Washington have existing biometric laws
- New York Biometric Privacy Act AB 27 – Introduced January 2021
- Federal Commercial Facial Recognition Privacy Act has been introduced
- California Consumer Privacy Act in effect
- Legislative activity specific to biometrics in Alaska, Arizona, California, Connecticut, Delaware, Florida, Idaho, Massachusetts, Michigan, Montana, New Hampshire, New Jersey, New York, Rhode Island, Washington

# The Latest: New York in Depth

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- On January 6<sup>th</sup>, 2021, New York state lawmakers proposed Assembly Bill 27 (AB 27), The Biometric Privacy Act.
  - This Bill's provisions largely mirror Illinois BIPA by requiring private entities to develop written retention policies, obtain individuals' express written consent, and mandated data destruction under certain conditions.
  - If passed, New York become the second state behind Illinois to allow for a private right of action.
  - Statutory damages would be up to \$1,000 for each negligent violation and \$5,000 for each intentional or reckless violation.

# Insurance Coverage Issues

# Where Is There Coverage?

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- Several potential sources of insurance coverage, including:
  - Employment Practices Liability
    - The majority of BIPA cases are filed by employees
  - Cyber Liability
  - Commercial General Liability
  - Director and Officer Liability/Board Liability Policies

# EPL Coverage

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- The majority of lawsuits have been brought by employees
- Coverage under EPL policies typically revolves around alleged “Loss” resulting from “Employment Practices Wrongful Acts” or “Workplace Torts”
  - “Employment Practices Wrongful Acts”/”Workplace Torts” are often defined to include allegations of employment-related invasion of privacy, which would bring the allegations of typical complaints filed under BIPA within the scope of coverage



# EPL Coverage

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- Loss/Damages generally include “monetary amounts which the insured is legally obligated to pay as judgments, awards or settlements”
- Includes liquidated damages – Unless expressly excluded
  - Plaintiff attorney fees covered
  - Exclusion for fines/penalties may be applicable to \$4,000 of \$5,000 award for intentional or reckless violations
  - Potential Public Policy Defense
- Willful/intentional acts exclusions may preclude coverage for “reckless” violations.

What Can We Do?

# Now What?

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- BIPA is here to stay – All BIPA amendments have failed
- Examine policies and consider exclusions
- Be proactive!
  - Companies should review compliance with BIPA
  - Put a carefully drafted BIPA policy in place – There are nuances
  - Obtain releases from employees and others?
  - Get rid of the “biometric” technology
  - Check contracts for indemnification obligations with third parties
  - Institute an arbitration policy with a class action waiver
  - Work with the experts and do it right

Questions?

# ILLINOIS BIOMETRIC INFORMATION PRIVACY ACT

## (BIPA)

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Practice Area

In the wake of the Illinois Supreme Court decision in *Rosenbach v. Six Flags Entertainment Corporation*, which drastically reduced the threshold required for an individual to seek redress for alleged violations of the Biometric Information Privacy Act (“BIPA” or “the Act”), companies with operations in the Prairie State have seen an uptick in litigation. Although we have been providing counsel and litigating under BIPA for years, Lewis Brisbois created a specialized BIPA Practice Group to assist organizations likely to face challenges under the Act, which requires all private entities that collect or use biometric information to take action with respect to its collection, disclosure and retention.

Our BIPA team is at the cutting-edge of defense in the recent wave of class action litigation being brought against Illinois employers and other groups under the Act, handling cases for companies and large insurers. We recognize the challenges that the decision in *Rosenbach* raises for organizations, both in terms of compliance with the Act and in avoiding costly violations. BIPA allows plaintiffs to recover \$1,000.00 per negligent violation and \$5,000.00 per intentional or reckless violation. Legal arguments have been crafted by the plaintiffs’ bar to assert potentially astronomical recovery, for instance, as much as \$20,000 per employee, per day, for use of a biometric timekeeping device without consent.

If you, your organization, or your clients collect and/or maintain any biometric information within the State of Illinois, you need certainty as to your obligations under BIPA. Our dedicated attorneys are available to outline the legal landscape and provide strategic direction to address all aspects of compliance, insurance coverage, litigation and the BIPA horizon.

Lewis Brisbois, with the largest number ABOTA-certified trial lawyers in the nation, is uniquely positioned to immediately spearhead the defense of BIPA litigation.

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Thank you!