

Perhaps Some Relief Under Illinois' Biometric Information Privacy Act.

In 2008, Illinois passed the [Biometric Information Privacy Act \("BIPA"\)](#). We've written about it [here](#) and [here](#).

BIPA opened the flood gates to a wave of employee-based class actions in Illinois. In 2019, following the Illinois Supreme Court's decision in [Rosenbach v. Six Flags Entertainment Corp](#), this wave of filings became a deluge. In the 148 days following the *Rosenbach* decision, the Illinois Plaintiff's bar filed nearly as many BIPA class action suits as they did in the ten years prior to the decision.

The Illinois legislature's failure to amend BIPA since *Rosenbach* is a problem for employers. Four pending federal and state appeals may provide some relief. A favorable holding in any of these cases would reduce potential BIPA exposure for employers.

The Preemption Defense — *McDonald v. Symphony Bronzeville Park LLC*

In [McDonald v. Symphony Bronzeville Park LLC](#), the Illinois Supreme Court will decide whether the [Worker's Compensation Act \("WCA"\)](#) preempts claims for statutory damages under BIPA. We believe the Court will not allow employers to use the preemption defense. After all, this is mostly the same court that decided *Rosenbach* in the first place.

McDonald is a case where a nursing home required an employee to provide her fingerprints for timekeeping purposes without adhering to BIPA's consent and disclosure requirements. The nursing home argued that *McDonald*'s claims were barred by Illinois' Workers' Compensation Statute ("WCA"). The appellate court ruled that statutory and liquidated damages were not barred by the WCA because the WCA protects workers from actual injuries, and *Rosenbach* held that plaintiffs need not have suffered actual damages to bring an action under BIPA.

Should the Court determine the WCA preempts BIPA claims, employers could have an almost complete defense against employee BIPA actions. A result like this is highly unlikely.

The Statute of Limitations Defense — *Tims v. Black Horse Carriers, Inc.* and *Marion v. Ring Container Techs*

In two other pending cases, *Tims v. Black Horse Carriers, Inc.* and *Marion v. Ring Container Techs*, Illinois appellate courts will decide whether BIPA claims are subject to a one, two, or five-year statute of limitations.

The text of BIPA does not include a statute of limitations. To date, Illinois trial courts have adhered to a five-year catchall limitations period. However, as defendants in *Tims* and *Marion* have pointed out, this five-year period does not apply if there is a statute of limitations that is "more specifically applicable." [735 ILCS 5/13-205](#).

The defendant in *Tims* argues that because BIPA is essentially a privacy statute, BIPA should be subject to the

one-year statute of limitations that other invasion of privacy claims carry under [735 ILCS 5/13-201](#). Alternatively, the defendant in *Marion* claims that because almost all BIPA actions demand statutory damages, a two-year statute of limitations is more appropriate under [735 ILCS 5/13-202](#).

In deciding these cases, Illinois' appellate courts will settle which statute of limitations applies to BIPA claims and potentially offer employers a defense against claims filed years after alleged violations.

The Single Violation Defense — *Cothron v. White Castle Systems, Inc.*

In [Cothron v. White Castle](#), the Seventh Circuit Court of Appeals will decide whether repeated collection of the same biometric information from the same employee constitutes multiple separate violations of BIPA.

BIPA does not define when a “violation” accrues. Cothron argues that an employer like White Castle who improperly collects and discloses an employee's fingerprints is committing an ongoing violation. Conversely, White Castle argues that repeated conduct only gives rise to a single claim.

Employer Takeaways

It is quite possible, indeed probable, that all four decisions will be decided in favor of employees. BIPA will remain a thorn in the side of any employer that uses a digitized workplace. Illinois employers must concentrate on complying with BIPA's notice provisions at the front end.

Employers cannot rely on the courts to save them. The Illinois legislature will not act either.

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