

## Biometric Privacy



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## Illinois Appellate Court: Workers' Compensation Act Does Not Preempt Biometric Claims

*Recently, an Illinois appellate court held claims asserted under the Illinois Biometric Information Privacy Act ("BIPA") are not preempted by the Illinois Workers' Compensation Act ("IWCA"). While the decision—*McDonald v. Symphony Bronzeville Park LLC*, 2020 IL App (1st) 192398—limits the availability of the IWCA preemption defense in BIPA litigation, preemption is nonetheless still available to defendants under both the Labor Management Relations Act ("LMRA") and the Railway Labor Act ("RLA"), and can be used to challenge a wide variety of BIPA claims asserted by unionized employees.*

### OVERVIEW OF THE ILLINOIS BIOMETRIC INFORMATION PRIVACY ACT

Under BIPA, a private entity cannot collect or store biometric data without first providing notice, obtaining written consent, and making certain disclosures. BIPA has created substantial liability for companies that utilize fingerprint and other types of biometric data in their operations. This risk arises primarily because of statutory damages available under BIPA—ranging between \$1,000 and \$5,000 per violation—can be pursued even where no "actual harm" is sustained.

### ILLINOIS APPELLATE COURT FINDS IWCA INAPPLICABLE TO BAR BIPA STATUTORY DAMAGES CLAIMS

Marquita McDonald, a former employee of Symphony Bronzeville Park LLC ("Bronzeville"), sued her former employer for alleged negligent BIPA violations stemming from its collection and use of her fingerprint biometric data for timekeeping purposes. McDonald claimed Bronzeville collected her data without first providing a publicly

available privacy policy and retention/destruction schedule, providing written notice, or obtaining a written release.

Bronzeville moved to dismiss McDonald's complaint. Among the arguments raised was that any claims made in connection with the alleged improper use of employee fingerprint data were barred by the exclusivity provisions of the Illinois Workers' Compensation Act.

The trial court rejected the IWCA preemption argument and denied Bronzeville's motion to dismiss.

On appeal, the Illinois appellate court agreed—holding the IWCA did not preclude BIPA claims involving alleged violations of employees' statutory privacy rights under BIPA.

In doing so, the court recognized the IWCA generally provides the exclusive means by which an employee can recover against an employer for a work-related injury. However, the court also noted the four exemptions that

existed to this exclusivity rule where that the injury: (1) was not accidental; (2) did not arise from his/her employment; (3) was not received during the course of employment; or (4) was not compensable under the IWCA.

Applied to the case at hand, the court held BIPA claims were exempted from the IWCA's exclusivity rules because BIPA claims which are limited to statutory damages are not a compensable injury under the IWCA.

In its analysis, the court found significant the fact that in *Rosenbach v. Six Flags Ent. Corp.*, 2019 IL 123196, ¶ 33, the Illinois Supreme Court held a violation of BIPA, in itself, is sufficient to support a statutory cause of action—with no additional consequences required to be pleaded or proved. Because actual injury is not required to recover statutory damages under BIPA, the court continued, such claims did not fit within the purview of the IWCA, which is a remedial statute designed to provide financial protection for workers that sustained an actual injury.

Thus, the exclusivity provisions of the IWCA did not preclude claims for statutory damages under BIPA.

With that said, the court also noted its holding applied only to statutory damages claims, but did *not* address whether the IWCA could preempt claims seeking *actual* damages (which were not sought by McDonald).

## TAKEAWAYS

To date, the primary focus of BIPA class action litigation has been employers that utilize biometric fingerprint readers for time and attendance purposes. One of the most common defenses raised by employer defendants in BIPA class litigation has been preemption under the IWCA.

The *McDonald* decision—and its rejection of IWCA preemption as a bar to BIPA statutory damages claims—cuts against the viability of this defense for litigants in BIPA class action litigation.

With that said, the *McDonald* opinion leaves the door open for an IWCA preemption defense to be applied to claims seeking actual damages. Thus, 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 in such instances.

In addition, preemption under both the LMRA and the RLA remains a robust, widely applicable defense that can be utilized to defeat BIPA claims filed by unionized employees. To date, at least five BIPA lawsuits have been dismissed in their entirety based on LMRA or RLA preemption following the Seventh Circuit Court of Appeals' decision in *Miller v. Southwest Airlines Co.*, 926 F.3d 898 (7th Cir. 2019).

## HOW WE CAN HELP

As leaders in the biometric privacy space, Blank Rome's dedicated Biometric Privacy Team has developed a comprehensive understanding of the core strategies relied on by plaintiffs' attorneys to litigate biometric class actions, as well as the applicable defenses to defeat and/or limit a range of different biometric class claims. Our biometric privacy litigators utilize this in-depth knowledge of the most significant and complex issues that arise in all types of biometric litigation to develop winning litigation strategies, aggressively defend clients, and posture cases for dispositive dismissals or favorable settlements.

At the same time, our Biometric Privacy Team can also provide key counseling and guidance regarding the collection, use, and storage of all types of biometric data, as well as today's new wave of biometric privacy laws. We can also assist in developing tailored, comprehensive biometric privacy compliance programs that ensure continued, ongoing compliance not just with current biometrics regulations, but anticipated laws as well—allowing you to stay ahead of this constantly-evolving legal landscape.

For more information on BIPA, assistance in defending BIPA class action litigation or enhancing and updating your biometric privacy compliance program, or to discuss any other biometric privacy issues in more detail, please contact a member of Blank Rome's [Biometric Privacy Team](#).

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