

Legal Update

February 2018

APPELLATE COURT LIMITS PRIVATE RIGHT OF ACTION UNDER ILLINOIS BIOMETRIC INFORMATION PRIVACY ACT

By Peter T. Berk

Recently, the Illinois Appellate Court issued an opinion that could significantly curtail private actions under the [Biometric Information Privacy Act \(“BIPA”\)](#). Despite the potential limitation on lawsuits, businesses need to be aware of whether they are subject to BIPA, and, if they are, that they are in compliance.

In 2008, the Illinois legislature passed BIPA, establishing standards and requirements for private entities that collect “biometric identifiers” and “biometric information”. A “biometric identifier” includes, subject to certain exceptions, a “retina or iris scan, fingerprint, voiceprint, or scan of hand or face geometry.” “Biometric information” is broadly defined to include not only the identifiers, but also any information that is “based on” a biometric identifier. Companies collecting such information or identifiers are required to (a) inform the subject about the collection and the length of time the information will be collected, stored and used, (b) obtain consent for the collection, (c) not sell or profit from the information, and (d) make disclosures about, and have policies and procedures in place for, the retention and destruction of such information, its use and sharing.

BIPA provides for private lawsuits by “[a]ny person aggrieved by a violation of [BIPA].” Remedies include awards of statutory or actual damages (whichever is greater), injunctive relief, attorneys’ fees, expert fees, and costs. Thus, businesses using thumbprints to track employee hours, or facial recognition at self-serve kiosks, or technology to allow “tagging” of photos on-line, without following the requirements of BIPA, have been the subjects of lawsuits. But BIPA could also apply to companies that use fingerprints or face recognition to access company computers and other technology, such as mobile phones.

In December 2017, the Illinois Appellate Court issued its decision in [Rosenbach v. Six Flags Entertainment Corp.](#), in which the plaintiff sued for violation of BIPA for Six Flags’ alleged failure to obtain the proper consents, and failure to provide the proper disclosures in connection with the purchase of an annual pass. She did not, however, allege any actual injury. Answering questions certified by the trial court, the Illinois Appellate Court held that “a plaintiff who alleges only a technical violation of [BIPA] without alleging *some* injury or adverse effect is not an aggrieved person under [BIPA].” The court did, however, state that the “injury or adverse effect need not be pecuniary.”

While this decision has the possibility of significantly limiting private rights of action over technical violations of BIPA, businesses should still take care to follow BIPA’s requirements. It remains unclear what “injury or adverse effect” will be sufficient (as such harm need not be pecuniary). Businesses should therefore consult legal counsel to see if they fall within the ambit of BIPA, and, if so, ensure that their policies, procedures and disclosures fully comply with the law.

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 contact Peter T. Berk, 312.701.6870, pberk@fvldlaw.com, Twitter: [@BerkPeter](https://twitter.com/BerkPeter), LinkedIn: www.linkedin.com/in/pberk, or your regular FVLD contact.

FVLD