

## The Illinois Biometric Information Privacy Act

In 2008, the Illinois legislature enacted the Illinois Biometric Privacy Act, 740 ILCS 14/1 et seq. (“BIPA”) to provide standards of conduct for private entities in connection with the collection and possession of “biometric identifiers and information.” BIPA regulates the collection, use, safeguarding, handling, storage, retention and destruction of such biometric identifiers. Biometric identifiers include retina and iris scans, fingerprints, voiceprints, and scans of hands and faces. It does not include writing samples, signatures, photographs, physical descriptions or biological materials used for medical or scientific purposes.

### BIPA’s Requirements

Significantly, BIPA does not prohibit the collection or purchase of biometric identifiers. Instead, BIPA requires private entities to develop written policies to establishing a retention schedule and guidelines for the destruction of such biometric identifiers. BIPA also imposes a set of guidelines with which the entities that do possess such biometric identifiers must comply. These include requirements that such entities:

1. Inform individuals in writing that the information is being collected or stored;
2. Inform individuals in writing of the purpose and length of time for which the information is being collected and stored; and
3. Obtain written consent from individuals whose biometric information is collected;

BIPA also prohibits entities that possess biometric identifiers from (i) selling, leasing, trading or otherwise profiting from such identifiers; and (ii) otherwise disclosing or disseminating such information unless the individual consents to such disclosure, the disclosure completes a financial transaction authorized by the individual, the disclosure is required by municipal, state or federal law or the disclosure is required in response to a warrant or subpoena.

### The Recent Onslaught of BIPA Class Actions

Although BIPA gives individuals aggrieved by a violation of the Act a private right of action, plaintiff’s attorneys essentially ignored BIPA from 2008 through 2016 and few lawsuits were brought on behalf of aggrieved individuals. However, in the past year, more than 30 class actions have been filed in Illinois for purported BIPA violations. Why the trend? For one, BIPA imposes penalties of \$1,000 per negligent violation of the Act and \$5,000 (or actual damages, whichever is greater) for intentional or reckless violations. Second, BIPA allows for the recovery of reasonable attorneys’ fees and costs, including expert witness fees. Accordingly, BIPA is a prime target for members of the plaintiff’s bar.

Although there is little case law interpreting BIPA, the Illinois Appellate Court issued its first opinion in December 2017 addressing the Act. In *Rosenbach v. Six Flags Entertainment Corp.*, 2017 IL App. (2d) 170317, the court, citing several Federal Court decisions, dismissed a plaintiff’s BIPA claim for failure to state a claim due to her inability to cite actual damages. In so holding, the Court focused on whether an individual is “aggrieved” (as required by BIPA) if he or she alleges that biometric information was collected without consent, but does not allege actual injury.

In dismissing the case, the appellate court found that mere technical violations are not actionable since a plaintiff is not “aggrieved” as the plain language of BIPA requires. While the opinion may deter some cases from being filed, it certainly leaves the door open for claims of actual damage and we expect BIPA cases to continue to be filed in the near future.

If you or your company have questions regarding compliance with BIPA, feel free to contact Jeff Widman at (312) 980-3807 or [jwidman@shawfishman.com](mailto:jwidman@shawfishman.com).