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Cybersecurity & Privacy Alert

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Illinois Supreme Court: Workers' Compensation Act does not bar claims under the Illinois Biometric Information Privacy Act

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This highly anticipated decision allows employment-related BIPA cases to resume.



What's the Impact?

- / Employers defending or facing BIPA lawsuits find no relief in yesterday's ruling
- / This decision reminds all businesses using biometric technology to maintain compliance with BIPA

On Thursday, the Illinois Supreme Court decided *McDonald v. Symphony Bronzeville Park, LLC, et al.*, holding that "personal and societal injuries" stemming from violations of the Illinois Biometric Information Privacy Act (BIPA) are "not the type of injury . . . preempted by the exclusive remedy provisions of the" Illinois Workers' Compensation Act (IWCA). For employers engaged in BIPA litigation, the *McDonald* decision was the most highly anticipated decision

since the Illinois Supreme Court's January 2019 opinion in *Rosenbach v. Six Flags Entertainment Corp.*, 2019 IL 123186.¹

In recent years, employers using biometric technology have been subject to a barrage of class action litigation alleging violations of BIPA's notice and consent requirements.² Most employment-related BIPA cases have shared similar allegations.

The Plaintiff in *McDonald*, an employee, alleged that her employer collected and stored her biometric information for timekeeping purposes without complying with BIPA's requirements to (a) provide written notice to its employees, (b) obtain informed written consent from each employee that used a biometric device, and (c) publish a publicly available written policy regarding the company's retention and destruction guidelines for biometric information. In her amended complaint, the plaintiff did not allege actual harm but instead sought statutory liquidated damages of \$1,000 per negligent violation or \$5,000 per intentional violation.

Many Illinois employers, including the *McDonald* defendant, have attempted to dismiss identical BIPA claims by arguing that injuries resulting from employees' use of biometric technology constitute a harm covered by the exclusivity provisions of the IWCA. Plaintiffs have countered that injuries stemming from BIPA violations are not the type of injury compensable under the IWCA, which is a required element for preemption. The trial court in *McDonald* sided with the plaintiff, and in September 2020, following an interlocutory appeal, the Illinois Appellate Court affirmed the trial court's ruling.³ The Illinois Supreme Court accepted the *McDonald* appeal to answer whether "the exclusivity provisions of the [IWCA] bar a claim for statutory damages under [BIPA] where an employer is alleged to have violated an employee's statutory privacy rights."

The Illinois Supreme Court's opinion focused on the narrow question of whether the plaintiff's injury was "compensable" under the IWCA. The defendant argued that the IWCA's exclusivity provisions were broadly worded to cover any injury "arising out of and in the course of employment." Plaintiff countered that "privacy inquiries are foreign to the workers' compensation system" and that the primary purpose of the IWCA—to "provide financial protection for injured workers until they can return to the workforce"—would not be given its full effect if applied to BIPA claims.

To reach its conclusion, the Court reviewed the IWCA's legislative history, as well as past IWCA preemption decisions, paying particular attention to the various types of injuries for which preemption has previously been found and distinguishing them from the "personal and societal" injuries stemming from a BIPA violation. Ultimately, the Court found, based on

¹ ["Illinois Supreme Court decision allows for biometric privacy claims to proceed without a showing of actual harm,"](#) January 24, 2019.

² ["Using fingerprints for timekeeping purposes in Illinois — what you need to know about the Illinois Biometric Information Privacy Act,"](#) October 19, 2017.

³ ["Illinois Workers' Compensation Act does not preempt biometric privacy claims brought by employees,"](#) September 23, 2020.

precedent, that a compensable injury was one that caused “a harmful change in the human organism.” Unlike physical or psychological work injuries, the Court reasoned that Plaintiff’s “lost opportunity ‘to say no by withholding consent’” was not an injury within the purview of the IWCA.

In a concurring opinion, Justice Burke noted that the plaintiff amended her pleading to remove any allegation that she suffered mental anguish from the purported violations of BIPA. She stated that “[h]ad McDonald persisted in her allegation of mental anguish, the exclusivity provisions of the Compensation Act would have barred her claim.”

Numerous BIPA cases that arose in the employment context were stayed while *McDonald* remained pending. With *McDonald* now decided, many employment-related BIPA cases will now resume. For employers using biometric technology in the workplace, the *McDonald* decision is another reminder of the importance of maintaining compliance with BIPA.

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