

Nine-figure verdicts: What is BIPA and why you should care

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The numbers are big — like, *really* big. Companies are paying hundreds of millions of dollars to settle employee and consumer suits for “BIPA” violations. But what is BIPA? And how can insurance potentially shield companies from this exposure?

What is BIPA?

In 2008, Illinois enacted the Biometric Information Privacy Act (BIPA). The law’s purpose is to protect individuals’ privacy rights in their biometric information, including retina or iris scans, fingerprint, voiceprint, hand scans, facial geometry, DNA and other unique, identifying biological information.

Private companies may collect and store this information only if they:

- (1) Inform the person in writing of what data is being collected or stored (e.g., fingerprint scans);
- (2) Inform the person in writing of the specific purpose and length of time for which the data will be collected, stored and used. (e.g., scan is used to allow employees to clock in and out of work and will be stored for one year or until employment termination); and
- (3) Obtain the person’s written consent for the information’s collection and storage.

Companies may not disclose this information to third parties without the individual’s written consent or when certain limited exceptions apply.

Penalties for noncompliance range from \$1,000 or actual damages for negligent violations to \$5,000 or actual damages for intentional or reckless violations, plus litigation costs and other relief, like an injunction against use. BIPA provides a private right of action for violations, and it is a strict liability statute.

A wave of lawsuits, largely putative class actions, followed BIPA’s passage. Most were brought by former or current employees whose employers used fingerprints or handprints for timekeeping. But customer suits have yielded high-dollar verdicts and settlements. For instance, a jury in the first ever BIPA trial (October 2022) found that defendant BNSF Railway Company recklessly or intentionally violated BIPA 45,600 times (once per class member) when it required drivers to register and provide fingerprints each time they used an automated gate system to enter the railyard. The verdict resulted in a \$228 million award for the plaintiffs. *Richard Rogers v. BNSF Railway Co.* (Case No. 19-C-3083, N.D. Ill.).

Two recent rulings by the Illinois Supreme Court have increased BIPA exposure. First, the Court found a five-year statute of limitations period applies to BIPA claims, rather than a one-year period. *Tims v. Black Horse Carriers, Inc.*, 2023 IL 127801 (Feb. 2, 2023), <http://bit.ly/3UBx6XK>.

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Second, the Court found a BIPA claim accrues each time an entity scans or transmits an individual’s biometric identifier or information, instead of a single violation when biometric information is first collected. *Cothron v. White Castle Sys., Inc.*, 2023 IL 128004 (Feb. 17, 2023), <http://bit.ly/41EONB>. Together these rulings increase the time frame and instances of BIPA violations.

Does this apply to companies operating outside of Illinois?

Illinois is the only state that currently permits a private right of action for BIPA violations, but plaintiffs are filing suits in other jurisdictions and seeking to apply Illinois law. Thus far, courts have denied these efforts. *See, e.g., Vance v. Microsoft Corp.*, No. 2:20-cv-01082, (W.D. Wash., Oct. 17, 2022); *Vance v. Amazon.com Inc.*, No. 2:20-cv-01084, (W.D. Wash., Oct. 17, 2022).

The more pressing concern is pending legislation in other states, including:

- Arizona’s “Act Relating to Biometric Information” (SB 1238, <http://bit.ly/3UG49KA>): Like the Illinois statute, Arizona’s proposed bill would allow a private right of action with the same damages (\$1,000 for negligent violations or \$5,000 for intentional or reckless violations).
- New York’s “Act Prohibiting Private Entities From Using Biometric Data for Advertising” (AB S02390, <http://bit.ly/41sQAA2>): This bill would prohibit private entities from

using biometric data for any advertising, detailing, marketing, promotion or any other activity that is intended to be used to influence business volume, sales or market share or to evaluate the effectiveness of marketing practices or marketing personnel.

- Vermont’s “Act Relating to Protection of Personal Information” (H. 121, <http://bit.ly/3mwO1ym>): This bill amends existing Vermont statutes related to protection of personal information, adding biometrics to this protected category information, among other changes.

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Even though some states have not provided private rights of action to their existing or proposed legislation, companies should consider these laws when establishing biometric data policies and procedures. If, for instance, a private Illinois action were to succeed at trial or result in a large settlement, the defendant may be a soft target for a follow-on action pursued by another state’s attorney general.

Is there insurance coverage for BIPA violations?

As BIPA exposure heats up, insurers are slapping BIPA exclusions onto their policies, but potential insurance sources for BIPA coverage remain.

Commercial general liability (CGL) insurance

Most CGL policies cover “personal injury,” which includes “oral or written publication of material that violates a person’s right of privacy.” Insurers argue that BIPA claims don’t allege “publication,” which they define as dissemination of information to the public.

But the Illinois Supreme Court has a broader view of “publication,” finding that sharing information with a single third party is sufficient. *W. Bend Mut. Ins. Co. v. Krishna Schaumburg Tan, Inc.*, 183 N.E.3d 47 (Ill. 2021).

Insurers also raise these exclusions:

- (1) Employment Practices Liability Exclusion. Many CGL policies exclude personal injuries arising out of employment related “practices, policies, acts, or omissions,” like “coercion, demotion, evaluation, reassignment, discipline, defamation, harassment, humiliation, or discrimination.” *State Auto. Mut. Ins. Co. v. Tony’s Finer Foods Enterprises, Inc.*, 589 F. Supp. 3d 919, 926 (N.D. Ill. 2022). Illinois courts generally find that these examples involve “treating an employee badly, either by taking adverse action against her (e.g., demotion, evaluation, reassignment, discipline), or by mistreating her in some way (e.g., coercion, defamation, harassment, humiliation, or

discrimination).” *State Auto. Mut. Ins. Co. v. Tony’s Finer Foods Enterprises, Inc.*, 589 F. Supp. 3d 919, 928 (N.D. Ill. 2022). Using an employee’s fingerprints so that she can clock in or out is different from “treating an employee badly,” so this exclusion does not apply to BIPA claims.

- (2) Statutory Violation Exclusion. CGL insurers exclude coverage for certain, enumerated statutory violations known to spawn litigation. These include violations of the Telephone Consumer Protection Act (TCPA), the CAN-SPAM Act of 2003, the Fair Credit Reporting Act (FCRA), and “any other laws, statutes, ordinances, or regulations, that address, prohibit, or limit the printing, dissemination, disposal, collecting, recording, sending, transmitting, communicating or distribution of material or information.” Illinois courts have rejected insurers’ attempts to shoehorn BIPA into the exclusion’s catch-all by finding the enumerated statutes regulate methods of communication (TCPA and CAN-SPAM) or use of materials (FCRA) while BIPA “regulates the collection, use, storage, and retention of biometric identifiers and information.” *W. Bend Mut. Ins. Co. v. Krishna Schaumburg Tan, Inc.*, 183 N.E.3d 47, 60 (Ill. 2021).
- (3) Access or Disclosure Exclusion. In a typical CGL policy, there’s an exclusion for losses arising out of “any access to or disclosure of any person’s or organization’s confidential or personal information, including patents, trade secrets, processing methods, customer lists, financial information, credit card information, health information or any other type of nonpublic information.” *Citizens Ins. Co. of Am. v. Thermoflex Waukegan, LLC*, 588 F. Supp. 3d 845, 855 (N.D. Ill. 2022). This exclusion is another instance where courts find that biometrics don’t fall into the listed examples of confidential or personal information such that the exclusion does not apply.

Cyber liability insurance

Cyber insurance may also be an avenue for coverage of BIPA claims, depending on the policy’s terms. Biometric information may fall within a policy’s definition of “confidential information.” But cyber policies are not standardized, so policyholders should consider their specific policy language in the event of a claim and upon renewal.

Employment practices liability insurance

Employment practices liability (EPL) policies cover employers for claims made by employees for defined sets of wrongful acts. Many policies include “invasion of privacy” in the policy’s definition of “wrongful act,” which gives policyholders a strong argument for coverage of BIPA claims.

Conclusion

As with all insurance matters, policy terms guide the availability of coverage, but, where new claims meet policy language drafted decades before, room for interpretation abounds. Traditional assumptions about policy coverages should not cramp applications to new and emerging risks. Consult experienced counsel for guidance.

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