

Illinois Biometric Information Privacy Act – Technical Violations Matter

Businesses beware. A recent decision by the Illinois Supreme Court is likely to lead to an increase in the number of class actions involving the use of biometric data of Illinois employees or customers. The Illinois Supreme Court has issued its decision in *Rosenbach v. Six Flags Entertainment*, a case involving technical violations of the *Illinois Biometric Information Privacy Act* (BIPA). The *Rosenbach* Court has affirmed a plaintiff's right to seek damages, costs and attorneys fees for a technical violation of BIPA.

In 2008, BIPA was enacted to protect biometric data. BIPA imposes a number of requirements on companies and other organizations that handle, collect, disseminate, or otherwise deal with nonpublic personal biometric information. Nonpublic personal biometric information includes unique biometric data such as scans of hand, finger, eye or facial geometry. BIPA's scope does not include photographs, physical descriptions, writing samples, signatures or biological materials used for medical or scientific purposes. In the employment realm, BIPA requires that if a private employer collects, captures or otherwise obtains biometric information of employees, the employer must develop and distribute a written policy that addresses various issues related to biometric information, and obtain written consent from employees before collecting, capturing or otherwise obtaining their biometric information. Under BIPA, "[a]ny person aggrieved by a violation of [the] Act shall have a right of action."

Rosenbach arose as the result of Six Flags Entertainment Corporation requiring a thumb print for season ticketholders at its amusement park. The fingerprint was then stored as part of the season ticket procedure. *Rosenbach* argued that Six Flags' actions violated Section 15(b) of BIPA, which requires private entities to (i) inform individuals that "a biometric identifier or biometric information is being collected or stored," (ii) inform individuals of "the specific purpose and length of term for which a biometric identifier or biometric information is being collected, stored, and used," and (iii) receive "a written release" from the individual whose biometrics are collected. Six Flags did not dispute the underlying facts or that it failed to comply with the notice and consent provisions of BIPA. Rather, Six Flags argued that plaintiff was not harmed and failed to meet the statutory "aggrieved by" standard as no injury was suffered as a result of the technical violation.

The Illinois Appellate Court for the Second District agreed with Six Flags and ruled that BIPA's "aggrieved by" standard requires allegations of "some actual harm." In a unanimous decision reversing the Second District's opinion, the Illinois Supreme Court held that an individual is "aggrieved" under BIPA even if the individual does not allege an actual injury or adverse effect beyond her entity's violation of the technical requirements of the statute.

The cost of non-compliance is significant. Negligent violations by private entities result in \$1,000 per violation in liquidated damages or the amount of actual damages, whichever is greater. For intentional or reckless violations, liquidated damages are increased to \$5,000 per violation or actual damages. Private entities are also liable for reasonable attorneys' fees, costs, experts' fee, and injunctive relief in addition to liquidated damages.

In light of the *Rosenbach* ruling, businesses should review their biometric data policies and procedures. Litchfield Cavo LLP's attorneys are here to assist with assessing your biometric data policies and procedures.