

# Illinois Biometric Information Privacy Act “BIPA”

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*Presenter*

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## Background of BIPA

- BIPA became effective on October 3, 2008.
- Its purpose is to protect the public welfare through regulation of the use of biometric information.
- This is due to the growth of the use of biometric information in businesses in Illinois, especially Chicago.
- Currently, under Illinois House Bill No. 5374, there are proposed changes to BIPA. The first reading of the bill took place on February 18, 2020, and it was assigned to a judiciary - civil committee on March 12, 2020.



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## Why do we have BIPA?

The legislature explicitly stated their intent within the Act:

“Biometrics are unlike other unique identifiers that are used to access finances or other sensitive information. For example, social security numbers, when compromised, can be changed. Biometrics, however, are biologically unique to the individual; therefore, once compromised, the individual has no recourse, is at heightened risk for identity theft, and is likely to withdraw from biometric-facilitated transactions...The full ramifications of biometric technology are not fully known.” 740 ILCS 14/5(c), (f)

## Definitions: Biometric Identifier

### 740 ILCS 14/10

#### Includes:

- Retina scan
- Iris scan
- Fingerprint
- Palm print
- Voice recognition
- Facial geometry recognition
- DNA recognition
- Gait recognition

#### Does not Include:

- Human biological samples
- Writing samples
- Written signatures
- Photographs
- Demographic data
- Tattoo descriptions
- Physical descriptions
- Donated organs
- Blood or serum stored for transplants
- Biological materials regulated under the Genetic Information Privacy Act
- Patient information or scans gained in a healthcare setting

## Definitions: Biometric Information

### 740 ILCS 14/10

- Any information, regardless of how it is captured, converted, stored, or shared, based on an individual's biometric identifier used to identify an individual.
  - The definition of "biometric identifier" (on the previous slide) is relevant in determining "biometric information."
- The Legislature has proposed to exclude from this definition any information derived from biometric information that cannot be used to recreate the original biometric identifier. No examples have been given of when this would be relevant.

## Why are the requirements of BIPA important to know?

- When a company violates BIPA, the aggrieved individual has a right of action against the company. 740 ILCS 14/20
- If the individual prevails on their claim:
  - For negligence, the company will be assessed a \$1,000 fine or actual damages, whichever is greater.
  - For intentional or reckless violations, the company will be assessed \$5,000 or actual damages, whichever is greater.
  - The company is responsible for reasonable attorneys' fees and costs.
  - The company is responsible for any other relief, such as injunction.

## Proposed Changes to Section 14/20

- Under the proposed legislation, the Legislature will impose greater liability on the violator:
  - Companies will be assessed actual damages, not just \$1,000.
  - For any willful conduct, companies are responsible for actual damages plus liquidated damages up to the amount of actual damages.
  - Attorneys' fees, costs, and other relief provisions stay the same.
  
- However, the Legislature has suggested the following protection for companies:
  - The action must be instituted within one year after accrual and the individual must give the company 30 days notice.
  - If the company cures its violation within the 30 days, no action can be brought.

## Illinois BIPA Cases

- The majority of the cases involving BIPA violations have been filed in Cook County. However, St. Clair County is also becoming a popular venue for BIPA cases.
  
- Class Action cases can include hundreds or thousands of class members and companies can be assessed damages for each violation.
  - Highest settlement fund: \$7 million
  - Lowest settlement fund: \$35,000
  - Median range: ~ \$450,000 to \$900,000
  
- This does not include attorneys' fees and costs, which often are 35% or more of the judgment.
  - For instance, in *Sekura v. L.A. Tan*, the attorneys' fees were \$600,000.

## Requirements Under BIPA

### 740 ILCS 14/15

- Any private entity that is in possession of “biometric identifiers” or “biometric information” must comply with the BIPA requirements.
- Create a written policy made available to the public establishing:
  - A retention schedule
  - Guidelines for permanently destroying biometric identifiers and biometric information. The policy must include that:
    - It will be destroyed when the initial purpose of retaining it has been satisfied
    - OR
    - Within 3 years of the individual’s last interaction with the private entity; whichever occurs first
- The policy must be adhered to unless there is a valid warrant or subpoena issued by a court.

## Requirements Under BIPA

### 740 ILCS 14/15

- Under the proposed changes:
  - The Legislature wishes to make the policy available *only* to the person from whom the information is collected, not the public.
  - Information can be disclosed pursuant to a valid order, as well as a warrant or subpoena.
  - The order, warrant, or subpoena can be issued from a local or federal government agency in addition to the court.

## Requirements Under BIPA

740 ILCS 14/15

- No private entity can obtain biometric identifiers or information unless the following requirements are met:
  - The individual must be informed in writing.
  - The individual must be informed in writing of the specific purpose and length of term for which it will be collected, stored, and used.
  - The individual must sign a written release.
- Proposed changes:
  - The individual must sign a written consent, not release.
  - The written consent may be obtained by electronic means.

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## Requirements Under BIPA

740 ILCS 14/15

- No private entity can do the following with biometric information and/or identifiers:
  - Sell, lease trade, or otherwise profit.
  - Disclose, redisclose, or otherwise disseminate.
- However, dissemination of the information or identifiers can occur where:
  - The individual consents, OR
  - It is required by State or Federal law, OR
  - It is required pursuant to a valid warrant or subpoena issued by a court.

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## Requirements Under BIPA

740 ILCS 14/15

- Every private entity in possession of a biometric identifier or information must do the following:
  - Reasonably store, transmit, and protect it from disclosure.
  - Store, transmit, and protect it from disclosure in the same manner or in a more protective manner in which the private entity does for other confidential and sensitive information.

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## Definitions: Private Entity

740 ILCS 14/10

### Includes:

- **Individuals**
- **Partnerships**
- **Corporations**
- **Limited Liability Companies**
- **Associations**
- **Any other group, however organized**

### Does not include:

- **State government agencies**
- **Local government agencies**
- **Illinois courts**
- **Clerk of Illinois courts**
- **Judge or Justice of Illinois courts**

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## Definitions: Written Consent

740 ILCS 14/10

- Any informed written consent.
- However, when it is in the context of employment, it can include a release executed by an employee as a condition of employment.
- Earlier this year, the Legislature has proposed to strike out the language regarding employment releases. This means the only type of written consent will be “informed written consent.”

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## Construction of BIPA

740 ILCS 14/25

- BIPA does not impact discovery in any court action.
- BIPA does not apply to:
  - X-Ray Retention Act
  - HIPAA
  - Financial institutions subject to Title V of the Gramm-Leach-Bliley Act
  - Private Detective, Private Alarm, Private Security, Fingerprint Vendor, and Locksmith Act
  - Contractors, subcontractors, or agents of a State agency or local government when working for that State agency or local government

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## Proposed Changes to Construction of BIPA

- The proposed changes by the Legislature:
  - BIPA will not apply to:
    - Contractors, subcontractors, or agents of a federal agency when working for that federal agency.
    - Private entities, if the private entity's employees are covered by a collective bargaining agreement that provides for different policies regarding the retention, collection, disclosure, and destruction of biometric information.

## Other States with biometric laws

## Texas

- In 2009, Texas passed its own biometric privacy act, Tex. Bus. & Com. Code §503.001.
- A “person may not capture a biometric identifier” without a prior consent, may not sell biometric data without consent or unless allowed by law, must use reasonable care in storing it, and “shall destroy the biometric identifier within a reasonable time.”
- There is a steep civil penalty of “\$25,000 for each violation.”
- But, there is no private right of action. The state attorney general has the enforcement rights.

## Washington

- In 2017, Washington enacted biometric privacy legislation. Wash. Rev. Code Ann. §19.375.020.
- It prohibits any company or individual from entering biometric data “in a database for a commercial purpose, without first providing notice, obtaining consent, or providing a mechanism to prevent the subsequent use of a biometric identifier for a commercial purpose.”
- But, there is no private right of action. The attorney general is authorized to enforce this law.

## California

- California Consumer Privacy Act (CCPA) went into effect this year and regulates biometric data by including it in the definition of personal information.
- CCPA defines biometric data very broadly to include “physiological, biological or behavioral characteristics, including ... DNA[,] that can be used ... to establish individual identity,” including “imagery of the iris, retina, fingerprint, face, hand, palm, vein patterns, and voice recordings, from which an identifier template, such as a faceprint, a minutiae template, or a voiceprint, can be extracted, and keystroke patterns or rhythms, gait patterns or rhythms, and sleep, health, or exercise data that contain identifying information.”

## New York

- New York amended its existing data-breach notification laws with its 2019 Stop Hacks and Improve Electronic Data Security (SHIELD) Act, which will go into effect sometime in 2020.
- The SHIELD Act broadens the definition of private information to include biometric information.
- Biometric information includes fingerprints, voiceprints, retina or iris images, or other unique physical characteristics.
- Earlier, New York had passed a limited biometric legislation, N.Y. Lab. Law §201-a, which applies specifically in the employment context. It prohibits fingerprinting “as a condition of securing employment or of continuing employment.”
- It does not expressly provide for a private right of action.

## Arkansas

- Arkansas became the latest state to pass biometric-data legislation.
- It amended its breach-response laws, Arkansas Code §4-110-103(7), by revising the definition of covered personal information to include biometric data.
- Biometric data includes an individual's "Fingerprints; Faceprint; A retinal or iris scan; Hand geometry; Voiceprint analysis; Deoxyribonucleic acid (DNA); or Any other unique biological characteristics."

## In sum, to protect your company:

- Consider whether use of biometric data is necessary and appropriate for your business.
- If relying on biometric data, provide advance notice to the individuals and obtain written informed consent.
- Ensure that the notice adequately discloses why you collect, how you use, how you store, and how you disclose biometric data.
- Include biometric policies in your handbooks/manuals.
- Allow individuals to opt out of biometric information collection.
- Stay abreast of the latest legal developments in this area and work with your attorney on implementing and updating relevant policies and procedures.

**Thank you.  
Please contact us with any  
questions.**

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