



Illinois Emerging Privacy Litigation – *What 2025 Has in Store*

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Seyfarth Shaw LLP

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Agenda

01 History of BIPA

02 BIPA in 2025

03 The Rise of GIPA

04 GIPA Litigation



BIPA History

- Enacted in 2008.
- First standalone biometric privacy law in U.S. with private right of action.
- \$1,000 for each negligent violation and \$5,000 for each reckless or intentional violation.*
- More than 1,500 BIPA lawsuits filed.
- Several key issues decided by Illinois Supreme Court between 2019 and 2023:
 - *Rosenbach v. Six Flags* (2019) – standing
 - *McDonald v. Symphony* (2022) – workers’ compensation preemption
 - *Tims v. Black Horse Carriers* (2023) – statute of limitation
 - *Cothron v. White Castle* (2023) – claim accrual*
 - *Walton v. Roosevelt University* (2023) – LMRA preemption
 - *Mosby v. The Ingalls Memorial Hosp.* (2023) – healthcare exemption*
- One trial – *Rogers v. BNSF Railway* - \$228 million verdict (2022).



#1: *State Contractor Exemption*

- “Nothing in this Act shall be construed to apply to a contractor, subcontractor, or agent of a State agency or local unit of government when working for the State agency or local unit of government.” 740 ILCS 14/25(e)
 - Entity falls within exemption if it:
 - is a contractor;
 - of a unit of government; and
 - was working for that unit of government at the time it collected or disseminated the alleged biometric information.
- Enriquez v. Navy Pier, Inc.*, 2022 IL (1st) 2111414, ¶ 19
- *Miranda v. Pexco, LLC* (Cook Cty., Ill., 2023): “when working for” = temporal question
 - Courts split on “when working for” for Illinois businesses with both private and state contracts



#2: Healthcare Exemption for Timeclocks

- BIPA excludes “information captured from a patient in a healthcare setting or information collected, used, or stored for health care treatment, payment, or operations under the federal Health Insurance Portability and Accountability Act of 1996 [HIPAA].” 740 ILCS 14/10
- *Mosby v. Ingalls Memorial Hospital*, 2023 IL 129081:
 - Answered in the affirmative that:
 - (1) BIPA applies to healthcare workers (as opposed to patients) and, more narrowly,
 - (2) biometric information collected from a healthcare worker, when utilized for purposes related to healthcare treatment, payment, or operation as defined by HIPPA, falls within BIPA’s purview.

(*Mosby*, ¶ 1)
 - **However**, the court emphasized that it did not establish a sweeping, categorical exclusion of biometric identifiers from health care workers. (*Mosby*, ¶ 57)
- Courts split on whether *Mosby* is applicable to healthcare workers enrolled in biometric timeclocks.



#3: *Retroactivity of Damages Amendment*

- BIPA provides that a prevailing party may recover for each violation:
 - (1) against a private entity that negligently violates a provision of this Act, liquidated damages of \$1,000 or actual damages, whichever is greater;
 - (2) against a private entity that intentionally or recklessly violates a provision of this Act, liquidated damages of \$5,000 or actual damages, whichever is greater;
 - (3) reasonable attorneys' fees and costs, including expert witness fees and other litigation expenses; and
 - (4) other relief, including an injunction, as the State or federal court may deem appropriate.
- Claim accrues under BIPA each time a person scans or otherwise transmits biometric information. *Cothron v. White Castle*, 2023 IL 128004, ¶ 1.
- Decision invited a “per scan” theory for Sections 15(b) and 15(d) of BIPA.
- “Ultimately, however, we continue to believe that policy-based concerns about potentially excessive awards under [BIPA] are based addressed by the legislature.” *Cothron*, ¶ 43.



#3: *Retroactivity (cont.)*

- August 2, 2024 – Illinois Governor Pritzker signed into law Senate Bill 2979, limiting damages to a single violation for damages under Section 15(b) and 15(d), to include:

(b) For purposes of subsection (b) of Section 15, a private entity that, in more than one instance, collects, captures, purchases, receives through trade, or otherwise obtains the same biometric identifier or biometric information from the **same person using the same method of collection in violation of subsection (b) of Section 15** has committed a **single violation of subsection (b) of Section 15 for which the aggrieved person is entitled to, at most, one recovery under this Section.**

(c) For purposes of subsection (d) of Section 15, a private entity that, in more than one instance, discloses, rediscloses, or otherwise disseminates the same biometric identifier or biometric information from the **same person to the same recipient using the same method of collection in violation of subsection (d) of Section 15** has committed a **single violation of subsection (d) of Section 15 for which the aggrieved person is entitled to, at most, one recovery under this Section** regardless of the number of times the private entity disclosed, redisclosed, or otherwise disseminated the same biometric identifier or biometric information of the same person to the same recipient.

740 ILCS 14/25(b) and (c).

- *But what about cases pending before the amendment?*



#3: *Retroactivity (cont.)*

Gregg v. Central Transport LLC, 2024 WL 4766297 (N.D. Ill. Nov. 13, 2024) - post-action amendment to BIPA applies retroactively.

- “In Illinois, there is a presumption that statutory amendments are ‘intended to change existing law.’ If the legislature has changed the law, courts must determine whether that change applies retroactively, or only prospectively. The presumption does not apply, however, where ‘the circumstances surrounding the amendment’ indicate that ‘the legislature intended merely to interpret or clarify the original act.’ Where an amendment is ‘a clarification of the prior statute,’ it ‘must be accepted as a legislative declaration of the meaning of the original Act.’ In that case, **there is no need to determine whether the amendment should have retroactive effect because it is as if the amendment has been in place all along.**”

Gregg, 2024 WL 4766297, at *2 (citations omitted).

- Relied on *Cothron* court’s invitation to legislature to “make clear its intent regarding the assessment of damages....”



#3: Retroactivity (cont.)

Schwartz v. Supply Network, Inc., 2024 WL 4871408 (N.D. Ill. Nov. 22, 2024) - post-action amendment to BIPA *not retroactive*.

- “Because the amendment to the Act is substantive, and the Illinois legislature did not expressly make it retroactive, Illinois law compels that the amendment be applied prospectively, not retroactively.”

Schwartz, 2024 WL 4871408, at *5.



The Next Big Thing – The Illinois Genetic Information Privacy Act (GIPA)

Over 100 class action lawsuits filed since 2023

- GIPA is very similar to BIPA--mimics language, structure, and damages provisions. Enacted in 1998 so arguably a predecessor to BIPA.
- Focus of the statute is on the use of genetic testing to determine suitability for insurance coverage or employment.
- Like BIPA, it too, contains no statute of limitations, and no definition of what constitutes a violation of the statute.
- **Notably, consent is NOT a defense.** Under the strict wording of the statute, arguably the collection of the genetic information constitutes the statutory violation.
- GIPA provides minimum statutory damages of \$2,500 per negligent violation and maximum statutory damages of \$15,000 per intentional violation or actual damages, **whichever is greater.**

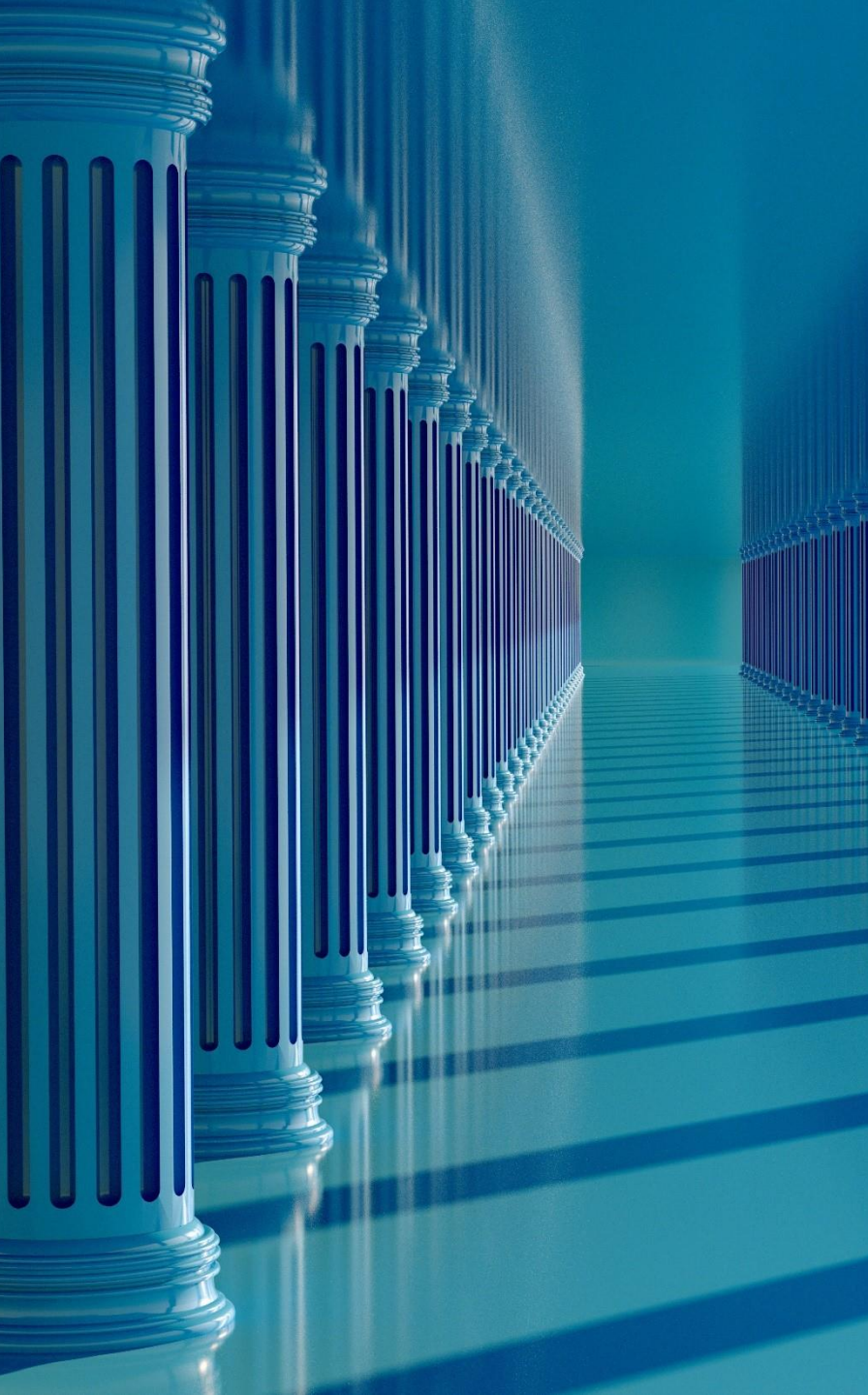


GIPA, Continued . . .

- Relevant here, defines “genetic information” as having “the meaning ascribed to it under HIPAA, as specified in 45 CFR 160.103.”
- In turn, the regulation provides:

Genetic information means: . . . with respect to an individual, information about:

- (i) The individual's genetic tests;
- (ii) The genetic tests of family members of the individual;
- (iii) The manifestation of a disease or disorder in family members of such individual; or
- (iv) Any request for, or receipt of, genetic services, or participation in clinical research which includes genetic services, by the individual or any family member of the individual.



GIPA, Continued . . .

- The plaintiffs’ bar is targeting Illinois employers that conduct pre-employment medical examinations.
- The plaintiffs allege in the complaints that during the pre-employment medical examination, they were asked (by a health care provider) to provide information regarding their family medical history.
- The plaintiffs argue that this family medical history constitutes “genetic information” which GIPA precludes employers from collecting as a condition of employment.
- Often accompanied by requests for medical records that include HIPAA releases.
- Examine the release carefully to ensure do not exceed the limits of the release.



GIPA Litigation To-Date

- Motions to dismiss largely unsuccessful – courts believe there are fact issues regarding what is and is not genetic information.
- One court has ruled on a motion to dismiss that a plaintiff's claim regarding the use of genetic information in a company wellness program was pre-empted by the Employment Retirement Income Security Act (ERISA).
- Recent expansion of GIPA to claims targeting technology companies that use tracking tools for marketing purposes, arguing that GIPA also prohibits disclosing genetic test results or identifying information in a way that reveals the subject's identity.
- Fewer GIPA filings in number than BIPA cases filed in the first two years following the *Rosenbach* standing decision.
 - Inherent complexities (i.e., what qualifies as genetic information and whether information solicited was a condition of employment)
 - non-privacy regulations (i.e., OSHA)



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Please reach out to us with any questions:

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