

# Illinois Employer Faces Class Action for Using Fingerprints to Track Attendance

## Labor & Employment Law Update

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Technology allowing employers to use biometric data tools to track attendance and maintain worksite security abounds. Purveyors hype the advanced technology's ability to accurately validate time entries, eliminate fraud, and better control access to the workplace or to sensitive areas within the workplace. If these systems are so readily available, it must be legal for employers to use them, right? As with seemingly everything involving HR and the workplace, it depends.

Last week, a group of Chicago-area employees filed a class action suit, alleging their employer's use of worker fingerprints for time-tracking purposes violates the state's biometric information privacy law. Specifically, the employees claimed that their employer failed to:

- Properly inform them in writing of the specific purpose for which their fingerprints were being collected and the length of time their fingerprints would be stored and used;
- Provide a publically available retention schedule and guidelines for permanently destroying their fingerprints; and
- Obtain their written consent before obtaining fingerprints.

In 2008, Illinois became the first state to explicitly regulate the use of "biometric identifiers" which it defines as a retina or iris scan, fingerprint, voiceprint, or scan of hand or face geometry and their derivatives, regardless of how that information is captured, converted, stored, or shared. 740 ILCS 14/10. The Illinois Biometric Information Privacy Act (BIPA) applies broadly to any individual or entity other than the government, and therefore encompasses all private-sector employers operating within the state.

### **Illinois Biometrics Legislation Sets Trend**

Until recently, Illinois and Texas were the only states with laws addressing biometrics. However, a new wave of high-exposure litigation under BIPA has had an impact on other states' decisions to introduce legislation on the matter. Many states, including Illinois, have data breach notification laws that cover biometric information, as well as other sensitive personal information.

Employers operating exclusively in jurisdictions that have not regulated the use of biometric information *specifically* could still face breach of privacy or negligence claims if their employee's biometric information is compromised.

### Tips for Employers

Due to the growing number of data breaches, employers are encouraged to ensure they have protocols in place to safeguard all of the personal information they possess, particularly biometric information.

Whether you are thinking about adopting and using biometric data or have already implemented this technology, it is vital that employers take the following steps before collecting *any* biometric data to ensure their use complies with the growing regulation in this area:

1. Assemble a **team of experienced legal, cyber-security, and data-breach experts** prior to selecting or implementing any technology that uses biometrics. Involve this team in vetting potential vendors, negotiating the terms of vendor contracts, and developing protocols.
2. Carefully draft **policies and procedures to safeguard** and properly destroy biometric information, as well as protocols in case of a breach. Ensure those policies, procedures, and protocols (and those of your outside vendors) comply with all applicable laws, including notice and disclosure requirements.
3. Clearly **disclose to your employees, in writing**, your intent to collect and use biometric information, the ways the information will be used, the means by which the information will be collected, maintained, and eventually destroyed, as well as the safeguards the company has put in place to secure this information.
4. Obtain each **employee's informed written content** prior to collecting any biometric information. Consider good faith objections and requests for accommodation and analyze and address those requests in accordance with all applicable laws.
5. **Continue to monitor changing** federal, state and local regulations in this area.

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