



Illinois Supreme Court Declares That Workers Comp Act Does Not Preempt Statutory Damages Under BIPA

On February 3, 2022, the Illinois Supreme Court in *McDonald v. Symphony Bronzeville Park, LLC*, No. 126511 (Ill. 2022) affirmed the Illinois Appellate Court (First District) decision that the exclusivity provisions of the Illinois Workers' Compensation Act ("Workers' Comp Act") do not bar BIPA claims. Enacted in 2008, the Illinois Biometric Information Privacy Act ("BIPA") generally prohibits the collection, use, and handling of biometric identifiers (i.e., fingerprints, eye scans, etc.) by private entities without prior consent. The Court in *McDonald* agreed with the plaintiff that BIPA claims are not compensable under the Workers' Comp Act and therefore, the exclusivity provisions are not applicable. Although this decision shuts the door on a popular BIPA defense, this significant case of judicial interpretation of the country's strictest biometric privacy act brings clarity for future litigation.

The defendant in *McDonald* argued that the Workers' Comp Act was the sole remedy for accidental workplace injuries; therefore, it should preempt recovery for employees who seek recourse under BIPA for employment-related violations. The plaintiff countered that the Workers' Comp Act is aimed at physical and mental injuries, whereas BIPA is focused on the personal and societal injuries of privacy violations. Ultimately, the Illinois Supreme Court sided with the plaintiff, saying that the Illinois Legislature did not intend for the type of violations contemplated under BIPA to come into purview of the Workers' Comp Act. Rather, BIPA was intended to protect the unique identifiers that are at risk in a manner different than social security numbers and other sensitive personal information because biometric identifiers cannot change once compromised.

This Illinois Supreme Court decision continues a pattern of plain statutory interpretation of BIPA that has allowed plaintiffs to recover large amounts in damages (e.g., Cothron discussed here and Tims discussed here). The *McDonald* decision also diminishes hope for Illinois employers that the courts will accept a pre-emption defense against future BIPA actions. However, efforts remain to safeguard employers and private entities that are being crushed by BIPA's statutory damages. Last year, the Illinois General Assembly proposed an amendment to BIPA that would provide a 30-day curing period for companies (discussed here), thereby relieving employers by softening the severe and inflexible statutory requirements, but it failed to pass after it was not given a third reading (see here). Although *McDonald* and other Illinois court decisions have failed to address the many issues under BIPA such as automatic statutory penalties, increased litigation, large settlement amounts, and overall financial exposure to employers, there is a trend towards more practicable privacy legislation that includes curing periods and reasonable penalties (as seen in New York state) in order to create a more business-friendly environment and restore the true intent of privacy protection.

KD is Here to Help

Should you have any questions or concerns on this matter, please contact Stefan R. Dandelles, Managing Partner of KD's Chicago Office, at (312) 646-6742, Sarah Suddarth, Chicago Attorney, at (312) 863-3697, or Brendon Pashia, Chicago Law Clerk, at (312) 759-1400.