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Proposed Reform to the Illinois Biometric Information Privacy Act May Soften the Nation's Toughest Biometric Privacy Law

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As the first state to offer a private right of action based on biometric statutory protections, Illinois has seen an explosion of lawsuits in recent years based on its Biometric Information Privacy Act ("BIPA"). However, newly proposed amendments to BIPA would thwart the onslaught of employment-related (and other) litigation. BIPA currently requires private entities that capture, retain, and/or disseminate biometric identifiers (i.e., retina or iris scans, fingerprints, voiceprints, palm prints, or face geometry) to obtain an individual's written consent and to publicly disclose their biometric retention policies. As it stands, BIPA provides liquidated damages of $1,000 for negligent violations and $5,000 for intentional or reckless violations, or actual damages, whichever is greater. Although BIPA was intended to address privacy risks in the face of financial transactions, BIPA lawsuits have primarily been brought against employers in relation to collection of biometric identifiers for timekeeping purposes (even where no dissemination of any biometrics has occurred). In turn, settlements have been significant and in some cases, devastating.

Last week, the Illinois House of Representatives Judiciary Civil Committee passed Illinois House Bill 559 ("HB 559") (introduced just a month prior), a bill that makes it harder for a claimant to file suit and emphasizes BIPA compliance by private entities rather than retribution. HB 559:

- Sets forth a curing period of 30 days before an individual can initiate litigation;
- Sets forth a defined a one-year statute of limitations;
- Limits available damages in the form of actual damages for negligent violations and actual damages plus liquidated damages for willful violations;
- Provides that the written retention policy needs only be distributed to those whose biometric information is at issue (as opposed to the public); and
- Excludes BIPA's applicability to employers subject to certain collective bargaining agreements.

HB 559's potential impact is significant because the changes promulgated under same may affect current and future BIPA litigation. HB 559 is not the first legislative attempt at BIPA reform, but fueled by bipartisan support, it is the first bill to advance out of a judiciary committee. Previous bills (many of which echo the proposed amendments in HB 559) have all failed at the committee level. But with increasing BIPA litigation and costly settlements, support for tempering BIPA and emphasizing compliance over litigation is growing. Notably, HB 559 is not the only pending bill seeking to reform BIPA. On the same day that they introduced HB 559, three senators also proposed House Bill 560 ("HB 560"), which seeks to remove BIPA's private right of action and instead contemplates enforcement by the Department of Labor and the Attorney General. HB 560 has not yet advanced out of committee.

While it is evident that there is an increased push for BIPA reform, enactment of HB 559 is not yet guaranteed. HB 559 now moves to the floor of the Illinois House to be voted on by April 23. If approved by the House, it will advance to the Illinois Senate, which must vote on it by May 28, and if approved, the governor will have 60 days to either sign HB 559 into law or exercise his veto power. Unsurprisingly, there is resistance to HB 559. The ACLU Illinois and Illinois Public Interest Research Group, among others, believe that BIPA is vital to protecting a person's biometric information from misuse for commercial gain. While opposition to BIPA reform has been successful in the past, HB 559's advancement out of the Judiciary Civil Committee signals that there is growing support to strike a reasonable balance between protection of personal information and disproportionate recoveries. HB 559 has the potential to dramatically decrease BIPA litigation. Because BIPA has served as a blueprint for other states seeking to enact similar laws, in the event HB 559 or HB 560 is successful, we would expect such other states to again follow Illinois' lead.

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