LEGAL UPDATES

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BIPA Claims Not Barred by Illinois Workers Compensation Exclusivity Provisions

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On February 3, 2022, in a unanimous decision in *Marquita McDonald v. Symphony Bronzeville Park, LLC, et al.*, the Illinois Supreme Court (Court) held that a claim for statutory damages for statutory violations of the Illinois Biometric Information Privacy Act (BIPA) is not compensable under the Illinois Workers' Compensation Act (IWCA) and consequently, is not barred by the exclusivity remedy provision of the IWCA. The Court's rejection of the IWCA preemption defense further underscores the significant risk of substantial financial exposure for violations of statutory privacy rights under BIPA faced by employers that collect and use Illinois employee biometric data.

Factual and procedural background

Plaintiff, Marquita McDonald (McDonald), filed a putative class action against her former employer, Symphony Bronzeville Park, LLC (Bronzeville) alleging violations of sections 15(a) and (b) of the Illinois Biometric Information and Privacy Act as a result of the collection, use and storage of employee biometric data as part of the fingerprint authentication and timekeeping system. McDonald later amended her complaint to withdraw allegations of mental anguish and negligence, limiting the allegations of the amended complaint to technical statutory violations under BIPA and to the statutory remedies of injunctive and equitable relief, liquidated damages, attorneys' fees and costs.

Defendant, Bronzeville, moved to dismiss the claims based on the defense that: 1) the IWCA is the exclusive remedy for accidental injuries transpiring in the workplace, and 2) the IWCA preempts any claims by an employee against an employer arising from common law or statutory right for damages, including under BIPA.

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The circuit court rejected the asserted defense and denied the motion to dismiss. The court held that an injury due to the loss of the ability to maintain privacy rights is distinguishable from the psychological and physical injuries recoverable under the IWCA and are not compensable under the IWCA. The court also specifically concluded that the legislature's inclusion of a reference to BIPA's application in the employment context demonstrated its intent to extend BIPA's protections to employees. Addressing the identical issue on interlocutory appeal, the Appellate Court of Illinois, First District reached the same conclusion as the circuit court.

The Illinois Supreme Court allowed Bronzeville's petition for leave to appeal to address the narrow question of whether the exclusivity provisions of the IWCA bar a claim of statutory damages under BIPA for violation of an employee's statutory privacy rights under BIPA.

Injuries arising from loss of privacy are distinguishable from other occupational injuries

The Court concluded that "personal and societal injuries" resulting from a violation of BIPA are distinguishable from the "nature and scope" of the physical and psychological work injuries compensable under the IWCA. The IWCA is a remedial statute meant to provide financial protection for injured workers until they can return to work. To that end, the IWCA provides a compensation schedule based on injuries that affect an "employee's capacity to perform employment-related duties, which is the type of injury for which the workers' compensation scheme was created." Injuries sustained due to BIPA violations, however, relate to a "lost opportunity" to maintain the right to biometric privacy.

While the IWCA provides the exclusive remedy by which an employee can recover against an employer for a work-related injury, it also contains four exceptions to the application of the exclusivity provisions. The fourth exception excludes injuries not compensable under the IWCA.

The Court concluded that claims of statutory violations for statutory damages under BIPA fall under the fourth exception and are not compensable under the IWCA. Consistent with the lower court decisions, the Court held that the nature and type of injury arising from statutory violations of BIPA are different in nature and scope from injuries compensable under the IWCA, do not categorically fit within the purview of the IWCA, and are not compensable under the IWCA.

The Court also found support for its holding in the text of BIPA and the legislature's inclusion of a reference to BIPA's application in the employment context.

What this means to you

BIPA imposes substantial liability on businesses that fail to follow BIPA's requirements regarding protection of individuals' biometric information. The Court's decision disposes of one potential

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defense employers' have asserted in response to employees' claims of BIPA violations. The Court's decision compels employers to continue to adopt measures regarding collection, use, storage and sharing of employees' biometric information that ensure compliance with BIPA.

Contact us

Husch Blackwell's Labor and Employment team conducts internal audits to review practices regarding collection, usage, storage and sharing of employee and customer biometric information and to aid employers in their efforts to stay compliant with BIPA. Contact Anne Mayette, Tracey O'Brien, Sam Mitchell or your Husch Blackwell attorney for guidance on necessary compliance measures. If you are facing a BIPA suit or exposure, contact Michael Hayes or Anne Mayette, who head our BIPA Litigation Team and have been involved in the defense of dozens of BIPA class action lawsuits.

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