

Illinois' Alphabet Soup of Privacy Protections

BIPA, GIPA, AND PIPA: WHAT THEY MEAN FOR YOUR BUSINESS IN 2024

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Taft/

Introductions



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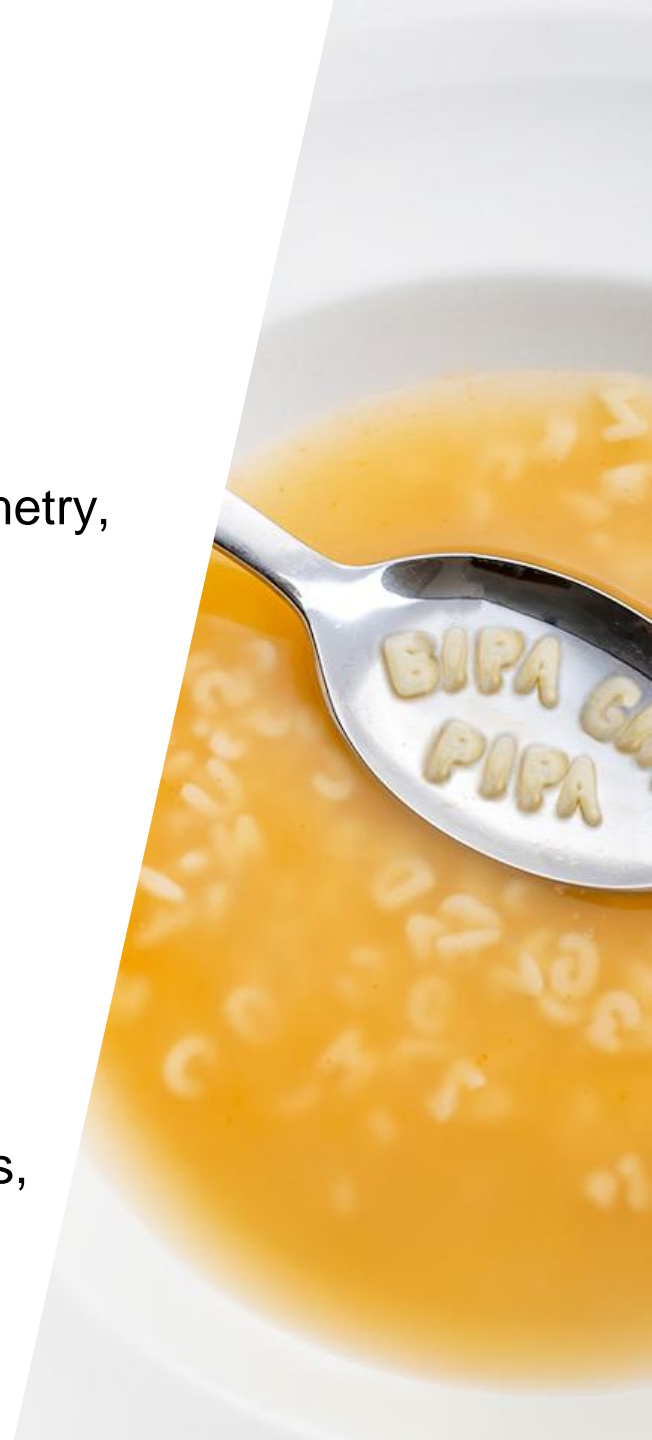
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Decoding the Alphabet Soup

- **BIPA: Biometric Information Privacy Act**
 - Passed in 2008.
 - Protection of biometric information – i.e., finger or hand print, face geometry, retina scan, voiceprint.
- **GIPA: Genetic Information Privacy Act**
 - Passed in 1998.
 - Protection of genetic information – i.e., information of an individual's or family member's genetic test or the manifestation of disease/disorder in family members.
- **PIPA: Personal Information Protection Act**
 - Passed in 2006; amended in 2017.
 - Protection of personal information – i.e., personal identification numbers, health information, financial information.



Illinois Privacy Litigation by Numbers

- **Over 2,000 BIPA Cases** have been filed over the past 5 years. Initial cases filed involved biometric timekeeping or access controls. Recent trend in consumer facial recognition cases; attacks on adequacy of consent.
- **Fifty-Nine** new Illinois cases under GIPA – which allows for even larger potential damage awards than BIPA – compared with **zero** cases in 2022 and **just two** in 2021.
- In 2023, there were **3,205 data breaches** reported in the United States. Increase in Illinois data breach litigation since 2017 amendments to PIPA.



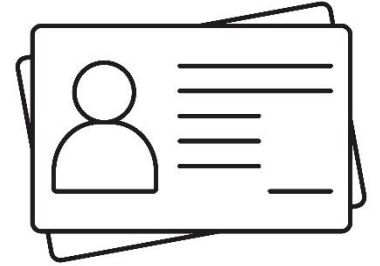
BIPA: Biometric Information Privacy Act

- 2023 Major Court Decisions
 - *Cothron v. White Castle* (per scan damages)
 - *Rogers v. BNSF* (jury applies discretion)
 - *Mosby v. Ingalls Memorial Hospital* (healthcare exemption)
- Insurance Coverage
- Legislative amendments (SB 2979)
- Mass Arbitration



Trends in Technology Subject to Litigation

- Government **ID check** (mobile apps, dispensaries)
- **Liveness scans** (mobile apps)
- Facial recognition **cameras** (real estate owners)
- **Driver distraction** detection (trucking; consumer)
- **Voice** recognition (McDonald's, inventory control)
- Fingerprint scanner cases remain (ongoing litigation regarding joint employment; active step)



New Theories of Liability Being Propagated

- Consent does not include **proper parties** (i.e., affiliates, staffing agencies, technology providers).
- Consent does not address **all technology** being used.
- Consent does not incorporate all relevant **purposes**.
- **Retention period** in policy is incorrect (destruction upon the *earlier* of completion of purpose or 3 years).
- **Failure to safeguard** to the same extent as other private information (Section 15e).



DATA MINING



PATTERN RECOGNITION

Best Practices for Minimizing Exposure

- Understand what technologies **actually involve** the collection of biometric information.
 - Do not rely on vendor / salespeople.
 - Read the contract. Are biometrics mentioned? Indemnification?
- Ensure BIPA policy is public and **complies in practice**.
 - Pre-collection consent, purpose, safeguarding, dissemination, deletion.
- Still may need independent consent even if one obtained by technology provider (which may be deficient).

Proliferation of Mass Arbitration

- Consumer and employee litigation
- Law firm solicitations; social media campaigns
- Intuit, Uber, Doordash, Amazon, Chegg
- *Wallrich v. Samsung* (50,000 claims, \$4 million fees)
 - Stayed pending expedited appeal



Best Practices to Avoid Mass Arbitration

1. **Review arbitration agreements** and consent process.
2. Informal dispute resolution **process** (SOL are stayed).
3. Consider **small claims election** (mass arb escape hatch).
4. **Avoid unconscionability** (notice, opt out, mutuality).
5. Don't agree to pay all **arbitration fees**.
6. Fee shifting for frivolous or harassing claims (forum dependent).
7. **Choose arbitral bodies with mass arbitration rules.**
 - Identify the rules to be applied.
 - Incorporate batching or **bellwether** proceedings.

Differing Arbitral Bodies

- Special Mass Arbitration Rules and Fees
 - American Arbitration Association (**AAA**) (updated 1/15/24)
 - National Arbitration and Mediation (**NAM**) (updated 8/24/23)
- No Mass Arbitration Rules and Fees Yet
 - ADR Systems Inc. (**ADR**)
 - International Institute of Conflict Prevention and Resolution (**CPR**)
 - Judicial Arbitration and Mediation Services, Inc. (**JAMS**)



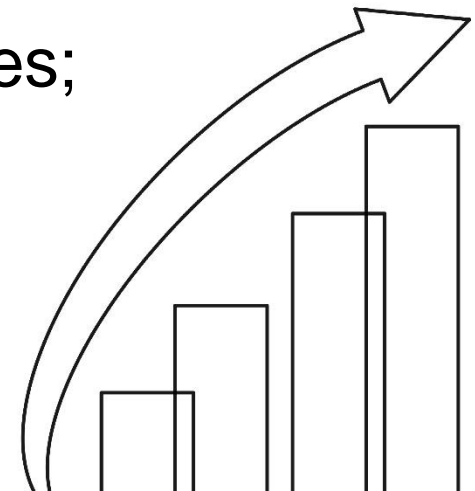
GIPA Genetic Information Privacy Act

- “Genetic information” includes family medical history.
- Employers may not:
 1. solicit or request genetic information as a condition of employment;
 2. make employment decisions based on genetic information;
 3. discriminate or retaliate because of genetic information.
- Greater potential damages than BIPA!
 - \$2,500 per negligent violation; \$15,000 per intentional or reckless violation.

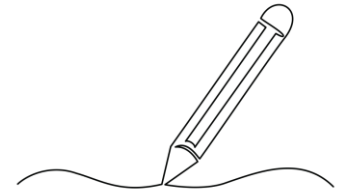


GIPA: The New BIPA?

- Given its *similar* private right of action and *greater* statutory damages model to BIPA, GIPA class actions are on the rise.
- Since passage in 2008, GIPA saw little action in first decade.
 - 2021 – 2 cases
 - 2022 – 0 cases
 - 2023 – ~**60 class actions in Illinois (employers, insurance, healthcare)**
- Most claims center on pre-employment questionnaires; also physicals or medical evaluations as part of application process or return to work.



GIPA: Best Practices to Minimize Exposure



1. **Remove** from applications **any rote inquiries** into family medical histories.
2. **Add disclaimers** to post-offer and pre-employment questionnaires that ask employees not to provide genetic information when responding to requests for medical information.
3. **Advise third-party medical providers** in writing to **modify their procedures** and not ask employees about family medical history.
4. **Workers' compensation exception** – employees may execute authorization that they voluntarily engage in medical exam for workers' compensation purposes.
5. Update **indemnification** obligations in contracts with third-party medical providers and **review insurance coverage**.

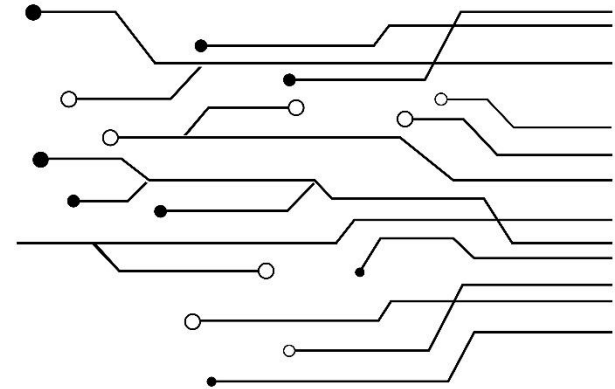
PIPA: Personal Information Protection Act

- Addresses data breaches involving the exposure of SSN, driver's license numbers, state identification numbers, credit or debit card numbers, medical or health insurance information, biometrics, etc.
- PIPA requires:
 - Maintaining ***reasonable security measures*** to protect personal information.
 - Notifying Illinois residents in the “most expedient time possible and without unreasonable delay” and IL Attorney General of any breach, if more than 500 Illinois residents impacted.



PIPA: Personal Information Protection Act

- **Private Right of Action** under the Consumer Fraud and Deceptive Business Practices Act
 - Recover only actual damages for specific economic injuries.
 - Example – cost of ongoing credit monitoring services; cost of fraudulent credit card charges resulting from breach.
 - Diminution of the value of personal information is *not* a specific economic injury for purposes of PIPA.
- **Common Law Negligence**
 - Changes to PIPA that have led plaintiffs to argue that there is a common law duty.
- **Attorney General** may sue for violations, seeking injunction, revocation of the right to do business in Illinois, restitution, and a fine.



PIPA: Best Practices to Minimize Exposure

- Review/obtain ***insurance coverage***
- ***Train*** your workforce; may be required by insurer
- Understand ***potential vulnerabilities*** of third-party software
- Partner with counsel to ***review policies*** regarding data storage, deletion, encryption, and breach notification
- ***Encrypt*** all communications
- ***Delete*** confidential information
- Implement ***breach notifications***



Thank You!

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