

Presentation on Biometrics Data Privacy for ACC Retail Affinity Group

*Summary on Compliance, Legislation and Recent Litigation
Issues Facing Retailers*

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Agenda

- Introduction – Biometrics Overview
- Current Biometrics Laws
- Illinois BIPA Requirements and Compliance
- Pending Biometric Litigation
- Litigation Risks
- Future Legal Issues and Trends
- Questions



Introduction – Biometrics Overview

What is it?

Biometrics are your physical or behavioral attributes that can be used to personally identify or authenticate who you are

When is it used?

Requires your interaction with the world

Introduction – Biometrics Overview (Cont'd)

Why is it used?

Advantages:

(1) efficient, (2) convenient, (3) secure, (4) experience

Disadvantages:

(1) costly, (2) breaches possible, (3) tracking, (4) accuracy

Introduction – Biometrics Overview (Cont'd)

Where is it used?

Broad application in different industries and businesses

General Examples/Applications

(1) Entry/exit, (2) Payments, (3) Marketing, (4) Security

Specific Applications to Retailers

(1) Payments, (2) security, and (3) marketing

Current Biometrics Laws

2008 - Illinois Biometric Information Privacy Act (BIPA)

2009 – Texas Business and Commerce Code § 503.001

2017 – Washington H.B. 1493

2018 – California Consumer Privacy Act (CCPA)

2019 – New York Stop Hacks and Improve Electronic Data Security Act (SHIELD)

2020 – California Privacy Rights Act (CPRA)

2021 – Virginia Consumer Data Protection Act (CDPA)

Illinois' BIPA Requirements

Statute Has Five Requirements:

1. Public, written policy
2. Notice/Informed Consent
3. Limited disclosure
4. Reasonable care
5. Profit



How Can A Business Be BIPA Compliant?

- **Written biometrics policy:**
 - Notice of collection, use, and storage of biometrics, including types of data
 - Purpose for collection and use
 - Length of time data collected, used, or stored
 - Retention and destruction of data
 - Protective measures in place (retention/destruction, consent, security, etc.)
 - How data will be used or shared
- **Written notice, informed consent, and limiting disclosure**
 - Written notice and disclosures about the above
 - Statement company will not disclose or sale/profit from data without consent from the individual
 - Consent is a robust defense

How Can A Business Be BIPA Compliant? (Cont'd)

- **Security Measures**

- Implement safeguards to protect biometric data from access or use
 - Reasonable standard of care for the industry
 - Same or more protective than how you store other sensitive PI
- Consider a written information security plan
 - Describe how biometrics data is controlled and why it's appropriate to the type of biometric data being collected
 - Documentation allows you to show you have reasonable security measures in place

- **Other considerations**

- Vendor contracts
 - Update provisions on biometric policies, indemnity, insurance, employee training, deletion, notice of breach
 - Still uncertainty on whether BIPA violations can apply to third party contracts

Pending Biometric Legislation

We anticipate seeing more states with specific biometric laws, either mirroring BIPA or in connection with broader data privacy and data breach requirement legislation

In 2020, numerous states (Arizona, Maryland, New Hampshire, South Carolina, and West Virginia) introduced, but did not successfully pass biometrics legislation

In 2021, see more states introducing privacy-related and biometric specific legislation

- New York AB 27
- Maryland SB 16

Litigation Risks

- BIPA
 - Applies to Illinois residents, and all companies operating in Illinois regardless of where it is based
 - Unlikely to avoid BIPA requirements through choice of law provisions
 - “Strict Liability”
 - Violations lead to statutory damages
- Private right of action for violations
 - Up to \$1,000 for each negligent violation
 - Up to \$5,000 for each intentional or reckless violation
 - Actual damages
 - Attorney’s fees and costs
 - Injunctive relief
- Case Examples, Including Actions Against Retailers



Future Legal Issues and Trends

Specific Issues and Trends

- Scope of “biometric data”
- Scope of BIPA violations on third-party vendors
- Preemption by other federal laws
- Standing / Personal Jurisdiction
- Statute of limitations



General Observations

- Introduction of more biometrics-specific legislation
- Potential for federal data privacy or biometrics law

Questions



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