

Howard & Howard

law for business®

PRIVACY LAW COURT RULING MAY AFFECT YOUR BUSINESS - ARE YOU READY?

LEGAL ALERT

ILLINOIS SUPREME COURT RULES NO ACTUAL INJURY IS REQUIRED TO BRING SUIT UNDER THE ILLINOIS BIOMETRIC INFORMATION PRIVACY ACT

January 25, 2019

In a much-anticipated decision, the Illinois Supreme Court ruled January 25, 2019, that a lawsuit can be brought under the Illinois Biometric Information Privacy Act (“BIPA”) without the Plaintiff making an allegation of “actual injury or adverse effect”. The case is captioned *Stacy Rosenbach v. Six Flags Entertainment Corp.*, No. 123186 (Ill.) Today’s ruling may have wide ranging effects as BIPA is the most watched U.S. law governing the collection and use of biometric data, which includes retina and iris scans, fingerprints, voiceprints, scans of hands or face geometry or biometric information. Such data is regularly used for purposes of employee timekeeping and customer identification.

The case arose from Six Flag Entertainment’s use of fingerprinting patrons in connection with the issuance of repeat-entry passes into its amusement park. Six Flags would scan pass holders’ fingerprints as a means of quickly identifying customers thereby expediting their entry into the park and preventing people from using another person’s pass. In June 2014, Alexander Rosenbach, a 14-year-old student, visited the park as part of a school field trip. Prior to the field trip, Alexander’s mother had purchased, online, a season pass. Unbeknownst to her, the sign-up process had to be completed in person when Alexander arrived at the park. Upon arriving Alexander was fingerprinted and then issued a season pass card. At no time prior to the fingerprinting of Alexander did either he, or his mother, give written consent to the “collection, storage, use, sale, lease, dissemination, disclosure, re-disclosure, or trade of, or for [defendants] to otherwise profit from Alexander’s biometric data.”

BIPA contains specific requirements regarding the collection and use of biometric data, including:

- 1) informing the subject, in writing, that biometric data is being collected or stored;

- 2) informing the subject, in writing, of the specific purpose and length of time for which the biometric data is collected, stored or used; and,
- 3) written consent to collect and use the biometric data is received from the subject.

In the event that BIPA's requirements are not met, an "aggrieved" person may bring a private cause of action. A violation of BIPA resulting from a party's negligence may result in liquidated damages of \$1,000 or actual damages, whichever is greater. An intentional violation or a violation resulting from a party's recklessness may result in liquidated damages of \$5,000 or actual damages, whichever is greater. In either case, attorneys' fees and costs, expert witness fees and other litigation expenses may be awarded.

The Court of Appeals held that a party may not bring an action under BIPA if only a technical violation of the law existed, but rather, some actual harm must also exist, thus upholding the district court's dismissal of a portion of the Plaintiff's Complaint. The Supreme Court reversed the decision and found that one need not allege an "actual injury" under BIPA in order to bring a lawsuit. The Illinois Supreme Court found that a party is "aggrieved" if their statutory rights are violated under BIPA, with or without actual injury. The Court reasoned that the violation of a person's rights under BIPA, standing alone, constituted a "real and significant" injury. Accordingly, Six Flags will have to defend the claims that they violated Alexander's rights under BIPA by collecting and using his biometric data without fulfilling the requirements of BIPA.

The full ramifications of the Court's ruling are difficult to predict, however, one thing that is known is that strict compliance with BIPA is a must. Other states are looking to Illinois for guidance in to enacting their own biometric privacy laws and thus, the Court's decision may pave the way for an increase in privacy obligations for businesses that use or capture biometric data. Many cases already are pending across the nation dealing with privacy and the use of biometric data, and today's ruling will certainly add fuel to the fire.

If you have questions about how this applies to you or your business, please contact us:

Brian J. Pezzillo, Esq., CIPP/E, CIPM
3800 Howard Hughes Pkwy., Ste. 1000
Las Vegas, NV 89169
bjp@h2law.com
702.667.4839