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BIPA Litigation Update: *Cothron*'s Impact and Employer BIPA Defense Affirmed

BY SUSAN LORENC, DREW MOORE, JAMES SHREVE, & RYAN GEHBAUER

The Illinois Supreme Court's most recent rulings have cut both ways while further clarifying the contours of litigating Illinois Biometric Information Privacy Act ("BIPA") claims. On one hand, its decision in the *Cothron v. White Castle System* case seemingly continues its trend to expand theoretical BIPA liability by both greatly magnifying the scope of theoretical liquidated damages while spurring even more litigation. Yet the Court's decision

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Supreme Court Rules High Earning Professionals Are Not Overtime-Exempt if Paid Hourly

BY KENNETH KIRSCHNER, ZACHARY SIEGEL, & HEATHER MCADAMS

Relevant Department of Labor regulations state that highly compensated employees are exempt from overtime pay requirements if:

1. The employee earns total annual compensation of $107,432 or more, which includes at least $684 per week paid on a salary or fee basis;
2. The employee's primary duty includes performing office or non-manual work; and
3. The employee customarily and regularly performs at least one of the exempt duties or responsibilities of an exempt executive,

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in *Walton v. Roosevelt University* offers a reprieve to employers defending BIPA claims.

White Castle v. Cothron

Cothron's facts resemble many BIPA claims populating Illinois dockets: a plaintiff filed suit alleging that their employer's implementation of a biometrically-enabled timekeeping system violated BIPA. The plaintiff's lawsuit was premised on the employer's failure to obtain a written release prior to the employee's use of that timekeeping system. *Cothron* introduced a wrinkle bringing the issue of claim accrual directly into issue. The plaintiff's employment started in 2004, four years before BIPA was enacted. White Castle moved to dismiss the claims as time-barred, arguing that—since the plaintiff alleged that they were required to scan their biometrics since early in their employment—the claim itself accrued upon BIPA's enactment in 2008 making 2013 the latest it should have been filed. The plaintiff countered, arguing that a BIPA violation occurred each and every time their biometrics were scanned and transmitted to third-party data processors.

While lower courts previously found that BIPA claims accrued only on the first scan, there has been no binding decision resolving the issue for the past 15 years. That changed with Cothron. The Illinois Supreme Court held that since BIPA contained no text limiting accrual to the first scan, each subsequent scan embodied a separate violation, thus extending the limitations period and significantly increasing the possible liability.

When presented with White Castle's $17 billion damage estimate, based on a potential class size of just 9,500 individuals, the Court held that it was required to effectuate BIPA's clear statutory language, even if the result was "harsh, unjust, absurd, or unwise." The Court noted that ruinous damage awards resulting from a mechanical calculation of BIPA's liquidated damages provision could be mitigated by a trial court's discretion. Since BIPA provides a trial court with the discretionary power to tailor damage awards, a judgment could be tailored so as to provide fair compensation to class members while preserving BIPA's deterrent effect without destroying defendants with ruinous penalties. The Court looked to Illinois' legislature to address potential inequities present in BIPA's liquidated damages provision.

Cothron seems to have emboldened plaintiffs to file even more suits against companies of all sizes throughout Illinois. According to a survey of Illinois' court dockets conducted by Bloomberg Law, the number of BIPA filings has increased by 65% since December 2022, with the largest spike occurring in the month immediately after the decision. If the increase in litigation is due to *Cothron*, it may be an unintended—but predictable—consequence of a decision which lengthened the time period in which to bring claims.

But the Court's decision might be delayed for a while longer, and it may potentially be overruled. On March 13, 2023, White Castle timely filed a petition for rehearing. White Castle's petition laid out three points of issue which it hopes will convince the Court that a new hearing, and another chance at oral argument, are warranted: The technology underlying biometrically-enabled timekeeping and security access scanning systems generally does not create and transmit scans or copies of biometrics on each use.

Instead, the devices generate "data" on the first scan - often anonymized alphanumeric codes which do not actually identify individuals - which are stored into a central database for authentication purposes (often called the "enrollment process"). But each subsequent scan compares the previously stored codes rather than re-capturing or transmitting them. Thus, the "BIPA injury" only occurs once and follow-up scans do not transmit biometric data enabling identification in the broader

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population such as to constitute a "new loss of secrecy."

The Court exceeded previously understood bounds of statutory interpretation by interpreting BIPA's elements in such a manner that unreasonable damages are essentially unavoidable. White Castle pointed to the Court's own statements indicating acknowledgment that "harsh, unjust, absurd, or otherwise unwise" results would flow from its mechanical application of BIPA's provisions. White Castle also noted that liquidated damages must conceptually be based on "a reasonable approximation of the plaintiff's damages" – an approximation missing from the legislative history and the current multiplicative damages scheme (also troubling since there have been no actual damages in any BIPA case to date).

Rather than clarifying how damages should be calculated under BIPA, the Court's statement that liquidated damages "appeared to be discretionary" introduced vagueness into how the lower courts and juries are supposed to assess damages. This is White Castle's last chance to change the Court's mind: no further petitions are allowed if it is denied.

Walton v. Roosevelt University

While litigants were assessing *Cothron*'s effect on their legal strategies, the Court confirmed that at least one defense remained for employers defending employee-led class actions. *Walton v. Roosevelt University* presented similar facts to *Cothron*. The key difference: a union agreement with alternative dispute resolution procedures for employee grievances was in place. The First District Appellate Court previously found in favor of enforcing the agreement, finding that the Labor Management Relations Act (the "LMRA") preempted the employee's BIPA claims from proceeding in state court. The plaintiff appealed.

On March 23, 2023, the Court affirmed the First District's decision, finding that broad management rights clauses encompass BIPA claims even without express references to biometrics in the agreement's terms. The Court recognized the uniformity among federal courts interpreting the LMRA in the context of BIPA claims on this point. Since timekeeping procedures are "a proper subject of negotiation between unions and employers", BIPA complaints related to employers' use of biometrically-enabled timekeeping systems are "clearly covered" by collective bargaining agreements. Corollary to that point, the employers' implementation of retention and destruction schedules for biometric data are likewise subject to a collective bargaining agreement's terms.

There is no sign that plaintiff intends to appeal, but the holding presents some reminders for employers defending BIPA claims: Employers should be vigilant while re-negotiating their union agreements to include or retain broad managements-rights clauses and avoid carve-outs.

Employers currently facing BIPA class action litigation should check their union agreement's terms to confirm whether union employees in their cases constitutes a distinct sub-category of putative class members whose claims should be dismissed and subject to collective bargaining dispute resolution procedures.■

Supreme Court Rules High Earning Professionals Are Not Overtime-Exempt if Paid Hourly

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administrative or professional employee.

In *Helix Energy Solutions Group, Inc. v. Hewitt*, the Supreme Court found that Helix Energy Solutions Group Inc. violated the FLSA by classifying an employee who earned over $200,000 per year as overtime-exempt but calculated his pay on a daily basis rather than on a salary basis.

Although the employee made well over $107,432 in a year and met the second and third requirements of the above test, the Supreme Court held that the employee was nevertheless not exempt under the FLSA, and thus entitled to overtime pay, because his annual compensation did not include "at least $684 per week paid on a salary or fee basis."

Employers should not interpret this ruling to mean that all highly compensated executives are now overtime eligible. Rather, as long as such employees are compensated on a salary basis (which the vast majority are) and meet the other requirements, the Supreme Court ruling would not require an employer to pay them overtime.

Although this ruling may have limited applicability to most employers, it is always prudent to regularly review employment classifications when new guidance or decisions are issued. ■

Illinois Supreme Court Clarifies Biometric Information Privacy Act

BY ASHLEY ORLER & ALYSSA WATZMAN

The Illinois Biometric Information Privacy Act, enacted in 2008, was designed to provide individuals with control over their biometric information and to establish standards for collection. The Illinois Supreme Court has recently issued three opinions interpreting provisions of the BIPA, two of which are likely to result in a spike in BIPA claims and related litigation.

What Is the BIPA?

The BIPA requires private entities that collect "biometric identifiers" to meet certain standards summarized below. "Biometric identifiers" include a "retina or iris scan, fingerprint, voiceprint, or scan of hand or face geometry," or "biometric information," regardless of how it is captured, converted, stored, or shared, based on an individual's biometric identifier used to identify an individual.

The standards are as follows:

1. Develop a publicly available, written policy establishing a retention schedule and guidelines for permanently destroying biometric identifiers and biometric information.
2. Inform data subjects in writing that biometric identifiers or biometric information is being collected or stored, including the specific purpose and length of the collection or storage, and obtain a written release from the data subject before the collection.
3. Protect biometric identifiers and biometric information from disclosure or dissemination absent consent from the data subject or if the disclosure is required by law or court order.

The BIPA allows any aggrieved person to bring a private action alleging a BIPA violation with the potential to recover a set amount for each violation.

Decision One: BIPA Claims Have a Five-Year Statute of Limitations

The BIPA, as originally drafted, did not contain a statute of limitations. On February 2, the Illinois Supreme Court ruled in Tims v. Black Horse Carriers, Inc., that BIPA claimants have *five years* from the date of an alleged violation to assert any type of BIPA claim.

The plaintiffs in *Tims* filed a class action complaint against their former employer, *Black Horse Carriers, Inc.,* alleging that the employer violated the BIPA by requiring its employees to use a time clock that scanned fingerprints. The employer argued that the lawsuit was untimely, contending that a one-year statute of limitations period should apply.

In its decision, the Court reviewed the intent of the legislature in passing the BIPA, citing to the "fears of and risks to the public surrounding the disclosure of highly sensitive biometric information," and holding that Illinois' five-year "catch-all" limitations period applies to BIPA claims.

Decision Two: Each BIPA Violation Gives Rise to a Separate Claim

The BIPA, as originally drafted, did not clearly define what constituted an individual "violation" for purposes of a claim. On February 17, the state Supreme Court ruled in *Cothron v. White Castle System, Inc.*, that a separate BIPA claim accrues with each violation.

The plaintiff in *Cothron* filed a class action against White Castle, alleging that the company failed to comply with the BIPA's notice and consent provisions before requiring employees to scan their fingerprints to access pay stubs and work computers. The plaintiff alleged that the employer violated BIPA every time it scanned fingerprints and provided those scans to a third-party vendor – beginning in 2008 and continuing through 2018.

The employer argued that the plaintiff should have sued in 2008, when the BIPA became effective and that only the first fingerprint scan or dissemination of the scan should count as a violation. The employer also argued that because the BIPA authorizes a certain recovery for each violation, applying the plaintiff's interpretation would result in "astronomical" damage awards that could exceed $17 billion in this case alone.

In its decision, the Court found that the plain language of the BIPA applies to multiple collections and disseminations of biometric identifiers or information. Responding to the employer's argument that the ruling would result in "annihilative liability," the Court cited to the potential recovery as an incentive for employers to comply with the law. In any event, the Court said, trial courts presiding over BIPA class actions have discretion to fashion a damage award that fairly compensates class members, deters future violations, and does not destroy the defendant business.

Decision Three: BIPA Claims From Union Employees May Be Preempted by Federal Labor Law

In *Walton v. Roosevelt University*, the Illinois Supreme Court found that section 301 of the Labor Management Relations Act preempts BIPA claims asserted by union employees if the employees are covered by a collective bargaining agreement that includes a broad management rights clause.

This ruling means that collective bargaining agreements and federal labor laws will dictate the course of BIPA claims for many unionized workers.

In *Walton*, a former employee filed a class action complaint alleging multiple violations of the BIPA when the university scanned

employees' hand geometry onto a biometric timeclock. The former employee was a union member, and the contract contained a clause allowing the employer to have "exclusive rights to direct the employees covered by [the contract]." Relying on established federal law recognizing preemption when claims depend on interpretation of a collective bargaining agreement, the Court found that the BIPA claims were preempted.

What Now?

The *Tims*, *Cothron,* and W*alton* decisions demonstrate the importance of companies' remaining sensitive to the requirements of the BIPA. ■

With Charge Against Apple, NLRB General Counsel Seeks to Expand Scope of Protected Concerted Activity

BY NICHOLAS S. RUBLE

Apple was recently charged with violating the NLRA by enforcing a facially neutral policy against solicitation and distribution in the workplace, which General Counsel Jennifer Abruzzo has alleged has the effect of violating workers' rights to solicit union membership and distribute union literature. Furthermore, the GC alleged enforcement of the policy, along with interrogation of suspected organizing employees, was intended to chill a union organizing campaign at an Apple store.

A hearing was recently held before an administrative law judge, and at the end of February, the Union (Communications Workers of America), Apple, and the GC submitted their post-hearing briefs.

In its briefing, the GC signaled the long-anticipated further expansion of "protected concerted activity" under the Act. Although the Board need not adopt the GC's arguments in their entirety, the briefs speak clearly to the GC's enforcement priorities in the second half of President Biden's term. The briefing also confirms the GC is intent on following through on her vocal support of workers' rights.

It is crucial that employers and practitioners keep up with this rapidly developing area of the law.

Contrary to popular misconception, the NLRA provisions related to "protected concerted activity" apply with equal force to employers without unions as they do to union shops. Although the Apple case applies in the context of a union organizing campaign, concerted activities need neither be organized nor with the aid of a union at all. In short, employers should treat any employee complaint or comment about working conditions as protected activity.

The Board has also recently held that severance agreements which contain non-disparagement and confidentiality clauses may run afoul of the Act, where they potentially hinder employees' rights to discuss working conditions.

Clearly, the Board is rapidly changing the playing field. Employers should always be aware that when an administration changes from Republican to Democrat (or vice versa), NLRB policies are likely to undergo significant changes.

Section 7 of the Act protects "concerted" employee conduct for employees' "mutual aid and protection."

The current GC has been aggressive about seeking expansion of section 7 to include a broader range of activity, even beyond the Obama Board and other employee-friendly predecessors. This GC has been particularly focused on the remedial nature of the Act and its Depression-era origins. The importance for all employees is sharpened even further by the Board's recent decision to expand the traditional "make whole" remedy to include reasonably foreseeable consequential damages.

The GC noted in its briefing that concerted activity includes not only an explicit group complaint, but also "when the totality of the circumstances supports a reasonable inference that the employee was seeking to initiate or prepare for a group action." A creative employee could bend almost any workplace complaint to fit this expansive definition of "concerted activity." Under such a definition, employers should consider most any complaint or comment about working conditions to be protected under the Act.

Factual Background and Board Charges

In May 2022, the Union filed a charge alleging Apple violated section 8(a)(1) of the Act by maintaining and enforcing a "solicitation and distribution policy" at its World Trade Center store in New York City that violated employees' section 7 rights.

Since 2016, Apple maintained a facially neutral policy against solicitation for any business and distribution of any literature,

regardless of content. Prohibited solicitation included "for your own hobbies or business (such as jewelry, makeup, personal training services), charitable campaigns or political causes – during work time." Employees could not distribute literature of any kind during work time "or in a work area. Third parties are not permitted to distribute materials or solicit employees, vendors, or customers on Apple property at any time."

In January 2021, employees at the WTC store began working with the Union to form an affiliate "Apple Retail Union." In May and June 2021, as the Union organizing campaign began heating up, employees placed Union flyers on the breakroom tables at the WTC Apple Store, in employee bathrooms, and on bulletin boards in employee common areas. By placing Union flyers in these areas, the employees violated Apple policy, and on several occasions, Apple managers allegedly removed the flyers from breakroom tables, bulletin boards, and bathrooms. Apple managers are also accused of interrogating employees who were suspected of being involved in the organizing campaign.

The GC argued that Apple violated the Act by prohibiting distribution of union literature in break rooms and other "nonworking" areas. Exercise of section 7 rights includes the right to communicate at the job site regarding both organizing efforts and the terms and conditions of employment. The Board has long held that since employees are most likely to interact, they need not limit union organizing discussions to off-duty hours, off-premises. However, employers may limit such discussions under "special circumstances" necessary to "maintain production or discipline." The GC and the Board are likely to make it even more difficult for employers to reach that already lofty standard.

Finally, the GC argued that confiscation of union literature from non-working areas is presumptively a violation of the Act, unless the employer "can affirmatively demonstrate the restriction is necessary to protect its property interest." Therefore, solicitation and distribution policies do not fall within the ambit of the watershed 2017 decision in The Boeing Co., 365 NLRB No. 154. According to the GC's argument, "work rules prohibiting solicitation during nonworking time in work areas and distribution during nonworking time in nonworking areas are presumptively unlawful unless the employer can demonstrate the restrictions are necessary to maintain production or discipline."

Importantly, an employer will not be protected by promulgating a blanket prohibition of solicitation or distribution. An employer may have and enforce a work rule barring employees from selling yoga pants, timeshares, or candles, or trying to rally support for a political candidate or attract religious converts. But if the rule is maintained in a manner that interferes with employees' distribution or solicitation rights, it violates section 7 if the employer cannot show special circumstances justify the rule.

Moreover, the Board will have no problem finding a violation where an employer removes union literature but permits other non-union literature (such as coupons, event flyers, advertisements, and the like) to remain.

Takeaways

What should employers do in light of the Apple case and the emerging Board law which seems to favor employees?

1. Evaluate workplace solicitation and distribution policies to ensure they do not unlawfully restrict section 7 rights. A policy which prohibits distribution and solicitation "except for information related to the terms and conditions of employment" might pass muster with the Board. Such a policy, however, must still be applied in a consistent manner that does not infringe employees' section 7 rights.
2. Avoid any rule or action that would chill union activity in nonworking areas during off-duty time. If a discussion is taking place in a breakroom during the lunch hour, managers should be trained to not go in and "break it up," even if such discussions make others uncomfortable. Of course, employers may still enforce disciplinary rules if, say, a physical fight breaks out among co-workers.
3. Remember the acronym TIPS for responding to organizing campaigns. Avoid any activity by management that could be interpreted as a Threat, Interrogation, Promise, or Surveillance related to union organizing. Whether inquiries about a campaign comprise unlawful coercive interrogation is a multi-factor analysis, but keep in mind the GC and the Board are likely to have a dim view of an employer's questioning of an employee about the union.
4. Employees are more likely to invite a union into the workplace where there are communication problems with management or uncompetitive pay and benefits. Nothing prohibits an employer from asking employees how to improve working conditions, but employers should take care not to make it seem like a "promise" to raise wages and benefits if employees vote against the union. If employers are pro-active about addressing workplace problems as they arise, unions will have less traction with employees.
5. Start planning now how to respond to union activity and training managers on how to respond (or more often, refrain from taking action). The added publicity from Board actions against large companies like Apple will no doubt draw the attention of employees in all industries and companies of all sizes. Advanced planning now may help resist a charge and adverse finding by the Board, and perhaps resist the organizing campaign altogether.■

Say What? NLRB Rules Employees May Tape Record Others in Violation of State Law

BY ELIZABETH TORPHY-DONZELLA

When I was first practicing law, I quickly learned that the answer to many legal questions under National Labor Relations Act depends on which Board's decision you pick. If the Board has a majority of members (the name for those people who issue decisions) appointed by a Republican president, I was likely to find an answer that would please my management clients (and the partner who asked me to do the research).

By contrast, if the Board's majority was comprised of appointees named by a Democrat president, the outcome would vex my clients. In other words, the "rules of the game" shift with administrations.

Hence, I am here today to report a recent NLRB ruling against Starbucks that concluded that, "[s]tate law be damned," employees may lawfully commit an act unlawful under the law of their state if they do so for reasons they claim to be protected concerted activity (PCA) under the NLRA. Okay, I'm being a little flip. The Board concluded in its decision that state laws that require that both parties to a conversation consent to its recording (or else the recording violates State law) are preempted (that is, displaced) where the recording is in furtherance of PCA.

In the Starbucks case, employees who were working hard to get their coworkers to vote for union representation recorded conversations with managers. One said she did so because she afraid management would retaliate against her and wanted or preserve a "neutral source" of what was said. Another stated that he had been advised by a union organizer to record the meeting to "preserve evidence" in case of potential retaliatory discipline.

When the recorded conversations were introduced during a hearing on unfair labor practice charges, Starbucks said managers were unaware of the recording and such recordings were a felony under Pennsylvania law (hence should not have been allowed into evidence). The administrative law judge hearing the case allowed the evidence, and the NLRB affirmed the ALJ's decision.

The NLRB opined that there was evidence managers knew that the recordings were being made, but even if they did not, Board precedent (you know which precedent) has found that surreptitious audio or video recordings are fair game when employees are engaged in PCA.

Said the Board:

As relevant here, the Board has found that employees have engaged in protected workplace recordings when such recordings were made to police the parties' collective bargaining agreement or preserve evidence for use in a future proceeding, including a possible grievance. … The Board has also found such recordings to be protected when made to document meetings held by an employer regarding unionization and in an effort to collect and compare information a union needs to respond to arguments advanced by the employer at the meeting about unionization.

… In many instances, workplace recordings, often covert, have been an essential element in vindicating employees' Section 7 rights. The Board found in the case before it that some of the employees' recorded evidence revealed labor law violations by Starbuck's management and thus served to vindicate the employees' rights. And this end justifies the means because "when a state purports to regulate conduct that is arguably protected by Section 7 or an unfair labor practice under Section 8, 'due regard for the [NLRA] requires that state jurisdiction must yield.'"

In other words, tough luck Pennsylvania law! ■