

After Ill. Ruling, Trucking Cos. Must Review Biometric Policies

By **Alexander Baker, Matthew Giardina and Howard Goldberg** (March 2, 2022)

In *McDonald v. Symphony Bronzeville Park LLC*, decided by the Illinois Supreme Court on Feb. 3, the court ruled that the state's exclusivity provision in the Illinois Workers' Compensation Act does not bar civil claims under the Illinois Biometric Privacy Act.

Illinois courts have found that workers' compensation is the exclusive remedy unless one of the following applies: (1) the injury was not accidental; (2) the injury did not arise from the employee's employment; (3) the injury was not sustained during the course of employment; or (4) the injury was not compensable under the act.[1]

This ruling will affect any company with operations in the state of Illinois that collects its employees' biometric data — including the Illinois trucking industry, which already has a number of claims related to this issue pending with the courts.

Under the Privacy Act, "biometric identifier" means a retina or iris scan, fingerprint, voiceprint, or scan of hand or face geometry.[2] Employers in the trucking industry, almost as a rule, have embraced the collection of employees' biometric data to better manage their workforces, increase security and improve safety on the roads.

For example, companies routinely use fingerprint software for security locks on devices, and utilize in-cab cameras to detect driver fatigue and roadway compliance.[3] Because the trucking industry has embraced these technologies, they have become targets for Privacy Act claims, as statutory damages include \$1,000 for each negligent violation and \$5,000 for each violation if proven intentional or reckless.[4]

Courts have established that a violation of the Privacy Act applies to every capture, not just when the company first obtains the information, so damages can quickly accumulate.[5] Companies must take these claims seriously, and must implement safeguards to prevent future exposure.

In *McDonald v. Symphony Bronzeville Park*, the plaintiff, Marquita McDonald, filed a class action against her employer, alleging that Bronzeville negligently failed to obtain a written release from her prior to collecting, using and storing her biometric data.[6] The biometric identifier at issue in that case was her fingerprints, which Bronzeville used in conjunction with software for authenticating and



Alexander Baker



Matthew Giardina



Howard Goldberg

tracking employees' time.[7]

Bronzeville moved to dismiss McDonald's claims, arguing that the Illinois Workers' Compensation Act was the exclusive remedy for accidental injuries occurring in the workplace.[8] The trial and appellate courts each denied Bronzeville's motion to dismiss, finding that the exclusivity provision of the Compensation Act does not bar claims alleging violations of an employee's rights under the Privacy Act — and the Illinois Supreme Court agreed.[9]

Justice Michael Burke, in a special concurring opinion, pointed out that McDonald's claim prevailed because she withdrew her original allegations that she suffered mental anguish as a result of Bronzeville's collection of her biometric data.[10]

Had she pursued those allegations, Justice Burke reasoned, then the Workers' Compensation Act's exclusivity provision would have superseded the Privacy Act and barred her claims.[11] This surely amounts to a procedural move to defeat subject matter jurisdiction challenges that will be employed by future plaintiffs in making these claims going forward.

While some states have comprehensive laws governing the collection of biometric information, Illinois is the only state that also permits a private right of action.[12] The Illinois Supreme Court's ruling in McDonald will affect any company with operations in Illinois, but no industry may feel the ripple effect more than the trucking industry.

Put bluntly, the McDonald decision slams the door on any hope that a court would intervene to prevent a flood of these types of claims against employers. Moreover, the decision almost certainly guarantees that the Illinois Legislature will look to amend the statute to curb the anticipated increase in Privacy Act claims.

Relevant here, under the Privacy Act, before obtaining an individual's fingerprint, a private entity must inform the individual in writing that it is collecting and/or storing his or her biometric identifier or biometric information; the specific purpose of collecting or using the biometric identifier or biometric information; and, the length of time for which the biometric identifier or biometric information will be collected, stored and used.[13]

The entity also must obtain a signed written release from an individual before collecting her biometric identifier or biometric information.[14] Under the Privacy Act, "written release" is defined as "a release executed by an employee as a condition of employment." [15]

So what should companies do to comply with the Privacy Act and avoid potential litigation? Once again, companies are allowed to collect biometric data under the Privacy Act — they just need to make it clear to employees what they are collecting, and obtain their employees' signed, written consent.[16]

Any company that operates in Illinois and collects biometric information from employees must conduct a thorough review of how it collects that data, and then revise existing policies to ensure compliance under the Privacy Act. Until the legislature amends the Act, the only way for companies to avoid these claims going forward is to obtain written consent as provided in the statute.

Thus far, courts in Illinois have sided with employees on this issue — and more litigation against companies likely will follow as a result.

Alexander Baker, Matthew Giardina and Howard Goldberg are partners at Manning Gross & Massenburg LLP.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] *Folta v. Ferro Engineering*, 2015 IL 118070 ¶ 14.

[2] 740 ILCS 14 §10.

[3] Vesna Brajkovic. "Truck Drivers Must Be Informed of Biometric Scans in Illinois." Truckinginfo, <https://www.truckinginfo.com/10158906/truck-drivers-must-be-informed-of-biometric-scans-in-illinois>. Jan. 5, 2022.

[4] Eric Miller. "Biometric Privacy Law in Illinois Posing Legal Challenge for Truckers." Transport Topics, <https://www.ttnews.com/articles/biometric-privacy-lawsuits-becoming-pain-illinois-truckers>. Jan. 27, 2022.

[5] Vesna Brajkovic. "Truck Drivers Must Be Informed of Biometric Scans in Illinois." Truckinginfo, <https://www.truckinginfo.com/10158906/truck-drivers-must-be-informed-of-biometric-scans-in-illinois>. Jan. 5, 2022.

[6] *McDonald v. Sympathy Bronzeville Park LLC*, 2022 WL 318649 (Ill. Sup. Ct. 2022).

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.* at ¶ 58.

[11] *Id.* at ¶ 59.

[12] Vesna Brajkovic. "Truck Drivers Must Be Informed of Biometric Scans in Illinois." Truckinginfo, <https://www.truckinginfo.com/10158906/truck-drivers-must-be-informed-of-biometric-scans-in-illinois>. Jan. 5, 2022.

[13] 740 ILCS 14 §15(b).

[14] 740 ILCS 14 §15(b)(3).

[15] *Id.* § 10.

[16] Eric Miller. "Biometric Privacy Law in Illinois Posing Legal Challenge for Truckers." Transport Topics, <https://www.ttnews.com/articles/biometric-privacy-lawsuits-becoming-pain-illinois-truckers>. Jan. 27, 2022.