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Cybersecurity & Privacy Alert

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7th Circuit rules fingerprinting BIPA claims may be preempted in some circumstances by Labor Management Relations Act

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The court affirmed that employee claims for violations of the Illinois Biometric Information Privacy Act by use of fingerprinting logins may be preempted under the Labor Management Relations Act for employees subject to union CBAs.



What's the Impact?

- / This ruling confirms that BIPA claims brought by employees subject to collective bargaining agreements may be subject to challenge if brought in court, and should be properly brought under the CBA
- / Employers using biometric information in the workplace should consult with counsel to ensure compliance with BIPA and other regulations governing biometric data

On Monday, a unanimous three-judge panel of the 7th Circuit affirmed the district court's prior ruling that employee claims for violations of the Illinois Biometric Information Privacy Act ("BIPA") may be preempted under Section 301 of the Labor Management Relations Act ("LMRA")

for those employees subject to a union collective bargaining agreement where interpretation of the collective bargaining agreement is required to resolve the issue.

In *Fernandez, et al. v. Kerry, Inc.*, plaintiffs—members of Local 781 of the Miscellaneous Warehousemen, Airline, Automotive Parts, Service, Tire and Rental, Chemical and Petroleum, Ice, Paper, and Related Clerical and Production Employees Union—alleged, among other things, that defendant violated BIPA by requiring workers to use fingerprints to clock in and out without providing notice and obtaining consent. At the district court level, plaintiffs' claims were dismissed as preempted by Section 301 of the LMRA because resolution required the interpretation of collective-bargaining agreements, which arguably granted management complete control over the method of clocking in and out, including apparently the use of fingerprint identification between defendant and plaintiffs' union.

The 7th Circuit's decision to affirm the lower court's dismissal follows prior decisions involving BIPA claims arising from the alleged collection of fingerprints brought by union workers against their employers. Of greatest significance to the court was its prior June 2019 decision in *Miller v. Southwest Airlines* where it held that disputes about the interpretation or application of a collective bargaining agreement related to the use of fingerprint-scanning time clocks were preempted by the Railway Labor Act ("RLA"). Plaintiffs attempted to distinguish *Miller* by arguing that the RLA is "more preemptive" than the LMRA, but the 7th Circuit disagreed and noted that Supreme Court precedent has equated the preemption standards under both Acts. The court also rejected as immaterial plaintiffs' argument that the means of clocking in and out was a "permissive subject" of collective-bargaining under the LMRA as opposed to a "mandatory subject" under the RLA.

Finally, as it did in *Miller*, the court recognized the significance of the management-rights clauses in the parties' collective-bargaining agreements because "whether [the] unions *did* consent to the collection and use of biometric data, or perhaps grant authority through a managements-rights clause, is a question for [decision under the agreement]." Therefore, because the interpretation of a collective bargaining agreement is required to resolve the issue, Plaintiffs' BIPA claims were preempted. The court further held that such disputes are reserved for an arbitrator per the LMRA; however, it declined to send the matter directly to arbitration as the parties' collective bargaining agreements contained specific steps for submitting a matter to arbitration, and the employees had not followed those steps or sought arbitration in the district court.

With *Fernandez*, the 7th Circuit makes clear that BIPA claims for use of fingerprint-based time clocks brought by employees subject to collective bargaining agreements may have a challenging path forward in federal court in Illinois. Quoting *Miller*, the Seventh Circuit reminded: "States cannot bypass the mechanisms of [federal law] and authorize direct negotiation or litigation between workers and management."

Before relying on this decision in their own workplaces, employers should consult with labor counsel. For more information on the content of this alert, please contact your Nixon Peabody attorney or:

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