



# The Here and Now of BIPA: Updates and Developments in Biometric Privacy

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Ada W. Dolph, Seyfarth Shaw LLP

Danielle M. Kays, Seyfarth Shaw LLP

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# Speakers

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**Danielle M. Kays**  
Senior Counsel  
Chicago  
dkays@seyfarth.com



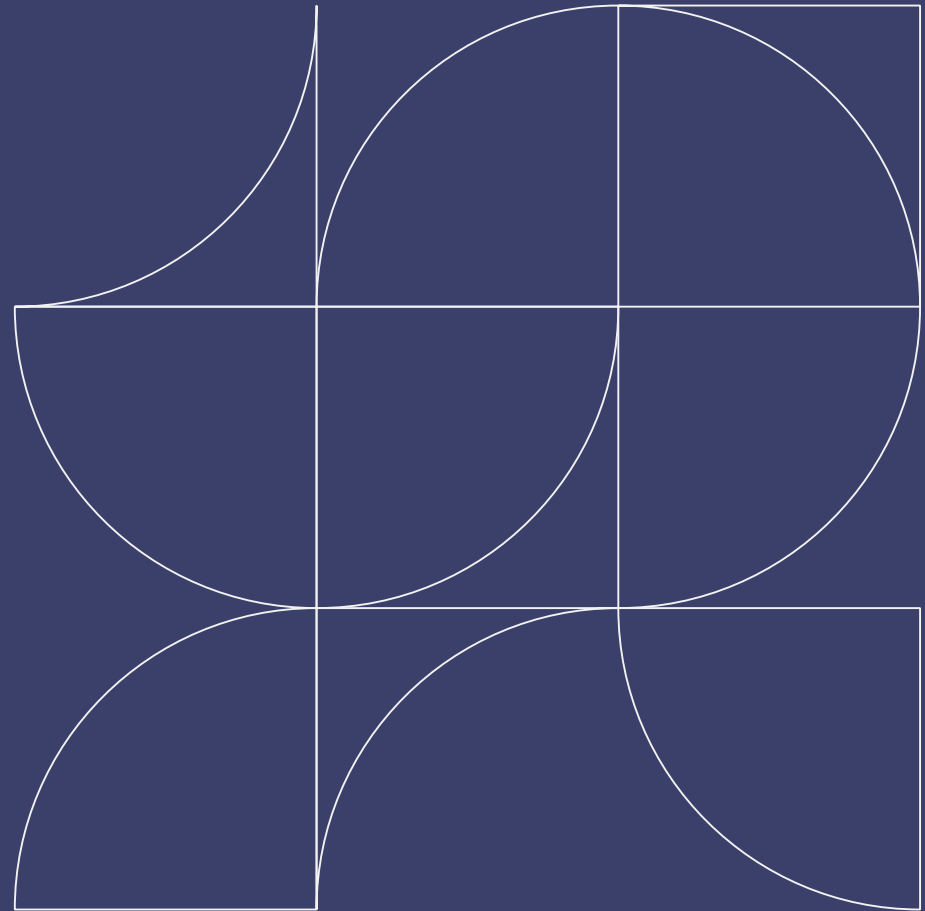
**Ada Dolph**  
Partner  
Chicago  
adolph@seyfarth.com



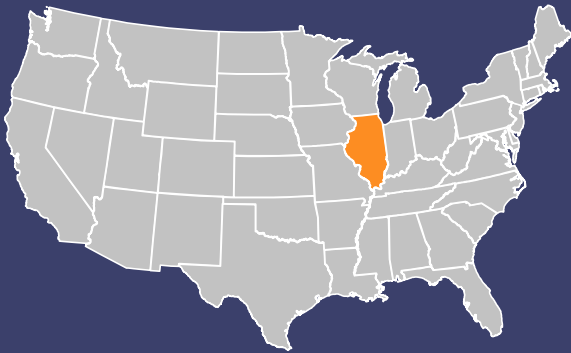
# Agenda

- 1 | Overview of Biometric Privacy Laws in the U.S.
- 2 | BIPA Compliance Requirements
- 3 | Current and Upcoming BIPA Issues

# Overview of the Illinois Biometric Information Privacy Act (BIPA)



## Understanding the **Illinois** BIPA



- Originally enacted in 2008, motivated by the bankruptcy of Pay by Touch (largest fingerprint scan system in Illinois)
- Regulates the “collection, use, safeguarding, handling, storage, retention, and destruction of biometric identifiers and information.”
- Because it has only recently generated litigation, courts are still interpreting BIPA.
- No user injury required to proceed in state court. A statutory violation can be enough.

## Overview

of the Illinois Biometric Information Privacy Act (BIPA)



## “Biometrics” Defined

Biometric Identifier – Includes “a retina or iris scan, fingerprint, voiceprint, or scan of hand or face geometry.”

- Excludes: photographs, human biological samples, demographic data, tattoo descriptions, and physical descriptions
- However, courts have held ***scans of photographs or videos and scans used for artificial intelligence are scans of face geometry***
- ***Voiceprints: do not include voice recordings but any technology that uses voice recognition***

Biometric Information – “any information . . . regardless of how it is converted . . . based on an individual’s biometric identifier”

# BIPA Compliance Requirements

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## NOTICE AND CONSENT

- Written notice and written consent required before collecting and storing biometric data
- BIPA prohibits a company from collecting biometric information unless it “first” obtains consent from individual

## PROTECTION OF DATA

- Requires that employers exercise reasonable care to protect biometric data

## RETENTION

- Written, publicly available retention schedule and guidelines for permanent destruction of biometric data
- Destroy data when purpose has been satisfied OR within 3 years of the individual’s last interaction with the employer, whichever occurs first



## Standard of Care



- Exercise reasonable care to protect biometric data.
- Reasonable standard of care within the industry, and in a manner that is the same as or more protective than the manner in which the business stores, transmits, and protects other confidential and sensitive information (e.g., social security numbers, account numbers, passwords, drivers license numbers, etc.)
- This element of BIPA is largely untested.

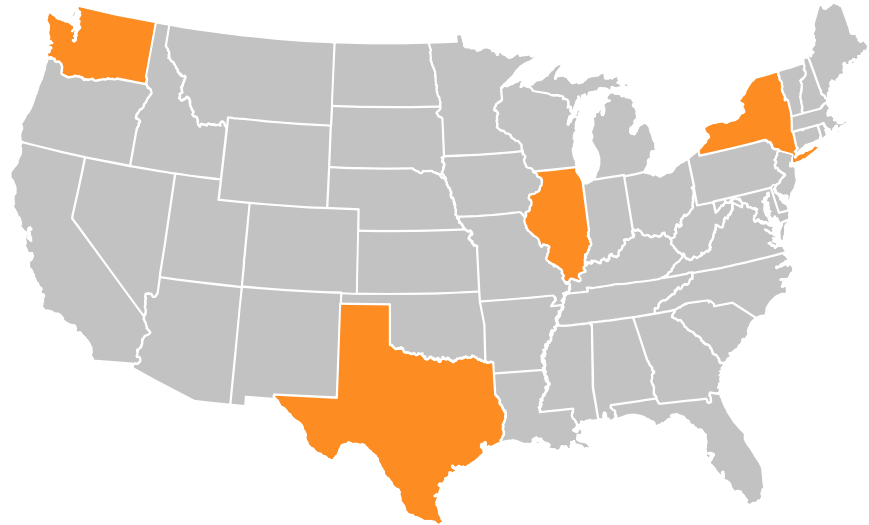
## Cause of Action



- BIPA is the only state biometric privacy law on the books currently that provides a ***private right of action***.
- BIPA Penalties
  - Authorizes **\$1,000** or actual damages (whichever is greater) for ***negligent*** violations.
  - Authorizes **\$5,000** or actual damages (whichever is greater) for ***intentional or reckless*** violations.
  - Injunctive relief and reasonable attorneys' fees (including for expert witnesses) and costs.

## States with Biometric Privacy Laws

- **Illinois** passed the Biometric Information Privacy Act (“BIPA”) in 2008. Contains a private right of action.
- **Texas** followed suit in 2009. No private right of action but the State’s Attorney General began enforcing in 2022 and expected to continue into 2023.
- **Washington** passed its biometric privacy law in 2017. Again, no private right of action but State’s Attorney has not opened enforcement matters.
- **All states** -- invasion of privacy tort suits anticipated.



# Similarities

under State Biometric  
Privacy Laws



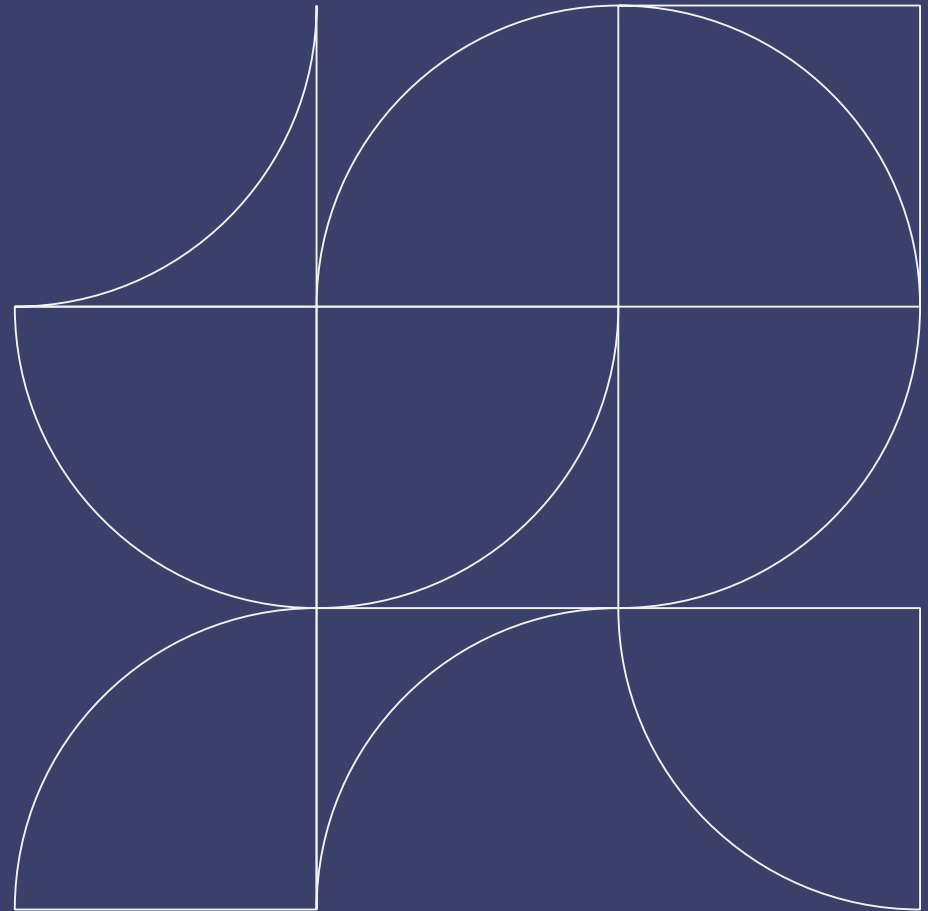
All three laws:

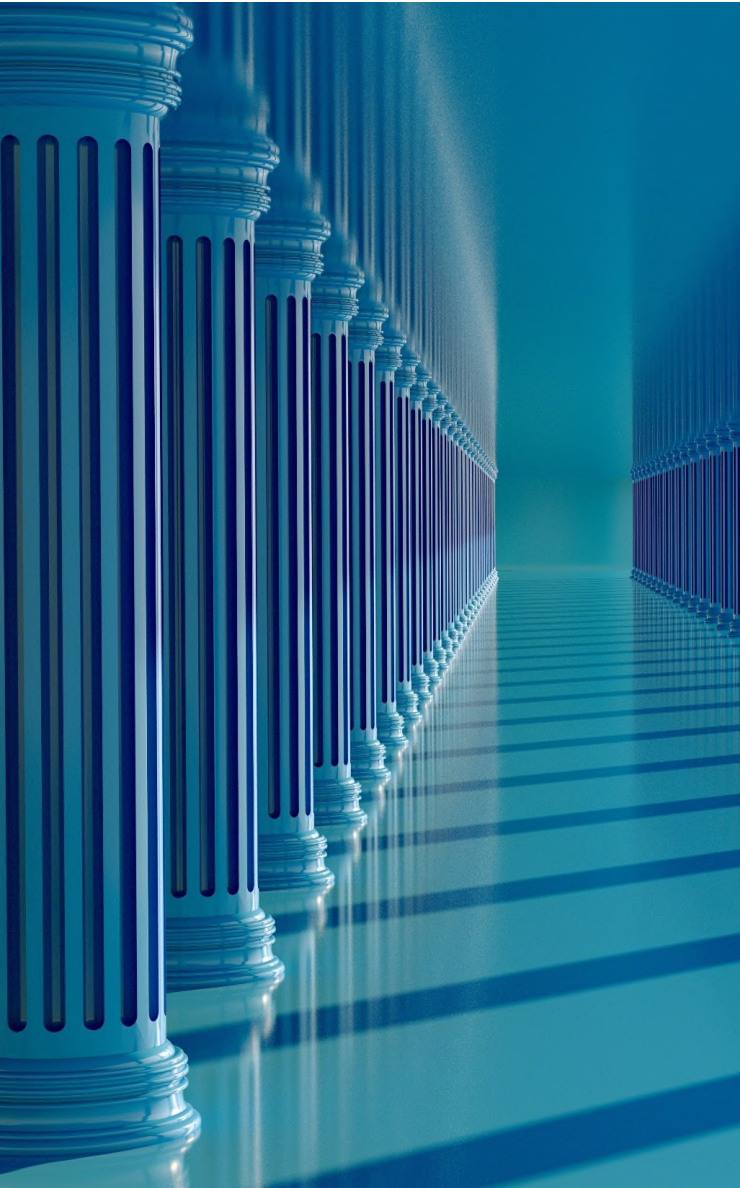
- Place restrictions on the collection and storage of “**biometric identifiers**”
- Require employers to **provide notice** and **obtain consent** before collecting and storing biometric data
  - Only Consent in Texas
  - New York City requires a posting notifying consumers/employees of use of biometric information.
- Require that employers exercise **reasonable care** to protect biometric data and contain **data retention** provisions
- Provide for civil relief

BIPA provides a **private right of action** that allows for recovery of attorneys’ fees.

- State’s Attorney General enforces the laws in TX and WA

# Current and Upcoming BIPA Issues





## Illinois Supreme Court Decides BIPA Statute of Limitations

### *Tims v. Black Horse Carriers, Inc. – decided 2/2/23*

- For sections 15(a) (retention schedule), (b) (written consent and release), and (e) (reasonable standard of care), "there are no words that could be defined as involving publication"
- For sections 15(c) (prohibit sale, lease, trade or profit without consent) and (d) (prohibit disclosure without consent) "the words sell, lease, trade, disclose, redisclose and disseminate could be defined as involving publication"
- "Therefore, we acknowledge that the one-year statute of limitations could be applied to subsections (c) and (d)"
  - ***But*** the Court found "it would be best to apply the five-year catchall limitations period codified in section 13-205 of the Code."
    - The Court "considered not just the plain language of [BIPA,] but also the intent of the legislature, the purposes to be achieved by the statute, and the fact that there is no limitations period in the Act."
- What does this mean?



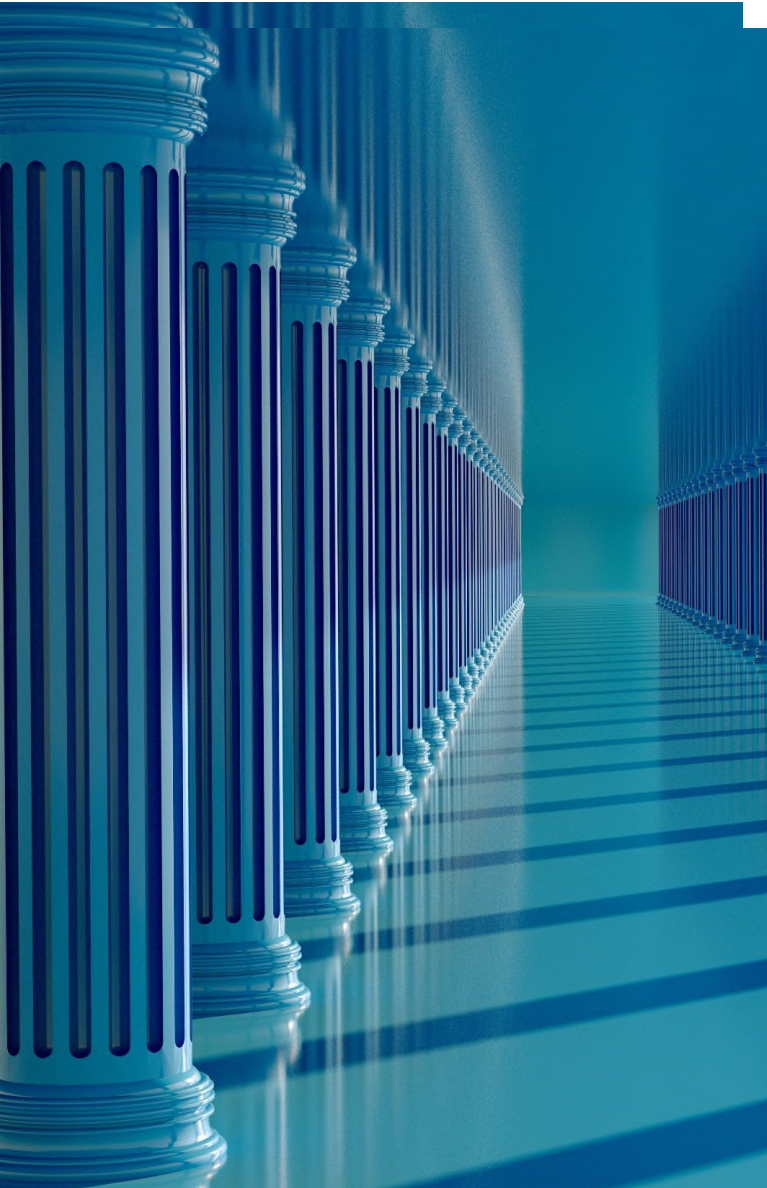
## BIPA Decisions: Expected 2023

- ***Cothron v. White Castle***

- Briefed, argued, and pending before the Illinois Supreme Court, addressing when a BIPA “violation” accrual of claims
- Oral argument held April 2022. Composition of Illinois Supreme Court has changed, and timing of expected decision is unknown.

- ***Walton v. Roosevelt University***

- On appeal before the Illinois Supreme Court, addressing whether union member claims are preempted by the Labor Management Relations Act.
- The Seventh Circuit Court of appeals already held “yes” in *Fernandez v. Kerry*, 14 F. 4<sup>th</sup> 644, 646-47 (7th Cir. 2021).



## BIPA Cases To Watch In 2023

- ***Rogers v. BNSF Railway***

- First ever BIPA jury trial. Class of plaintiffs awarded \$228 million in damages (\$5,000 per employee).
- Even though the Court found the third-party vendor collected and processed fingerprints on behalf of BNSF, the railway was still responsible for compliance.
- BNSF moved for a new trial and to amend the judgment based on argument that damages are unconstitutional and there is not enough evidence to support third party liability.
- Appeal expected.

- ***Mosby v. Ingalls Memorial Hosp.***

- First District Illinois Appellate Court held that finger-scan information collected by a healthcare provider from its employees **does not** fall within BIPA's exclusion for "information collected, used, or stored for health care treatment, payment or operations under HIPAA."
- Illinois Supreme Court accepted the appeal on January 25, 2023.

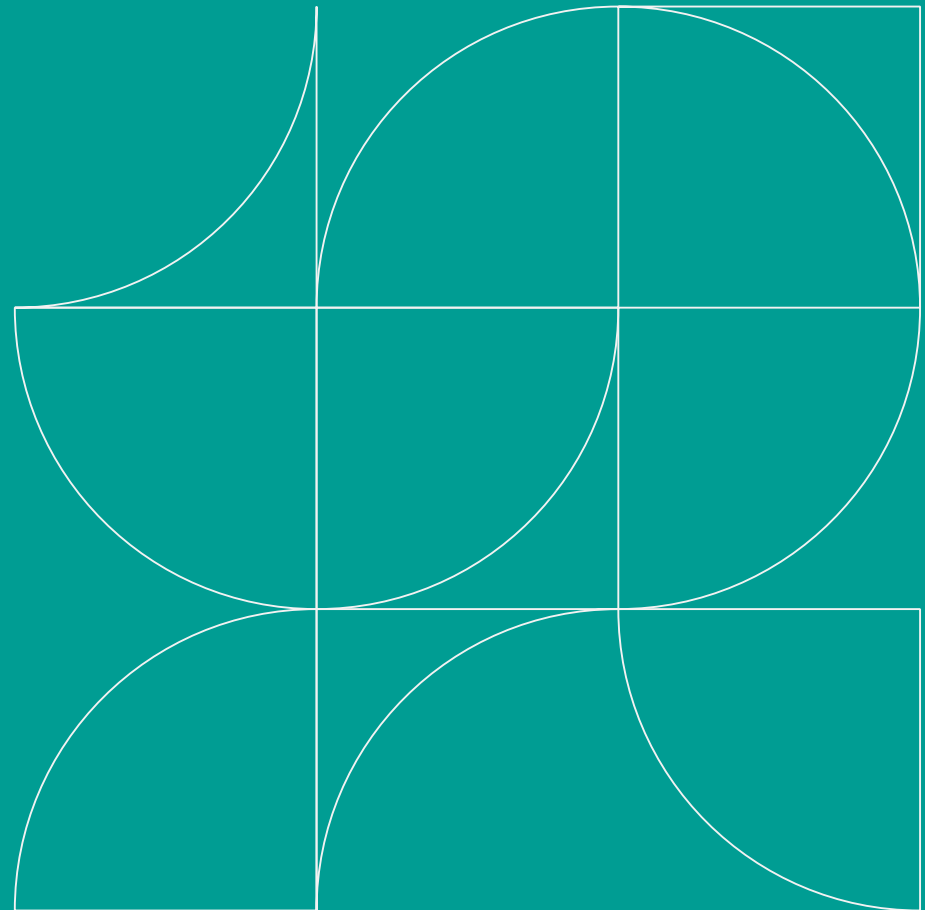




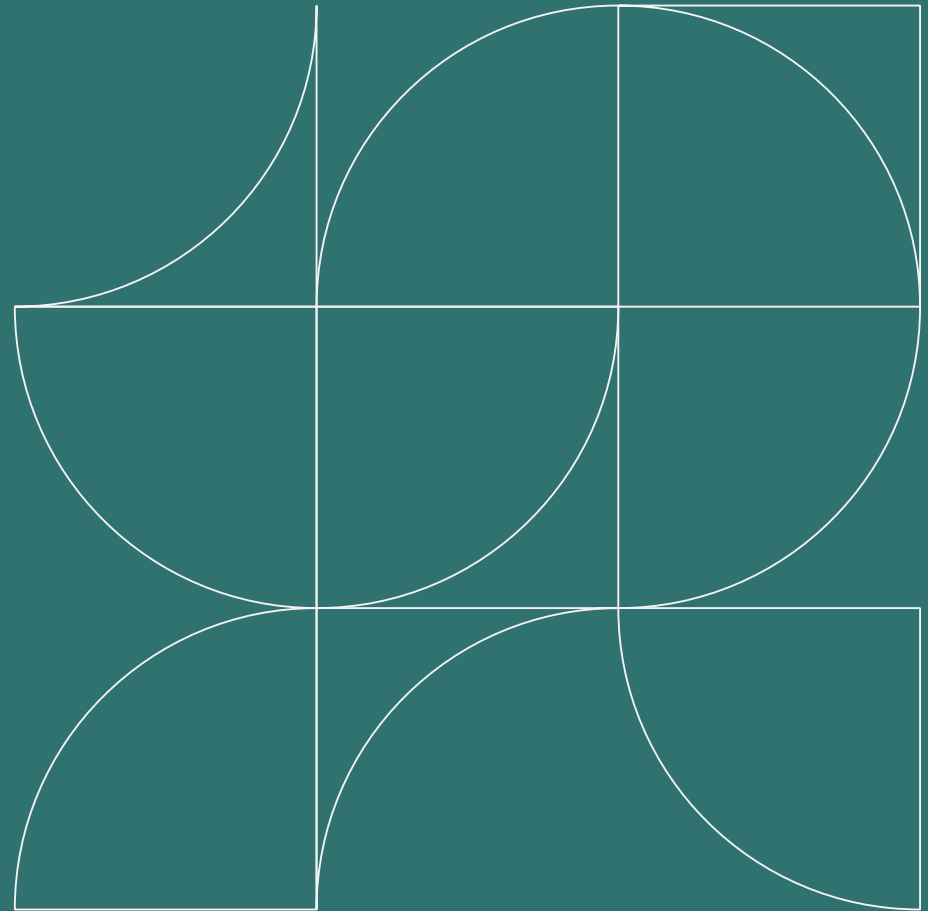
## Looking Forward to 2023

- Plaintiffs are expanding the technology they are targeting
- Growing trend by plaintiffs to use BIPA litigation to expand privacy causes of action outside of Illinois under various state laws

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# Pending BIPA Bills

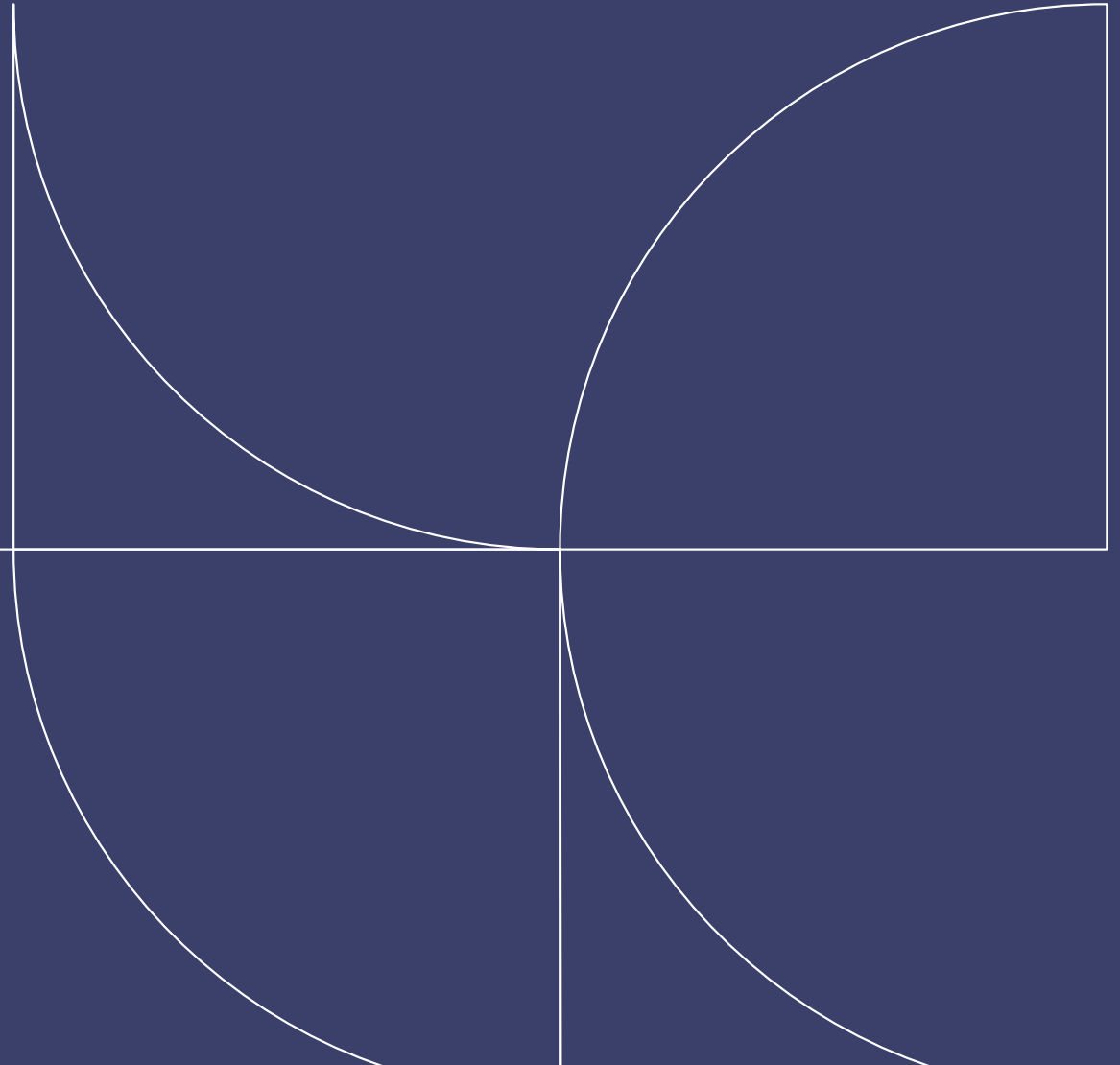




## Pending IL House Bills

- HB 1230 (referred to Rules Committee 1/31): Amends BIPA so that “nothing in the Act shall be construed to apply to any health care employer that . . . “uses and stores biometric information or biometric identifies exclusively for employment, human resources, compliance, payroll . . .”
- HB 559 would have narrowed the application and penalties of BIPA. Session *Sine Die*

**Questions?**



thank  
you

For more information please contact:

**Ada Dolph**

adolph@seyfarth.com

312-460-5977

**Danielle Kays**

dkays@seyfarth.com

312-460-5674

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