

BIOMETRIC AND FACIAL RECOGNITION LAWSUITS AND REGULATION "FACE" NATIONAL EXPANSION

Legislation to watch

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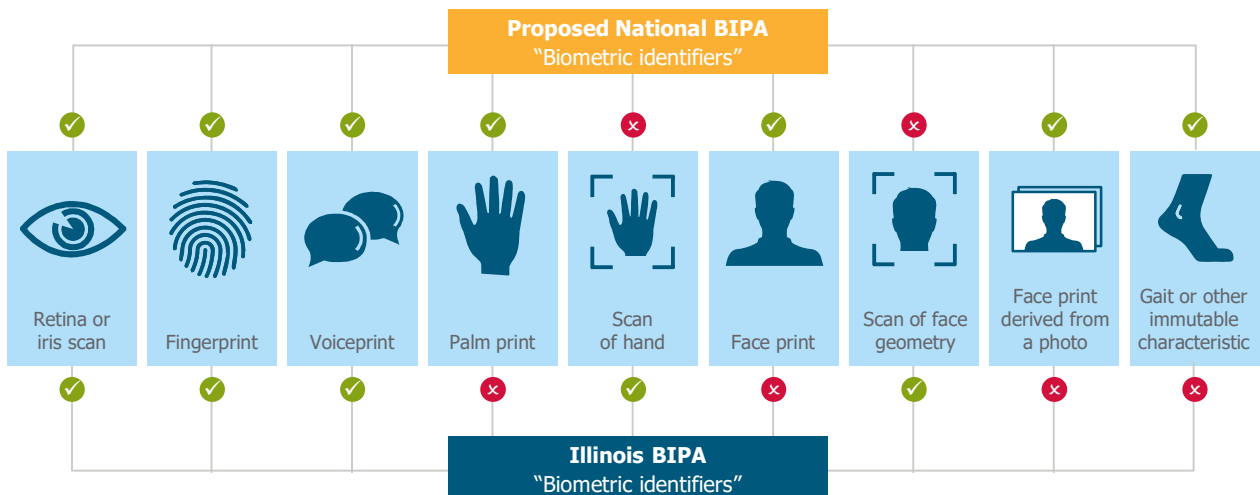
The federal government is looking to put its finger on the pulse of biometric privacy with the proposed National Biometric Information Privacy Act of 2020 (S. 4400), introduced by United States Senators Bernie Sanders (Vermont) and Jeff Merkley (Oregon), "to regulate the collection, retention, disclosure, and destruction of biometric information."

Class action litigation over biometric privacy has already exploded across the country under the Illinois Biometric Information Privacy Act ("Illinois BIPA"), currently the only statute in the United States providing a private right of action for individuals whose "biometric identifier" or "biometric information" is collected without their informed written consent. In the last few years alone, cases have been brought on behalf of hundreds of thousands of claimants. If enacted, the National Biometric Information Privacy Act ("National BIPA") will all but ensure this number increases exponentially.

Below is an overview and comparative analysis of the proposed National BIPA and the Illinois BIPA.


Proposed National BIPA vs. Illinois BIPA

The proposed National Biometric Information Privacy Act is nearly identical to the Illinois BIPA; indeed, the National BIPA's parrots the Illinois BIPA's defined term "biometric information" without any corresponding definition in the National BIPA. Both laws govern the collection, use, storage and disclosure of "biometric identifiers." The term is defined similarly by both laws, with a few notable differences:




Possessing and Collecting Biometric Identifiers


Depending on whether a private entity is possessing, capturing, collecting, otherwise obtaining, or disclosing any of these biometric identifiers, both the Illinois BIPA and proposed National BIPA impose similar requirements:




Develop written policy
Develop a written policy, made available to the public, establishing a retention schedule and guidelines for permanently destroying biometric identifiers and biometric information.




Comply
Comply with that written policy.



Protect information
Protect the information using the reasonable standard of care within the private entity's industry or in a manner that is the same as, or more protective than, the manner in which the private entity stores, transmits, and protects other confidential and sensitive information.




Inform in writing
Inform the subject in writing that a biometric identifier or biometric information is being collected and of the specific purpose and length of term for which a biometric identifier or biometric information is being collected, stored, and used.




Receive written release
As set forth more fully below, receive a written release executed by the subject of the biometric identifier or information or the subject's legally authorized representative.

The proposed National BIPA, however, is more particular than the Illinois BIPA in describing the type of "written release" required. Specifically, under the proposed federal law:



Written release required
Written consent given by an individual must be informed, specific, discrete, freely given and unambiguous. At the time of consent, the individual must not be under any duress or undue influence of an entity or third party. This definition appears to borrow heavily from the concept of "consent" articulated in European dataprivacy law, specifically the General Data Protection Regulation ("GDPR").



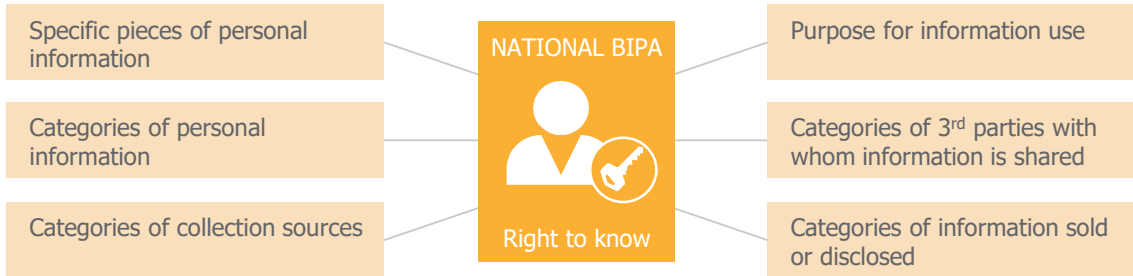
Written release in employment
A release can be executed by an employee as a condition of employment, however it may not be:

- × sought through, as a part of, or otherwise combined with any other consent or permission seeking instrument or function
- × combined with an employment contract.

Right to Know

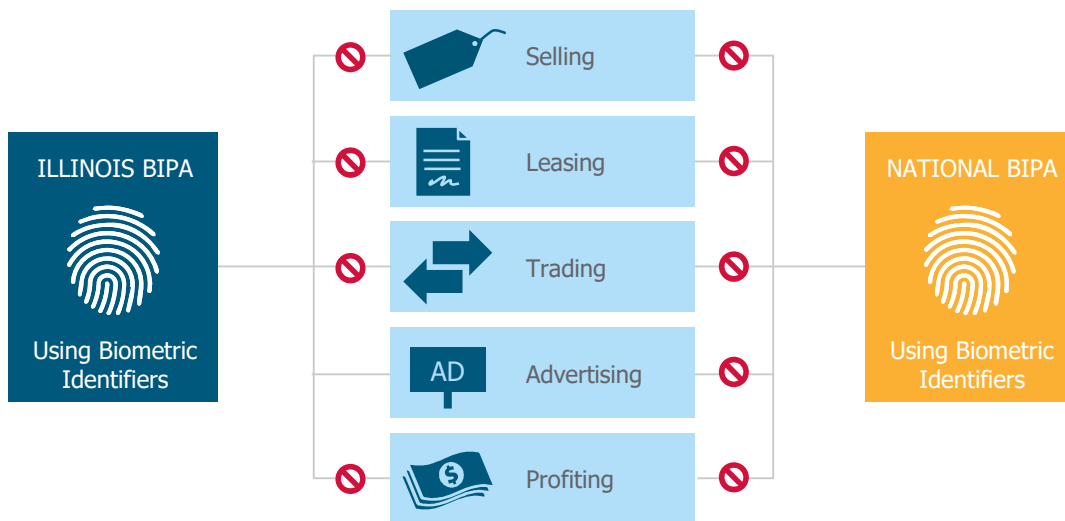
The proposed National Biometric Information Privacy Act borrows from the California Consumer Privacy Act (“CCPA”) and GDPR and contains a “right to know” provision that does not exist in the Illinois BIPA.

On request, a business must disclose to an individual any personal information collected during the preceding 12-month period, including:



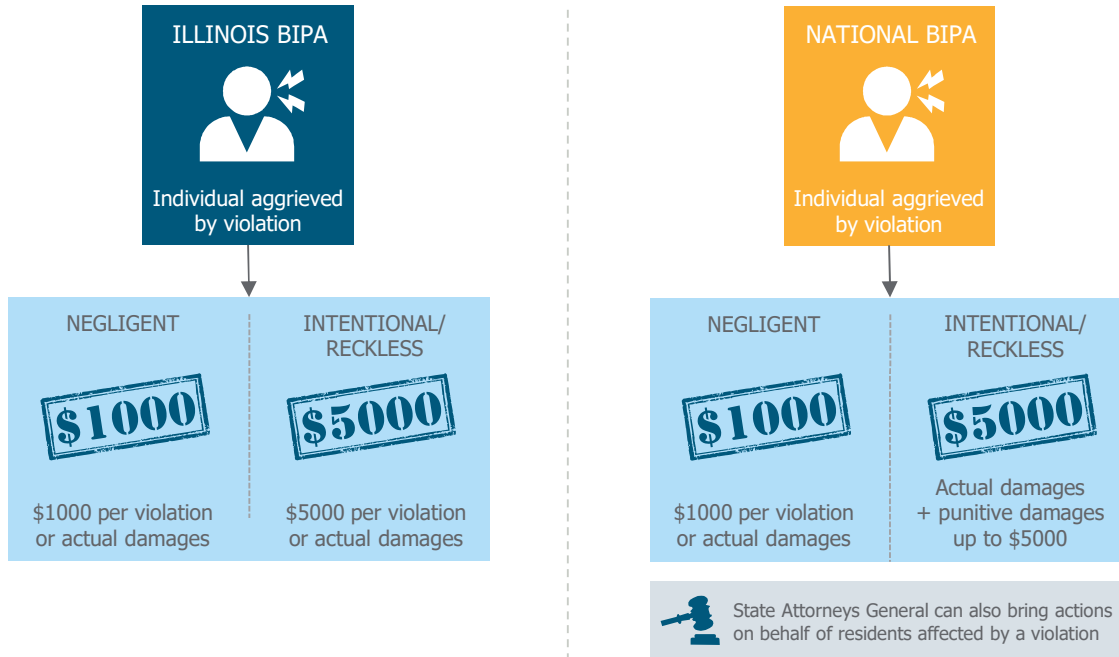
Prohibitions on Using Biometric Identifiers

The Illinois BIPA and proposed National BIPA also generally prohibit similar conduct:



Causes of Action

Unlike under biometric statutes in other parts of the country, like Texas and Washington, the Illinois BIPA and proposed National BIPA allow any person “aggrieved by a violation” to bring a civil suit in an appropriate court of law. Private entities must thus keep an eye on the National BIPA and the Illinois BIPA given the allowable monetary damages:



A heavily litigated issue under the Illinois BIPA, the proposed National BIPA expressly states that: “Any such violation [of the National BIPA] constitutes an injury-in-fact and a harm to any affected individual.”

Textual Comparison

The following chart provides a more detailed comparison of the text of the Illinois BIPA and the proposed National Biometric Information Privacy Act of 2020:

General Definitions

DEFINITIONS	Illinois BIPA	National BIPA
"Biometric identifier"		
- Retina or iris scan	✓	✓
- Fingerprints	✓	✓
- Palm prints/ Scan of hand	✓	✓
- Voiceprint	✓	✓
- Face print/ scan of face geometry	✓	✓
- Face print derived from a photograph	✗	✓
- Any other uniquely identifying information based on the characteristics of an individual's gait or other immutable characteristic of an individual	✗	✓
- Writing samples	✗	✗
- Written signatures	✗	✗
- Photographs	✗	✗
- Human biological samples used for valid scientific testing or screening	✗	✗
- Demographic data	✗	✗
- Tattoo descriptions	✗	✗
- Physical descriptions (e.g., height, weight, hair color, or eye color)	✗	✗
- Donated organs, tissues, or parts as defined in the Illinois Anatomical Gift Act or blood or serum stored on behalf of recipients or potential recipients of living or cadaveric transplants and obtained or stored by a federally designated organ procurement agency	✗	✗
- Information captured from a patient in a health care setting or information collected, used, or stored for health care treatment, payment, or operations under the federal Health Insurance Portability and Accountability Act of 1996	✗	✗
- An X-ray, roentgen process, computed tomography, MRI, PET scan, mammography, or other image or film of the human anatomy used to diagnose, prognose, or treat an illness or other medical condition or to further validate scientific testing or screening.	✗	✗
- Biological materials regulated under the Illinois Genetic Information Privacy Act.	✗	Not specified

DEFINITIONS	Illinois BIPA	National BIPA
"Biometric Information"		
Any information, regardless of how it is captured, converted, stored, or shared, based on an individual's biometric identifier used to identify an individual. Biometric information does not include information derived from items or procedures excluded under the definition of biometric identifiers.	✓	Not defined
"Private Entity"		
- Individual	✓	✓
- Partnership	✓	✓
- Corporation	✓	✓
- Limited liability company	✓	✓
- Association	✓	✓
- Other group, however organized	✓	✓
- Federal government agency	Not specified	✗
- State government agency	✗	✗
- Local government agency	✗	✗
- Any court of Illinois, a clerk of the court, or a judge or justice thereof	✗	Not specified
- Federal academic institution	Not specified	✗
"Confidential and Sensitive Information"		
Personal information that can be used to uniquely identify an individual or an individual's account or property for example: <ul style="list-style-type: none"> - Genetic markers - Genetic testing information - A unique identifier number to locate an account or property - An account number - A PIN number - A pass code - A driver's license number - A social security number 	✓	✓
"Written release"		
Written consent given by an individual must be: <ul style="list-style-type: none"> - Informed - Specific - Discrete - Freely given - Unambiguous 	<ul style="list-style-type: none"> ✓ Not specified Not specified Not specified Not specified 	<ul style="list-style-type: none"> ✓ ✓ ✓ ✓ ✓
At the time the consent is given, the individual must not be under any duress or undue influence of an entity or third party	Not specified	✓

DEFINITIONS	Illinois BIPA	National BIPA
In the context of employment, a release executed by an employee as a condition of employment	✓	✓ with restrictions <ul style="list-style-type: none"> • May not be sought through, as a part of, or otherwise combined with any other consent or permission seeking instrument or function • May not be combined with an employment contract

Requirements for collection, retention, disclosure, destruction

DEFINITIONS	Illinois BIPA	National BIPA
Written Policy		
Any private entity in possession of biometric identifiers or biometric information concerning an individual shall develop and make available to the public a written policy establishing a retention schedule and guidelines for permanently destroying such biometric identifiers and biometric information.	✓ ¹	✓
Biometric identifiers/information must be destroyed the earlier of the following: <ul style="list-style-type: none"> - the date on which the initial purpose for collecting or obtaining such identifiers or information has been satisfied - Within a specific time period of the individual's last interaction with the private entity - if the individual from whom the biometric information was collected: freely consented to the original purpose for such collection and could have declined such collection without consequence 	✓ ✓ 3 years ✗	✓ ✓ 1 year ✓
Compliance with Written Policy		
Absent a valid warrant or subpoena issued by a court of competent jurisdiction, a private entity in possession of biometric identifiers or biometric information must comply with its established retention schedule and destruction guidelines.	✓	✓
Conduct		
A private entity may not collect, capture, purchase, receive through trade, or otherwise obtain a person's or a customer's biometric identifier or biometric information unless: <ul style="list-style-type: none"> - The entity requires the identifier or information to provide a service for the person or customer 	✗	✓

DEFINITIONS	Illinois BIPA	National BIPA
- For another valid business purpose specified in the written policy published	✘	✓
- The entity first informs the person/subject or customer, or his or her legally authorized representative, in writing: <ul style="list-style-type: none"> - that such biometric identifier or biometric information is being collected or stored - of the specific purpose and length of term for which a biometric identifier or biometric information is being collected, stored, and used - receives a written release executed by the subject of the biometric identifier or information or the subject's legally authorized representative 	✓	✓
A private entity in possession of a biometric identifier or biometric information may not: <ul style="list-style-type: none"> - Sell - Lease - Trade - Use for advertising purposes - or otherwise profit from a person's or a customer's biometric identifier or biometric information 	✓ ✓ ✓ ✘ ✓	✓ ✓ ✓ ✓ ✓
Disclosure		
A private entity in possession of a person's biometric identifier or the biometric information may only, disclose, redisclose, or otherwise disseminate if: <ul style="list-style-type: none"> - The subject of the biometric identifier or biometric information, or the subject's legally authorized representative, provides a written release to such specified action - immediately prior to such disclosure or redisclosure, including a description of—(A) that the data will be disclosed; (B) the reason for such disclosure; and (C) the recipients of such data - The disclosure or redisclosure completes a financial transaction requested or authorized by the subject of the biometric identifier or the biometric information or the subject's legally authorized representative - The disclosure or redisclosure is required by Federal, State, or municipal law/ordinance; or - The disclosure or redisclosure is required pursuant to a valid warrant or subpoena issued by a court of competent jurisdiction 	✓ ✘ ✓ ✓ ✓ ✓	✓ ✓ ✓ ✓ ✓
Data Security		
A private entity in possession of a biometric identifier or biometric information shall store, transmit, and protect from disclosure all biometric identifiers and biometric information: <ul style="list-style-type: none"> - Using the reasonable standard of care within the private entity's industry; and - In a manner that is the same as, or more protective than, the 	✓	✓

DEFINITIONS	Illinois BIPA	National BIPA
manner in which the private entity stores, transmits, and protects other confidential and sensitive information.		
Right to know		
<p>Any business that collects, uses, shares, or sells biometric identifiers or biometric information, upon the request of an individual, shall disclose, free of charge, any such information relating to such individual collected during the preceding 12-month period, including:</p> <ul style="list-style-type: none"> - The categories of personal information; - Specific pieces of personal information; - The categories of sources from which the business collected personal information; - The purposes for which the business uses the personal information; - The categories of third parties with whom the business shares the personal information; and - The categories of information that the business sells or discloses to third parties. 	x	✓

Cause of Action

DEFINITIONS	Illinois BIPA	National BIPA
Right to Sue		
Any individual aggrieved by a violation . . . may bring a civil action in a court of competent jurisdiction against a private entity that allegedly committed such violation	✓ ²	✓
“Any such violation constitutes an injury-in-fact and a harm to any affected individual.”	✗	✓
Monetary Relief		
For negligent violations, whichever is greater of either: - \$1,000 in liquidated damages per violation; or - actual damages suffered by the plaintiff	✓ ✓	✓ ✓
For intentional or reckless violations: - \$5,000 in liquidated damages per violation; or actual damages, whichever is greater - the sum of actual damages suffered by the plaintiff; and any punitive damages awarded by the court, which shall be limited to \$5,000 per violation	✓ ✗	✗ ✓
Reasonable attorneys’ fees and costs, including expert witness fees and other litigation expenses	✓	✓
Injunctive Relief		
- May be awarded, as court may deem appropriate	✓	✓
- A court may require a private entity to permanently destroy the biometric identifiers, biometric information, or confidential and sensitive information of a plaintiff		✓
Enforcement by State Attorneys General		
The chief law enforcement officer of a State, or any other State officer authorized by law to bring actions on behalf of the residents of a State, may bring a civil action, as parens patriae, on behalf of the residents of such State in an appropriate district court of the United States to enforce this Act if the chief law enforcement officer or other State officer has reason to believe that the interests of the residents of the State have been or are being threatened or adversely affected by a violation.	✗	✓

Construction

DEFINITIONS	Illinois BIPA	National BIPA
Nothing in this Act may be construed:		
- To impact the admission or discovery of biometric identifiers and biometric information in any action of any kind in any court, or before any tribunal, board, agency, or person.	✓	✓
- To conflict with the Health Insurance Portability and Accountability Act of 1996	✓	✓
- To conflict with the X-Ray Retention Act	✓	✗
- To apply in any manner to a financial institution or an affiliate of a financial institution that is subject to Title V of the federal Gramm-Leach-Bliley Act of 1999 and the rules promulgated thereunder	✓	✓
- To conflict with title V of the Federal Gramm-Leach-Bliley Act	✗	✓
- To conflict with the Private Detective, Private Alarm, Private Security, Fingerprint Vendor, and Locksmith Act of 2004 and the rules promulgated thereunder.	✓	✗
- To apply to a contractor, subcontractor or agent during the course of employment with the following: <ul style="list-style-type: none"> - Federal agency - State agency - Local government agency 	<ul style="list-style-type: none"> ✗ ✓ ✓ 	<ul style="list-style-type: none"> ✓ ✓ ✓
- To preempt or supersede any Federal, State, or local law that imposes a more stringent limitation than the limitations described.	✗	✓