

BELOW THE RED LINE

WORKERS' COMPENSATION UPDATE "WE'VE GOT YOU COVERED!"

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WORKERS' COMPENSATION PUBLICATION TEAM

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A WORD FROM THE PRACTICE CHAIR

I know not everyone likes Daylight Saving Time and losing an hour every spring, but I must admit having daylight after the dinner hour is comforting. And, once the weather improves and temperatures warm, I am looking forward to more opportunities to enjoy the outdoors. I find those activities more enjoyable when I am not wearing a winter coat, hat, and gloves. So, bring on the spring weather, and let's get this warm-up started!

Speaking of spring, I hope your schedule allowed you to take a Spring Break to re-charge your batteries and maybe put on a pair of shorts and experience some sunshine and warm weather. I know it is hard to take time because the work continues to pile-up and our business can seldom put work on hold, but it is still so essential for your mental well-being to take those breaks and experience either the literal or figurative sun shining on your face. I promise the Heyl Royster Team will be here when you get ready to get back to work. So, don't forget to take that vacation (big or small).

[Emily Galligan](#), an associate in our Peoria office, writes this month's article, discussing the latest wave of mass tort subjects: BIPA, or the Biometric Information Privacy Act. I am sure you are seeing more and more claims filed against companies that use technology to run their day-to-day operations, including using their employee's biometric data. The reason for this article and the cross-over into the workers' compensation world is the case of *Marquita McDonald v. Symphony Bronzeville Park, LLC*, 163 N.E.3d 746, 444 Ill.Dec. 183, 2021 WL 4150197 (S.Ct. of Ill.), which addresses whether the exclusivity provisions within the Illinois Workers' Compensation Act would preclude a BIPA action filed by an employee. Emily does a great job working through the facts and analysis of the case and identifying takeaways for our employers.



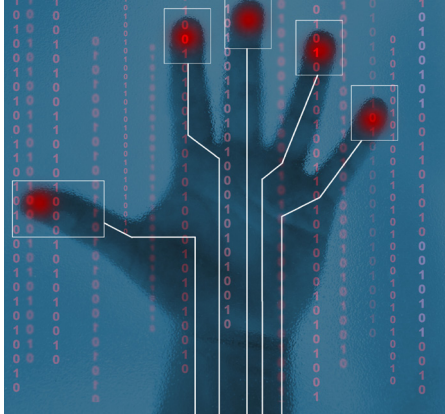
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FEATURE ARTICLE

IL SUPREME COURT RULES EXCLUSIVITY PROVISIONS IN WORKERS' COMP ACT DOESN'T BAR CLAIMS UNDER BIPA

By Emily Galligan



The Illinois Supreme Court recently considered the question as to whether the exclusivity provisions of the Illinois Workers' Compensation Act bar a claim for statutory damages under the Biometric Information Privacy Act where it was alleged that an employer violated an employee's statutory privacy rights under the Privacy Act.

The *McDonald* case arose after the plaintiff, Marquita McDonald, filed a class action lawsuit against her former employer, the defendant, Symphony Bronzeville Park, LLC, alleging that Bronzeville's collection, use, and storage of its employees' biometric data violated the Privacy Act. McDonald alleged that she and other employees were required to scan their fingerprint as a means of authenticating employees and tracking their time, but that they were never provided or signed a release consenting to the storage of their biometric data. Bronzeville filed a motion to dismiss McDonald's class action lawsuit, asserting that the claim was barred by the exclusive remedy provisions of the Workers' Compensation Act.

The Court initially noted the purpose of the Privacy Act is to help regulate "the collection, use, safeguarding, handling, storage, retention, and destruction of biometric identifiers and information", and impose restrictions on the handling of biometric data. The Privacy Act requires a private entity to inform the individual in writing regarding the fact that their biometric information is being collected or stored, the specific purpose of collecting it, the length and term for which it will be stored and/or used before obtaining an individual's fingerprint. The Privacy Act also requires a private entity to obtain a signed written release from an individual before collecting the

biometric information and before disclosing or disseminating that information to a third party.

Bronzeville argued that despite language in Section 20 of the Privacy Act, which provides a right of action in a state circuit court, the Workers' Compensation Act precludes McDonald's class action in the circuit court because the alleged injury occurred in the course of employment. The Workers' Compensation Act is a remedial statute courts construe liberally to effectuate its main purpose – to provide financial protection for injured workers until they can return to the workforce. It serves as the exclusive remedy if an employee sustains a compensable injury. However, an employee can escape the exclusivity provisions of the Workers' Compensation Act if the employee establishes that the injury (1) was not accidental, (2) did not arise from his employment, (3) was not received during the course of employment, or (4) was not compensable under the Workers' Compensation Act.

In this case, the Court analyzed whether McDonald's alleged injuries were compensable under the Workers' Compensation Act. McDonald argued that the fourth exception was construed to mean that only physical or psychological injuries are compensable under the Act.

However, Bronzeville argued that the exclusivity provisions were broadly worded and required exclusive resort to the Workers' Compensation Act's remedy for any injury arising out of and in the course of employment.

The Court agreed that McDonald's failure to maintain her privacy rights was not a psychological or physical injury that is compensable under the Workers' Compensation Act. Additionally, the Court agreed with the First District's ruling holding that a violation under the Privacy Act is not the type of injury that categorically fits within the purview of the Workers' Compensation Act and is thus not compensable. The Court reasoned that the plain language of the Privacy Act supports a conclusion that the legislature did not intend for the Privacy Act to be preempted by the Workers' Compensation Act. The Privacy Act, which postdates the Workers' Compensation Act, defines the pre-collection of biometric data written release to include "a release executed by an employee as a condition of employment." Therefore, the legislature was aware that Privacy Act claims could arise in the employment context, yet it treated them identically to nonemployee claims except as to permissible methods of obtaining consent.



Bronzeville further argued that when workplace injuries can be cleverly characterized to evade the broad sweep of the exclusivity provisions of the Workers' Compensation Act, the proverbial litigation floodgates will open and protections for Illinois employers will erode. Thus, if the Court allowed Privacy Act claims to proceed against employers, it would expose employers to potentially devastating class action lawsuits. The Court noted that it was aware of the consequences that were imposed by the legislature as a result of Privacy Act violations, and that the General Assembly intended to prevent such issues by imposing safeguards to ensure that the individual's privacy rights in their biometric information are properly protected before being compromised. The Court concluded that McDonald and the putative class could pursue Privacy Act claims in the circuit court rather than before the Illinois Workers' Compensation Commission because the injury in this case was not compensable in a Workers' Compensation proceeding and is therefore not preempted by the exclusive-remedy provisions of the Workers' Compensation Act.

Employers must proceed with great caution when collecting biometric identifiers or information from its employees. Employers must inform employees in writing that biometric data will be collected, stored, and/or used, along with the specific purpose, and length of time before the data is collected, stored, and/or used. Employers are further required to publicly provide a retention schedule or guideline for permanently destroying the biometric identifiers and information. Additionally, after providing this information to employees, employers must obtain written releases from their employees, providing consent to the collection, storage, and/or use of their biometric identifiers and information, including consent to disclosing the information to a third party.

ABOUT THE AUTHOR



Emily Galligan

Concentrating her practice in employment law, medical negligence/healthcare law, and Section 1983 civil rights litigation, Emily Galligan defends employers in various employment matters, including sexual harassment, discrimination, and retaliation claims against employers. She also spends a large portion of her practice representing hospitals, medical entities, physicians, and nurses in medical negligence actions. Further, Ms. Galligan represents

state actors (clinical therapists and law enforcement officers) in Section 1983 claims, including deliberate indifference, due process, and failure to protect claims. Emily has experience in drafting and negotiating various contracts ranging from severance agreements to large business contracts and litigating premises liability and personal injury claims in state court.

Emily joined the firm's Peoria office as an associate in 2014 after serving as a summer associate the previous two years. She is a frequent author of the Illinois Defense Counsel Quarterly and presenter at various seminars around the state. Active in the community, she serves on the board for the Heart of Illinois Big Brothers Big Sisters and volunteers as a mentor in the program. Emily earned her M.B.A. in 2011 from Bradley University, where she now teaches classes including the Law of Business as an adjunct faculty member.



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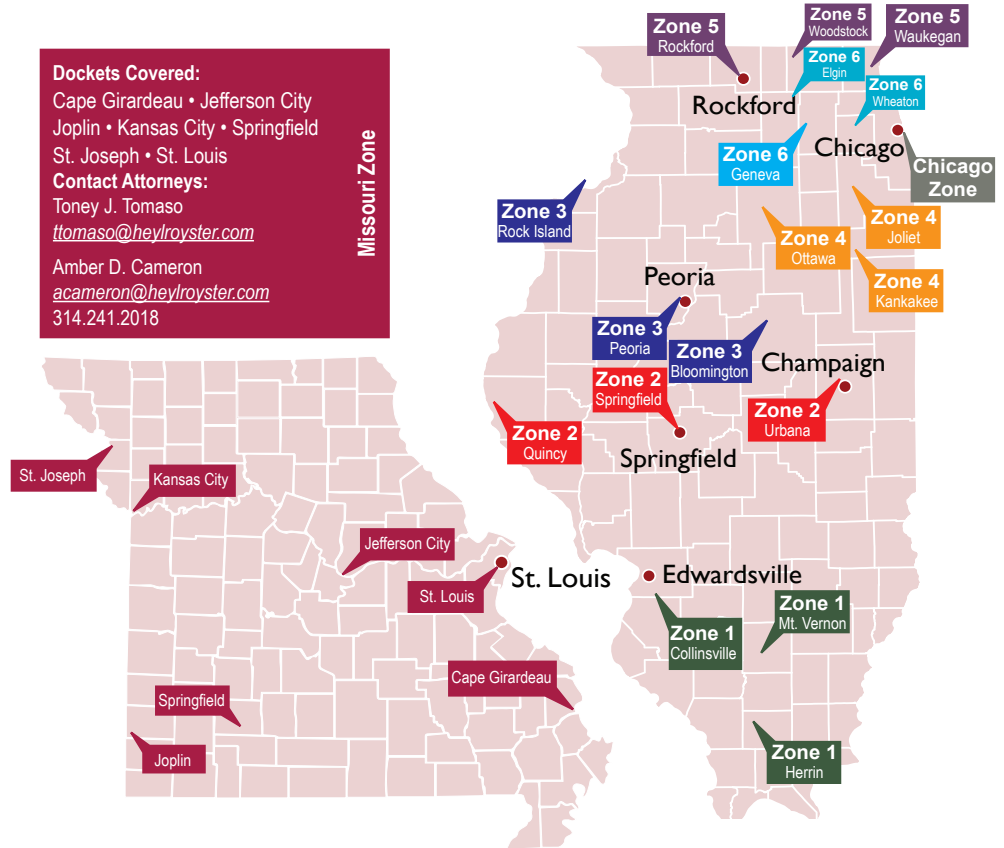
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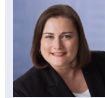
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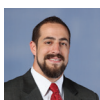
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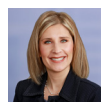
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