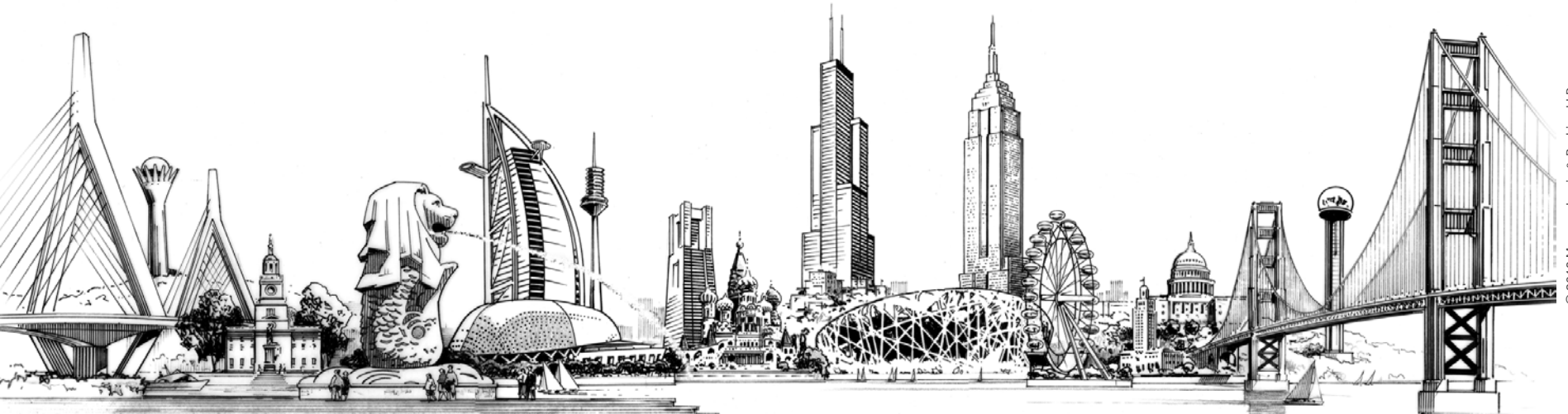


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BIOMETRICS IN THE WORKPLACE



WHAT ARE BIOMETRICS?

Biometrics Defined

- No set definition
- Not personally identifying information – e.g., SSN
- Cannot be changed – e.g., retina, fingerprint, DNA
- “Measurable human biological and behavioral characteristics that can be used for identification”

Facial recognition from photos?

- In 2013, Facebook revealed that users uploaded 350 million photographs per day, with nearly 250 billion photographs already uploaded to its website
- *In re Facebook Biometric Info. Privacy Litig.*, 185 F. Supp. 3d 1155, 1171 (N.D. Cal. 2016)
 - Facebook's facial recognition data can be biometric data
- *Monroy v. Shutterfly, Inc.*, 2017 WL 4099846, at *3-4 (N.D. Ill. Sept. 15, 2017)
 - Biometric information does not have to result from an in-person scan, but can be derived from a phot
- *Gullen v. Facebook, Inc.*, 2018 WL 1609337, at *2-3 (N.D. Cal. Apr. 3, 2018)
 - Stating in dicta that biometric privacy law can apply to photos
 - On appeal to the Ninth Circuit

HOW ARE BIOMETRICS USED?

Use of Biometrics

- By employers:
 - Timekeeping
 - Most common use by employers
 - Security
 - Employee identification verification (e.g., building access; computer access)
 - Wellness Programs
 - Fitness trackers
- Other uses:
 - “Selfie pay”
 - Photo tagging?

Biometric Process

- Enrollment
 - Providing your biometric data to your employer
- Template generation
 - Employer creates a record of your biometric data
- Matching
 - When you provide your biometric data for employer's required purpose (e.g., timekeeping), it is matched to the employer's recorded template

CURRENT REGULATIONS

Illinois

- Biometric Information Privacy Act (“BIPA”)
- Enacted 2008
- Recent explosion as a class action weapon by plaintiffs bar
- Defines biometrics as: “biologically unique to the individual; therefore, once compromised, the individual has no recourse . . . [and] is at heightened risk for identity theft.” ILCS 740 § 14/5(c)
 - Inability to modify biometrics warrants additional protection of biometric data
- Applies to private employers and private COA
- BIG damages available
- Requires notice, consent, “publicly” posted policy

Illinois

- Possible relief for Illinois' employers
- Proposed exemptions to BIPA are currently pending
- Proposed amendments that would limit the right to bring a private cause of action
- Expressly excludes “writing samples, written signatures, photographs, human biological samples used for valid scientific testing or screening, demographic data, tattoo descriptions, or physical descriptions such as height, weight, hair color, or eye color”

Texas

- Capture or Use of Biometric Information Act (“CUBI”)
- Enacted 2009 and modified 2017
- Similar to BIPA, but application is limited to “commercial purpose”
 - BUT, the statute does not define “commercial purpose”!
 - Employers are left guessing whether or not timekeeping or other activities that assist them in running their business constitute a “commercial purpose,” or whether “commercial purpose” is something different, like and employer selling of biometric data for profit
- No private cause of action; enforced by Texas AG
 - But possibility for BIG/Texas-sized penalties
- Must inform employee beforehand, and employee must consent

Washington

- No cute acronym
- Enacted 2017
- Similar to CUBI (applies to private employers and no private cause of action), but it defines “commercial purpose”
- Narrower application
 - Excludes government agencies, certain financial institutions, HIPAA activities
 - Excludes digital photographs, information derived from voice recordings
- Notice, consent, and prevention of later commercial use
- No private right of action, but possibility of the biggest (Washington-sized?) penalties

LITIGATION INVOLVING CURRENT REGULATIONS

No Actual Damages Required?

- Issue is currently pending before the Illinois Supreme Court
- Federal and state courts interpreting BIPA have reached conflicting determinations

Large Settlements

- L.A. Tan's \$1.5 million settlement fund
 - Customers received a check for \$125
- Crème de la Crème
 - LifeLock Program Enrollment for the class
 - \$5,000 to named Plaintiff
 - \$350,000 attorneys' fees

PROPOSED LEGISLATION

States

- Alaska
- California
- Connecticut
- Idaho
- Massachusetts
- Montana
- New Hampshire
- New York

OTHER REGULATIONS AT
PLAY

STATE, FEDERAL, EUROPEAN

California

- California Labor Code makes it a misdemeanor for an employer to require an employee or applicant to be photographed or fingerprinted as a condition of employment, if the employer plans to provide the information to a third-party *and* the information could be used to the employee's detriment

New York

- New York generally prohibits employers from fingerprinting applicants or employees as a condition of employment or continued employment unless specifically authorized by another law

Title VII

- Religious discrimination?
 - Mark of the Beast
 - Drivers' license resulting in internal condemnation

ADA

- *EEOC v. Flambeau, Inc.*, 131 F. Supp. 3d 849 (W.D. Wis. 2015), *aff'd*, 846 F.3d 941 (7th Cir. 2017) (in a case of first impression, rejecting the EEOC's challenge to a wellness plan requiring a biometric screening test and finding that the plan was not subject to the ADA prohibition on employer-mandated medical examinations)).

Duty to Bargain?

- May implicate an employer's obligation to bargain with its unionized workforce
- What does the collective bargaining agreement say?

FTCA

- Section 5 of the Federal Trade Commission Act gives the FTC broad authority to protect consumers from unfair and deceptive trade practices in or affecting commerce.
- 2012 Guidance on Facial Recognition Technologies

State Data Breach Laws

- Certain states include an individual's unique biometric data in the definition of "personal information" found in their general data breach notification statutes

Other Laws?

- HIPAA
- GINA
- FCRA
- GDPR

STRATEGIES FOR IMPLEMENTING BIOMETRIC PROGRAMS

Step 1: Planning

- What law *could* govern the employment relationship?
 - Determines the highest applicable standards and guides the rest of implementation.
- Who will oversee the implementation and operation of the program?
 - Placement of the program with departments and individuals aware of the intersectional nature of biometric compliance.
- How will the data be maintained?
 - Multi-statute analysis to determine what privacy standards govern the biometric data itself.
 - May require sequestration of data or new security measures.

Step 2: Rollout

- Notice to and consent from affected employees.
- Prepare to accommodate.
- Afford appropriate data security from the outset.

Step 3: Ongoing Operation

- Control access to the information.
- Evaluate legal obligations to respond in the event of breach and prepare response plans.
- Conduct regular programmatic reviews to ensure compliance with the most rigorous potentially applicable statute—especially as new statutes emerge.

Our Global Reach

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Asia Pacific
Europe
Latin America
Middle East
North America

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