

# Employment & Labor Law FLASHPOINTS February 2022

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## **Employee's Loss of Ability To Maintain Privacy Rights Is Not Injury Compensable Under Workers' Compensation Act**

On February 3, 2022, the Illinois Supreme Court held that the exclusivity provisions of the Workers' Compensation Act (WCA), 820 ILCS 305/1, *et seq.*, do not bar a claim for statutory damages under the Biometric Information Privacy Act (BIPA), 740 ILCS 14/1, *et seq.*, when an employer is alleged to have violated an employee's statutory privacy rights. *McDonald v. Symphony Bronzeville Park*, 2022 IL 126511. This decision creates a clear path forward for plaintiffs seeking to bring claims under BIPA, which gives employees rights over how their voices, fingerprints, facial scans, etc., are collected and shared by their employer.

Symphony Bronzeville Park, LLC, is a post-acute-care facility, which provides patients with a variety of rehabilitative and palliative service. 2022 IL 126511 at ¶4. Marquita McDonald was employed by Bronzeville from December 2016 to February 2017. *Id.* McDonald alleged that Bronzeville utilized a biometric information system, which required her to scan her fingerprint, as a means of tracking employee time at work. *Id.* McDonald and the putative class alleged that Bronzeville failed to obtain written releases from them before collecting, using, and storing their biometric identifiers and biometric information; failed to inform them in writing that their biometric identifiers and biometric information were being collected and stored; failed to inform them in writing of the specific purpose and length of time for which their biometric identifiers or biometric information was being collected, stored, and used; and failed to publicly provide a retention schedule or guideline for permanently destroying the biometric identifiers and biometric information. 2022 IL 126511 at ¶5. They further alleged that Bronzeville's actions violated BIPA and that they were entitled to statutory damages under BIPA. 2022 IL 126511 at ¶6.

Bronzeville filed motions to dismiss McDonald's class action complaint on the basis that the alleged claims were barred by the exclusive remedy provisions of the WCA. 2022 IL 126511 at ¶7. Bronzeville argued that the WCA is the exclusive remedy for accidental injuries transpiring in the workplace and that an employee has no common-law or statutory right to recover civil damages from an employer for injuries incurred in the course of her employment. *Id.*

The Cook County Circuit Court denied Bronzeville's motions to dismiss. The circuit court held that McDonald's injury involved the loss of the ability to maintain her privacy rights, which was neither a psychological nor physical injury and not compensable under the WCA. 2022 IL 126511 at ¶8. The circuit court further held that BIPA specifically defined "written release" in the employment context and, thus, the legislature intended for BIPA to apply to violations by employers in the workplace. Accordingly, the circuit court allowed McDonald's claim to proceed in the circuit court. 2022 IL 126511 at ¶10.

Bronzeville filed a motion for reconsideration of the circuit court's conclusion or, alternatively, a motion to certify questions for immediate appeal pursuant to Illinois Supreme Court Rule 308(a). Bronzeville's motion to reconsider was denied. *Id.* However, the circuit court certified the following question for interlocutory appeal: "Do [ ] the exclusivity provisions of the [WCA] bar a claim for statutory damages under [the BIPA] where an employer is alleged to have violated an employee's statutory privacy rights under [the BIPA]?" *Id.*

The appellate court agreed, concluding that the exclusivity provisions of the WCA do not bar a claim for statutory, liquidated damages when an employer is alleged to have violated an employee's statutory privacy rights under BIPA, as such a claim is simply not compensable under the WCA. 2022 IL 126511 at ¶13.

On January 27, 2021, the Illinois Supreme Court granted Bronzeville's petition for leave to appeal. The court affirmed the ruling of the appellate court. 2022 IL 126511 at ¶14.

The Illinois Supreme Court began by noting that, in construing a statute, it may consider the reasons behind the implementation of the law, the problems sought to be remedied, the purposes to be achieved, and the consequences of construing the statute one way or another. 2022 IL 126511 at ¶18. BIPA imposes restrictions on how private entities collect, retain, use, disclose, and destroy "biometric identifiers" and "biometric information." 2022 IL 126511 at ¶21. Specifically, the Act mandates that before obtaining an individual's fingerprint, a private entity must inform the individual in writing. Further, the entity must obtain a signed "written release" before collecting biometric information. In the employment context, BIPA specifically defines "written release" as "a release executed by an employee as a condition of employment." *Id.*

The court then examined the WCA, noting that the legislature enacted the WCA "to abrogate the common law rights and liabilities which previously governed an injured employee's ability to recover against his employer." 2022 IL 126511 at ¶28, quoting *Sharp v. Gallagher*, 95 Ill.2d 322, 447 N.E.2d 786, 787, 69 Ill.Dec. 351 (1983). The WCA "established a new 'system of liability without fault, designed to distribute the cost of industrial injuries without regard to common-law doctrines of negligence, contributory negligence, assumption of risk, and the like.'" *Id.* "This trade-off between employer and employee promoted the fundamental purpose of the [WCA], which was to afford protection to employees by providing them with prompt and equitable compensation" for injuries or death suffered in the course of employment. 2022 IL 126511 at ¶28, quoting *Kelsay v. Motorola, Inc.*, 74 Ill.2d 172, 384 N.E.2d 353, 356, 23 Ill.Dec. 559 (1978). Even more, damages are awarded according to a predetermined fee schedule created by the Illinois Workers' Compensation Commission, eliminating the variability in the value of each judgment. "[The WCA] imposes liability without fault upon the employer and, in return, prohibits common law suits by employees against the employer." 2022 IL 126511 at ¶30, quoting *Meerbrey v. Marshall Field & Co.*, 139 Ill.2d 455, 564 N.E.2d 1222, 1225, 151 Ill.Dec. 560 (1990). "However, an employee can escape the exclusivity provisions of [the WCA] 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 [WCA]." 2022 IL 126511 at ¶32, quoting *Folta v. Ferro Engineering*, 2015 IL 118070, ¶14, 43 N.E.3d 108, 397 Ill.Dec. 781. Bronzeville argued that this fourth exception above is a restatement of the second and third exceptions. 2022 IL 126511 at ¶33. McDonald, on the other hand, interprets the fourth exception to mean that only physical or psychological injuries are compensable under ' WCA. 2022 IL 126511 at ¶34.

In deciding if the exclusivity provision bars an employee's civil claims, the court explained that it must consider the nature of the injury, as the exclusivity provisions apply only if the injury is covered by the WCA. 2022 IL 126511 at ¶40. It found that the WCA's main purpose is to provide financial protection for injured workers until they can return to the workforce. 2022 IL 126511 at ¶41, citing *Interstate Scaffolding, Inc. v. Illinois Workers' Compensation Commission*, 236 Ill.2d 132, 923 N.E.2d 266, 274, 337 Ill.Dec. 707 (2010). The personal and societal injuries caused by violating BIPA's prophylactic requirements are different in nature and scope from the physical and psychological work injuries that are compensable under the WCA. This was not the case here, as McDonald and the putative class are merely seeking redress for the lost opportunity "to say no by withholding consent", which is not a psychological or physical injury that is compensable under the WCA. 2022 IL 126511 at ¶43. Additionally, a BIPA violation is not the type of injury that categorically fits within the purview of the WCA and is thus not compensable under the WCA. See generally *Toothman v. Hardee's Food Systems, Inc.*, 304 Ill.App.3d 521, 710 N.E.2d 880, 888, 238 Ill.Dec. 83 (1999) (in order for injuries to be compensable under WCA, there must be some "demonstrable medical evidence of injury"); *Marino v. Arandell Corp.*, 1 F.Supp.2d 947, 951 (E.D.Wis. 1998) ("workers' compensation acts such as the WCA were not designed to regulate or deter employer conduct, but to financially compensate injured employees and, specifically, to redress impaired earning capacity").

The court further reasoned that the plain language of BIPA supports a conclusion that the legislature did not intend that BIPA would be preempted by the WCA. As a matter of legislative intent, later-enacted statutes control over earlier statutes, and more-specific statutes control over general acts. See *People ex rel. Madigan v. Burge*, 2014 IL 115635, 18 N.E.3d 14, 385 Ill.Dec. 14 (in construing two conflicting statutes that cover same subject, specific governs general and more recently enacted statute should generally be given precedence). BIPA, enacted after the WCA, defines the pre-collection "written release" required by the WCA to include "a release executed by an employee as a condition of employment." 740 ILCS 14/10. It is therefore reasonable to conclude that the legislature was aware that BIPA claims could arise in the employment context, yet it treated them identically to nonemployee claims except as to permissible methods of obtaining consent. Therefore, the text of BIPA itself, which mentions its application in the employment context, is further evidence that the legislature did not intend for BIPA claims to be presented to the Workers' Compensation Commission. 2022 IL 126511 at ¶45.

Employers should ensure that they comply with BIPA as to any system that collects and stores an employee's biometric information to avoid claims under BIPA and the risk of an award for statutory liquidated damages.

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