

# BIPA Wave: Three Reasons to Believe It Has Crested

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Though the Illinois Biometric Information Privacy Act (“BIPA”) was passed in 2008, it remained fairly under-the-radar until about 2017, when it manifested in a growing wave of class action lawsuits largely centered on whether benign, finger scan timeclock technology falls within the auspices of the statute. Some three years later, we still have little clarity on the type of technology covered by the BIPA. That uncertainty has driven over **500** class actions to be filed under the BIPA in Illinois in less than three years. However, there is good reason to believe the wave has crested.

**First**, the Seventh Circuit’s decision in *Miller v. Southwest Airlines Co.*, 926 F.3d 898 (7th Cir. 2019) will dramatically reduce, if not preclude, BIPA claims involving plaintiffs in unions. This decision involved a consolidated appeal of BIPA suits against Southwest Airlines and United Airlines, focusing largely on whether the Railway Labor Act (“RLA”) preempted BIPA claims brought by union airline employees. The Court held, in no uncertain terms, that it did.

This decision, in a vacuum, has limited effect as the RLA covers relatively few entities. However, the RLA has nearly identical preemptive reach as does a more commonly used statute in the employment context--the Labor Management Relations Act (“LMRA”). Since the *Miller* decision, at least two federal district courts have dismissed BIPA lawsuits brought by union employees as preempted by the LMRA. See *Gray v. Univ. of Chicago Med. Ctr., Inc.*, No. 19-CV-04229, 2020 WL 1445608, at \*5 (N.D. Ill. Mar. 25, 2020); *Peatry v. Bimbo Bakeries USA, Inc.*, No. 19 C 2942, 2020 WL 919202, at \*4 (N.D. Ill. Feb. 26, 2020).

It is no secret that the overwhelming majority of BIPA lawsuits have arisen in the employment context. The prospect of LMRA preemption is a significant defense victory. It limits the field of potential plaintiffs dramatically to non-union members. And even when the plaintiff is a non-union member, LMRA preemption still eliminates putative class members that are in a union.

**Second**, the recent decision in *Miracle-Pond v. Shutterfly, Inc.*, No. 19 CV 04722, 2020 WL 2513099, at \*3 (N.D. Ill. May 15, 2020) speaks volumes to the value of implementing an arbitration clause. In *Miracle-Pond*, the plaintiff created a Shutterfly account in 2014, agreeing to terms that allowed Shutterfly to unilaterally make changes by posting a notice on its website. In May of 2015, about a month after the very first BIPA lawsuit was filed (a 2015 case against Facebook), Shutterfly amended its terms to add an arbitration clause requiring individual arbitration, and the plaintiff continued to use Shutterfly after the amendment.

The Court held that the 2015 unilaterally amended terms applied and compelled arbitration. This decision is critical to allow companies to implement arbitration clauses and get out in front of past-BIPA risk without necessarily drawing significant attention to a potential violation.

**Third,**

there are multiple appeals ongoing in the BIPA context and any one of which going in favor of defendants will further limit BIPA litigation. At this point, plaintiffs' lawyers have been largely successful in Illinois trial courts concerning various challenges to the BIPA, most notably whether the Workers' Compensation Act bars BIPA claims for statutory damages and whether the statute of limitations is one, two or five years. Most courts have sided with plaintiffs on both issues, finding that the Workers' Compensation Act has no impact and the statute of limitations is five years. That luck may be reaching its endpoint, however.

Over the course of the last few months, multiple Illinois trial courts have certified questions concerning the BIPA for immediate interlocutory appeal under Illinois Supreme Court Rule 308. These questions have concerned (i) whether the exclusivity provision in the Workers' Compensation Act bars BIPA claims that arose during the course of employment, (ii) the proper statute of limitations for BIPA claims and (iii) when the statute of limitations begins running (*i.e.*, at the time a biometric timeclock is first used or last used). The Workers' Compensation question was recently accepted by the First District Court of Appeals in the *McDonald v. Symphony Bronzeville Park* case. And multiple appellate petitions are challenging the appropriate limitations period are currently pending.

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While the onslaught of BIPA class actions has been substantial, there is good reason to believe it may have passed its peak. The *Miller and Miracle-Pond* decisions are critical victories for the defense. And a win on any one of the pending certified questions could dramatically curtail BIPA claims and exposure.

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