

# Technical Comments

## Florida BIPA (HB 1153 / SB 1270)

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From: Computer & Technology Law Committee, Business Law Section, The Florida Bar

Re: Florida's Biometric Privacy Information Act (HB 1153 / SB 1270)

Date: March 12, 2019

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### **A. Overview**

- The “Florida Biometric Information Privacy Act,” introduced this session as House Bill 1153 and Senate Bill 1270, regulates the collection and use of biometric information.
- Biometric information, as defined by the bill, consists of any information that can be used to identify a person based on biometric identifiers, such as retina or iris scans, fingerprints, voiceprints, or scans of hand or face geometry.
- Related laws include Florida’s primary data protection law, the Florida Information Protection Act, section 501.171, Fla. Stat., which generally requires businesses in the state to provide for appropriate data security, establish disposal requirements, and provide notices of data breaches as required under the law. Section 501.171, Fla. Stat., does not expressly include biometric data in the definition of personal information.
- Another related law includes section 1002.222, Fla. Stat., which prohibits public schools and agencies from collecting biometric information of a student, parent, or student’s sibling.

### **B. What Florida BIPA (HB 1153) Requires**

- Under HB 1153, an organization may not “collect, capture, purchase, receive through trade, or otherwise obtain” biometric identifiers or information (collectively, biometric data) unless:
  - (i) it provides written notice stating that
    - biometric data is being collected or stored, and
    - the specific purpose and length of term for which biometric data is being collected, stored, and used; and
  - (ii) it receives a written consent that is executed by either the individual whose biometric data is to be collected or the individual’s legally authorized representative.
- HB 1153 creates a private right of action for “any person aggrieved” by a violation of the statute and provides for statutory damages of \$1,000 for a negligent violation to \$5,000 for an intentional or reckless violation, in addition to reasonable attorneys’ fees and costs.

### **C. How Other States and the Federal Government Regulate Biometric Data**

- There are three states that currently have biometric data privacy laws in place: Illinois, Texas, and Washington. HB 1153 is patterned after the Illinois' Biometric Information Privacy Act. 740 Ill. Comp. Stat. 14/1-99. The Illinois statute is the only one that allows for a private right of action. The Texas and Washington statutes are enforced by the state attorneys general. Other states that have considered, or are currently considering, similar biometric data legislation include: Alaska, Arizona, Connecticut, Delaware, Massachusetts, Michigan, New Hampshire, and New York.
- Some states that do not have specific statutes addressing biometrics include biometric data within the definition of "personal information" in their general data breach notification statutes. Similarly, the California Consumer Privacy Act, which takes effect January 1, 2020, includes "biometric information" in the definition of protected personal information.
- There is no specific federal law that currently regulates the collection and use of biometric data. Congress is considering different versions of a federal U.S. privacy law, and it is not known whether and to what extent such a law would regulate the use of biometric data or preempt state laws on the matter. The Federal Trade Commission generally may take enforcement action pursuant to Section 5 of the FTC Act to protect consumers from unfair and deceptive trade practices in or affecting commerce, which could include the collection/use of consumer biometric data.

### **D. Concerns Regarding HB 1153**

- Threat to Florida Employers: In the past few years there have been an increasing number of putative class actions filed under Illinois' BIPA relating to the use of biometric data in facial recognition software. Many of these are filed against employers for their use of biometric data in the workplace.
- Threat to Florida Businesses and Consumers: Some companies have begun altering their behavior in Illinois to adhere to the law. For example, Nest, a maker of smart thermostats and doorbells, sells a doorbell with a camera that can recognize visitors by their faces. However, Nest does not offer that feature in Illinois because of the BIPA. ([Source](#)). In addition, retailers, banks, and consumer product manufacturers are increasingly relying on biometric-based identification technology to allow consumers to authenticate purchases, to help direct consumers to specific products in physical stores, and to prevent shoplifting and other crimes. A restrictive biometrics statute could chill these technological benefits for Florida consumers and businesses.
- Threat of Increased Class Actions: In January 2019, the Illinois Supreme Court ruled in *Rosenbach v. Six Flags*, 2019 IL 123186, that a plaintiff suing under BIPA need not allege or show actual injury or an adverse effect to maintain an action for damages. It is anticipated that this decision will result in an increase in class action lawsuits.
- Conclusion: Because HB 1153 is patterned after Illinois' BIPA, it is anticipated that Florida businesses, consumers, and employers would experience the same potentially adverse effects as Illinois if HB 1153 were to pass. Accordingly, any final legislation should mitigate these issues.