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BIPA Class Actions: Liability of Third-Party Vendors

BY JAY BOGAN

There has been an explosion of class action litigation under Illinois's Biometric Information Privacy Act (BIPA). The decision by the Northern District of Illinois in *Ronquillo v. Doctor's Associates, LLC*, No. 21-C-4903, 2022 WL1016600 (N.D. Ill. Apr. 4, 2022), which ruled that section 15(b) of BIPA applies to third-party vendors with no direct employment relationship with a BIPA plaintiff, adds to the growing line of pro-plaintiff decisions under that statute.

In *Ronquillo*, a Subway restaurant employee named Mariel Ronquillo asserted claims regarding the restaurant's point-of-sale ("POS") system, consisting of computer hardware owned by HP Inc. ("HP") and POS software licensed by the American franchisor of Subway restaurants, Doctor's Associates, LLC ("DAL"). Ms. Ronquillo

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Addressing Employee Speech in Times of Controversy

BY DOUGLAS ANSPACH JR & SHAWNA SORRELL

The Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization* sparked debate in a

variety of settings. It was and continues to be front-page news in newspapers and their online editions, the prominent story on many news channels, and trending on social media. Make no mistake, employees are talking about this as well. Employers must consider how to address employees' engagement in these conversations, both in the workplace and online.

There are a number of laws related to employee speech and activity, including most prominently the First Amendment to the United States Constitution and the National Labor Relations Act (NLRA). Regarding the First Amendment, it prohibits only the government from censoring or oppressing speech. While employees will sometimes reference their

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"used the POS system to clock in and out of her shifts and breaks, as well as to unlock the cash registers." 2022 WL 1016600, at *1. Although she was directly employed by a Subway franchisee, she filed a putative class action asserting that HP and DAL violated § 15(b) of BIPA, alleging that "they collected and obtained her biometric information without providing her with the required notice and obtaining her written consent." *Id*.

HP and DAL filed separate motions to dismiss Ronquillo's complaint, arguing her claims should be dismissed because (1) a section 15(b) claim requires that a BIPA defendant "take active steps to collect, capture, or otherwise obtain the plaintiff's biometric information," whereas "possession of biometric data alone" does not subject a defendant to liability; and (2) "§ 15(b) does not apply to third-party vendors of technology an employer uses to obtain its employees' biometric information," such that "extending § 15(b)'s reach to such parties does not further BIPA's purpose and instead creates absurd results." *Id*. at *2-*3.

The district court rejected both arguments.

On the "active steps" point, the district court cited the allegations of Ms. Ronquillo's complaint, which asserted that "DAL uses the Subway POS system, which it exclusively controls, to capture workers' fingerprints and create the reference templates," and "HP stores the reference templates on its hardware, which DAL then compares to scanned fingerprints to identify the workers." *Id*. at *3. Even though the Subway franchisee had more control of the overall process, Ms. Ronquillo's allegations "allow[ed] for the reasonable inference that DAL and HP played more than a passive role in the process." *Id*.

On the third-party vendor point, the district court ruled that "DAL and HP could not point to anything in BIPA's text that supported limiting § 15(b)'s reach only to employers." *Id*. The district court further rejected the argument that imposing liability on third-party vendors created absurd results, noting that DAL and HP could have contractually required the Subway franchisee to obtain the appropriate consents as a precondition to using the POS system.

Accordingly, "the Court cannot conclude that DAL and HP may escape liability under § 15(b) because they do not have a direct employment relationship with Ronquillo." *Id*. The district court also rejected an extraterritoriality argument and an effort to dismiss Ms. Ronquillo's enhanced statutory damages claim. *Id*. at *4.

While the court's opinion noted certain arguments might be properly renewed after evidence had been developed, as a whole, Ronquillo represents another difficult decision for BIPA class action defendants.■

Addressing Employee Speech in Times of Controversy

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"right of free speech," the First Amendment applies only to public sector employers and will not protect an employee's speech in the private employment setting. It is important for public sector employers to note that the First Amendment also does not protect all speech, including obscene speech or speech that incites violence.

The NLRA applies to all private employers, both with unions and without, and prohibits an employer from restricting employees from discussing matters that affect their terms and conditions of employment.

Specifically, section 7 of the NLRA guarantees employees the right to engage in "protected concerted activities . . . for the purpose of . . . mutual aid and protection." Section 8(a)(1) of the NLRA prohibits employers from enforcing any policies that either limit, or could be interpreted by an

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employee as limiting, section 7 rights.

Limited exceptions to section 7 exist, such as when an employee's speech renders the employee unfit because of his/her severe misconduct. These are high standards, and each situation is evaluated on a case-by-case basis. Employers should also be aware that many states also have public sector collective bargaining statutes that provide for protections for public sector "protected concerted activities."

Activity is concerted if it involves a group effort of multiple employees and is not for the sole benefit or on behalf of one employee. An individual employee's speech may also be protected if the employee is raising a concern—directly or indirectly—on behalf of a group of employees. For example, assume an employee posts on social media that he or she is disappointed with the Dobbs decision, and that the employee wishes his or her employer would do something to address its impact on employees seeking abortion access. Then, a fellow employee comments on the post agreeing that the employer should develop policies to address those needs. In this scenario, the discussion is now considered protected concerted activity under the NLRA.

Discussions must also relate to terms and conditions of employment. Multiple employees expressing personal gripes or political viewpoints unrelated to work are generally not protected by Section 7 of the NLRA. But, if an employer implements a policy regarding a particular topic and employees express strong personal viewpoints about it, the discussions will become protected activity under Section 7 because of the tie to the terms and conditions of employment. This is also true if the employer does not implement a policy, but employees urge the employer to do so.

Employers must keep in mind that section 7 protections do not shield employees from all recourse if they violate other lawful policies, such as anti-harassment and discrimination, bullying, or workplace violence policies. For example, if discussions turn volatile, which sometimes occurs when controversial issues are involved, employees are not free to then engage in threatening or harassing behavior. Employees who violate other lawful policies should be addressed in the same manner as any other policy violation.

Employers should make certain that their workforce has been provided these conduct-related policies—and that there is an acknowledgment form to prove it—to ensure employees are not crossing certain boundaries when discussing hot topic issues. It is especially important to remind employees that they could violate those policies on social media as well, even if they are commenting outside of regular work hours.■

Implementing Diversity, Equity, and Inclusion Initiatives in Hiring Without Running Afoul of Anti-Discrimination Laws

BY JENNIFER G. PROZINSKI & KAREL MAZANEC

Promoting diversity in the workforce has become a key focus for many employers.

Organizations have increasingly recognized the many benefits of employing a workforce with diverse backgrounds, perspectives, and experiences, and, more specifically, employees who belong to a variety of different characteristics protected by federal and state employment laws, including race, gender/sexual orientation, age, religion, and disability, among others. The challenge for employers, however, is how to promote diversity in the workforce without violating the federal, state, and local anti-discrimination laws that prohibit employers from making any employment decision, including hiring decisions, based on a legally protected trait. This article provides some best practice tips designed to help your organization navigate this complex area of the law.

Thorough Job Posting Procedures. Employers should post job openings internally and externally. An employer should avoid the temptation to offer an open position only to its existing workforce or to only a single, current employee.

Diverse Candidate Pools. Employers should ensure that the organization is recruiting from diverse candidate pools. If candidates with a certain protected characteristic (e.g., race, gender, age) are underrepresented in an employer's hiring pools, the employer should consider broadening recruiting strategies to attract more diverse candidates. Such efforts may include, for example, advertising for a position using additional platforms or reaching out to local organizations that can help to reach a broader target audience.

Diverse Interviewers. Employers should take steps to include diverse hiring managers and interviewers during the hiring process.

Training on the Dos and Don'ts of

Hiring. Employers should train hiring managers and interviewers on what can and cannot be considered when making hiring decisions, as well as on what questions can and cannot be asked of candidates during the hiring process. Employers are legally prohibited from hiring a candidate, or making any other employment-related decision, based on that candidate's race, gender, age, or any other protected characteristic. Employers should select the best-qualified candidate for the job.

Robust Hiring Process. Employers should consider implementing multiple rounds of interviews for an open position, during which hiring managers and interviewers complete a standardized form/questionnaire to evaluate the candidate. This will allow the organization to gradually narrow the pool of candidates with the input of multiple decision makers.

Review Job Application Form. An organization's job application should not request information about candidates' protected characteristics or seek information that could result in the disclosure of a protected characteristic. (Note, many jurisdictions have ban-the-box laws that prohibit inquiries about a candidate's prior criminal or arrest history.) Employers should be mindful of laws related to the collection of DEI data. As a best practice, such data generally should be collected on an anonymized basis only after a candidate has accepted an offer of employment.

Review Job Postings and Marketing Materials. Job postings and marketing materials should not include a suggestion that the organization is seeking a candidate who belongs to any particular protected characteristic. That said, a carefully drafted diversity statement may be an effective tool for advertising an organization's commitment to hiring candidates from all manner of backgrounds.

Avoid Arbitrary Quotas or Diversity Metrics. Except in certain limited circumstances, employers should avoid making hiring decisions using any numerical quota, metric, or rubric based on any legally protected characteristic.■

Post-*Roe*: What Employers Should Know About Employees, Medical Coverage, and Privacy

BY ANNE HALL

The U.S. Supreme Court's leaked draft in *Dobbs v. Jackson Women's Health Organization* now has become law with the Court's recent issuance of its final opinion. A post-*Roe* America raises new and challenging issues for employers concerning employment law, medical plan coverage, and employee privacy.

Issues Related to Employment Law

Allegations of Discrimination

The Dobbs decision will likely bring about a wide range of emotions from employees on both sides of this religious and politically charged issue. Employee discussions about the decision can easily escalate into an unwelcome debate that can cross the line into allegations of discrimination and a hostile work environment. Employers should be prepared to address employee concerns and handle complaints arising from these discussions.

Paid Sick Leave to Obtain Abortions

Employers may also encounter unprecedented legal issues concerning their employees in states where abortions and related services are no longer legal. For example, an employee who wishes to consult a physician or have an abortion typically would take paid sick leave offered by the employer, or time available under state law, or the Family and Medical Leave Act (FMLA). If a state passes a law prohibiting abortion and related services, it may prohibit employees from using their sick time to obtain such services. Suppose the law makes aiding and abetting individuals in procuring such services illegal. In that case, the employer theoretically could face criminal charges for allowing an employee to use sick leave to travel out of state and have an abortion. Employers also need to consider whether and how to maintain confidential information about employees who disclose that they are using sick leave to obtain an abortion or related services.

Solicitation Policies

Many employers have anti-solicitation policies in their workplaces, often to prevent unionization efforts. In light of the Dobbs decision, employers could make an exception, allowing employees to attend rallies or protests. Exceptions to an anti-solicitation policy can lead to the employer having no choice but to allow other solicitations.

Medical Plan Coverage

ERISA Preemption

Employers must consider how ERISA preemption will affect medical insurance plan coverage for abortion and related services, which is currently far from clear. Some states are pondering legislation that would create a private right of action against individuals (and perhaps entities) who facilitate abortion services. How courts interpret ERISA preemption, concerning state laws limiting self-funded plans' ability to fund abortions, is unknown. Due to the differences in state laws, employers likely will need to consider these issues on a state-by-state basis.

Travel Costs as Medical Expenses

As employers grapple with how best to support their employees in jurisdictions that are likely to ban or limit abortion access, some employers have considered funding travel expenses to seek abortion services through their employer-sponsored health plans. If employers wish to offer this coverage outside their existing medical plans, those reimbursement plans would have to meet Affordable Care Act (ACA) requirements. It likely would be easier for employers to cover travel expenses under an existing group health plan or health savings account. Employers also must consider the tax implications for their employees of reimbursing travel and lodging expenses related to accessing abortion services. Finally, employers must weigh the potential risks of criminal liability associated with medical plan coverage for abortion-related travel expenses.

Employee Privacy

Individual privacy rights are at the heart of the Dobbs decision, which could place employers in the undesirable position of feeling increased pressure to tighten security concerning employees' confidential information. To the extent that employers collect any data that could show employees having accessed information about abortions, abortion facilities, or abortion-inducing drugs, employers should consider instituting stricter cybersecurity measures to protect employees' identities.

Employers should remember that the Health Insurance Portability and Accountability Act (HIPAA) prohibits them from using or disclosing employees' protected health information (PHI) for any purposes not otherwise authorized.

They also cannot utilize this information to inform employment decisions. ■

3 Key Considerations Under GINA: The Federal Law You May Have Overlooked

BY TRACEY I. LEVY

The Genetic Information Nondiscrimination Act (GINA) may be the sleepiest of the federal EEO laws, the one that many employers have never heard of or have entirely forgotten. It prohibits employers from collecting genetic information from employees and using that as a basis for employment decisions. Most employers, in the practical realities of day-to-day interactions, have little or no interest in their employees' genetic information and never run afoul of the law. The EEOC's charge-filing statistics reflect this as well. Of the tens of thousands of charges filed annually with the EEOC, typically only 200 to 300 include reference to a claim under GINA.

But things have changed a bit with the pandemic. Charge filings asserting a violation of GINA spiked to 440 in 2020 as employers began to more formally probe into employees' personal lives, and the EEOC posted lengthy guidance on employers' obligations under various federal laws, including GINA, when responding to the COVID-19 pandemic. The EEOC's guidance sets the parameters of appropriate inquiries in the COVID-19 context, but it also serves as a primer for employers on the scope of GINA.

Don't Ask About Family Members

GINA prohibits employers from asking medical questions about family members. In the COVID-19 context, that has meant that employers seeking to gather information about employees' COVID exposure can ask if an employee has been in close contact with someone who tested positive or was exhibiting symptoms of COVID. An employer cannot ask whether an employee's family member has tested positive for or exhibited symptoms of COVID. The latter inquiry runs afoul of GINA.

Similarly, in more typical workplace interactions, employers should coach their managers not to probe too closely into employees' family medical histories. If an employee reports a recent cancer diagnosis, for example, an appropriate response is to express sympathy and ask if the employer can provide support. An inappropriate response in having that conversation is to ask whether cancer runs in the employee's family, or anything along those lines – such inquiries might be common in conversations with friends and neighbors, but in the workplace they may run afoul of GINA.

A Florida-based medical practice learned a painful lesson on the reach of GINA. The employer had been collecting employees' family members' COVID-19 testing results. The EEOC recently announced it had reached a conciliation agreement with this employer, which included payment of compensatory damages and back pay to employees, posting a notice, and conducting training on EEO laws pertaining to COVID-19. The employer also had to stop collecting employees' family members' test results.

Collecting Vaccination Information Is Permissible

The EEOC guidance clarifies that information on vaccination status (as distinct from COVID symptoms or test results) is not considered family medical history. Therefore, employers can request proof of vaccination of employees and their family members without violating GINA. Notably, though, if an employer were to gather information on medical history related to an employee's family member's vaccination status, then the employer would potentially run afoul of GINA. It was important to the EEOC's analysis that the pre-vaccination screening questions for COVID-19 do not seek family history or any other type of genetic information.

Incentivizing Vaccinations Is Complicated

Employers looking to take their COVID precautions to the level of incentivizing employees' family members to get vaccinated face various hurdles under GINA:

1. Beware of Incentives

The employer cannot offer an incentive to the employee in exchange for a family member receiving a vaccine from the employer or the employer's agent because, in posing the pre-vaccination medical screening questions, the employer would thereby be collecting family medical history on the employee.

2. Make it Purely Voluntary

The employer must ensure that the vaccinations of family members are purely voluntary, meaning that the employer neither requires employees to have their family members get vaccinated nor penalizes employees whose family members opt not to be vaccinated.

3. Keep it Confidential

Employers need to safeguard the confidentiality of the medical information obtained from family members during the screening process, and ensure it is not shared with anyone who makes employment decisions involving the employee.

4. Get Written Consent

Employers need to obtain prior, knowing, voluntary, written authorization from the family members before asking any pre-screening questions or administering the vaccine. Other EEO laws may present additional hurdles in the vaccination context, and employers are advised to consult legal counsel before implementing any vaccine incentive program. ■

Upcoming Webinar – Due Diligence in Mergers & Acquisitions

BY ALAN M. KAPLAN

What are the challenges when representing a buyer in a merger and acquisition? When conducting due diligence, lawyers representing companies must know and appreciate the real-life problems and issues existing so that the merger and acquisition is successful.

On October 6, 2022, from 12:00 noon to 2:00 p.m., Frank J. Del Barto will present "Due Diligence in Mergers & Acquisitions – Top 10 Employment and Immigration Issues." Frank is a shareholder with Masuda, Funai, Eifert & Mitchell, Ltd. in Schaumburg, Illinois, a firm specializing, in part, in representing companies and investors. Focusing on non-unionized companies, Frank will discuss the Top 10 employment, benefits and immigration issues.

The webinar is co-sponsored by both the Labor & Employment as well as the Business Advice & Financial Planning section councils. Please sign up for the webinar by visiting the CLE page of ISBA's website. Participants will receive 2.0 MCLE credits.■