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Illinois act leading nation in new form of biometric privacy regulations

In the absence of comprehensive federal consumer privacy laws (which look less likely under the current administration) and the rollback of federal agency level privacy regulations, states are attempting to fill the privacy law void.

While most people think of California as the state with the strictest and most pro-consumer laws, Illinois has caught up and by some measures surpassed the Golden State in developing some of the strictest consumer privacy laws in the nation — including enacting regulations that protect biometric information in 2008 to recently passing legislation that attempts to restrict the collection of geolocation data.

Illinois' legislature recently became the first in the nation to pass a bill restricting the collection and use of geolocation data by private entities. The Illinois Geolocation Privacy Protection Act (HB 3449) passed both houses and was sent to Gov. Bruce Rauner for his signature on June 27.

It is increasingly likely, however, that the governor will veto the bill at least in part due to lobbying efforts by the business community including the Illinois Chamber of Commerce, the Chicagoland Chamber of Commerce and the Illinois Retail Merchants Association. If enacted, the bill would require private entities to obtain "affirmative express consent after providing clear, prominent and accurate notice" before collecting, using or disclosing geolocation information from a person's mobile device.

In addition, the proposed Right to Know Data Transparency and Privacy Protection Act was passed by the state Senate in May and is pending in the House. It also has drawn opposition from the business community.

The Right to Know Act (SB 1502) would require operators of commercial online services that collect personally identifiable information online about consumers living in Illinois to disclose certain information about personal information sharing practices to Illinois consumers.

Illinois also was the first state to regulate the collection of a person's biometric information and the state is now the site of litigation over the law.

Biometric technologies, including facial recognition technology, "identify people using their faces, fingerprints, hands, retinas and irises, voice and gait, among other things," according to a July 2015 report by the U.S. Government Accountability Office.

The state took the lead on biometric data regulation largely in response to the selection of Chicago to test new applications of fingerprint-scanning technologies for financial transactions. Enacted in 2008, the Biometric Information Privacy Act, prohibits collecting, capturing or otherwise obtaining a person or customer's biometric information unless it first informs the subject in writing that the information is being collected, why it is being collected and

how long it will be used and stored and then receives the subject's written release.

The act also requires private entities possessing biometric information to have a written policy available to the public that establishes a schedule for retaining and permanently destroying the biometric information. Violations would bring a \$1,000 fine

PRIVACY, TECHNOLOGY AND LAW



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for each negligent violation and a \$5,000 fine for each intentional or reckless violation.

Texas enacted a statute that is similar to Illinois', but does not include a private right of action clause. On May 16, Washington state became the third state to do so, but like Texas, the new Washington law also does not include a private right of action clause.

More regulation is likely on the way. Currently, Alaska, Connecticut, Montana and New

metric law provides a private right of action, Illinois courts are seeing a proliferation of putative class-action lawsuits and a range of claims from customers and employees of companies using facial recognition technology.

Most recently, on Sept. 15, an Illinois U.S. District Court refused to dismiss proposed class-action claims against Shutterfly Inc. alleging that the online photo publisher violated the biometric act by gathering and storing "face geometry" scans without the subject's consent.

A Florida resident filed suit in Illinois arguing that Shutterfly created and stored a template of his face without his permission from a photo that his friend uploaded to the site.

Significantly, a district court ruled that Illinois' act does not require plaintiffs to allege actual damages. It also rejected Shutterfly's arguments that the law does not apply to scans of face geometry from photographs.

Other recent developments include two lawsuits filed on Sept. 5 in the Cook County Circuit Court allege that the restaurant chain Wow Bao and gas station/convenience store chain Speedway LLC violated the act by failing to notify customers and obtain consent before collecting their biometric information.

In the potential class-action suit against Wow Bao, owned by Lettuce Entertain You Enterprises Inc., the plaintiff argues the restaurants of improperly collecting and storing customers' facial scans through self-order kiosks, according to watchdog organization Illinois Policy.

The proposed class action against Speedway alleges the company collected employees' fingerprints without getting their written consent and then improperly shared the data with Kronos Inc., a third-party vendor

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Hampshire are considering biometric data laws. Illinois may also expand its current laws.

In addition, bills have been introduced in a few states, including Arizona and Missouri, to protect student privacy by limiting the collection of student biometric information without their parents' consent.

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of fingerprint-operated time clocks.

In April, an employee of Roundy's Supermarkets Inc., a regional chain owned by Kroger Co., filed a putative class-action suit in an Illinois state court arguing that the supermarket's practice of scanning and storing employees' fingerprints to clock them in and out of work violates the biometric act because it did not get written consent first. The suit was removed to a federal district court in May.

Major companies are also facing litigation over their use of biometric information. On Feb. 27, a federal district court refused to dismiss two Illinois residents' claims that Google violated the act by creating face templates based on their photographs using facial recognition technology. In the putative class-action lawsuit filed in 2016, the district court ruled that data derived from photos about an individual's physical characteristics is protected by the act.

Facebook has battled claims regarding the act in Illinois since 2015. Initially filed in Illinois, the action was transferred to a

federal California court and captioned *In re: Facebook Biometric Information Privacy Litigation*.

Facebook attempted to dismiss the suit in 2016, arguing the plaintiffs lack Article III standing. The case was put on hold until the U.S. 9th Circuit Court of Appeals issued a ruling in *Spokeo Inc. v. Robins*, on remand from the U.S. Supreme Court to determine whether a concrete injury-in-fact had been alleged, as mandated by Article III.

On Aug. 15., the 9th Circuit concluded that the plaintiffs suing Spokeo under the Fair Credit Reporting Act did indeed allege an injury sufficient to establish standing.

Other lawsuits have settled, including one alleging privacy violations against L.A. Tan over its collection of customers' fingerprints. Biometric claims against Snapchat in a California federal court were voluntarily dismissed last year in favor of arbitration.

Meanwhile, a federal appeals court will have the opportunity to weigh in on the emerging legal area.

A New York federal court dismissed a potential class-action

lawsuit brought by an Illinois brother and sister against New York-based video game maker Take-Two Interactive. Take-Two's NBA 2K15 game scans players' faces to create personalized virtual basketball players exclusively for in-game play.

The siblings argued Take-Two violated the biometric act because it didn't notify players before collecting and storing their biometric data. But the court concluded that Take-Two's failure to notify was merely a procedural violation and that the siblings failed to establish that storage and use of their facial scans posed any real harm. The siblings have appealed to the U.S. 2nd Circuit Court of Appeals.

Businesses are increasing using consumers' biometric information for security purposes and to enhance and personalize gaming and social media functions. It's likely more states will follow Illinois by introducing biometric data protection and other privacy regulations in the next few years.

Proponents of such legislation argue that certain sensitive personal information, such as Social

Security numbers, warrant comprehensive protection because once stolen the process to get a new one issued can be difficult.

Further, biometric data, such as facial features and fingerprints, is irreplaceable. Trade associations, like those that oppose the Geolocation Privacy Protection Act and the Right to Know bills, argue the proposed laws would impose unnecessary burdens on the business community and stifle job growth.

They also argue that the legislation would discourage innovation, particularly products and services that use emerging data collection practices.

It remains to be seen what efforts other states will make or how the federal government will respond to state-level privacy protection legislation. Notably, Illinois remains the only state with a biometric law to have a private right of action, which has opened the door to an emerging area of class-action litigation.

It is likely that state legislatures will look to Illinois as an example of what to do — and perhaps what not to do — in the future.