

Employers Beware: Historic BIPA Verdict the Sign of More to Come?

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Key Takeaways:

- A \$228 million verdict may encourage more biometric privacy litigation in Illinois
- Corporations must ensure biometric **contractors** will comply with BIPA's requirements
- Illinois juries are receptive to biometric privacy claims, making trial a high-risk gamble

Illinois may see an influx of privacy litigation after a recent verdict in the Northern District of Illinois. In *Rogers v. BNSF Railway Co.*, a federal jury awarded a class of **45,000** plaintiffs \$228 million in damages against BNSF Railway Co. for violations of the Biometric Information Privacy Act.

Among many other provisions, the BIPA prohibits private entities from collecting a person's biometric identifier or biometric information without providing notice and obtaining written consent. The recent verdict has added to the developing landscape hostile to corporations who utilize biometric technology. Under the statute, a "biometric identifier" means a retina, iris, fingerprint, voiceprint, hand, or face scan.¹ 740 ILCS 14/10. Biometric information means any information "based on an individual's biometric identifier used to identify an individual." *Id.*

As a reminder, the Illinois Supreme Court has already held that, for plaintiffs to assert BIPA claims, a plaintiff need not establish an actual injury. See *Rosenbach v. Six Flags Entertainment Corporation*, 129 N.E.3d 1197 (2019). Early on, the plaintiff in *Rogers* relied on this "no-harm-necessary" standard to survive dismissal. See *Rogers v. CSX Intermodal Terminals, Inc.*, 409 F.Supp.3d 612 (N.D. Ill. 2019).

Before trial, BNSF attempted to limit the BIPA's scope. One unresolved issue in the *Rogers* case was whether BNSF could be held liable for data collection done by a third-party contractor. In September, the court in *Rogers* rejected BNSF's attempt to limit BIPA liability to actions attributable to the defendant corporation. The court held that the state statute's wording allowed plaintiffs to assert that corporations could be vicariously liable for a contractor's failure to provide notice and seek written consent. That pre-trial decision puts the burden on private entities to perform expanded due diligence when picking a biometric technology contractor. Moreover, the risk of noncompliance cannot be left unspoken; contracts should include provisions to ensure compliance with BIPA.

In the end, a five-day trial produced a historic verdict. The BNSF trial was the first of its kind in Illinois: a BIPA case had not been heard by an Illinois jury before. The verdict has highlighted risk to biometric litigation defendants that juries are likely to be sympathetic to aggrieved consumers and may award company-ending damages. Much like the [Rosenbach decision](#), the award will certainly encourage numerous other classes of plaintiffs with BIPA claims to file claims. With a \$228 million-dollar verdict as the only evidence of trial success or failure, the risk of litigation maturing to trial may be too high.

If you are anticipating BIPA related litigation, or need to review employee or contractor agreements, please contact a member of Freeborn's [Biometric Data & Privacy Litigation Team](#).

¹ The statute also excludes a broad range of seemingly biometric data. Personal descriptors excluded include handwriting, tattoo descriptions, and even hair and eye color. There are also cross-references to other statutes covering bio-data privacy.

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