THURSDAY, JANUARY 13, 2022 | SERVING CHICAGO'S LEGAL COMMUNITY FOR 164 YEARS | CHICAGOLAWBULLETIN.COM

Chicago Daily Law Bulletin®

VOLUME 168, NO. 6

LAW BULLETIN MEDIA

Appeals court assesses date when biometric privacy claims accrue

In *Watson, et al. v Legacy Healthcare Financial Services, LLC, et al.,* 2021 IL App (1st Dist.) 210279 (Dec. 15, 2021), the 1st District Appellate Court decided the issue of when a claim accrues under the Biometric Information Privacy Act (740 ILCS 14/1 et seq.).

Plaintiff Brandon Watson, who had worked at various Legacy Healthcare facilities in Chicago, alleged that from the start of his employment with the defendants in 2012 through the end of his employment in 2019, he was "required to have his fingerprint and/or handprint collected and/or captured so that defendants could store it and use it moving forward as an authentication method." Specifically, the plaintiff alleged that he was "required to place his entire hand on a panel to be scanned in order to 'clock in' and 'clock out' of work" each day.

The act requires an entity that utilizes biometric data (1) to publicly provide a written policy governing the retention and permanent destruction of biometric information, (2) to inform any subject in writing that his or her biometric information is being collected or stored, (3) to inform the subject in writing of the specific purpose and length of time for which his or her biometric information is being stored and used, and (4) to obtain his or her written consent. 740 ILCS 14/15(a), (b). The complaint alleges that the defendants violated the act by failing to satisfy all four of these requirements.

In response, the defendants filed a section 2-619 motion to dismiss, arguing that the plaintiff's claim accrued on the first day they collected his biometric information and that the plaintiff's thus suit was time-barred. In the alternative, the defendants argued that the plaintiff's claim was preempted by the Workers' Compensation Act (820 ILCS 305/5(a), 11) and the Labor Management Relations Act of 1947 (LMRA) (29 U.S.C. Sec. 185(a) (2018)).

The trial court granted the defendants' motion to dismiss, finding (1) that the plaintiff's claim accrued with the initial scan on Dec. 27, 2012; (2) that the statute of limitations was five years; and (3) that his suit, filed on March 15, 2019, was therefore time barred.

The trial court observed: "This holding disposes of the case, but the Court will address defendants' other arguments for the record." The trial court then found that the plaintiff's claim was not preempted by either the Workers' Compensation Act or LMRA.

The trial court subsequently granted the plaintiff's motion for entry of a finding pursuant to Illinois Supreme Court Rule 304(a) that there was no just reason to delay an appeal from its orders.

LIFE IN THE WORKPLACE

JOSEPH M. GAGLIARDO

JOSEPH M. GAGLIARDO *is a lawyer with Laner, Muchin Ltd. He has counseled and represented private and governmental employers in a broad range of employment matters for more than 30 years.*

The act itself does not contain an express statute of limitation or set forth an accrual date. On appeal, neither side contested the trial court's finding that the statute of limitations is five years. As a result, the issue of the applicable term of years of the statute of limitations was not before the Appellate Court on the interlocutory appeal.

After an extensive review of the act and the parties' arguments, the appellate court found that the plain language of the act, its legislative history and purpose, and the dictionary definitions of its key terms compelled the court to reject the defendants' argument that the accrual date occurred with the first collection of plaintiff's fingerprint or handprint. The court went on to state that the plain language of the statute establishes that it applies to each and every capture and use of the plaintiff's fingerprint or hand scan.

In response to the defendants' argument that, if the accrual date is not the first collection, then damages will be ruinous for them, the court stated it did not need to decide whether each scan was a new and separate violation or a continuing violation. "All we have to determine now is whether plaintiff's suit against these defendants survives their motion to dismiss."

The court further stated that questions relating to damages were not before the court, and it was not going to decide the preemption arguments raised by the defendants, as all defendants who are parties in the case before the trial court, were not parties to the appeal. The court further noted that it has already accepted a certified question regarding the issue of whether the LMRA preempts claims under the act, and this question has been fully briefed in another appeal. See *Watson v. Legacy Healthcare Financial, et al.,* 2021 IL App (1st) 210279.