

## The New BIPA? Attys Warn GIPA Is A 'Live Grenade'

By **Celeste Bott**

*Law360 (February 23, 2024, 8:45 PM EST)* -- After notable appellate victories in biometric privacy cases, Illinois plaintiffs have seized upon a previously little-used law protecting workers' genetic privacy, leaving defense attorneys wondering if history will repeat itself and open companies to potentially explosive liability.

While the much-litigated Biometric Information Privacy Act protects the sharing and collection of things like fingerprints and facial scans, the Genetic Information Privacy Act safeguards against the misuse of genetic information, which plaintiffs have claimed covers everything from their family's history of asthma to a test result suggesting they are likely to develop cancer. Companies are barred from using that type of information to make employment decisions and insurers can't use it for many underwriting purposes, including determining eligibility for coverage or calculating premiums.

In recent months, dozens of class actions have taken aim at companies that have required physicals as a contingency for hiring workers, with candidates and employees claiming questions about their family medical histories during those doctor's appointments violated GIPA.

The volume of new suits is unprecedented. While the law was passed in 1998, a full decade before BIPA, even the Seventh Circuit acknowledged in a recent ruling that there's been a "dearth of Illinois precedent examining GIPA."

Danielle Kays, a labor and employment attorney with Seyfarth Shaw LLP, told Law360 her firm has been closely tracking the influx of class actions filed under GIPA.

More than 60 have been filed within roughly the last year, she said, and before 2023 only two cases had been brought under the statute in 25 years.

Plaintiffs' appellate success over BIPA, which similarly provides a private right of action and substantial statutory damages, is likely the inspiration for this new wave of privacy cases, according to Jason Stiehl of Crowell & Moring LLP.



Much like the Biometric Information Privacy Act protects the sharing and collection of things like fingerprints and facial scans, the Genetic Information Privacy Act bars employers from using genetic information such as medical test results to make employment decisions and insurers from using it for underwriting purposes. (Photo by Christopher Furlong/Getty Images)

"It's a perfect storm between the success the plaintiffs' bar has had under that law and the recent Illinois Supreme Court decisions allowing companies to be held liable for repeated violations of the same act," Stiehl said, referencing the high court's recent findings that BIPA claims accrue each time a worker's biometric data is collected and that the claims are subject to a five-year statute of limitations.

BIPA has inspired lawsuits over all kinds of widely used technology, including biometric timekeeping systems, facial recognition tools used by social media platforms and voice recognition in smart devices, while GIPA has a much more limited scope. But the damage potential is still huge: GIPA provides damages of \$2,500 for every negligent violation and \$15,000 for every willful violation, compared to BIPA's \$1,000 or \$5,000, respectively.

"It's monumental damages. If you can hit one as a plaintiff's lawyer you can pretty much retire," Stiehl said.

Attorneys from firms representing recent GIPA plaintiffs, including Wallace Miller, McGuire Law PC and Siri & Glimstad LLP, did not immediately respond to requests for comment.

With so many of these cases in their infancy, there's not much left to do for now but to wait and see what clarity courts offer, Stiehl said.

In the meantime, many employers outsource physicals and should review those contracts to see if there's an indemnification provision, he said, adding they should check their insurance policies as well to see if there are any carveouts barring coverage for this type of litigation.

It could also be worth some internal conversations about a company's hiring practices, he added.

"For any employer in Illinois, it's a risk," Stiehl said. "How important are those questionnaires to have? How detailed of a family medical history do they really need for employment?"

Insurance attorneys, meanwhile, cautioned that the suits could upend the entire business model for life insurers, which rely on medical history to price policies.

The law doesn't apply to life insurers, Michael McMorrow of Locke Lord LLP told Law360. There are parts of the law that are specific to accidental and health insurers, but more generally, it contains a limitation stating it applies only to "protected health information," he said.

One argument insurers have raised in seeking dismissal of these suits is that GIPA borrows the Health Insurance Portability and Accountability Act's definition of "protected health information," which encompasses information that can identify an individual and is created or received by "a health care provider, health plan, employer or health care clearinghouse."

"A life insurance provider simply doesn't provide healthcare," McMorrow said.

Still, all insurance companies in Illinois should be aware of the statute, and might consider adding arbitration provisions to various agreements and forms they use with consumers when applicable and enforceable, he said.

"It is a live grenade," McMorrow said. "This is a very uncommon statute. It allows recovery for a lot of statutory damages and attorney's fees, with no cap on damages. Most consumer statutes out there

have one feature or another."

Most insurers have common policies and procedures, which is going to make class certification more attractive to a plaintiff, he added.

Brian Hays, also with Locke Lord, said he also recommends clients take proactive steps to educate lawmakers and the state's insurance department on the effects of the law.

"It's important for insurance companies to advocate for legislation limited to addressing real problems for consumers and not just things people are losing sleep over because they're worried about [artificial intelligence] and genetic companies taking over the world," Hays said.

--Editing by Alex Hubbard.