

Steps For Employers After 7th Circ. BIPA Retroactivity Ruling

By **David Duffy, Carlos Ortiz and Dremain Moore** (June 24, 2026)

The U.S. Court of Appeals for the Seventh Circuit recently resolved a critical question that employers in Illinois have wrestled with: whether Illinois' 2024 amendment to the Biometric Information Privacy Act applied retroactively to the numerous BIPA cases that were already pending when the amendment took effect. The amendment capped statutory damages on a per-person basis rather than per scan, such as fingerprint or facial scans.

On April 1, in *Clay v. Union Pacific Railroad Co.*, the Seventh Circuit held that the 2024 damages cap applied retroactively to all pending BIPA cases. The court reasoned that the amendment was procedural, not substantive, because it limited the statutory damages available under BIPA without modifying the conduct that creates liability.

The amendment and its retroactive application under *Clay* materially narrowed what were once catastrophic penalties in the form of per-scan statutory damages in BIPA cases.

However, employers should not mistake the ruling in *Clay* for a broad safe harbor. BIPA's underlying duties remain intact, large classes can still create substantial exposure and several questions regarding the amendment's practical application remain unresolved.

How an Illinois Supreme Court Ruling Set the Stage

BIPA regulates how private entities collect, retain, disclose, and protect biometric identifiers and biometric information.

Among other obligations, BIPA generally requires a publicly available retention and destruction policy; written notice before biometric data is collected or stored; disclosure of the specific purpose and duration of the data's collection, storage and use; and a written release.

It also restricts sales and disclosures of biometric data, and requires private entities to protect the data using a reasonable standard of care.

For employers, the most familiar application is a fingerprint or hand geometry time clock, but the law may also implicate facial recognition access controls, voice authentication and other technologies that identify an individual through biometric characteristics.

BIPA authorizes a prevailing plaintiff to seek actual or liquidated damages of \$1,000 for a negligent violation, and \$5,000 for an intentional or reckless violation, whichever is greater. A prevailing plaintiff may also recover attorney fees and costs and seek other appropriate relief, including an injunction.

The damages issue became especially consequential after the Illinois Supreme Court's 2023 decision in *Cothron v. White Castle System Inc.* There, the court interpreted BIPA to



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allow damages on a per-scan basis, meaning that each individual biometric scan could constitute a separate violation.

This interpretation created the potential for extraordinary and, in some cases, existential liability, particularly in the employment context where employees scan in and out daily. For example, a single employee who scans twice per workday could theoretically generate hundreds of thousands — or even millions — of dollars in damages annually.

The Cothron court acknowledged the potential for enormous liability, including a damages estimate exceeding \$17 billion in that case. It nevertheless concluded that policy concerns regarding excessive damages were best addressed by the Illinois General Assembly, and invited the Legislature to clarify its intent concerning the assessment of damages.

The Illinois General Assembly responded with Public Act 103-0769, which took effect in August 2024. The amendment added two provisions to BIPA's right of action and damages section.

For repeated collections, it provides that obtaining the same biometric identifier or biometric information from the same person using the same method of collection constitutes a single violation for which the person is entitled to "at most, one recovery." The amendment imposes a similar limitation when a person's biometric data is repeatedly disclosed to the same recipient using the same method of collection.[1]

It also expressly recognizes an electronic signature as a permissible written release.

Importantly, the amendment did not specify whether the new damages provisions applied to BIPA cases that were already pending. That silence produced conflicting federal district court decisions and sharply different exposure assessments.

Three Appeals, One High-Stakes Question

In Clay, the Seventh Circuit considered three interlocutory appeals from the U.S. District Court for the Northern District of Illinois.

In one of the appeals, Reginald Clay, a commercial truck driver, alleged that Union Pacific Railroad Co. required him to scan his fingerprints when entering and leaving company facilities.[2] In the others, John Gregg[3] and Brandon Willis alleged that their respective employers, Central Transport LLC and Universal Intermodal Services Inc., collected fingerprints or hand geometry through biometric time clocks.[4]

The financial stakes illustrated the significance of the retroactivity issue. Clay alleged approximately 1,500 fingerprint scans, so under a theory seeking \$5,000 for every intentional or reckless violation, his individual statutory damages claim could have reached \$7.5 million. Gregg asserted at least 700 violations, which could amount to alleged damages in the millions. Willis brought a putative class action that presented potential exposure in the billions under a per-scan theory.

In all three cases, the district court concluded that the 2024 amendment did not apply retroactively, but granted the defendant's request to certify the question for interlocutory review.

In short, the plaintiffs argued that the amendment was substantive because it reduced damages that were associated with conduct that had already occurred. Meanwhile, the

defendants argued that the amendment was remedial, or procedural, because it only changed the recovery available after liability was established.

Why the Seventh Circuit Found the Amendment Remedial

The Seventh Circuit began its analysis in Clay with Illinois' retroactivity framework.

If the Illinois General Assembly does not expressly state an amendment's temporal reach, courts apply the state's statutory savings rule and determine whether the change is substantive or procedural. Substantive changes generally operate prospectively. On the other hand, procedural changes may apply in pending proceedings, and Illinois law treats changes that only affect remedies as procedural.

In Clay, the panel concluded that the amendment's text and structure demonstrated a remedial purpose based on the following reasoning.

First, the Illinois General Assembly placed the amendment in BIPA's damages section and left the statute's substantive compliance duties unchanged. It also left untouched the provision creating a private right of action.

Second, the new provisions focus expressly on recovery. They provide that a person is entitled to one recovery at most under the specified circumstances. In the panel's view, that language limits the remedy that is available after a violation, rather than changing what conduct BIPA prohibits.

The Seventh Circuit also rejected the plaintiffs' argument that Cothron required a different result. It explained that Cothron addressed when claims accrue under BIPA's substantive provisions, that is, a separate BIPA claim accrues each time a private entity unlawfully scans, collects, or transmits a person's biometric identifier or information without satisfying BIPA's requirements, not merely the first time the entity does so, principally for statute of limitations purposes.

It did not decide how many statutory damages awards a plaintiff must receive under BIPA's damages provision. The court could, therefore, preserve the claim accrual rule under Cothron, while holding that the Legislature had limited the available recovery for repeated scans or disclosures.

Finally, the panel relied on the discretionary nature of BIPA damages. The Illinois Supreme Court had previously observed that the statute says that a prevailing party may recover damages, suggesting that a plaintiff is not guaranteed a specific liquidated award before judgment. Because the amendment limits the available remedy, rather than eliminating a vested right, the Seventh Circuit found no constitutional barrier to applying it in pending cases.

The Clay court reversed all three district court rulings and remanded the cases. It also expressly noted that the reduced damages framework may require trial courts to revisit other issues, including subject matter jurisdiction.

What Clay Does and Doesn't Change

Clay significantly changes the valuation of pending federal BIPA cases involving repeated scans or disclosures. As such, defendants should revisit damages models, settlement positions, insurance notices and reserves that were based on a per-scan recovery theory.

Plaintiffs and defendants should also reassess amount-in-controversy calculations. In some individual cases or smaller class actions, the reduced damages theory may affect traditional diversity jurisdiction or the \$5 million jurisdictional threshold under the Class Action Fairness Act because the amount at issue will not be sufficient to invoke federal subject matter jurisdiction, such as \$75,000 for diversity jurisdiction under the removal statute.

The decision in *Clay* does not necessarily end the retroactivity debate in Illinois state court. The Seventh Circuit made an *Erie* prediction, as established by the U.S. Supreme Court's 1938 ruling in *Erie Railroad Co. v. Tompkins*, regarding how the Illinois Supreme Court would apply state retroactivity law.

An *Erie* prediction involves the following situation: When the precise issue has never been addressed by the state's highest court, the federal judge must make an educated estimate or prediction of what the state law is, rather than deciding what they think it should be. Under *Erie*, federal courts must apply state substantive law to state law claims.

Although the ruling binds federal district courts within the circuit, Illinois reviewing courts remain the final authority on Illinois law and could reach a different conclusion.

Further, the amendment should not be treated as a universal one-award cap for every BIPA claim, as its text specifically addresses repeated collections under the consent provision involving the same person and the same collection method. For repeated disclosures, the limitation also depends on whether it involves the same recipient. Different collection methods, different disclosure recipients or claims under BIPA's other provisions may present separate exposure.

For example, the amendment does not expressly limit recovery for alleged violations involving retention and destruction policies, profiting from biometric data, or failing to use reasonable safeguards.

The amendment also does not eliminate claims for actual damages, attorney fees, costs or injunctive relief. Even where statutory damages are limited to one recovery for each affected person and covered category of conduct, a large class can still generate substantial liability and defense costs.

Compliance Priorities for Employers

The central practical lesson from *Clay* is that lower potential damages do not excuse noncompliance. The decision changes the scope of the remedy available in BIPA cases, not the duties imposed by BIPA. Employers that are using biometric technologies should consider the following measures.

First, inventory and map biometric technologies and dataflows. The review should reach beyond timekeeping systems to access control, security, wellness programs, recruiting tools and authentication platforms.

Employers should document what data is collected, the collection method, where it is stored, why it is used, who receives it, and which vendors, affiliates or customers can access it. That mapping can also help determine whether multiple methods or recipients could create separate exposure under the amended law.

Second, confirm that compliant notice and consent are obtained before collection begins.

Notices should state that biometric data is being collected or stored, and should explain the specific purpose and length of time for its collection, storage and use.

Employers should retain the written release and evidence showing when and how it was executed. Although the amendment expressly permits electronic signatures, employers should use a reliable process that preserves proof of the employee's intent to sign.

Third, maintain and operationalize a publicly available retention and destruction policy. The policy should provide for destruction when the initial purpose for collecting or obtaining the data has been satisfied, or within three years of the individual's last interaction with the entity, whichever occurs first.

Employers should verify that actual deletion practices — including those used by vendors and in backup systems — match the policy. Where litigation or an investigation is pending or reasonably anticipated, employers should coordinate deletion requirements with lawful preservation obligations.

Fourth, review vendor agreements and disclosure practices. Contracts with timekeeping, security and technology providers should allocate BIPA responsibilities; restrict unauthorized use and disclosure; require appropriate safeguards; address retention and deletion; and provide audit, indemnification and incident notification protections that are appropriate to the relationship.

Employers should also verify the actual recipients of biometric data, rather than relying solely on contract language, because the identity and number of recipients may affect exposure under the amended disclosure provision.

Finally, strengthen governance and consider less risky alternatives. Limit access to biometric data, document approved uses and recipients, train relevant personnel, audit compliance, and incorporate biometric systems into incident response planning.

When practical, employers should consider offering a nonbiometric alternative or discontinuing a biometric process that provides little operational value compared to its compliance burden.

Conclusion

The 2024 amendment to BIPA and its retroactive application under Clay combine to form a major development for businesses defending BIPA claims, because they sharply limit the most extreme per-scan statutory damages theories in covered pending cases.

However, the broader message is this: The Illinois General Assembly recalibrated the remedy without rewriting BIPA's substantive privacy protections. Employers should use the decision as an opportunity to reassess litigation exposure and strengthen biometric data governance, not as a reason to relax compliance.

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[1] Illinois Public Act 103-0769, effective Aug. 2, 2024.

[2] Clay v. Union Pac. R.R. Co., No. 24 CV 4194, 2025 WL 4670609 (N.D. Ill. Apr. 10, 2025), motion to certify appeal granted, No. 24 CV 4194, 2025 WL 1651529 (N.D. Ill. June 10, 2025), and rev'd and remanded, 171 F.4th 975 (7th Cir. 2026).

[3] Gregg v. Cent. Transp. LLC, No. 24 C 1925, 2025 WL 907540 (N.D. Ill. Mar. 21, 2025), rev'd and remanded sub nom. Clay v. Union Pac. R.R. Co., 171 F.4th 975 (7th Cir. 2026).

[4] Willis v. Universal Intermodal Servs., Inc., No. 21 C 1716, 2025 WL 1455791 (N.D. Ill. Apr. 2, 2025), motion to certify appeal granted, No. 21 C 1716, 2025 WL 2549234 (N.D. Ill. July 14, 2025), and rev'd and remanded sub nom. Clay v. Union Pac. R.R. Co., 171 F.4th 975 (7th Cir. 2026).