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FOS NEWS - *Our clients come first*

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Editor: Diane Slomowitz

BE CAREFUL WHEN COLLECTING BIOMETRIC DATA

By Lauren Maddente

Employers routinely collect, and often use, employee biometric information for, among other things, timekeeping, work activity monitoring, safety and health plan administration.

For example, biometric timeclocks can efficiently and reliably facilitate employees clocking in and out of work.

Employers should be aware of the legal restrictions and potential liability regarding collecting biometric data.

Illinois' Biometric Information Privacy Act ("BIPA") is a state law which addresses the collection and use of biometric data by private entities, including employers.

However, Wisconsin does not have an equivalent law.

Nonetheless, several other states recently introduced laws mirroring Illinois' BIPA.

A BIPA-type law may accordingly be in Wisconsin's future.

BIPA restricts how and when private entities can collect, retain, use, disclose and destroy "biometric information" and "biometric identifiers" which include iris and retina scans, fingerprints, voiceprints, or hand and face geometric scans.

BIPA:

1) requires informed consent before collection;

2) limits disclosure;

3) mandates protection and retention guidelines;

4) prohibits profiting from biometric data;

5) creates a private right of action for individuals harmed by violations of BIPA;

6) provides statutory damages for each violation; and

7) provides for reasonable attorneys' fees for violations.

A February, 2022 Illinois Supreme Court decision, *McDonald v. Symphony Bronzeville Park, LLC*, judicially expanded BIPA's application.

The decision should give employers collecting biometric data in Illinois pause.

Given the regulatory trend, even non-Illinois employers should consider it.

McDonald was a class action

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WISCONSIN SUPREME COURT RULES 7-0 FOR FOS CLIENT IN BILLION DOLLAR VICTORY

On April 12, 2022, the Wisconsin Supreme Court, in *Sewell v. Racine Unified School District*, unanimously affirmed the Court of Appeals' determination that an April, 2020 referendum in the Racine Unified School District was approved by the majority of voters.

The referendum authorized the School District to spend $1 billion on capital projects, over the next three decades, to improve Racine students' educational opportunities.

On first count, the referendum's "yes" votes outnumbered the "no" votes by just *five votes*, out of more than 33,000 cast ballots.

FOS shareholder **Matt O'Neill** represented the Racine School District's Board of Canvassers.

When a recount was requested, Matt helped the Board of Canvassers organize and run the statutory ballot recount.

The recount occurred during the first month of the Covid-19 pandemic.

As a result, creative and effective protocols were required to protect the health of everyone involved while allowing the parties to fully participate in the recount process and see all ballots.

After six days of hard work, the recount concluded with the same slim margin - the "yes" votes again outnumbered the "no" votes by *five ballots.*

The recount was challenged but upheld in the circuit court. Appeals followed.

The case ultimately made its way to the Wisconsin Supreme Court.

The November 22, 2021 oral argument was O'Neill's sixth time arguing before the Wisconsin Supreme Court.

After reviewing the entire record, the Supreme Court concluded that the recount

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KNOW WHAT'S BELOW

By Michael Koutnik

As part of summer landscaping projects, people are often encouraged to "know what's below" their property before doing any digging.

A recent Wisconsin Supreme Court decision, *Bauer v. Wisconsin Energy Corporation,* proves that the same advice is true for people purchasing property.

When Claudia Bauer purchased a piece of Wisconsin lakefront property in 1996, she did not know that it included a Wisconsin Energy Corporation ("WEC") gas line that served her neighbor's property.

The line was originally installed in 1980 with the previous owner's consent.

In 2014, WEC asked if Bauer would grant an easement that would allow the utility to install a larger pipe.

Bauer was surprised to learn that the gas line existed.

She refused to give WEC permission.

Instead, she filed a lawsuit requesting that the court declare that WEC was operating without an easement.

If that were true, WEC could be required to vacate the gas line from her property.

In response, WEC argued that it had obtained a "prescriptive easement."

A prescriptive easement is customarily an easement which has been acquired through the continuous and adverse use of another person's property.

The lower courts and the Wisconsin Supreme Court all agreed with WEC, that WEC had acquired a prescriptive easement.

In Wisconsin, the standard rule for a prescriptive easement is that a party must continuously use another person's land in a way that is adverse to the property owner's rights for a period of 20 years.

The use must be visible, open and notorious.

Public utilities like WEC, however, don't have to comply with the standard rule.

Instead, if a utility is permitted to use property in a certain way - here for a gas line - that use can become a right for the utility to continue to use the property in that same way.

If a utility like WEC uses the right granted as to the property in that way for 10 continuous years, it will acquire a prescriptive easement.

In this case, WEC's use of the right granted to it for the gas line was found to have been continuous for the required 10 years.

This was true even though the line was relocated multiple times and portions of it were replaced.

As the court reasoned: "No evidence suggests that the character of the use - supplying gas along a single conduit - ever changed."

Easements are a complicated but important issue.

Your FOS attorney can help.

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process was "open and fair" and properly protected the parties' constitutional rights to observe and participate in the recount process.

The decision's unanimity was a bit surprising, as the Wisconsin Supreme Court's election decisions are rarely unanimous.

O'Neill believes the resounding win is a testament to the hard work, dedication and fairness of the Board of Canvassers, who did a difficult job with grace and humility.

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lawsuit alleging that the employer-medical facility collected employees' fingerprints in violation of BIPA.

The employer argued that the claim should be dismissed because, like in Wisconsin and other states, the Illinois' Workers Compensation Act was the exclusive remedy for employee injury claims.

This argument was important, because worker's compensation statutes can provide less protection and recovery than civil claims.

The *McDonald* court, agreeing with the lower courts, ruled that Illinois' Workers Compensation Act does not preempt or preclude employee damage BIPA claims.

The court reasoned that data -related injuries are not the type of injury covered or "compensable" under the Illinois' Workers Compensation Act. Specifically:

> "the personal and societal injuries caused by violating [BIPA]'s prophylactic requirements are different in nature and scope from the physical and psychological work injuries that are compensable under the [Workers] Compensation Act."

Given the potential for higher civil recoveries, employers with Illinois employees should ensure their policies comply with BIPA.

Even non-Illinois employers should go through the same exercise, so that if their state adopts a BIPA-type law, they'll be well-positioned for compliance.

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NO FREE LUNCH!

By Jamie Barwin

Employees and employers alike are familiar with the phrase compensation at "time-and-a-half" for overtime.

The federal Fair Labor Standards Act ("FLSA"), 29 USC §207(a)(1), confirms this requirement.

So does Wisconsin's Department of Workforce Development, which applies the FLSA rules to state employees.

But who gets time-and-a-half? All your employees? Some of them?

The general rule exempts from overtime pay requirements professional employees, including those employed in an executive, administrative or professional capacity.

An April 5, 2022 Wisconsin Court of Appeals decision, *Magnussen v. Wisconsin,* applied the exemption to a state nurse clinician.

The employee was paid a base salary (plus incentive pay), with the amount of overtime hours calculated at the salary's hourly rate.

The court held that the state met its burden to prove that the employment position was exempt from overtime, despite the hourly rate calculations.

All Wisconsin salaried state employees, regardless of exemption status, are required to track their hours and receive a break-down of their hourly rate.

Some private employees may do the same.

The court applied the "salary basis test," under which an employee receives a set amount of compensation each pay period.

Under this test, if employees receive a "predetermined amount" of wages each pay period, without a reduction in pay for quality or quantity of output, they are generally exempt from overtime requirements.

Because the employee at issue was paid on a salary basis, no overtime was required.

The court refused to apply a different, "reasonable relationship" test.

That test exempts an employee when compensation is "computed on an hourly, a daily or shift basis," as long as a reasonable relationship exists between the guaranteed pay compensation and the amount actually earned.

Because the employee was paid on a salaried basis (and not hourly, daily or shift-basis), that test did not apply.

The court may have taken a leap in making its ruling, since the employee's appointment letter stated no guaranteed salary.

The court also characterized the employee's wages as being, "**generally**...for eighty hours per pay period…." (emphasis added).

Nonetheless, employers should continue to review and monitor their overtime pay practices.

DOUBLE CHECK TO AVOID PAYING TWICE

By Laurna Kinnel

Phishing scams are nothing new. FOS has been covering them for years: foslaw.com/gone-phishing-for-paychecks/.

Unfortunately, they are not going away.

But I don't have to double check everything, do I?

I can at least be confident that the professional businesses with which I deal are legitimate…right?

Unfortunately - again, no.

The clients of law firms, accountants, medical providers, and other professionals can be the target of phishing scams, just as easily as the customers of any other outside business.

Scammers often manipulate authentic invoices, mimic – but do not mirror – legitimate looking email addresses, and provide fraudulent "updated" payment procedures.

Invoices, for example, may list or describe charges differently than normal.

Or, the amount of fees or charges may be wholly out of line with prior invoices.

With phishing, like many areas in life, the best offense is a good common sense defense.

Don't be complacent. Read all invoices carefully.

If an invoice contains "new" payment information, confirm the information directly with the business.

And if something seems odd or you have any concerns, ask.

Responsible businesses appreciate their clients' attention to detail, and will always confirm information precisely to avoid and prevent scams.

If, on the other hand, your business is the victim of a false invoice phishing scam, act fast.

Your clients will appreciate your efforts, which can add to your goodwill.

Advise clients as soon as possible that they may have received a scam invoice.

Provide details on what they can look for to identify a fraud.

Provide contact information of those that can assist clients with any questions or concerns.

And contact your FOS attorney.

FOX O'NEILL SHANNON S.C.

622 N. Water Street
Suite 500
Milwaukee, WI 53202

Phone: 414-273-3939
Fax: 414-273-3947
www.foslaw.com

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IN THIS ISSUE

RECKLESS AND UNREGISTERED

By Jacob Manian

The Milwaukee Police Department (MPD) has instituted a new reckless driving enforcement policy.

The policy went into effect on May 1, 2022.

The new policy allows MPD to tow unregistered vehicles which are involved in reckless driving.

The policy is part of an overall effort by the City to combat increasing instances of reckless driving in Milwaukee.

Before becoming effective, the policy was approved by the Milwaukee Fire and Police Commission.

Milwaukee had 66 fatal vehicle crashes in 2021.

Before the policy was created, city residents had complained, including to police and the Mayor's office, that reckless driving, in addition to being dangerous, is seriously out of control.

MPD and the Mayor's office have characterized the new enforcement mechanism as critically necessary to address the pressing public safety issues which reckless driving engenders.

The enforcement measure puts the onus on vehicle owners to think twice before driving recklessly.

It also puts the onus on vehicle owners to make sure that others driving their cars, for example when owners loan them out, drive safely.

Under the new policy, officers can tow a vehicle which has been pulled over for reckless driving.

A vehicle can also be towed whenever an officer "comes into contact" with a vehicle involved in a vehicular crash investigation.

The owner of the vehicle will be required to present a valid driver's license, proof of registration, and proof of insurance to recover the vehicle from the tow lot.

The vehicle will not be released unless all fees related to the towing are paid.

The new policy is a timely one, given that Milwaukee is heading into its summer months of warm weather.

With more people out and about, especially at night, more vehicles will be on the road and the potential for reckless driving behavior will increase.

Be cautious. Drive safely.

For questions about the new MPD reckless driving enforcement policy, contact your FOS attorney.