No. 128338

In the

Supreme Court of Illinois

WILLIAM WALTON,
individually and on behalf of all others similarly situated,

Plaintiff-Appellant,

v.

ROOSEVELT UNIVERSITY,

Defendant-Appellee.

Appeal from the Appellate Court of Illinois, First Judicial District, No. 1-21-0011.
There Heard on Appeal from the Circuit Court of Cook County, Illinois,
County Department, Chancery Division, No. 09 CH 04176.
The Honorable **Anna H. Demacopoulos** Judge Presiding.

BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT

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TABLE OF CONTENTS
AND STATEMENT OF POINTS AND AUTHORITIES

NATURE OF THE CASE 1

740 ILCS 14/1, *et seq.* 1

740 ILCS 14/5 1

740 ILCS 14/15(b)(1) 1

740 ILCS 14/15(b)(2) 1

740 ILCS 14/15(b)(3) 1

Ill. S. Ct. R. 308 1

29 U.S.C. § 185 1

Walton v. Roosevelt University,
2022 IL App (1st) 210011, *appeal allowed*,
128338, 2022 WL 1738484 (Ill. May 25, 2022) 2

ISSUES PRESENTED FOR REVIEW 2

29 U.S.C. § 185 2

STATEMENT OF JURISDICTION 2

Ill. S. Ct. R. 315(a) 2

Walton v. Roosevelt University,
2022 IL App (1st) 210011, *appeal allowed*,
128338, 2022 WL 1738484 (Ill. May 25, 2022) 2-3

STATUTUES INVOLVED 3

740 ILCS 14/1 *et seq.* 3

29 U.S.C. § 185 3

STATEMENT OF FACTS 3

A. Walton Was in a Union With a CBA Devoid of Any Consent to Biometric Data Collection or Mention of Biometrics, Biometric Privacy, Timeclocks, or "Timekeeping Procedures" 3

B. Roosevelt Violates the Privacy Act, and Walton Seeks Redress. 5

C. The Trial Court Rejects Roosevelt's Preemption Defense 5

29 U.S.C. § 185 ..... 5, 6

Miller v. Southwest Airlines Co.,
926 F.3d 898 (7th Cir. 2019) 5, 6, 7

45 U.S.C. §§ 151, *et seq.*.....5

Winters v. Aperion Care, Inc.,
No. 2019-CH-06579 (Cir. Ct. Cook Cty., Feb. 11, 2020) 6, 7

Watson v. Legacy Healthcare Financial Services, LLC et al.,
No. 19-CH-3425 (Cir. Ct. Cook Cty., June 30, 2020) 7

Thomas v. KIK Custom Productions, Inc.,
No. 19 CH 2471 (Cir. Ct. Cook Cty., Dec. 19, 2019).....7

Ill. S. Ct. R. 308 7

D. The Appellate Court Reverses 7

Walton v. Roosevelt University,
2022 IL App (1st) 210011, *appeal allowed*,
128338, 2022 WL 1738484 (Ill. May 25, 2022).....7, 8, 9, 10

Fernandez v. Kerry,
14 F.4th 644 (7th Cir. 2021) 8, 9

Miller v. Southwest Airlines Co.,
926 F.3d 898 (7th Cir. 2019) 8

Matter of Amoco Petroleum Additive Co.,
964 F.2d 706 (7th Cir. 1992) 9

STANDARD OF REVIEW 10

735 ILCS 5/2-619 10

Carter v. SSC Odin Operating Co., LLC,
237 Ill. 2d 30 (2010) 10

Cent. Laborers' Pension Fund v. Nicholas & Associates, Inc.,
2011 IL App (2d) 100125 10

ARGUMENT 10

I. The Appellate Court Erred by Accepting Roosevelt's Unsubstantiated "Suggestion" That the Union Was Authorized to Consent and Execute a Release for Walton Under the Privacy Act.....10

Local 727, Intern. Broth. Of Teamsters v. Metropolitan Pier & Exposition Authority,
784 F. Supp. 2d 1008 (N.D. Ill. 2011) 10

29 U.S.C.S. § 158(d).....10

740 ILCS 14/15(b) 11, 12, 13

740 ILCS 14/15(d) 11, 12, 13

29 U.S.C. § 159(a) 11

Liu v. Four Seasons Hotel, Ltd.,
2019 IL App (1st) 182645.....11

740 ILCS 14/1, *et seq*..... 11-12

410 ILCS 513/25.....12

720 ILCS 5/14-1, *et seq*. 12

Bryant v. Compass Group USA, Inc.,
958 F.3d 617 (7th Cir. 2020), *amended on other grounds*
Bryant v. Compass Group USA, Inc.,
No. 20-1443, 2020 WL 6534581 (7th Cir. June 30, 2020).....12

740 ILCS 14/15(a) 12

II. The Appellate Court Erred By Not Following the Established LMRA Preemption Analysis.....13

Lingle v. Norge Div. of Magic Chef, Inc.,
486 U.S. 399 (1988).....13, 14

Gelb v. Air Con Refrigeration and Heating, Inc.,
356 Ill. App. 3d 686 (1st Dist. 2005) 13, 14

Livadas v. Bradshaw,
512 U.S. 107 (1994).....13, 14

Byrne v. Hayes Beer Distrib. Co.,
2018 IL App (1st) 172612.....13, 14

Gendron v. Chi. & N. W. Transp. Co.,
139 Ill. 2d 422 (1990) 14

In re Bentz Prods. Co.,
253 F.3d 283 (7th Cir. 2001) 14

Fowler v. Ill. Sports Facilities Auth.,
338 F. Supp. 3d 822 (N.D. Ill. 2018) 14

Crosby v. Cooper B-Line, Inc.,
725 F.3d 795 (7th Cir. 2013) 14

A. Walton's Action Does Not Give Rise to a Dispute Over a Subject of Bargaining, and Even If It Did, the Appellate Court Was Still Required to Examine the CBA 15

1. Walton Does Not Challenge Roosevelt's Ability to Implement a Timekeeping Device 15

Crosby v. Cooper B-Line, Inc., 725 F.3d 795 (7th Cir. 2013) 15

Walton v. Roosevelt University, 2022 IL App (1st) 210011, *appeal allowed*, 128338, 2022 WL 1738484 (Ill. May 25, 2022).....15, 16, 17, 18

740 ILCS 14/15(b) 15, 16

740 ILCS 14/15(d) 15, 16

740 ILCS 14/1, *et seq.*.....15, 16

Rosenbach v. Six Flags Ent. Corp., 2019 IL 123186.....16

740 ILCS 14/15.....16

740 ILCS 14/15(a) 16

Matter of Amoco Petroleum Additive Co., 964 F.2d 706 (7th Cir. 1992) 17, 18

720 ILCS 5/26-4, *et seq.* 17

740 ILCS 14/5.....18

In re Bentz Prods. Co., 253 F.3d 283 (7th Cir. 2001) 19, 20

Burnside v. Kiewit Pacific Corp., 491 F.3d 1053 (9th Cir. 2007) 19

Cramer v. Consolidated Freightways, Inc., 255 F.3d 683 (9th Cir. 2001) 19

Byrne v. Hayes Beer Distrib. Co., 2018 IL App (1st) 172612.....19, 20

820 ILCS 115/1, *et seq.*.....19

Vasserman v. Henry Mayo Newhall Mem. Hosp., 65 F. Supp. 3d 932 (C.D. Cal. 2014) 19

2. Roosevelt's Preemption Defense Succeeds Only if It Can Establish That Walton's Claims Are "Substantially Dependent" on a CBA Term.....20

Byrne v. Hayes Beer Distrib. Co., 2018 IL App (1st) 172612.....20, 22

Lingle v. Norge Div. of Magic Chef, Inc.,
486 U.S. 399 (1988).....20, 22

Andrews v. Kowa Printing Corp.,
351 Ill. App. 3d 668 (2004), *aff'd*, 217 Ill. 2d 101 (2005).....20

Nat'l Metalcrafters, Div. of Keystone Consol. Indus. v. McNeil,
784 F.2d 817 (7th Cir. 1986) 20

Walton v. Roosevelt University,
2022 IL App (1st) 210011, *appeal allowed*,
128338, 2022 WL 1738484 (Ill. May 25, 2022).....20, 21

Fernandez v. Kerry,
14 F.4th 644 (7th Cir. 2021) 21

Livadas v. Bradshaw,
512 U.S. 107 (1994).....22

Allis-Chalmers Corp. v. Lueck,
471 U.S. 202 (1985).....22

Caterpillar, Inc. v. Williams,
482 U.S. 386 (1987).....22

In re Bentz Prods. Co.,
253 F.3d 283 (7th Cir. 2001) 22

3. If the Appellate Court Had Examined the CBA, It Would Have Found Walton's Claims Are Not "Substantially Dependent" on Its Terms Because There Is Nothing to Interpret.....23

Miller v. Southwest Airlines Co.,
926 F.3d 898 (7th Cir. 2019) 23

Walton v. Roosevelt University,
2022 IL App (1st) 210011, *appeal allowed*,
128338, 2022 WL 1738484 (Ill. May 25, 2022).....23, 26

745 ILCS 14/15.....24

740 ILCS 14/15(b)(1) 25

740 ILCS 14/15(b)(2) 25

740 ILCS 14/15(d).....25

740 ILCS 14/15(b).....25

Rosenbach v. Six Flags Ent. Corp.,
2019 IL 123186.....25

Byrne v. Hayes Beer Distrib. Co.,
2018 IL App (1st) 172612.....25, 28, 29

740 ILCS 14/15(a) 25, 26

740 ILCS 14/15(e) 25, 26

Thomas v. KIK Custom Productions, Inc.,
No. 19 CH 2471 (Cir. Ct. Cook Cty., Dec. 19, 2019).....26

Winters v. Aperion Care, Inc.,
No. 2019-CH-06579 (Cir. Ct. Cook Cty., Feb. 11, 2020) 26

410 ILCS 305/9.....27

In re Bentz Prods. Co.,
253 F.3d 283 (7th Cir. 2001) 27

29 U.S.C. § 185.....27, 29

Hawaiian Airlines, Inc. v. Norris,
512 U.S. 246 (1994).....27

Lingle v. Norge Div. of Magic Chef, Inc.,
486 U.S. 399 (1988).....28

Livadas v. Bradshaw,
512 U.S. 107 (1994).....28

4. Walton's Claims Are Dependent on the Discrete Facts of Roosevelt's Conduct 29

Lingle v. Norge Div. of Magic Chef, Inc.,
486 U.S. 399 (1988).....29, 30

Crosby v. Cooper B-Line, Inc.,
725 F.3d 795 (7th Cir. 2013) 29

Kline v. Sec. Guards, Inc.,
386 F.3d 246 (3d Cir. 2004).....29

Winters v. Aperion Care, Inc.,
No. 2019-CH-06579 (Cir. Ct. Cook Cty., Feb. 11, 2020) 29-30

Walton v. Roosevelt University,
2022 IL App (1st) 210011, *appeal allowed*,
128338, 2022 WL 1738484 (Ill. May 25, 2022).....30

5. *Fernandez* and the Other Federal Trial Court Rulings Relied Upon by the Appellate Court Were Incorrectly Decided Because the Courts in Those Cases Failed to Examine the Relevant CBAs.....30

Fernandez v. Kerry,
14 F.4th 644 (7th Cir. 2021) ..... *passim*

Walton v. Roosevelt University,
2022 IL App (1st) 210011, *appeal allowed*,
128338, 2022 WL 1738484 (Ill. May 25, 2022).....30

People v. Kidd,
129 Ill. 2d 432 (1989) 31

State Bank of Cherry v. CGB Enterprises, Inc.,
2013 IL 113836.....31

Weiland v. Telectronics Pacing Sys., Inc.,
188 Ill. 2d 415 (1999) 31

Byrne v. Hayes Beer Distrib. Co.,
2018 IL App (1st) 172612..... 31-32, 33, 36

Miller v. Southwest Airlines Co.,
926 F.3d 898 (7th Cir. 2019) ..... *passim*

29 U.S.C. § 185.....32, 36, 37

45 U.S.C. § 152.....33

Carletto v. Quantum Foods,
No. 1-05-3163, 2006 WL 2018250
(Ill. App. Ct. June 5, 2006) 33

Mitchell v. JCG Indus.,
929 F. Supp. 2d 827 (N.D. Ill. 2013) 34

Gonzalez v. Farmington Foods, Inc.,
296 F. Supp. 2d 912 (N.D. Ill. 2003) 34

Anderson v. JCG Indus., Inc.,
09 C 1733, 2009 WL 371310 (N.D. Ill. Nov. 4, 2009).....34

740 ILCS 14/15(a) 34

Kline v. Sec. Guards, Inc.,
386 F.3d 246, 255 (3d Cir. 2004).....36, 37

Peatry v. Bimbo Bakeries USA, Inc.,
No. 19 C 2942, 2020 WL 919202 (N.D. Ill. Feb. 26, 2020).....36

Gray v. University of Chicago Medical Center, Inc.,
Case No. 19-cv-04229, 2020 WL 1445608
(N.D. Ill. Mar. 25, 2020).....36

Williams v. Jackson Park SLF, LLC,
Case No. 19-CV-8198, 202 WL 5702294
(N.D. Ill. Sept. 24, 2020) 36

Fernandez v. Kerry, Inc.,
No. 17-cv-08971, 2020 WL 7027587 36

Gil v. True World Foods Chicago, LLC,
Case No. 20 C 2362, 2020 WL 7027727 36

Roberson v. Maestro Consulting Services LLC,
507 F. Supp. 3d 998 (S.D. Ill. 2020).....36

Barton v. Swan Surfaces, LLC,
2021 WL 793983 (S.D. Ill. Mar. 2, 2021) 36

B. The Unavoidable Outcome That Will Result From the Appellate Court's Decision Calls for a Different Result.....38

1. Herding Privacy Act Claims Into the Union Grievance Procedure Is Tantamount to Extinguishing Them 38

Tims v. Black Horse Carriers, Inc.,
2021 IL 200563.....38

740 ILCS 14/15(a) 38

740 ILCS 14/15(b) 38

Rosenbach v. Six Flags Ent. Corp.,
2019 IL 123186.....38

740 ILCS 14/5.....39

2. The Privacy Act Sets the Floor for Biometric Privacy Rights, and a CBA Cannot Go Below that Floor 39

29 U.S.C. § 185.....39, 42

Livadas v. Bradshaw,
512 U.S. 107 (1994).....39

Allis-Chalmers Corp. v. Lueck,
471 U.S. 202 (1985).....39

Lingle v. Norge Div. of Magic Chef, Inc.,
486 U.S. 399 (1988).....39

San Diego Bldg. Trades Council, Millmen's Union, Local 2020 v. Garmon,
359 U.S. 236 (1959).....39, 40, 41

Vaca v. Sipes,
386 U.S. 171 (1967)..... 39-40

Linn v. United Plant Guard Workers of America, Local 114,
383 U.S. 53 (1966).....40, 41

U.S. v. Palumbo Bros, Inc.,
145 F.3d 850 (7th Cir. 1998) 40

Krasinski v. United Parcel Service, Inc.,
124 Ill. 2d 483 (1988) 40, 43

Gonzalez v. Prestress Eng'g Corp.,
115 Ill. 2d 1 (1986) 40

740 ILCS 14/5.....41

Glinski v. City of Chi.,
No. 99 C 3063, 2001 WL 109540 (N.D. Ill., Feb. 5, 2001).....41

Byrne v. Hayes Beer Distrib. Co.,
2018 IL App (1st) 172612.....41

Rymel v. Save Mart Supermarkets, Inc.,
30 Cal. App. 5th 853 (2018) 41

Matter of Amoco Petroleum Additive Co.,
964 F.2d 706 (7th Cir. 1992) 41

Rosenbach v. Six Flags Ent. Corp.,
2019 IL 123186.....41, 42

McDonald v. Symphony Bronzeville Park, LLC,
2022 IL 126511.....41

Watson v. Legacy Healthcare Financial Service, LLC,
2021 IL App (1st) 210279.....42

740 ILCS 14/5(g) 42

95th Ill. Gen. Assem., House Proceedings, May 30, 2008 42

Allis-Chalmers Corp. v. Lueck,
471 U.S. 202 (1985).....42

Fisher v. Illinois Office Supply Co.,
130 Ill. App. 3d 996 (1984) 43

III. Even If Walton's Section 15(b) and (d) Claims Required Interpretation of the CBA (They Do Not), the Union Cannot Bargain Away Section 15(a) Rights Because Section 15(a) Creates a Duty Owed to the Public 43

740 ILCS 14/15(a) 43, 44

Fox v. Dakkota Integrated Sys., LLC,
980 F.3d 1146 (7th Cir. 2020) 43

Bryant v. Compass Group USA, Inc.,
958 F.3d 617 (7th Cir. 2020), *amended on other grounds*
Bryant v. Compass Group USA, Inc.,
No. 20-1443, 2020 WL 6534581 (7th Cir. June 30, 2020) 44

Wypych v. Cheese Merchants of America, LLC,
No. 20 CH 2437, Order (Cir. Ct. Cook Cty. July 21, 2021) 44

740 ILCS 14/15(b) 44

740 ILCS 14/15(d) 44

CONCLUSION 45

29 U.S.C. § 185 45

NATURE OF THE CASE

In 2008, the Illinois legislature unanimously enacted the Illinois Biometric Information Privacy Act ("the Privacy Act") (740 ILCS 14/1, *et seq.*) in response to the reality that biometric identifiers and biometric information (collectively, "biometric data"), "once compromised," leave an individual with "no recourse" – an increasingly troublesome reality given the exponential rise in the use of biometric data as a means of identification and authorization. *See* 740 ILCS 14/5. Under the Act's informed consent regime, a collector is absolutely prohibited from collecting, storing, or disseminating a person's biometrics "unless it first . . . informs the subject or the subject's legally authorized representative in writing" that biometric data is being collected and the specific purpose and length of time for which the data is being collected. 740 ILCS 14/15(b)(1)-(2). The collector then must receive a "written release executed by the subject of the biometric identifier or biometric information or the subject's legally authorized representative" before collecting or disseminating biometrics. 740 ILCS 14/15(b)(3).

This appeal under Supreme Court Rule 308 (Ill. S. Ct. R. 308 (eff. Oct. 1, 2019)) presents the question of whether Section 301 of the Labor Management Relations Act ("LMRA") (29 U.S.C. § 185) preempts Privacy Act claims asserted by an employee covered by a collective bargaining agreement ("CBA"). The trial court correctly held that Defendant Roosevelt University ("Roosevelt") did not – and could not – meet its burden to establish that Plaintiff William Walton's ("Walton") Privacy Act claims are substantially dependent on interpretation of the CBA, as the claims exist independently of the agreement and Walton's Union membership. (SR 148-155). On appeal, the appellate court reversed, holding that all Privacy Act claims brought by unionized employees are preempted under

federal law. *Walton v. Roosevelt University*, 2022 IL App (1st) 210011, appeal allowed, 128338, 2022 WL 1738484 (Ill. May 25, 2022).

But the Appellate Court erred. There is absolutely no basis for Roosevelt's "suggestion" that the Union was authorized to consent to Roosevelt's collection, storage, and dissemination of Walton's biometric data and release his claims under the Privacy Act as his "legally authorized representative" or that it ever did. In fact, even assuming it was somehow lawfully empowered, there is no basis for a genuine dispute over whether the Union consented and released Walton's claims for him. Simply put, it is impossible to decide whether Walton has a meritorious claim under the Privacy Act by referencing the CBA. The Appellate Court's decision upends decades of United States Supreme Court precedent on the established preemption analysis and, if not overturned, will have dangerous and far-reaching consequences not only for unionized workers with meritorious Privacy Act claims, but for those with any Illinois statutory claims that are wholly untethered to collective bargaining or the negotiated terms of a given CBA. This Court should reverse.

ISSUE PRESENTED FOR REVIEW

Whether Section 301 of the LMRA preempts Privacy Act claims asserted by bargaining unit employees covered by a collective bargaining agreement.

STATEMENT OF JURISDICTION

Jurisdiction in this Court is based on Supreme Court Rule 315(a), which provides for permissive review of a final decision of the Appellate Court. Ill. S. Ct. R. 315(a). The Appellate Court's decision was published on February 22, 2022. *See Walton*, 2022 IL App

(1st) 210011. On May 25, 2022, this Court granted Walton's Petition for Leave to Appeal. (A001).

STATUTES INVOLVED

1. The Illinois Biometric Information Privacy Act, 740 ILCS 14/1 *et seq.*, the full text of which is in the Appendix. (A002-13).

2. Section 301 of the Labor Management Relations Act (29 U.S.C. § 185), the full text of which is in the Appendix. (A014-15).

STATEMENT OF FACTS

A. Walton Was in a Union With a CBA Devoid of Any Consent to Biometric Data Collection or Mention of Biometrics, Biometric Privacy, Timeclocks, or "Timekeeping Procedures."

Walton worked for Roosevelt in its Campus Safety department from January 2018 through January 2019. (SR 10, 56). During his employment, Walton was a member of the Service Employees International Union, Local 1 ("the Union"). (SR 56). The Building Owners and Managers Association of Chicago ("BOMA/Chicago") and its member buildings entered into a CBA with the Union effective from April 25, 2016, through April 28, 2019. (SR 58-89). The CBA lists 121 "member buildings" subject to the CBA and includes "members of the Association as now are or who may hereafter become parties hereto." (SR 59, 82-84). Roosevelt and its 430 S. Michigan Avenue building are not on this list, but Roosevelt maintains that it "agreed to" the CBA with the Union. (SR 56, 82-84).

Like virtually every CBA, the one at issue "covers wages, hours, and working conditions" of its members. (SR 59). With respect to the scope of the Union's authority, the CBA provides that the Union is "the sole and exclusive representative of all non-supervisory full and part-time security employees." (*Id.*) Moreover, it sets forth that

"[e]mployers and employees shall not bargain independently of Union with respect to wages, hours of employment or working conditions as provided in this Agreement; the right to bargain on behalf of all such employees is vested solely in the Union." (*Id.*) (emphasis added). Article II, Section 1 of the CBA, titled "Employer Rights, Union Membership and Checkoff," includes a management rights clause stating:

> Subject to the provisions of this Agreement, the Employer shall have the exclusive right to direct the employees covered by this Agreement. Among the exclusive rights of management, but not intended as a wholly inclusive list of them are: the right to plan, direct, and control all operations performed in the building, to direct the working force, to transfer, hire, demote, promote, discipline, suspend or discharge for proper cause, to subcontract work and to relieve employees from duty because of lack of work or for any other legitimate reason. The Union further understands and agrees that the Employer provides an important service to its tenants of a personalized nature to fulfill their security needs, as those needs are perceived by the Employer and the tenants. Accordingly, this Agreement shall be implemented and interpreted by the parties so as to give consideration to the needs and preferences of the tenants.

(SR 56).

The CBA includes a "working conditions" section addressing: (1) lockers and washing facilities; (2) first aid kits; (3) uniforms, apparel and equipment; (4) drug testing; (5) training pay; and (6) paid annual wellness visits. (SR 67-68). There is no consent to biometric data collection or mention of biometrics, privacy in general, biometrics or biometric privacy specifically, the Privacy Act, timeclocks or timekeeping procedures in this or any other section. (*Id.*, SR 58-89). Any employee aggrieved under the CBA must "present such grievance within ten (10) calendar days following the event which gives rise to its occurrence" or after "first acquir[ing] knowledge concerning such event." (SR 76).

B. Roosevelt Violates the Privacy Act, and Walton Seeks Redress.

Roosevelt collected and stored Walton's hand geometry in its employee database, then disclosed his biometric data to its third-party payroll vendor. (SR 8, 10). Despite collecting Walton's hand geometry each shift, Roosevelt failed to inform Walton of the specific purpose for its collection, storage, and use of his biometrics, receive his written consent or receive his written release authorizing this conduct. (SR 5-6, 8-11, 15-19.). Roosevelt also failed to secure Walton's consent before disclosing his biometric data to its payroll vendor or other third parties. (*Id*). Finally, Roosevelt failed to develop, publish, and follow a publicly-available retention schedule and destruction guidelines for employee biometric data. (*Id*.). In light of Roosevelt's failure to comply with Sections 15(a), (b), and (d) of the Privacy Act, Walton filed a class action lawsuit on March 29, 2019. (SR 19-20).

C. The Trial Court Rejects Roosevelt's Preemption Defense.

Roosevelt moved to dismiss Walton's Complaint, arguing that his claims are preempted under Section 301 of the LMRA because Walton was a member of the Union and subject to a CBA, which included a broad "management rights" clause. (SR 22-31). Roosevelt relied heavily on the Seventh Circuit's opinion in *Miller v. Southwest Airlines Co.*, 926 F.3d 898 (7th Cir. 2019), where it held that the Railway Labor Act ("RLA"), 45 U.S.C. §§ 151, *et seq.,* preempts unionized workers' claims under the Privacy Act. (SR 25-29). Roosevelt argued that the "preemption analysis" under the RLA and the LMRA are identical, and therefore, the trial court should hold that Walton's claims are preempted by the LMRA. (*Id*.).

Walton opposed Roosevelt's motion, pointing out that *Miller* is not binding on Illinois courts, and it is factually distinguishable, as the RLA is not applicable to Walton's claims or otherwise at issue. (SR 90-103). Walton also explained that his Privacy Act

claims did not require any interpretation of the CBA because nothing in this document could plausibly be construed as granting the Union authority to consent to Roosevelt's collection, storage, and dissemination of sensitive biometric data on behalf of its entire membership, much less actually consenting on his behalf. (*Id*.). In other words, Roosevelt could not establish that Walton's claims raise any dispute at all, much less one which could possibly be resolved by interpreting the CBA**.**

In reply, Roosevelt, with no further analysis, again cited *Miller* and asked the trial court to find that the mere existence of a CBA with a broad management rights clause automatically preempted Privacy Act claims. (SR 109-115). Roosevelt later supplemented its motion with three federal district court opinions, all of which followed *Miller* as their binding precedent. (SR 117-147).

The trial court denied Roosevelt's motion in a written opinion. (SR 148-155). It held that Walton's action was distinguishable from *Miller*, in part because "preemptive intent tends to be more readily inferred in aviation because it is an area of the law where the federal interest is dominant." (SR 150 (internal citation and quotations omitted)). The trial court noted "that it is significant that the *Southwest Airlines* opinion was written without any citation to the record before the court or any decisional authority." (SR 151 (citing *Winters v. Aperion Care, Inc.*, No. 2019-CH-06579 (Cir. Ct. Cook Cty., Feb. 11, 2020) (Cohen, J.) (A016-26)). Holding that Section 301 of the LMRA did not preempt Walton's Privacy Act claims, the trial court determined:

> A person's rights under [the Privacy Act] exist independently of both employment and any given CBA. A claim under [the Privacy act] is not intertwined with or dependent substantially upon consideration of terms of a collective bargaining agreement. No clear or unmistakable waiver of [the Privacy Act] rights has been presented to the Court. Preemption is not appropriate in this matter.

(SR 155). Thus, the trial court, after reviewing the CBA concluded: (1) nothing in it could be construed as a waiver of Privacy Act claims; and (2) Walton's claims were not dependent upon any of its terms. The trial court's ruling was consistent with several other Illinois trial court decisions. *See, e.g., Watson v. Legacy Healthcare Financial Services, LLC et al.*, No. 19-CH-3425 (Cir. Ct. Cook Cty., June 30, 2020) (SR 220-226) ("the Court does not need to interpret the CBAs to decide if Defendants complied with [the Privacy Act's] requirements"); *Winters,* No. 19-CH-06579 (A016-26); *Thomas v. KIK Custom Productions, Inc.*, No. 19 CH 2471 (Cir. Ct. Cook Cty., Dec. 19, 2019) (Cohen, J.) (A027-39).

Roosevelt moved to reconsider the trial court's decision or, in the alternative, certify a question under Rule 308. (SR 156-167). Roosevelt again urged the court to follow *Miller* and the federal district court opinions it submitted as supplemental authority. (*Id.*). The trial court denied Roosevelt's motion to reconsider but granted certification of a question to be answered on appeal under Rule 308. (SR 306).

D. The Appellate Court Reverses.

On appeal, the Appellate Court held that the LMRA does preempt Walton's Privacy Act claims. The Appellate Court began its analysis by stating that federal courts "have exclusive jurisdiction over state law claims when the resolution of such claims depends on the interpretation or administration of a collective bargaining agreement." *See Walton,* 2022 IL App (1st) 210011, at ¶ 16. While recognizing that "not every employment dispute where a [CBA] is involved is automatically preempted by federal law[,]" and that LMRA preemption questions "require[] a case-by-case factual analysis," the Court held that for preemption to attach, "the employer need only advance a nonfrivolous argument that the

complained-of conduct was authorized by the [CBA]." *Id*. ¶ 17. The "complained-of conduct" here is Roosevelt's failure to secure Walton's written, informed consent and release before collecting, storing and disseminating his biometric data. (SR 1-21).

The Appellate Court concluded, without elaborating, that the Seventh Circuit's opinion in *Fernandez v. Kerry*, 14 F.4th 644 (7th Cir. 2021), was not without logic or reason. *Id*. ¶ 20. Accordingly, relying upon this decision, it held, "[t]he timekeeping procedures for workers are a topic for negotiation that is clearly covered by the collective bargaining agreement and requires the interpretation or administration of the agreement." *Id*. ¶ 21. The court went on to opine: "It is impossible to consider whether Walton and his similarly situated fellow employees have a claim under the Privacy Act without first determining whether their union consented on their behalf[.]" *Id*. The court concluded its opinion by deferring to *Fernandez* and *Miller* and held that Roosevelt met its burden of "advancing a nonfrivolous argument that bargained-for rights are at issue in this dispute . . ., and therefore it has met its burden for demonstrating that the claims are preempted under federal law." *Id.* ¶ 25.

Walton does not challenge Roosevelt's "timekeeping procedures," but even if he did, the Appellate Court did not reference any CBA provision that addresses them, "clearly" or otherwise. There are none. Unfortunately, the Appellate Court did not examine the text of the CBA at issue, finding that "the relevant factual and legal circumstances of this case are indistinguishable from *Fernandez*, so our real objective in this appeal becomes to determine whether the court of appeals' ruling on a matter of federal law is wrongly decided in such a way that we deem it to be without logic and reason." *Id.* ¶ 18. It held that the "grievances that Walton has raised against Roosevelt are all things that his union *can*

bargain about," meaning "his complaint raises the question of whether such bargaining has occurred, either implicitly or explicitly." *Id.* ¶ 20 (emphasis in original). The court went on to find that the CBA "contains a broad management rights clause" and "makes the union the sole and exclusive bargaining agent for the employees in the union," and that Walton's claims are therefore subject to CBA interpretation. *Id.* ¶ 21.

Accordingly, the Appellate Court held that Walton and all other Union members[1] "surrendered their individual right to bargain with their employer about timekeeping procedures, even where those timekeeping procedures also include the collection and use of the employees' biometric information." *Id.* ¶ 21. Deferring to *Fernandez* and its progeny, the Appellate Court concluded that Walton's claims were preempted because federal courts had found that management rights clauses in CBAs give "broad authority" for an "employer to manage the business, direct the workforce, and set the rules of employment," and that this authority encompassed the power not only to consent to the collection, storage and dissemination of biometrics, but to execute a written release for this conduct. *Id.* ¶ 22. Citing a 1992 Seventh Circuit decision, the court also noted that privacy in the workplace is an ordinary subject of bargaining. *Id.* ¶ 17 (citing *Matter of Amoco Petroleum Additive Co.* ("*Amoco*"), 964 F.2d 706, 710 (7th Cir. 1992)).

Finally, the court stated it must "take into consideration the nature of claims as well as the defenses" in determining preemption, and because "Roosevelt suggests that the union consented to the collection and use of biometric data either through negotiation or through the management rights clause of the [CBA]," that it was constrained to find

[1] In fact, because the CBA is between the Union and BOMA/Chicago, the Appellate Court's ruling, if left undisturbed, will apply to every building security worker in every BOMA/Chicago building member in the City of Chicago.

preemption based on the hypothetical defense raised by Roosevelt. *Id.* ¶ 25 (emphasis added).

STANDARD OF REVIEW

The standard of review is *de novo* because the trial and appellate courts' rulings involved determinations of federal preemption arising from a motion for dismissal pursuant to 735 ILCS 5/2-619. *See Carter v. SSC Odin Operating Co., LLC*, 237 Ill. 2d 30, 39 (2010) ("Questions of federal preemption . . . present questions of law that are subject to *de novo* review."); *see also Cent. Laborers' Pension Fund v. Nicholas & Associates, Inc.*, 2011 IL App (2d) 100125, ¶ 16 ("A dismissal pursuant to section 2-619 is reviewed *de novo*.").

ARGUMENT

I. The Appellate Court Erred by Accepting Roosevelt's Unsubstantiated "Suggestion" That the Union Was Authorized to Consent and Execute a Release for Walton Under the Privacy Act.

As an initial matter, Roosevelt never demonstrated that Walton designated the Union as his legally authorized representative to consent to Roosevelt's collection, storage and dissemination of his biometrics under the Privacy Act, or to execute a written release. It is axiomatic that unions and employers may bargain only over matters that directly impact wages, hours, or working conditions. *See, e.g., Local 727, Intern. Broth. Of Teamsters v. Metropolitan Pier & Exposition Authority*, 784 F. Supp. 2d 1008, 1018 (N.D. Ill. 2011) (listing mandatory subjects of collective bargaining). CBAs exist to address traditional workplace issues: namely, wages, hours, and employee discipline. *See* 29 U.S.C.S. § 158(d).

Roosevelt's "suggestion" that the Union consented for Walton rests not on any evidence or facts, but solely on a provision in the Privacy Act that states that lawfully

authorized representatives *can* provide consent. *See* 740 ILCS 14/15(b), (d). Roosevelt does not (and cannot in good faith) affirmatively point to anything showing Walton actually authorized the Union to consent or execute a release for him under the Privacy Act. As a result, there is simply no basis for any genuine dispute over the issue.

Just because the Union theoretically *could* act as an agent for this purpose does not mean there is a rational or good faith basis to believe Walton gave it any such lawful authority here. Unions, of course, are the exclusive representative of their members for the purpose of negotiating over lawful subjects of collective bargaining. (*See* SR 59) (Walton's Union is authorized to act as covered employees' representative for purposes of bargaining "with respect to wages, hours of employment or working conditions"); National Labor Relations Act ("NLRA"), 29 U.S.C. § 159(a) (unions "shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment"). Therefore, it is reasonable to assume Walton's Union was empowered to bargain over matters like his rate of overtime pay, when he was expected to begin and end his workday, or when and under what circumstances he could take a break. But Walton's Privacy Act action does not touch upon any such condition of employment.

Importantly, the substantive rights afforded every Illinois citizen under the Privacy Act apply "inside and outside the workplace." *Liu v. Four Seasons Hotel, Ltd.*, 2019 IL App (1st) 182645, ¶ 30. Far from "wage[s]," "hours of employment," or "other conditions of employment," Walton's statutory right to say no to Roosevelt's collection, storage, and third-party dissemination of his biometrics through the Privacy Act's informed consent regime exists independently of his employment with Roosevelt. *Id.*; *see generally* 740

ILCS 14/1, *et seq*. Thus, even if the Union was Walton's legally authorized representative for purposes of the Privacy Act (it was not), it could only act as his agent to consent to the collection, storage, or dissemination of biometrics in the specific manner dictated by Sections 15(b) and (d), which it was required to do in writing. *See* 740 ILCS 14/15(b), (d). There is no evidence the Union did (or even believed it could) do that in this case.

Indeed, unions are not *guardians ad litem* for their members. Walton did not designate the Union to act as his agent with respect to any and all conduct Roosevelt could feasibly engage in at the workplace.[2] The Union, for example, could not lawfully consent on Walton's behalf to submit to a genetic test to be considered for promotion. *See* Genetic Information Privacy Act, 410 ILCS 513/25. A union could not consent on behalf of call center employees to the employer's surreptitious recording of personal calls made to its members. *See* 720 ILCS 5/14-1, *et seq*. It was error for the Appellate Court, having been presented with no support, to simply *assume* the scope of the Union's agency encompassed essentially limitless power of this kind. Yet, when it came to providing consent and a release under the Privacy Act, this is exactly what it did.

Without any basis to suggest that Walton somehow authorized the Union to act as his agent for purposes of granting consent under the Privacy Act, the issue should not have been decided as a matter of law solely on Roosevelt's say-so. Nothing in the CBA (or

[2] Even more self-evident, the Union could not lawfully act as an agent of the public at large for purposes of overseeing Roosevelt's obligation to create and adhere to a publicly-available retention and destruction policy—a duty that, as discussed in Section III, *infra*, no employee (or their representative) *ever* has the legal ability to waive. *See Bryant v. Compass Group USA, Inc.*, 958 F.3d 617, 626 (7th Cir. 2020), *amended on other grounds Bryant v. Compass Group USA, Inc.*, No. 20-1443, 2020 WL 6534581 (7th Cir. June 30, 2020) ("In contrast to the obligations set forth under section 15(b), the duty to disclose under section 15(a) is owed to the public generally, not to particular persons whose biometric information the entity collects.")

anything else) shows the Union ever had, much less exercised, lawful authority to consent under Sections 15(b) and (d) of the Privacy Act for thousands of its members to Roosevelt's (and countless others') widespread harvesting and dissemination of their sensitive biometric data. (*See generally* SR 58-89). As such, Roosevelt's preemption defense should have been rejected on that basis alone.

II. The Appellate Court Erred By Not Following the Established LMRA Preemption Analysis.

Even if Roosevelt had overcome its initial lack of agency problem, the Appellate Court erred by bypassing the established analytical framework for evaluating preemption claims under the LMRA. State law statutory claims, like those under the Privacy Act, are preempted by the LMRA only under exceedingly limited facts. To benefit from preemption, the defendant must affirmatively show that "resolution of a state-law claim ***depends upon the meaning of a [CBA]*** . . . ." *See Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 405-06 (1988) (emphasis added). If the factual inquiry driving resolution of the claim does not turn on the meaning of any CBA provision, preemption does not apply. *See id*. at 407. Thus, "where a claim is purely a question of state law and is entirely independent of any understanding of the terms of a CBA, it may proceed as a state law claim." *Gelb v. Air Con Refrigeration and Heating, Inc.*, 356 Ill. App. 3d 686, 692 (1st Dist. 2005) (citing *Livadas v. Bradshaw,* 512 U.S. 107, 124-25 (1994)).

Courts adjudicate a defense premised on claim preemption using a two-step framework. *See Byrne v. Hayes Beer Distrib. Co.*, 2018 IL App (1st) 172612, ¶ 24. First, the court determines whether the claim is founded on a right conferred by the CBA. *Byrne*, 2018 IL App (1st) 172612, ¶ 24. If, as here, the claim is indisputably not founded on any CBA right, the defendant must establish that evaluation of the claim is "substantially

dependent" upon an interpretation of the agreement. *Id.* (citing *Lingle*, 486 U.S. at 409-10). This means the defendant must affirmatively show that adjudication of the claim would require the trial court to interpret a provision of the CBA. *Id.*; *see also Gendron v. Chi. & N. W. Transp. Co.*, 139 Ill. 2d 422, 434 (1990) ("questions requiring an interpretation of a [CBA] are to be answered by reference to Federal law"). Establishing a need to actually interpret language is imperative, because if the court need only look to or reference the CBA, the claim is not preempted. *Byrne*, 2018 IL App (1st) 172612, ¶ 24; *see also In re Bentz Prods. Co.*, 253 F.3d 283, 285 (7th Cir. 2001) (holding "that a state law claim is not preempted if it does not require interpretation of the CBA even if it may require reference to the CBA.") (citing *Livadas*, 512 U.S. 107); *Gendron*, 139 Ill. 2d at 435. Critically, "[a] state law claim is not completely preempted where a defendant contending that the claim requires interpretation of a [CBA] advances a frivolous or insubstantial reading of the agreement." *Gelb*, 356 Ill. App. 3d at 693; *Fowler v. Ill. Sports Facilities Auth.*, 338 F. Supp. 3d 822, 825-26 (N.D. Ill. 2018) (collecting cases). Nor is "[f]actual overlap between a state-law claim and a claim one could assert under a CBA . . . necessarily sufficient." *Crosby v. Cooper B-Line, Inc.*, 725 F.3d 795, 800 (7th Cir. 2013) (finding that a grievance settlement, while governing the terms of an employees' discharge, "says nothing at all about the central question" to his retaliatory discharge case and was thus "unnecessary to the resolution" of his state-law retaliation claim).

Simply put, Roosevelt advances frivolous reading of the CBA at issue, which explains why it and the Appellate Court's decision omits any explanation of exactly how Walton's claims are *at all* dependent on any CBA term, much less "substantially" dependent.

A. Walton's Action Does Not Give Rise to a Dispute Over a Subject of Bargaining, and Even If It Did, the Appellate Court Was Still Required to Examine the CBA.

1. Walton Does Not Challenge Roosevelt's Ability to Implement a Timekeeping Device.

Walton's claims, like all claims under the Privacy Act, do not present a challenge to any subjects of collective bargaining, such as Roosevelt's implementation of a particular timekeeping device or its timekeeping procedures. Like the plaintiff in *Crosby*, Walton does not bring his action to repudiate or change bargaining terms, but to seek "money damages in compensation for [defendant's] alleged violation of Illinois law and public policy." 725 F.3d at 802. Nevertheless, the Appellate Court concluded that because the CBA has "a broad management rights clause" and "timekeeping procedures for workers are a topic of negotiation," the workers "surrendered their individual right to bargain with their employer about timekeeping procedures . . .." *Walton*, 2022 IL App (1st) 210011, ¶ 21. But the Privacy Act does not regulate and does not provide a mechanism by which an individual can challenge "timekeeping devices" or "timekeeping procedures," terms that appear nowhere in statute. Indeed, Walton ***cannot (and does not) premise his claims on Roosevelt's use of a biometric timeclock or requirement that he scan his hand geometry to clock in and out.*** (SR1-21). Rather, Walton challenges Roosevelt's capture, collection, storage, use, and disclosure of his biometrics ***without his informed consent*** – conduct the Privacy Act *does* regulate. *See* 740 ILCS 14/15(b), (d); *see also* Class Action Compl. (SR 1-21).

This only makes sense, given a private entity's nonconsensual deployment of a biometric device alone cannot give rise to liability under the Privacy Act. *See generally* 740 ILCS 14/1, *et seq.* Put another way, Walton could not properly state a cause of action

under the Privacy Act simply because Roosevelt used a biometric timekeeping device without his consent. *Id.* Only after Roosevelt collected, stored, or disclosed his biometric data without securing his prior informed consent could he bring an action under the Privacy Act. *See* 740 ILCS 14/15(b), (d). That Roosevelt happened to use a timekeeping device to collect Walton's biometrics (rather than, for example, a facial recognition device at the entranceway) is irrelevant under the Privacy Act. Thus, Walton's claims do not (and cannot) concern the "mundane issue of timekeeping" procedures. *Walton*, 2022 IL App (1st) 210011, ¶ 26. Rather, Walton challenges "the more important issue" of Roosevelt's failure to secure his written consent before collecting, storing, disseminating, and otherwise using his biometrics, which is what the Privacy Act actually regulates under its informed consent regime. *Id.*; *see also Rosenbach v. Six Flags Ent. Corp.*, 2019 IL 123186, ¶¶ 19, 36. The requirements of the Privacy Act are not "procedures" subject to negotiation, compromise or "bargaining." *See* 740 ILCS 14/15. Private entities that want to collect biometric data must first provide the specific information required under the Privacy Act, institute data protection safeguards, and receive written consent and an executed release. *See* 740 ILCS 14/15(a), (b), (d).

This is the unavoidable result regardless of how Roosevelt collected Walton's biometric data, what device(s) it used, or for what purpose it used it. If Roosevelt had installed retina scanners to regulate access to certain areas of campus, Walton could not properly bring claims under the Privacy Act premised upon this action alone. Walton could only seek redress if Roosevelt collected his retina scan data without his informed consent. *See* 740 ILCS 14/15(b). Like Walton's claims stemming from Roosevelt's collection of his biometric data without his informed consent, an action resulting from the nonconsensual

collection of Walton's retina scan data would not challenge the tools Roosevelt uses to secure its campus; rather, it would singularly concern Walton's right to informed consent under the Privacy Act.

As such, Plaintiff's claims are readily distinguished from cases where claims involving other kinds of privacy infractions were preempted. In *Amoco*, the sole decision relied upon by the Appellate Court below, the Seventh Circuit held that plaintiffs' invasion of privacy tort claims were subject to LMRA preemption because an arbitrator would have to interpret whether the CBA implicitly permitted the defendant-employer's implementation of video surveillance through a management rights clause in a CBA. 964 F.2d at 710; *see also Walton*, 2022 IL App (1st) 210011, ¶ 2. Reasoning that "state law invasion of privacy claims depend on proof that the defendant invaded an objectively reasonable expectation of privacy," the court concluded that "[w]hat expectations of privacy in the workplace are objectively reasonable depends on powers and duties specified in the [CBA]."[3] *Id.*

This case is very different from *Amoco*. Unlike Walton, the plaintiffs in *Amoco* challenged the employer's use and placement of surveillance cameras outside the locker room and claimed to suffer common law tortious injuries directly from its use of those cameras. *Id*. Their damages hinged on a determination by the trier of fact that the employer's use of surveillance cameras met the elements of invasion of privacy (*e.g.*,

[3] It is worth noting that since the Seventh Circuit's decision in *Amoco* in 1992, the 2012 Illinois General Assembly enacted a statute making it unlawful for any person to video record another person without their consent in a restroom, tanning bed, tanning salon, locker room, changing room, or hotel bedroom, eliminating the need for individuals to rely on the common law for relief. *See* 720 ILCS 5/26-4, *et seq*. Remarkably, under the Appellate Court's decision, claims under this statute presumably would still be preempted, essentially rendering the law meaningless to unionized workers.

whether defendant's usage of surveillance cameras presented an unreasonable intrusion upon the employees' seclusion) and intentional inflection of emotional distress (*e.g.*, whether defendant's use of surveillance cameras was extreme and outrageous). *See id*. at 710. In short, the plaintiffs' claims necessarily required interpretation of the CBA to determine whether the management rights clause allowed the employer to install surveillance cameras at a work site in the first place.

It is worth repeating: Walton does not challenge Roosevelt's installation of biometric timeclocks. He does not dispute that Roosevelt has a right to use biometric timeclocks. There is no question over whether Roosevelt's use of biometric timeclocks might violate a management rights clause of a CBA, depending on anyone's objectively-reasonable expectations of privacy or otherwise. In fact, a person's reasonable expectation of privacy is *never* an issue under the Privacy Act because the General Assembly, by unanimously enacting the law, determined that Illinois citizens *do* have a reasonable expectation of privacy in their biometric data and established a specific mechanism to protect it. Walton's claims depend solely on whether Roosevelt complied with the statutory informed consent regime set forth under the Privacy Act. *See* 740 ILCS 14/5.

Walton's claims cannot possibly be resolved by any interpretation of the powers and duties specified in the CBA. As such, the Appellate Court's rationale that Walton's claims under the Privacy Act are preempted because "privacy in the workplace is an ordinary subject of bargaining" dramatically oversimplifies. *Walton*, 2022 IL App (1st) 210011, ¶ 22 (citing *Amoco*, 964 F.2d at 710). It is absolutely not true that any employer conduct infringing upon employee privacy is subject to collective bargaining, much less that any privacy claim properly giving rise to an assumption that it was "implicitly"

negotiated in any given case. *See In re Bentz Prods. Co.*, 253 F.3d at 287-88; *Burnside v. Kiewit Pacific Corp.*, 491 F.3d 1053, 1064 (9th Cir. 2007) ("Neither the Supreme Court nor, as far as we can determine, any other court, has ever held that the *potential* for waiver absent actual waiver is enough – standing alone – to trigger preemption under Section 301."); *Cramer v. Consolidated Freightways, Inc.*, 255 F.3d 683, 694 (9th Cir. 2001) ("Although some such rights of privacy might well be subject to negotiation and be conditioned by the terms of the CBA," not all privacy claims are subject to LMRA preemption.).

Even if providing informed consent to the collection of biometrics was a proper subject of collective bargaining (it is not), the result is exactly the same. The mere fact that a right is subject to negotiation or waiver does not trigger LMRA preemption. *See In re Bentz Prods. Co.*, 253 F.3d at 287-88; *see also Byrne*, 2018 IL App (1st) 172612, ¶ 36. For example, the Appellate Court in *Byrne*, on closely-analogous facts, determined that a unionized worker's state-law claim under the Illinois Wage Payment and Collection Act ("IWPCA"), 820 ILCS 115/1, *et seq.*, contesting wage deductions made by their employer without first obtaining statutorily-required written consent, was not preempted by the LMRA. 2018 IL App (1st) 172612, ¶¶ 1-3, 36. Although the claims brought by the plaintiff in *Byrne*, who challenged the amount of his wages, indisputably concerned "a subject of bargaining," the Appellate Court correctly engaged in the analysis required by United States Supreme Court precedent, first reviewing the CBA to determine whether interpretation of the text was necessary to evaluate the claims. *Id.*; *see also Vasserman v. Henry Mayo Newhall Mem. Hosp.*, 65 F. Supp. 3d 932, 957 (C.D. Cal. 2014) (rejecting Section 301 preemption of employees' state law unpaid overtime claims even though

applicable wage rates and overtime plans were detailed in the CBA, finding resolution of plaintiffs' claims will only require reference to the terms of the CBA rather than interpretation). Significantly, although the CBA itself contained provisions directly relevant to employees' wages, this fact alone did not mandate preemption.

Regardless of whether unions may generically bargain over certain discrete privacy matters, the Appellate Court was required to engage in the analytical framework expressly developed by the United States Supreme Court to determine whether Walton's specific claims under the Privacy Act are substantially dependent on an interpretation of the CBA. *See Byrne*, 2018 IL App (1st) 172612, ¶ 24; *In re Bentz Prods Co.*, 253 F.3d at 287-89. Its failure to do so warrants reversal.

2. Roosevelt's Preemption Defense Succeeds Only if It Can Establish That Walton's Claims Are "Substantially Dependent" on a CBA Term.

Walton's claims are founded on a state law statutory right, so to find preemption, a court must be persuaded that "the claim[s] [are] 'substantially dependent' on the [CBA]." *Byrne*, 2018 IL App (1st) 172612, ¶ 24 (citing *Lingle*, 486 U.S. at 409-10); *Andrews v. Kowa Printing Corp.*, 351 Ill. App. 3d 668, 673 (2004), *aff'd*, 217 Ill. 2d 101 (2005) ("The parties must engage in a ***good-faith dispute or debate*** over the meaning of terms within the contract in order for preemption to be triggered.") (emphasis added) (citing *Nat'l Metalcrafters, Div. of Keystone Consol. Indus. v. McNeil*, 784 F.2d 817, 825-26 (7th Cir. 1986)). But by failing to engage in any substantive analysis of the text of the CBA or identifying a dispute or debate over any CBA term, the Appellate Court erred. *Walton*, 2022 IL App (1st) 210011, ¶¶ 21-22. Indeed, while the Appellate Court succinctly set forth

Walton's sound reasoning, it hastily cast it aside in conclusory fashion because federal courts have found that preemption applies in other cases under the Privacy Act:

> Walton argues that his claims are not "substantially dependent" on an interpretation of the [CBA]. He points out that there is no reference to biometric information in the [CBA] and that the terms of the agreement in no way make the union the authorized representative for providing consent to biometric data collection. ***However, federal courts interpreting similar [CBAs] with similar management rights clauses have found that the broad authority given to the employer . . . is sufficient to result in the preemption of claims arising under the Privacy Act.***

Id. ¶ 22 (emphasis added).

In other words, rather than look to the text of the CBA to determine the existence of any dispute and accordingly, whether any provision actually required "interpretation" to resolve Walton's claims, the Appellate Court skipped this step and simply adopted the findings of the federal courts. In so doing, it reached the extraordinary conclusion that consenting to the collection, storage, dissemination, and use of biometric data is a subject of collective bargaining and found that because the union somehow "could" have consented or bargained them away, Walton's claims are preempted. *See Walton*, 2022 IL App (1st) 210011, ¶ 22 (citing *Fernandez*, 14 F.4th at 646-47). Thus, under the Appellate Court's holding, the mere existence of a CBA with a "management rights clause," regardless of its actual terms, is a universal trump card, triggering a knee-jerk quantum leap to preemption of all Privacy Act claims as a matter of law. *Id.* ¶¶ 25-26 ("[w]hether it is ultimately true that Walton's union, in fact, consented to the procedures at issue here either expressly or implicitly is not for us to determine at this stage," as the question "requires ***resort*** to the [CBA]") (emphasis added).

But again, merely having to "resort" to the CBA is not the standard for LMRA preemption. And even if it were, exactly why a court, an arbitrator, or any other trier of

fact would have to "resort" to an interpretation or understanding of the management rights clause to resolve Walton's claims is unexplained. *See Byrne*, 2018 IL App (1st) 172612, ¶ 24; *Livadas*, 512 U.S. at 124-25. "The LMRA does not automatically preempt state law claims just because the plaintiff is a union member and employed under a CBA." *Byrne*, 2018 IL App (1st) 172612, ¶ 21. The Appellate Court's finding reduces the burden on a defendant claiming preemption of any state law claim to simply point to a CBA clause captioned "management rights" or "employer rights" to strip away the employee's right to seek redress in court. This result is not only contrary to established authority but common sense.

The Appellate Court's holding fashions a unique "substantially dependent" standard for Privacy Act claims out of whole cloth, under which the only question is whether a management rights clause exists. It has no root in federal labor law and is plainly unsupported by Supreme Court precedent. Inescapably, the Court must examine the text of the CBA to determine if the claim calls for actual interpretation of the agreement or merely calls for the Court to look to or reference it in the course of the litigation. *See id.* ¶ 24; *Lingle*, 486 U.S. at 413 n.12; *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 211, 215-16 (1985); *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 394 (1987); *In re Bentz Prods. Co.*, 253 F.3d at 287. Thus, to ascertain if a claim is preempted, the Court must examine the language of the CBA and determine whether evaluation of the claim requires substantive interpretation of the CBA.

3. If the Appellate Court Had Examined the CBA, It Would Have Found Walton's Claims Are Not "Substantially Dependent" on Its Terms Because There Is Nothing to Interpret.

Roosevelt cannot show that looking or referring to a CBA term is necessary to resolve Walton's claims under the Privacy Act, let alone that any "interpretation" is required (or even possible) to adjudicate them. Indeed, as discussed in Section I, *supra*, there is no genuine "dispute" to resolve. This is not a situation, as in *Miller*, where the employer has a basis to claim the union consented and released claims under the Act while the employees say it did not. 926 F.3d at 903 ("Southwest asserts that the union assented to the use of fingerprints . . . ."). But even if Roosevelt could muster a good faith basis to claim Walton's Union consented and secured a release for its members under the Privacy Act, thereby creating some genuine factual dispute, reference to the CBA could not possibly help to resolve it, as shown by the most cursory review.

The "management rights" clause on which the Appellate Court relied states in full as follows:

> Subject to the provision of this Agreement, the Employer shall have the exclusive right to direct the employees covered by this Agreement. Among the exclusive rights of management, but not intended as a wholly inclusive list of them are: the right to plan, direct, and control all operations performed in the building, to direct the working force, to transfer, hire, demote, promote, discipline, suspend, or discharge, for proper cause, to subcontract work and to relieve employees from duty because of lack of work or for any other legitimate reason. The union further understands and agrees that the Employer provides an important service to its tenants of a personalized nature to fulfill their security needs, as those needs are perceived by the Employer and the tenants. Accordingly, this Agreement shall be implemented and interpreted by the parties so as to give consideration to the needs and preferences of the tenants.

(SR 60); *Walton*, 2022 IL App (1st) 210011, ¶¶ 9, 21.

So, exactly which word(s), sentence(s) or other text must the parties supposedly have to dispute and debate over their meaning, and which will an arbitrator purportedly "interpret" to determine whether the Union consented to the collection, storage and dissemination of Walton's biometric data? The Court is left to guess. Clearly, any attempt to elevate a standard CBA provision like this to something that conceivably authorized the specific scope and form of consent mandated by the Privacy Act defies logic and reason.

The management rights clause – and CBA as a whole – shows that employee biometric data privacy rights, to no one's surprise, fall nowhere within its scope. (*See* SR 60). The terms "biometric," "hand geometry," or anything of the sort appear nowhere in the CBA, nor – as discussed in Section I, *supra* – does any suggestion that the Union was appointed the agent or *de facto* legal guardian of its members for Privacy Act purposes. (*See generally* SR 58-89). Nothing in the CBA (or any other document) could plausibly be construed as providing informed consent, as required by the Privacy Act, because nothing suggests the employer would collect biometric data in the first place, let alone exactly how it would store, disseminate, otherwise use, or ultimately destroy it (if ever). 745 ILCS 14/15. Accordingly, because there is literally *nothing* in the CBA to interpret or understand, the Appellate Court incorrectly held that Roosevelt met its burden to establish that Walton's claims are substantially dependent on interpretation of the CBA.

Pointing to *Fernandez*, *Miller* and their federal progeny – which, as discussed in Section II.A.5., *infra*, were wrongly decided – the Appellate Court turned a blind eye to the reality that the Union lacked authority to consent on Walton's behalf. *See* Section I, *supra*. If it did, then in addition to some tangible expression that the workforce empowered the Union to act as their agent for this specific purpose, something in the body of the CBA,

an appendix, or some other document would have to explicitly spell out, at the very least, that Roosevelt would collect biometric data from its unionized workforce and the purpose and length of time for which it would collect, store, use, and disseminate this biometric information. *See* 740 ILCS 14/15(b)(1)-(2), (d). After all, under the Privacy Act, there is only one way for a private entity to secure consent: expressly and in writing. *See* 740 ILCS 14/15(b); *Rosenbach*, 2019 IL 123186, ¶¶ 20, 33. Accordingly, any argument that the management rights clause could "implicitly" authorize Roosevelt's collection, storage, and dissemination of Walton's biometric data is a legal impossibility. *See* 740 ILCS 14/1, *et seq.*; *Byrne*, 2018 IL App (1st) 172612, ¶ 42 (finding that, "[a]lthough the parties could not have contracted around the requirements of the [IWPCA], they could have included a provision in the CBA detailing procedures" for wage deductions). An executed consent and release (presumably by the Union, if we accept Roosevelt's representation), which is easy to produce if it exists, would at least give an arbitrator something to genuinely "interpret" and provide an arguably nonfrivolous basis for preemption.[4] But it is undisputed that no such document exists, so even arguable compliance with the Privacy Act by Roosevelt is impossible as a matter of law. *Id.*

The same goes for Plaintiff's Section 15(a) claim, which is premised upon Roosevelt's failure to draft a publicly-available retention schedule and destruction policy, and its apparent failure, under Section 15(e), to implement policies for storing, transmitting, and protecting from disclosure biometric identifiers and biometric

[4] For example, a purported written consent and release executed by the Union for its members might require the parties to fight over things like whether the document properly identified all the collectors and third-parties who received the workers' biometrics, the measures taken to safeguard their data, or whether the employer made other required disclosures.

information, all of which would, under the statute, likewise require the creation of separate documents (or at the very least specific language present in the CBA spelling out Roosevelt's retention and destruction policy). *See* 740 ILCS 14/15(a), (e). But nothing like that exists either. What Roosevelt envisions an arbitrator "interpreting" to resolve the issue of whether the Union secured Walton's informed consent to the collection, storage, and dissemination of his biometric data remains a mystery. Contrary to the Appellate Court's holding, whether Walton's claims are substantially dependent upon interpretation of a CBA absolutely *does* depend on whether the CBA expressly references the Privacy Act, biometric privacy, or something else that could rationally require interpretation by an arbitrator. *See Walton*, 2022 IL App (1st) 210011, ¶ 21.

For example, in *Thomas*, No. 19 CH 2471 (Cir. Ct. Cook Cty., Dec. 19, 2019), the defendant failed to identify "any clause or provision of the CBA which would constitute an express or explicit waiver of [the plaintiff's] and the putative class's statutory BIPA rights." (A032). Thus, the court found, "Given the CBA's at issue here were signed in 2012 and 2015 . . . and that BIPA was passed in 2008 . . . it strains credulity to engage in a legal pronouncement that BIPA and biometric data gathering somehow obtained the same level of ubiquity as drug testing in the collective bargaining process a mere four years after the BIPA statute was enacted." (A033). Likewise, in *Winters*, No. 19 CH 6579 (Cir. Ct. Cook Cty., Feb. 11, 2020), the trial court recognized that a "management rights clause provid[ing an employer] with the right to determine the 'equipment to be utilized by employees' is separate and distinct from BIPA compliance." (A023). In so holding, the court stated that the defendant, like Roosevelt here, was unable to provide any evidence that the union *did* provide the requisite consent. (A022).

The reason courts are required to examine the language of CBAs to determine whether preemption is meritorious is because of the danger that could result otherwise. If every management rights clause leads to preemption of Privacy Act claims, notwithstanding its absolute and undeniable silence on the matter, nothing prevents an employer from claiming the same clause preempts *any* (and every) state statutory or common law claim. And in light of the Appellate Court's "do not read the CBA" admonition, trial courts will have to accept every employer's "suggestion" that a management rights clause covers the claim at face value. Effective enforcement of state wage statutes, anti-discrimination laws, or workplace safety ordinances would be severely curtailed for unionized workers, leaving a wholly-theoretical union grievance procedure as the sole avenue by which to secure any remedy. For example, under the Appellate Court's holding, an HIV-positive unionized employee could not sue in court if her employer published a list disclosing the HIV status of every employee in direct violation of the AIDS Confidentiality Act, because the employer need only suggest that an arbitrator must interpret the "management rights" to decide whether the union consented to this conduct for its members. *See* 410 ILCS 305/9. Such a result not only makes a mockery of the Privacy Act's purpose in ensuring people receive accurate information and make an informed choice over the handling of their biometrics, it flies in the face of well-established precedent and jeopardizes the ability of unionized employees to vindicate other statutory rights. *See In re Bentz Metal Prods Co.*, 253 F.3d at 286 (explaining that the Supreme Court "cautioned that § 301 cannot be read broadly to preempt rights conferred on individual employees as a matter of state law.") (citing *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246 (1994)).

Illinois courts have correctly followed this analytical framework to reject preemption in analogous cases. For example, as discussed in Section II.A.1., *supra*, the *Byrne* defendant pointed to two articles in the CBA in support of its bid for preemption of the plaintiffs' IWPCA claims: one that described drivers' commission pay structure, and another that established procedures to ensure product freshness, both of which it claimed required interpretation to determine whether consent was granted for deductions in the event of a delivery of stale beer. 2018 IL App (1st) 172612, ¶¶ 5-6, 26. After reviewing the CBA, as required, the Appellate Court astutely held, "because Byrne's claim arises under section 9 of the [IWPCA] and nothing in the CBA addresses the consequences of failing to rotate the beer, there is nothing requiring interpretation of the CBA." *Id.* ¶ 35. After reference to the CBA showed there was nothing for an arbitrator to interpret, the Court held that the defendant failed to meet its burden to establish preemption and foreclose plaintiffs from asserting their claims in court. The *Byrne* court correctly followed United States Supreme Court precedent, which further shows that preemption of Walton's claims is improper. *See Lingle*, 486 U.S. at 407 (holding that the plaintiff's state law tort claims for retaliatory discharge were not preempted because, despite containing a provision requiring just cause for termination, the CBA need not be construed to resolve an employee's claim); *Livadas*, 512 U.S. at 125 (allowing claim based on California wage payment penalty statute to proceed even though damages might be determined under the CBA, finding, "[b]eyond the simple need to refer to bargained-for wage rates in computing the penalty, the [CBA] is irrelevant to the dispute"). Unlike these cases in which the Supreme Court rejected Section 301 preemption despite the existence of tangentially-related CBA provisions, the

CBA between Roosevelt and Walton's Union does not contain anything remotely touching upon the claims at issue.

The *Byrne* court's logic applies with equal force here: Walton's claims arise under the Privacy Act, and nothing in the CBA touches upon Roosevelt's capture, collection, usage, storage, obtainment, or disclosure of employees' biometric data, much less grants the Union "legally authorized representative" status. Indeed, not a single word in the CBA evidences that Roosevelt and the Union bargained over consent for collection and disclosure of all Union members' biometric data. Thus, as with the *Byrne* CBA, there is simply nothing to interpret.

Because there is no language in the CBA that could be construed to answer the question of whether the Union granted Roosevelt consent to its collection, storage, or dissemination of his biometric data, Roosevelt cannot meet its burden of setting forth a nonfrivolous argument that the CBA requires interpretation. Accordingly, Walton's claims under the Privacy Act are not preempted under Section 301 of the LMRA.

4. Walton's Claims Are Dependent on the Discrete Facts of Roosevelt's Conduct.

Even if a CBA provision "tangentially related" to Walton's claims under the Privacy Act did exist – and none does – because the claims and defenses pertain exclusively to Roosevelt's conduct, the purely factual questions at issue further demonstrate that the Court need not interpret any CBA term. *See Lingle*, 486 U.S. at 407; *Crosby*, 725 F.3d at 801; *see also Kline v. Sec. Guards, Inc.*, 386 F.3d 246, 255, 258 (3d Cir. 2004) (rejecting Section 301 preemption because resolution of the plaintiff's state law claims was a purely factual issue capable of being determined by "simply considering the conduct of [the employer] and the facts and circumstances of [the plaintiffs'] workplace"); *Winters*, No.

19-CH-6579 (Cir. Ct. Cook Ct. Dec. 10, 2020) (A025). In *Lingle*, the Supreme Court, evaluating whether the plaintiff's state tort law retaliatory discharge claims were preempted by the CBA, expressly held that the elements of a retaliatory discharge claim are purely factual questions that pertain to the conduct of the employee and the conduct and motivation of the employer. 486 U.S. at 407. These "purely factual questions" about an employee's conduct, or an employer's conduct and motives, "do not require a court to interpret any term of a [CBA]." *Id.*

Walton's claims likewise invoke purely factual questions, namely: (1) whether Roosevelt collected Walton's biometric data; and (2) whether Roosevelt provided written notice, secured informed consent, and received an executed release so as to not violate Walton's rights and satisfy its obligations under the Privacy Act. These discrete factual inquiries, like those in *Lingle*, do not require a court to interpret any term of the relevant CBA. Because Walton's rights under the Privacy Act are established by statute and arise independently from the CBA, and as deciding Roosevelt's asserted defenses on the merits by interpreting any term of the CBA is impossible, the Appellate Court's holding that Walton's claims are preempted under the LMRA should be reversed. *See Walton*, 2022 IL App (1st) 210011, ¶ 27.

5. *Fernandez* and the Other Federal Trial Court Rulings Relied Upon by the Appellate Court Were Incorrectly Decided Because the Courts in Those Cases Failed to Examine the Relevant CBAs.

Relying heavily on *Fernandez*, 14 F.4th at 664, the Appellate Court, without engaging meaningfully with the Seventh Circuit's opinion, concluded it was not "wrongly decided" or lacking "logic or reason." *Walton*, 2022 IL App (1st) 210011, ¶¶ 18-20. The Appellate Court incorrectly assumed that the Seventh Circuit – which lacked the benefit of

any input from this Court when issuing *Fernandez* – properly resolved the question of LMRA preemption.

Generally, where the United States Supreme Court has not opined on an issue, "lower [f]ederal courts exercise no appellate jurisdiction over [s]tate courts, [and] decisions of lower [f]ederal courts are not conclusive on [s]tate courts . . . ." *People v. Kidd*, 129 Ill. 2d 432, 457 (1989). Thus, "in the absence of a United States Supreme Court decision, the weight this court gives to federal circuit and district court interpretations of federal law depends on factors such as uniformity of law and the soundness of the decisions." *State Bank of Cherry v. CGB Enterprises, Inc.*, 2013 IL 113836, ¶ 33. "While we are *bound* only by the United States Supreme Court, if the lower federal courts are uniform on their interpretation of a federal statute, this court, in the interest of preserving unity, will give *considerable weight* to those courts' interpretations of federal law and find them to be highly persuasive." *Id*. ¶ 35 (citations omitted) (emphasis in original). "However, we may choose not to follow Seventh Circuit or uniform lower federal court precedent if we find that precedent to be wrongly decided because we determine the decision to be without logic or reason." *Id*. ¶ 54 (citing *Weiland v. Telectronics Pacing Sys., Inc.*, 188 Ill. 2d 415, 423 (1999)).

Leaving aside the *Fernandez* court's flawed assumption that the Union was somehow authorized to consent to biometric collection, storage, and dissemination under the Privacy Act, the Seventh Circuit did not engage in the established two-step analytical framework to decide LMRA preemption. Nowhere in its six-paragraph opinion did the court address whether Privacy Act rights were conferred by the CBA, which is understandable given that they indisputably are not. *See, e.g.*, *Byrne*, 2018 IL App (1st)

172612, ¶ 24 ("If the right exists by statute and independent of the CBA, we then determine if the claim is 'substantially dependent' on the CBA.")

But the real problem with *Fernandez* centers on the court's failure to take the next analytical step and engage with the text of the CBA to determine whether evaluation of the Privacy Act claims were "substantially dependent" upon its interpretation. Instead, the Seventh Circuit simply cited its decision in *Miller*, 926 F.3d at 898, and summarily concluded "that provisions in the [RLA] parallel to [Section 301 of the LMRA]" permit the union to consent to collection and use of biometric data. *Id*. at 645. Without further analysis, the court went on to state, "If an employer asserts that a union *has* consented, then any dispute about the accuracy of that contention is one about the meaning of a collective-bargaining agreement and must be resolved between the union and the employer." *Id*. at 645-46 (emphasis in original).

Miller, the first Seventh Circuit decision to consider federal preemption of a Privacy Act claim, birthed the line of flawed reasoning that permeates *Fernandez* and their federal progeny. In *Miller*, the Seventh Circuit consolidated two appeals asking whether plaintiffs suing air carriers under the Privacy Act "must present these contentions to an adjustment board under the RLA. 926 F.3d at 899. The *Miller* court concluded that disputes under the Privacy Act between unionized employees and their employers subject to the RLA must be resolved before an adjustment board without citing to the factual record, analyzing the CBA at issue, or otherwise performing the requisite fact-based, two-step preemption analysis. 926 F.3d at 903. The decision in *Miller* reflects a fundamental misapprehension of the issue.

In ascertaining subject-matter jurisdiction, the Seventh Circuit stated: "[T]he stakes in both suits include whether the air carriers can use fingerprint identification." *Id*. But the Court's recitation of the issue is, respectfully, simply wrong. Whether the air carriers could use fingerprint identification was absolutely *not* at stake in either underlying suit, just as Roosevelt's ability to *use* biometric technology is not at stake here. Walton does not (and cannot) seek an injunction requiring Roosevelt to remove its biometric devices, and a ruling in his favor does not extinguish its right to use biometric technology. Rather, Walton's claims, like all claims under the Privacy Act, do not concern whether a private entity can use biometric technology or challenge how it tracks employee time worked, ***but whether Roosevelt secured his informed consent before taking, storing, and disseminating his biometrics***. *See* Section II.A.1., *supra*. The *Miller* court's misstep over this critical distinction is what led to its erroneous result.

In *Miller*, the Seventh Circuit observed, "there can be no doubt that how workers clock in and out is a proper subject of negotiation between unions and employers – is, indeed, a mandatory subject of bargaining." 926 F.3d at 903 (citing 45 U.S.C. § 152 First). True enough. But again, *how* workers clock in and out is not the issue in this or any Privacy Act action because the statute does not regulate biometric devices or employee timekeeping. *See* Section II.A.1., *supra*. Walton's claims, for example, do not concern whether he could clock in before donning personal protective equipment. *See, e.g.*, *Byrne*, 2018 IL App (1st) 172612, ¶ 22 (citing with approval *Carletto v. Quantum Foods*, No. 1-05-3163, 2006 WL 2018250, at *6 (Ill. App. Ct. June 5, 2006), which found LMRA preemption where a "finder of fact would first have to determine whether appellants donning and doffing of safety equipment and work clothes constituted work" under the

CBA, and further, that because the overtime rates set by the CBA were greater than those set by the IMWL, that the damages would also need to be interpreted by the CBA); *see also Mitchell v. JCG Indus.*, 929 F. Supp. 2d 827, 836 (N.D. Ill. 2013) (holding that plaintiffs' union and employers' agreement to exclude time spent donning and doffing from compensable time in the CBA did not violate IMWL and the FLSA). Nor do they concern whether overtime pay was properly recorded on the timeclocks, and thereafter, properly paid at the overtime rates guaranteed by the CBA. *See, e.g., Gonzalez v. Farmington Foods, Inc.*, 296 F. Supp. 2d 912, 935-36 (N.D. Ill. 2003) (finding LMRA preemption where overtime pay rate over time-and-one-half times an employee's hourly rate for work done on Sundays is a right created by the CBA, not state law, and thus required CBA interpretation); *Anderson v. JCG Indus., Inc.*, 09 C 1733, 2009 WL 371310, at *4 (N.D. Ill. Nov. 4, 2009) (same). Whether to establish a publicly-available biometric data retention and destruction schedule as required by Section 15(a) has never been a subject of bargaining, mandatory or permissive, and neither the Seventh Circuit nor any federal court has ever suggested otherwise. *See, e.g., Miller*, 926 F.3d at 898; *Fernandez*, 14 F.4th at 644.

By misreading the issue, the Seventh Circuit mistakenly believed that an RLA adjustment board, not a court, would have to interpret the management rights clause to determine whether the union did provide the requisite consent.[5] *Id.* This result might have

[5] The *Miller* court "reject[ed] plaintiffs' contention that a union is not a 'legally authorized representative'" for Privacy Act purposes. 926 F.3d at 903. The Seventh Circuit reasoned that nothing in the Privacy Act's text or any state court holdings suggested the legislature intended to exclude unions from the category of "legally authorized representatives." *Id.* But whether a union theoretically *could be* a legally authorized representative is hardly the same as concluding, on literally no facts or evidence, that the union *was* actually authorized

been correct if the *Miller* plaintiffs were, in fact, complaining "that the air carriers implemented these systems without their consent[.]" *Id*. at 901. After all, the implementation of timekeeping systems and procedures *is* something covered by a management rights clause or other CBA provision. But the CBA in *Miller*, like the CBA here, contained no provision that could plausibly require interpretation to determine whether the union consented to an employer's collection, storge or dissemination of workers' biometric data without complying with the Privacy Act. By misunderstanding the actual claims plaintiffs seeking redress under the Act are required to plead and prove, the Seventh Circuit arrived at a conclusion outside of logic and reason.

Following *Miller*, the *Fernandez* court also premised its decision on the misconception that the plaintiffs were attempting to bypass their union and bargain directly with their employer "about how to clock in and out." 14 F.4th at 645. Thus, the court concluded that if any employer-defendant asserts the union consented via a broad management rights clause, an arbitrator must interpret that clause to determine consent. *Id*. at 645-46. Again, "clocking in and out" was simply not the issue; the plaintiff in *Fernandez* did not seek any remedy or change premised upon how, when, or under what circumstances he would record his time. The *Fernandez* court, like *Miller*, misapprehended the plaintiffs' claim and, therefore, failed to examine the CBA to determine whether *any* provision therein needed to be interpreted. In so doing, the Seventh Circuit created a new, improper legal standard to determine federal preemption of Privacy Act claims. Accordingly, the

to consent under the Privacy Act (or whether a genuine dispute exists at all). *See* Section I, *supra*.

Appellate Court should have declined to follow *Fernandez* as wrongly decided because the Seventh Circuit failed to perform any recognized LMRA preemption analysis.[6]

Aside from *Byrne,* several other state and federal courts faced with similar preemption questions illustrate how the Seventh Circuit should have performed its analysis. For example, the Third Circuit, in *Kline v. Security Guards, Inc.,* considered whether alleged violations of Pennsylvania's state wiretap act were preempted by the LMRA, a case that arose out of defendants' surveillance of hourly employees at one of their facilities. 386 F.3d at 250. There, the defendants claimed that the plaintiffs' state law claims "[went] to the 'core' of [defendants'] management rights, a subject of collective bargaining." *Id*. at 255. The defendants further argued that the plaintiffs' "claims 'necessarily implicate' the

[6] None of the federal district court rulings the Appellate Court cited provide any meaningful analysis or interpretation on whether or how Privacy Act claims are preempted by the LMRA. These courts simply followed *Miller* as their binding precedent, as they were duty-bound to do. *See, e.g., Peatry v. Bimbo Bakeries USA, Inc.*, No. 19 C 2942, 2020 WL 919202, at *3 (N.D. Ill. Feb. 26, 2020) ("Therefore, under *Miller*, Peatry's claims require interpretation of the CBA so that § 301 preempts her . . . claims.") (citing *Miller,* 926 F.3d at 903-04); *Gray v. University of Chicago Medical Center, Inc.,* Case No. 19-cv-04229, 2020 WL 1445608, at *4 (N.D. Ill. Mar. 25, 2020) ("In these circumstances, the Seventh Circuit's guidance makes clear that Plaintiff's claims require interpretation of the CBA – at the very least its management rights clause.") (citing *Miller,* 926 F.3d at 903); *Williams v. Jackson Park SLF, LLC,* Case No. 19-CV-8198, 202 WL 5702294, at *2 (N.D. Ill. Sept. 24, 2020) ("Jackson Park argues that because Williams is a union member, the issue in dispute here is preempted under Section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185. Based on [*Miller*] , this Court agrees."); *Fernandez v. Kerry, Inc.*, No. 17-cv-08971, 2020 WL 7027587, at *3 ("The Court, contrary to Plaintiffs' suggestion, is bound to follow Seventh Circuit precedent and finds therefore, that under *Miller*, Plaintiffs' claims are preempted and must be dismissed."); *Gil v. True World Foods Chicago, LLC*, Case No. 20 C 2362, 2020 WL 7027727, at *2 ("The Seventh Circuit's decision in [*Miller*], controls the court's decision in this case."); *Roberson v. Maestro Consulting Services LLC,* 507 F. Supp. 3d 998, 1013 (S.D. Ill. 2020) ("Plaintiffs' claims regarding union members are preempted by Section 301 of the LMRA under a straightforward application of *Miller*."); *Barton v. Swan Surfaces, LLC,* 2021 WL 793983, at *7 (S.D. Ill. Mar. 2, 2021) (". . . in reliance on the binding precedent in [*Miller*], defendant Swan Surfaces, LLC's motion to dismiss for lack of subject matter jurisdiction is GRANTED.").

'Management Rights' and 'Shop Rules' clauses of the CBA . . . ." *Id.* Accordingly, the defendants sought Section 301 preemption, "contend[ing] that the claims cannot be analyzed without reference to the CBA." *Id.*

The Third Circuit rejected defendants' claims. First, the court noted that the plaintiffs did not allege a violation of any term or condition of the CBA at issue, nor did their state law claims derive from rights created by the CBA. *Id.* at 256. Importantly, the court noted that while the state law claims *related to* employer conduct at the workplace, they were *grounded in* substantive rights under state law. *Id.* "[T]he essential question is not whether [plaintiffs'] claims relate to a subject – management's rights – contemplated by the CBA . . . . Rather, the dispositive question here is whether [plaintiffs'] state claims require any *interpretation* of a provision of the CBA." *Id.* (citation omitted). The court further noted that the defendants failed to "point to any specific provision of these clauses that must be interpreted" in order to resolve the state law claims. *Id.*

Kline is indistinguishable. While the device Roosevelt used to capture Walton's hand geometry was a biometric timeclock deployed at the workplace, the machine is not the problem. The issue presented by the Privacy Act, as Walton alleges, is Roosevelt's failure to secure his informed consent before collecting his biometric data, which is a substantive right created by the statute itself. Again, there is simply nothing in the management rights clause or any other CBA provision that an arbitrator could possibly interpret to decide the merits of Walton's claims or Roosevelt's defenses on the merits.

If the Appellate Court's decision stands, it will signal the start of a steady erosion of rights for union workers, effectively making them second class employees, all of which

is antithetical to the point of union membership. The Seventh Circuit's opinions in *Miller* and *Fernandez* were incorrectly decided.

B. The Unavoidable Outcome That Will Result From the Appellate Court's Decision Calls for a Different Result.

1. Herding Privacy Act Claims Into the Union Grievance Procedure Is Tantamount to Extinguishing Them.

After an exhaustive search, Walton cannot identify a single instance in the history of collective bargaining where a unionized employee has ever been able to grieve a Privacy Act claim to arbitration. If Walton is required grieve his claims, it would effectively create two dramatically different substantive and procedural standards under the Privacy Act for unionized workers and every other Illinois citizen. Leaving aside the substantive problem that arbitrators have never been called upon to adjudicate claims under the Privacy Act, it would reduce the statute of limitations for Walton's claims from five years to 10 days, giving him a mere 0.7% of the amount of time afforded to every other Illinois citizen. *Compare* (SR 76) (CBA sets ten-day grievance presentment rule), *with Tims v. Black Horse Carriers, Inc.*, 2021 IL 200563, ¶ 35 (holding Section 15(a) and 15(b) claims under the Privacy Act are governed by a five-year statute of limitations). These realities completely remove the incentives built into the Privacy Act for private entities to proactively comply. *See id.*, *see also Rosenbach v. Six Flags Ent. Corp.*, 2019 IL 123186, ¶ 37 (holding that liability under BIPA incentivizes private entities to "conform to the law and prevent problems before they occur . . . ."). Despite an employer's failure to disclose any information about its biometric data collection and use, an employee would be required to investigate the employer's conduct, determine they had a basis to bring Privacy Act claims,

and initiate the grievance procedure (by contacting their supervisor)[7] in 10 days. The unavoidable result of the Appellate Court's decision is that tens of thousands of Illinois workers whose employers categorically disregarded the unambiguous and easy-to-follow requirements of the Privacy Act will have no way to vindicate their rights *solely because they unionized*, a result that utterly contravenes the stated purpose of the Privacy Act. *See* 740 ILCS 14/5.

2. The Privacy Act Sets the Floor for Biometric Privacy Rights, and a CBA Cannot Go Below that Floor.

The result nearly universally reached by the Illinois trial courts makes sense, given that the Privacy Act guarantees all Illinoisians certain rights to control their biometric privacy. The United States Supreme Court has consistently held that "§ 301 cannot be read broadly to pre-empt nonnegotiable rights conferred on individual employees as a matter of state law" and that "it is the legal character of a claim, as 'independent' of rights under the collective-bargaining agreement . . . that decides whether a state cause of action may go forward." *Livadas*, 512 U.S. at 123-24 (citing *Lueck*, 471 U.S. at 213, *Lingle*, 486 U.S. 408). The United States Supreme Court also has long held that federal preemption is inappropriate when the state claim at issue "touche[s] interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act." *San Diego Bldg. Trades Council, Millmen's Union, Local 2020 v. Garmon*, 359 U.S. 236, 244 (1959); *Vaca*

[7] There are other reasons why the notion that employees can grieve claims under the Privacy Act is a sham. For example, whether to refer a grievance to arbitration is left to the discretion of the employee's supervisor. But even assuming they were able to grasp the nature of the claim, the supervisor would have no way to identify, in writing as required, the specific CBA provision Roosevelt allegedly violated or how, because no such provision exists. (*See* Article XVIII – Grievance Procedure and Arbitration, SR 75-77).

v. Sipes, 386 U.S. 171, 180 (1967) ("[T]his Court has refused to hold state remedies pre-empted where the activity regulated was a merely peripheral concern of the [LMRA]" or "touched interests so deeply rooted in local feeling and responsibility that in the absence of compelling congressional direction, we could not infer that Congress has deprived the States of the power to act.") (internal quotations omitted); *Linn v. United Plant Guard Workers of America, Local 114*, 383 U.S. 53, 62 (1966) (following the LMRA preemption standard of *Garmon*, finding that "an overriding state interest in protecting its residents from malicious libels should be recognized in these circumstances" and preemption should be denied.); *see also U.S. v. Palumbo Bros., Inc.*, 145 F.3d 850, 864 (7th Cir. 1998) ("[T]he Supreme Court recognized that a LMRA lawsuit is not suited to displace the jurisdiction of federal courts and to resolve claims that . . . involve the application of independent federal statutes or state statutes 'rooted in local feeling and responsibility' and . . . concern only collateral issues of labor law.") (quoting *Garmon*, 359 U.S. at 244).

This Court has consistently followed this precedent, denying LMRA preemption in several circumstances where claims involve state laws of deep public interest to Illinois citizens. *See, e.g., Krasinski v. United Parcel Service, Inc.*, 124 Ill. 2d 483, 473 (1988) (denying LMRA preemption because defamation is "the type of activity deeply rooted in local feeling and responsibility that would be viewed as peripheral concern of the LMRA under the *Garmon* and *Linn* standards. Under our law, the right to be free from malicious defamation is firmly rooted in our State's public policy.") (internal quotations omitted); *Gonzalez v. Prestress Eng'g Corp.*, 115 Ill. 2d 1, 10 (1986) (denying LMRA preemption "[w]here, as here, the State tort claim is based on a duty and right firmly rooted and fixed

in an important and clearly defined public policy, evaluation of the tort claim does not in any way depend upon an interpretation of the 'just cause' provision in a labor contract.")

As unequivocally and unambiguously stated by the General Assembly when unanimously enacting the Privacy Act, an individual's interest in his or her biometric privacy is a deep concern of the State of Illinois. *See* 740 ILCS 14/5. Thus, under the *Garmon* and *Linn* standards, the Privacy Act cannot be subject to LMRA preemption. The Privacy Act creates a nonnegotiable right conferred to all Illinois citizens as a matter of state law, acting as a floor to be built upon by a CBA. *See Glinski v. City of Chi.*, No. 99 C 3063, 2001 WL 109540, at *5 (N.D. Ill., Feb. 5, 2001) ("So long as the substantive rights granted under the CBA meet the "floor" of rights required by statute, this intent should be given effect."); *Byrne*, 2018 IL 172612, ¶ 42 (explaining that a union and employer cannot contract around the requirements of the IWPCA); *Rymel v. Save Mart Supermarkets, Inc.*, 30 Cal. App. 5th 853 (2018) (holding that a CBA cannot authorize violations of state law). Unlike common law privacy rights, which rest on an individual's reasonable expectations, in Illinois, the nature and extent of individual biometric privacy rights is codified by statute. *See Amoco*, 964 F.2d at 710.

This Court recognized the need to protect the public against "the substantial and irreversible harm that could result if biometric identifiers and information are not properly safeguarded; and the public welfare, security, and safety will be advanced. That is the point of the law." *Rosenbach*, 2019 IL 123186, ¶ 37. This is because, through the Privacy Act, the "General Assembly has codified that individuals possess a right to privacy in and control over their biometric identifiers and biometric information." *Id.* ¶ 33; *McDonald v. Symphony Bronzeville Park, LLC*, 2022 IL 126511, ¶ 24 (same). This Court has observed

that the Privacy Act concerns "personal and societal injuries caused by violating the Privacy Act's prophylactic requirements." *Id.* ¶ 43. And as the Appellate Court correctly observed, the Privacy Act's legislative purpose is to "serve[] the public 'by regulating the collection, use safeguarding, handling, storage, retention, and destruction of biometric identifiers and information.'" *Watson v. Legacy Healthcare Financial Service, LLC*, 2021 IL App (1st) 210279, ¶ 49 (quoting 740 ILCS 14/5(g). The Appellate Court also observed the remarks of the bill's sponsor, Representative Kathleen Ryg, explaining the impetus for the Privacy Act:

> This Bill is especially important because one of the companies that has been piloted in Illinois, Pay By Touch, is the largest fingerprint scan system in Illinois and they have recently filed for bankruptcy and wholly stopped providing verification services in March of 2008. This pullout leaves thousands of customers from Albertson's, Cub Foods, Farm Fresh, Jewel Osco, Shell, and Sunflower Market wondering what will become of their biometric and financial data. The California Bankruptcy Court recently approved the sale of their Pay By Touch database. So, we are in very serious need of protections for the citizens of Illinois when it comes to biometric information. I know of no opposition to the legislation and I'll attempt to answer any questions.

Id. ¶ 63 (quoting 95th Ill. Gen. Assem., House Proceedings, May 30, 2008, at 249 (statements of Representative Ryg).

The Supreme Court has held that Section 301 simply does not "delegate to unions and unionized employers the power to exempt themselves from whatever state labor standards they disfavored." *Lueck*, 471 U.S. at 213. By the same logic, Section 301 does not delegate to unions and unionized employers the power to exempt themselves from state privacy laws, like the Privacy Act, which the employers disfavor (or simply do not care about). This Court has recognized that an "individual's interest in his reputation is a deep and traditional concern of the State of Illinois" that could not be preempted by the LMRA.

See Krasinski, 124 Ill. 2d at 494 (quoting *Fisher v. Illinois Office Supply Co.*, 130 Ill. App. 3d 996, 1001 (1984)). If an individual's interest in their reputation is so rooted in the local feelings and responsibility of Illinoisans as to make LMRA preemption inappropriate, then surely an individual's security, privacy, and consent to the usage of their biometric data – their irreplaceable, immutable, and deeply sensitive traits – are a deep public policy concern for the State of Illinois.

III. Even If Walton's Section 15(b) and (d) Claims Required Interpretation of the CBA (They Do Not), the Union Cannot Bargain Away Section 15(a) Rights Because Section 15(a) Creates a Duty Owed to the Public.

Even if the Court were to find that the Appellate Court correctly held that Roosevelt advanced a nonfrivolous argument that the management rights clause in the CBA secured written consent and provided an executed release on behalf of Walton and the entire Union membership for Roosevelt's collection, storage, and dissemination of their biometric data, this holding cannot apply to Walton's Section 15(a) claims. Section 15(a) provides:

> A private entity in possession of biometric identifiers or biometric information must develop a written policy, ***made available to the public***, establishing a retention schedule and guidelines for permanently destroying biometric identifiers and biometric information when the initial purpose for collecting or obtaining such identifiers or information has been satisfied or within 3 years of the individual's last interaction with the private entity, whichever occurs first. Absent a valid warrant or subpoena issued by a court of competent jurisdiction, a private entity in possession of biometric identifiers or biometric information must comply with its established retention schedule and destruction guidelines.

740 ILCS 14/15(a) (emphasis added). Section 15(a) creates a "full panoply" of duties: "the duties to develop, publicly disclose, *and comply with* data retention and destruction policies[.]" *Fox v. Dakkota Integrated Sys., LLC*, 980 F.3d 1146, 1149 (7th Cir. 2020). As the Seventh Circuit noted, "the duty to disclose under section 15(a) is owed to the public generally, not to particular persons whose biometric information the entity collects." *See*

Bryant, 958 F.3d at 626; *see also Wypych v. Cheese Merchants of America, LLC*, No. 20 CH 2437, Order, at *10-12 (Cir. Ct. Cook Cty. July 21, 2021). In fact, that court expressly held that the duty to create a publicly-available retention and destruction policy imposed under Section 15(a) "*is not* part of the informed consent regime." *Bryant*, 958 F.3d at 626.

As Section 15(a) sets forth duties owed not only to Walton, but to the public at large, it is legally impossible for Roosevelt and the Union to have negotiated this right or to have bargained it away through a management rights clause. The plain text of the Privacy Act supports this conclusion. Section 15(b) and 15(d) both provide for notice and consent through the subject of collection's "legally authorized representative." *See* 740 ILCS 14/15(b), (d). Importantly, nowhere in Section 15(a) does the Privacy Act permit a private entity to satisfy its obligations by providing a retention policy and destruction schedule solely to a purported legally authorized representative, like Walton's Union. *See* 740 ILCS 14/15(a). Indeed, the plain text expressly prohibits such conduct, requiring that the retention policy and destruction schedule be "made available to the public." 740 ILCS 14/15(a).

The Appellate Court was required to examine the text of the CBA to determine whether Walton's claims were "substantially dependent" on interpretation of the agreement. Because there is no nonfrivolous argument that any term of the CBA requires "interpretation" to resolve Plaintiff's claims (or is even possible), Roosevelt cannot meet its burden.

CONCLUSION

For all the reasons stated above, the Court should answer the certified question in the negative and hold that Section 301 of the Labor Management Relations Act (29 U.S.C. § 185) does not preempt Privacy Act claims asserted by an employee covered by a collective bargaining agreement.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), contains 45 pages.

/s/ Haley R. Jenkins
Haley R. Jenkins

APPENDIX

TABLE OF CONTENTS TO APPENDIX

Supreme Court Order allowing Petition for Leave to Appeal A-1
740 ILCS § 14 ..... A-2
740 ILCS § 14/1 ..... A-3
740 ILCS § 14/5 ..... A-4
740 ILCS § 14/10 ..... A-6
740 ILCS § 14/15 ..... A-8
740 ILCS § 14/20 ..... A-10
740 ILCS § 14/25 ..... A-11
740 ILCS § 14/30 ..... A-12
740 ILCS § 14/99 ..... A-13
29 USCA § 185 ..... A-14
Memorandum and Order entered on February 11, 2020 ..... A-17
Memorandum and Order entered on December 19, 2019 ..... A-28
Appellate Court Opinion entered on February 22, 2022 ..... A-40
Table of Contents to Supporting Record A-53
Appellate Court Order of February 1, 2021 ..... A-54

SUPREME COURT OF ILLINOIS

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May 25, 2022

In re: William Walton, Indv., etc., Appellant, v. Roosevelt University, Appellee. Appeal, Appellate Court, First District.
128338

The Supreme Court today ALLOWED the Petition for Leave to Appeal in the above entitled cause.

We call your attention to Supreme Court Rule 315(h) concerning certain notices which must be filed.

Very truly yours,

Cynthia A. Grant

Clerk of the Supreme Court

West's Smith-Hurd Illinois Compiled Statutes Annotated
Chapter 740. Civil Liabilities
Act 14. Biometric Information Privacy Act

ILCS Ch. 740, ACT 14, Refs & Annos
Currentness

I.L.C.S. Ch. 740, ACT 14, Refs & Annos, IL ST Ch. 740, ACT 14, Refs & Annos
Current through P.A. 102-730 of the 2022 Reg. Sess. Some statute sections may be more current, see credits for details.

End of Document

West's Smith-Hurd Illinois Compiled Statutes Annotated
Chapter 740. Civil Liabilities
Act 14. Biometric Information Privacy Act (Refs & Annos)

740 ILCS 14/1

14/1. Short title

Effective: October 3, 2008
Currentness

§ 1. Short title. This Act may be cited as the Biometric Information Privacy Act.

Credits
P.A. 95-994, § 1, eff. Oct. 3, 2008.

740 I.L.C.S. 14/1, IL ST CH 740 § 14/1
Current through P.A. 102-730 of the 2022 Reg. Sess. Some statute sections may be more current, see credits for details.

End of Document

West's Smith-Hurd Illinois Compiled Statutes Annotated
Chapter 740. Civil Liabilities
Act 14. Biometric Information Privacy Act (Refs & Annos)

740 ILCS 14/5

14/5. Legislative findings; intent

Effective: October 3, 2008
Currentness

§ 5. Legislative findings; intent. The General Assembly finds all of the following:

(a) The use of biometrics is growing in the business and security screening sectors and appears to promise streamlined financial transactions and security screenings.

(b) Major national corporations have selected the City of Chicago and other locations in this State as pilot testing sites for new applications of biometric-facilitated financial transactions, including finger-scan technologies at grocery stores, gas stations, and school cafeterias.

(c) Biometrics are unlike other unique identifiers that are used to access finances or other sensitive information. For example, social security numbers, when compromised, can be changed. Biometrics, however, are biologically unique to the individual; therefore, once compromised, the individual has no recourse, is at heightened risk for identity theft, and is likely to withdraw from biometric-facilitated transactions.

(d) An overwhelming majority of members of the public are weary of the use of biometrics when such information is tied to finances and other personal information.

(e) Despite limited State law regulating the collection, use, safeguarding, and storage of biometrics, many members of the public are deterred from partaking in biometric identifier-facilitated transactions.

(f) The full ramifications of biometric technology are not fully known.

(g) The public welfare, security, and safety will be served by regulating the collection, use, safeguarding, handling, storage, retention, and destruction of biometric identifiers and information.

Credits
P.A. 95-994, § 5, eff. Oct. 3, 2008.

740 I.L.C.S. 14/5, IL ST CH 740 § 14/5

Current through P.A. 102-730 of the 2022 Reg. Sess. Some statute sections may be more current, see credits for details.

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West's Smith-Hurd Illinois Compiled Statutes Annotated
Chapter 740. Civil Liabilities
Act 14. Biometric Information Privacy Act (Refs & Annos)

740 ILCS 14/10

14/10. Definitions

Effective: October 3, 2008
Currentness

§ 10. Definitions. In this Act:

"Biometric identifier" means a retina or iris scan, fingerprint, voiceprint, or scan of hand or face geometry. Biometric identifiers do not include writing samples, written signatures, photographs, human biological samples used for valid scientific testing or screening, demographic data, tattoo descriptions, or physical descriptions such as height, weight, hair color, or eye color. Biometric identifiers do not include donated organs, tissues, or parts as defined in the Illinois Anatomical Gift Act or blood or serum stored on behalf of recipients or potential recipients of living or cadaveric transplants and obtained or stored by a federally designated organ procurement agency. Biometric identifiers do not include biological materials regulated under the Genetic Information Privacy Act. Biometric identifiers do not include information captured from a patient in a health care setting or information collected, used, or stored for health care treatment, payment, or operations under the federal Health Insurance Portability and Accountability Act of 1996. Biometric identifiers do not include an X-ray, roentgen process, computed tomography, MRI, PET scan, mammography, or other image or film of the human anatomy used to diagnose, prognose, or treat an illness or other medical condition or to further validate scientific testing or screening.

"Biometric information" means any information, regardless of how it is captured, converted, stored, or shared, based on an individual's biometric identifier used to identify an individual. Biometric information does not include information derived from items or procedures excluded under the definition of biometric identifiers.

"Confidential and sensitive information" means personal information that can be used to uniquely identify an individual or an individual's account or property. Examples of confidential and sensitive information include, but are not limited to, a genetic marker, genetic testing information, a unique identifier number to locate an account or property, an account number, a PIN number, a pass code, a driver's license number, or a social security number.

"Private entity" means any individual, partnership, corporation, limited liability company, association, or other group, however organized. A private entity does not include a State or local government agency. A private entity does not include any court of Illinois, a clerk of the court, or a judge or justice thereof.

"Written release" means informed written consent or, in the context of employment, a release executed by an employee as a condition of employment.

Credits
P.A. 95-994, § 10, eff. Oct. 3, 2008.

740 I.L.C.S. 14/10, IL ST CH 740 § 14/10

Current through P.A. 102-730 of the 2022 Reg. Sess. Some statute sections may be more current, see credits for details.

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West's Smith-Hurd Illinois Compiled Statutes Annotated
Chapter 740. Civil Liabilities
Act 14. Biometric Information Privacy Act (Refs & Annos)

740 ILCS 14/15

14/15. Retention; collection; disclosure; destruction

Effective: October 3, 2008
Currentness

§ 15. Retention; collection; disclosure; destruction.

(a) A private entity in possession of biometric identifiers or biometric information must develop a written policy, made available to the public, establishing a retention schedule and guidelines for permanently destroying biometric identifiers and biometric information when the initial purpose for collecting or obtaining such identifiers or information has been satisfied or within 3 years of the individual's last interaction with the private entity, whichever occurs first. Absent a valid warrant or subpoena issued by a court of competent jurisdiction, a private entity in possession of biometric identifiers or biometric information must comply with its established retention schedule and destruction guidelines.

(b) No private entity may collect, capture, purchase, receive through trade, or otherwise obtain a person's or a customer's biometric identifier or biometric information, unless it first:

(1) informs the subject or the subject's legally authorized representative in writing that a biometric identifier or biometric information is being collected or stored;

(2) informs the subject or the subject's legally authorized representative in writing of the specific purpose and length of term for which a biometric identifier or biometric information is being collected, stored, and used; and

(3) receives a written release executed by the subject of the biometric identifier or biometric information or the subject's legally authorized representative.

(c) No private entity in possession of a biometric identifier or biometric information may sell, lease, trade, or otherwise profit from a person's or a customer's biometric identifier or biometric information.

(d) No private entity in possession of a biometric identifier or biometric information may disclose, redisclose, or otherwise disseminate a person's or a customer's biometric identifier or biometric information unless:

(1) the subject of the biometric identifier or biometric information or the subject's legally authorized representative consents to the disclosure or redisclosure;

(2) the disclosure or redisclosure completes a financial transaction requested or authorized by the subject of the biometric identifier or the biometric information or the subject's legally authorized representative;

(3) the disclosure or redisclosure is required by State or federal law or municipal ordinance; or

(4) the disclosure is required pursuant to a valid warrant or subpoena issued by a court of competent jurisdiction.

(e) A private entity in possession of a biometric identifier or biometric information shall:

(1) store, transmit, and protect from disclosure all biometric identifiers and biometric information using the reasonable standard of care within the private entity's industry; and

(2) store, transmit, and protect from disclosure all biometric identifiers and biometric information in a manner that is the same as or more protective than the manner in which the private entity stores, transmits, and protects other confidential and sensitive information.

Credits
P.A. 95-994, § 15, eff. Oct. 3, 2008.

740 I.L.C.S. 14/15, IL ST CH 740 § 14/15
Current through P.A. 102-730 of the 2022 Reg. Sess. Some statute sections may be more current, see credits for details.

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West's Smith-Hurd Illinois Compiled Statutes Annotated
Chapter 740. Civil Liabilities
Act 14. Biometric Information Privacy Act (Refs & Annos)

740 ILCS 14/20

14/20. Right of action

Effective: October 3, 2008
Currentness

§ 20. Right of action. Any person aggrieved by a violation of this Act shall have a right of action in a State circuit court or as a supplemental claim in federal district court against an offending party. A prevailing party may recover for each violation:

(1) against a private entity that negligently violates a provision of this Act, liquidated damages of $1,000 or actual damages, whichever is greater;

(2) against a private entity that intentionally or recklessly violates a provision of this Act, liquidated damages of $5,000 or actual damages, whichever is greater;

(3) reasonable attorneys' fees and costs, including expert witness fees and other litigation expenses; and

(4) other relief, including an injunction, as the State or federal court may deem appropriate.

Credits
P.A. 95-994, § 20, eff. Oct. 3, 2008.

740 I.L.C.S. 14/20, IL ST CH 740 § 14/20
Current through P.A. 102-730 of the 2022 Reg. Sess. Some statute sections may be more current, see credits for details.

End of Document

West's Smith-Hurd Illinois Compiled Statutes Annotated
Chapter 740. Civil Liabilities
Act 14. Biometric Information Privacy Act (Refs & Annos)

740 ILCS 14/25

14/25. Construction

Effective: October 3, 2008
Currentness

§ 25. Construction.

(a) Nothing in this Act shall be construed to impact the admission or discovery of biometric identifiers and biometric information in any action of any kind in any court, or before any tribunal, board, agency, or person.

(b) Nothing in this Act shall be construed to conflict with the X-Ray Retention Act, the federal Health Insurance Portability and Accountability Act of 1996 and the rules promulgated under either Act.

(c) Nothing in this Act shall be deemed to apply in any manner to a financial institution or an affiliate of a financial institution that is subject to Title V of the federal Gramm-Leach-Bliley Act of 1999 and the rules promulgated thereunder.

(d) Nothing in this Act shall be construed to conflict with the Private Detective, Private Alarm, Private Security, Fingerprint Vendor, and Locksmith Act of 2004 and the rules promulgated thereunder.

(e) Nothing in this Act shall be construed to apply to a contractor, subcontractor, or agent of a State agency or local unit of government when working for that State agency or local unit of government.

Credits
P.A. 95-994, § 25, eff. Oct. 3, 2008.

740 I.L.C.S. 14/25, IL ST CH 740 § 14/25
Current through P.A. 102-730 of the 2022 Reg. Sess. Some statute sections may be more current, see credits for details.

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West's Smith-Hurd Illinois Compiled Statutes Annotated
Chapter 740. Civil Liabilities
Act 14. Biometric Information Privacy Act (Refs & Annos)

740 ILCS 14/30

14/30. § 30. Repealed by its own terms, eff. Jan. 1, 2009

Effective: January 1, 2009
Currentness

740 I.L.C.S. 14/30, IL ST CH 740 § 14/30
Current through P.A. 102-730 of the 2022 Reg. Sess. Some statute sections may be more current, see credits for details.

West's Smith-Hurd Illinois Compiled Statutes Annotated
Chapter 740. Civil Liabilities
Act 14. Biometric Information Privacy Act (Refs & Annos)

740 ILCS 14/99

14/99. Effective date

Effective: October 3, 2008
Currentness

§ 99. Effective date. This Act takes effect upon becoming law.

Credits
P.A. 95-994, § 99, eff. Oct. 3, 2008.

740 I.L.C.S. 14/99, IL ST CH 740 § 14/99
Current through P.A. 102-730 of the 2022 Reg. Sess. Some statute sections may be more current, see credits for details.

End of Document

United States Code Annotated
Title 29. Labor
Chapter 7. Labor-Management Relations (Refs & Annos)
Subchapter IV. Liabilities of and Restrictions on Labor and Management

29 U.S.C.A. § 185

§ 185. Suits by and against labor organizations [Statutory Text & Notes of Decisions subdivisions I to XIV]

Currentness

<Notes of Decisions for 29 USCA § 185 are displayed in multiple documents.>

(a) Venue, amount, and citizenship

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgments

Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) Jurisdiction

For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) Service of process

The service of summons, subpena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) Determination of question of agency

For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

CREDIT(S)

(June 23, 1947, c. 120, Title III, § 301, 61 Stat. 156.)

29 U.S.C.A. § 185, 29 USCA § 185
Current through P.L. 117-160. Some statute sections may be more current, see credits for details.

End of Document

JUDGE NEIL H. COHEN
CIRCUIT COURT OF COOK COUNTY
CHANCERY DIVISION
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Chicago, IL 60602
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FACSIMILE TRANSMITTAL SHEET

DATE:
February 11, 2020

FROM:
Chambers of Judge Neil H. Cohen

TO:
Lottie Peeters

FAX NUMBER:
[redacted] (312) 577-0720

RE:
19-CH-6579
Winters v. Aperion Care

NUMBER OF PAGES (INCLUDING COVER PAGE)
11

☐ URGENT ☐ FOR REVIEW ☐ PLEASE COMMENT ☐ PLEASE CONFIRM ☐ PLEASE RECYCLE

NOTES/COMMENTS:

If any of this message is not clear please call 312/603-6052

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

KEAMBER WINTERS and DAWN MEEGAN, individually and on behalf of all others similarly situated,	)	
Plaintiff,	)	
v.	)	**Case No. 19-CH-6579**
APERION CARE INC., et al.,	)	
Defendants,	)	

MEMORANDUM AND ORDER

Defendants Aperion Care, Inc., Aperion Care Morton Villa, LLC, Aperion Care Morton Terrace, LLC, Aperion Care Galesburg North, LLC, Island City Rehabilitation Center LLC, d/b/a Aperion Care Wilmington, and Doe Defendants 1-100 have filed a motion to dismiss Plaintiffs Keamber Winters and Dawn Meegan's complaint and compel arbitration pursuant to 735 ILCS 5/2-619.1.

I. Background

The Biometric Information Privacy Act ("BIPA") requires private entities in possession of biometric information to develop a publicly available written policy establishing a retention schedule and guidelines for permanently destroying biometric information. 740 ILCS 14/15(a). BIPA also requires a private entity to obtain written consent from the individual before it can collect the individual's biometric information. 740 ILCS 14/15(b). Significantly, BIPA prevents a private entity from disseminating an individual's biometric information unless it has received the individual's consent. 740 ILCS 14/15(d).

Section 14/20 of BIPA grants any person aggrieved by a violation of BIPA a right of action. 740 ILCS 14/20. A prevailing party may recover actual damages or a statutory penalty whichever is greater for each violation. 740 ILCS 14/20 (1) and (2).

A. Plaintiff Keamber Winters

Plaintiff Keamber Winters ("Winters") alleges she formerly "performed work" for Defendants Aperion Care, Inc. ("Aperion Care"), Aperion Care Morton Villa, LLC ("Morton Villa"), Aperion Care Morton Terrace, LLC ("Morton Terrace"), and Aperion Care Galesburg North, LLC ("Galesburg North") but not defendant Island City Rehabilitation Center LLC, d/b/a Aperion Care Wilmington ("Wilmington") (collectively "Defendants"). (First Amended Complaint at ¶¶3, 26-27).

Winters alleges that each of the Defendants required her submit her fingerprint for time keeping purposes. (FAC at ¶¶3, 30, 32, 34). Winters alleges that Defendants violated BIPA because: (1) she was never informed of the specific limited purposes or length of time for which Defendants collected and stored her biometric information; (2) she was never informed of any biometric data retention and deletion policy; and (3) she never signed a written release allowing Defendants to collect, store, and use her biometric data. (FAC. at ¶¶3, 31, 50, 54-57).

B. Plaintiff Dawn Meegan

Plaintiff Dawn Meegan ("Meegan") alleges she formerly "performed work" for defendants Aperion Care and Wilmington. (FAC at ¶¶4, 28). Meegan alleges that defendants Aperion Care and Wilmington required her submit her fingerprint for time keeping purposes. (FAC at ¶¶ 4, 30, 32-33). Meegan alleges that defendants Aperion Care and Wilmington violated BIPA because: (1) she was never informed of the specific limited purposes or length of time for which defendants collected and stored her biometric information; (2) she was never informed of any biometric data retention and deletion policy; and (3) she never signed a written release allowing defendants to collect, store, and use her biometric data. (FAC. at ¶¶4, 31, 50, 54-57).

C. The Collective Bargaining Agreements

Defendants' motion to dismiss asserts that Winters and Meegan (collectively "Plaintiffs") were respectively represented by Local 536 United Food and Commercial Workers International Union, CLC ("Local 536) and Local 1546 United Food and Commercial Workers International Union ("Local 1546") (collectively the "Unions") and that the Unions executed different collective bargaining agreements (collectively the "CBAs") with defendants Wilmington and Morton Villa and Morton Terrace.

On May 23, 2018, Wilmington and Local 1546 entered into a collective bargaining agreement (the "Wilmington CBA"). (Motion at Ex. D1). Article Two, section 2.2 of the Wilmington CBA states that Local 1546 is the exclusive bargaining agent for all employees of Wilmington with respect to, among other things, "other terms and conditions of employment." (Id.). Article Six, section 6.1 of the Wilmington CBA grants Wilmington management rights including the right to determine procedures and the equipment to be utilized by employees. (Id.). Article Thirteen, section 13.1 states that any grievance by an employee against Wilmington "with respect to the interpretation or application of, or compliance with" the Wilmington CBA shall be settled pursuant to the grievance procedure. (Id.). Section 13.2 grants either party the right to invoke the arbitration provisions of the Wilmington CBA. (Id.).

On January 28, 2014 Local 536 signed a collective bargaining agreement with defendants Morton Villa and Morton Terrace (the "Morton CBA"). (Motion at Ex. E1). Article Two, section 2.1 recognizes Local 536 as the exclusive bargaining agent with respect to "other terms and conditions of employment." (Id.). Article Six, section 6.1 grants defendants Morton Villa and Morton Terrace management rights. (Id.). Article Twelve section 12.1 provides "[a]ny grievance that may be asserted by the Union or any Employee, and any other difference or dispute relating directly or indirectly to the interpretation or application of, or compliance with this Agreement, [. . .] shall be resolved in accordance with" the procedure in the Morton CBA. (Id.). If Local 536 is

not satisfied with step three of the grievance procedure, Local 536 may submit the grievance to arbitration. (Id.). Article Twelve section 12.7 explains the requirements that must be followed for arbitration. (Id.).

II. Motion to Dismiss

Defendants are seeking to dismiss the Complaint pursuant to 735 ILCS 5/2-619.1. Section 2-619.1 allows a party to bring a combined motion to dismiss under sections 2-615 and 2-619. 735 ILCS 5/2-619.1.

"A section 2-615 motion to dismiss challenges the legal sufficiency of the complaint." Yoon Ja Kim v. Jh Song, 2016 IL App (1st) 150614-B, ¶41. "Such a motion does not raise affirmative factual defense but alleges only defects on the fact of the complaint." Id. "All well-pleaded facts and all reasonable inference from those facts are taken as true. Where unsupported by allegations of fact, legal and factual conclusions may be disregarded." Kagan v. Waldheim Cemetery Co., 2016 IL App (1st) 131274, ¶29. "In determining whether the allegations of the complaint are sufficient to state a cause of action, the court views the allegations of the complaint in the light most favorable to the plaintiff. Unless it is clearly apparent that the plaintiff could prove no set of facts that would entitle him to relief, a complaint should not be dismissed." Id.

A section 2-619 motion to dismiss "admits the legal sufficiency of the complaint and affirms all well-plead facts and their reasonable inferences, but raises defect or other matters either internal or external from the complaint that would defeat the cause of action." Cohen v. Compact Powers Sys., 382 Ill. App. 3d 104, 107 (1st Dist. 2008). A dismissal under §2-619 permits "the disposal of issues of law or easily proved facts early in the litigation process." Id. Section 2-619(a)(9) authorizes dismissal where "the claim asserted against the defendant is barred by other affirmative matter avoiding the legal effect of or defeating the claim." 735 ILCS 5/2-619(a)(9). "A motion to compel arbitration and dismiss the lawsuit is essentially a motion pursuant to section 2-619(a)(9) to dismiss based on the exclusive remedy of arbitration." Griffith v. Wilmette Harbor Ass'n, 378 Ill. App. 3d 173, 180 (1st Dist. 2007).

A. Section 2-619

Defendants argue Plaintiffs' Complaint should be dismissed because: (1) Plaintiffs were never employed by Aperion Care and Galesburg North; (2) Plaintiffs claims are preempted by the Labor Management Relations Act; (3) Plaintiffs' claims must be resolved through arbitration per the CBAs; and (4) Plaintiffs claims are precluded by the HIPAA exemption of BIPA.

1. Employment by Aperion Care and Galesburg North

"[T]he difference between proper section 2-619 motions and improper ones [is] the difference between 'yes but' and 'not true' motions." Doe v. Univ. of Chicago Med. Ctr., 2015 IL App (1st) 133735, ¶40. "A proper section 2-619 motion is a 'yes but' motion that admits both that the complaint's allegations are true and that the complaint states a cause of action, but argues that some other defense exists that defeats the claim nevertheless." Id.

"On the other hand, a motion that attempts to merely refute a well-plead allegation in the complaint is a 'not true' motion that is inappropriate for Section2-619." Id.at ¶41. "A 'not true' motion at the pleading stage, in essence, serves as nothing more than an answer that denies a factual allegation and is not a basis for dismissal. Such a fact-based motion is appropriate for a summary judgment motion or for resolution at trial." Id.

Defendants' section 2-619 argument on this point is an improper "not true" motion.

Here, Defendants are merely attempting to refute the well-pled allegations of the Complaint which alleges that Winters "performed work" for all of the Defendants except Wilmington and that Meegan "performed work" for Aperion Care and Wilmington (FAC at ¶¶ 3, 26-27; 4, 28). The fact that Defendants have attached affidavits to support their assertion does not change the fact they are really advancing an improper "not true" motion. Such a motion is not a basis for dismissal. Doe v. Univ. of Chicago Med. Ctr., 2015 IL App (1st) 133735, ¶41.

2. Plaintiffs' Argument re: "performed work" versus employment

Plaintiffs' argument that they were not employed by defendants Aperion Care and Galesburg North and are therefore not subject to the CBAs is unpersuasive and unsupported by any citation to legal authority. Plaintiffs have not cited any legal authority supporting their argument that placement by a staffing agency somehow exempts a union member from a CBA. Nor have Plaintiffs cited any legal authority that a union member may avoid the terms of a CBA based upon a short duration "performing work" for an employer.

3. The Exhibits and Illinois Supreme Court Rule 138

Defendants' exhibits attached to their affidavits violate Illinois Supreme Court Rule 138 ("Rule 138"). Rule 138 provides that personal identity information, such as social security numbers, "shall not be included in documents or exhibits filed with the court except as provided in paragraph (c)." Ill. Sup. Ct., R 138 (b)(1) and (a)(1). Rule 138 allows for the redacted filing of the last four digits of a social security number. Ill. Sup. Ct., R 138 (c)(1). Rule 138 also provides the procedure to be followed if an exhibit or document containing personal identity information has been filed with the court. Ill. Sup. Ct., R 138 (f).

Exhibits attached to the affidavits of Jodi Jude and Erica Otto, respectively, both contain the full unredacted social security numbers of Meegan and Winters. (Affidavit of Jodi Jude at Ex. 2; Affidavit of Erica Otto at Ex. 2). The inclusion of unredacted social security numbers is a violation of Rule 138. Those exhibits are stricken. Defendants shall submit to this court an order requiring the Clerk of Court to seal said exhibits.

4. Preemption by the Labor Management Relations Act

Section 185 (a) of the LMRA provides:

> (a) Venue, amount, and citizenship. Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties,

> without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C.S. § 185 (a).

The United States Supreme Court has held "if the resolution of a state-law claim depends upon the meaning of a collective-bargaining agreement, the application of state law [. . .] is pre-empted and federal labor-law principles [. . .] must be employed to resolve the dispute." Lingle v. Norge Division of Magic Chef, 486 U.S. 399, 405-06 (1988).

Thus, whether the LMRA preempts Plaintiffs' claim turns on whether their BIPA claims require interpretation of the CBAs.

i. Whether resolution of Plaintiffs' BIPA claims require interpretation of the CBAs

Defendants argue the Wilmington CBA applies to Meegan's BIPA claims because its grievance and arbitration procedure applies to all disputes with respect to the interpretation, or application of, or compliance with the Wilmington CBA. Defendants also argue that the Morton CBA applies to Winters' BIPA claims because it "directly contemplates timekeeping procedures, methods, and equipment to be utilized by Wilmington employees." (Motion at 7). Finally, Defendants argue that by granting them a management rights clause the court would need to interpret the CBAs. The court disagrees.

In Gelb v. Air Con Refrigeration & Heating, Inc., 356 Ill. App. 3d 686, 692-93 (1st Dist. 2005), the First District held:

> Where a matter is purely a question of state law and is entirely independent of any understanding of the terms of a collective bargaining agreement, it may proceed as a state-law claim. [citation]. By contrast, where the resolution of a state-law claim depends on an interpretation of the collective bargaining agreement, the claim will be preempted. [citation] Where claims are predicated on rights addressed by a collective bargaining agreement, and depend on the meaning of, or require interpretation of its terms, an action brought pursuant to state law will be preempted by federal labor laws [citation] Defenses, as well as claims, must be considered in determining whether resolution of a state-law claim requires construing of the relevant collective bargaining agreement. [citation]

Id. 356 Ill App 3d at 692-93.

Here, Defendants' argument that Plaintiffs' BIPA claims would require interpretation of the CBAs or are predicated on rights addresses in the CBAs is unpersuasive. First, no evidence has been presented that the Unions' grant of a management rights clause complied with section 15 (b)(3) of BIPA. Section 15 (b)(3) of BIPA provides that no private entity may collect biometric information unless it first, among other things, receives a written release executed by the subject's legally authorized representative. 740 ILCS 14/15 (b)(3). While the Unions are Plaintiffs exclusive collective bargaining representative, Defendants have produced no evidence

indicating that the Unions provided them with a written release as required by section 15 (b)(3) of BIPA.

Second, Defendants reliance on Miller v. Sw. Airlines Co., 926 F.3d 898 (7th Cir. 2019) is misplaced. In Miller, the Seventh Circuit considered "whether persons who contend that air carriers have violated state law by using biometric identification in the workplace must present these contentions to an adjustment board under the Railway Labor Act (RLA), 45 U.S.C. §§ 151-188, which applies to air carriers as well as railroads." Miller, 926 F.3d at 900. The Seventh Circuit held that "[t]he answer is yes if the contentions amount to a [']minor dispute[']—that is, a dispute about the interpretation or application of a collective bargaining agreement." Id. The court noted that "[a]s a matter of federal law, unions in the air transportation business are the workers' exclusive bargaining agents." Miller, 926 F.3d at 903. Because federal law governed the plaintiffs in Miller, "[a] dispute about the interpretation or administration of a collective bargaining agreement must be resolved by an adjustment board under the Railway Labor Act." Id. Thus, the Seventh Circuit reasoned, "[w]hether Southwest's or United's unions *did* consent to the collection and use of biometric data, or perhaps grant authority through a management-rights clause, is a question for an adjustment board." Id.

Defendants raise two arguments under Miller: (1) an employee may not bypass their union and deal directly with their employer regarding BIPA compliance; and (2) when the issue of a Union's consent is disputed, it is a matter for the arbitrator because Plaintiffs are asserting a right in common with all employees which deals with a mandatory subject of collective bargaining.

The Defendants first argument is largely irrelevant because section 15(b)(3) of BIPA unambiguously provides that an individual's legally authorized representative may provide the written release. 740 ILCS 14/15 (b)(3). As mentioned above, the Defendants have not provided any evidence that the Union actually *did* provide the written release as contemplated by section 15 (b)(3). See, *supra*. The Defendants' speculation that the Unions could have provided the written release is largely irrelevant. (Memo at 9-10).

Defendants' second argument is unpersuasive and distinguishable. The Seven Circuit's statement that BIPA is a mandatory subject of collective bargaining, Miller, 926 F.3d at 903-904, is rooted in 45 U.S.C.S. § 152 of the Railway Labor Act, which governs air carriers as well as railroads. Miller, 926 F.3d at 900. Section 152 lists the general duties of employers, unions, and employees to come to an agreement concerning the conditions of employment, among other things. 45 U.S.C.S. § 152. Thus, it is clear that Miller's statement about the mandatory nature of BIPA and collective bargaining is limited to employers governed by the Railway Labor Act. Defendants' have not argued, nor could they, that the Railway Labor Act applies to them.

Turning to the actual terms of the CBAs at issue, it is clear that none can be interpreted to include BIPA claims.

First, Defendants' argument that the CBAs contemplate timekeeping is unpersuasive. The Wilmington CBA's provisions related to "timekeeping" are not broad enough to include BIPA claims or an agreement to arbitrate BIPA claims. Rather, the provisions related to

"timekeeping" are narrow in scope and address issues like the definitions of full-time and part-time employees, the basis for calculating overtime, and vacation payout. (Motion at Ex. D1, p. 2, 5, 14). Similarly, the Morton CBA's management rights clause provides the employer with the right to determine starting time, quitting times, shifts, and the number of hours to be worked. None of these terms can be interpreted as encompassing BIPA claims, let alone an agreement to arbitrate BIPA claims. (Motion at Ex. E, p. 4).

Second, Defendants' argument that the Morton CBA's management rights clause provided them with the right to determine the "equipment to be utilized by employees" is separate and distinct from BIPA compliance. (Id.). Permitting an employer to choose the method an employee uses to clock-in, for example with a biometric fingerprint scanner, is distinct from whether an employer who decides to use a biometric fingerprint scanner is exempt from compliance with BIPA. Plaintiffs' Complaint does not contain any allegations challenging Defendants' decision to use a biometric fingerprint scanner. Rather Plaintiffs' Complaint is best understood as alleging that Defendants, having decided to use a biometric fingerprint scanner, failed to ensure their use of biometric fingerprint scanner complied with BIPA.

For these reasons, there is no agreement to arbitrate BIPA claims.

5. HIPAA preclusion

Section 14/10 of BIPA states:

> Biometric identifiers do not include information captured *from a patient* in a health care setting or information collected, used, or stored for health care treatment, payment, or operations under the federal Health Insurance Portability and Accountability Act of 1996.

740 ILCS 14/10 (emphasis added).

Defendants argue the use of "or operations" in section 10 excludes Plaintiffs' claims because Plaintiffs used the biometric fingerprint scanner to clock-in and out of work as part of Defendants' operations. According to the Defendants since they are healthcare providers as defined by section 160.103 of the Code of Federal Regulations and since Plaintiffs provided treatment as defined by section 164.501 of the Code of federal Regulations, Plaintiffs' claims are barred by the HIPAA exclusion of BIPA. 45 CFR § 160.103; 45 CFR § 164.501. Plaintiffs' argue that Defendants' argument is contrary to the plain unambiguous language of the statute. The court agrees with Plaintiffs.

First, Defendants have not argued that section 14/10 of BIPA is ambiguous. "When the language of a statute is clear and unambiguous, a court must give effect to the plain and ordinary meaning of the language without resort to other tools of statutory construction." Raintree Homes, Inc. v. Village of Long Grove, 209 Ill. 2d 248, 255 (2004). Defendants' failure to argue that section 14/10 is ambiguous prevents this court from looking to the Code of Federal Regulations since the plain and unambiguous language of section14/10 is clear that it applies to information collected *from a patient* and not information collected from healthcare workers or providers. 740 ILCS 14/10.

Furthermore, even if Defendants had argued section 14/10 was ambiguous, they have failed to explain how their reading of section 14/10 does not lead to absurd result of excluding all members of the healthcare industry. Section 14/10 clearly shows that the legislature knows how to explicitly exclude a class from BIPA's requirements. See, 740 ILCS 14/10 ("A private entity does not include a State or local government agency"). Defendants offer no argument nor cite any case law explaining how and why this court should read section 14/10 to *imply* the exclusion of all members of the healthcare industry from BIPA. Accepting Defendants' argument would lead to an absurd result.

Third, even assuming *arguendo*, that HIPAA and BIPA related the same subject matter it is clear that both statutes refer to patient data, not employee data. HIPAA's exclusion of BIPA unambiguously refers to information *from a patient*. 740 ILCS 14/10.

Section 160.103 of the Code of Federal Regulations, the section replied upon by the Defendants, defines health information as "any information, [. . .], that: (1) Is created or received by a health care provider, [. . .], employer, [. . .]; ***and*** (2) Relates to the past, present, or future physical or mental health or condition ***of an individual***; the provision of health care **to *an individual***; or the past, present, or future payment for the provision of health care ***to an individual***." 45 C.F.R. § 160.103 (emphasis added). Section 160.103 unambiguously defines "health information" as information created by a health care provider or employer *and* related to the health condition *of an individual*. The Defendants offer no explanation as to how the Plaintiffs' fingerprint scans, allegedly used to clock-in and out, are related to health conditions of individual patients.

The HIPAA exclusion does not preempt Plaintiffs' claims.

B. Section 2-615

Defendants argue Plaintiffs have failed to state a claim because: (1) section 15(a) of BIPA does not contain the word "provide," therefore, according to Defendants they have no obligation to "provide" Plaintiffs with anything pursuant to section 15(a); and (2) because Plaintiffs were never employed by Aperion Care and Wilmington, section 15 (b) releases were not required.

1. Section 15 (a)

Section 15 (a) of BIPA provides:

> (a) A private entity in possession of biometric identifiers or biometric information must develop a written policy, made available to the public, establishing a retention schedule and guidelines for permanently destroying biometric identifiers and biometric information when the initial purpose for collecting or obtaining such identifiers or information has been satisfied or within 3 years of the individual's last interaction with the private entity, whichever occurs first.

740 ILCS 14/15 (a).

Defendants' argument is contrary to the purpose of BIPA. In Rosenbach, our Supreme Court noted that:

> [BIPA] vests in individuals and customers the right to control their biometric information by *requiring notice before collection* and giving them the power to say no by withholding consent. [citation]. These procedural protections "are particularly crucial in our digital world because technology now permits the wholesale collection and storage of an individual's unique biometric identifiers—identifiers that cannot be changed if compromised or misused." [citation]. When a private entity fails to adhere to the statutory procedures, as defendants are alleged to have done here, "the right of the individual to maintain [his or] her biometric privacy vanishes into thin air. The precise harm the Illinois legislature sought to prevent is then realized." [citation]

Rosenbach v. Six Flags Entertainment Corp., 2019 IL 123186, ¶ 34 (quoting Patel v. Facebook Inc., 290 F. Supp. 3d 948, 953-954 (N.D. Cal. 2018)) (citations omitted) (emphasis added).

Defendants' argument that section 15 (a) does not require them to "provide anything at all" is contrary to the stated purpose of BIPA, and the holding of Rosenbach.

2. Section 15 (b)

Section 15 (b) of BIPA states that a private entity may not collect an individual's biometric data unless it first, among other things, obtain a written release. 740 ILCS 14/15 (b). Section 10 of BIPA defines "written release" in the context of employment as a "release executed by an employee as a condition of employment." 740 ILCS 14/10.

Defendants argue that Plaintiffs were never employees of Aperion Care or Wilmington, and therefore there was no obligation to obtain a written release as required by section 15 (b). 740 ILCS 14/15 (b).

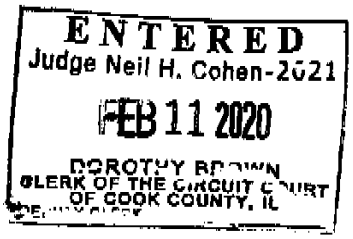
Rather, on a section 2-615 motion, a defendant accepts as true all well pled allegations. Kagan, 2016 IL App (1st) 131274, ¶29. The Complaint specifically alleges Winters and Meegan "performed work" for Apieron Care and that Meegan "performed work for" Wilmington. (FAC at ¶¶ 3, 26-27; 4, 28). The purpose of a section 2-615 motion is not to raise affirmative factual defenses. Yoon Ja Kim, 2016 IL App (1st) 150614-B, ¶41. As a matter of law, Defendants cannot bring a section 2-615 to argue that Aperion Care and Wilmington never employed Plaintiffs.

Defendants' motion is not a proper section 2-615 motion and is not a proper basis for dismissal.

III. Conclusion

Defendants' motion to dismiss is DENIED.

The status date of February 13, 2020 stands.



Entered: _____

_____

Judge Neil H. Cohen

JUDGE NEIL H. COHEN
CIRCUIT COURT OF COOK COUNTY
CHANCERY DIVISION
2308 RICHARD J. DALEY CENTER
Chicago, IL 60602
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19-CH-2471 Thomas v. KIK Custom	13

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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

JAMALA THOMAS, individually and on behalf of all others similarly situated, Plaintiff,	)	
v.	)	Case No. 19-CH-2471
KIK CUSTOM PRODUCTIONS, INC., Defendants,	)	

MEMORADUM AND ORDER

Defendant KIK Custom Products, Inc. has filed a motion to dismiss Plaintiff Jhamala Thomas's complaint and compel arbitration pursuant to 735 ILCS 5/2-619.1.

I. Background

The Biometric Information Privacy Act ("BIPA") requires private entities in possession of biometric information to develop a publicly available written policy establishing a retention schedule and guidelines for permanently destroying biometric information. 740 ILCS 14/15(a). BIPA also requires a private entity to obtain written consent from the individual before it can collect the individual's biometric information. 740 ILCS 14/15(b). Significantly, BIPA prevents a private entity from disseminating an individual's biometric information unless it has received the individual's consent. 740 ILCS 14/15(d).

Section 14/20 of BIPA grants any person aggrieved by a violation of BIPA a right of action. 740 ILCS 14/20. A prevailing party may recover actual damages or a statutory penalty whichever is greater for each violation. 740 ILCS 14/20 (1) and (2).

A. Plaintiff Jhamala Thomas

Plaintiff Jhamala Thomas ("Thomas") has filed a two-count class action complaint (the "Complaint") against Defendant KIK Custom Products, Inc., ("KIK Custom") for alleged violations of the BIPA statute.

Thomas worked for KIK Custom at their Illinois location beginning in or about 2013. (Compl. at ¶2). As an employee, Thomas was required to "clock-in" at the beginning of her work day and "clock-out" at the end of her work day using a timeclock which operated, at least in part, by scanning her fingerprints. (Id. at ¶¶11, 22, 25). Thomas alleges that KIK Custom used her biometric data as an identification and authentication method to track her time and stored her data in their database. (Id. at ¶¶24-25).

Thomas alleges that KIK Custom violated BIPA because: (1) she was never informed of the specific limited purposes or length of time for which KIK Custom collected, stored, and disseminated her biometric information; (2) she was never informed of any biometric data retention and deletion policy; (3) she never signed a written release allowing KIK Custom to collect, store, use, or disseminate her biometric data; and (4) upon information and belief, Defendants have disclosed his fingerprint data to at least one out-of-state third-party vendor. (Compl. at ¶¶18, 27-29, 33, 51-52, 57, 59. 63-65, 70-72, 85-92).

It is undisputed that Thomas is subject to the Collective Bargaining Agreement (the "CBA") entered into between KIK Custom and the United Steelworkers, ALF-CIO, CLC, Local Union 201B (the "Union").

B. The Collective Bargaining Agreement

On November 30, 2012, KIK Custom and the Union entered into the CBA. (Memo at Ex. 1, p.32). The CBA states that "[KIK Custom] recognizes the Union as the sole and exclusive collective bargaining representative for and behalf of [KIK Custom's] employees [. . .]. (Id. at Ex. 1, p. 2).

The CBA's stated purpose, among other things, is to provide "a fair and equitable method for the settlement of any grievances which may arise, as grievances are defined in the grievance article hereinafter set forth." (Id.).

Article 3, entitled "Grievance Procedures" defined "grievance" "as any difference of opinion with respect to the meaning, interpretation or application of any provision of this Agreement *and not otherwise*." (Id. at Ex. 1, p. 8) (emphasis added). Article 3 provides a four-step procedure of resolving a grievance.

Article 8 (the "management rights provision") provides that "[n]othing in this Agreement is intended nor shall be construed as denying or in any manner limiting the right of the Company to control and supervise all operations and direct all working forces." (Id. at Ex. 1, p. 18). "This will include, but shall not be deemed limited to, [. . .] promulgate and enforce reasonable rules and regulations for the conduct of employees [. . . and . . .] change or abolish reasonable policies and procedures [. . .]. (Id.). The "Company hereby retaining all rights not specifically restricted by this agreement including but not limited to managing the operation and establish the terms and conditions of employment." (Id.).

On February 10, 2015, KIK Custom and the Union entered into a substantially similar CBA. (Id. at Ex. 2).

C. Oral argument

On October 10, 2019, this court heard oral argument on KIK Custom's motion to dismiss. Following oral argument, this court ordered supplemental briefing on two additional issues: (1)

the implication of Miller v. Sw. Airlines Co., 926 F.3d 898 and (2) how Miller intersects with the Illinois Constitutional Right to Privacy. The parties have fully briefed these issues.

II. Motion to Dismiss

KIK Custom is seeking to dismiss the Complaint pursuant to 735 ILCS 5/2-619.1. Section 2-619.1 allows a party to bring a combined motion to dismiss under sections 2-615 and 2-619. 735 ILCS 5/2-619.1.

"A section 2-615 motion to dismiss challenges the legal sufficiency of the complaint." Yoon Ja Kim v. Jh Song, 2016 IL App (1st) 150614-B, ¶41. "Such a motion does not raise affirmative factual defense but alleges only defects on the fact of the complaint." Id. "All well-pleaded facts and all reasonable inference from those facts are taken as true. Where unsupported by allegations of fact, legal and factual conclusions may be disregarded." Kagan v. Waldheim Cemetery Co., 2016 IL App (1st) 131274, ¶29. "In determining whether the allegations of the complaint are sufficient to state a cause of action, the court views the allegations of the complaint in the light most favorable to the plaintiff. Unless it is clearly apparent that the plaintiff could prove no set of facts that would entitle him to relief, a complaint should not be dismissed." Id.

A section 2-619 motion to dismiss "admits the legal sufficiency of the complaint and affirms all well-plead facts and their reasonable inferences, but raises defect or other matters either internal or external from the complaint that would defeat the cause of action." Cohen v. Compact Powers Sys., 382 Ill. App. 3d 104, 107 (1st Dist. 2008). A dismissal under §2-619 permits "the disposal of issues of law or easily proved facts early in the litigation process." Id. Section 2-619(a)(9) authorizes dismissal where "the claim asserted against the defendant is barred by other affirmative matter avoiding the legal effect of or defeating the claim." 735 ILCS 5/2-619(a)(9). "A motion to compel arbitration and dismiss the lawsuit is essentially a motion pursuant to section 2-619(a)(9) to dismiss based on the exclusive remedy of arbitration." Griffith v. Wilmette Harbor Ass'n, 378 Ill. App. 3d 173, 180 (1st Dist. 2007).

A. Illinois Constitutional Right to Privacy

Article 1 section 6 of the Illinois Constitution provides:

> The people shall have the right to be secure in their persons, houses, papers and other possessions against unreasonable searches, seizures, invasions of privacy or interceptions of communications by eavesdropping devices or other means. No warrant shall issue without probable cause, supported by affidavit particularly describing the place to be searched and the persons or things to be seized.

Illinois Const., Art. I, § 6.

The Illinois Supreme Court has held "that the due process and equal protection provisions of the Illinois Constitution, as well as section 6 of article I, which creates a right of freedom from invasion of privacy, *apply only to actions by government or public officials*." People v. DiGuida, 152 Ill. 2d 104, 121 (1992) (emphasis added). See also, Barr v. Kelso-Burnett Co., 106 Ill. 2d 520, 526-27 (1985).

As Thomas argues, Illinois strongly favors the privacy rights of its citizens. However, case law is clear that article 1 section 6 applies only to actions by government or public officials. Thomas does not allege that KIK Custom is a government or public official. The Illinois constitutional right to privacy is inapplicable to this case.

B. Section 2-619

KIK Custom raises two arguments for dismissal under section 2-619. First under the Illinois Uniform Arbitration Act and the Federal Arbitration Act, the CBA requires Thomas's claim to be arbitrated. Second, the Illinois Worker's Compensation Act (the "IWCA") preempts Thomas's claims.

1. Arbitration

The central issue presented by KIK Custom's motion is whether Thomas's claim is arbitrable, i.e., whether the Union, on behalf of Thomas and the putative class, agreed with KIK Custom to arbitrate BIPA claims. To answer this issue the court must first examine whether the Union could agree to arbitrate BIPA claims on behalf of its members and then, assuming the answer is in the affirmative, whether the Union actually agreed to arbitrate BIPA claims.

a. Whether a Union can agree to arbitrate BIPA claims on behalf of its members; the Miller opinion

Initially, Thomas argues that the Union could not agree to arbitrate BIPA claims[1] and did not explicitly waive its members' right to enforce BIPA claims. (Response at 13). According to KIK Custom, the Union could have agreed to arbitrate BIPA claims. (Reply at 1) (quoting Miller v. Sw. Airlines Co., 926 F.3d 898, 903 (7th Cir 2019).

i. Could the Union agree to arbitrate

Illinois case law establishes beyond peradventure that a Union can indeed waive the statutory rights of its members through a CBA. See, Matthews v. Chicago Transit Authority,

[1] Thomas primarily relies on Federal cases to support her argument, Pryner v. Tractor Supply Co. and Allen v. City of Chicago. Pryner v. Tractor Supply Co., 109 F.3d 354 (7th Cir 1997); and Allen v. City of Chicago, No. 10 C 3183, 2011 U.S. Dist. LEXIS 27137 (N.D. Ill. Mar. 15, 2011). (Response at 13). However both of these cases involved federal statutes and thus are distinguishable on that ground alone. Pryner, 109 F.3d at 355; Allen, No. 10 C 3183, 2011 U.S. Dist. LEXIS 27137, at *1. Although a circuit court may look to federal court orders for guidance or persuasive authority, they are not binding authority. Reichert v. Board of Fire & Police Commr's of Collinsville, 388 Ill. App. 3d 834, 845 (5th Dist. 2009).

2016 IL 117638, ¶ 67-68 ("Constitutional rights can be waived or restricted by a union in a CBA." and "In addition, a union can waive statutory and economic rights on behalf of its members.").

The Illinois Supreme Court has described the rationale for these rules as follows:

> A union is allowed a great deal of flexibility in serving its bargaining unit during contract negotiations. It makes concessions and accepts advantages it believes are in the best interest of the employees it represents. [Citations.] This flexibility includes the right of the union to waive some employee rights, even the employee's individual statutory rights.

Ehlers v. Jackson County Sheriff's Merit Comm'n, 183 Ill. 2d 83, 93 (1998).

ii. Did the Union waive its members statutory rights

A waiver is a voluntary relinquishment of a known right. Gallagher v. Lenart, 226 Ill. 2d 208, 229 (2005). "Waiver can arise either expressly or by conduct inconsistent with an intent to enforce that right." Ciers v. O.L. Schmidt Barge Lines, Inc., 285 Ill. App. 3d 1046, 1050 (1st Dist. 1996).

In Cook County College Teachers Union, Local 1600, the CBA at issue contained the following provision:

> Outside employment. A full-time position in the Colleges is accepted with the understanding that the faculty member will not continue, or at a future date accept, a concurrent full-time position or positions equal to a full-time position with any other employer or employers while he is teaching full-time in the Colleges.

Cook County College Teachers Union, Local 1600, etc. v. Board of Trustees, 134 Ill. App. 3d 489, 490 (1st Dist. 1985). The court found that "[t]he union, by agreeing to a restriction against full-time outside employment, waived its constitutional rights to privacy and confidentiality [. . .]." Cook County College Teachers Union, Local 1600, etc. v. Board of Trustees, 134 Ill. App. 3d 489, 492 (1st Dist. 1985).

KIK Custom has not identified any clause or provision of the CBA which would constitute an express or explicit waiver of Thomas's and the putative class's statutory BIPA rights. Rather, KIK Custom argues that by granting it the management rights provision of the CBA, the Union waived Thomas' and the putative class's BIPA rights.

KIK Custom relies primarily on the Seventh Circuit opinion in Miller v. Southwest Airlines Co., 926 F.3d 898 (7th Cir. 2019) to support its argument.

In Miller, the Seventh Circuit considered "whether persons who contend that air carriers have violated state law by using biometric identification in the workplace must present these contentions to an adjustment board under the Railway Labor Act (RLA), 45 U.S.C. §§ 151-188, which applies to air carriers as well as railroads." Miller, 926 F.3d at 900. The Seventh Circuit held that "[t]he answer is yes if the contentions amount to a ['Jminor dispute['J—that is, a dispute about the interpretation or application of a collective bargaining agreement." Id. The court noted that "[a]s a matter of federal law, unions in the air transportation business are the workers' exclusive bargaining agents." Miller, 926 F.3d at 903. Because federal law governed the plaintiffs in Miller, "[a] dispute about the interpretation or administration of a collective bargaining agreement must be resolved by an adjustment board under the Railway Labor Act." Id. Thus the Seventh Circuit reasoned, "[w]hether Southwest's or United's unions *did* consent to the collection and use of biometric data, or perhaps grant authority through a management-rights clause, is a question for an adjustment board." Id.

KIK Custom points to and relies upon Judge Easterbrook's statement that biometric information is indistinguishable from many other subjects of collective bargaining, such as drug testing, which unions routinely give consent for and thus are routinely covered by collective bargaining agreements. Miller, at 926 F. 3d at 904. In doing so, Judge Easterbrook lumped biometric data gathering into many other issues which are the subject of collectively bargaining, such as drug testing. Id. But that comment was mere dicta and utterly unnecessary to the disposition of the case.

Given that the CBA's at issue here were signed in 2012 and 2015 (Memo at Ex. 1, p.32; Ex. 2), and that BIPA was passed in 2008, Miller, 926 F. 3d 898, 900, it strains credulity to engage in a legal pronouncement that BIPA and biometric data gathering somehow obtained the same level of ubiquity as drug testing in the collective bargaining process a mere four years after the BIPA statute was enacted.

As significant, it was written without any citation to the record before the court or any decisional authority. Id.

In any event, no argument or evidence has been presented indicating that the Union's grant of the management right provision complied with section 14 (b)(3)'s requirements. 740 ILCS 14/15 (b)(3).

Section 15 (b)(3) of BIPA states:

> **(b)** No private entity may collect, capture, purchase, receive through trade, or otherwise obtain a person's or a customer's biometric identifier or biometric information, unless it first:
>
> * * * * *

> **(3)** *receives a written release executed by* the subject of the biometric identifier or biometric information or *the subject's legally authorized representative.*

740 ILCS 14/15 (b)(3) (emphasis added). Section 10 of BIPA defines "written release" "in the context of employment, [as] a release executed by an employee as a condition of employment." 740 ILCS 14/10.

Although the CBA recognizes the Union as the sole and exclusive collective bargaining representative for Thomas and the putative class, there has been no argument or evidence presented that KIK Custom received any written release executed by the Union.

* * *

In summary, Miller is distinguishable and inapplicable. There was no explicit waiver of Thomas's and the putative class's BIPA rights, and the Union's grant of the management rights provision did not amount to an explicit waiver.

b. Whether the Union agreed to arbitrate BIPA claims

"The Illinois Uniform Arbitration Act applies to all written agreements to arbitrate, even those appearing in collective bargaining agreements, unless a statute specifically provides for an exception to the application of the Illinois Uniform Arbitration Act." Chicago Transit Authority v. Amalgamated Transit Union Local 308, 244 Ill. App. 3d 854, 859 (1st Dist. 1993).

Section 5/2(a) of the Illinois Uniform Arbitration Act provides:

> (a) On application of a party showing an agreement described in Section 1 [710 ILCS 5/1], and the opposing party's refusal to arbitrate, the court shall order the parties to proceed with arbitration, but if the opposing party denies the existence of the agreement to arbitrate, the court shall proceed summarily to the determination of the issue so raised and shall order arbitration if found for the moving party, otherwise, the application shall be denied.

710 ILCS 5/2 (a).

It is undisputed that: (1) the CBA contains an arbitration clause; and that (2) Thomas and the putative class' employment was governed by the CBA. The parties dispute whether there was an agreement to arbitrate BIPA claims. The parties also disagree as to whether the arbitration clause should be interpreted broadly or narrowly.

i. The proper for interpretation and the forum arbitrability

"Generally, *where the interpretation of a collective bargaining contract is involved*, there is a presumption of arbitration." Jupiter Mechanical Industries v. Sprinkler Fitters & Apprentices

Local Union No. 281, 281 Ill. App. 3d 217, 221 (1st Dist. 1996) (citing United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582-83 (1960)) (emphasis added). This is so because:

> In the commercial case, arbitration is the substitute for litigation. [In the labor disputes context] arbitration is the substitute for industrial strife. Since arbitration of labor disputes has quite different functions from arbitration under an ordinary commercial agreement, the hostility envinced by courts toward arbitration of commercial agreements has no place here. For arbitration of labor disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself.

Board of Education v. Faculty Ass'n of District 205, 120 Ill. App. 3d 930, 933 (1st Dist. 1983) (quoting United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578 (1960)).

However, despite the presumption in favor of abitrability, Illinois courts still recognize that "arbitration remains a matter of contract, and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit." Board of Education v. Faculty Ass'n of District 205, 120 Ill. App. 3d 930, 934 (1st Dist. 1983) (citing United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960) and Croom v. De Kalb, 71 Ill. App. 3d 370, 375 (2nd Dist. 1979)). Thus under Illinois law, "the initial decision as to arbitrability is for the courts." Id.

ii. No agreement to arbitrate BIPA claims

Here, the court finds that the arbitration clause at issue is not susceptible to an interpretation that it covers BIPA claims.

First, Article 3 of the CBA provides that "[n]o arbitration shall be processed unless the grievance involves a difference of opinion as to the interpretation or application of a provision the Agreement." (Memo at Ex. 1, p. 9). Article 3 defines a "grievance" as "as any difference of opinion with respect to the meaning, interpretation or application of any provision of this Agreement *and not otherwise*." (Id. at Ex. 1, p. 8) (emphasis added). The plain and unambiguous language of the CBA is clear that the arbitration clause is not generalized, but limited and it is equally clear that not all grievances are subject to arbitration.

Second, the court notes that the CBA is utterly silent and makes no reference to the BIPA statute or the collection and use of biometric data.

Finally, the court notes that "the mere existence of a dispute between an employee and an employer is insufficient to make the disputed matter subject to arbitration procedures of the collective bargaining agreement." Gelb v. Air Con Refrigeration & Heating, Inc., 356 Ill. App.

3d 686, 695 (1st Dist. 2005) (citing Daniels v. Board of Education, 277 Ill. App. 3d 968, 972 (1st Dist. 1996)). Simply put, "[t]he court must consider whether the claim is one which, on its face, is governed by the contract. If it is, the exclusive remedy is to follow the grievance procedures. If not, the complainant may seek judicial relief." Id. (citing Daniels, 277 Ill. App. 3d at 972).

Comparing the allegations of Thomas's Complaint to the provisions of the CBA, it is clear that Thomas's BIPA claim is not, on its face, governed by the CBA. While the company rules prohibit an employee from fraudulently clocking-in or clocking-out herself or another employee, Thomas's Complaint is devoid of any allegations indicating that she was accused of fraudulently clocking-in or out herself or another employee. Similarly, while the CBA unambiguously grants KIK Custom the right to set Thomas's work shifts and breaks, Thomas's Complaint is devoid of any allegations challenging her work shifts and breaks. None of these provisions can be interpreted to include BIPA claims.

KIK Custom's reliance on the CBA's provisions which allow it to set reasonable rules and regulations in the workplace is inapplicable. A fair reading of Thomas's Complaint indicates that she alleging that KIK Custom never adopted or promulgated *any* rules or regulations as required by the BIPA statute. (Compl. at ¶¶17, 19, 27-29). Thomas is not challenging any particular rule or regulation KIK Custom promulgated, rather she is challenging KIK Custom's alleged total failure to adopt any rules or regulations, as required by the BIPA statute.

Also unpersuasive is KIK Custom's argument that by alleging she was required to clock-in and out, Thomas's claim would require interpreting the CBA. Thomas's Complaint does not contain any allegations challenging KIK Custom's decision to use a biometric fingerprint scanner as a time-tracking or challenging KIK Custom's requirement that employees use a biometric fingerprint scanner. Thomas's Complaint is clear that she is challenging KIK Custom's alleged failure to comply with any of BIPA's statutory requirements.

Therefore, there is no agreement to arbitrate BIPA claims.

2. Preemption

KIK Custom has argued that Thomas's complaint should be dismissed pursuant to 735 ILCS 5/2-615 because it barred by the Illinois Workers' Compensation Act (the "IWCA"). This argument is not properly raised under section 2-615. KIK Custom's argument should have been raised under section 2-619(a)(9).

"A proper section 2-619 motion is a 'yes but' motion that admits both that the complaint's allegations are true and that the complaint states a cause of action, but argues that some other defense exists that defeats the claim nevertheless." Doe v. Univ. of Chicago Med. Ctr., 2015 IL App (1st) 133735, ¶40.

Despite this pleading problem, Thomas has responded to KIK Custom's argument. Because the parties have fully briefed the issue, the court will proceed to the merits of KIK Custom's argument, but will analyze the arguments under section 2-619(a)(9).

KIK Custom argues the IWCA provides the exclusive remedy for employment related injuries except under very limited circumstances, which KIK Custom argues are not present in Thomas's complaint. (Memo at 13). The court disagrees.

Section 305/5(a) of the IWCA (the "exclusivity provision") provides:

> [. . .] no common law or statutory right to recover damages from the employer [...] for injury or death sustained by any employee while engaged in the line of his duty as such employee, other than the compensation herein provided, is available to any employee who is covered by the provisions of this Act [. . .].

820 ILCS 305/5(a).

"The purpose of the [IWCA] is to protect employees against risks and hazards which are peculiar to the nature of the work they are employed to do." Mytnik v. Illinois Workers' Compensation Comm'n, 2016 IL App (1st) 152116WC, ¶ 36.

In order to avoid the exclusivity provision an employee must establish "that the injury (1) was not accidental; (2) did not arise from his employment; (3) was not received during the course of employment; or (4) was not compensable under the [IWCA]." Folta v. Ferro Engineering, 2015 IL 118070, ¶ 14; See also, Meerbrey v. Marshall Field & Co., 139 Ill. 2d 455, 463 (1990).

Even assuming *arguendo* that KIK Custom is correct that the alleged violation of BIPA was accidental, KIK Custom has not cited any binding authority indicating that Thomas's alleged injury is compensable under the IWCA.

The Illinois Supreme Court has held that "[t]o be compensable under the Workers' Compensation Act, an employee's injury must arise out of and in the course of his employment. [citation]." Brady v. Louis Ruffolo & Sons Construction Co., 143 Ill. 2d 542, 547-48 (1991) (citation omitted).

> The mere fact that claimant was present at the place of injury because of his employment duties will not by itself suffice to establish that the injury arose out of the employment. [citations] Rather, a claimant must demonstrate that his risk of the injury sustained is peculiar to his employment, or that it is increased as a consequence of the work. [citations] If an industrial accident is caused by a risk unrelated to the nature of the employment, or is not fairly traceable to the workplace environment, but results instead from a hazard to which the claimant would have been equally exposed apart from his work, the injury cannot be said to arise out of the employment. [citation]

Brady v. Louis Ruffolo & Sons Construction Co., 143 Ill. 2d 542, 550 (1991) (citations omitted).

Thomas's statutory right to maintain her privacy in her biometric data is not an injury particular to her employment. The mere fact that her employer, KIK Custom, chose to use a biometric fingerprint scanner as a time-keeping device does not mean that Thomas's alleged injury "arose out of her employment." Brady, 143 Ill. 2d at 550. Furthermore, KIK Custom's alleged failure to comply with BIPA does not increase the risk of harm concerning Thomas's biometric data "beyond that to which the general public is exposed." Brady, 143 Ill. 2d at 548. BIPA's requirements apply to any private entity in possession of biometric data. 740 ILCS 14/15. Thus, the risk of harm to Thomas's biometric data is the same whether a grocery store, tanning salon, or hotel fails to comply with BIPA's requirements.

Finally, this court finds persuasive Judge Raymond W. Mitchell's well-considered opinion in McDonald v. Symphony Bronzeville Park, LLC, et al., No. 2017-CH-11311 (Cir. Ct. Cook Cty. June 17, 2019). In McDonald, Judge Mitchell held that the plaintiff's loss of her ability to maintain her privacy rights under BIPA was neither a psychological nor a physical injury and thus was not compensable under the IWCA.

Therefore, the IWCA does not preempt or bar Thomas's claim.

C. Section 2-615

KIK Custom argues that Thomas has failed to state a claim because Thomas has failed to allege either a negligent or intentional or reckless violation of the BIPA statute. (Memo at 9). The court disagrees.

Section 14/20 of BIPA provides:

> Any person aggrieved by a violation of this Act shall have a right of action in a State circuit court or as a supplemental claim in federal district court against an offending party. A prevailing party may recover for each violation:
>
> (1) against a private entity that negligently violates a provision of this Act, liquidated damages of $1,000 or actual damages, whichever is greater;
>
> (2) against a private entity that intentionally or recklessly violates a provision of this Act, liquidated damages of $5,000 or actual damages, whichever is greater;
>
> * * * * *

740 ILCS 14/20.

In Rosenbach v. Six Flags Entertainment Corp., 2019 IL 123186, the Illinois Supreme Court held that "[t]he violation [of section 15], in itself, is sufficient to support the individual's or customer's statutory cause of action." Rosenbach, 2019 IL 123186, ¶ 33; 740 ILCS 14/15.

KIK Custom argues that a statute's words should not be read as to render any words or phrases meaningless, redundant, or superfluous. (Memo at 12). However, it is also well-settled that a court is "limited by the rules of statutory construction and cannot add words to a statute to change its meaning." Wolf v. Toolie, 2014 IL App (1st) 132243, ¶ 24.

If the court were to accept KIK Custom's argument, it would require this court to add the words "negligently" and "intentionally or recklessly" to the word "violation" in the sentence "Any person aggrieved by a violation of this Act shall have a right of action in a State circuit court [. . .]," which is something this court cannot do. 740 ILCS 14/20; Wolf, 2014 IL App (1st) 132243, ¶ 24.

KIK Custom's argument also fails to recognize that the words "negligently" and "intentionally or recklessly" appear in the part of section 20 which explains what a prevailing party may recover. 740 ILCS 14/20 (1) and (2). Therefore, contrary to KIK Custom's argument, the words *do* have a meaning and are not rendered superfluous.

Therefore, Thomas has sufficiently pled her BIPA claim.

III. Conclusion

KIK Custom's motion to dismiss pursuant to 735 ILCS 5/2-619 is DENIED.

KIK Custom's motion to dismiss pursuant to 735 ILCS 5/2-615 is DENIED.

The status date of December 20, 2019 stands.

Entered: ENTERED Judge Neil H. Cohen-2021 DEC 19 2019 DOROTHY BROWN CLERK OF THE CIRCUIT COURT OF COOK COUNTY, IL DEPUTY CLERK

Judge Neil H. Cohen

2022 IL App (1st) 210011

FIRST DISTRICT
SECOND DIVISION
February 22, 2022

No. 1-21-0011

WILLIAM WALTON, Individually and on Behalf of Others Similarly Situated, Plaintiff-Appellee, v. ROOSEVELT UNIVERSITY, Defendant-Appellant.	)	Appeal from the Circuit Court of Cook County. No. 19 CH 04176 Honorable Anna A. Demacopoulos, Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court, with opinion.
Presiding Justice Fitzgerald Smith and Justice Cobbs concurred in the judgment and opinion.

OPINION

¶ 1 This case is before the court for an answer to a certified question under Illinois Supreme Court Rule 308 (eff. Oct. 1, 2019). The certified question asks us to determine whether claims asserted by union member-employees under the Biometric Information Privacy Act (Privacy Act) (740 ILCS 14/1 *et seq.* (West 2020)) are preempted by federal law. The question certified by the circuit court for appeal is:

> "Does Section 301 of the Labor Management Relations Act (29 U.S.C. § 185) preempt [Privacy Act] claims (740 ILCS 14/1) asserted by bargaining unit employees covered by a collective bargaining agreement?"

¶ 2 The defendant argued that the claims asserted by the plaintiff are preempted and moved to dismiss the complaint. The circuit court denied the motion to dismiss but certified the relevant question for interlocutory review. For the following reasons, we conclude that the plaintiff's claims are preempted under the Labor Management Relations Act (29 U.S.C. § 185 (2018)) and answer the certified question in the affirmative. Having answered the certified question, we remand the case to the circuit court for further proceedings.

¶ 3 BACKGROUND

¶ 4 Plaintiff William Walton was an employee of defendant Roosevelt University (Roosevelt). Walton worked in Roosevelt's campus safety department. Like the other employees in the campus safety department, Walton was a member of the SEIU Local 1, a collective bargaining unit. Roosevelt required Walton and similarly situated employees to enroll scans of their hand onto a biometric timekeeping device as a means of clocking in and out of work. During the course of his employment, Walton allegedly scanned his hand geometry repeatedly for the purpose of Roosevelt keeping track of the hours he worked.

¶ 5 Under Illinois law, private entities that collect and use individuals' biometric data, such as scans of their hand, must secure informed consent from those individuals or their legally authorized representatives and take other steps to ensure that the data is not stolen or used for improper purposes. See generally 740 ILCS 14/1 *et seq.* (West 2020). Recognizing the importance of biometric identification data to the individual and in recognition of its immutability, the General Assembly enacted the Privacy Act to "regulat[e] the collection, use, safeguarding, handling, storage, retention, and destruction of biometric identifiers and information." *Id.* § 5(g). When an entity collects biometric information but fails to comply with the Privacy Act's requirements, the

Privacy Act provides that aggrieved individuals are entitled to file a civil action and collect damages for each violation of the Privacy Act committed by the collecting entity. *Id.* § 20.

¶ 6 Among other requirements, in order to comply with the Privacy Act, a private entity that wishes to collect and use individuals' biometric information must secure informed consent from the individual or his legally authorized representative before collecting and storing the data. *Id.* § 15(b). Further, the collecting entity must develop, publish, and follow a publicly available retention schedule and destruction guidelines. *Id.* § 15(a). The collecting entity is prohibited from disclosing the biometric data to third parties without consent from the individual or his legally authorized representative. *Id.* § 15(d).

¶ 7 Walton filed this case seeking damages from Roosevelt for its collection, storage, use, and dissemination of his biometric data. Specifically, Walton claims that Roosevelt collected and used his biometric data without complying with the Privacy Act's informed consent requirements and without developing and following the required retention policies. Walton also claims that Roosevelt disclosed his biometric data to a third-party payroll service without his consent. Roosevelt moved to dismiss the complaint.

¶ 8 In its motion to dismiss, Roosevelt argued that Walton's claims are preempted by the Labor Management Relations Act (29 U.S.C. § 141 *et seq.* (2018)). In moving to dismiss, Roosevelt's position was that the manner by which employees clock in and out of work is a subject covered by the collective bargaining agreement between Roosevelt and Walton's union. Thus, Roosevelt argued, Walton's claims are preempted by the Labor Management Relations Act, which governs most disputes arising under collective bargaining agreements. The Labor Management Relations Act has been interpreted to preempt any claims that substantially depend on the analysis of a

collective bargaining agreement. See *International Brotherhood of Electrical Workers, AFL-CIO v. Hechler*, 481 U.S. 851, 857 (1987).

¶ 9 Roosevelt pointed to the management rights clause of the collective bargaining agreement, which gives the employer broad authority to control the terms of the employees' employment.

> "Subject to the provision of this Agreement, the Employer shall have the exclusive right to direct the employees covered by this Agreement. Among the exclusive rights of management, but not intended as a wholly inclusive list of them are: the right to plan, direct, and control all operations performed in the building, to direct the working force, to transfer, hire, demote, promote, discipline, suspend, or discharge, for proper cause, to subcontract work and to relieve employees from duty because of lack of work or for any other legitimate reason. The union further understands and agrees that the Employer provides an important service to its tenants of a personalized nature to fulfill their security needs, as those needs are perceived by the Employer and the tenants. Accordingly, this Agreement shall be implemented and interpreted by the parties so as to give consideration to the needs and preferences of the tenants."

¶ 10 The circuit court disagreed with Roosevelt that Walton's claims were preempted by federal law. The circuit court reasoned that claims arising under the Privacy Act are "not intertwined with or dependent substantially upon consideration of terms of a collective bargaining agreement." The circuit court explained that a person's rights under the Privacy Act exist independently of their employment and any given collective bargaining agreement. Ultimately, the circuit court concluded that "[p]reemption is not appropriate in this matter," and it denied the motion to dismiss.

¶ 11 Roosevelt moved the trial court to reconsider its ruling on the motion to dismiss or, alternatively, to certify a question for review by this court under Illinois Supreme Court Rule 308 (eff. Oct. 1, 2019). The court denied the motion to reconsider but did certify the question at issue in the case for appeal. We granted Roosevelt's application for review of the certified question. The parties fully briefed the issue, and we also received *amicus* briefs from interested third parties on this important labor law question.

¶ 12 ANALYSIS

¶ 13 Rule 308 authorizes this court to allow an appeal from an interlocutory order when the trial court has found that (1) the order involves a question of law as to which there is substantial ground for difference of opinion and (2) an immediate appeal from the order may materially advance the ultimate termination of the litigation. Ill. S. Ct. R. 308(a) (eff. Oct. 1, 2019); *Santiago v. E.W. Bliss Co.*, 2012 IL 111792, ¶ 12. Because it is a prerequisite that a certified question presents a question of law, our review of a certified question is done without deference to the circuit court and is, therefore, *de novo*. *Williams v. Athletico, Ltd.*, 2017 IL App (1st) 161902, ¶ 9.

¶ 14 The certified question we are presented with in this appeal is:

> "Does Section 301 of the Labor Management Relations Act (29 U.S.C. § 185) preempt [Privacy Act] claims (740 ILCS 14/1) asserted by bargaining unit employees covered by a collective bargaining agreement?"

¶ 15 Article VI of the Constitution of the United States of America provides that federal law "shall be the supreme Law of the Land." U.S. Const., art. VI, cl. 2. Under the supremacy clause, a federal statute preempts a state law when there is " '(1) express preemption—where Congress has expressly preempted state action; (2) implied field preemption—where Congress has implemented a comprehensive regulatory scheme in an area, thus removing the entire field from the state realm;

or (3) implied conflict preemption—where state action actually conflicts with federal law.' " *Performance Marketing Ass'n v. Hamer*, 2013 IL 114496, ¶ 14 (quoting *Carter v. SSC Odin Operating Co.*, 237 Ill. 2d 30, 39-40 (2010)). " 'The key inquiry in all preemption cases is the objective or purpose of Congress in enacting the particular statute. The doctrine requires courts to examine the Federal statute in question to determine whether Congress intended it to supplant State laws on the same subject.' " *Coram v. State of Illinois*, 2013 IL 113867, ¶ 71 (quoting *Kellerman v. MCI Telecommunications Corp.*, 112 Ill. 2d 428, 438 (1986)).

¶ 16 In the field of labor management specifically, Congress has granted federal district courts exclusive jurisdiction over state law claims when the resolution of such claims depends on the interpretation or administration of a collective bargaining agreement. See 29 U.S.C. § 185(a); *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 209-11 (1985). In general, where a collective bargaining agreement exists between employers and employees who are parties to litigation, their disputes fall within the exclusive purview of federal labor laws, not state laws, in order to ensure uniform interpretation of collective bargaining agreements. *Gelb v. Air Con Refrigeration & Heating, Inc.*, 356 Ill. App. 3d 686, 692 (2005) (citing *National Metalcrafters v. McNeil*, 784 F.2d 817, 823 (7th Cir. 1986)). "[Q]uestions relating to what the parties to a labor agreement agreed, and what legal consequences were intended to flow from breaches of that agreement, must be resolved by reference to uniform federal law ***." *Allis-Chalmers*, 471 U.S. at 211.

¶ 17 However, not every employment dispute where a collective bargaining agreement is involved is automatically preempted by federal law. *Id.* Instead, whether the Labor Management Relations Act preempts a state law claim requires a case-by-case factual analysis. *Byrne v. Hayes Beer Distributing Co.*, 2018 IL App (1st) 172612, ¶ 21. For preemption to apply, the employer need only advance a nonfrivolous argument that the complained-of conduct was authorized by the

collective bargaining agreement, like in a management rights clause. *Brazinski v. Amoco Petroleum Additives Co.*, 6 F.3d 1176, 1179 (7th Cir. 1993).

¶ 18 While this appeal was pending, the United States Court of Appeals for the Seventh Circuit directly addressed the question brought to bear in this appeal. In *Fernandez v. Kerry, Inc.*, 14 F.4th 644, 646-47 (7th Cir. 2021), the court of appeals found that unionized employees' claims that their employer violated the Privacy Act were preempted by the Labor Management Relations Act (29 U.S.C. § 185). As Walton conceded at oral argument, the relevant factual and legal circumstances of this case are indistinguishable from *Fernandez*, so our real objective in this appeal becomes to determine whether the court of appeals' ruling on a matter of federal law is wrongly decided in such a way that we deem it to be without logic and reason. See *State Bank of Cherry v. CGB Enterprises, Inc.*, 2013 IL 113836, ¶ 54.

¶ 19 In *Fernandez*, the court of appeals explained that, when the employer invokes a broad management rights clause from a collective bargaining agreement in response to a Privacy Act claim, the claim is preempted because it requires an arbitrator to determine whether the employer and the union bargained about the issue or the union consented on the employees' behalf. *Fernandez*, 14 F.4th at 646. The court in *Fernandez* refers substantially to its recent decision in *Miller v. Southwest Airlines Co.*, 926 F.3d 898 (7th Cir. 2019), in which it held that a Privacy Act claim was preempted in the same way under the Railway Labor Act (45 U.S.C § 152 (2018)). See *Miller*, 926 F.3d at 903-04.

¶ 20 In contrast to finding the court of appeals' decision to be without logic or reason (see *State Bank of Cherry*, 2013 IL 113836, ¶ 54), we think it is the proper interpretation of the Privacy Act when viewed through the prism of the Labor Management Relations Act's preemptive effect. The Privacy Act contemplates the role of a collective bargaining unit that may act as an intermediary

on issues concerning the employee's biometric information. See 740 ILCS 14/15(b) (West 2020). The Privacy Act provides that "[n]o private entity may collect *** a person's *** biometric identifier or biometric information, unless it first: (1) informs the subject *or the subject's legally authorized representative* in writing that a biometric identifier or biometric information is being collected or stored; (2) informs the subject *or the subject's legally authorized representative* in writing of the specific purpose and length of term for which a biometric identifier or biometric information is being collected, stored, and used; and (3) receives a written release executed by the subject of the biometric identifier or biometric information or the *subject's legally authorized representative*." (Emphases added.) *Id.* Under the Privacy Act, it is clearly within a union's purview to negotiate with the employer about its members' biometric information. The grievances that Walton has raised against Roosevelt are all things that his union *can* bargain about, but his complaint raises the question of whether such bargaining has occurred, either implicitly or explicitly.

¶ 21 The collective bargaining agreement at issue in this case contains a broad management rights clause. The agreement makes the union the sole and exclusive bargaining agent for the employees in the union. Walton and any other similarly situated employees agreed to their employment being covered by the subject collective bargaining agreement. The timekeeping procedures for workers are a topic for negotiation that is clearly covered by the collective bargaining agreement and requires the interpretation or administration of the agreement. The members of the collective bargaining unit in this case have surrendered their individual right to bargain with their employer about timekeeping procedures, even where those timekeeping procedures also include the collection and use of the employees' biometric information. See *Miller*, 926 F.3d at 904 ("That biometric information concerns workers' privacy does not distinguish it

from many other subjects, such as drug testing, that are routinely covered by collective bargaining and on which unions give consent on behalf of the whole bargaining unit."). The issue here is not unique to Walton, it concerns every member of his union in the same manner. It is impossible to consider whether Walton and his similarly situated fellow employees have a claim under the Privacy Act without first determining whether their union consented on their behalf, which the Act permits the union to do and which the members arguably empower the union to do on their behalf. Whether the management rights clause at issue in Walton's collective bargaining agreement covers biometric information is a question that itself results in preemption. See *Brazinski*, 6 F.3d at 1179.

¶ 22 Walton argues that his claims are not "substantially dependent" on an interpretation of the collective bargaining agreement. He points out that there is no reference to biometric information in the collective bargaining agreement and that the terms of the agreement in no way make the union the authorized representative for providing consent to biometric data collection. However, federal courts interpreting similar collective bargaining agreements with similar management rights clauses have found that the broad authority given to the employer to manage the business, direct the workforce, and set the rules of employment is sufficient to result in the preemption of claims arising under the Privacy Act. See, *e.g.*, *Fernandez*, 14 F.4th 646-47; *Miller*, 926 F.3d at 903; *Williams v. Ecolab Inc.*, No. 21 C 695, 2021 WL 3674608, at *3 (N.D. Ill. Aug. 19, 2021); *Abudayyeh v. Envoy Air, Inc.*, No. 20-cv-00142, 2021 WL 3367173, at *7 (N.D. Ill. Aug. 3, 2021); *Singleton v. B.L. Downey Co.*, No. 21 C 236, 2021 WL 3033393, at *2 (N.D. Ill. July 19, 2021); *Carmean v. Bozzuto Management Co.*, No. 20 C 5294, 2021 WL 2433649, at *1 (N.D. Ill. June 15, 2021). Moreover, privacy in the workplace is an ordinary subject of bargaining. *In re Amoco Petroleum Additives Co.*, 964 F.2d 706, 710 (7th Cir. 1992). Unions frequently bargain for matters concerning their members' privacy and protection. Collective bargaining agreements may include

express and implied terms (*id.*), and it is up to an arbitrator, not a state court, to define the scope of the parties' agreement (*Fernandez*, 14 F.4th at 646-47). Ultimately, Walton acknowledges that *Fernandez* and the other federal court decisions discussed above address the same factual and legal issue raised here, but he argues that the federal courts in those cases were wrong, and he urges us to reach the opposite conclusion.

¶ 23 When an Illinois court interprets a federal statute like the Labor Management Relations Act (29 U.S.C. § 141 *et seq.*), we give "considerable weight" to the decisions of federal courts that have addressed the issue. (Emphasis omitted.) *State Bank of Cherry*, 2013 IL 113836, ¶¶ 33, 35. Our supreme court has consistently recognized the importance of maintaining a uniform interpretation of federal statutes and has instructed that when, federal decisions interpreting federal statutes are uniform, we should usually follow course. *Id.* ¶ 34. When an issue of interpreting a federal statute has been uniformly decided in federal court and the identical factual and legal issue is raised in this court, we will follow the federal courts' decisions unless we find them to be "wrongly decided." (Internal quotation marks omitted.) *Id.* ¶ 47.

¶ 24 The issue in this case has been uniformly decided in federal courts in favor of preemption. The Court of Appeals for the Seventh Circuit recently addressed the issue raised here directly and previously addressed the issue tangentially. The federal district court has addressed the issue on more than a dozen occasions, and all of the authority comes down in favor of finding preemption. "[W]e may choose not to follow Seventh Circuit or uniform lower federal court precedent if we find that precedent to be wrongly decided because we determine the decision to be without logic or reason." *Id.* ¶ 54. Here, to the contrary, we find the reasoning expressed by the federal courts to be sound, and we decline to find that all the federal decisions are wrongly decided and without

logic or reason. See *id.* (we will follow and apply uniform federal application of federal law provided it is not illogical and unreasonable).

¶ 25 Roosevelt suggests that the union consented to the collection and use of biometric data either through negotiation or through the management rights clause of the collective bargaining agreement. We must take into consideration the nature of claims as well as the defenses when we determine whether preemption applies. *Jones v. Caterpillar Tractor Co.*, 241 Ill. App. 3d 129, 137 (1993). Whether it is ultimately true that Walton's union, in fact, consented to the procedures at issue here either expressly or implicitly is not for us to determine at this stage. Such a question is reserved for arbitration or other bargained-for grievance procedures under the Labor Management Relations Act. *Fernandez*, 14 F.4th at 646. Certainly Roosevelt has met the low bar of advancing a nonfrivolous argument that bargained-for rights are at issue in this dispute (*Williams*, 2021 WL 3674608, at *4), and therefore it has met its burden for demonstrating that the claims are preempted under federal law. See *Brazinski*, 6 F.3d at 1179.

¶ 26 As a general principle, "[f]ederal law prevents states from interfering in relations between unions and private employers." *Fernandez*, 14 F.4th at 645. When workers unionize and agree to be bound by a collective agreement, they forgo the right to raise some of their grievances on an individualized basis in state court. The federal court of appeals has found that there is no room for individual employees to sue for violations of the Privacy Act where the interpretation and administration of their collective bargaining agreement must occur before such questions can be resolved. *Miller*, 926 F.3d at 904. Whether the question is about the more mundane issue of timekeeping or the more important issue of employee privacy rights, both questions require resort to the collective bargaining agreement.

¶ 27 Walton and his fellow unionized employees are not prohibited from pursuing redress for a violation of their right to biometric privacy—they are simply required to pursue those rights through the grievance procedures in their collective bargaining agreement rather than in state court in the first instance. Walton cannot bypass his union, his sole and exclusive bargaining agent, to demand that Roosevelt deal with him directly on this issue. Walton comes to the court attempting to represent a class of similarly situated employees over a workplace grievance, but that is a place for his union, not Walton himself. Federal law prevents state courts from stepping in and usurping the bargained-for dispute resolution framework where the parties have elected to establish a working relationship that comes within the purview of the Labor Management Relations Act. Accordingly, we answer the certified question in the affirmative and find that Privacy Act claims asserted by bargaining unit employees covered by a collective bargaining agreement are preempted under federal law.

¶ 28 CONCLUSION

¶ 29 Certified question answered; cause remanded.

No. 1-21-0011

Cite as:	*Walton v. Roosevelt University*, 2022 IL App (1st) 210011
Decision Under Review:	Appeal from the Circuit Court of Cook County, No. 19-CH-04176; the Hon. Anna H. Demacopoulos, Judge, presiding.
Attorneys for Appellant:	David M. Schultz, John P. Ryan, and Adam R. Vaught, of Hinshaw & Culbertson LLP, of Chicago, for appellant.
Attorneys for Appellee:	Ryan F. Stephan, James B. Zouras, and Haley R. Jenkins, of Stephan Zouras, LLP, of Chicago, for appellee.
***Amicus Curiae*:**	Catherine Simmons-Gill, of Offices of Catherine Simmons-Gill, LLC, of Chicago, for *amici curiae* National Employment Lawyers Association *et al.* Melissa A. Siebert, Matthew C. Wolfe, and Elisabeth A. Hutchinson (*pro hac vice*), of Shook, Hardy & Bacon L.L.P., of Chicago, for *amicus curiae* Illinois Chamber of Commerce.

TABLE OF CONTENTS

Date	Document	Page Number
3/29/19	Class Action Complaint	SR001
7/16/19	Defendant's Memorandum in Support of Motion to Dismiss	SR022
7/16/19	Exhibits to Defendant's Memorandum in Support of Motion to Dismiss	SR032
8/28/19	Plaintiff's Response to Defendant's Motion to Dismiss Plaintiff's Complaint	SR090
8/28/19	Exhibits to Plaintiff's Response	SR105
9/18/19	Defendant's Reply is Support of its Motion to Dismiss	SR108
2/27/20	Defendant's Notice of Supplemental Authority	SR117
3/27/20	Defendant's Second Notice of Supplemental Authority	SR134
4/29/20	Defendant's Third Notice of Supplemental Authority	SR146
5/5/20	Court's order denying Defendant's Motion to Dismiss	SR148
615/20	Defendant's Motion to Reconsider or in the alternative, for appellate court certification under Ill. S. Ct. R. 308	SR156
6/15/20	Exhibits to Defendant's Motion to Reconsider	SR168
8/17/20	Plaintiff's Response to Defendant's Motion to Reconsider	SR179
8/17/20	Exhibits to Plaintiff's Response	SR186
8/31/20	Defendant's Reply in Support of Motion to Reconsider	SR227
8/31/20	Exhibits to Defendant's Reply in Support of Motion to Reconsider	SR238
12/2/20	Parties Proposed Issue for Rule 308 Certified Question	SR303
12/9/20	Order granting Motion to Certify Rule 308 question	SR306
10/28/20	Report of Proceedings on oral argument on Motion to Reconsider	SR307

IN THE APPELLATE COURT OF ILLINOIS
FIRST DISTRICT
SECOND DIVISION

WILLIAM WALTON, Individually, and on Behalf of Others Similarly Situated,	)	
Plaintiff-Appellee,	)	
v.	)	No. 1-21-0011
ROOSEVELT UNIVERSITY,	)	
Defendant-Appellant.	)	

ORDER

Upon Defendant-Appellant Roosevelt University's Application for Leave to Appeal a Supreme Court Rule 308 Certified Question, no response having been filed,

IT IS HEREBY ORDERED THAT:

Defendant-Appellant Roosevelt University's Application for Leave to Appeal a Supreme Court Rule 308 Certified Question is GRANTED.

ORDER ENTERED

FEB 01 2021

APPELLATE COURT FIRST DISTRICT

James Fitzgerald Smith
Presiding Justice

Terrence Lavin
Justice

Cynthia Y. Cobbs
Justice

NOTICE OF FILING and PROOF OF SERVICE

In the Supreme Court of Illinois

WILLIAM WALTON, individually and on behalf of all others similarly situated,	)	
Plaintiff-Appellant,	)	
v.	)	No. 128338
ROOSEVELT UNIVERSITY,	)	
Defendant-Appellee.	)	

The undersigned, being first duly sworn, deposes and states that on August 3, 2022, there was electronically filed and served upon the Clerk of the above court the Brief and Appendix of Appellant. On August 3, 2022, service of the Brief will be accomplished electronically through the filing manager, Odyssey EfileIL, to the following counsel of record:

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Within five days of acceptance by the Court, the undersigned states that thirteen copies of the Answer bearing the court's file-stamp will be sent to the above court.

/s/ Haley R. Jenkins
Haley R. Jenkins

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.

/s/ Haley R. Jenkins
Haley R. Jenkins