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## **LMRA Defense to BIPA Lawsuits in Illinois**

Unionized employers in Illinois may have a useful defense to expensive employee BIPA lawsuits: the management rights clause and federal preemption law. A grievance might be a lot cheaper than a lawsuit.

The federal district court for the Northern District of Illinois, Eastern Division, has recently confirmed that unionized Chicago employers have a defense to the recent wave of lawsuits brought by employees pursuant to Illinois's broad Biometric Information Privacy Act (known as "BIPA"). *Carmean v. Bozzutto Management Co.*, No. 20 C 5294 [GF] [N.D.Ill. June 15, 2021]. BIPA suits brought by employees have proliferated in Illinois in recent years, in large part because BIPA is the only one of these types of statutes that allows a plaintiff to recover damages without proof of harm.

In 2019, the Seventh Circuit Court of Appeals held that a similar suit against Southwest Airlines was preempted by the Railway Labor Act. *Miller v. Southwest Airlines Co.*, 926 F.3d 898 [7th Cir. 2019]. The district court in *Carmean* concluded that the logic of *Miller* required a finding that unionized non-transportation employers can make a similar preemption argument under the Labor Management Relations Act ("LMRA").

As the court found, Section 301 of the LMRA completely preempts state law claims "founded directly on rights created by collective-bargaining agreements, and also claims substantially dependent on analysis of a collective-bargaining agreement." The district court went on to find that whether the employer violated BIPA depended on the extent to which the union consented, via the collective bargaining agreement's management rights clause, to the use, retention, and disclosure of Carmean's and the other building employees' biometric information, as governed by BIPA. "It is not possible even in principle to litigate a dispute about how an [employer] acquires and uses fingerprint information for its whole workforce without asking whether the union has consented on the employees' collective behalf.", *id.*, quoting *Miller*. Because the outcome of the suit depended on an interpretation of the CBA's management rights clause, the court held that it was preempted by the LMRA. The plaintiff was obligated to file a grievance instead of a lawsuit.

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Page 2 of 2

Miller and Carmean should be useful tools for unionized employers in Illinois defending against employee-driven BIPA lawsuits. Almost every collective bargaining agreement has a management-rights clause, and any reasonably generous management-rights clauses can be interpreted to encompass the employer's right to collect biometric information for payroll and similar purposes.

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