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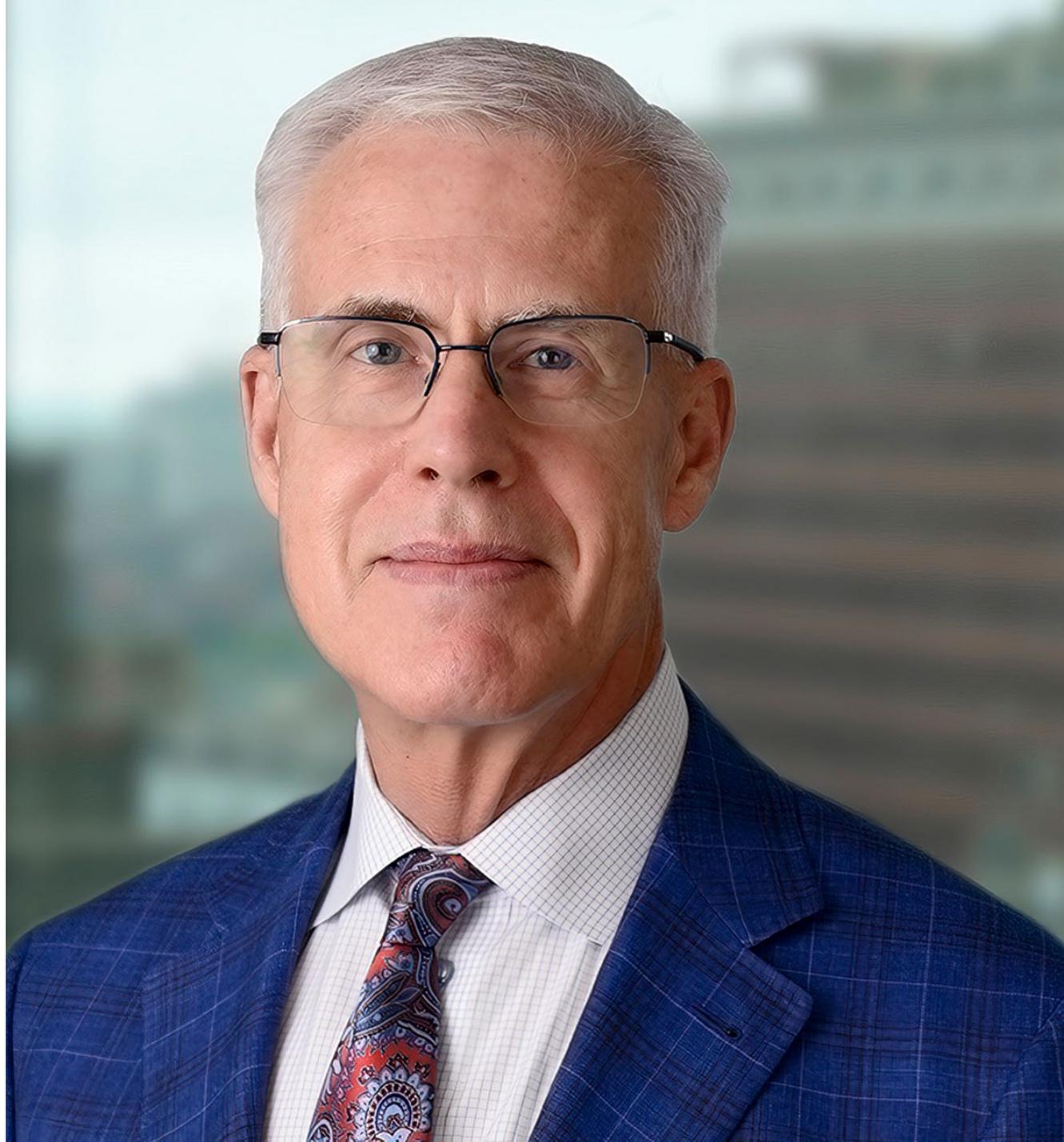
Legal Frontiers - IC Update

Cottingham & Butler Transportation Summit

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Agenda

1. Federal Update
2. State Case Law Trends, Signals & Lessons - Decisions Over the Past 18 Months
3. AB 5 Update

Legal Frontiers - IC Update

Key Takeaways

1. The US DOL IC Test Rule is expected by October and could spark misclassification collective actions - pressure test your owner-operator contract!
2. East Coast and West Coast states tend to produce bad case law on IC issues, especially when Lease Purchase Programs exist!
3. Biometric capture of drivers is now a hot area for plaintiff attorneys - make sure you know where you have devices that capture driver biometrics - and get disclosure and release forms signed!

Federal Update

Nominations

- March 11, Secretary Walsh steps down
- Deputy Secretary Julie Su nominated March 14
 - Hearing held April 20; voted out of committee April 26
- Original nominee to head WHD, David Weil, withdraws April 7, 2022
- Principal Deputy Administrator, Jessica Looman, nominated July 28, 2022; passed out of committee but no Senate vote scheduled
- Looman re-nominated this year and passed out of committee March 28; awaits Senate vote

DEPARTMENT OF LABOR

DOL Update



Proposed IC Rulemaking

- June 3 - announced plans to engage in rulemaking on determining IC status under the FLSA
 - “We remain committed to ensuring that employees are recognized correctly when they are, in fact, employees so that they receive the protections the FLSA provides. At the same time, we recognize the important role legitimate independent contractors play in our economy. We need to hear from workers and employers as we develop our proposal.”
- October 13 - proposed rule published
 - The proposed rule “will protect workers from misclassification while at the same time providing a consistent approach for those businesses that engage (or wish to engage) with properly classified independent contractors, who the [DOL] recognizes play an important role in the economy.”

Proposed IC Rule Under the FLSA

6-factor economic realities test of whether worker is economically dependent on putative employer for work with determination based on totality of the circumstances and no pre-determined weighting

1. Opportunity for profit or loss depending on managerial skill
2. Investments by the worker and employer
3. Degree of permanence of the work relationship
4. Nature and degree of control
5. Extent to which the work performed is an integral part of the putative employer's business
6. Skill and initiative

Factor Spotlight - Control

- “Control implemented by the employer for purposes of complying with legal obligations, safety standards, or contractual or customer service standards may be indicative of control.”
 - Whereas some courts have disregarded compliance with legal obligations and customer standards, because the putative employer is not the source of the control, this goes in the opposite direction
- Right to supervise, even if not exercised, will be evidence of control; supervision can be done through electronic monitoring even if intended to comply with law
 - What does this mean for ELDs? GPS tracking? Onboard camera systems?

Factor Spotlight - Control

Facts relevant to the control inquiry are:

- The worker's ability to set his/her own schedule
- The putative employer's supervision of the performance of the work
- Whether there are limits - explicit or by virtue of amount of work assigned - on the ability to work for others (exclusivity)
- Whether the putative employer uses technological means of supervision ELDS? GPS tracking? Onboard camera systems?
- Whether the putative employer reserves the right to discipline or supervise workers
- Whether the putative employer control prices or rates for services and the marketing of services provided by the worker

Factor Spotlight - Opportunity for Profit or Loss

- This factor now focuses on opportunity for profit or loss *depending on managerial skill*
- Relevant factors:
 - Who determines the charge or pay for the work or whether worker can meaningfully negotiate it - *see Lawson v. Grubhub* (N.D. Cal. Mar. 2023) (AB 5 B2B exemption case but found that Grubhub driver did not and could not negotiate his own rates)
 - Whether the worker can meaningfully negotiate the order and/or time in which the jobs are performed - *see Flores v. Velocity Express* (N.D. Cal. 2017) (putative employer “determined the customer, the rate of pay for a particular route, the stops, and the order of the stops before they even hired a driver to work the route.”)

Factor Spotlight - Investment

- Examines whether investment by worker is *capital or entrepreneurial in nature*
- “Costs borne by a worker to perform their job (e.g., tools and equipment to perform specific jobs and the workers’ labor) are not evidence of capital or entrepreneurial investment and indicated employee status.”
 - NPRM notes that use of a personal vehicle the worker already owns or that the worker leases as required by the employer to perform work is generally not capital or entrepreneurial in nature. (is a separate vehicle dedicated to courier business required?)
- Although courts are split, proposal examines worker’s investment relative to putative employer’s investment

Factor Spotlight - Degree of Permanence

- 2021 Rule considered exclusivity of working relationships as part of analysis under the control factor
- Proposed rule considers it under the control factor and under the degree of permanence
- NPRM that “where workers provide services under a contract that is routinely or automatically renewed, courts have determined that this indicates permanence ... associated with employment.”
 - Even if o automatic renewal, routine renewal or extension will be problematic

Actual Practice vs. Theoretical Possibility

- The 2021 IC rule says, “the actual practice of the parties involved is more relevant than what may be contractually or theoretically possible.”
- The proposed rule says, “both the actual practices of the parties and the contractual possibilities must be considered”; thus looks at contractual right to control even if never exercised
- *Harris v. Express Courier Int’l* (W.D. Ark. 2017) - agreeing with courts across the country “that the actual control a putative employer exerts over its workers is far more important in the misclassification analysis than the employer's right to control.”

National Labor Relations Board

- *The Atlanta Opera* - 10-RC-276292 - test for determining IC status under the National Labor Relations Act (decided June 13, 2023)
 - Board overrules its 2019 decision in *SuperShuttle DFW, Inc.*, in which the Board indicated that the common law factors should be viewed through the prism of entrepreneurial opportunity
 - Returns to an Obama-era standard issued by the Board in 2014 in *FedEx Home Delivery* and rejecting the notion that entrepreneurial opportunity is an “animating principle” or super-factor
 - Further establishes that entrepreneurial opportunities that are theoretically available but not taken advantage of will be disregarded

FTC-NLRB MOU

- In July 2022, FTC and NLRB entered into a MOU “[t]o better root out practices that harm workers in the “gig economy” and other labor markets.”
 - Jan. 5, FTC proposes rule to ban use of non-compete agreements; applies to employees and independent contractors
 - May 30, NLRB GC issues memo explaining her view that non-competes are illegal under the NLRA; NLRA does not apply to independent contractors (importance of *Atlanta Opera*)

State Case Law Trends, Signals & Lessons Decisions of the Past 18 Months

Farrugio's Bristol & Philadelphia Express, Inc. v. New Jersey Dept. of Labor & Workforce Development
April 20, 2022 Office of Administrative Law New Jersey

- Summary judgment in favor of Farrugio - drivers are ICs per New Jersey O/O exemption. NJSA 43-21-19(i)(7)(x)
- Trucks heavier than 18,000 lbs.
- No ownership interest by Farrugio
- Percent of revenue comp
- Plus detention pay and fuel surcharge!

continued

Farrugio's Bristol & Philadelphia Express, Inc. v. New Jersey Dept. of Labor & Workforce Development

April 20, 2022 Office of Administrative Law New Jersey

- Farrugio was issued an SS8 determination by IRS from 1994 and 2020 no FUTA/employment taxes owed!
- NJ DLWD did not dispute SS8 but states fuel surcharge and detention pay disqualifies Farrugio from O/O exemption
- ALJ rules that prior precedent shows fuel surcharge and detention pay does not offend the percent compensation which meets the requirement of exemption
- Interesting that the IRS SS8 requirement was used despite its only being amended into a rule in 2018 when audit was for 2011, 2012, 2013 and 2014

Portillo v. National Freight, Inc.

6/9/2022 U.S.D.C. New Jersey

- Class action misclassification case under New Jersey Wage Payment Law (“WPL”)
- ABC Test which starts with presumption workers are employees
- Unemployment tax exemption in *Farrugio* not applicable under WPL
- B-Prong provides two alternate factors
 1. Course of business (like AB5)
 2. Place of business - warehouses and stores where pickup and delivery - NFI places

continued

Portillo v. National Freight, Inc.

6/9/2022 U.S.D.C. New Jersey

- No FAAAA preemption because court saw no connection between WPL and trucking prices, routes and services
- No Federal Leasing Regulation preemption because WPL could be violated through settlement deductions but FLRs could be complied with via proper disclosures
- Claims release was valid. Thus, 20 drivers barred from claims (A) release signed before class action filed and (B) release was substantial (\$6k) consideration for release not for wage dispute later filed
- Plaintiffs granted summary judgment on misclassification in favor of employment status

Workers' Comp. Board v. TransAm Trucking, Inc.

10/18/22 New York

- Lease Purchase Program contractor
- NY Fair Play Act provides 11 factors that must be met if worker/employer cannot meet ABC Test (like AB5)
- Board disagrees with initial hearing officer that the NY Fair Play Act factors were met!
 - They were not met due to substantial control over deliveries
 - Requiring shipping docs, wash trailers, return equipment on set date, notify of trailer damage, permission for passengers and subcontractors, right to terminate drivers for poor work, set pay rate and escrows

continued

Workers' Comp. Board v. TransAm Trucking, Inc.

10/18/22 New York

- Claimant was employee
- Facts Board use to support control (other than lease purchase) are found in virtually every IC Agreement
- Failure to show where contractual requirements actually come from - i.e. federal law!

Workers' Comp. Board v. Vivar Trucking, LLC

5/26/22 New York

- New York Fair Play Act case - not an IC under ABC Test - BUT
- “Separate business entity” in commercial goods transport applies if 11 factors are proven
- No control as customer requirements were only restriction and no forced dispatch
- Claimant business did not end if IC Agreement terminated
- Claimant had substantial investment [i.e. no lease purchase program]
- No exclusivity

continued

Workers' Comp. Board v. Vivar Trucking, LLC

5/26/22 New York

- Business entity
- 1099 payments
- Written contract
- Claimant paid for permits
- Claimant hired its own drivers only subject to FMCSRs
- Drivers paid even if claimant was not
- Claimant held itself out to provide similar services

continued

Workers' Comp. Board v. Vivar Trucking, LLC

5/26/22 New York

Vivar Trucking

- No liability for WC benefits

Conclusion

- Other than Lease Purchase Program - facts very similar to *TransAm Trucking* Decision with opposite result!

Rosa v. Swift Transportation Co. of Arizona, LLC

2/25/22 USDC Texas

- Single vehicle accident where O/O dies and estate brings tort suit against Swift
- DWC-82 Form filed by O/O electing to assume responsibility as an employer
- Swift therefore raises contributory negligence and assumption of risk - applicable under Texas law to those opting out of WC system
- DWC-82 Form applies in context of WC but influenced IC decision under tort action
- Know whether forms exist for O/Os!

Bone v. Maczuk Farm Trucking LLC

1/9/21 MO Court of Appeals/Division of Employment Security

- UET claim using 20-factor indices of control balancing test
- DES Board decision in favor of employment overturned by Court of Appeals
- O/O simply stops working and two months later claims he was laid off - though he refused to take calls from carrier!
- “Furthermore, the record as a whole contains competent and substantial evidence ... regarding Claimant’s right of control supports ... independent contractor [status]”

continued

Bone v. Maczuk Farm Trucking LLC

1/9/21 MO Court of Appeals/Division of Employment Security

- There was a “delivery by 8:00 AM” requirement yet Claimant ignored it and set his own schedule
- Paid by percentage of revenue
- No policies or handbooks
- Paid via 1099
- Claimant could terminate contract without cause
- No UET benefits awarded and no deference to underlying agency decision

AB 5 Update

California AB 5 Litigation

- *Olson v. California* (9th Cir) - reversal of lower court's dismissal of equal protection challenge
 - *Plausibly alleged* irrational basis for unequal treatment because: 1) AB 5 bill sponsor showed animus toward Uber/Lyft/Postmates and targeted them; and 2) numerous exemptions, including for app-based companies like Wag and Task Rabbit, that “are nearly identical to Uber and Postmates
- *CTA v. Bonta* update

AB 5 Jurisdiction

- Cal. Sup. Ct. sets forth analysis for application of California statutes to interstate workers in *Ward/Oman*
 - Analyze geographic scope by looking at 1) text; 2) purpose; and 3) increment of work covered by statute
 - For longer increments (like wage statements for entire pay periods) is work performed primarily in California? If no, is it performed primarily in another state? If no, is California the worker's base of operations?
- Cal. DLSE takes position in webinar on application of AB 5 to motor carriers that “AB 5 is applied if the statutory claim at issue (examples: minimum wage or reimbursement of business expenses) is decided under California law.”

California AB 5: Business-to-Business Exception Update

- *Lawson v. Grubhub, Inc.*, N.D. California (Mar. 30, 2023)
- Focused on the following elements of the test:
 - No. 8 – “The business service provider advertises and holds itself out to the public as available to provide the same or similar services.”
 - No. 10 – “The business service provider can negotiate its own rates

California AB 5: What if it doesn't apply?

- *Borello* test (1989)—multi-factor test emphasizing right to control
- *Martinez* test (2010)—joint employment test evaluating whether individual was engaged, suffered, or permitted to work



California AB 5:

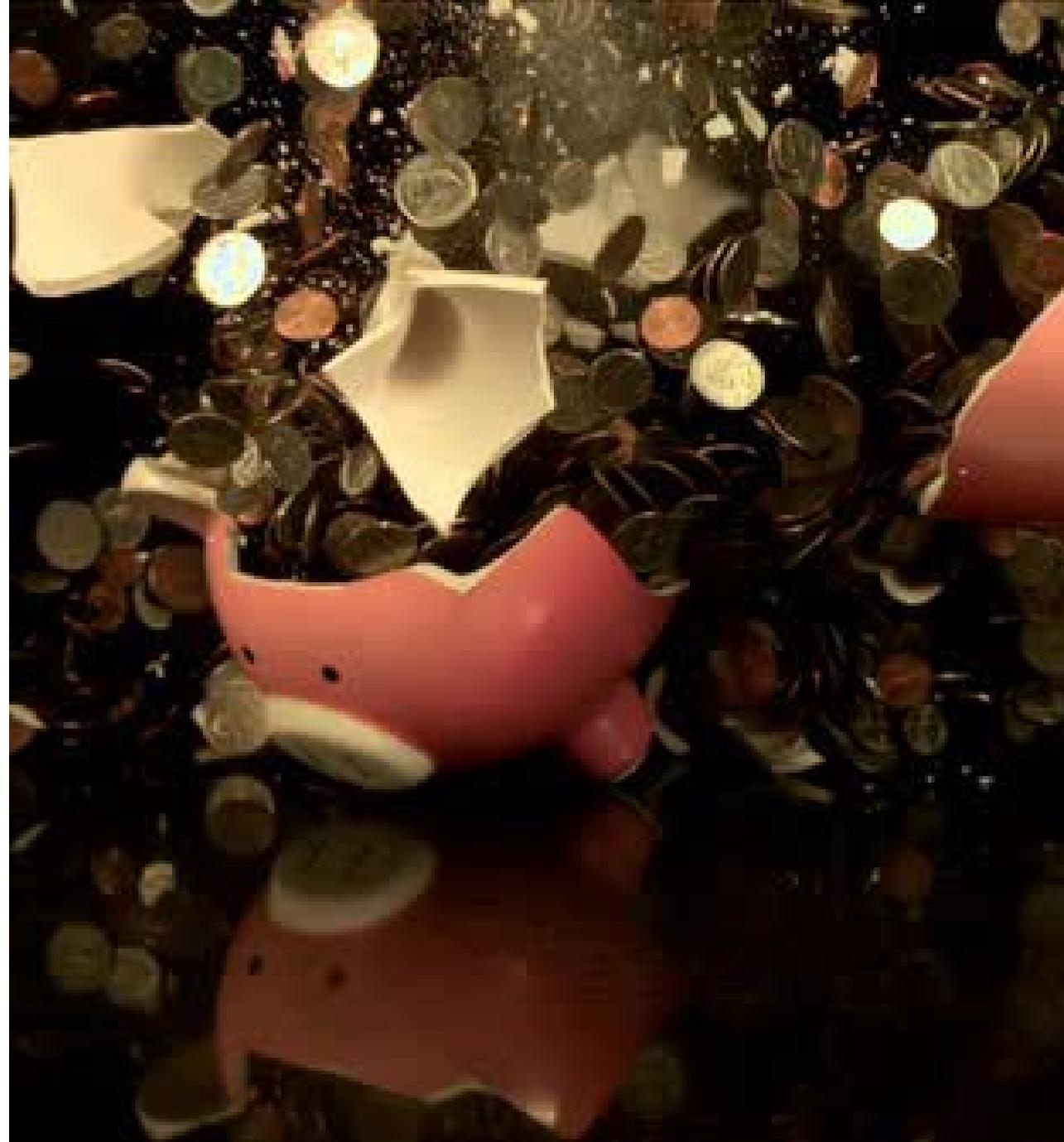
What if workers are reclassified

Claims for:

- Minimum wage
- Failure to pay all hours worked
- Meal and rest breaks
- Overtime and double time
- Itemized wage statements

May also face consequences related to:

- Workers' compensation
- Unemployment tax
- Paid sick leave laws

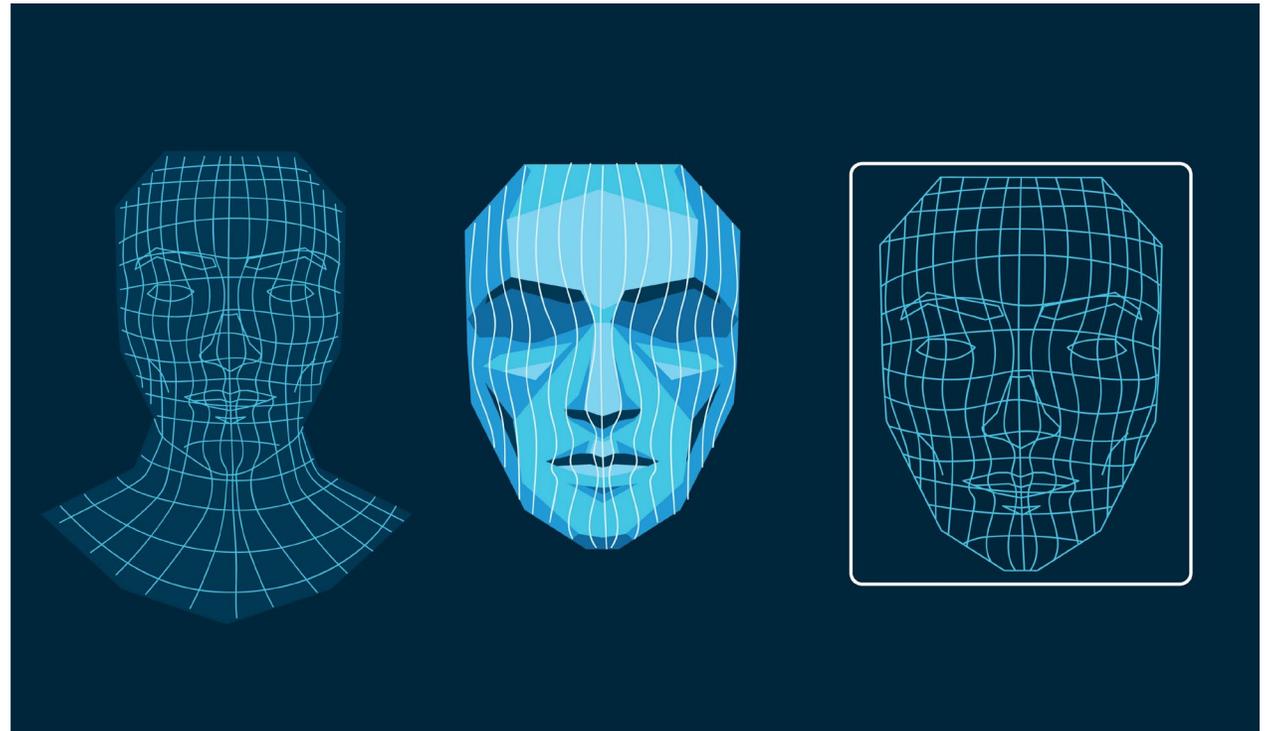


Biometrics

Illinois' Biometric Information Privacy Act (BIPA)

Broad statutory definition

- Retina or iris scan
- Fingerprint
- Voiceprint
- Scan of hand or face geometry



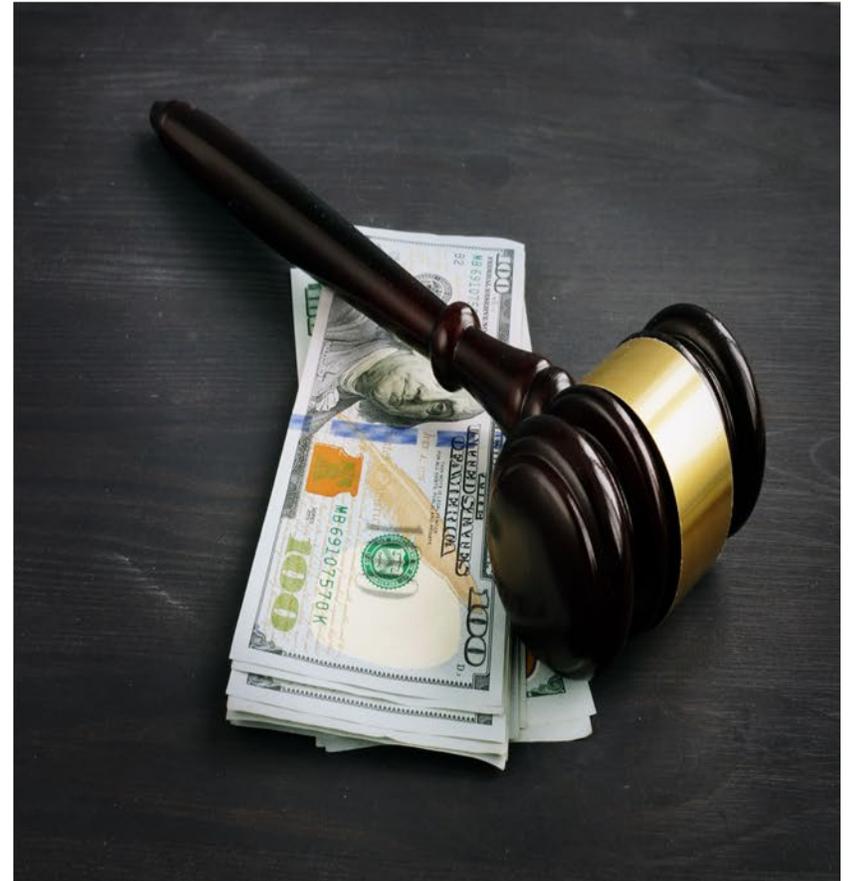
What Does BIPA Require?

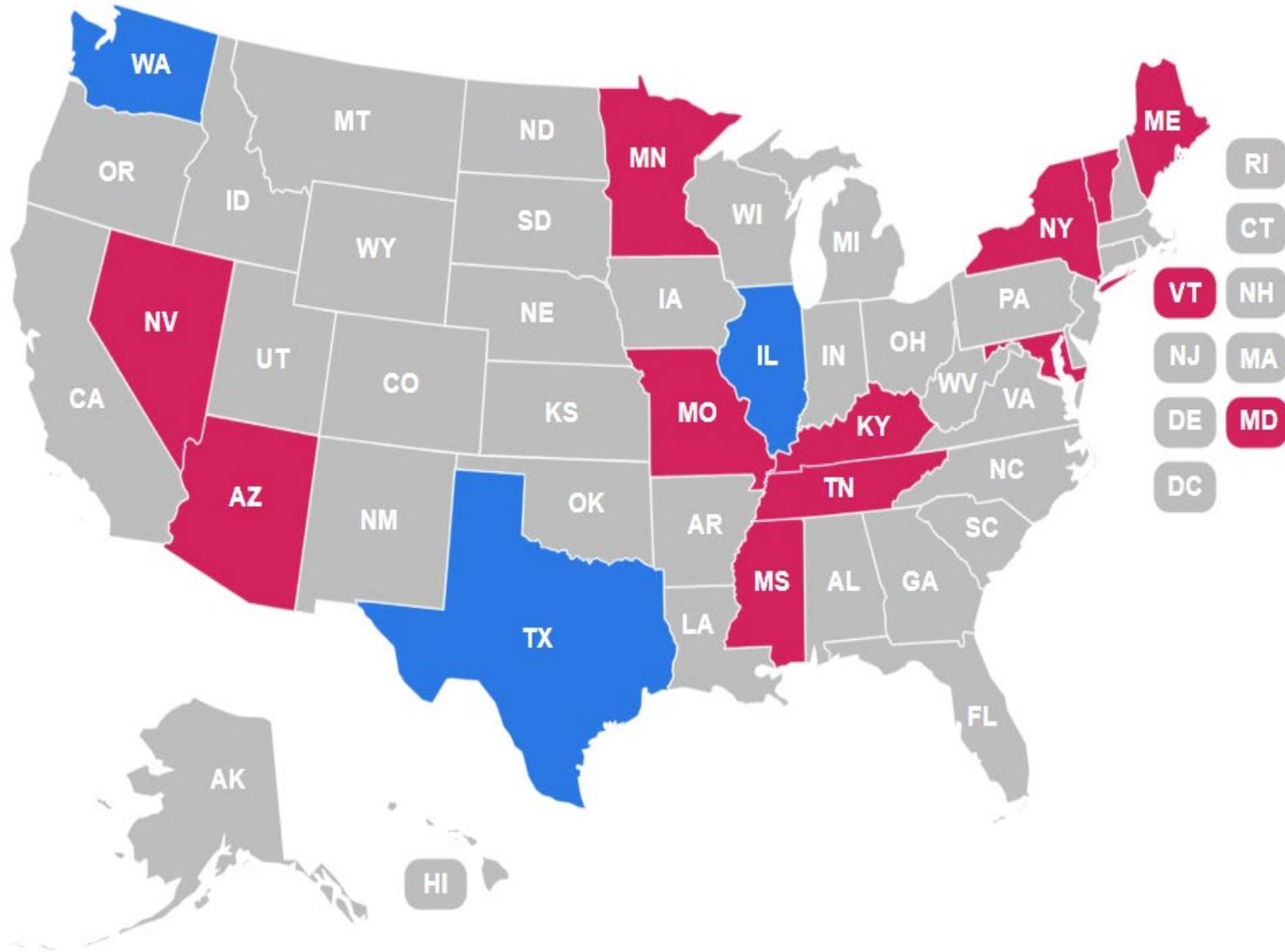
- Publicly available policy addressing retention
- Informed written consent before collection
- Destruction of information within statutory timelines
- Reasonable precautions to protect data



Statutory Penalties

- \$1,000 / \$5,000 per violation, regardless of actual harm
- Recent Illinois Supreme Court decisions:
 - *Cothron v. White Castle Systems, Inc.* → One scan = one violation
- Fee shifting for attorneys' fees and experts' fees





Current Status of State Biometric Privacy Laws

- **States with current laws:**
 - IL, WA, TX
- **States considered biometric legislation in 2023:**
 - AZ, KY, MD, ME, MN, MO, MS, NV, NY, TN, VT

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