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SENSIBLE SOLUTIONS

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We are comprised of seasoned and dedicated professionals who familiarize themselves with our clients' industries as well as their legal issues. We strive to maintain long-term client relationships by keeping our clients fully informed and respecting their time and business resources.

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- Condo-Community Association Representation
- Corporate and Other Business Transactions
- Defamation, Privacy and First Amendment
- Employee Benefits
- Employment Law
- Estate Planning, Probate and Trust Administration
- Health and Fitness Industry
- Independent Sales Representatives
- Intellectual Property Law
- Litigation and Alternative Dispute Resolution
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- Real Estate Tax Reduction
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Your Move, Governor: The Illinois Biometric Information Privacy Act is Poised for Substantial Reform

An amendment to the Illinois Biometric Information Privacy Act (BIPA) of significant interest to the Illinois business community has been passed by the Illinois General Assembly and presently sits with Governor J.B. Pritzker for approval or veto. The amendment will deem the repeated collection or transmission of a plaintiff's biometric information to constitute a single violation of BIPA, eliminating a plaintiff's present right to recover statutory or actual damages for *each* violation of BIPA resulting from the repetitive collection of biometric data. The amendment also clarifies that an electronic signature is a valid method of providing written consent to the collection or transmittal of biometric data.

Enacted in 2008, BIPA regulates the collection, possession and transmission of biometric data, which includes, among other data: fingerprints, voiceprints, retina and hands scans. BIPA requires entities collecting, possessing or transmitting biometric data to provide notice to and secure written consent from individuals whose data is being collected. Further, BIPA limits the purposes for which data is collected or stored and requires that publicly available written data-retention policies be established.

BIPA provides for a private right of action, entitling individuals to recover the greater of $1,000 or actual damages for *each* negligent violation of the statute, or the greater of $5,000 or actual damages for *each* reckless or intentional violation. Emboldened by an Illinois Supreme Court decision in 2019, which held that a plaintiff need not establish actual damages in order to be awarded statutory damages for each independent violation, the plaintiffs' bar set upon BIPA with fervor. Thereafter, the filing of BIPA lawsuits skyrocketed by over 1400% from 9 cases in 2018 to 134 in 2019, with almost 2,000 BIPA class actions in total having been filed since 2017. The overwhelming majority of those lawsuits arise in the employment context from the repetitive use of biometric data for timekeeping or data security purposes, with an employee compiling independent BIPA violations each time biometric information is collected.

As a result, oversized settlements have become commonplace within the BIPA landscape, including the resolution of claims asserted against Facebook ($650 million), Google ($100 million), TikTok ($92 million), BFSF Railway ($75 million), Instagram ($68.5 million), Snapchat ($35 million) and, as discussed below, White Castle ($9.4 million). Lower profile and smaller employers are not immune from BIPA class actions, as demonstrated by an Illinois-based janitorial services firm's settlement of BIPA claims for $1.85 million in June 2024.

In 2023, the Illinois Supreme Court tackled the punitive and potentially destructive nature of BIPA liability when deciding *Cothron v. White Castle System, Inc.* There, a plaintiffs' class of restaurant workers sought statutory damages resulting from their employer's repetitive use of a fingerprint scanning system to access pay stubs and corporate data. White Castle argued that imposing statutory damages for each independent violation of BIPA would subject it (and similarly situated employers) to "annihilative liability" not contemplated by the Illinois legislature. By way of example, White Castle estimated its potential exposure to exceed $17 billion, based on a plaintiffs' class comprised of at least 9,500 former and current employees asserting claims for each independent biometric scan or transmission. While acknowledging the consequences of violating BIPA may be harsh, unjust or even absurd, the Illinois Supreme Court elected to apply BIPA as written, and rejected an interpretation which would limit recoverable damages by limited recovery for repeated biometric scans to a single violation of the statute. The Illinois Supreme Court concluded that "policy-based concerns about potentially excessive damage awards under [BIPA] are best addressed by the legislature."

A bipartisan majority of the Illinois Senate and House of Representatives responded to that judicial invitation for legislative action. As proposed by Senate Bill 2979, an entity using a biometric method of collection or transmission on a repetitive basis (such as biometric time clock entries) would be liable to a plaintiff for only a single violation of BIPA. The amendment also clarifies that written consent to the collection, possession and transmission of biometric information can be secured by electronic means, such as an electronic signature, so as to facilitate the collection of consent to the collection of biometric data.

As of the time of this article's publication, Senate Bill 2979 sits on Governor Pritzker's desk awaiting approval or veto. Irrespective of his decision, it remains vitally important that your organization take steps to comply with BIPA, as drafted or as potentially amended. Critically, the amended version of the statute does not have retroactive effect, and thus the potential for liability for each instance of biometric scanning, collection or transmittal remains. Further, the enactment of BIPA reform, while limiting the extent of potential damages, will not immunize organizations from liabilities in the absence of BIPA compliance, including the maintenance of written and publicly available policies explaining how and for what purpose biometric data is needed, retention and destruction guidelines for biometric data, and the establishment of a method of securing written consent for the collection of biometric data.

For more information or any questions, please contact Jeffery Heftman at (312) 648-2300 or by e-mail at jeffery.heftman@sfbbg.com.

Now is the Time: A Golden Opportunity for Estate Planning

Now may be the most favorable estate tax planning environment in history, but the window of opportunity may close on January 1, 2026. With an all-time high federal gift, estate and generation skipping transfer tax exemption of $13.61 million, favorable interest rates (the applicable federal rate for many planning techniques is currently around 4%), and the proliferation of advanced planning strategies to maximize your control, access and flexibility over gifted assets, now is the time to lock in your exemption and take advantage of favorable IRS-set interest rates.

Current Exemptions and Tax Rates. The federal estate tax is 40% and is assessed on the value of your assets on death. Fortunately, you can shield up to $13.61 million of assets from tax by virtue of the estate tax exemption. A gift tax of 40% prevents you from giving it all away during your lifetime, but you can tap into that same exemption amount to make lifetime gifts. Any exemption not used during your lifetime can be used to shield your assets from the estate tax on death.

January 1, 2026 Expiration. The 2017 Tax Cuts and Job Act ("TCJA") increased the exemption to its current level, but the law is scheduled to sunset (expire) on January 1, 2026. Unless new legislation is enacted, the exemption will be reduced from $13.61 million to approximately $7 million. Accordingly, time is of the essence to use your current exemption.

Gifting Through Irrevocable Trusts. A common way to make a lifetime gift is to transfer assets to an irrevocable trust set up for the benefit of your spouse and/or descendants. An irrevocable trust generally cannot be terminated and is generally considered unamendable. However, the assets gifted to an irrevocable trust become exempt from estate tax and are placed out of the reach of most creditors, including a divorcing spouse. Sometimes people are reluctant to make a large gift to an irrevocable trust because they fear they may want to change beneficiaries in the future, they are concerned about losing control over the assets (for example: stock in a closely held company), they can't afford to lose the income from the assets, or they worry they may need the assets back.

There are currently many techniques available to minimize or remove these fears. A transfer to an irrevocable gift trust can be structured to maximize the donor's control over the gifted assets, to provide a future income stream to the donor, to allow the donor to swap or even use the gifted assets in certain situations, and to provide a degree of flexibility to accommodate changed circumstances (for example, by allowing a third party to amend certain provisions of the trust, to add or remove beneficiaries, and to exercise a special power of appointment to transfer trust assets back to the donor).

There are many types of irrevocable gift trusts designed for different circumstances. Deciding which type of trust to use and how to fund it will depend on the size of your estate, the types of assets you own, your family structure (i.e., first or second marriage, blended families), your income and liquidity needs, and your intended beneficiaries.

The following are three examples of irrevocable gift trust strategies that can be used alone or in combination with each other.

Spousal Lifetime Access Trust. For married couples, a carefully drafted Spousal Lifetime Access Trust (SLAT) provides a way to use your expiring exemption while retaining access to the gifted assets. The donor spouse can gift a variety of assets to the trust for the benefit of the donee spouse. The donee spouse can be the trustee as well as the beneficiary of the SLAT. As beneficiary, the donee spouse has access to distributions of income and principal which might also benefit the donor spouse, albeit indirectly. In addition, the SLAT can allow the donee spouse a limited power of appointment to gift assets to family members (without incurring gift tax) and to make donations to charities (resulting in a charitable deduction on the income tax return of the donor spouse). Upon the death of the donee spouse, the assets will pass outright or to trusts established for the lifetimes of the beneficiaries you select.

Qualified Personal Residence Trust. If your residence is one of your larger assets, a Qualified Personal Residence Trust ("QPRT") can be used to remove it and its future appreciation from your estate for federal estate tax purposes. A QPRT allows you to make a gift of a residence to the trust in exchange for the right to live in the residence for a period of years you select. The longer the term, the less exemption is required to cover the gift. However, if you do not survive the term, the residence will be added back to your estate. At the end of the term, you can continue to live in the residence by paying rent, which is an additional wealth transfer to the beneficiaries of your QPRT.

Intentionally Defective Grantor Trust. A sale or gift of assets to an Intentionally Defective Grantor Trust (IDGT), can be used to reduce the size of your estate by locking in the value of the transferred assets at the time of the transfer. An additional benefit of the IDGT is that the income generated by the trust's assets is taxed to the person creating the trust (the grantor) for income tax purposes, further reducing his or her estate for estate tax purposes. The grantor can either gift assets to the IDGT and use up some or all of his or her exemption, or the grantor can sell assets to the trust in return for an installment note. Because the minimum amount of interest the IRS requires the trust to charge is currently around 4%, more money stays in the trust (growing estate tax free) and provides the grantor with a stream of income over the term of the note.

There are other types of gift trusts and funding strategies for different situations, and this article only scratches the surface. Which trust and funding strategy would work best for you depends on your circumstances. But don't wait too long - the current exemption amount is likely expiring at the end of 2025, and some strategies take months to properly establish.

For more information or any questions, please contact J. Christian Manalli at (312) 775-3628 or by e-mail at christian.manalli@sfbbg.com.

Case Victories

SFBBG attorneys Norm Finkel and Bill Klein were successful in convincing a Will County judge to dismiss a lawsuit against their client, a national health club chain, in which a corporate landowner had asked the court to nullify a parking easement on its property, which was to be developed as an integrated portion of a shopping center in Joliet, Illinois. The lawsuit was dismissed on April 16, 2024. Now pending before the court is SFBBG's petition for attorneys' fees.

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After four years of litigation, SFBBG attorney Andrew Johnson prevailed in a longstanding property dispute in Kankakee County, Illinois. In a suit that began in the early stages of the pandemic and involved numerous challenges and nuanced legal issues, the Court ultimately ruled in favor of SFBBG's client, a commercial property owner, and ordered that the defendants release their cloud on title on the property.

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In May, Adam Maxwell and Dan Beederman achieved a significant victory in the Court of Chancery in Delaware, prevailing on a motion for attorneys' fees and expenses after obtaining a favorable declaratory judgment last December which restored equity interests valued at approximately $1.3 million. Adam and Dan took the position that the Defendant triggered a prevailing party provision by raising an agreement on which they did not rely in defense to our client's motion for judgment on the pleadings. The victory is the result of skilled lawyering and is a testament to the forward thinking and strategic counsel SFBBG brings to bear in every matter.

Cook County Property Taxes

Property tax bill data for 2023 (payable 2024) reveals a record high increase for some, and the appeal season for the 2024 (payable 2025) tax year is already underway. The median property tax bill for south suburban homeowners increased 19.9% in 2023, which is the highest percentage increase in the last 29 years. Cook County has begun to accept appeals for 2024. In 2024, townships in Chicago will be reassessed. Taxpayers should be on the lookout for reassessment notices in the mail. Outside of Cook County, the 2024 appeal session has started with most collar counties anticipated to open by the fall.

Welcome Aboard!

The Firm is happy to announce the latest addition to our group of attorneys. Jonathan Northington has joined the Corporate practice group as an associate.

Speaking Engagements

On June 20, Dan Beederman, legal counsel for the Association of Independent Manufacturers'/ Representatives, Inc. (AIM/R), presented to members "Are Non-Competes Still Enforceable?"

Published Articles

Adam Maxwell's article, "Federal Overtime Rule, Income Thresholds Set to Change July 1," was published by the *Chicago Daily Law Bulletin* on May 29.

Bruce Bell's article, "What's the Tax Impact if You Gift Stock at Below Your Purchase Price?" was published by *Forbes* on May 31.