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## Court weighs question of whether BIPA covers system used in health care setting

In *Mosby v. Ingalls Memorial Hospital*, 2022 IL App (1st) 200822 (Feb. 25, 2022), two plaintiffs who were involved with patient care brought separate class actions on behalf of themselves and others, alleging that their medical employers required them to scan their fingerprints and did not comply with the Biometric Information Privacy Act (BIPA), 740 ILCS 14/1, et seq.

The fingerprints were used, among other things, to have access to medication for patients, as well as the confidential medical information of patients.

After significant motion practice in each case before the Circuit Court, the following question was ultimately certified for interlocutory appeal in both cases:

“Does finger-scan information collected by a health care provider from its employees fall within the Biometric Information Privacy Act’s exclusion for ‘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, when the employee’s finger-scan information is used for purposes related to ‘health care,’ ‘treatment,’ ‘payment,’

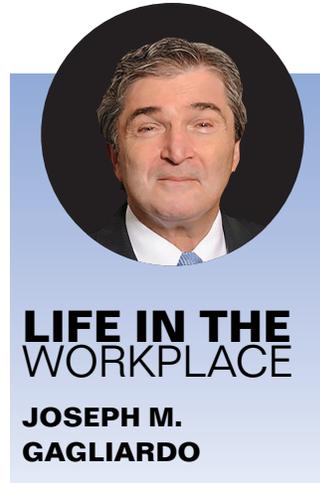
and/or ‘operations’ as those terms are defined by the HIPAA statute and regulations?”

The parties do not dispute that the fingerprint scans of the plaintiffs and other similarly situated hospital employees is a biometric identifier and, when stored, this fingerprint constitutes biometric information as outlined in the act.

Section 10 of the act provides exclusions to the protections of the act; specifically at issue is the following language:

“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.”

On appeal, the defendants maintain that the medication dispensing system that is at issue in this case is permitted to collect information for “health care treatment, payment, or operations” as defined by HIPAA. 45 C.F.R. Sec. 164.501(2) (2018). This includes the fingerprint scan of its employees who facilitate the dispensing and administration of medications to patients. They further contend: (1) that the



### LIFE IN THE WORKPLACE

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collection, use, and storage of health care workers’ biometric information is for “health care” and “treatment” that is provided to its patients and those terms are defined by HIPAA; (2) that this medication dispensing system also acts to provide an audit trail, which includes diversion, fraud, and abuse detection; (3) that this system additionally aids in patient safety, quality of care, and accurate billing; and (4) that the biometric information collected through the medication

dispensing system is also used for “health care operations” and “payment.”

The plaintiffs argued that BIPA only excludes patient biometric data from its protections because patient data is already protected by HIPAA. The plaintiffs further argued that acceptance of the defendants’ arguments would in effect leave thousands of hospital workers unprotected from the risks that the act was designed to protect against.

The appellate court, in rejecting the defendants’ arguments, stated:

“We find that the language of the statute is clear and simple.... What is excluded from the protections of section 10 are (1) information from the patient in a health care setting and (2) information that is already protected ‘under the federal Health Insurance Portability and Accountability Act of 1996.’ 740 ILCS 14/10 (West 2018). Consistent with the plain language of the Act, we find that the legislature did not exclude employee biometric information from its protections, and we answer the certified question in the negative.”

Based on its ruling, the cases were remanded for further proceedings consistent with the appellate court’s opinion.