

The Public Servant

The newsletter of the Illinois State Bar Association's Committee on Government Lawyers

Equifax data breach: Where are we now?

BY OSCAR PIÑA

The massive Equifax data breach last year exposed the personally identifying information of approximately 145 million consumers, including their full names, social security numbers, birth dates, and over 200,000 credit card credentials. The breach was announced months after hackers successfully obtained access to the sensitive financial information collected by Equifax.

Following the breach, the company was the subject of multiple congressional hearings and the target of numerous lawsuits filed by private parties and governmental agencies, including the

Commonwealth of Massachusetts and the City of Chicago, among others. The media firestorm following this unprecedented breach has mostly subsided, but legislation is currently pending at the state and federal levels that seeks to hold credit reporting agencies accountable for data breaches and seeks to eliminate the costs associated with credit freezes.

State of Illinois

When the breach was announced, financial experts recommended that

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Preventing and addressing sexual harassment today

BY ROBERT L. MILLER

By now, practitioners are aware that private companies and public entities are legally and morally obligated to take measures to prevent sex discrimination and sexual harassment and to respond to complaints in the workplace. These basic requirements are again subject to increased scrutiny in light of the national conversation on the topic of harassment and assault. While the law provides limits

on the legal filing of complaints against employers, the issue of responding to a new internal complaint about behaviors from years past remains.

An employer's responsibilities regarding workplace harassment can be summarized in a timeline. The bad behavior(s) committed by an employee against another would be the mid-point

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Save the Date!

**Hello, My Name is PAC:
An Introduction to the
Attorney General's Public
Access Duties**

**Thursday, March 15, 2018
12:00 -1:00 p.m.**

Presenter: Michael J. Luke,
Counsel to the
Attorney General

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Equifax data breach: Where are we now?

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consumers place a freeze on their credit reports to limit their exposure to identity theft. A credit freeze allows you to restrict access to your credit report, which makes it more difficult for identity thieves to open new accounts in your name; however, it also limits *your* ability to obtain a loan without first temporarily lifting or removing the freeze. To do this you must pay a fee in Illinois.

With the introduction of House Bill 4095, Illinois seeks to join several states that prohibit credit reporting agencies from charging fees for placing credit freezes.¹ The bill amends the Consumer Fraud and Deceptive Business Practices Act, which currently allows credit reporting agencies to charge consumers \$10 to place a freeze on their credit and an additional fee to remove or temporarily lift the freeze.²

Because a freeze is most effective when placed with all three major credit reporting agencies, an Illinois consumer would incur a \$30 cost to place the freeze. The consumer would then have to pay an additional fee each time a credit freeze was lifted or removed.

The Consumer Fraud Act prohibits credit reporting agencies from charging these fees to consumers who are at least 65 years of age, victims of identity theft, and active duty military service members. If enacted, HB 4095 would eliminate these fees for all consumers. On October 26, 2017, the Illinois House voted unanimously in favor of the bill. The bill is currently being considered by the Senate.

U.S. Senate

At the federal level, Senators Elizabeth Warren and Mark Warner recently introduced the Data Breach Prevention and Compensation Act.³ The bill creates the Office of Cybersecurity at the Federal Trade Commission, which will have the authority to supervise data security at credit reporting agencies, promulgate regulations for effective data security, and impose fines for data breaches.

The bill applies to any instance where at least one piece of personally

identifying information maintained by a credit reporting agency is exposed to an unauthorized party. "Personally identifying information" includes, among other things, social security numbers, passport numbers, unique biometric data such as fingerprints, and financial account numbers.

The credit reporting agencies will be required to notify the Commission of a covered breach within 10 days of an occurrence. Once the Commission receives notice, it will have 30 days to commence a civil action in federal district court to recover a civil penalty. The Commission will have the authority to fine a credit reporting agency \$100 for each consumer whose personally identifying information was compromised and an additional \$50 for each additional piece of information that was stolen. That penalty can double, however, if the credit reporting agency fails to notify the Commission of the breach within the 10-day window.

To put this into context, Equifax would have been subject to a fine of at least \$14.5 billion for the 2017 breach, assuming that each person had at least one piece of personally identifying information compromised.

Total fines would be capped based on the company's gross revenue for the fiscal year preceding the occurrence of the breach. Here, that amount would have totaled approximately \$1.57 billion based on Equifax's 2016 earnings.⁴ Half of the assessed penalties would be divided among the consumers affected by the breach, with the remainder being allocated to cybersecurity research and inspections by the Commission.

The bill was introduced on January 10, 2018, and has been referred to the Committee on Banking, Housing, and Urban Affairs. ■

1. H.R. 4095, 100th Gen. Assem., Reg. Sess. (Ill. 2017).

2. 815 ILCS 505/2MM.

3. S. 2289, 115th Cong. (2018).

4. Equifax.com, Quarterly Results, <https://investor.equifax.com/financial-information/quarterly-results/2016> (last visited January 7, 2018).

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Preventing and addressing sexual harassment today

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of the timeline. Although the employer most likely did not permit or condone the conduct, the employer will be measured on what was done prior to the behavior and what was done after. In order to avoid legal liability for harassment perpetrated by a supervisor, an employer must show that it took steps to prevent the harassment.¹ One of the primary goals of protection from discrimination is to prevent harm.² Employers must take reasonable steps to avoid and prevent harm and these responsibilities increase as the potential level of harm increases.

For example, a payroll specialist who works in a prison around potentially violent inmates is entitled to more vigilant efforts by the prison to prevent harm. At a prison in Wisconsin, a clerk complained to the warden and to the director of human resources that an inmate performing janitorial work was alone with her in the office and she believed his actions were suspicious. Eight days after she complained, the inmate had not been removed from his duties, actions were not implemented to protect her from harm, and as a result she was assaulted.³

Whether or not employees are exposed to supervisors, co-workers, vendors or customers who may physically endanger others, employers must take actions to prevent harassment and assault, which should include:

- Maintaining a policy that prohibits harassment, which must be communicated to employees;
- Conducting training for all employees;
- Responding promptly and thoroughly to complaints, and
- Taking action when warranted.

Harassment prevention training is obviously one of the tools used most often by employers, but the effects of repeated training may be limited. Motivating employees to behave appropriately is more complicated than just providing yearly training. Employees need to see that complaints are taken seriously

and that retaliation is not tolerated. To do otherwise sends a message that complainants will either be dismissed, or worse, that they may incur penalties for having complained.

Taking action is critical. An appropriate response by the prison would likely have prevented harm in the Wisconsin case and would help fulfill the goals and obligations of prevention as outlined by the Supreme Court.

The timeline mentioned above is instructive in that employers will also be measured by what is done *after* the behavior occurs. Once an employer has information about potential wrongdoing, the clock starts. (However, options to correct behavior are very limited when a supervisor commits actionable harassment coupled with a tangible job action).

In addition, once harassment occurs, the clock also starts for the employee. She or he has limited time in which to file a complaint. In Illinois, a complaint must be filed with the Illinois Department of Human Rights within 180 days of the civil rights violation.⁴ However, in deferral jurisdictions, the time for filing with the Equal Employment Opportunity Commission is extended to 300 days.⁵ Employers may be tempted to become clock watchers and perhaps even exhale when these time periods are exhausted. But this approach is not a best practice and may result in more harm later.

Taking Action Even When the 180- or 300-Day Time Period Expires

Since employers are required to prevent and correct illegal harassment, and since avoiding harm is a primary goal of discrimination law, employers would be well served to accept internal complaints that are filed months or even years after the time for legal filing has expired. Recognizing that there are limitations, such as spoliation, faded memories and so on, to receiving dated

claims, refusing to examine such claims may expose the entity to liability if the offending employee commits future acts of harassment.

In addition, failure to investigate a claim of harassment could even result in penalties against the employer or persons not involved in the underlying complaint. The Illinois Human Rights Act contains a provision that it is a civil rights violation for a person to aid or abet the commission of a violation of the law.⁶ Seemingly, failing to perform a duty—to investigate the complaint—is not an overt or affirmative act, and therefore the non-performer would not have aided or abetted anyone. However, plaintiffs have argued and courts have considered, that failing to investigate a complaint could actually be an affirmative adverse employment action which could support a retaliation claim.⁷ It is not beyond the realm of possibility that an individual human resources officer or counsel could be charged with violating the “aiding” and “abetting” provision of the Illinois Human Rights Act by failing to investigate a claim.

Finally, in the interest of good corporate citizenship (public and private), protecting employees from harassment should be ingrained in the culture. Responding to complaints, even when the conduct occurred years ago, sends a strong message to potential harassers, and demonstrates to all employees that victims of illegal harassment are valued. ■

1. *Burlington Industries v. Ellerth*, 524 U.S. 742, 765 (1998).

2. *Faragher v. City of Boca Raton*, 524 U.S. 775, 805 (1998).

3. *Erickson v. Wisconsin Department of Corrections*, 469 F.3d 600, at 603 (7th Cir. 2006).

4. Illinois Human Rights Act 775 ILCS 5/7A-102(A)(1).

5. 29 C.F.R. §1601.13.

6. Illinois Human Rights Act 775 ILCS 5/6-101(B).

7. See e.g. *Fincher v. Depository Trust and Clearing Corp.*, 604 F.3d. 712, at 722 (2nd Cir. 2010).

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Back-pay claim has 10-year statute of limitations

BY PHILLIP LENZINI, KAVANAGH, SCULLY, SUDOW, WHITE & FREDERICK P.C., PEORIA

The Illinois Appellate Court, Second District, recently ruled that a back-pay claim against a unit of government under the Wage Payment and Collection Act did not fall within the one-year limitation period in the Tort Immunity Act (745 ILCS 10/8-101(a)) in *Prorok v. Winnebago County*, 2017 IL App (2d) 161032. As a result of this decision, back-pay claims from public employees could be brought as long as 10 years after the claim arises under the Wage Act (735 ILCS 5/13-206), and the Court's reasoning in reversing the trial court's decision was that the claim was essentially for the non-performance of a contractual obligation, regardless of whether it could be viewed as "equitable." *Prorok*, 2017 IL App (2d) 161032, ¶ 10.

The trial court had determined that the Tort Immunity Act's one-year statute of limitations applied to block the former employee's claim on the basis of the County employer's argument that the claim was essentially seeking equitable relief and damages and thus fell within the Tort Immunity Act's one-year limitation. *Id.* ¶ 4.

The appellate court's opinion started by noting that "to determine the applicable statute of limitations, a court must focus on the nature of the liability and not on the nature of the relief sought." The court determined that the "injury" alleged, though a "matter on which reasonable people could certainly disagree," need not be addressed because the claim for back pay was said to fall within the Tort Immunity Act's exception for contract claims. *Id.* ¶ 6.

The key to the appellate court's analysis is what the court identified as the purpose of the Act, which is to protect local public entities and their employees from liability arising from the operation of government. In its reasoning, the Court noted that while claims for damages can arise from a

breach of legal duty (*i.e.* tort) or from the breach of a contractual promise (*i.e.* *ex contractu*), here, the plaintiff's claim was for wages for work he had already performed, which arose from his employment with the county. Since the employee was an "at-will" employee and employment at-will is essentially a contractual relationship, the claim fell outside of the scope of the Tort Immunity Act. *Id.* ¶ 9.

Of course, practically speaking, the holding of this case opens more widely

the potential for much older claims to be brought against local government employers for the 10-year period after claims arise, rather than the one-year limitation under the Tort Act. And the decision eliminates a legal argument that somewhat protected public entities by limiting the period for wage claims post-employment. At the very least, the decision suggests that employers would be wise to maintain employment records past the 10-year period. ■



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Tuesday, 04-10-18 – Webinar—Keeping Your Clients Happy and Coming Back for More. Practice Toolbox Series. 12:00-1:00 PM.

Wednesday, 04-11-18 – LIVE Webcast—Tips and Traps in UCC Compliance. Presented by Commercial Banking. 12:00-1:00 PM.

Thursday, 04-12-18 – ISBA Chicago Regional Office—Secrets of the Citation Act and Tips for Enforcing Judgement. Presented by Commercial Banking. 8:55 AM – 12:15 PM.

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Thursday, 04-13-18 – NIU Hoffman Estates—Spring 2018 DUI and Traffic Law Program. Presented by Traffic Law. All day.

Wednesday, 04-18-18 – LIVE Webcast—Mastering the Dead Man's Act. Presented by Trusts and Estates. 2:00-3:15.

Thursday, 04-19-18 – Chicago Regional Office—Nuts and Bolts of Juvenile Court. IJC/ISBA/CCBA Joint CLE Program. 5:30-7:00 p.m.

Thursday, 04-19-18 – LIVE Webcast—Interns and Externs: Training, Supervision and Professionalism Issues. Presented by LEAC. 12:00-2:00.

Friday, 04-20-18 – ISBA Chicago Regional Office—The Cyborgs are Coming! Ethical Concerns from Technology Disruptions. Master Series presented by the ISBA. 9:00 AM – 12:45 PM.

Friday, 04-20-18 – LIVE Webcast—The Cyborgs are Coming! Ethical Concerns from Technology Disruptions. Master Series presented by the ISBA. 9:00 AM – 12:45 PM.

Tuesday, 04-24-18 – Webinar—The Next Level of Excel for Legal Professionals. Practice Toolbox Series. 12:00-1:00 PM.

Thursday and Friday, 04-26-18 and 04-27-18, ISBA Chicago Regional Office—5th Annual Elder Law Bootcamp: Basics and Beyond. Presented by Elder Law. Thursday 8:45AM-4:30PM and Friday 8:45AM-1:00 PM.

May

Thursday, 05-03-18 - Webinar—Introduction to Legal Research on Fastcase. Presented by the Illinois State Bar Association – Complimentary to ISBA Members only. 12:00-1:00 pm.

Thursday and Friday, 05-03 to 05-04, 2018 – ISBA Chicago Regional Office—17th Annual Environmental Law Conference. Presented by Environmental Law. All day.

Tuesday, 05-08-18 – Webinar—Starting, Merging, or Closing a Law Firm. Practice Toolbox Series. 12:00-1:00 PM.

Wednesday, 05-09-18 – George W Duanne Cook County Building—The Anatomy of a Mechanics Lien Claim. Presented by Construction Law. All day.

Thursday, 05-10-18 Webinar—Advanced Tips for Enhanced Legal Research on Fastcase. Presented by the Illinois State Bar Association – Complimentary to ISBA Members only. 12:00-1:00 pm.

Friday, 05-11-18 – ISBA Chicago Regional Office—Evidence: Discussions about obtaining evidence, foundation issues, objections and effective presentation to maximize proof. Presented by Civil Practice and Procedure. 8:50-4:30.

Tuesday, 05-15-18 – LIVE Webcast—The Nuts and Bolts of LLC Taxation. Presented by Business and Securities Law. 1:00-3:00 PM

Thursday, 05-17-18 – NIU Naperville—Representing the Elderly Real Estate Client. Presented by Real Estate. 8:30 AM – 4:30 PM.

Thursday, 05-17-18 – Webinar—Fastcase Boolean (Keyword) Search for Lawyers. Presented by the Illinois State Bar Association – Complimentary to ISBA Members only. 12:00-1:00 pm.

Friday, 05-18-18 – College of DuPage—Computers for Seniors: The Next Step. Presented by Senior Lawyers. Half-day – morning only.

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Thursday, 05-24-18 – Bilandic Building, Chicago—Open Meetings Act: Ensuring Public Access to Information. Presented by Government Lawyers. 12:30-5:00 PM.

June

Friday, 06-01-18 – NIU Naperville, Naperville—Solo and Small Firm Practice

Institute. All day.

Thursday, 06-07-18 – ISBA Chicago Regional Office—What Comes Next? Emerging Issues for LGBT Clients. Presented by Women and the Law. All Day.

Thursday, 06-07-18 - Webinar—Introduction to Legal Research on Fastcase. Presented by the Illinois State Bar Association – Complimentary to ISBA Members only. 12:00-1:00 pm.

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Friday, 06-08-18 – ISBA Chicago Regional Office—Gain the Edge! * Negotiation Strategies for Lawyers - Marty Latz Negotiations. Master Series Presented by the Illinois State Bar Association. 9:00 AM – 4:30 PM. All day.

Tuesday, 06-12-18 – Webinar—Starting a New Firm – What you need to Know. Practice Toolbox Series. 12:00-1:00 PM.

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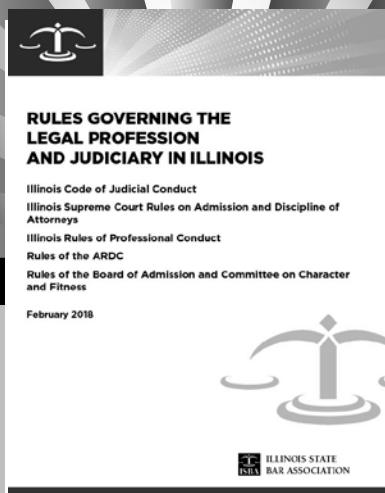
12:00-1:00 pm.

Wednesday and Thursday, 06-20/21-2018 – ISBA Chicago Regional Office—6th Annual Minority Bar Conference. Staff: Meeting Solutions.

Thursday, 06-21-18 – Webinar—Fastcase Boolean (Keyword) Search for Lawyers. Presented by the Illinois State Bar Association – Complimentary to ISBA Members only. 12:00-1:00 pm.

Friday, 06-29-18 – O’Fallon—Tips of the Trade: A Federal Civil Practice Seminar for Downstate Illinois. Presented by: Federal Civil Practice. Morning only. ■

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