City of Portland Bans Private Entities From Using Facial Recognition Technologies

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The City of Portland, Oregon becomes the first city in the United States to ban the use of facial recognition technologies in the private sector citing, among other things, a lack of standards for the technology and wide ranges in accuracy and error rates that differ by race and gender. Failure to comply can be painful. Similar to the remedy available under the Illinois Biometric Information Privacy Act, fueling hundreds of class action lawsuits, the Ordinance provides persons injured by a material violation a cause of action for damages or $1,000 per day for each day of violation, whichever is greater. The Ordinance is effective January 1, 2021.

Facial recognition technology has become more popular in recent years, including during the COVID-19 pandemic. As the need arose to screen persons entering a facility for symptoms of the virus, including temperature, thermal cameras, kiosks, and other devices with embedded with facial recognition capabilities were put into use. However, many have objected to the use of this technology in its current form, citing problems with the accuracy of the technology, as summarized in a June 9, 2020 New York Times article, "A Case for Banning Facial Recognition."

Under the Ordinance, a "private entity" shall not use "face recognition technologies" in "places of public accommodation" in the boundaries of the City of Portland. Facial recognition technologies under the Ordinance means

> *an automated or semi-automated process that assists in identifying, verifying, detecting, or characterizing facial features of an individual or capturing information about an individual based on an individual's face*

Places of public accommodation include any place or service offering to the public accommodations, advantages, facilities, or privileges whether in the nature of goods, services, lodgings, amusements, transportation or otherwise. This covers just about any private business and organization. Note, Portland also passed a separate ordinance prohibiting the use of facial recognition technology by the city government.

There are some exceptions, however. Places of public accommodation do not include "an institution, bona fide club, private residence, or place of accommodation that is in its nature distinctly private." It is not clear from the Ordinance what it means to be "distinctly private." Also, the Ordinance does not apply:

- When facial recognition technologies are necessary to comply with federal state or local law,
- For user verification purposes by an individual to access the individual's own personal or employer issued communication and electronic devices, or
- To automatic face detection services in social media applications.

So, in Portland, employees can still let their faces get them into their phones, including their company-provided devices. But, businesses in Portland should evaluate whether they are using facial recognition technologies, whether they fall into one of the exceptions in the ordinance, and if not what alternatives they have for verification, security, and other purposes for which the technology was implemented.

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