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News and Information for Clients and Friends

THREE NOMINATED FOR FEDERAL JUDGESHIPS IN NORTHERN DISTRICT

On June 7, 2018, President Trump announced three judicial nominees for the Northern District of Illinois. If confirmed, Martha M. Pacold, Hon. Mary M. Rowland, and Steven C. Seeger will serve as Article III District Court Judges in the Eastern Division, which is located in Chicago.

Martha M. Pacold currently serves as Deputy General Counsel of the U.S. Department of Treasury. Before that, she was in private practice at the Chicago office of Bartlit Beck Herman Palenchar & Scott. Earlier in her career, Ms. Pacold clerked for Justice Clarence Thomas and two Courts of Appeals judges and worked as a Special Assistant U.S. Attorney and Counsel to the Attorney General.

Hon. Mary M. Rowland has been a U.S. Magistrate Judge in the Northern District since 2012. Prior to her service as a magistrate judge, Judge Rowland was a partner at the Chicago law firm of Hughes, Socol, Piers, Resnick & Dym, Ltd. Before entering private practice, Judge Rowland worked as a Federal Defender.

Steven C. Seeger has served as Senior Trial Counsel for the Securities and Exchange Commission's Chicago office since 2010. Prior to that, Mr. Seeger worked in private practice at Kirkland & Ellis and clerked for Judge David Sentelle of the Court of Appeals for the D.C. Circuit.

All three nominations are presently before the Senate Judiciary Committee; confirmation hearings are expected to be held later this year.

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Abraham Lincoln's Home in Springfield, Illinois. Mr. Caffarelli recently had the pleasure of visiting and photographing historic Springfield while on business.

#METOO MOVEMENT

In the fall of 2017, news broke that Harvey Weinstein, a film executive, had sexually harassed and assaulted women for decades. Once women began to go public with their allegations, it ended the acceptable "open secret" in Hollywood regarding Weinstein's history of harassment. His accusers were finally taken seriously, which released the floodgates for women, and men, to speak on the record about their own experiences being subjected to sexual harassment and assault. The familiarity that women in particular had with sexual harassment became known simply as #MeToo.

Although Weinstein was just the beginning of the movement, his ability to harass and assault women for decades stemmed from the typical imbalance of power that has allowed sexual harassment without repercussion to pervade the work place. In the entertainment industry, Weinstein was considered untouchable – he was wealthy, influential, and the head of his own film studio. Women feared they would not be believed and, even if they were, their careers would be destroyed.

Until the #MeToo movement took the public consciousness by storm, all too often the response has been to believe the accused, silence the accuser through pressure or non-disclosure agreements, or justify taking no action by deeming any investigation to be 'inconclusive' due to conflicting accounts between the accused and accuser. As the #MeToo movement gained steam, many of the accused were tried in the court of public opinion rather than by any administrative or judicial body. Many high-ranking men in the entertainment industry, media, and legislatures have been terminated or forced to resign. Some of those men walked away with generous severance packages – even after their employers had spent thousands, or even millions, of dollars in settlement payments.

Now that the #MeToo movement has pushed many people to shake off the insidious default assumption that women lie or exaggerate about sexual harassment and/or assault, legislators must catch up. Legislative solutions are particularly important since the movement thus far has disproportionately focused on women who are relatively wealthy and, therefore, have more flexibility than the majority of workers. Often living paycheck-to-paycheck, low-wage earners suffer a greater power disparity and risk of financial devastation when confronted with sexual harassment in the workplace. In addition, the movement is limited in its efficacy and equity by relying solely on public outcry. The court of public opinion does not wait for due process, which makes legislative solutions crucial in striking a balance between the rights of accuser and accused.

Congress introduced two bills aimed at addressing sexual harassment within their own ranks. The House unanimously passed its bill in February 2018, which would simplify the process for filing complaints, require legislators found liable of sexual harassment to compensate victims from their personal – rather than taxpayer – funds, and provide legal counsel to all accusers. The Senate passed a less stringent bill in May 2018. The bills need to be reconciled before any further action can be taken. To date, both bills appear to have stalled.

State legislatures have accomplished a bit more. Illinois passed HB 4572, which extends the time to file a charge to 300 days, allows complainants to request a right-to-sue from the Department of Human Rights after 60 days, and enacts other procedural changes designed to accelerate the process of pursuing a claim of sexual harassment. Illinois also passed HB4243, which prohibits the use of public funds for payment of sexual harassment claims against a member of the General Assembly or to secure a non-disclosure agreement related to sexual harassment committed by a member of the General Assembly. Both bills have yet to be signed by the Governor.

Multiple states introduced bills to prohibit non-disclosure agreements and/or mandatory arbitration agreements for sexual harassment claims. Many in the #MeToo movement contend that these agreements hide problems rather than attempting to solve them. The bills have failed in most states, but were enacted in Maryland and Arizona. As many companies revisit their policies on sexual harassment, they should consider revisiting the strictures imposed by NDAs and mandatory arbitration. Perhaps more companies will find that the cost-benefit analysis does not justify retaining a person who has received multiple complaints. Greater corporate transparency may also reduce sexual harassment complaints by letting employees see they are taken seriously. #MeToo jump-started public awareness of the problems. Now, legislative and corporate action are needed to create lasting change in understanding, preventing, and remedying sexual harassment.

SUPREME COURT: CLASS WAIVERS REIGN SUPREME

The Federal Arbitration Act ("FAA") was enacted in 1925 in response to judicial hostility to the private arbitration of commercial disputes. It provides that an agreement to arbitrate "shall be valid, irrevocable, and enforceable" unless it is otherwise deemed illegal. The National Labor Relations Act ("NLRA"), on the other hand, protects employees' right to band together for "mutual aid and protection," and due to the imbalance in power between labor and management invalidates any agreement that purports to limit that right.

In the 2016 case of *Lewis v. Epic Systems Corp.*, the Seventh Circuit Court of Appeals determined that an arbitration agreement that purported to waive an employee's right to participate in a class action lawsuit was in fact illegal and unenforceable by virtue of the fact that it hindered the right to engage in protected, concerted activity under the NLRA. Authored by Judge Diane Wood, the Seventh Circuit emphasized the need to harmonize the two statutes, and that Epic's attempt to use the FAA to limit employees' rights to band together under the NLRA failed to do just that.

On May 21, 2018, the United States Supreme Court issued its eagerly anticipated decision on Epic Systems' appeal, which was consolidated with two other cases: *Ernst & Young v. Morris* and *National Labor Relations Board v. Murphy Oil USA, Inc.* Authored by newly appointed Justice Gorsuch, (and joined by Chief Justice Roberts and Justices Kennedy, Thomas, and Alito), the 5-4 decision in favor of Epic Systems significantly shifts the balance of power in favor of management. Turning Judge Wood's opinion on its head, Justice Gorsuch rejected the notion that there was a conflict between the FAA and the NLRA, noting that the NLRB has only recently taken the position that the NLRA prohibits class waivers (but ignoring the fact that the Supreme Court has similarly only recently taken the position that the FAA applies to employment relationships). Perhaps not surprisingly given Justice Gorsuch's well documented hostility to the *Chevron* doctrine, the Court also disregarded the NLRB's position on the basis that the FAA was at issue, which the Board lacked authority to administer.

In a 30-page dissent that was read from the bench, Justice Ginsburg (joined by Justices Breyer, Sotomayor, and Kagan), criticized the majority's opinion as "egregiously wrong." Ginsburg noted that both the NLRB and federal courts have long held that joint legal proceedings are the types of activities protected under the NLRA, and that the FAA's savings clause was specifically designed to exclude agreements purporting to limit that right. More significantly, Justice Ginsburg emphasized the practical effect of the majority's ruling, pointing out that "employers, aware that employees will be disinclined to pursue small-value claims when confined to proceeding one-by-one, will no doubt perceive that the cost-benefit balance of underpaying workers tips heavily in favor of skirting legal obligations." Justice Ginsburg concluded by stating that "[c]ongressional correction" of the court's decision is "urgently in order." While that sentiment is shared by the author, it is extremely unlikely that such correction will take place given the current composition of both congress and the executive branch. As former President Obama once said, "elections have consequences," and this is one of the unfortunate ones.

Historic Springfield, Illinois

ILLINOIS SUPREME COURT EXPECTED TO ISSUE KEY DECISION IN BIOMETRIC PRIVACY CASE

Many people are surprised to learn that Illinois provides one of the strongest legal protections for biometric data in the nation. The Biometric Information Privacy Act (BIPA) is a decade-old state law that is intended to protect individuals' sensitive and immutable biometric information (i.e., fingerprints, hand prints, iris scans, facial scans, etc.). The state legislature recognized that other types of sensitive identifying information, like social security numbers, can be changed if they are compromised. Biometric information, however, is biologically unique; "therefore, once compromised, the individual has no recourse [and] is at heightened risk for identity theft."

Historic Springfield, Illinois

For this reason, BIPA includes language intended to regulate the "collection, use, safeguarding, handling, storage, retention, and destruction of biometric identifiers and information." Specifically, BIPA includes the baseline requirements that companies must provide individuals with written information about why they are collecting biometric information, obtain written consent to collect and use the data, and store and dispose of the information safely.

This law has more frequently applied in the employment context over the past several years, as companies have increasingly required employees to submit their fingerprints or handprints in order to clock in and out of work, open registers, and access stored goods. Notably, it is exceedingly simple for employers to comply with the law; they essentially need only publish their biometric information policies and obtain employee consent during the onboarding process prior to collecting the sensitive information. Yet, employers often fail to adhere to the simple measures of the law, intended to prevent catastrophic invasion of their employees' biometric privacy.

When companies violate BIPA, individuals may seek recourse by filing a lawsuit. Often, these claims are brought on a class basis, as companies are likely to violate BIPA with respect to every individual from whom they have gathered biometric information. Statutory damages range between $1000-$5000 per violation, for each person affected. Caffarelli & Associates Ltd. currently has several BIPA class actions pending in state and federal court.

In recent years, companies that have violated BIPA have vigorously argued that individuals cannot move forward with claims unless they have suffered actual monetary damages as a result of the company's violation of the law. Of course, this makes little sense in the context of BIPA's inception; the law was specifically put into place in order to *prevent* the circumstances that might leave individuals susceptible to identity theft and financial ruin.

The Illinois Supreme Court is set to rule on the issue of whether an individual may move forward with a lawsuit against a company that has technically violated the law, even if the individual has not yet suffered financial damages as a direct result. The case, *Rosenbach v. Six Flags*, is currently pending with the Court. The ruling, which may not be issued for several months or more, will have a profound impact on the viability of BIPA claims moving forward.

AMENDMENTS TO ILLINOIS HUMAN RIGHTS ACT

On August 24, 2018, Governor Rauner signed amendments to the Illinois Human Rights Act that are intended to update and streamline certain procedures at the Illinois Department of Human Rights. These amendments include:

- Increasing the time frame that individuals have to file a charge under the Illinois Human Rights Act, from 180 to 300 calendar days;
- Allowing individuals to opt out of an investigation at the Illinois Department of Human Rights and electing to proceed to Illinois Circuit Court within 60 days of filing a Charge of Discrimination; and
- Changing to composition of the Illinois Human Rights Commission to 7 full-time members, as opposed to 13 part-time members.

Given the existing 300 day filing deadline at the Equal Employment Opportunity Commission, the change from 180 to 300 calendar days is not significant, except with regard to those categories that are specifically protected under the Illinois Human Rights Act but not under federal law. The change in the composition of the Commission may speed up determinations at the agency, but that has yet to be seen. But perhaps the most significant amendment is the inclusion of the 60-day opt out provision. One reason employees tend to avoid bringing claims to Circuit Court under the Illinois Human Rights Act is the sheer amount of time wasted waiting for the ability to obtain the right to sue, which prior to the amendments meant waiting at least a year after filing a Charge of Discrimination. This change is likely to tip the balance in certain discrimination cases, funneling them away from federal court and into Circuit Court.