

LAW OFFICES

Caffarelli & Associates

L I M I T E D

News and Information for Clients and Friends

Alejandro Caffarelli has been named to the American Arbitration Association National Roster of Arbitrators, for which he will serve on the employment law panel. Founded in 1926 with the goal of helping to implement arbitration as an out-of-court solution to resolving disputes, the American Arbitration Association (AAA) is the nation's leading provider of alternative dispute resolution services.

Alejandro Caffarelli has been named an Illinois "Super Lawyer" by Thomson Reuters for 2021, marking over ten consecutive years that he has been named an Illinois Super Lawyer. Madeline Engel was named an Illinois Super Lawyer - Rising Star for the second consecutive year.

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President Biden Confronts a Packed Judiciary, Frozen in Time

By Lorrie T. Peeters

In our 2017 newsletter, we observed that there were then 130 judicial vacancies to fill on the federal courts. We noted that the unusually high number was largely due to the Republican-controlled senate blocking dozens of President Obama's appointees in the final years of his administration. Unsurprisingly, former Majority Leader Mitch McConnell and Senate Republicans were busy over the past four years, pushing a steady stream of predominantly young, White, male judges through to lifetime appointments at all levels of the federal court system.

We now have some perspective on what will likely be one of

the longest-lasting and most impactful aspects of Trump's single disgraceful term in office: a less diverse, significantly more conservative judiciary. In four years, 226 judges have been appointed, including 54 Circuit Court judges and 3 Supreme Court Justices. 76% of Trump's appointees were men, and 84% were White. Astoundingly, Trump appointees comprise over a quarter of the nation's federal judiciary overall, with the share even greater at the appellate levels. The average age of Trump's appointed judges is 50, and all three of his Supreme Court picks are under the age of 55. This means that – given the average retirement age of most judges – Trump's picks will continue to sit on the nation's courts and shape our jurisprudence for several decades.

It is more than unfortunate that the federal judiciary has taken such a halting leap backwards in terms of reflecting the growing diversity of the Nation. In the Seventh Circuit, for instance, 30% of residents are racial minorities; yet every single Circuit Court judge is White. A federal judiciary that is

so grossly unrepresentative of the communities it serves is greatly hindered in its ability to administer equal justice. Sadly, research and statistics support that a whiter, more heavily male judiciary is likely to be less sympathetic to people of color and women on legal issues related to race and gender. This is frequently borne out in the employment context, where plaintiffs must often turn to the courts to combat the effects of discrimination in the workplace – both systemic and acute, subtle and overt.

President Biden took part in hundreds of confirmations during his years on the Senate Judiciary Committee, and early indications reveal that as President, he will seek to restore some semblance of balance to the nationwide bench. There are already a number of Circuit Court openings to fill, and over a third of federal appeals court judges will be eligible to step back from active service in coming years. Supreme Court Justice Stephen G. Breyer, 82, is likely to retire in the next few years, and President Biden has already pledged that his first Supreme Court nominee would be a Black woman – an historic first. Given the demographic diversity of President Biden's administration nominees and confirmed Cabinet members, we are optimistic that the next eight years will see the reshaping of the federal bench to more closely mirror our melting pot of a country – and to enhance equity and justice for all. 🇺🇸



Windsor County Court House, Vermont

Employment Policy Goals under the Biden Administration

By Madeline K. Engel

During his presidential campaign and since his election in November 2020, President Biden has stressed his commitment to strengthening workers' rights and improving work conditions in the U.S. He identified three primary focus areas to that end: Tamping down corporate abuses of power in the employment context; incentivizing workforce organization and collective bargaining; and improving the standards for pay, benefits, and protections at all workplaces. Chief among these, he has voiced support for increasing the federal minimum wage – which has sat stagnant at \$7.25 per hour for over a decade – to \$15 per hour.

Several other goals have also crystallized in the Biden administration's early days. Some of these are tied directly to

efforts to blunt the economic and other devastating impacts of the COVID-19 pandemic on workers. These include expanding unemployment benefits through September 2021, providing back hazard pay to frontline and other essential workers; renewing and expanding coverage of the paid sick and family leave provisions of the Families First Coronavirus Response Act; and authorizing OSHA to issue and enforce a nationwide COVID-19 protection standard.

Outside of the pandemic response context, other policy goals include adopting a relaxed, straightforward test for determining joint employer liability under the FLSA and labor laws; making misclassification of employees as independent contractors a substantive

violation of federal law; requiring employers bidding for federal contracts to demonstrate historic compliance with labor and employment laws; and dramatically expanding the definition of an employee under the National Labor Relations Act to capture more workers currently excluded as independent contractors and supervisors.

With the Senate now under narrow democratic control, it remains to be seen whether – and how – the administration can achieve these goals. If President Biden is unable to accomplish his desired ends through formal legislation, he may turn to executive orders to implement his new policies. 🗳️

Pragmatic Changes Arrive for Illinois Practitioners

By Alexis D. Martin

When it comes time for briefing, Illinois practitioners will find a dearth of State case law as compared with federal decisions. In part, this is due to the fact that federal trial courts may have their opinions published whereas Illinois trial courts rarely issue written opinions, let alone have them easily accessible online. Considering that the Circuit Court of Cook County – the nation's second largest unified court system – still uses handwritten orders and carbon paper, this is hardly surprising. Yet, when crafting an argument, perhaps the most aggravating stumbling block has been Illinois Supreme Court Rule 23.

Due to the fact that research was primarily limited to books, in the 1990s the Illinois Supreme Court decided to limit the number of precedential decisions because, according to Chief Justice Michael A. Bilandic there was “an avalanche” of Appellate Court decisions that were too lengthy for publication in the reporters. As a result, a substantial number of appellate decisions were tacked with the Rule 23-U designation, which prohibited parties from citing the opinions except in very narrow circumstances. In the past decade, books have been largely abandoned in favor of online research services. Thankfully,

the Illinois Supreme Court has now recognized that these technological changes have effectively rendered the original purpose for Rule 23 moot. As a result, effective January 1, 2021, Rule 23 has been amended to allow practitioners to cite such cases for their persuasive value, which is a pragmatic amendment that will benefit parties and practitioners by providing greater guidance.

Additionally, for the first time in two decades, Cook County has a new Circuit Court Clerk. Iris Martinez assumed the office of Clerk of the Circuit Court of Cook County in December 2020.

Pragmatic Changes Arrive for Illinois Practitioners (cont.)

The outgoing Clerk, Dorothy Brown's tenure was marked by a number of scandals and criticisms levelled at her office for cumbersome processes and archaic systems. While other Illinois circuit courts had already implemented call-in procedures for certain proceedings, it took a global pandemic for Cook County to utilize remote hearings. Indeed, many judges now require

electronic courtesy copies and their clerks have taken to corresponding with attorneys by email. Ms. Martinez campaigned on a promise to modernize Cook County's technology. This past year revealed that the Cook County Circuit Court Clerk's office can move rapidly when necessary. Perhaps with Ms. Martinez at the helm, the Clerk's office will finally address many

of its longstanding technological deficiencies to increase accessibility and streamline proceedings. We are particularly interested to see if the Clerk creates online access to case files, streamlines the existing e-filing system, if Zoom hearings continue, and, of course, if carbon paper will finally be retired. ☞

One of the Many Lessons Learned from the Pandemic: This Country is in Need of Guaranteed Paid Leave for Workers

By Katherine E. Stryker

In a country that has historically provided minimal legal protections for workers, the pandemic has certainly exposed how vulnerable our workforce truly is and the need for reform going forward.

The Families First Coronavirus Response Act ("FFCRA"), which went into effect in April of last year, was a step in the right direction. The FFCRA provided workers two main benefits: two weeks of paid sick leave due to COVID-19 related reasons and expanded paid leave under the Family Medical Leave Act ("FMLA") for COVID-19 related child-care issues.

While there is no denying that the FFCRA provided some critical benefits to workers, it did not go far enough. The Act only applied to employers with fewer than 500 employees and provided a broad exemption for employers with fewer than 50 employees. This means that most of the country's essential workforce was left out to dry – forced to choose between going to work sick or not being able to pay their bills. Not to mention, the FFCRA expired on

December 31, 2020 and Congress failed to extend it into 2021. The pandemic is clearly still an ongoing crisis and workers are desperately in need of some form of job protection.

Thankfully, the new Biden administration has already called for Congress to not only extend the FFCRA protections, but also remove the broad exemptions for employers with more than 500 and fewer than 50 employees. President Biden presented this policy to Congress, among many other crucial COVID-19 related policy proposals, in his emergency stimulus package titled The American Rescue Plan ("ARP"). In the meantime, while we await Congress' action on the ARP, it is left up to the good will of employers to implement their own COVID-19 policies that protect workers faced with issues such as child-care, direct exposure to COVID-19, contracting COVID-19, or caring for a loved one with COVID-19.

But whether we are experiencing a pandemic or not, the truth

remains: workers are in need of guaranteed paid leave for reasons such as dealing with health issues, pregnancies, or caring for family members with serious health conditions. Workers being forced to choose between a paycheck and their health is not a novel issue – the pandemic has just exacerbated the issue. This is why Democrats in Congress are using this opportunity to spark dialogue again for the need for national paid leave in this country. For instance, on February 5, 2021, Senator Kirsten Gillibrand and Congresswoman Rosa DeLauro introduced legislation that would provide workers the right to receive up to 66% of their monthly wages for up to a 12-week period due to health conditions, pregnancy, childbirth, child adoption, or to care for a sick family member. This is not the first time this type of legislation has been introduced; however, Democrats believe that there has never been a better time to persuade members of Congress on both sides of the aisle that job protections for workers like this are imperative. ☞