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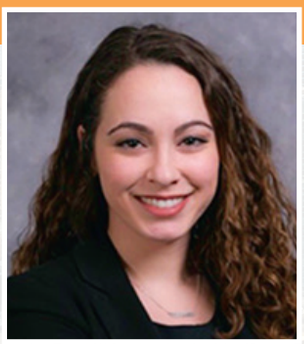
LAW OFFICES

Caffarelli & Associates LIMITED

News and Information for Clients and Friends

Katherine Stryker Joins Caffarelli & Associates Ltd.



Caffarelli & Associates Ltd. is proud to announce that Katherine Stryker has joined the firm as an Associate (admission pending). Ms. Stryker received her Juris Doctorate from Chicago-Kent College of Law in May of 2019, where she graduated with a joint certificate in Alternative Dispute Resolution & Workplace Litigation.

During law school, Ms. Stryker worked diligently to gain practical experience outside of the classroom, focusing primarily on employment litigation. Ms. Stryker's time working as a law clerk at two Chicago-based law firms allowed her to gain hands-on experience in every stage of pre-trial litigation, including drafting complaints, discovery requests and responses, and substantive motions. Working on both sides of the bar has taught her to be versatile and has prepared her to analyze legal issues through different lenses. Additionally, as a judicial extern in the Chancery Division of the Circuit Court of Cook County for Judge Diane J. Larsen, Ms. Stryker regularly undertook in-depth analyses of a wide variety of complex legal issues.

Ms. Stryker was also an active member of the Moot Court Honor Society at Chicago-Kent, where she served as Vice President for the 2018-19 academic year. Ms. Stryker competed in a number of appellate advocacy competitions, including the Hunton Andrews Kurth National Moot Court Championship held annually in Houston, Texas. In the spring of 2018, Ms. Stryker received the award for Second Best Oral Advocate at the Evans A. Evans Constitutional Law Moot Court competition out of a field of 52 advocates. That same year, Ms. Stryker was awarded Best Overall Advocate when studying appellate advocacy abroad at St. Andrews University in Scotland. Aside from appellate advocacy, Ms. Stryker received the CALI Award for earning the highest grade in Trial Advocacy I, and she remained on the Dean's List each semester. Ms. Stryker sat for the July 2019 Illinois Bar Exam and her admission is pending.

In this Issue...

The Developing Law of Biometric Privacy

By Alexis D. Martin

Following the Illinois Supreme Court's landmark ruling in *Rosenbach v. Six Flags* last January, the wealth of litigation surrounding the Biometric Information Privacy Act ("BIPA") has begun to yield additional opinions further refining the proper interpretation of the law. Once *Rosenbach* found that plaintiffs need not establish actual damages, defendants have mounted other legal challenges, with particular focus on whether the Illinois Workers' Compensation Act ("IWCA") preempts BIPA, the applicable statute of limitations, and whether plaintiffs need to plead the elements of negligence. Although the Illinois Appellate Courts have yet to rule on these issues, a number of Cook County Circuit Courts have weighed in. See *Mims v. Freedman Seating Co.,* No. 18-CH-9806 (Ill. Cir. Ct. Aug. 22, 2019) (Demacopolous, J.); *Robertson v. Hostmark Hospitality Grp., Inc.,* No. 2018-CH-5194 (Ill. Cir. Ct. Jul. 31, 2019) (Cohen, J.) and *Fluker v. Glanbia Performance Nutrition, Inc.,* No. 2017-CH-12993 (Ill. Cir. Ct. Jul. 11, 2019)(Mitchell, J.); *McDonald v. Symphony Bronzeville Park, LLC, et al.,* Case No. 2017-CH-11311 (Ill. Cir. Ct. June 17, 2019) (Mitchell J.)

First, these opinions found that BIPA claims do not fall within the IWCA's exclusivity provision because a BIPA injury constitutes a violation of the plaintiff's privacy due to the mismanagement of his or her biometric data. A violation of the statutory right to maintain privacy in one's biometric data (i) is not the type of injury that falls within the purview of the IWCA, (ii) is not a physical or psychological injury and thus not compensable under the IWCA, and (iii) is not a risk or hazard peculiar to the plaintiffs' specific type of employment.

Second, several courts have held that the five-year "catch-all" statute of limitations for civil actions applies to BIPA. BIPA does not contain a limiting provision. Some defendants have argued that BIPA should be subject to the one-year limitations period for privacy claims, 735 ILCS 5/13-201, or that BIPA's liquidated damages are penal and, therefore, subject to a two-year statute of limitations as set forth in 735 ILCS 5/13-202. Several decisions reject these arguments, finding that: (i) Section 13-201 applies to privacy claims only where publication is an element of the claim, and (ii) Section 13-202 does not apply because BIPA is a remedial, not penal, statute. Additionally, the 9th Circuit recently affirmed class certification in the matter of *Patel v. Facebook*, No. 18-15982 (Aug. 8, 2019), for a class encompassing the five-year period preceding the filing of the complaint, though the opinion did not analyze the applicable limitations period.

Finally, the Court in *Mims* applied *Rosenbach* to find that a plaintiff need not plead negligence in order to seek liquidated damages. *Rosenbach* determined that actual damages are not necessary in order for a plaintiff to be "aggrieved" and seek liquidated damages under BIPA. The elements of a negligence claim require a showing of damages. As such, *Mims* held that plaintiffs do not need to plead the elements of negligence in order to state a claim under BIPA.

Despite *Rosenbach*, the question of Article III standing remains unsettled in federal court. Multiple opinions issued from the Northern District of Illinois have held that BIPA violations without actual damages fail to connote an injury-in-fact. However, the issue has become more nuanced. In *Miller v. Southwest Airlines*, 926 F. 3d 898, the 7th Circuit found Article III standing for the unionized employees of an air carrier because a change to the method of clocking in and out of work constituted a change in the terms and conditions of work. According to the *Miller* court, under the Railway Labor Act, such a change would constitute a concrete injury sufficient to confer Article III standing. Separately, the 9th Circuit held in *Patel* that BIPA violations are an invasion to one's constitutional right to privacy, not merely a statutory right. Consequently, Article III standing exists for individuals whose biometric information was gathered without their knowledge because an invasion of the constitutional right to privacy is a particularized injury.

While significant legal questions remained unsettled under BIPA, the courts are adhering to a primary feature of the *Rosenbach* decision: BIPA is a clearly written statute and additional limitations or requirements cannot or should not be read in to the law. Caffarelli & Associates currently has a number of BIPA cases pending in state and federal court and looks forward to further participating in the growing body of case law interpreting this important statute.

Sweeping California Consumer Privacy Law to Take Effect in 2020

By Lorrie T. Peeters

Come 2020, California will become the fourth state (after Illinois, Texas, and Washington) to have a comprehensive biometric privacy law in place. The California Consumer Privacy Act ("CCPA") goes into effect on January 1 of the new year, and is intended to provide California residents and their households with control over the way their "personal information" is handled by corporations. The California legislature passed the CCPA largely in response to the misuse of personal data carried out in 2018 by the data mining firm Cambridge Analytica. It came to light at that time that tens of millions of people had their personal data sold, shared, or otherwise misused; and so the California legislature sought to implement and enforce broad transparency in the collection, sharing, and sale of residents' personal information.

In many ways, the CCPA has the broadest scope of any consumer privacy protection statute enacted to date. Protected personal information includes but is not limited to biometric information (for example, DNA, fingerprints, facial recognition, etc.); social security numbers; drivers' license numbers; e-mail addresses; employment-related information; geolocation data; postal addresses; purchase histories; records of personal property; and internet activity information such as browser history and search history. "Personal information" does not include publicly available information, i.e. information lawfully made available from federal, state, or local government records. The law specifies that "publicly available" does not mean biometric information collected by a business about a consumer without the consumer's knowledge. Generally, the CCPA provides California residents (1) the right to know what categories and specific pieces of information is being collected about them, and what that information is used for; (2) the right to prohibit businesses from selling or sharing their information by opting out of the practice or asking the business to delete their information; and (3) protections against businesses that compromise their personal information.

One limiting factor of the CCPA is that businesses must meet certain large thresholds before the law will apply to them. Specifically, they must (1) generate annual gross revenue exceeding $25M; (2) receive or share personal information of more than fifty thousand California residents annually; or (3) derive at least fifty percent of their annual revenue by selling the personal information of California residents.

The CCPA is only the second biometric privacy law (after the Illinois Biometric Information Privacy Act ("BIPA")) to provide consumers with a private right of action. However, it appears that the CCPA requires a greater showing of harm than that required under BIPA before litigation may proceed. Specifically, a plaintiff can only file suit if their personal information "is subject to an unauthorized access and exfiltration, theft or disclosure as a result of the business' violation of the duty to implement and maintain reasonable security procedures and practices." The CCPA also provides that a consumer must provide the business with a 30-day notice and cure period prior to filing suit. Assuming that the business does not cure the violation in that time, the consumer may proceed with an individual or class action lawsuit, and recover between $100-$750 in statutory damages "per incident," or actual damages. The California Attorney General must be informed of any CCPA litigation, and may decide to prosecute an action against any violation, seeking up to $7500 per violation for intentional acts.

Caffarelli & Associates Ltd. has been on the forefront of biometric privacy litigation in Illinois, and looks forward to levying that experience to help shape the contours of the CCPA in favor of California residents.

California Reclassification Law Expected to Reshape the Gig Economy

By Lorrie T. Peeters

Beginning on January 1, 2020, companies will have to designate their workers as "employees" instead of "contractors" if the companies exert control over how the workers perform their duties, or if their work is part of the company's regular business. This is a significant change, and it is estimated that the new law will affect at least one million workers in California alone.

As newly-classified employees, workers will gain entitlement to enhanced statutory rights and protections, basic protections for minimum wages and overtime, employment benefits, and programs such as unemployment insurance and workers' compensation. It is expected that some small business and the so-called "gig economy" - companies like Lyft, Uber, DoorDash, and the like, which rely on "contract work" to service customers - will see this change as an existential threat. Under the new law, these businesses will have to restructure and adapt to the change, ultimately benefiting the throngs of workers in California who perform the services vital to their function.

Given California's size and economy, it is likely that this new law will re-shape the treatment of gig economy workers across the nation. More immediately, Starting on January 1, the majority of workers still treated and compensated as "contractors" in California will likely be able to move forward with legal action in order to obtain the benefits of employment due them as a result of the new law.

New Illinois Employment Laws for 2020

By Katherine E. Stryker

Illinois recently enacted several laws that strengthen protections for workers, particularly as it relates to sexual harassment.

On August 9, 2019, Illinois Governor J.B. Pritzker signed the Workplace Transparency Act ("WTA") into law, which directly addresses employers' longstanding practices of concealing sexual harassment and discrimination claims. There are two critical changes the WTA imposes onto employers: (1) restrictions on non-disclosure, non-disparagement, and arbitration clauses; and (2) mandatory reporting.

Starting January 1, 2020, employers can no longer enter into employment agreements that prevent employees from making truthful statements or disclosures about discrimination or harassment claims. The WTA also restricts an employer's ability to implement arbitration clauses for harassment and discrimination claims. However, it is unclear how this restriction will interact with the Federal Arbitration Act ("FAA"). Until there is a judicial opinion addressing the apparent conflict, there is likely to be uncertainty among employers about enforcing these arbitration clauses. Additionally, the WTA amends the Illinois Human Rights Act ("IHRA") to impose a mandatory reporting obligation. The amendment requires all employers to make annual reports of any adverse judgments, administrative rulings, or even past settlements involving alleged harassment or discrimination to the Illinois Department of Human Rights ("IDHR").

The WTA also amends the IHRA to expand the definitions of "employer" and "unlawful discrimination." A covered "employer" now includes any entity that employs at least one or more employees, instead of the previously covered entities employing 15 or more employees. Further, the IHRA amends "unlawful discrimination" to now cover discrimination based on "perceived" protected characteristics—a concept that previously only applied to disability and sexual orientation discrimination, but now applies to all protected classes.

The WTA also amends the Illinois Victims' Economic Security and Safety Act ("VESSA"), a 2003 statute that provides unpaid protected leave to victims of domestic and sexual violence. Effective January 1, 2020, VESSA will cover all entities employing one or more persons, and will add a new category of protection for victims of gender violence.

Separately, hotels and casinos operating in Illinois will face additional requirements for protecting their employees' safety. Starting July 1, 2020, the Hotel and Casino Employee Act will require hotels and casinos to provide employees who work alone in guest rooms, restrooms or casino floors, with a safety or notification device that will signal for help if the employee feels that he or she is facing the threat of an ongoing crime, sexual harassment, assault, or other emergency.

Illinois also recently passed legislation that addresses another perpetual issue in the workplace: the gender wage gap. The Illinois Equal Pay Act ("EPA"), enacted in 2003, makes it illegal to discriminate with respect to pay on the basis of sex or race. On July 31, 2019, Governor J.B. Pritzker signed into law an amendment to the EPA making it illegal for employers to inquire about a job applicant's salary history. The EPA amendments become effective on September 29, 2019.