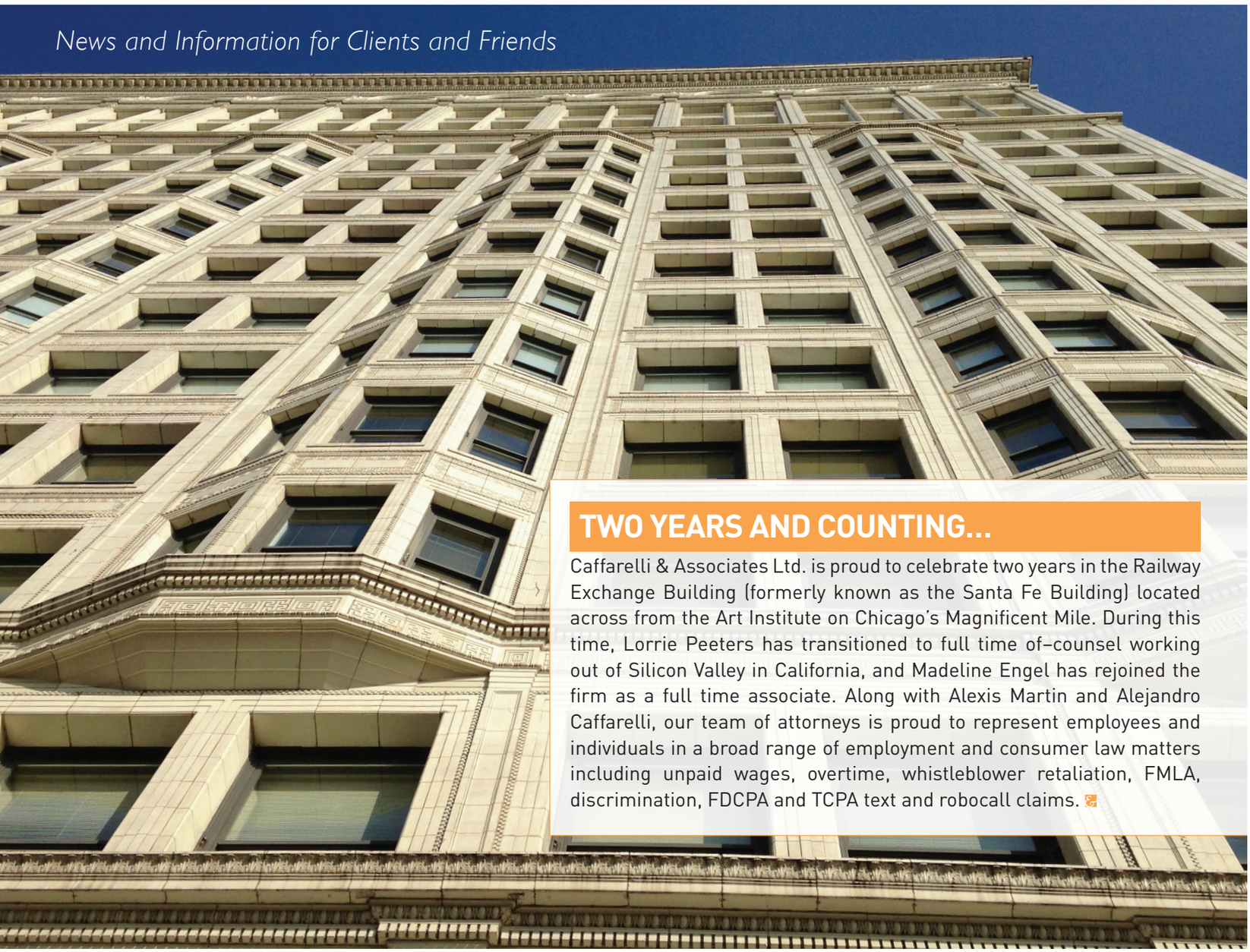
FALL 2016

LAW OFFICES

Caffarelli & Associates LIMITED

News and Information for Clients and Friends



TWO YEARS AND COUNTING...

Caffarelli & Associates Ltd. is proud to celebrate two years in the Railway Exchange Building (formerly known as the Santa Fe Building) located across from the Art Institute on Chicago's Magnificent Mile. During this time, Lorrie Peeters has transitioned to full time of–counsel working out of Silicon Valley in California, and Madeline Engel has rejoined the firm as a full time associate. Along with Alexis Martin and Alejandro Caffarelli, our team of attorneys is proud to represent employees and individuals in a broad range of employment and consumer law matters including unpaid wages, overtime, whistleblower retaliation, FMLA, discrimination, FDCPA and TCPA text and robocall claims.

In this Issue...

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NEW ILLINOIS AND LOCAL EMPLOYMENT LAWS

This year has seen an uptick in new and expanded employment laws in the State of Illinois, as well as the City of Chicago.

New laws of note include:

The Illinois Child Bereavement Act

Under the Illinois Child Bereavement Act, Illinois employers with at least 50 employees must provide employees who suffered the loss of a child with up to two weeks of unpaid leave to allow for grieving. The law also provides for a cause of action against employers who retaliate against employees who attempt to take bereavement leave or oppose practices that violate the law, among other things. Note, however, that the bereavement leave must be completed within 60 days after the employee becomes aware of the death, the employee must provide the employer with at least 48 hours' advance notice (unless providing such notice is not reasonable and practicable), and an employer may require reasonable documentation before granting leave (such as a death certificate or a published obituary). The law took effect immediately upon the Governor's signature on July 29, 2016.

The Illinois Employee Sick Leave Act

Although the federal Family and Medical Leave Act already requires covered employers to provide eligible employees with up to 12 weeks' unpaid leave to care for family members, this new law expands the types of family members that are covered by an employer's sick leave policy. While the new law does not in and of itself require employers to offer sick leave, it does require employers who voluntarily provide it to also permit employees to use that time to care for the employees' immediate family members, parents-in-law, grandchildren or grandparents. The law takes effect on January 1, 2017.

The Illinois Freedom to Work Act

The Illinois "Freedom to Work" Act will prohibit employers of any size from entering into non-competition agreements with low wage employees, which under the Act are defined as employees earning less than $13.00 per hour. The introduction and passage of this law follows national press coverage of Jimmy John's non-compete agreements, which prohibited workers during their employment and for two years after from working at any other business that sells "submarine, hero-type, deli-style, pita, and/or wrapped or rolled sandwiches" within two miles of any Jimmy John's restaurant in the United States. Jimmy Johns operates over 2400 shops in 46 states. The law takes effect on January 1, 2017.

Illinois Domestic Workers' Bill of Rights

The law amends the Illinois Human Rights Act to cover sexual harassment and other forms of employment discrimination to domestic workers in Illinois, so long as they work more than 8 hours per week in the aggregate. Domestic workers include nannies, housekeepers, private caregivers, and other domestic workers. Prior to the amendment, domestic workers were specifically excluded by the Illinois Human Rights Act. The new law also extends coverage to domestic workers under the Illinois Minimum Wage Law, the Illinois One Day Rest in Seven Act, and the Illinois Wages of Women and Minors Act, and takes effect on January 1, 2017.

City of Chicago Requires Paid Sick Leave

As of July 1, 2017, the City of Chicago will require employers to provide employees with paid sick leave. This new Ordinance will apply to all employers that maintain a facility within the City or who are subject to any of the City's licensing requirements. After a 6 month probationary period, the law covers all employees who perform at least 2 hours of work within the City in any 2-week period, and who work at least 80 hours during any 120-day period. Employers will be required to provide 1 hour of paid sick leave for every 40 hours worked, up to a maximum of 40 hours in each 12-month period. Employees will be allowed to carry over 2.5 paid sick days into the following 12-month period, but employers will not be required to pay employees for unused sick days. Similar to the federal Family and Medical Leave Act, eligible employees will be able to use paid sick leave for their own illness, injury or medical care, as well as to care for covered family members, including domestic partners.

ALEJANDRO CAFFARELLI & ALEXIS MARTIN PREVAIL IN FEDERAL FLSA TRIAL

On April 26, 2016, Alejandro Caffarelli and Alexis Martin of Caffarelli & Associates Ltd. tried a case before the Honorable Magistrate Judge Soat Brown in the District Court for the Northern District of Illinois. Mr. Caffarelli and Ms. Martin represented Plaintiff Juan Valentin Hernandez against The View restaurant, the Defendant. Mr. Hernandez was a former cook for the View who was paid a fixed salary instead of on an hourly basis, and who regularly worked in excess of 40 hours per week. The day-long bench trial focused on whether the Defendants had failed to pay the Plaintiff overtime wages, in violation of the federal Fair Labor Standards Act (FLSA) and Illinois Minimum Wage Law (IMWL). On May 11, 2016, the Court issued a decision in favor of Mr. Hernandez, holding that "an employer cannot lawfully agree with its employees that they will receive the same sum, comprising both straight time and overtime compensation, in all weeks without regard to the number of overtime hours worked in any workweek. 29 C.F.R. § 778.500(b). Likewise, an employer does not comply with the law by paying a fixed salary or paying a lump sum for overtime." Caffarelli & Associates Ltd. is proud to represent employees from all walks of life, from restaurant workers to Fortune 500 executives. For a copy of the Court's opinion, or for further information about the trial or any other matter, please contact the Firm at 312.763.6880.

THE LIABILITY LOOPHOLE FOR SECONDARY EMPLOYERS UNDER THE FMLA

Due to the proliferation of temporary placement agencies, the number of employees working for two employers has risen dramatically. By using placement agencies, the jobsite company is able to limit its exposure to liability. Yet, the FLSA and FMLA recognize that a single employee may work for joint employers. Under the FLSA, the standards for how to determine the existence of joint employers are well established and fairly straightforward. However, the courts have rarely examined the joint employer relationship under the FMLA. The Seventh Circuit has found that the "joint-employer regulation in the FLSA mirrors that in the FMLA" such that it applies the FLSA analysis to the FMLA. See Moldenhauer v. Tazewell-Pekin Consol. Commc'ns Ctr., 536 F.3d 640 (7th Cir. 2008). However, practitioners should be aware that the similarities in how the FLSA and FMLA treat joint employers end with the analysis to determine the existence of such a relationship.

Crucially, once a joint-employer relationship is established under the FMLA, the court must determine which entity is the primary employer and which is the secondary employer (note that "joint employers" are distinct from "integrated employers"). See 29 CFR 825.106. The Code of Federal Regulations has created the default presumption that a joint-employer relationship exists for a temporary placement agency and the jobsite company. The regulation established the presumption that the placement agency is the primary employer. The primary-secondary inquiry centers on the degree of control each employer exercises over the employee, including the ability to hire, fire, discipline, and maintain payroll and other employment benefits. As a practical reality, the jobsite company often exercises more day-to-day control over the employee. Yet, the courts have deferred to the default position that the jobsite company is typically the secondary employer. Diaz v. Legion Personnel, No. 10 C 1500, 2010 WL 3732768 (N.D. Ill. Sept. 15, 2010) (Guzman, J.).

The key issue is the division of responsibility and liability. Under the FLSA, joint employers are jointly and severally liable. Under the FMLA, the secondary employer has minimal responsibility and minimal liability. The primary employer is responsible for providing all statutorily mandated notices (designation, eligibility, and rights and responsibilities) to the employee. See 29 CFR 825.106(d). The primary employer is responsible for investigating, granting, and administering leave. Indeed, the only responsibility that the secondary employer carries under the FMLA is to reinstate the employee at the end of the leave – that is, assuming that the secondary employer continues to utilize an employee from the placement agency (i.e. primary employer) and the agency chooses to place the employee with the secondary employer. See 29 CFR 825.106(e). The only other limitations are that the secondary employer cannot discriminate against an employee for taking FMLA leave or interfere with his or her rights to take leave.

Due to the limited responsibilities for secondary employers it may seem that pursuing the secondary employer is a waste of time. However, pursuing one employer on its own may fail to establish liability. For instance, when an employee works at a jobsite company for two years, but has only been employed with the placement agency for six months, the plaintiff will need to establish the joint employment relationship in order to prove he was eligible to receive FMLA benefits because the time spent working at the jobsite company is also counted against the placement agency. See Salgado v. CDW Computer Centers, Inc., No. 97 C 1975, 1998 WL 60779 (N.D. Ill. Feb. 5, 1998) (Hart, J.). Moreover, should the plaintiff pursue one entity only to have the court later determine that the defendant is actually the secondary employer, the plaintiff would likely be unable to establish liability or recover any damages. To date, few opinions have found secondary employers liable or even performed an analysis of what it would take to find a secondary employer liable. The courts thus far have merely ascertained the existence of the relationship, and reiterated the division of labor.

In January 2016, the DOL published Fact Sheet #28N regarding the responsibilities of primary and secondary employers under the FMLA. The Fact Sheet is a quick guide on how to determine which entity is the primary employer, and the responsibilities of the primary versus secondary employer. However, the information contained in the Fact Sheet was not new. Interestingly, following the publication of the Fact Sheet, a large number of management-side employment practitioners responded as though groundbreaking information had been disclosed. This reaction, coupled with the lack of litigation on the issue, raises the specter that increasing focus will be placed upon the role of primary versus secondary employer. As such issues begin to be litigated, plaintiff's practitioners will need to be creative to establish precedent concerning unlawful interference by secondary employers. Consider an employee who attempts to return from FMLA leave. The secondary employer informs the primary employer that the employee must obtain a fitness for duty certificate before he will be permitted to return. The primary employer did not request or require a fitness for duty certificate until the secondary employer requested it. Does this constitute a failure to reinstate? Has the secondary employer interfered by imposing conditions upon accepting the returning employee that are outside the discretion of the secondary employer?

As the 5th Circuit observed: "[t]he statute and regulations demonstrate that 'interference' requires something more to create liability against a secondary employer." Cuellar v. Keppel Amfels, L.L.C., 731 F.3d 342, 347-48 (5th Cir. 2013). When undertaking claims involving a secondary employer, practitioners must consider the full breadth of what "interference" can mean in order to demonstrate that "something more" to establish that liability for secondary employers does exist and is more than a mere hypothetical scenario envisioned within the CFR.

THE PRESIDENTIAL ELECTION WILL HAVE AN ENORMOUS IMPACT ON AMERICAN JURISPRUDENCE

With the February death of Supreme Court Associate Justice Antonin Scalia, the Court lost the longest-running and perhaps the most outspoken member of its conservative wing. As it seems increasingly unlikely that the Senate will step up to meet with and confirm President Obama's replacement nominee Merrick Garland, the next Supreme Court justice will be appointed by either Hillary Clinton or Donald Trump. Not to mention, three of the current eight justices are age 77 or older; the next President may find herself in the position to "stack the deck" and shift the ideological makeup of the nation's highest court for a generation.

Several employment and consumer law cases will likely be decided in the next year, and countless others in the decades to follow. The makeup of the Court will have a significant and lasting impact on employee and consumer rights for the foreseeable future, and will affect not only the day-to-day conditions and rights for individuals, but also lawyers' abilities to pursue justice on behalf of their clients. The Court's October 2016-2017 term is nearly underway, and while there are not as many employment cases on the docket as in this past term, the Court will surely add several over the next presidential term.

For instance, Microsoft Corp. v. Baker will be argued in coming months. The Court is set to determine whether a federal court of appeals has jurisdiction under both Article III and 28 U.S.C. 1291 to review an order denying class certification after the named plaintiffs voluntarily dismiss their claims with prejudice. Currently, litigants in the Ninth Circuit are permitted to immediately appeal any order denying class certification by dismissing their case with prejudice, then appealing the resulting order to the higher court. Opponents of this voluntary dismissal rule argue that the rule provides plaintiffs with an unequal advantage in seeking immediate appellate review of class certification decisions. While Baker is not, itself, an employment law case, its implications will impact class actions in the employment and consumer law arenas. There is currently a circuit split with respect to the issue to be decided in this case. The Ninth and Second Circuits permit voluntary dismissal as a vehicle for review, while the remainder of the nation, including the Seventh Circuit, forbids the tactic.

This and other cases will shape the face of litigation, particularly with respect to the effectiveness of class actions (a significant vehicle for change and protection in both the employment and consumer contexts). The Supreme Court has historically played a vital role in workplace and consumer rights, and we cannot underestimate the importance of this next Presidential election in equipping individuals with the best possible chance for fair treatment and justice.