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New Jersey Court Extends Whistleblower Statute to Protect Independent Contractors

On February 23, 2006, the New Jersey Superior Court, Appellate Division, ruled that the definition of "employee" in the Conscientious Employee Protection Act (CEPA) hinges on an employer's "control and direction" of the worker. Further, the court found that this definition might allow a worker classified as an independent contractor under common law to qualify as an "employee" for CEPA purposes. *D'Annunzio v. Prudential Insurance Company of America*. This definition is significantly broader than the definition of a protected "employee" under the New Jersey Law Against Discrimination (LAD). As set forth below, the effects of this decision are significant, and New Jersey employers should be wary of terminating any independent contractor who makes any complaints regarding an employer's conduct. In such a situation, an employer must first evaluate to what extent the employer has "control and direction" of that worker in order to assess potential whistleblower liability.

In *D'Annunzio*, the plaintiff, a licensed chiropractor, contracted with defendant Prudential Property and Casualty Insurance Company (PRUPAC) to work in PRUPAC's Personal Injury Department as a chiropractic medical director. As a medical director, the plaintiff was required to determine the need for chiropractic care, testing, and independent medical evaluation of PRUPAC insureds; to identify fraudulent practices and inappropriate referrals; and to assist PRUPAC's Special Investigation Unit. After six months, the plaintiff's contract was terminated. The plaintiff claimed that PRUPAC and its representatives terminated him in violation of CEPA in retaliation for his complaints that PRUPAC took part in unethical and illegal practices.

The trial court dismissed the plaintiff's CEPA claim on summary judgment on the basis that plaintiff was not eligible to commence a CEPA action, because he was an independent contractor, not an employee. The Appellate Division analyzed the scope of the term "employee" under CEPA. The court found that the legislature clearly intended for CEPA to afford protections to a broader scope of "employees" than those protected under the LAD. The court based its opinion on a number of findings. First, the definition of "employee" found in CEPA is different from the definition found in the LAD. Second, the LAD's definition of

"employee" is based on prior federal history and other anti-discrimination laws and does not apply to CEPA, as CEPA has no applicable federal antecedent. Third, CEPA is intended to vindicate different public interests than the LAD, so it does not necessarily follow that CEPA's definition of "employee" should follow in lockstep with the definition contained in the LAD.

The court explained that CEPA's primary purpose is to encourage workers to voice concerns about the unlawful activities of employees and coworkers. Therefore, to satisfy that purpose, the court found that the following factors must be utilized to determine whether a worker can properly assert a CEPA claim: 1) the employer's right to control the means and manner of the worker's performance, 2) the kind of occupation—supervised or unsupervised, 3) who furnishes the equipment and workplace, and 4) the manner of termination of the work relationship.

The court remanded to the trial court the issue of whether the plaintiff in *D'Annunzio* was himself a worker who fit CEPA's definition of "employee." But the court did cite several aspects of plaintiff's work and relationship with PRUPAC that suggested he might fit the definition. These include the fact that plaintiff had his own cubicle with a nameplate and a PRUPAC-provided computer, e-mail address, and supplies; the plaintiff received training from PRUPAC; and all letters and faxes created by the plaintiff were on the PRUPAC letterhead. The court also noted that PRUPAC's ability to control the plaintiff's performance was further suggested by the plaintiff's assertion that PRUPAC pressured him to meet its expected approval rate for treatment requests.

In the wake of the *D'Annunzio* decision, employers should be wary of terminating independent contractors. Further, when employers do terminate workers they must take steps to ensure that they are aware to what extent they maintain "control and direction" of those independent contractors. If it is determined that they do have "control and direction" over a worker they wish to terminate, an employer should inquire as to whether this employee has voiced any concerns protected by CEPA. If that worker has, the employer should seek counsel before terminating such a worker. It is important to note that the *D'Annunzio* court did not determine whether workers such as independent contractors will always be considered "employees" for CEPA purposes. Instead, the court set forth the aforementioned factors that employers should review when assessing their "control and direction" of their workers.

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Please feel free to contact **James P. Flynn** in the firm's **Newark** office at 973/639-8285 if you have any questions or comments. Mr. Flynn's e-mail address is **jflynn@ebglaw.com**. **Dina C. Kerman**, an associate in the Labor and Employment Department, assisted in the preparation of this alert.