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## More Protection for Whistleblowers

Amendments to CEPA, and recent decisions, enhance scope, strengthen enforcement

**By Maxine Neuhauser, James Flynn,  
Dina Kerman and Daniel Levy**

**O**n Jan. 12, 2006, the New Jersey legislature amended the state's whistleblower law, the Conscientious Employee Protection Act (CEPA), to include protection against retaliation of employees who disclose or refuse to participate in employer "deception of, or misrepresentation to, any shareholder, investor, client, patient, customer, employee, former employee, retiree or pensioner of the employer or any governmental entity." The amendment strengthened the enforcement provisions of CEPA by (1) making certain remedies mandatory for a court to order upon a finding of a violation of the statute; (2) raising the maximum civil fine for a first violation from \$1,000 to \$10,000 and from \$5,000 to \$20,000 for each subsequent violation; and (3) exempting punitive damages awarded under CEPA from the limits contained in New Jersey's Punitive Damages Act. The amendment became effective immediately.

Under CEPA, employers are forbidden to retaliate against employees who (a) disclose, or threaten to disclose, to a supervisor or public body any activity, policy or practice of the employer, or another employer who has a business relationship with the

employer, that the employee reasonably believes (1) is in violation of a law, or a rule or regulation promulgated pursuant to law; or (2) is fraudulent or criminal; (b) provide information or testimony to any public body conducting an investigation, hearing or inquiry into any violation of law by the employer, or another employer who has a business relationship with the employer; or (c) object to or refuse to participate in any activity, policy or practice that the employee reasonably believes (1) is in violation of a law, or a rule or regulation promulgated pursuant to law; (2) is fraudulent or criminal; or (3) is incompatible with a clear mandate of public policy concerning the public health, safety or welfare or protection of the environment.

The amended law enhances the scope of CEPA by expressly including protection for "any activity, policy, or practice of deception or misrepresentation which the employee reasonably believes may defraud any of the employer's shareholders, investors, clients, patients, customers, employees, former employees, retirees or pensioners, or any governmental entity." In addition, the amendment also strengthens the enforcement provisions of CEPA in three significant ways.

First, the amendment requires a court in a civil action to order the following remedies, where appropriate, when there has been a violation of the statute: (1) an injunction to restrain any violation of CEPA that is continuing at the time that the court issues its order; (2) the reinstatement of the plaintiff-

employee to the same, or an equivalent, position held before the retaliatory action; (3) the reinstatement of full fringe benefits and seniority rights; (4) the compensation for all lost wages, benefits and other remuneration; and (5) the payment by the employer of reasonable costs, and attorney's fees. These remedies existed previously, but the amendment makes clear that they are mandatory, not discretionary.

Second, the enforcement provisions increase the civil fines that may be assessed for an employer's violation of CEPA. The amendment allows the court or jury, in addition to the remedies stated above, to assess a civil fine of not more than \$10,000 for the first violation of the statute and not more than \$20,000 for each subsequent violation. The civil fines are not mandatory, however, they may be ordered in the discretion of the court.

Third, the amendment exempts punitive damages awarded under CEPA from the cap on damages set by the Punitive Damages Act. Although the amendment does not change the prerequisites that a plaintiff must meet to establish entitlement to punitive damages, it expands the criteria a court or jury must consider in determining the amount of an award. The amendment directs the court to consider "not only the amount of compensatory damages awarded to the employee, but also the amount of all damages caused to shareholders, investors, clients, patients, customers, employees, former employees, retirees or pensioners of the employer, or to the public or any gov-

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*Neuhauser and Flynn are members of the labor and employment practice group at Epstein Becker & Green of Newark. Kerman and Levy are associates at the firm.*

ernmental entity, by the activities, policies or practices of the employer which the employee disclosed, threatened to disclose, provided testimony regarding, objected to, or refused to participate in.”

Recent case law also points to an expansion of CEPA’s definition of “employee.” Whether and when an independent contractor may be deemed an “employee” within the meaning of CEPA has been the focus of several recent decisions. Although the New Jersey Supreme Court has yet to rule, employers have reason to be wary.

On Feb. 23, 2006, the New Jersey Superior Court, Appellate Division, ruled that the definition of “employee” under CEPA hinges on an employer’s “control and direction” of the worker. *D’Annunzio v. Prudential Insurance Company of America*. Further, the court found that this criterion might allow a worker classified as an independent contractor under common law to qualify as an “employee” for CEPA purposes.

In *D’Annunzio*, the plaintiff, a licensed chiropractor, contracted with defendant Prudential Property and Casualty Insurance Company (PRUPAC) to work as a chiropractic medical director in PRUPAC’s Personal Injury Department. 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 alleged 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.

Guided by case law under the New Jersey Law Against Discrimination (LAD), the trial court granted PRUPAC’s motion for summary judgment, finding that the plaintiff was not eligible to commence a CEPA action because he was an independent contractor, not an employee. The Appellate Division approached

the issue differently, and found that the Legislature intended for CEPA to afford protections to a broader scope of “employees” than those protected under the LAD. The court based its opinion on three rationales. 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 anti-discrimination laws that do 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 as remedial legislation is to encourage workers to voice concerns about the unlawful activities of employees and co-workers. Therefore, to satisfy that purpose, the court found that the following factors must be analyzed 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.” The court did, however, cite to several aspects of plaintiff’s work and relationship with PRUPAC that suggested he might qualify as an “employee” under CEPA. These included 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 PRUPAC letterhead. The court also noted PRUPAC’s ability to control the plaintiff’s performance, as evidenced by plaintiff’s allegation that PRUPAC pressured him to meet its expected approval rate for treatment requests.

On March 13, the Committee on Opinions approved for publication a Law Division case which also addressed the issue of whether the plaintiff was an employee or independent contractor under CEPA. The plaintiff in *Perlowski v. Elson T. Killam Assocs., Inc.*, was an attorney engaged by the defendant company as its “in-house” counsel. Plaintiff devoted 80 percent of his time to the legal services of the company. He billed the defendant on an hourly basis, but had company business cards identifying him as “corporate counsel.” His office was located on company premises and his staff and supplies were provided by the defendant.

Plaintiff alleged, among other things, that he was wrongfully terminated in violation of CEPA after objecting to certain allegedly fraudulent actions by the Corporate Secretary. The employer argued that the plaintiff was not entitled to protection under CEPA because he was an independent contractor, and the trial court agreed.

Although *Perlowski* has been approved for publication, it was decided before the Appellate Division ruled in *D’Annunzio*. The Appellate Division in *D’Annunzio* held out the possibility that, on remand, the particular independent contractor there involved would not qualify as an “employee” under CEPA. It is thus unclear what weight, if any, courts will give to the cases. What is clear, however, is that CEPA’s definition of “employee” remains unsettled.

In the wake of the amendment to CEPA and developing case law expanding the statute’s scope, employers may expect increased litigation alleging violations of the statute. CEPA is broadly interpreted as a remedial statute and the amendments further expand its reach and remedies. The increased enforcement provisions of the amendment enhance the risks of litigation to employers and thus highlight the continuing need for employers to have a demonstrated business reason for employment decisions that adversely affect employees and independent contractors. ■