

## Reshaping CEPA

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In five important cases decided in 2006, New Jersey courts appear to have reshaped the scope of New Jersey's Conscientious Employee Protection Act (CEPA) and redefined who may bring an action under it. CEPA — the whistleblower statute — was enacted in 1986. N.J.S.A. §34:19-1 *et. seq.* It codified the common law cause of action for at-will employees for wrongful discharge when the discharge is contrary to a clear mandate of public policy set forth in *Pierce v. Ortho Pharmaceutical Corp.*, 84 N.J. 58, 417 A.2d 505 (1980). CEPA's essential purpose is to provide broad protections against employer retaliation for workers whose whistleblowing actions benefit the health, safety and welfare of the public. *Feldman v. Hunterdon Radiological Associates, et. al*, 187 N.J. 228, 901 A.2d 322 (2006). In doing so, CEPA establishes a statutory exception to the general rule that an employer may terminate an at-will employee with or without cause. *Higgins v. Pascack Valley Hosp.*, 158 N.J. 404 730 A.2d 327 (1999).

CEPA defines an employee as "any individual who performs services for and under the control and direction of an employer." N.J. Stat. Ann. §34:19-(2). As relevant to this article, CEPA, N.S.J.A. §34:19-3, further provides in pertinent part:

An employer shall not take any retaliatory action against an employee because the employee does any of the following:

- a. Discloses, or threatens to disclose to a supervisor or to a public body an activity, policy or practice of the employer or another employer, with whom there is a business relationship, that the employee reasonably believes is in violation of a law, or a rule or regulation promulgated pursuant to law, or in the case of an employee who is a licensed or certified health care professional, reasonably believes constitutes improper quality of patient care.
- b. Provides information to, or testifies before, any public body conducting an investigation, hearing or inquiry into any violation of law, or a rule or regulation promulgated pursuant to law by the employer or another employer, with whom there is a business relationship, or, in the case of an employee who is a licensed or certified health care professional,

provides information to, or testifies before any public body conducting an investigation, hearing or inquiry into the quality of patient care; or

c. Objects to, or refuses to participate in any activity, policy or practice which the employee reasonably believes:

(1) is in violation of a law, or a rule or regulation promulgated pursuant to law or, if the employee is a licensed or certified health care professional, constitutes improper quality of patient care;

(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.

### A. Certain independent contractors can now bring an action as an employee

On Feb. 23, the Appellate Division ruled an individual who may be defined as an "independent contractor" under common law may qualify as an "employee" under CEPA, and thus be protected by the statute. *D'Annunzio v. Prudential Ins. Co.*, 383 N.J. Super. 270 (App. Div. 2006). In *D'Annunzio*, a chiropractor hired by an insurance company to review treatment plans was allowed to proceed with his CEPA claim against an employer even though his contract with the company expressly defined his status as an independent contractor. The court held the contract was not determinative of his status under CEPA even though CEPA permits an action only as an employee defined as "any individual who performs services for and under the control and direction of an employer."

In a strong departure from the past, the court stated:

"CEPA's definition of 'employee' not only has the capacity to include workers who may be classified at common law as independent contractors but that the definition should be construed broadly and principally focus on the 'control and direction' factor expressly mentioned in CEPA."

The court adopted for CEPA the factors set forth in *Pukowsky v. Caruso*, 312 N.J. 171 (App. Div. 1998), which were weighed in determining whether a worker is an employee for purposes of the New Jersey Law Against Discrimination (the Pukowsky Test). Those factors are: (1) the



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employer's right to control the means and manner of the worker's performance; (2) the kind of occupation — supervised or unsupervised; (3) skill; (4) who furnishes the equipment and workplace; (5) the length of time in which the individual has worked; (6) the method of payment; (7) the manner of termination of the work relationship (whether the employer has the ability to terminate the worker's relationship in a manner similar to the termination of an at-will employee); (8) whether there is annual leave; (9) whether the work is an integral part of the business of the employer; (10) whether the worker accrues retirement benefits; (11) whether the employer pays Social Security taxes; and (12) the intention of the parties.

Furthermore, the court declared that courts are to broadly and liberally apply the "control and direction" factor provided in CEPA's definition of employee.

Still, the court admitted CEPA was not intended to protect all individuals with a working relationship with an employer, only those vulnerable to retaliation. Clarifying this point, the court stated, "[S]ome workers are contractually positioned in a way that frees them from fear of termination or other forms of retaliation, and have no critical need for CEPA's protections." *D'Annunzio*, 383 N.J.Super. at 285. The court provided an example of an individual that CEPA does not protect — a tenured tax assessor who could only be removed from office by the director of the Division of Taxation.

Just a few weeks following *D'Annunzio*, on March 10, the Appellate Division further expanded the definition of those individuals who may bring suit under CEPA when they permitted a public defender to bring suit against a municipality even though the attorney maintained his own law practice in his separate and independent law firm. *Stomel v. City of Camden*, 383 N.J.Super 615, 893 A.2d 32 (App.Div. 2006). The *Stomel* court held that while the "control test" is utilized to determine whether individuals such as employees and independent contractors may bring suit under CEPA, a second test — the "relative nature of the work test" — must also be applied to determine whether a professional individual qualifies as an employee under CEPA. *Stomel*, 383 N.J.Super at 634. Although the tests are different, both tests bear upon the degree of control the employer exercises over an individual. *Stomel* held that the relative nature of the work test "requires a court to examine 'the extent of the economic dependence of the worker upon the business he serves and the relationship of the nature of his work to the operation of that business.' "

*Stomel*, a public defender in Camden, alleged he was dismissed in retaliation for reporting an extortion attempt and for providing testimony that implicating the mayor of Camden in unlawful activity. The public defender brought action against the city under 42 U.S.C.A. §1983 and CEPA. In holding that the "relative to the nature of the work" test applies to professional individuals such as public defenders *Stomel* surprisingly held that while control is an element generally important to determine whether an employer-employee relationship exists:

"[W]here the type of work requires little supervision over details for its proper prosecution and the person performing it is so experienced that instructions concerning such details would be superfluous, a degree of supervision no greater than that which is held to be normally consistent with an independent contractor status might be equally consistent with an employment relationship."

This type of reasoning seems to be contrary to most court analyses on the subject.

The *Stomel* court concluded the public defender was an employee for the purposes of CEPA based on the city assigning the public defender clients and telling him when to appear in court. In addition, while the public defender maintained his own private business with his own support staff, he was paid by Camden with a monthly check based on a yearly salary, not individually for the representation of each client. The fact Camden chose to provide him with a 1099 form, rather than a W-2 form, is merely a factor for consideration and by no means controlling. In light of all of the above, *Stomel* found the facts established an employer-employee relationship.

Finally, *Stomel* held that CEPA "is remedial legislation designed to protect employees who report illegal or unethical workplace activities. . . . Plaintiff's whistleblowing about the extortion attempt benefited the public and deserves CEPA's broad protection. Considering plaintiff an employee under these circumstances will foster CEPA's purposes."

## B. NJ adopts U.S. Supreme Court test

In *Feldman v. Hunterdon Radiological Associates, et. al*, 187 N.J. 228, 901 A.2d 322 (2006), New Jersey's highest court held the six-factor test established by the U.S. Supreme Court in *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440 (2003), applies when defining who is considered an "employee" under CEPA. The New Jersey Supreme Court expressly stated that under the test, certain shareholder-directors may in fact be determined to be employees for purposes of CEPA. The test considers the following:

- (1) Whether the organization can hire or fire the individual or set the rules and regulations of the individual's work;
- (2) Whether and, if so, to what extent the organization supervises the individual's work;
- (3) Whether the individual reports to someone higher in the organization;
- (4) Whether and, if so, to what extent the individual is able to influence the organization;
- (5) Whether the parties intended that the individual be an employee, as expressed in written agreements or contracts;
- (6) Whether the individual shares in the profits, losses, and liabilities of the organization.

The *Feldman* court opined, "It is not the shareholder-director's delineated status that is pivotal; rather, the focus should be on the party's true power and influence within the organization. Thus, there is no per se bar to a shareholder-director being denominated as an 'employee' nor is there a per se conclusion that a shareholder-director subject to an 'employment agreement' is an employee."

The court further held that each case must be considered on its merits and there is no "shorthand formula or magic phrase to determine whether a shareholder-director is an employee or an employer." The determination whether a shareholder-director is an employee depends on all of the incidents of the relationship with no one factor being decisive.

### C. Employers need not actually violate a law to be liable under CEPA

On July 20, in a further expansion of individual's rights under CEPA, the New Jersey Supreme Court allowed an Atlantic City police officer — demoted shortly after challenging the city's refusal to enforce certain criminal prostitution laws — to proceed with his CEPA claim for retaliatory action, despite question as to whether he reasonably believed the city's refusal actually violated a clear mandate of public policy. *Maimone v. City of Atlantic City*, 188 N.J. 221 903 A.2d 1055 (2006).

In arriving at its decision, the New Jersey Supreme Court first contrasted the elements of a claim under subsections N.J.S.A. §34:19-3(c)(1) and (3) of CEPA, which provides:

- An employer shall not take any retaliatory action against an employee because the employee does any of the following:
- c. Objects to, or refuses to participate in any activity, policy or practice which the employee reasonably believes:
    - (1) is in violation of a law, or a rule or regulation promulgated pursuant to law or, if the employee is a licensed or certified health care professional, constitutes improper quality of patient care;
    - (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.

An employee who rests his claim under N.J.S.A. §34:19-3(c)(1) is not required to show the employer actually violated a law, rule or regulation. He must only show an "objectively reasonable belief" the employer's activity, policy or practice violated a law, rule or regulation.

N.J.S.A. §34:19-3(c)(3) requires the employee show he reasonably believes employer's practices or actions are incompatible or irreconcilable with a clear and identifiable mandate of public policy demonstrated by a "substantial nexus" between the complained of conduct and the public policy identified by the plaintiff. *Maimone*, 188 N.J. at 233.

After comparing the language in N.J.S.A. §34:19-3(c)(1) to that in N.J.S.A. §34:19-3(c)(3) of CEPA, the New Jersey Supreme Court admitted that at first glance it appears easier for an employee to proceed where the employee reasonably believes the employer is in violation of

a law as opposed to where the employee reasonably believes the employer's actions are incompatible with a clear mandate of public policy. However, the court added that an employee who proceeds under N.J.S.A. §34:19-3(c)(3) must prove an additional element not required under N.J.S.A. §34:19-3(c)(1); that is, the employee reasonably believes the employer's action or policy is incompatible with a clear mandate of public policy that concerns the public health, safety or welfare or protection of the environment.

**D. Common law and statutory relief for untimely CEPA claims**

On July 25, the Appellate Division in *Notte v. Merchants Mutual Ins. Co.*, 386 N.J.Super. 623 (2006), granted leave to a plaintiff who sought to replead his time-barred CEPA claims as separate common law wrongful discharge and statutory Law Against Discrimination (LAD) retaliation claims. The New Jersey Supreme Court earlier affirmed the right of the plaintiff under the doctrine of relation back to bring now time-barred common law wrongful discharge and statutory LAD retaliation claims, finding defendant was not prejudiced thereby. The Supreme Court remanded the case to the Appellate Division to determine whether CEPA's waiver provision precludes the filing at all of related common law and statutory causes of action. The waiver provision of Section 8 of CEPA provides:

Nothing in this act shall be deemed to diminish the rights, privileges, or remedies of any employee under any other federal or State law

or regulation or under any collective bargaining agreement or employment contract; except that the institution of an action *in accordance with* this act shall be deemed a waiver of the rights and remedies available under any other contract, collective bargaining agreement, State law, rule or regulation or under the common law. N.J. Stat. Ann. §34:19-8 (2006) (emphasis added).

*Notte* rejected the view that the "mere mention of a CEPA claim in a complaint precludes any other course of action to vindicate the plaintiff's employment rights, even where the plaintiff is barred from asserting the CEPA claim." Significantly, the court further reasoned that for purposes of the statute, a claim is not "in accordance with" CEPA where the statute of limitations expired prior to filing because the plaintiff lacked the right to make the CEPA claim in the first place. The court deemed the statutory CEPA and statutory LAD claims as timely even though the statute of limitations for both had expired. Absent prejudice to the defendant, the court permitted the filing of the common law and statutory LAD claims. The court provided that their construction of the statute comports with the remedial, beneficent social purposes of CEPA and conversely, the narrow application of CEPA's waiver provision. Lastly, the court states that CEPA is designed to provide an election of remedies, not to leave the plaintiff remediless to vindicate employment rights where the CEPA claim is barred. ©