

CLIENT ALERT

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Who Qualifies As An “Employee” Under CEPA: Will You Know One When You See One?

Three recent opinions provide mixed signals as to how to determine who is an employee eligible to bring a claim under the New Jersey Conscientious Employee Protection Act (“CEPA”).

D’Annunzio v. Prudential Insurance Company of America

Plaintiff George D’Annunzio, a licensed chiropractor, entered into a contract with Prudential Property and Casualty Insurance Company (PRUPAC) to work as a chiropractic medical director. Six months later his contract was terminated on the basis that he had acted unprofessionally and did not follow instructions. He sued, claiming that his termination violated CEPA because it was in retaliation for his complaints that PRUPAC was engaged in unethical and illegal practices. PRUPAC moved for summary judgment, claiming that D’Annunzio was an independent contractor, not an employee. The trial court agreed. The Appellate Division reversed.

Focusing on CEPA’s definition of an employee as including “any individual who performs services for and under the control and direction of an employer,” the court held that the essence of that definition is the employer’s “control and direction” of the worker’s performance of services. Accordingly, it categorically rejected PRUPAC’s argument that it should follow the approach of the Law Against Discrimination (“LAD”), which excludes independent contractors from its broader definition of “employee.”

The court reasoned that the Legislature, having unambiguously excluded independent contractors in other statutes, did not do so in CEPA. Moreover, the court held that a narrow interpretation of “employee” under

CEPA would directly contradict CEPA’s purpose: to provide broad protections to workers who report unlawful activities in the workplace. It also relied on what it described as a “growing trend in the marketplace” among employers to hire independent contractors in order to avoid providing benefits normally associated with employment and concluded that “it is conceivable that unscrupulous employers might also adopt this hiring approach to limit exposure to lawsuits by reducing the number of persons who, because of the employer’s withholding of benefits or other badges of ‘employment,’ would not be eligible to assert statutory claims.”

Rejecting the 12-part test set forth in *Pulkowsky v. Caruso* – which has been used to define “employee” under the LAD, and which was applied by the trial judge – as having “no logical bearing on whether an individual is an ‘employee’ as defined by CEPA,” the court remanded the case with instructions that 8 of the 12 *Pulkowsky* factors relied upon by the judge below were irrelevant and that the issue of whether D’Annunzio was an employee must be resolved in accordance with “whether [he] ‘perform[ed] services for and under the control and direction’ of PRUPAC.”

Stomel v. City of Camden et al.

Decided approximately two weeks after *D’Annunzio*, another appellate panel reached a different conclusion in *Stomel*.

Plaintiff Elliot Stomel served as the public defender for the City of Camden, New Jersey for approximately 17 years, before he was dismissed. In addition to his duties for the City, plaintiff had his own private law practice, which operated independently. Other than designated court sessions, Stomel had no regular schedule for doing his City work, and was not required to account for the

time he spent on his cases. While he “answered to” the court director for scheduling purposes, his work was not reviewed and he represented his public defender clients without interference or supervision.

Stomel did not have access to Camden’s computer system, had no support staff or office space in City Hall, received no reimbursement from the City for office or travel expenses, received no health or pension benefits, and for the last six years of his tenure was issued 1099 tax forms which indicated that his pay was “non-employee compensation” or “other income.”

According to Stomel, he was dismissed in retaliation for reporting an attempt to extort him. Specifically, he claimed that the municipal prosecutor, Joseph Caruso told him that he needed to make a \$5,000 contribution to the newly-elected mayor, in order to keep his job. Stomel went to local and federal employees and, at their direction, made the contribution. Following a federal investigation, Caruso was indicted and tried. Stomel testified, directly implicating the new mayor. Three days after a mistrial was declared due to a hung jury, Stomel received a letter from the mayor dismissing him.

Stomel sued claiming, among other things, that he was terminated in retaliation for his whistleblowing in violation of CEPA. The trial court dismissed his CEPA claim on the basis that he was not an employee. The Appellate Division reversed. It considered two tests to determine whether Stomel was an employee or an independent contractor.

The control test considers (1) the degree of control over the means of completing the work; (2) the source of the worker’s compensation; (3) the source of the worker’s

equipment and resources; and (4) the employer’s termination rights.

The “relative nature of the work test,” which generally applies where the worker is a professional, “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.’”

The court concluded that both tests applied and, looking at his relationship with the City, concluded that they supported considering Stomel an employee. In addition, the court held that policy considerations also militated in favor of finding him to be an employee, since doing so fosters CEPA’s purpose: to provide “broad protections against employer retaliatory action” for workers whose whistle-blowing actions benefit the health, safety and welfare of the public.”

Minerva Marine, Inc. v. Spiliotes

In a case decided three days after *Stomel*, by the United States District Court for the District of New Jersey, a third approach was applied. All 12 *Pukowsky* factors were held to apply to Spiliotes’s CEPA counter claim.

The controversy arose on September 26, 2001, just weeks after the terrorist attacks. Spiliotes was on board Minerva Marine’s (“MM”) ship, which was discharging its cargo of unleaded gasoline. Spiliotes, who contended that he was “port captain” (employee) of the vessel, while MM claimed that he was “vessel agent” (independent contractor), asked the chief officer (“CO”) when the discharge would be completed. Although the CO denied it, Spiliotes claimed that the CO said that it would be completed in 2000 hours “unless he put[] a bomb on the ship and bl[ew] it up.”

Spiliotes informed Port Security, which in turn, informed the FBI, the U.S. Coast Guard and the Bayonne Police Department. In addition, Spiliotes wrote a letter to the Coast Guard that MM was employing “individuals with terrorist affiliations or who are terrorist sympathizers.” The CO was arrested and Spiliotes was fired.

Although Spiliotes argued that public policy favored finding him to be an employee, he provided no supporting case law. Accordingly, applying all 12 criteria of the *Pukowsky* test, the judge held that Spiliotes was an independent contractor and, therefore, could not maintain his CEPA claim.

Conclusion

The criteria for determining whether one is an employee or an independent contractor under CEPA is not crystal clear. What is clear, however, is that mere formalities regarding payment for services are not dispositive. Rather, a careful examination of relationship between the parties, taking into account the significant public policy considerations inherent in CEPA is required.

We send these Alerts to our clients and friends to provide information on recent developments in the law. The Alerts, however, should not be relied on for legal advice in any particular matter:

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