

# CLIENT ALERT

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### **“Independent Contractors” May Sue As New Jersey Whistleblowers**

Although New Jersey’s whistleblower law, the Conscientious Employee Protection Act (“CEPA”), only provides a cause of action to “employees” who are subjected to unlawful retaliation, the state’s Supreme Court has interpreted this term broadly. In a recent decision, *D’Annunzio v. Prudential Insurance Co.*, No. A-119 (July 25, 2007), the Court held that an independent contractor who held a professional license, exercised independent judgment, and maintained a separate private practice could proceed as an “employee” under CEPA. The decision, which affirmed the Appellate Division decision that was a topic of our March 2006 *Client Alert*, serves as a reminder that courts will not necessarily accept the labels that a company uses to describe its relationships.

#### **CEPA**

CEPA generally prohibits an employer from taking adverse employment action against an “employee” who reports or refuses to participate in fraudulent, corrupt, or criminal conduct. CEPA defines “employee” as “any individual who performs services for and under the control and direction of an employer for wages or other remuneration.”

#### **The Facts**

Plaintiff George D’Annunzio worked as a chiropractic medical director for defendant Prudential Property and Casualty Insurance Company (“Prudential”). D’Annunzio was one of a “cadre” of licensed medical professionals responsible for providing Prudential with independent judgments as to the necessity of proposed treatment plans submitted by physicians treating insurance claimants injured in car accidents.

Prudential designated these medical professionals “independent contractors,” required each to maintain a separate private practice, and mandated that billable hours for Prudential account for no more than half of their total professional practice.

These terms were set forth in a one-year “Medical Director Consultant Agreement,” which D’Annunzio signed in the name of his professional association rather than as an individual. D’Annunzio earned \$125 per hour for twenty hours of work per week, which he performed in a Prudential office, Monday through Friday, from 8:00 a.m. to 12:00 p.m.

Prudential provided D’Annunzio with a list of responsibilities, workflow instructions, and a time sheet. Included in the workflow instructions were detailed directions for reviewing claims. D’Annunzio was required to record his billable hours on the time sheets. At Prudential, he had a workstation with a nameplate, a telephone number, an e-mail address, and office supplies. He was instructed to use Prudential letterhead for all of the Company’s work and received training on Prudential’s approach to pre-certifying medical treatment plans.

Within the first year of his relationship with Prudential, D’Annunzio allegedly complained that the company was improperly failing to pay MRI invoices, hiring non-medical vendors to conduct medical evaluations, and using nurse case managers to approve medical care. Soon after, Prudential raised concerns about his performance and subsequently notified him that it was terminating the relationship.

#### **The Trial Court**

D’Annunzio filed a lawsuit alleging, among other things, that he had been “fired” in violation of CEPA for complaining about

Prudential's "lack of regulatory and contractual compliance." The trial court granted summary judgment for Prudential, holding that because D'Annunzio was an independent contractor and not an employee, he could not maintain a CEPA claim. D'Annunzio appealed.

### The Appellate Division

The Appellate Division reversed, concluding that "the record was replete with evidence suggesting that Prudential controlled and directed D'Annunzio." In reaching its conclusion, the Appellate Division applied certain elements of the twelve factor *Pukowsky* analysis.

The *Pukowsky* factors are: "(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) 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; (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."

Prudential sought certification, which the Supreme Court granted.

### The Supreme Court

The Supreme Court affirmed the judgment of the Appellate Division. According to the Supreme Court, CEPA is "remedial social legislation" that must be "construed liberally." The Court noted that the statute's definition of employee "does not exclude, explicitly, persons who are designated as independent contractors performing services for an employer for remuneration."

The Court explained that when "CEPA or other social legislation must be applied in the setting of a professional person or an individual otherwise providing specialized services allegedly as an independent contractor, we must look beyond the label attached to the relationship." The three primary considerations, according to the Court, are: (1) employer control; (2) the worker's economic dependence on the relationship; and (3) the degree to which the worker has become functionally integrated into the company's business.

The Court indicated that a "reasonable application of CEPA's definition of 'employee' should include adjustment for the modern reality of a business world in which professionals and other workers perform regular or recurrent tasks that further the business interests of the employer's enterprise, notwithstanding that they may receive remuneration through contracts instead of through the provision of wages and benefits."

The Court reaffirmed the *Pukowsky* test, though explained that certain factors should be given additional weight when considering a professional services relationship. Specifically, courts should focus on factors that pertain to the right to control how work is performed for the purposes of the business operations. Less weight should be given to "those factors that would produce evidence of traditional employee status, when applicable, such as payment of wages and benefits."

Also, emphasis should be placed on whether the professional's services were incorporated into the work of the business and the impact of that work on the professional's ability to offer services to the public. With regard to the former factor, the Court indicated that "the whole overlay of

expectations [that Prudential] placed on D'Annunzio made him a necessary part in its day-to-day operations." Moreover, "his day-to-day activities were controlled in minute detail." According to the Court, "D'Annunzio can certainly argue that he was essentially under the control of Prudential and that he was a veritable 'cog' in its operations. In sum, the Court explained, many facts "support the creation of an employment relationship for CEPA purposes, notwithstanding that his agreement described him as an independent contractor."

### Conclusion

Despite the plain language of CEPA, its scope extends beyond just "employees." Even licensed professionals working as independent contractors may be able to pursue CEPA claims. As *D'Annunzio* makes clear, courts will particularly consider the extent to which a company controls the contractor's performance and the extent to which the contractor's responsibilities have been incorporated into the work of the business.

*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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