

An illustration on the left side of the page shows a hand in a white shirt sleeve holding a blue pen over a document. The background is a mix of orange and green. The main title 'CLIENT ALERT' is at the top in a large, black, serif font.

# CLIENT ALERT

## Employment, Labor & Immigration

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### **New Jersey Supreme Court Reaffirms the Enforceability of Restrictive Covenants**

In *Maw v. Advanced Clinical Communications, Inc.*, the New Jersey Supreme Court recently held that an employee who is discharged for refusing to execute a restrictive covenant agreement may not maintain a cause of action for statutory or common law whistleblowing. In so doing, the Supreme Court reversed the decision of the Appellate Division that would have expanded the reach of employee the New Jersey Conscientious Employee Protection Act (“CEPA”) and undermined the ability of employers to use restrictive covenant agreements to protect their legitimate business interests. The Supreme Court’s decision makes clear, however, that employers must continue to exercise caution when using restrictive covenants.

#### **Factual Background**

Karol Maw worked as a graphic designer for Advanced Clinical Communications, Inc. (“ACCI”), a company that provided marketing and educational services to the healthcare and pharmaceutical industries. During Maw’s employment, ACCI decided to require all of its employees above a certain level to execute agreements containing non-disclosure, non-compete and non-solicitation provisions. ACCI conditioned continued employment upon executing an agreement. The non-compete provision was for a two-year duration and did not have a geographical limitation. Maw refused to sign the agreement and ACCI terminated her employment for failure to comply with company policy.

Maw filed a Complaint asserting whistleblowing claims under the common law and CEPA. Maw alleged that the non-compete clause violated public policy because ACCI had no legitimate business reason to require her to sign it – and firing her for refusing to sign was unlawful retaliation.

#### **The Appellate Division**

The Appellate Division held that non-compete provisions may be necessary to protect an employer’s legitimate business interests under circumstances in which an employee has contact with clients or access to trade secrets or other confidential information. The court further explained, however, that if, as Maw alleged, an employer required an employee to sign a restrictive covenant agreement that was merely intended to reduce competition rather than to protect the employer’s legitimate business interests, then discharging the employee for refusing to sign could violate public policy and support a statutory or common law whistleblowing claim.

#### **The Supreme Court**

In a 4 to 2 decision, the Supreme Court considered the language of CEPA, focusing, in particular, on the phrase, “clear mandate of public policy.” The majority reasoned that this phrase requires that “the complained of activity must have public ramifications.” It further explained that a private dispute between an employer and employee over the terms of a non-compete agreement “does not implicate violation of a clear mandate of public policy” and does not concern the public health, safety or welfare or protection of the environment, as

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required by CEPA. Thus, the Court reversed the Appellate Division's decision and dismissed Maw's claims.

In reaching its conclusion, the majority noted that Maw admitted that she possessed ACCI's proprietary and confidential information and would not have objected to restrictions barring her from sharing it with future employers. Maw simply contended that the terms of the restrictive covenant agreement were unreasonable, an argument that, according to the Court, she "was free to make if and when her employer tried to prevent her from working at another company ... The burden then would be on the employer to hire counsel and initiate enforcement litigation ... and nothing would preclude the employee-defendant in such an action from asserting any and all affirmative defenses and counterclaims."

The majority also took the opportunity to reaffirm the enforceability of reasonable restrictive covenants that are

narrowly tailored to protect an employer's legitimate business interests. Recognizing that noncompete agreements "are a common part of commercial employment," the majority noted that they "can serve a useful purpose so long as [they] are not unreasonable."

### Conclusion

In *Maw*, the Supreme Court declined to expand whistleblowing claims under CEPA and the common law. At this point, it is not clear what impact the decision will have on whistleblowing claims outside of the restrictive covenant context. The Court may have intended to narrow the range of such claims generally, or may have intended to narrow such claims only in restrictive covenant disputes.

The implications of the Court's decision on restrictive covenants, however, are clearer. New Jersey courts will continue to enforce restrictive covenant agreements, but only to the extent that they are reasonable and necessary to protect an employer's legitimate interests.

Accordingly, employers should use restrictive covenant agreements only as part of a rational plan for protecting their legitimate business interests. Moreover, restrictive covenants should be narrow in geographic scope and of limited duration, and employees with similar access to an employer's business relationships and confidential information should be subject to similar restrictive covenants. An employer must be prepared to justify its restrictions and its decision as to which employees must agree to be bound by them.

Overall, *Maw* should serve as a reminder that New Jersey courts will closely scrutinize restrictive covenant agreements and only enforce them to the extent that they are reasonable and necessary to protect legitimate business interests.

*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.*

## IMMIGRATION NEWSFLASH

### USCIS INTRODUCES NEW EMPLOYMENT AUTHORIZATION DOCUMENT WITH ENHANCED SECURITY FEATURES

U.S. Citizenship and Immigration Services (USCIS), which is charged with fundamentally transforming and improving the delivery of immigration and citizenship services, will soon begin issuing a new version of the Employment Authorization Document (EAD) or Form I-766. The EAD serves as proof to employers that an individual is authorized to work in the United States.

The new card is designed with numerous security features to prevent counterfeiting and fraud including a magnetic strip, a two-dimensional barcode, and several features that can be used in forensic examination to determine the card's authenticity. It eliminates all references to the former Immigration and Naturalization Service (INS) and includes only markings that identify it as a Department of Homeland Security (DHS) and USCIS document.

An EAD is normally valid for up to one year, although there are some cases in which a longer validity period is authorized. It is typically produced and mailed within three days after an individual's application for benefits is processed and approved. The current production rate of the EAD is about 24,000 per week. USCIS expects to issue the new cards in early June 2004.

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