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## EMPLOYMENT LAW

### The Employee Protection and Anti-Discrimination Provisions of the N.J. False Claims Act

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On January 7, 2008, the New Jersey legislature passed a powerful new anti-fraud statute known as the New Jersey False Claims Act, NJSA Sections 2A:32C-1 through 17, (“NJFCA”). The law was approved by Governor Corzine on January 13, 2008 and became effective on March 13, 2008. This new law has two separate and distinct causes of action for private plaintiffs. The first cause of action outlined in section 2A:32C-3 is brought by a whistleblower, also known as a relator, on behalf of the state of New Jersey. NJSA Sections 2A:32C-3. If the whistleblower is successful, he or she will receive up to 30 percent of the state’s recovery, plus attorneys’ fees and costs. New Jersey joins 22 other states and the District of Columbia which have passed such powerful false claims statutes.

This article will focus on the second cause of action for private plaintiffs which may not have received as much attention as the whistleblower recovery provisions. This provision is contained in NJSA Section 2A:32C-10,

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and is known as the Whistleblower or Employee Protection Provision. As New Jersey practitioners become more familiar with this provision, it is likely to generate a significant amount of litigation. It is similar, but different, to whistleblower protection provisions which exist in the federal false claims statute and all other state false claims acts which have been passed to date. The NJFCA provides broader protection to employees than the federal statute or most other state statutes which have been passed. The provision states in pertinent part that:

No employer shall discharge, demote, suspend, threaten, harass, deny promotion to, or in any other manner discriminate against an employee in the terms and conditions of employment because of lawful acts done by the employee on behalf of the employee or others in disclosing information to a State or law enforcement agency or in furthering a false claims action, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this act.

This cause of action provides strong statutory protection to employees

who blow the whistle on their employers, or cooperate with the government even if a case is not filed, or if filed, ultimately is not successful. However, it goes even further. It precludes New Jersey employers from promulgating policies, practices or procedures which could discriminate against an employee:

No employer shall make, adopt, or enforce any rule, regulation, or policy preventing an employee from disclosing information to a State or law enforcement agency or from acting to further a false claims action, including investigating, initiating, testifying, or assisting in an action filed or to be filed under this act.

A violation of this employee protection section of the act can result in some wide-reaching statutory remedies. The NJFCA, at section 2A:32-C-10.c, sets forth these remedies, which includes double damages, as well as attorneys’ fees and court costs. While subsection 2A:32C-10.b prohibits employers from discriminating against employees engaging in “lawful acts” in disclosing information or furthering a false claims action investigation, the remedies contained in subsection 2A:32C-10.c are also available to employees who have actually

participated in conduct which leads to the submission of a false claim. Under subsection 2A:32C-10.d, any employee who has been discriminated against "by his employer because of participation in conduct which directly or indirectly resulted in a false claim being submitted to the State" may avail himself of the whistleblower's remedies where both of the following conditions are met: the employer has coerced the employee into engaging in fraudulent activity; and the employee voluntarily discloses information to the state in furtherance of a false claims action.

### **New Jersey Whistleblower and CEPA Claims**

The Whistleblower Provisions of the NJFCA overlap, in some respects, with the protections afforded employees under New Jersey's Conscientious Employee Protection Act ("CEPA"), NJSA 34:19-1, et seq. That statute, which was enacted in 1986, prohibits employers from retaliating against an employee who engages in the following conduct: (1) discloses or threatens to disclose to a supervisor or public body; (2) provides information about; or (3) who refuses to participate in "an activity, policy or practice of the employer or another employer with whom there is a business relationship" which the employee reasonably believes constitutes a misrep-

resentation to, among others, a governmental entity. NJSA 34:19-3. Employers who violate CEPA can face a variety of sanctions, including: injunctive relief, reinstatement, compensation for lost wages, attorneys fees and costs, possible civil fines of up to \$10,000 for the first violation (and \$20,000 for subsequent violations), as well as punitive damages. CEPA contains a broad waiver provision which bars similar claims based upon other state laws. NJSA 34:19-8. See e.g., *Boyle v. Quest Diagnostics, Inc.*, 441 F. Supp. 2d 665, 671 (D.N.J. 2006) (Employee who commenced CEPA action waived state law contract claims based upon disclosure of wrongdoing).

CEPA's waiver provisions could prove problematic for whistleblower employees seeking to protect their interests by filing both CEPA claims and claims for whistleblower retaliation based upon Section 10 of the NJFCA. An employee may bring concurrent claims for CEPA violations and for violations of the anti-retaliation provisions found in Section 3730(h) of the federal False Claims Act ("federal FCA") because CEPA's waiver applies only to claims based upon state law. See, e.g., *Palladino ex rel. United States v. VNA of S. N.J., Inc.*, 68 F. Supp. 2d 455 (D.N.J. 1999) (CEPA claims not pre-empted by federal false claims act). In contrast, an employee may waive his state law claims by first bringing an action for CEPA violations.

See NJSA 34:19-8 and *Boyle*. It is yet to be determined how retaliation claims under the NJFCA will be treated under the CEPA waiver.

Careful attention to the language of the NJFCA and the CEPA statute, including CEPA waiver language, is required so that an employee does not inadvertently waive his NJFCA Whistleblower Protection claims by first bringing an action for violations of the Conscientious Employee Protection Act. Should New Jersey courts conclude that the CEPA waiver applies to an employee's retaliation claims under the NJFCA, both employees and their counsel must carefully weigh the benefits afforded under each statute and the relatively short limitations period (one year) for CEPA violations before commencing an action under either the CEPA or NJFCA Whistleblower Protection provisions.

Employers throughout New Jersey should promptly familiarize themselves with the entirety of the NJFCA. In doing so, employers, employment lawyers, and all practitioners should become conversant with the powerful protections now afforded an employee who can prove that their employer has adversely treated or discriminated against them for disclosing information or otherwise furthering an action under New Jersey's powerful new false claims statute. ■