In New Jersey, Everyone is a Whistleblower

Adam E. Gersh, Esquire
Michael D. Homans, Esquire
Flaster/Greenberg, P.C.
Philadelphia

IN NEW JERSEY, EVERYONE IS A WHISTLEBLOWER

By
Adam E. Gersh
&
Michael D. Homans
Flaster/Greenberg, P.C.

I. Introduction

The New Jersey Conscientious Employee Protection Act, N.J.S.A. § 34:19-1 et seq. ("CEPA"), is one of the broadest "whistleblower" statutes in the nation, and that breadth has increased in recent years as the courts have interpreted its various provisions. As set forth more fully below, courts have found that CEPA's protections may extend to independent contractors and partners, shareholders and part owners of businesses. In addition, employees who resign because they refuse to perform work they deem unlawful can be protected by the statute. Even complaints about overflowing toilets, vicious dogs and dirty diapers have been deemed sufficient, by New Jersey courts, to state a CEPA "whistleblower" claim. The variations that plaintiffs have tried – and succeeded with – go on and on.

Yet, there is a limit to what a plaintiff must allege to prevail on a CEPA action. Mere questions or concerns are not enough; vague goals of improving patient safety are not enough; and complaining because the employer does not meet standards higher than the law does not give the employee any whistleblower protection.

No article can digest all of the cases that have probed the breadth of coverage under CEPA, but this paper attempts to at least summarize the highlights and pertinent examples from the past several years. We begin by setting forth the key elements and definitions of a CEPA claim, and then survey key issues and decisions under recent CEPA jurisprudence, including:

- Whether independent contractors, partners and shareholders may bring CEPA claims;

- What constitutes an "objectively reasonable belief" in a violation of the law;

- What constitutes an adverse action required under CEPA, including issues of constructive discharge and retaliatory transfer;

- Establishing the causal nexus in a CEPA claim;

- Examples of conduct that courts recently have found to be protected under CEPA, and not protected under CEPA.

II. Prohibited Conduct and Obligations of Employers

CEPA prohibits retaliatory action against employees by providing, in relevant 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:
>
> (1) is in violation of a law, or a rule or regulation promulgated pursuant to law, including any violation involving deception of, or misrepresentation to, any shareholder, investor, client, patient, customer, employee, former employee, retiree or pensioner of the employer or any governmental entity, or, in the case of an employee who is a licensed or certified health care professional, reasonably believes constitutes improper quality of patient care; or
>
> (2) is fraudulent or criminal, including any activity, policy or practice of deception or misrepresentation which the employee reasonably believes may defraud any shareholder, investor, client, patient, customer, employee, former employee, retiree or pensioner of the employer or any governmental entity;
>
> 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, including any violation involving deception of, or misrepresentation to, any shareholder, investor, client, patient, customer, employee, former

employee, retiree or pensioner of the employer or any governmental entity, 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, including any violation involving deception of, or misrepresentation to, any shareholder, investor, client, patient, customer, employee, former employee, retiree or pensioner of the employer or any governmental entity, or, if the employee is a licensed or certified health care professional, constitutes improper quality of patient care;

(2) is fraudulent or criminal, including any activity, policy or practice of deception or misrepresentation which the employee reasonably believes may defraud any shareholder, investor, client, patient, customer, employee, former employee, retiree or pensioner of the employer or any governmental entity; or

(3) is incompatible with a clear mandate of public policy concerning the public health, safety or welfare or protection of the environment.

N.J.S.A. § 34:19-3.

In addition to designating certain protected conduct, CEPA also imposes obligations upon employers to advise employees of their rights under the Act, including posting a specific notice. N.J.S.A. § 34:19-7.

Covered employers. All New Jersey employers, public and private, corporate and individual, are covered by CEPA. See Abbamont v. Piscataway Tp. Bd. of Educ. 138 N.J. 405, 418 (1994). Under N.J.S.A. 34:19-2(a), an employer is an "individual, partnership, association, corporation or any person or group of persons acting directly or indirectly on behalf of or in the interest of an employer with the employer's consent."

Individuals also may be found liable under CEPA. Maw v. Advanced Clinical Communications Inc., 359 N.J. Super. 420, 439-40 (App. Div. 2003, rev'd on other grounds, 179 N.J. 439 (2004); Sunkett v. Misci, 183 F. Supp. 2d 691, 716 n.12 (D.N.J. 2002).

III. Covered Employees

Under CEPA, an "Employee" is "any individual who performs services for and under the control and direction of an employer for wages or other remuneration." N.J.S.A. § 34:19-2(b). In interpreting this provision, New Jersey's courts have fashioned a twelve-factor test that examines:

> (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.

Pukowsky v. Caruso, 312 N.J. Super. 171, 182-83 (App. Div. 1998).

In applying these factors, New Jersey's courts have extended CEPA protection in a broad array of situations. Most recently, the Supreme Court of New Jersey held that a part-time municipal public defender, serving in an appointed position, was an employee within the meaning of CEPA. Stomel v. City of Camden, 192 N.J. 137 (2007) (affirming Appellate Division's reversal of trial court's decision that the plaintiff was not en employee within the scope of CEPA).

Independent contractors may be covered. In D'Annunzio v. Prudential Ins. Co. of America, 192 N.J. 110 (2007), where a chiropractor who was hired as an independent

contractor by an insurer to review medical records asserted claims under CEPA, the Supreme Court of New Jersey affirmed the Appellate Division's reversal of summary judgment in favor of the insurance company and remanded for a determination as to whether the chiropractor was, in fact, an employee under the Pukowsky test.

However, in Feldman v. Hunterdon Radiological Assocs., 187 N.J. 228 (2006) the Supreme Court of New Jersey held that a shareholder/director of a physicians' association was not considered an employee under CEPA. In cases determining whether or not a shareholder constitutes an employee under CEPA, the Supreme Court of New Jersey adopted a more limited test than the Pukowsky test. In cases where the plaintiff has an ownership interest in his/her employer, New Jersey's courts apply the following six-factor test:

> (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.

Id. (relying on Clackamas Gastroenterology Assocs., P. C. v. Wells, 538 U.S. 440 (2003)).

IV. Required Notice to Employer and Opportunity to Correct

An employee who brings a claims under N.J.S.A. § 34:19-3 (a) or (b), asserting retaliation arising from his/her disclosure of the employer's conduct to a public body, must generally notify the employer of the conduct and provide the employer with an opportunity to correct it in order to be protected by CEPA. Specifically, N.J.S.A. § 34:19-4 provides, in relevant part:

> The protection against retaliatory action provided by this act pertaining to disclosure to a public body shall not apply to an employee who makes a disclosure to a public body unless the employee has brought the activity, policy or practice in violation of a law, or a rule or regulation promulgated pursuant to law to the attention of a supervisor

of the employee by written notice and has afforded the employer a reasonable opportunity to correct the activity, policy or practice.

Importantly, there is an exception to this precondition such that "[d]isclosure shall not be required where the employee is reasonably certain that the activity, policy or practice is known to one or more supervisors of the employer or where the employee reasonably fears physical harm as a result of the disclosure provided, however, that the situation is emergency in nature." N.J.S.A. § 34:19-4.

Notably, there is no requirement that an employee provide notice or give an employer an opportunity to correct in cases where the employee is retaliated against for objecting to, or refusing to participate in, conduct that he/she reasonable believes constitutes a violation of a law, rule, regulation, or is incompatible with a clear mandate of public policy.

V. The Objectively Reasonably Belief

To assert a claim under CEPA, a plaintiff must have "an objectively reasonable belief, at the time of objection or refusal to participate in the employer's offensive activity, that such activity is either illegal, fraudulent or harmful to the public health, safety or welfare and that there is a substantial likelihood that the questioned activity is incompatible with a constitutional, statutory or regulatory provision, code of ethics, or other recognized source of public policy." Abbamont v. Piscataway Twp Bd. of Educ., 138 N.J. 405, 431 (1994).

The Appellate Division recently interpreted the meaning of an "objectively reasonable belief" in Massarano v. New Jersey Transit, 2008 WL 239133 (App. Div. January 30, 2008). In Massarano, the plaintiff-transit worker alleged, among other things, that she suffered retaliation because she notified management that documents, including blueprints for bridges, tunnels, a new rail operations center, underground gas lines, and building specifications, were placed in recycling bins accessible to other tenants of New Jersey Transit's building. The trial court held, and the Appellate Division affirmed, that plaintiff's employer's disposal of the documents in a bin on a gated loading dock was not a clear violation of a statute, regulation or public policy and that plaintiff did not have a reasonable, objective belief that it a clear violation of public policy had occurred. Id. at *10. The trial court's decision was supported by unchallenged evidence by the plaintiff's employer that the documents in question were available to contractors and subcontractors bidding on New Jersey Transit projects. Id.

In contrast, the Appellate Division in Turner v. Associated Humane Societies, Inc., 396 N.J. Super. 582 (App. Div. 2007), reversed a directed verdict in favor of an employer where the trial court had not properly determined the employee's objective reasonable belief. In Turner, an employee of a nonprofit organization brought a CEPA claim alleging that he suffered retaliation for objecting to his employer allowing an elderly woman to adopt a dog that had been surrendered because it had bitten its owner and that was supposed to be euthanized. Id. at 589. In reaching its determination, the

trial court examined whether the plaintiff believed the dog was actually vicious. Id. at 596. In reversing, the Appellate Division held that the proper inquiry was whether the plaintiff had an objectively reasonable belief that adoption of dog violated or was incompatible with the law or clear mandate of public policy, and not whether the plaintiff believed the dog was vicious. Id.

Although a plaintiff must show a reasonable, objective belief that the conduct he/she objected to was a violation of law, rule, or public policy, the law does not require that plaintiff's be correct. CEPA's goal is "not to make lawyers out of conscientious employees but rather to prevent retaliation against those employees who object to employer conduct that they reasonably believe to be unlawful or indisputably dangerous to the public health, safety or welfare." Mehlman v. Mobil Oil Corp., 153 N.J. 163, 193-94 (1998). "A plaintiff need not show that his or her employer actually violated a law, rule, regulation, or clear mandate of public policy, just that he or she reasonably believes that to be the case." Klein v. Univ. of Med. and Dentistry of New Jersey, 377 N.J. Super. 28 (App. Div. 2005) (affirming summary judgment in favor of employer upon holding that generalized broad-brush allegation by a licensed professional that an employer's policies threaten patient safety was insufficient to state a prima facie case under CEPA).

VI. What Constitutes an Adverse Employment Action?

New Jersey's courts have a "disparate view" of what constitutes an "adverse employment action" under CEPA. Monto v. Township Of Sparta, 2007 WL 4472106 *15 (App. Div. December 24, 2007).

In one line of cases, an adverse employment action requires "an employer's action to have either impacted on the employee's 'compensation or rank' or be 'virtually equivalent to discharge' in order to give rise to the level of a retaliatory action required for a CEPA claim." Id. (quoting Klein, 377 N.J. Super. at 46). See also Keelan v. Bell Communications Research, 289 N.J. Super. 531, 539 (App. Div. 1996) (finding "no retaliatory action until plaintiff's actual discharge," concluding that the "definition of retaliatory action speaks in terms of completed action. Discharge, suspension and demotion are final acts. 'Retaliatory action' does not encompass action taken to effectuate the 'discharge, suspension or demotion.' ").

In contrast, other cases have held that adverse employment action includes actions beyond those affecting compensation or rank. Beasley v. Passaic County, 377 N.J. Super. 585, 608, 873 A.2d 673 (App.Div.2005) (holding that employee who had been reprimanded had suffered an adverse employment action.) Although the Supreme Court of New Jersey has not reached the issue directly, its decision in Maimone v. City of Atlantic City, 188 N.J. 221 (2006) suggests that the Court favors a broad interpretation of the meaning of "adverse employment action." Id. at 236 (citing Beasley and holding that transfer that resulted in both a reduction in compensation and a loss of other benefits to satisfies the element of an adverse employment action). But see Smith v. Township Of East Greenwich, 519 F.Supp.2d 493, 511 (D. N.J. 2007) (the denial of an opportunity to attend a leadership program is not a retaliatory action under CEPA where the program was not linked to the plaintiff's compensation or future career opportunities).

Retaliatory transfer. New Jersey courts also have recognized a "retaliatory transfer" as an adverse employment action. Guslavage v. City of Elizabeth, 2004 WL 3089743 (N.J. Super. App. Div.), holding that internal transfers can be de facto demotions since "the terms and conditions of employment are broader than title and salary." In the trial following the Appellate Division decision, a jury awarded Guslavage $600,000. Subsequently, in Nardello v. Township of Voorhees, 377 N.J. Super. 428 (2005), a police lieutenant who was moved from his position supervising SWAT team detectives to performing bathroom maintenance and supervising dispatchers after he complained about cover-ups in his department, was allowed to proceed with his claims before a Camden County jury, and was awarded $500,000.

Constructive discharge. In addition to traditional adverse employment actions, Zubrycky v. ASA Apple, Inc., 381 N.J. Super. 162, 166 (App. Div. 2005) allows employees to advance constructive discharge claims. In Zubrycky, the Appellate Division noted that "an employee is expected to take all reasonable steps necessary to remain employed." Id. Under CEPA, constructive discharge requires not merely "severe or pervasive" conduct, but "conduct that is so intolerable that a reasonable person would be forced to resign rather than continue to endure it." Id. The standard envisions a "sense of outrageous, coercive and unconscionable requirements." Id.

The Third Circuit addressed – but did not fully resolve - a difficult issue in constructive discharge cases under CEPA in Dewelt v. Measurement Specialties, Inc., 2007 WL 542234 (D. N.J. February 16, 2007). In Dewalt, the District Court of New Jersey had suggested that a plaintiff who is faced with participating in unlawful conduct or resigning may bring a constructive discharge claim under CEPA. The plaintiff, a CFO, was required to sign off on financial statements that he believed were improper and, in the face of this duty, promptly resigned. Id. at 4. The plaintiff in Dewelt claimed he was faced with the choice of signing the objectionable financial statements, resigning, or accepting a demotion. Id. The defendant in Dewelt disputed this and claimed that plaintiff was offered other alternatives but, applying the summary judgment standard, the Court held there was a factual dispute as to whether these alternatives were retaliatory. Nevertheless, the court noted that the plaintiff has "a huge hurdle to prove the alternatives of employment offered by [defendant] constitute constructive discharge." Id. at *5.

VII. Establishing the Causal Connection

To establish a prima facie case under CEPA, a plaintiff must also show a direct causal connection between his/her protected conduct and the retaliatory action. A plaintiff may present direct evidence of retaliation, and/or jurors may infer a causal connection based on the surrounding circumstances. Estate of Roach v. TRW, Inc., 164 N.J. 598, 611 (2000).

Timing and antagonism. When the evidence is circumstantial, courts frequently focus on two indicia of causation under CEPA: timing and evidence of ongoing antagonism. Schlichtiq v. Inacom Corp., 271 F. Supp. 2d 597, 612 (D.N.J. 2003); see also Farrell v. Planters Lifesavers Co., 206 F.3d 271, 280 (3d Cir. 2000). With regard to timing, New Jersey courts have held that a two-month temporal relation between the

employee's CEPA-protected conduct and the adverse action "permits an inference of a causal connection." Miller v. Community Medical Center, et al., Docket No. A-1781-03T5 (App. Div. May 6, 2005) (employee complained to Board of Health in November 2000 regarding alleged unsanitary diaper-changing policy and was suspended on January 8, 2001); see also Kachmar v. SunGard Data Sys., Inc., 109 F.3d 173, 177 (3d Cir. 1997) (holding a four-month difference was sufficient to establish a causal link); Khair v. Campbell Soup Co., 893 F. Supp. 316, 336 (D.N.J. 1995) (two-month difference established causal connection).

VIII. Burden-Shifting

The "burden shifting analysis under the Law Against Discrimination (LAD) should be applied to CEPA cases." Zappasodi v. New Jersey, 335 N.J. Super. 83, 89 (App. Div. 2000) (citing Kolb v. Burns, 320 N.J. Super. 467, 479 (App. Div. 1999)). "[O]nce plaintiff establishes a prima facie case of retaliatory discharge, the defendant must then come forward and advance a legitimate reason for discharging plaintiff." Id. Where a defendant proffers a legitimate, non-retaliatory reason for the adverse employment action, no CEPA liability will be found. Massarano, 2008 WL 239133 at *11 (Where defendant demonstrated that plaintiff's demeanor was "obstructionist" and "insubordinate" and justified her termination, summary judgment was affirmed in favor of the defendant). Of course, as with race discrimination clams that employ a similar burden-shifting analysis, the plaintiff is free to show that the defendant's proffered legitimate non-retaliatory reason for the adverse employment action is pretext. In order to show the reason is pretext, plaintiffs "must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them 'unworthy of credence,' and hence infer 'that the employer did not act for [the asserted] non-discriminatory reasons.'" Kolb, 320 N.J. Super. at 530 (citing Fuentes v. Perskie, 32 F.3d 759, 765 (3rd Cir. 1994) (other citations omitted)).

IX. Examples of Conduct Found Protected under CEPA

Listed below are recent cases in which courts ruled that a plaintiff could meet his or her burden of engaging in protected conduct:

- ***Calling school to report grandmother's possible meningitis.*** Hospital clerk who was fired for divulging to a local school that a student's grandmother was being evaluated for possible meningitis was entitled to proceed to trial, based on employee's claim that she was fire din violation of a state policy of protecting the health of children, despite the conflicting state policy favoring patient privacy. The conflict in policies regarding patient privacy and child safety "are best left for the factfinder to decide." Serrano v. Christ Hosp., Daily Labor Report (BNA), Jan. 1, 2008, at A-4 (N.J. Super. App. Div. 12/21/07).

- ***Voicing concerns about applying adult diapers.*** Employee who complained to Board of Health regarding alleged unsanitary diaper-changing

policy could prevail on CEPA claim. Miller v. Community Medical Center, et al., Docket No. A-1781-03T5 (App. Div. May 6, 2005).

- ***Custodian's complaints about overflowing toilets and exit light out at school.*** School custodian who testified he informed principal and facilities manager that toilets at elementary schools overflowed and that light in exit sign was out, and that he believed these conditions violated health and safety rules and regulations to protect school children, raised fact issue for jury as to whether he reasonably believed law had been violated and that he had performed whistle-blowing activity under CEPA. Hernandez v. Montville Tp. Bd. of Educ., 354 N.J. Super. 467 (App. Div. 2002).

- ***Protesting vicious dog's adoption.*** The employee alleged that he suffered retaliation for objecting to his employer allowing an elderly woman to adopt a dog that had been surrendered because it had bitten its owner and was supposed to be euthanized. In Turner v. Associated Humane Societies, Inc., 396 N.J. Super. 582, 589 (App. Div. 2007). The Appellate Division held that the proper inquiry was whether the plaintiff had an objectively reasonable belief that adoption of dog violated or was incompatible with the law or clear mandate of public policy.

- ***Complaint about police department's failure to enforce prostitution law.*** Police detective complained about department's decision not to initiate new prostitution investigations, constituted a complaint relating to a "clear mandate of public policy concerning the public health, safety or welfare" (e.g., N.J. Stat. Ann. § 2C:34-7, making it a criminal offense to operate a sexually oriented business within 1,000 feet of a church or school). Maimone v. City of Atlantic City, et al., 188 N.J. 221 (2006).

- ***Refusal to perform unpaid work.*** Refusal to perform unpaid work is protected activity. Dass v. National Retail Transportation, 2005 WL 3108212, *4 (N.J. Super. App. Div. 2005).

X. Examples of Conduct Falling Outside of CEPA's Protections

In these examples, courts ruled that a plaintiff could not meet his or her burden of establishing he or she had engaged in protected conduct:

- ***Health care professional must allege more than mere threat to patient safety, or disagreement as to manner of care.*** Certified anesthesiologist expressed concern about patient safety in the radiology department, and thereafter was assigned to record review and clinical work under the supervision of another faculty member. Klein v. University of Medicine and Dentistry of New Jersey, 377 N.J. Super. 28 (App. Div. 2005). Appellate Division held that a health care professional must demonstrate a reasonable belief that the activity, policy or practice violates a specific law, rule, regulation or declaratory ruling adopted

pursuant to law, or a professional code of ethics. It is not enough for a licensed or certified health care professional to merely allege a threat to patient safety. The court went on state that CEPA was not intended to shield a constant complainer who simply disagrees with the manner in which the hospital is operating one of its medical departments.

- ***Suspicions of improper disposal of documents is not enough.*** A transit worker alleged, among other things, that she suffered retaliation because she notified management that documents, including blueprints for bridges, tunnels, a new rail operations center, underground gas lines, and building specifications, were placed in recycling bins accessible to other tenants of New Jersey Transit's building. Massarano v. New Jersey Transit, 2008 WL 239133 (App. Div. January 30, 2008). The trial court held, and the Appellate Division affirmed, that the employer's disposal of the documents in a bin on a gated loading dock was not a clear violation of a statute, regulation or public policy and that plaintiff did not have a reasonable, objective belief that a clear violation of public policy had occurred. Id. at *10. The documents in question were available to contractors and subcontractors bidding on New Jersey Transit projects. Id.

- ***Complaints about unlawful activities not done on behalf of the employer.*** CEPA does not protect disclosures of or objections to employee activities where such activities were not done on behalf of the employer and in fact victimized the employer, because those activities do not constitute an "activity, policy or practice" of the employer. Roach v. TRW, Inc., 1999 N.J. Super. LEXIS 146 (App. Div. May 4, 1999).

- ***Governor may supersede authority of prosecutor without violating CEPA.*** Plaintiff failed to state a cause of action where he alleged that the Governor and the Attorney General violated CEPA when they exercised their statutory power to supersede him as prosecutor, as supersession must occur when the Governor requests it, and that power is within the Governor's discretion. Yurick v. New Jersey, 184 N.J. 70 (2005).

- ***Employee sets standards higher than those required by law.*** Environmental and safety engineer complained to OSHA regarding his concerns over particular compliance issues with employer. Plaintiff admitted that his complaints were based on standards higher than those required by law and were not actually violations of the law or OSHA regulations. Based on these admissions, he could not establish an objectively reasonable belief that the employer was violating the law, as required by the first prong of a CEPA prima facie case. Flear v. Glacier Garlock Bearings, 159 Fed. Appx. 390 (3d Cir. 2005).

- ***Raising questions and concerns not enough.*** An employee who merely questions or disagrees with his employer's practices and has concerns about their potential legal impact, has not engaged in protected activity under CEPA. See Blackburn v. United Parcel Service, Inc., 3 F. Supp. 2d 504, 517 (D.N.J. 1998).

- ***Supervisor not a good role model.*** Employee who alleged that high school principal was not a good role model did not state a claim because he in no way suggested illegal behavior. Garlino v. Gloucester City H.S., 57 F. Supp. 2d 1, 35-36 (D.N.J. 1999), aff'd in part, 44 Fed Appx. 599 (3d Cir. 2002).

- ***Opportunity to cure.*** As noted above, CEPA also requires an employee seeking protection for making a disclosure to a public body to first provide written notice to a supervisor regarding the alleged violation. The employer must then be permitted a reasonable opportunity to correct the activity, policy or practice. N.J.S.A. 34:19-3a & 34:19-4. Signification exceptions to this rule exist (1) when the employee is "reasonably certain" that the activity, policy or practice is already known to one or more supervisors; or (2) in cases of emergency where the employee reasonably fears physical harm. N.J.S.A. 34:19-4.

XI. Conclusion

Already one of the nation's broadest whistle-blowing statutes, CEPA appears to be expanding in its coverage each year, as the appellate courts address new wrinkles in the law. However, the statute and case law have established limits with respect CEPA actions. Savvy practitioners will serve their clients well by examining each new CEPA claim with the rigor and step-by-step analysis provided by these precedents. In so doing, many meritless CEPA claims can be defeated – or snuffed out before they are even filed. Nevertheless, given the expansive definitions applied to CEPA and its elements, lawyers and their clients in New Jersey are certain to stay busy with new claims – involving toilets, diapers, dogs and more – that will survive summary judgment and require litigation.

For all of these cases, we hope this review has provided some guidance and insights.