Employers Should Plan Proactively To Address The Increased Risk Of COVID-Related Claims Under The Conscientious Employee Protection Act

May 28, 2020

Porzio Client Alert

Employers first became aware of COVID-19's ultimately tragic arrival in New Jersey just before the start of Spring. And, as the leaves unfurled from the trees throughout late March and early April 2020, so unfurled a forest of new laws that governs the movements of individuals and the functions of businesses in a way most New Jerseyans have never seen before. Even employers who make a good faith effort to abide by the new laws may find themselves defending claims for compensatory and punitive damages and counsel fees and costs if they do not plan for the increased risk of COVID-related allegations of violations of the New Jersey Conscientious Employee Protection Act, N.J.S.A. 34:19-1, et seq. (CEPA), which are likely to emerge as a result of this new authority.

There have been executive orders requiring people to shelter in place and dividing businesses into non-essential and essential categories; there have been emergency expansions of existing state and federal leave laws, and a new emergency federal sick leave law; there are new occupational safety and health guidelines for employers to learn and follow. Prolific guidance relating to the effects of the pandemic on every imaginable topic continues to sprout from government agencies. As everyone impacted by these directives has attempted to navigate new responsibilities and entitlements, there have been, and inevitably will be, employers and employees who find themselves at odds with one another. As a result, potential CEPA claims lurk within this new landscape. In fact, lawsuits alleging that plaintiffs were retaliated against for complaining about their employers' early responses to the looming threat of coronavirus already are hitting the docket.

An employer (including an individual supervisor acting on behalf of the employer) may be liable for violating CEPA if an employee can show that the employer retaliated against the employee for complaining about conduct that the employee reasonably believed to violate a law, a rule or regulation promulgated pursuant to law, a clear mandate of public policy, or was fraudulent or criminal, or in the case of an employee who is a licensed or certified healthcare professional, constituted improper patient care. It is well-established that generalized grievances are not entitled to CEPA protection. Nevertheless, considering the rapid growth of authority in this area, employees searching for legal support to kindle their COVID-related complaints may not have to look far to find it. By way of example, the detailed guidance issued by the Occupational Safety and Health Association (OSHA) and the Center for Disease Control (CDC) may have created a new realm of protected activity.[1] Pre-COVID, the possibility that an office worker could invoke CEPA by alleging retaliation resulting from a complaint about a colleague's hygiene might have seemed absurd; now, such a complaint actually may pass muster as legally protected activity, depending on the circumstances.[2] Prudent employers now will exercise extreme care in addressing such complaints.

Employees need not prove that their employer's conduct actually violated or would have violated the law, only that they reasonably believed such a violation had occurred or was imminent. As a result, even where they have not acted illegally, employers may find themselves needing to evaluate and manage their CEPA exposure where employees may have voiced COVID-related concerns, and where independent, legitimate circumstances such as poor performance, policy violations, or an employer's economic circumstances necessitate adverse action against such employees. A proactive approach should include the following measures:

1) Maintain a policy that directs employees to report COVID-related employee complaints to Human Resources, Compliance, or another specifically designated department or individual.

Ensure that employee reporting policies are up-to-date, well-publicized, and easy to follow. The goal of such policies is to enable employers to address COVID-related concerns as they arise, before the complained-of conduct escalates.

2) Be prepared to promptly investigate all COVID-related complaints, and to take remedial action in response to substantiated complaints.

Prepare in advance for investigation of COVID-related complaints. Evaluate whether all complaints, or complaints of a particularly sensitive nature, should be independently investigated by a third party, and whether the investigation should be conducted by an attorney, under privilege. Investigations should be thorough and well-documented, with clear findings as to whether a complaint was or was not substantiated, and what action was taken as a result. These investigation files should be maintained separately from employee personnel files to the extent that they might implicate the confidentiality provisions of the Americans with Disabilities Act. While it is not required by CEPA that an employer investigate or endeavor to remediate each alleged violation of law, employers are often better-positioned to defend against retaliation claims when they are able to produce documentation demonstrating that they ensured thorough investigation of the underlying complaints and acted reasonably in accordance with the findings. Employers are encouraged to contact employment counsel to discuss strategy, the scope of the investigation, confidentiality concerns, and addressing any potentially problematic or high-risk behavior.

3) Train employees and supervisors on COVID precautions, anti-retaliation policies and the application of such policies to COVID-related employee complaints.

Train employees on the importance of following the employer's safety measures, and make sure that all supervisors and company leaders set a clear example by following them. Supervisors should be reminded of the policy to report complaints immediately, and that COVID-related complaints should be treated as being within the anti-retaliation policy. Separately, train or re-train supervisors on implementing the employer's policies against retaliation, reminding them to escalate any COVID-related complaints of which they become aware to the individual, unit, legal advisor, or committee assigned to investigate such complaints. The message conveyed to supervisors in connection with such training should be that all COVID-related complaints, regardless of their apparent severity, or the formality with which they are made, must be treated seriously, and as potentially legally protected communications.

4) Ensure consistency in measuring performance and issuing discipline.

Consistency and documentation are critical to mitigate the risk of claims that legitimate employment actions are a pretext for retaliation as the result of an employee's COVID-related complaints.

To the extent practicable, standardize performance metrics, especially if they are changing as the result of the impact of COVID on the workplace. Document all circumstances where employees are excused, for COVID-related reasons, from meeting performance metrics, and ensure that such standards are applied consistently for all employees similarly impacted. Where employees are expected to continue meeting pre-COVID metrics, consistently document each instance where employees fall short, and address such failures equitably for all similarly situated employees.

Continue to adhere to any progressive discipline standards set forth in employer policies, and apply consistent discipline for similar violations. Document issues thoroughly and maintain documentation in a designated location.

5) Ensure objectivity in taking cost reduction measures.

As a result of the severe economic downturn resulting from COVID, many employers will need to limit certain job perquisites or take more austere measures such as layoffs, furloughs, wage reductions, and restructuring. Determinations regarding which employees will be impacted should be based on objective, quantifiable data wherever possible. Additionally, it is important that these decisions and the rationale for making each decision is well documented, this includes the rationale for each individual (if not part of a larger group by category, location, or job title).

6) Consult with legal counsel to plan for specific situations.

When it becomes necessary to take adverse action against an employee who may believe he or she has blown the whistle, employers must act with extreme care. Experienced legal counsel can provide guidance as to whether an employee is likely to be able to allege successfully that he or she has engaged in protected activity under CEPA, as well as whether the employer's independent basis for taking action impacting a protected employee is likely to withstand scrutiny. Counsel further can recommend solutions for reducing exposure in various situations.

* * * *

Employers who have walked the whistleblower path before know just how costly it can be to defend against even the weakest of CEPA claims. However, by mapping careful responses to COVID-related complaints, and maintaining consistently applied objective standards and documentation, employers can position themselves to limit the increasing risk of such claims as they move forward through the new normal brought about by this pandemic.

---

[1] Guidance on Preparing Workplaces for COVID-19, Occupational Safety and Health Administration, https://www.osha.gov/Publications/OSHA3990.pdf.; Interim Guidance for Businesses and Employers Responding to Coronavirus Disease 2019 (COVID-19), May 2020, Center for Disease Control, https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html

[2] Notably, in 2014, the New Jersey Supreme Court struck down a CEPA claim, holding that an employee's complaint regarding infection control and hygiene practices did not have a nexus to any cognizable source of law or public policy. See Hitesman v. Bridgeway, 218 N.J. 8 (2014). There, the court expressly noted that the plaintiff did not demonstrate, at trial, that his complaints had invoked CDC standards. Hitesman, 218 N.J. at 39-41. In light of this decision, the facts and circumstances of any such employee complaints, and whether they were sufficient to put the employer on notice of any CDC or OSHA violations, likely will be determinative.