

# Client Alert

A report  
for clients  
and friends  
of the firm     **January 2006**

## Amendment Enhances Employee Protections and Increases Remedies and Fines under New Jersey's Whistleblower Law

Just before leaving office, Governor Richard Codey signed into law an amendment to the Conscientious Employee Protection Act ("CEPA"), also known as the Whistleblower Law. (Proskauer issued a previous alert in November 2004 when the Senate first passed this bill.) As originally enacted, CEPA prohibits an employer from retaliating against an employee who: (1) discloses or threatens to disclose to a supervisor or public body conduct that the employee reasonably believes violates a law, or a rule or regulation promulgated pursuant to law; (2) provides information to or testifies before public bodies regarding such conduct; or (3) objects to or refuses to participate in an activity, policy or practice the employee reasonably believes violates a law, rule, regulation or public policy, or is fraudulent or criminal.

The amendment aims to assure protection of employees who blow the whistle on Enron-type internal fraud. As noted in an accompanying statement, the new law "enhances" the scope of CEPA by specifically providing that protected whistleblowing activity includes disclosing, objecting to, or refusing to participate in "any violation [of law, rule or regulation] 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." Similarly, the amendment expressly protects

any employee providing information or testimony to a public body investigating such a violation, or who blows the whistle on "fraudulent or criminal" conduct that involves "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." The amendment also protects employees who disclose, or threaten to disclose, fraudulent or criminal conduct to a supervisor or public body, and not just for objecting to or refusing to participate in such conduct, as under the original law.

The new legislation also strengthens the remedies available under CEPA. The bill exempts CEPA claims from the Punitive Damages Act ("PDA") provision limiting such damages to \$350,000 or five times the amount of compensatory damages, whichever is greater. (Claims under the Law Against Discrimination already are included in the exemptions from the PDA cap on damages.) In addition, in determining the amount of punitive damages, the jury or court now must consider not only the amount of compensatory damages to be awarded to the employee, but also any damage caused to shareholders, investors, clients, patients, customers, employees, former employees, retirees or pensioners of the employer, or to governmental entities or the public, as a result of the employer's wrongful activities, policies or practices.

Other provisions make it mandatory, rather than optional as under the current law, to order injunctive relief, reinstatement, compensatory damages and attorneys' fees for CEPA violations "where appropriate and to the fullest extent possible." Civil fines also have been increased from \$1,000 to \$10,000 for first time offenders and from \$5,000 to \$20,000 for each additional violation, which may be imposed by the court or a jury.

**EDITORS' COMMENT:** With the enactment of this amendment to CEPA, employers can expect more whistleblowing suits involving allegations of internal fraud or misconduct. The courts soon will be called upon to determine whether, by "enhancing" CEPA in this manner, the bill is an expansion of rights, or merely a clarification of existing law. Plaintiffs' lawyers likely will argue that the amendment enlarges protection for blowing the whistle on private internal disputes. Even under the new language, however, it appears that an employee's whistleblowing must still relate to a violation of a law, rule or regulation, or something that is fraudulent or criminal, and not merely any "deception or misrepresentation." If an employer is found guilty of retaliating against an employee for Enron-like internal misconduct, the potential for substantial punitive damages in such a case would certainly be "enhanced."

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