

Legal Alerts

[Download PDF](#) +

- [Practices](#)

+ [View All Legal Alerts](#)

New Jersey's Conscientious "Everyone" Protection Act? State Supreme Court says "Yes"

July 16, 2015

[Mark A. Saloman](#), [Joanna S. Rich](#)

Executive Summary: As we previously [forecast](#) and employers feared, New Jersey's Supreme Court has dramatically expanded the state's whistleblower law, the Conscientious Employee Protection Act or "CEPA." In doing so, the Court held that so-called "watchdog" employees—who monitor, advise, or report to upper management concerning corporate conduct—may invoke the whistleblower protections of CEPA based upon the same consulting, advice, and reporting performed as part of their normal job functions. In rejecting more than a dozen appellate and federal cases dating back nearly a decade, the Court's decision confirms that CEPA likely is the most far-reaching whistleblowing statute in the U.S.

In [Lippman v. Ethicon, Inc.](#), __ N.J. __, No. 073324 (July 15, 2015), Joel Lippman served as Ethicon's chief medical officer and worldwide vice president of medical affairs and claimed he was fired in retaliation for his various recommendations to upper management concerning product safety. The lower court held that making recommendations and raising concerns about product safety was a central function of Lippman's job and, therefore, Lippman was not engaged in activity protected by CEPA when simply performing his job. The Appellate Division reversed, holding that an employee's job title or responsibilities are not dispositive of whether the employee presents a valid CEPA claim. Instead, the appeals court slightly enhanced the standard of proof for "watchdog" plaintiffs, requiring that they either exhaust internal means of securing compliance or outright refuse to participate in the objectionable conduct.

In rejecting the appellate court's enhanced standard, the Supreme Court found that "watchdogs" (like Lippman) engage in protected whistleblowing activity even when merely performing their normal job duties. These employees need not object to employer conduct, raise unpopular concerns, or even disagree with their employer; indeed, the Court observed that Ethicon agreed with most of Lippman's advice, including the recommendation immediately preceding his termination.

Bottom Line: New Jersey employers must now deal with a judicially-created sub-class of potentially "untouchable" employees: professional whistleblowers with ready-made retaliation claims should any adverse employment action be taken against them. Historically, an employee seeking to invoke the

protections of CEPA had to "blow the whistle" on employer misconduct by somehow alerting the employer to a practice which the employee reasonably believed was unlawful or a danger to the public, or refusing to participate in such a practice. Earlier decisions held that "watchdog" employees merely performing their job duties were not whistleblowers protected by CEPA. *Lippman* rejects the volume of decisions following this reasoning. Now, an employee whose normal job functions include alerting her employer to potentially unlawful or unsafe conditions is conceivably blowing the whistle every hour of every day on the job. These "untouchables" need only perform their regular job duties to be protected from retaliation by CEPA.

Post-*Lippman*, employers must be extremely careful in disciplining employees in "watchdog" positions. It is the very purpose of these positions to alert employers to unsafe or unlawful practices, and in that process, advocate strong opinions within the organization about legal affairs, business strategy, and the public welfare. To keep management informed, robust discussion and even contentious debate is expected. Such interaction may even descend into a power struggle over methodology, best business practices, and institutional influence. Yet the "watchdog" is an employee like any other who should respect and, at times, accede to the demands of the employer—unless, of course, those demands are to engage in acts that are unlawful. By making every disagreement the seed for a whistleblower lawsuit, *Lippman* erodes every New Jersey employer's authority to make tough business decisions which contradict the "watchdog" employee's recommendation.

If you have questions regarding this Alert or other labor or employment related issues concerning your "watchdog" employees, please contact the authors, [Mark A. Saloman](mailto:msaloman@fordharrison.com), msaloman@fordharrison.com, a partner in our Berkeley Heights, New Jersey office who briefed the position to the Supreme Court in *Lippman* on behalf of *amicus* Employers Association of New Jersey, or [Joanna S. Rich](mailto:jrich@fordharrison.com), jrich@fordharrison.com, a senior associate in our Berkeley Heights office. You may also contact the FordHarrison attorney with whom you usually work.

© 2015 Ford & Harrison LLP | [DISCLAIMER](#)