



Does New Jersey's Conscientious "Everyone" Protection Act Trump the NLRB's Exclusive Jurisdiction? State Supreme Court says "Yes"

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Executive Summary: Just when employers thought New Jersey's Supreme Court could not expand the state's whistleblower law further (as we reported [last summer](#)), the Conscientious Employee Protection Act (CEPA) once again has been broadened. Now the Court has held that an employee governed by a collective bargaining agreement (CBA) and allegedly terminated in retaliation for engaging in protected activity concerning wages regulated by the CBA may bring a CEPA claim in New Jersey state court—rather than pursue the same claim for relief before the National Labor Relations Board. In so doing, the Court's decision erases any doubt CEPA likely is the most far-reaching whistleblowing statute in the U.S.

In *Puglia v. Elk Pipeline, Inc.*, __ N.J. __, No. 075171 (August 16, 2015), union laborer Salvatore Puglia alleged he was fired in violation of his CBA's seniority rights after complaining about Elk's wage practices governed by his CBA. The decision is available [here](#). Rather than file an unfair labor practice charge before the Board, Puglia sued in state court alleging he was a whistle-blower terminated in violation of CEPA. Elk won summary judgment because the trial court determined Puglia's claim was founded on rights created in the CBA such that (i) Section 301(a) of the Labor Management Relations Act (LMRA) preempted his CEPA claim; and (ii) the National Labor Relations Act (NLRA) preempted his CEPA claim because Puglia engaged in concerted activity and conduct governed by that act. The Appellate Division affirmed the lower court's ruling, but the Supreme Court reversed, holding Puglia's claim did not require interpretation of the CBA, and CEPA overrides the Board's exclusive jurisdiction.

"Choice-of-law preemption" under the LMRA

The Supreme Court recognized Section 301(a) of the LMRA grants jurisdiction to federal courts to apply federal law to resolve disputes arising out of labor agreements, including claims alleging CBA breaches. The lower courts found Puglia's complaint directly invoked the CBA such that his CEPA claim was preempted by federal law. The Supreme Court rejected that finding and held Puglia's CEPA claim required no interpretation of the CBA. Instead, Puglia merely sought to enforce his rights under CEPA, independent and apart from his bargained-for employment conditions. Importantly, the Court held it was insufficient for an employer to secure preemption by asserting the defense it acted under the CBA's seniority provision.

"Choice-of-forum preemption" under the NLRA

The Court then addressed the Board's exclusive jurisdiction of claims implicating Sections 7 and 8 of the NLRA,



which protect an employee's right to engage in concerted activity and prohibit employers from interfering with those rights. At the outset, the Court recognized the Board's exclusive jurisdiction to determine what activity is protected by Section 7 or prohibited by Section 8. The Court further recognized Puglia arguably engaged in protected concerted activity under Section 7 when he and a co-worker complained about the reduction of their wages. Yet the Court leaned on the overarching remedial nature of CEPA to find the importance to New Jersey in enforcing CEPA simply "win[s] out" over the long-standing federal labor structure. Stated differently, our state's interest in enforcing CEPA runs deeper than the Board's (albeit identical) interest in preventing and remedying unfair labor practices committed by private sector employers and unions.

Bottom Line: The U.S. Supreme Court's preemption doctrines relating to the NLRA center on reinforcing the purpose of the Act: to obtain uniform application of its substantive rules and avoid conflicts likely to result from a variety of local procedures and attitudes toward labor controversies. Yet, the New Jersey employer with a unionized workforce now must deal with uncertainty, confusion, and rising costs as employees flock to state court to litigate what should be labor grievances—under the cloak of CEPA and its seemingly boundless application.

Post-*Puglia*, employers must be even more careful when disciplining union employees who engage in concerted activity relating to the terms of their CBAs. Instead of an unfair labor practice charge, employers must now expect a lawsuit, regardless of the exclusive remedies provided by the NLRA. If the New Jersey "watchdog" employee merely performing her job duties is a whistleblower protected by CEPA, the union worker terminated shortly after filing a grievance is not far behind.

If you have questions regarding this Alert or other labor or employment related issues concerning your unionized workforce, please contact the authors of this Alert, [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 *Puglia* on behalf of *amicus* Employers Association of New Jersey, or [Natalya G. Johnson](mailto:njohnson@fordharrison.com), njohnson@fordharrison.com, a senior associate in our Berkeley Heights office. You may also contact the FordHarrison attorney with whom you usually work.