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In a potentially far reaching decision, the New Jersey Supreme Court ruled that professional employees labeled as independent contractors may be covered as “employees” under New Jersey’s whistleblower statute. The decision adopts the test used to evaluate independent contractor status under New Jersey’s fair employment practices law, the Law Against Discrimination.

## East Coast Edition

*A Littler Mendelson East Coast-specific Newsletter*

### N.J. Supreme Court Extends New Jersey Law Against Discrimination Independent Contractor Test to the Whistleblower Statute

*By Bryan M. Churgin and Katy Shi-Klepper*

In a potentially far-reaching decision, the New Jersey Supreme Court, in *D’Annunzio v. Prudential Insurance Co.*, No. A-119-2005 (July 25, 2007), ruled that in certain circumstances, an independent contractor may be an *employee* under New Jersey’s whistleblower statute, the Conscientious Employee Protection Act (CEPA), and thus be entitled to pursue a statutory wrongful termination claim. In doing so, the New Jersey Supreme Court adopted the same test it uses to analyze independent contractor status under New Jersey’s fair employment practices law, the Law Against Discrimination.

This case serves as a reminder that employers should frequently evaluate whether the individuals labeled as “independent contractors” have become (or always were) *employees* for purposes of workplace employment laws, including CEPA and workers’ compensation law.

#### Factual Background

In February 2000, Prudential Property and Casualty Insurance Company (“Prudential”) entered into a “Medical Director Consultant” agreement with George D’Annunzio (“D’Annunzio”). Pursuant to that agreement, D’Annunzio worked as a chiropractic medical director in Prudential’s Personal Injury Protection Department. Although the agreement designated him as an independent contractor, Prudential exercised substantial control over D’Annunzio’s day-to-day activities. For example, Prudential issued D’Annunzio an extensive list of duties and workflow instructions, required him to record his hours on Prudential time sheets, dictated his work location and schedule, and provided him with office supplies, an email address

and telephone.

During the summer of 2000, D’Annunzio complained to his supervisors about what he perceived were insurance law violations committed by Prudential and its employees. In August 2000, Prudential informed D’Annunzio that his performance was unsatisfactory and, during the following month, it terminated the consultant agreement. D’Annunzio sued Prudential and a number of individuals under CEPA. He alleged that Prudential terminated him because he complained about Prudential’s “lack of regulatory and contractual compliance.”

After the parties conducted limited discovery, which focused on D’Annunzio’s employment status, the trial court dismissed D’Annunzio’s CEPA claim because he was an independent contractor, and not an *employee*, for CEPA purposes. The Appellate Division reversed the dismissal because the record evidence demonstrated Prudential “controlled and directed” D’Annunzio as an *employee* in spite of his alleged independent contractor status.

#### The Supreme Court’s Analysis

In reviewing the lower courts’ decisions analyzing *employee* status under CEPA, the New Jersey Supreme Court considered the public policy rationale behind the legislature’s enactment of the statute. The court recognized that workers performing duties independently may nevertheless require whistleblower protection against retaliatory action. Moreover, the court believed that CEPA’s deterrent function would be undermined if individuals labeled as independent contractors were ineligible for coverage under it.

The court explained that in fulfilling CEPA’s remedial purpose, the test used for determining employment status under CEPA must be adjusted to the specialized and non-traditional worker who is nevertheless integral to his or her employer’s business interests. For this purpose, the court adopted the test established by *Pukowsky v. Caruso*, 312 N.J. Super. 171 (App. Div. 1998), in which the Appellate Division identified 12 factors to determine whether an independent contractor is an employee under the New Jersey Law Against Discrimination. The New Jersey Supreme Court reasoned that it applied the Pukowsky test because it addressed most of the routine factors relevant to an individual’s employment status and has been applied in a number of other similar contexts.

In evaluating whether D’Annunzio was an employee of Prudential, the New Jersey Supreme Court looked beyond the traditional label attached to an independent contractor relationship. Instead, it considered whether his (or, generally, an independent contractor’s) services have been incorporated into the employer’s business and the impact of that relationship upon the individual’s ability to offer his or her professional services to the public. The court also examined such factors as employer control, the individual’s economic dependence upon the work relationship, and the degree to which there has been a functional integration of the employer’s business with that of the person doing the work.

The New Jersey Supreme Court applied these factors to D’Annunzio’s relationship with Prudential and concluded that his duties were an integral and essential aspect of Prudential’s operations. The court also found that D’Annunzio pointed to sufficient facts to support the existence of an employer-employee relationship under CEPA. Although the Supreme Court affirmed the reversal of summary judgment, it expressed no opinion on the merits of D’Annunzio’s alleged CEPA claim.

## Lessons Learned

Although *D’Annunzio* does not *per se* extend CEPA’s protections to all independent contractors, the decision is significant nonetheless. Specifically, the Supreme Court expanded the potential class of individuals who, their title notwithstanding, may be entitled to CEPA’s

statutory protections. Independent contractors who perform regular or recurrent tasks that further the business interests of the employer’s enterprise may constitute an employee under CEPA.

In light of this decision, employers must re-evaluate their business relationships with individuals providing services, including professional services, in a capacity other than as a traditional employee. Companies must focus upon the functional role played by that individual in the organization, whether the individual is limited in providing services to third parties and the level of control exerted by the organization over this person.

Indeed, *D’Annunzio* confirms that courts will likely attribute minimal, if any, weight to the labels or titles used by the parties in describing their business relationship. Therefore, an employer must ensure that individuals hired as independent contractors are treated strictly as such in all aspects of the business relationship. Failure to properly treat professionals as independent contractors may create an unintended employment relationship under CEPA and possibly other employment laws, many of which traditionally limit protections to employees, including the New Jersey Workers’ Compensation Act and New Jersey Law Against Discrimination.

In light of this decision, we recommend that employers:

- proactively assess which independent contractors may be considered employees by evaluating the role the service provider plays in the organization;
- ensure that independent contractors are not treated like employees by carefully drafting, or revising where necessary, consultant or “independent contractor” agreements;
- abide by the terms of independent contractor or consultant agreements;
- analyze whether company-provided benefits traditionally bestowed upon employees are or have been provided to independent contractors or consultants; and
- if the employer determines that certain independent contractors are in fact

employees for CEPA purposes, such individuals must receive the required annual summary of CEPA rights, because failure to do so may expose the employer to penalties and fines for violating CEPA’s notice distribution provisions.

By adopting the foregoing procedures, employers may minimize their risk of legal exposure to claims brought under the state’s whistleblower law and, if litigation ensues, will be better positioned to defend against and defeat one or more of those claims. Moreover, misclassification of independent contractors, who are really employees, may expose employers to tax and other unanticipated wage and hour liabilities.

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