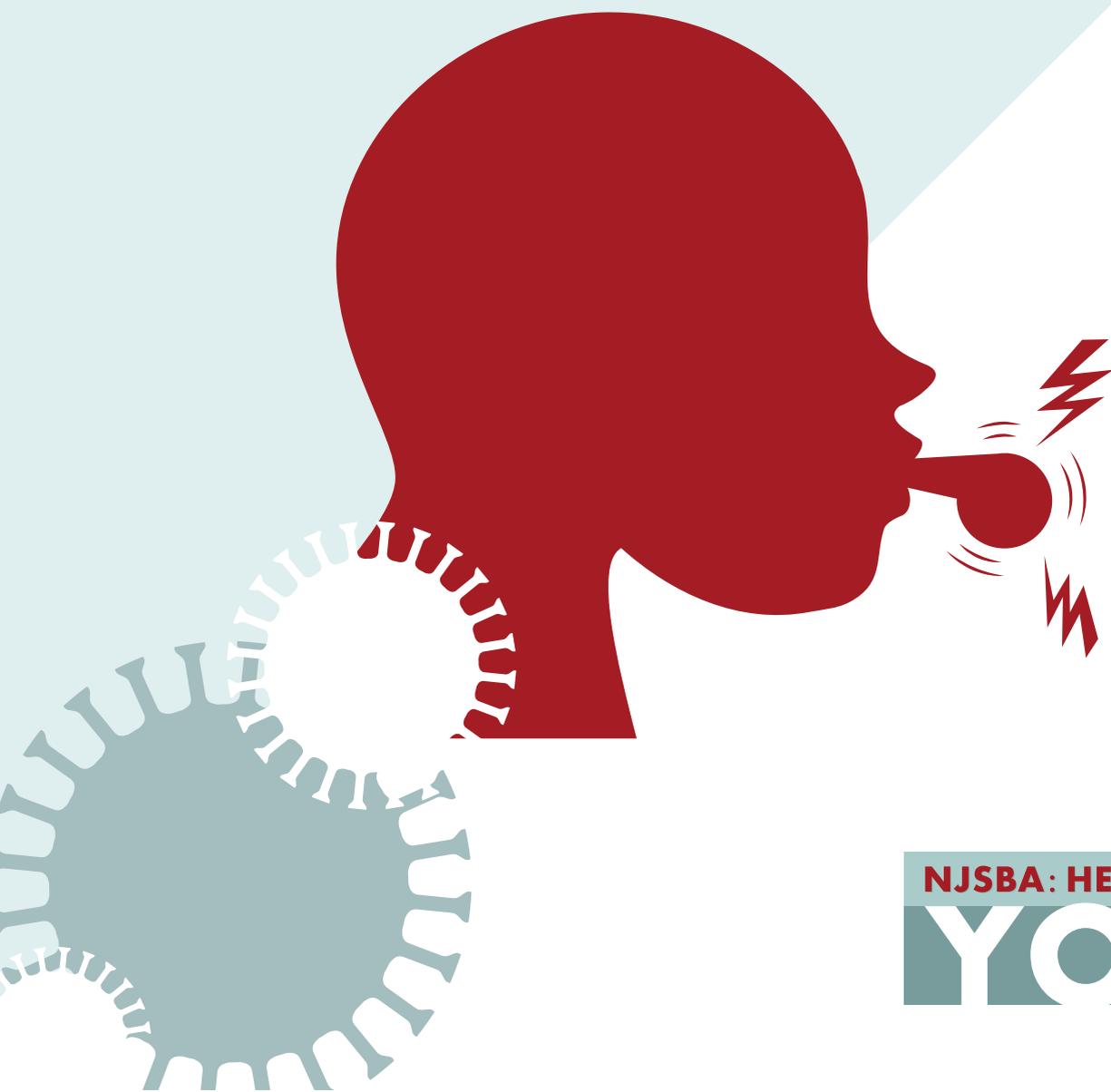


NJSBA

PANDEMIC TASK FORCE

Whistleblower Complaints in the Time of COVID



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As businesses begin to reopen, employers will be faced with complaints by employees about allegedly unsafe working conditions and requests to work from home. The potential for employee “whistleblower” claims under the Conscientious Employee Protection Act (CEPA) is heightened in this new reality. Aggrieved employees may also file complaints with the Occupational Safety and Health Administration (OSHA), the state of New Jersey or local health departments. Thus, employers need to take seriously employee complaints about working conditions and requests to work at home, be extra vigilant and prepare and maintain detailed documentation supporting their plan, as well as any performance or business reasons for any employment action impacting a potential plaintiff.

CONSCIENTIOUS EMPLOYEE PROTECTION ACT

The COVID-19 crisis has generated a plethora of Executive Orders issued by Governor Murphy as well as legislation designed to protect public health and safety. Much of this effort has a direct bearing on the employer-employee relationship in terms of worker safety. As businesses begin to reopen, complaints by employees about allegedly unsafe working conditions are likely, as are requests by employees to work from home or continue to do so. Employers should be aware that employees who believe that they have been retaliated against for making such complaints or requests can be expected to bring claims under CEPA.

CEPA, in relevant part, prohibits an employer from taking retaliatory action against an employee who “discloses, or threatens to disclose to a supervisor or to a public body an activity, policy or practice of the employer...that the employee reasonably believes...is in violation of a law, or a rule or regulation promulgated pursuant to law, or is incompatible with a clear mandate of public policy concerning the public health, safety or welfare...” The statute authorizes aggrieved employees to bring a civil action with trial by jury to recover all forms of tort damages and authorizes the court to order reinstatement, award attorneys’ fees and impose civil fines. The New Jersey Supreme Court has noted CEPA’s goal is “to protect and encourage employees to report illegal or unethical workplace activities and to discourage public and private sector employers from engaging in such conduct.” *Dzwonar v. McDevitt*, 177 N.J. 451, 461 (2003) (internal quotations omitted). And, as CEPA is a remedial statute that “promotes a strong public policy of the State,” it “should be construed liberally to effectuate its important social goal.” *Battaglia v. United Parcel Serv., Inc.*, 214 N.J. 518, 555 (2013) (internal quotations omitted).

Unsafe Working Conditions

An employee who bases a CEPA claim on unsafe working conditions must either identify a specific law, rule or regulation that the employer allegedly violated relating to the workplace or object to a policy or practice that is incompatible with a clear mandate of public policy concerning public health or safety.

A CEPA claim cannot be premised on an employee's personal beliefs as to the impropriety of an employer's practices. *Compare Abbamont v. Piscataway Tp. Bd. of Education*, 138 N.J. 405 (1994) (unsafe ventilation system in metal shop in violation of health and safety regulations served as proper basis for CEPA claim), *with Hitesman v. Bridgeway, Inc.*, 218 N.J. 8 (2014) (employee's personal belief as to employer's alleged improper handling of infectious diseases not a basis for a CEPA claim).

In terms of the COVID-19 crisis, a series of Executive Orders require workplaces to observe a variety of safety requirements concerning, *e.g.*, sanitization, distancing of workers, number and types of workers permitted at the worksite and facial coverings. Violators of these requirements are subject to prosecution as disorderly persons. As a result, the courts are likely to permit employees who claim to have been retaliated against for complaining about violations of these requirements to proceed with CEPA claims. In this regard, it is important to note that such an employee will not be required to prove the employer actually is in violation of a Governor's Executive Order, only that they had an objectively reasonable belief that a violation occurred.

Teleworking

In relevant part, Governor Murphy's Executive Order 107 provides:

All businesses or non-profits in the State, whether closed or open to the public, must accommodate their workforce, wherever practicable, for telework or work-from-home arrangements. For purposes of this order, "telework" means the practice of working from home or alternative locations closer to home through the use of technology that equips the individual to access necessary materials. (Emphasis added.)

Subsequent guidance from the "New Jersey Covid-19 Information Hub" emphasizes this requirement.

The Executive Order does not require an employee who wishes to telework to demonstrate any specific COVID-19 reason (personal health, family circumstances) for doing so. Thus, at least while the Executive Order is in place, unless an employer can demonstrate that it is impracticable to permit a given

employee to telework, terminating an employee who insists on teleworking creates the potential for a CEPA claim.

OTHER AVENUES FOR EMPLOYEE COMPLAINTS TO GOVERNMENTAL AUTHORITIES

The federal Occupational Safety and Health Act (OSHA) authorizes employees terminated or otherwise discriminated against for making complaints about alleged employer violations of OSHA's safety regulations to file complaints of retaliation with the Secretary of Labor. Such complaints will be investigated as the Secretary "deems appropriate." 29 U.S.C. § 660. OSHA does not provide for a private right of action. *Ries v. National R.R. Passenger Corp.*, 960 F.2d 1156, 1164 (3d Cir. 1992). Nevertheless, retaliation against employees who have asserted COVID-19-related violations of OSHA's regulations may provide the basis of a CEPA claim. *Hernandez v. Montville Tp. Bd. of Educ.* 354 N.J. Super. 467 (App. Div. 2002), *aff'd.*, 179 N.J. 81 (2004), and may result in an OSHA investigation or adverse finding.

In addition, complaints of Executive Order violations can be made to the state of New Jersey, through an online "Executive Order Violation Reporting Form." Complaints can also be made to local health departments. These complaints may be investigated by the relevant department within New Jersey and could result in adverse actions against the employers.

CONCLUSION

Employers need to take any complaints relating to health and safety seriously and ensure that they are following all of the Executive Orders, OSHA and U.S. Centers for Disease Control guidance. Employers also need to be especially careful before deciding to terminate an employee or to take other adverse action against an employee who has complained either internally or to a governmental authority about unsafe working conditions. Similarly, employers should be careful when requesting an employee return to the office but the employee refuses to give up teleworking.

The potential for a CEPA claim or governmental investigations in these circumstances highlights the need for employers to prepare and maintain detailed documentation supporting their COVID-19 plan and preparedness and any performance or business reasons for any employment action impacting a potential plaintiff.