

# ARCHER & GREINER

## ATTORNEYS AT LAW

### CLIENT ADVISORY

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## New Jersey Employers Beware!

*It May Be A CEPA Violation To Terminate An Employee Who Refuses To Sign An Overbroad Non-Compete Agreement*

Non-compete agreements are often used by New Jersey employers to protect a company's confidential business information, customer relationships, and other legitimate business interests. These agreements are commonly included in employment agreements presented to at will employees, often times after the employee has worked for the company for some time. Until now, when existing at will New Jersey employees refused to sign non-compete agreements presented to them by their employers, the employers were free to fire those employees without fear of repercussion.

That may have all changed beginning April 16, 2003, when a divided New Jersey intermediate appeals court held in Maw v. Advanced Clinical Communications, Inc. that, when an existing employee is fired for refusing to sign a non-compete agreement which is not narrowly crafted to protect the employer's legitimate interests, the firing may support a claim for wrongful termination and a claim under New Jersey's whistleblower protection law, the Conscientious Employee Protection Act, N.J.S.A. 34:19-1 ("CEPA"). In another landmark aspect of the case, the Court also held for the first time in a published state court opinion, that individual liability may be imposed under CEPA.

The Maw decision carries potentially huge implications in employment law. Perhaps most importantly, the decision places individuals at risk of violating CEPA for adverse employment actions by concluding that CEPA allows for individual liability

against supervisors. As a practical matter, this decision means that supervisors can now be sued in their individual capacity for adverse employment actions taken against employees who "blow the whistle" on their employers' alleged unlawful or improper practices. This aspect of the opinion extends to all CEPA claims, not just those situations where an existing employee is fired for his refusal to sign a restrictive covenant.

In addition, the decision leaves open the possibility that a terminated employee has a claim if *any* restriction in the non-compete agreement he refused to sign (after the commencement of his employment) would have been "unreasonable," despite the fact that, in deciding cases involving the post-termination enforcement of non-compete agreements, the courts often enforce the agreements in part, but narrow their scope and reduce the restrictions on the employees to those that reasonably protect the employers' legitimate business interests under the circumstances. Therefore, an employer who asks its current employees to sign a non-compete agreement that is arguably overbroad runs some risk of being sued if it takes adverse employment action against an existing employee who refuses to sign.

Certainly the Maw decision does not toll the death knell for restrictive covenants in New Jersey. In fact, to the contrary, the court reiterated that New Jersey continues to recognize the enforceability

of restrictive covenants that are narrowly tailored to protect an employer's legitimate interests. The case also does not impose any liability, personal or otherwise, on employers or supervisors that require employees to sign restrictive covenants at the beginning of their employment, or place any limitations upon an employer's ability to refuse to hire a person who will not sign a restrictive covenant. Nonetheless, the case emphasizes that prudent employers should engage in careful planning with experienced counsel when drafting and presenting non-compete agreements to their current employees and when considering the consequences for current employees who refuse to sign such agreements.

If the parties to the Maw case do not settle, the employer has an automatic right to appeal the case to the New Jersey Supreme Court because the appeals court was divided. Archer & Greiner will follow any further developments in the case. In the meantime, if you have any questions or require additional information about this issue, please contact a member of Archer & Greiner's Labor and Employment Department or the Employment Competition and Information Protection Group at 856-795-2121.

The members of Archer & Greiner's Employment Competition and Information Protection Group and Labor and Employment Department are ready to discuss the groundbreaking implications of this decision on your company's use of non-compete agreements. To schedule a consultation or in-house seminar for your HR professionals, please contact Karen Kruza at 856-795-2121 or [kkruza@archerlaw.com](mailto:kkruza@archerlaw.com).