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Commentary

# No *Maw* Uncertainty

## New Jersey Supreme Court rejects CEPA claim for terminated employee who refused to sign restrictive covenant

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What a difference a year makes. It has been an anxious 12 months for employers and their counsel ever since the Appellate Division's 2-1 decision in *Maw v. Advanced Clinical Communications Inc*., 359 N.J. Super 420. There, the court opened the door for employees fired for refusing to sign restrictive covenants to sue under the Conscientious Employee Protection Act, N.J.S.A. 34:19-1.

That decision left employers in New Jersey rethinking whether the at-will employment doctrine still existed and how to protect legitimate business interests, without risking a lawsuit.

It's not surprising that the decision also generated an enormous amount of spirited debate throughout the legal community, given its potential impact on the balance of power between employer and employee.

Employers and their counsel, therefore, took a collective sigh of relief on May 4 when the New Jersey Supreme Court held in *Maw v. Advanced Clinical Communications Inc*., A-99-02, that New Jersey employers who terminate at-will employees for refusing to sign noncompete agreements cannot be liable under CEPA.

In doing so in its per curiam opinion, the Court held that Karol Maw's dispute with Advanced Clinical Communications was a private one without public ramifications and therefore not covered by CEPA.

The decision is being hailed as a major victory in the employer community, which has watched with growing alarm as New Jersey courts have expanded the reaches of CEPA in the workplace.

Indeed, the *Maw* decision contains specific language that may help employers avoid CEPA liability when employees allege that they were terminated in retaliation for complaining about "clear violations of public policy."

Perhaps more important, the decision will not only restore certainty to employers who seek to legitimately protect business interests through the use of restrictive covenants but will also reassure their counsel who draft, negotiate and litigate such covenants.

Indeed, if CEPA had been interpreted to give employees protection when they complain about an unreasonable covenant (or any other unreasonable conduct by their employer), there would be no conceivable way to limit when CEPA could be invoked.

Many employees undoubtedly "reasonably" believe that their employers act "unreasonably" every day. Had the Supreme Court affirmed, at-will employment would have been eviscerated based solely on conduct presumed to be merely "unreasonable" and not "illegal" or "unethical," as the Legislature intended in its enactment of CEPA.

If affirmed, the majority opinion also would have undermined an employer's ability to require, and enforce, restrictive covenants for existing employees. Employers would have faced an impossible task in persuading employees to enter into otherwise reasonable covenants, thus undermining morale among existing employees and altering the enforceability of these covenants contrary to *Solari Indus.v. Malady,* 55 N.J. 571 (1970), and *Whitmyer Bros. v. Doyle,* 58 N.J. 25 (1971). One can imagine the disarray in the business community that would have created.

By correctly categorizing Karol Maw's dispute with her employer as a private contractual dispute, and refusing to recast the dispute as a CEPA claim, the Supreme Court avoided a number of potential practical nightmares in the workplace.

In so doing, the Court has brought a welcome measure of certainty to an area of the law where outcomes are difficult to predict in the first place, dependent as they are on the subjective balancing of many factors.

In other words, no *Maw* uncertainty. ■

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