

You Have the Right to Disclose Unlawful Activity and to Not Participate In Such Activity Without Retaliation

New Jersey's Conscientious Employee Protection Act (CEPA)¹ protects employees by establishing that their jobs are protected if they object to or report employer conduct which they reasonably believe violates the law or is dangerous to the public health, safety and welfare. CEPA's purpose is to encourage you and your co-workers to report illegal or unethical workplace activities and to discourage employers from acting illegally or unethically.

The Act protects you in the following ways:

If you have reasonable concerns that:

- Your employer's conduct violates a law or regulation;

Or

- Your employer's conduct is incompatible with a clear mandate of public policy concerning public health, safety, welfare, or protection of the environment;

Or

- If in the healthcare field, your employer's conduct constitutes improper patient care.

You are protected when you:

- Disclose or threaten to disclose information to a supervisor or public body about your employer's illegal or plainly unethical conduct;

And/or

- Object to or refuse to participate in such conduct.

However, going to news outlets or the media is **not** protected by CEPA.

You may also be protected if the conduct at issue concerns another employer with whom your own employer has a business relationship, or if the conduct is by one of your coworkers, even if your employer did not authorize or direct the conduct in question.

If you intend to use your rights under CEPA:

☞ **BEFORE REPORTING TO A PUBLIC BODY**, you must give written notice to your employer as to the activity, policy, or practice that you reasonably believe violates the law. You must also give

¹ N.J.S.A. 34:19-1, et seq.

your employer a reasonable chance to correct the problem before you report it to any public body. Disclosure may not be required if you are reasonably certain that a supervisor or management knows of the problem; if there is any doubt, you should give the written notice. ***Written notice is unnecessary in cases of emergency or if you reasonably fear imminent physical harm.***

☞ **DO YOUR HOMEWORK.** You should clearly and with as much specificity as possible identify the law, regulation, or clear mandate of public policy that makes your employer's conduct wrongful.

You should also be able to explain the harm that will result. A clear mandate of public policy cannot be based on a religious doctrine or an individual's personal belief, no matter how correct these principles may be. A well-recognized code of ethics or a law's legislative intent may be used.

☞ **SEEK SUPPORT OF CO-WORKERS AND YOUR UNION.** If there is such support, the employer is more likely to correct its unlawful activity without retaliation. If a lawsuit results, the factfinder is more likely to rule in your favor if co-workers agree with you.

☞ **DOCUMENT EVERYTHING.** What you do must not only be reasonable, it may need to be proven in court. Document the conduct or condition that you believe violates the law or a clear mandate of public policy. Take notes and get witnesses. Keep a copy of all documents. In court, the burden of proof is on you.

☞ **USE THE LEAST DISRUPTIVE MEANS** when asserting your rights under CEPA. If you refuse work, make it clear to your employer that you are refusing only a particular job because it is unlawful or it poses an imminent risk of serious physical harm or death. Offer to perform other work. Always maintain a calm and reasonable tone. Explain why, preferably in front of witnesses, your refusal to do this particular job is objectively reasonable.

If your employer retaliates:

You should promptly let your union know and file a grievance and contact an attorney experienced in such lawsuits. A successful lawsuit can get your job back, along with compensatory and punitive damages. **You must file your CEPA lawsuit within one year**, although other laws that may be applicable to your situation may permit you to file a lawsuit later.

Other Remedies

In addition to CEPA, you may be protected under other laws. This includes the National Labor Relations Act, if you acted with and/or for others. New Jersey common law may also be applicable to your particular situation, as may other statutes. Because figuring out the best remedy for you may be a difficult choice, you should seek the advice of a knowledgeable union representative and an experienced employment law attorney as soon as you can.

Some potentially applicable state or federal statutes (see list below) provide for administrative hearings while others require going to court. Time limits vary but the complaint under many of these laws, such as the Occupational Safety and Health Act, **must be filed within 30 days of your knowledge that you were discriminated against.** For (non-federal) public workers, under the New

Jersey Public Employees Occupational Safety and Health Act, you have 180 days to file. You may also file a lawsuit under New Jersey's common law, which must be filed within two years. However, using these laws may eventually preclude you from using CEPA.

Deciding between CEPA and the other state and federal statutes requires a balancing of interests. You are more likely to resolve your claim sooner under non-CEPA administrative proceedings. However, you are less likely to receive high monetary awards. Administrative proceedings are generally quicker than going to court under CEPA, largely because they do not include the extensive discovery proceedings provided by courts. However, the lack of investigative resources often limits these laws' effectiveness. For example, OSHA does typically not have enough anti-retaliation staff to investigate all complaints thoroughly and/or may decide not to act if there is a pending grievance.

You may also have a remedy pursuant to the grievance/arbitration proceedings under your employment or union contract. The availability of arbitration under a contract may preclude you from suing under CEPA or other laws. Under most arbitration procedures for termination or discipline, the employer has the burden of proof, which makes an employee's success more likely. If your employer denies any adverse employment action or the presence of unsafe working conditions, however, the burden of proof may be on you. Monetary awards under arbitration may not be as large as under CEPA.

Some Federal Laws with Administrative Proceedings

Occupational Safety and Health Act (Section 11(c))
Asbestos Hazard Emergency Response Act
International Safe Container Act
Surface Transportation Assistance Act
Clean Air Act
Comprehensive Environmental Response, Compensation, and Liability Act
Federal Water Pollution Control Act
Safe Drinking Water Act
Solid Waste Disposal Act
Toxic Substances Control Act
Energy Reorganization Act
Wendell H. Ford Aviation Investment and Reform Act for the 21st Century
Corporate and Criminal Fraud Accountability Act, Title VIII of the Sarbanes-Oxley Act
Pipeline Safety Improvement Act
Federal Railroad Safety Act
National Transit Systems Security Act
Consumer Product Safety Improvement Act
Affordable Care Act
Consumer Financial Protection Act of 2010
Seamen's Protection Act
FDA Food Safety Modernization Act

Congress has charged the Occupational Safety and Health Administration (OSHA) with enforcing the anti-retaliation provisions of 22 different laws. File your complaint with the *regional* OSHA office.

Their telephone number is (212) 337-2365. The complaint should be in writing and include a full statement of the acts and pertinent dates that are alleged to constitute the violation.

For more information about filing a complaint with OSHA, go to www.whistleblowers.gov. We also urge you to contact WEC before filing a complaint.

Federal Statutes Requiring an Administrative Filing Before Filing a Lawsuit

Title VII of the Civil Rights Act
Americans with Disabilities Act
Age Discrimination in Employment Act

Federal Statutes Requiring a Direct Lawsuit

Family and Medical Leave Act
Section 1983 (42 U.S.C. Sec. 1983)

New Jersey Laws with Administrative Procedures

Public Employees Occupational Safety and Health Act (enforced by NJ Department of Labor and Workforce Development)
Worker and Community Right to Know Act (relating to chemical use in the workplace and enforced by NJ Department of Labor and Workforce Development)
Law Against Discrimination

COURT DECISIONS RULING FOR EMPLOYEES WHO DID THEIR HOMEWORK

DuPont Corporation accused an employee with falsifying time cards as a means of retaliation. The employee had made complaints to OSHA and to management about the hazards related to doing employee security checks at night on busy roads. The court reasoned that concerns about catastrophic damages caused to employees from accidents on the roadway were clearly within the realm of public policy concerns intended to be furthered by CEPA. Donelson v. Dupont Chambers Works, 206 N.J. 243 (2011).

An industrial arts teacher was fired for reporting to his supervisor that his shop had inadequate ventilation. Although the teacher was not familiar with a specific regulation on ventilation, the court held that the teacher reasonably believed that poor ventilation violated a clear mandate of public policy because the ventilation was dangerous to health and safety of school children. Abbamont v. Piscataway Twp., 269 N.J. Super. 11 (App. Div. 1993) *affirmed* 138 N.J. 405 (1994).

An employee was fired for refusing to “set up” a shop steward by planting an illegal object on him. The court relied on the following sources for evidence that the employee’s refusal was valid on the basis of a clear mandate of public policy: National Labor Relations Act and the NJ Constitution protecting the right to organize and bargain collectively. Radwan v. Beecham Lab., 850 F.2d 147 (3rd Cir. 1988).

COURT DECISION RULING AGAINST AN EMPLOYEE WHO DID NOT DO HER HOMEWORK

An employee complained about a union’s executive board not following their internal bylaws. She was a paid employee of the union and an unpaid member of the executive board. She was fired from her paid position in the union. The court reasoned that a union’s bylaws were not an expression of public policy and therefore the employee’s defense of them could not be used to bring a CEPA claim. Dzwonar v. McDevitt, 177 N.J. 451 (2003).

COURT DECISION RULING AGAINST THE EMPLOYEE FOR NOT USING THE LEAST DISRUPTIVE MEANS

A blood bank employee was fired for intentionally destroying a blood bank sample to show his objection to and his refusal to participate in a hospital’s dangerous practice. The court ruled that the employer did not violate CEPA by firing him because his actions were not reasonable and less disruptive means should have been used. Haworth v. Deborah Heart & Lung Ctr., 271 N.J. Super. 502 (App. Div. 1994).

“An employer shall conspicuously display, and annually distribute to all employees, written or electronic notices of its employees' protections, obligations, rights and procedures under this act, and use other appropriate means to keep its employees so informed. Each notice posted or distributed pursuant to this section shall be in English, Spanish and at the employer's discretion, any other language spoken by the majority of the employer's employees.”²

Employers can obtain a CEPA poster (in English and Spanish) from the New Jersey Department of Labor and Workforce Development's website at:

http://lwd.state.nj.us/labor/forms_pdfs/lwdhome/CEPA270.1.pdf

For more information or referral to an attorney knowledgeable about CEPA and other anti-retaliation protections, contact:

N.J. Work Environment Council (WEC)
142 West State Street, 3rd Floor, Trenton, NJ 08608
Phone: (609) 695-7100. Fax: (609) 695-4200.
Email: info@njwec.org.
And visit: www.njwec.org.

WEC gratefully acknowledges the assistance of Bennet D. Zurofsky, Esq. and David Tykulsker, Esq. in the preparation of this fact sheet.

² N.J.S.A. 34:19-7.