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CLIENT ALERTS

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THE CONTINUED EMPLOYER PREDICAMENT: A DIVIDED COURT LOOKS AT PRELIMINARY ORDERS OF REINSTATEMENT UNDER SARBANES-OXLEY

In a May 1, 2006, decision, in which each of three judges issued separate, divergent opinions, a two-judge majority of the United States Court of Appeals for the Second Circuit held that a district court should not have enforced an administrative preliminary order of reinstatement of an alleged whistleblower under the Sarbanes-Oxley Act of 2002 ("SOX"). Bechtel v. Competitive Technologies, Inc.*, No. 05-2404-cv, 2006 WL 1148501 (2d Cir. May 1, 2006). The three separate opinions reveal the obvious difficulty the judges encountered in interpreting SOX, and they underscore the tensions inherent in the unique remedial and procedural scheme of preliminary orders of reinstatement under SOX. While an apparent victory for the employer, this round in the* Bechtel *litigation leaves uncertainty as to whether the federal courts have jurisdiction to enforce such orders and portends more litigation. It also further highlights the practical and legal problems faced by covered SOX employers at all stages of their defense against administrative complaints of retaliation raised by whistleblowers invoking SOX. It is clear that until there is definitive judicial guidance, the Department of Labor ("DOL") and employees will continue to press for immediate relief by way of preliminary orders of reinstatement once there is any administrative determination favorable to a SOX whistleblower, despite the myriad business and practical difficulties such orders create for employers that believe they will prevail in a fully litigated proceeding. While they await greater clarity, employers must insist on their due process rights during investigations and lay the groundwork for economic reinstatement in lieu of a preliminary order of physical reinstatement where appropriate.*

Under SOX, whistleblowers are provided the unique remedy of preliminary orders of reinstatement at any administrative stage after there has been a finding favorable to the whistleblower. This includes a mere finding of "reasonable cause" in the initial administrative investigation, before there has been an evidentiary hearing or an opportunity to create or review a full record containing testimony under oath (subjected to cross-examination) as well as authenticated documentary evidence. Such an order is ***not*** *stayed by the filing of a request for a hearing before an*

Administrative Law Judge ("ALJ") or by a request for review by the Administrative Review Board ("ARB"), the final administrative authority for adjudicating SOX cases. This creates a tremendous burden for an innocent employer that may be ordered to reinstate to a sensitive position an employee terminated for good cause. For the corporation vindicating its action through the administrative process, preliminary reinstatement carries risks of disruptions at a high level within the organization and additional retaliation charges from a reinstated employee whose interests may not be compatible with the legitimate interests of the business and its shareholders. Although an employer may file a motion to stay a preliminary order of reinstatement, unlike other employment legislation, SOX requires the employer, not the employee, to bear the burden of showing that it can meet the traditional standards for injunctive relief: a probability of success on the merits and that it will suffer irreparable harm that outweighs the harm to the former employee and the public. Furthermore, the decisions of ALJs in Bechtel *and other cases show that ALJs are interpreting the traditional standards in a way that is very difficult for employers to meet, requiring them, in effect, to overcome a very strong presumption in favor of a preliminary order of reinstatement.*

Facts

In *Bechtel*, OSHA administratively found reasonable cause to believe that the termination by Competitive Technologies, Inc. ("CTI"), of two top executives violated SOX, and it issued a preliminary order of reinstatement. CTI sought a stay based on alleged irreparable harm as well as after-acquired evidence of misconduct. The ALJ denied the motion, finding that the harm to the former employees was at least as serious as the problems that reinstatement might cause CTI. Notably, the ALJ also concluded that economic reinstatement would be constructive compliance with a preliminary order of reinstatement. When CTI did not reinstate the employees, the employees filed a complaint in district court seeking a preliminary injunction. The court granted the preliminary injunction, rejecting CTI's arguments that the court lacked jurisdiction to enforce the order and that the employees were required to establish the material elements of injunctive relief, finding it sufficient that OSHA had determined immediate reinstatement was appropriate. *Bechtel v. Competitive Technologies, Inc.*, 369 F. Supp. 2d 253 (D. Conn. 2005). CTI appealed this virtual abdication of any real review by the district court but reinstated Mr. Bechtel in the interim. (The other employee settled.)[1] In its 2–1 decision, the Second Circuit reversed.

The only matter on which the two-judge majority agreed was that the preliminary injunction should have been denied. Judge Dennis Jacobs found that there was no statutory authority for a federal court to enforce a *preliminary* order of reinstatement, noting that the SOX remedial scheme makes provision only for enforcing *final* orders, or for filing an action *de novo* if a final decision is not issued within 180 days. Judge Pierre Leval found that it was unclear whether or not the statute authorized the district court to enforce a preliminary order of reinstatement, and instead held that even if jurisdiction existed, the order should not be enforced because the disclosures made to CTI prior to the issuance of the preliminary reinstatement order failed to meet the due process requirements of *Brock v. Roadway Express, Inc.*, 481 U.S. 252 (1987). *Brock* held that under the Surface Transportation Assistance Act of 1982, an evidentiary hearing was not necessary prior to a preliminary order of reinstatement, but due process required notice of the employee's allegations, notice of the

[1] While the appeal was pending, the ALJ issued a decision finding in CTI's favor on the merits, and Mr. Bechtel then left CTI. Review of the ALJ's decision is now pending before the ARB.

substance of the relevant supporting evidence, and an opportunity to meet with the investigator and present statements from rebuttal witnesses. In particular, Judge Leval found that while OSHA had provided notice of the allegations, it had not provided the notice of the substance of the relevant supporting evidence, including witness statements (redacted or summarized to protect identity, if necessary) that DOL's own regulations require to be disclosed. Judge Chester Straub dissented, finding both jurisdiction and no violation of due process, despite the lack of production of witness statements and the fact that some of the evidence the OSHA investigator relied upon was provided by the employee late in the investigation and never provided to CTI in any form.

Analysis

The decision in *Bechtel* follows closely the March 31, 2006, decision of the ARB in *Welch v. Cardinal Bankshares Corp.* that an order of reinstatement issued by an ALJ after a hearing is immediately effective and is not stayed unless the ARB grants a motion to stay. That decision arose out of an effort by the employee to enforce the ALJ's reinstatement order in federal court, which the court denied because it was unclear whether the ALJ's order was "final."[2] Together, these cases show that, despite the unusual SOX statutory remedy providing for a preliminary order of reinstatement prior to a full adjudication, the courts may be reluctant to enforce such orders – either because of a procedural gap allowing court intervention only for final orders or because of an absence of clear evidence that there has been some opportunity for the employer to challenge the evidence proffered by the employee and to seek a stay of the order. This resistance appears at least in part grounded on the problems an employer faces when reinstating to a high level of responsibility someone who it has already decided should be discharged, often due to misconduct and incompatibility with other executives, managers, and outside consultants and professionals. This includes both the inevitable tension and distrust as well as the strong possibility, if not likelihood, of additional retaliation charges after a reinstatement.

At the same time, the split decision by the Second Circuit in *Bechtel* makes it clear that issues of the jurisdiction of the federal courts to enforce a preliminary order of reinstatement, as well as the nature of the due process that must be granted an employer in the investigative stage and of the court review of the administrative order, all remain open questions. Indeed, DOL, which intervened in *Bechtel* to support judicial enforcement of preliminary orders of reinstatement, has indicated that, despite CTI's apparent vindication by the ALJ, who dismissed the complaint after a full evidentiary hearing, it may seek *en banc* review in the Second Circuit. Similarly, it is likely that if the ARB denies a motion to stay in *Welch*, there will be a renewed attempt to enforce that reinstatement order in federal court.

Until these issues are resolved, employers faced with SOX allegations must make every effort during the investigative stage to demand disclosure of the evidence against them, including witness statements. They should also present their best case (1) against finding reasonable cause and (2) for economic reinstatement as an alternative to a preliminary order of physical reinstatement where appropriate.

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[2] *See* **CLIENT ALERT: An Employer Predicament: Preliminary Orders of Reinstatement under the Sarbanes-Oxley Act of 2002**, posted May 2, 2006.

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If you have any questions regarding preliminary orders of reinstatement, SOX, or other whistleblower issues, please contact **Frank C. Morris, Jr.**, at (202) 861-1880, **fmorris@ebglaw.com**, or **Allen B. Roberts** at (212) 351-3780, **aroberts@ebglaw.com**.

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