

# CLIENT ALERTS

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## AN EMPLOYER PREDICAMENT: PRELIMINARY ORDERS OF REINSTATEMENT UNDER THE SARBANES-OXLEY ACT OF 2002

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*In a March 31, 2006 decision, the United States Department of Labor (“DOL”) Administrative Review Board (“ARB”) held that an ALJ’s preliminary order of reinstatement of the Chief Financial Officer (“CFO”) of a small, publicly traded 65-employee bank who had filed a whistleblower complaint under the Sarbanes-Oxley Act of 2002 (“SOX”) was immediately effective, notwithstanding the CFO’s inability to get along with the Chief Executive Officer (“CEO”), Audit Committee, outside accountant, and outside counsel and notwithstanding a showing of enmity and distrust on his part. (Welch v. Cardinal Bankshares Corp.) Substitution of other economic remedies was not permitted. Under SOX, whistleblowers are provided the unique remedy of preliminary reinstatement at any administrative stage after there has been a finding favorable to the whistleblower. The ARB is the final administrative authority for adjudicating SOX cases.*

*As illustrated by the ARB’s decision in Welch, under SOX, a company faces the very problematic prospect of having to restore a high-level executive to employment before there has been a full adjudication and administrative or court review – simply because the whistleblower had a “reasonable belief” that there was a SOX violation and showed that his or her protected activity was a contributing factor to an unfavorable personnel action. The ARB’s decision drives home the impact of the SOX remedial scheme borrowed from a statute applicable to the airline industry, and it portends the difficulties with which covered SOX employers must be prepared to contend within a highly visible arena.*

### Facts

David Welch (“Welch”) filed a whistleblower complaint with the DOL, alleging that Cardinal Bankshares Corp. (the “bank”) violated SOX by terminating him. Following a hearing, an Administrative Law Judge (“ALJ”) ultimately concluded that the bank had violated SOX and ordered, *inter alia*, that Welch be reinstated to his former position as CFO. The ALJ further noted that the only reasonable alternative to reinstatement would be front pay, but that reinstatement was the “presumptive” remedy and other remedies, such as front pay, “would not adequately redress Welch’s injury.”

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The bank did not reinstate Welch and instead filed a petition for review with the ARB, which was accepted and remains pending. Welch filed a motion in federal court to enforce the ALJ's reinstatement order, but the court denied enforcement, holding that it was unclear whether the initial order was "final" and thus the bank did not have sufficient notice that it should have moved to stay the reinstatement order during the pendency of the appeal. Welch then filed a motion with the ARB, seeking confirmation that a preliminary order of reinstatement had issued from the ALJ and that the bank was required to reinstate him absent a successful motion to stay. In its March 31, 2006 decision, the ARB confirmed that applicable SOX regulations dictate that an ALJ's decision requiring reinstatement is effective when the employer receives the decision and will not be stayed unless the ARB grants a motion to stay the reinstatement. Although holding that the ALJ's preliminary order of reinstatement was in effect, the ARB granted the bank 10 days within which to move to stay that reinstatement order.

## Analysis

Just as with other discrimination and retaliation statutes, whistleblowers may obtain conventional "make-whole" relief under SOX by way of reinstatement to their former position with full seniority, together with back pay, interest, and compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorneys' fees. SOX, however, provides for an additional remedy, which allows for interim relief by way of preliminary reinstatement.

The relief is available immediately upon an investigative, ALJ, or ARB determination. Although the *Welch* reinstatement order followed a full hearing before an ALJ, the decision highlights and reinforces that preliminary reinstatement is the preferred SOX remedy at any stage of the DOL administrative proceedings where there is a determination favorable to the whistleblower. Following a finding of reasonable cause in the initial administrative investigation, reinstatement will be directed by way of a preliminary order before there has been an evidentiary hearing or an opportunity to hear testimony, to cross-examine, or to create or review a record. In fact, that was the result in *Bechtel v. Competitive Techs. Inc.*, where two top executives won preliminary reinstatement at the investigative stage, even though one later lost his case entirely based on a fully developed record (the other settled after the hearing). Before having the benefit of a full evidentiary record, the ALJ rejected a company claim that it would experience irreparable harm from immediate reinstatement. Denying a motion to stay, the ALJ noted, "Complainants are unemployed, and their continued lack of salary and benefits is a harm at least as serious as the discomfort their presence in the workplace would create for Respondent."

*Bechtel* reveals the import of the uncommon remedial structure of SOX and sounds a cautionary note for employers. Other administrative schemes provide a complaining employee with an opportunity to obtain an administrative hearing upon a showing of mere reasonable cause that an employee-protective statute may have been violated. But SOX veers sharply away from conventional administrative processes and instead imposes a substantive preliminary reinstatement remedy once an investigation discloses reasonable cause that a violation may have occurred. Under SOX, the familiar minimal initial showing of reasonable cause is not the basis for a hearing entitlement; it triggers the unusual remedy of preliminary reinstatement.

There are only two circumstances that allow for exception to the immediate availability of the preliminary reinstatement relief: (1) where the employer is able to establish that such relief is not appropriate by showing with available or after-acquired information that the complainant is, or has become, a security risk;<sup>1</sup> and (2) where the employer is able to show to OSHA's satisfaction that preliminary reinstatement is "inadvisable for some reason" so that "economic reinstatement" providing pay and benefits, instead of preliminary job reinstatement, may be substituted.

<sup>1</sup> A security risk exists where the employer can demonstrate that reinstatement of an employee "might result in physical violence against persons or property." 2



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Where neither of the above circumstances is proven to exist, the exception does not apply and the order of reinstatement becomes effective immediately. Notably, as illustrated by the ARB's decision in *Welch*, the sensitivity of the position to which the whistleblower is seeking reinstatement may not be a consideration and may not be sufficient to demonstrate that reinstatement is "inadvisable."

## Implications for Employers

The ARB in *Welch* read and interpreted the SOX statute literally. What it did not do, however, is recognize that the regulations provide for the possibility of economic reinstatement under certain circumstances, which arguably were present in the *Welch* case. *Welch* was a CFO who, at various times throughout his employment, had proven himself unable to get along with the CEO, Audit Committee, outside accountant, and outside counsel and had exhibited a sense of enmity and distrust. Restoring him to the position of major financial responsibility on behalf of a publicly traded company seems fraught with tensions and impracticalities that could be damaging to business, regulatory, and investor interests. But the relief imposed was held to fit squarely within SOX's remedial scheme.

The structure of relief provided under SOX sharply contrasts with other employment legislation, such as Title VII and the Age Discrimination in Employment Act ("ADEA"), where front pay is generally held to be available in preference to immediate reinstatement. Even where other statutes make provision for preliminary reinstatement, there are judicial safeguards, with the burden on the party seeking the extraordinary relief of reinstatement prior to a full adjudication. Under Title VII, the ADEA, the Fair Labor Standards Act, and the LMRA, a plaintiff or government agency petition for court intervention and a preliminary injunction is subject to the showing of substantial and irreparable harm customary whenever equitable relief is sought. Under SOX, however, the burden is shifted to the respondent employer to file a motion seeking a stay of the preliminary reinstatement order. To prevail, the employer must show that its circumstances fit within one of the exceptions to immediate relief or 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. As noted by the ALJ in *Welch*, preliminary reinstatement is "presumptive." This is despite the stark reality that there is a possibility, if not likelihood, of additional retaliation charges after a preliminary reinstatement.

Employers should, of course, take the steps necessary to avoid a successful whistleblower complaint. But *Bechtel* teaches that ultimate success on the merits may be scant reward for an employer that was ordered to restore a discharged key employee to a sensitive position while it awaits vindication by way of a fully litigated case. Anticipating that they may prevail on the merits, employers must nonetheless be mindful of a burdensome preliminary order of reinstatement. Because of SOX's preference for this interim relief, a necessary component of any defense strategy, from the investigative stage forward, is justification for economic reinstatement as an alternative to a preliminary reinstatement order.

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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](mailto:fmorris@ebglaw.com), or **Allen B. Roberts** at 212/351-3780, [aroberts@ebglaw.com](mailto:aroberts@ebglaw.com).

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