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## Recent Rulings Address Limits of Sarbanes-Oxley Act Protections for Whistleblowers

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The law of whistleblower protection under the Sarbanes-Oxley Act (SOX) continues to develop as proceedings move through the administrative and judicial processes. Among the recent developments:

### **Whistleblower Complaints Limited to Fraud Against Shareholders**

The US Department of Labor's (DOL) appellate body, the Administrative Review Board (the Board), recently rejected an expansive view of the type of conduct that might have an impact on shareholders sufficient to invoke the whistleblower protections of SOX. In *Platone v. FLYi, Inc.*,<sup>[i]</sup> the Board specified that SOX protects only those whistleblowers who allege fraudulent activity that involves securities fraud or otherwise affects shareholders of publicly traded companies. The Board overruled a DOL Administrative Law Judge (ALJ) who had held that SOX protected an employee who had complained of alleged abuse by airline pilots of their collective bargaining agreement's provisions for compensation for lost flight time during union activities. The Board held that SOX does not cover "employee complaints about how a public company spends its money and pays its bills." Even with respect to allegations of bank, mail and wire fraud—to which SOX explicitly applies—the Board limited protection to conduct "at least of a type that would be adverse to investors' interests," relying on Congress's preamble to SOX, which explains that the law is meant "[t]o protect investors."

### **Enforceability of Preliminary Reinstatement Orders Remains Unclear at Best**

Preliminary reinstatement orders—in which an employer is ordered to reinstate the employee before DOL has concluded the case—continue to be controversial. In the continuing saga of *Welch v. Cardinal Bankshares*,<sup>[ii]</sup> a federal district court in Virginia again denied requests to enforce the ALJ's preliminary reinstatement order. Earlier this year, the court refused to enforce the order on the grounds that it was not sufficiently clear and because the Administrative Review Board had not had the opportunity to "stay" the order. The Board subsequently issued orders clarifying the ALJ's order, calling for its immediate effect, and refusing to issue a stay. The DOL then took the unusual step of intervening at the district court to request enforcement of the preliminary reinstatement order. The DOL argued that the relevant procedural statute specifically allows for preliminary reinstatement

orders with immediate effect even while the case proceeds, thereby implying that Congress meant for them to be enforced by federal courts. The court rejected the DOL's arguments, however, interpreting the relevant statute to grant enforcement powers to the courts only for "final orders" of the Secretary of Labor, which the court found to include orders by the Board but not preliminary orders by an ALJ. In this case, the Board has not completed its review of the merits of the case.

In light of its reading of the statute, the court also became the first to "disregard" DOL's SOX regulations that call for federal court enforcement of preliminary reinstatement orders. Currently, both the DOL and the whistleblower in *Welch* are considering appealing the district court's latest ruling. Other courts, like *Welch*, have had difficulty with the issue of preliminary reinstatement orders. Last spring, a panel of the US Court of Appeals for the Second Circuit split three ways and thereby failed to reach a decision on the issue of whether courts have the power to enforce preliminary orders of reinstatement under SOX.[iii]

For more information on these issues or related matters, please contact the authors listed above.

[i] Dep't of Labor ARB No. 04-154, ALJ No. 2003-SOX-27 (ARB Sept. 29, 2006).

[ii] No. Civ.A. 7:06CV00407, 2006 WL 2838894, (W.D. Va. Oct. 5, 2006). The ALJ ordered preliminary reinstatement on February 15, 2005. See Dep't of Labor ALJ No. 2003-SOX-15 (ALJ Feb. 15, 2005). Welch first requested court enforcement on September 14, 2005. The court's earlier refusals to enforce the order can be found at 407 F.Supp.2d 773 (W.D. Va. 2006) and No. Civ.A. 7:05CV00546, 2006 WL 197039 (W.D. Va. Jan. 26, 2006).

[iii] See *Bechtel v. Competitive Techs., Inc.*, 448 F.3d 469 (2d Cir. 2006).

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