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Sarbanes-Oxley Whistleblowers Receive Reinstatement Prior to Full Hearings by Department of Labor

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In recent weeks, corporate whistleblowers—who are shielded from employer retaliation by whistleblower protections implemented by the US Department of Labor under the Sarbanes-Oxley Act—have benefited from the Department's increasingly forceful exercise of its powers under the Act. The Department of Labor's Occupational Safety and Health Administration appears serious about exercising its power to reinstate whistleblowers to their jobs and award them back pay and special damages even before a case has received a full administrative hearing, as long as the employee does not represent a security risk. The Department has ordered a number of large companies to rehire their employees and pay them back wages and compensatory damages following only initial inquiries into allegations that the employees suffered retaliation for reporting suspected corporate wrongdoing or fraud against shareholders. These companies include:

- Connecticut-based Competitive Technologies, Inc., which was ordered to reinstate two company vice presidents and pay them more than $700,000 in damages and costs (including $30,000 each for damage to reputation and mental suffering) because they allegedly were terminated shortly after they raised concerns that certain oral agreements the CEO entered into with consultants should be disclosed to shareholders and on SEC reports. A preliminary investigation by the Department of Labor showed that the company was unable to substantiate its contention that it terminated the employees for poor performance or economic reasons.
- Hertz Corporation, which was ordered to rehire a lead auto rental representative and pay her $154,364 in back pay and compensatory damages for allegedly terminating her after she complained that rental representatives and a local manager were selling insurance to customers whose contracts already included such insurance, allegedly to raise monthly bonuses.
- American Standard Companies, together with its subsidiary Trane Corporation, which was ordered to rehire its assistant controller and pay him more than $105,489 in back pay and damages for allegedly terminating him for his refusal to remove expenses from the company's financial books and his objections to managers who did remove expenses, allegedly to overstate income and increase bonuses.
- Washington Mutual Inc., which was forced to reinstate a vice president and pay her more

than $167,000, plus the value of lost stock options, for allegedly terminating her three months after she complained to management that the bank was failing to conduct due diligence prior to granting loans and thereby putting the bank and shareholders at financial risk, in violation of federal regulatory requirements for lending.

These companies may challenge the preliminary order of reinstatement and demand a full hearing before an administrative law judge. However, under the Department of Labor's regulations implementing the Sarbanes-Oxley Act, a preliminary order of reinstatement—unlike other preliminary orders—will not be automatically stayed during the administrative law judge's hearing. Similarly, a preliminary order of reinstatement remains in effect during appellate review by the Administrative Review Board, should the board grant review of an order. Both the administrative law judges and the Administrative Review Board maintain the power to stay a preliminary order of reinstatement should they determine that the whistleblower poses a security risk or that, upon further review, the whistleblower's case is weak.

Recently, the whistleblower in one of these cases was successful in convincing a federal court to enforce the Department of Labor's reinstatement order, over the company's objection. Competitive Technologies fought the Department of Labor's order in federal court when the two company vice presidents sought an injunction to enforce the order, but the US District Court in Connecticut ruled in favor of the employees (See *Bechtel v. Competitive Technologies, Inc.*, — F.Supp.2d —, 2005 WL 1138790 (D.Conn., May 13, 2005)). Competitive Technologies sought to challenge the district court's subject matter jurisdiction to enforce the Department of Labor's order on the basis that it was a preliminary order rather than a final order. The district court countered that it had jurisdiction to enforce the preliminary order of reinstatement, because to find otherwise would negate the regulation's plain language that preliminary orders of reinstatement are to be effective immediately and may not be automatically stayed pending appeal, as other preliminary orders may be.

Competitive Technologies also contended that the two vice presidents were not entitled to a preliminary injunction by the district court because they failed to demonstrate the material elements for such relief. The district court rejected this contention, finding that the elements for a preliminary injunction are not relevant because preliminary orders of reinstatement by the Department of Labor are entitled to be judged exclusively on the findings of the Department of Labor—which Congress empowered to conduct such determinations. Furthermore, the district court noted that the Supreme Court upheld similar authority by the Department of Labor to issue preliminary orders of reinstatement under another whistleblower protection statute (the Surface Transportation Assistance Act), as long as the Department of Labor's process provided minimum due process standards and Competitive Technologies had not complained of due process violations. For these reasons, the district court ordered Competitive Technologies to comply with the preliminary order of reinstatement and to pay the employees any compensation they would have earned had the company complied with the preliminary order when it was first issued.

These recent orders of preliminary reinstatement reinforce the importance of implementing effective non-retaliation policies and obtaining expert advice in handling employee complaints of corporate wrongdoing so as to avoid even the appearance of retaliation. This trend also demonstrates the

importance of providing employees with prompt and documented performance feedback before claims arise, so that employers can take appropriate disciplinary action without the fear that it may be misconstrued as retaliation.

For questions or for assistance in reviewing existing non-retaliation policies, planning for how to handle any future employee complaints of corporate wrongdoing, or handling a current complaint by an alleged whistleblower, contact any of the authors listed above.

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