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[Sixth Circuit Skirts Jurisdictional Issue in Denying Reinstatement to Alleged SOX Whistleblower](#)

In *Solis v. Tennessee Commerce Bancorp, Inc.*, a three-judge panel of the Sixth Circuit recently reversed a lower court's decision to enforce a preliminary order by the Department of Labor ("DOL" or "Department") to reinstate an alleged whistleblower under the Sarbanes-Oxley Act of 2002 ("SOX"). The court avoided determining whether it had authority under SOX to enforce preliminary orders, instead deciding the case based on the "balance of harms" test that applies in all cases seeking preliminary injunctive relief.

This case arose out of Tennessee Commerce Bank's ("Tennessee Commerce") termination of its Chief Financial Officer, George Fort. Mr. Fort filed a whistleblower claim with the DOL and the Department found reasonable cause to believe that Tennessee Commerce had violated SOX's whistleblower provisions. Pursuant to SOX's enforcement procedures, the Department then issued a preliminary order requiring the bank to reinstate Mr. Fort to his former position and to pay him more than \$1 million in damages. When Tennessee Commerce refused to reinstate Mr. Fort on the basis of the preliminary order, the Department brought an enforcement action in federal district court.

Under SOX's enforcement procedures, the DOL must issue a preliminary order providing relief to an alleged whistleblower within 60 days of the complaint if it finds reasonable cause to believe that a violation has occurred. The preliminary order becomes final after 30 days if it is not contested. Otherwise, the statute affords additional time for the Department to conduct a full hearing on the complaint before issuing a final order. SOX clearly provides that *final* orders may be enforced by the federal courts, but the statute is ambiguous with respect to *preliminary* orders.

Prior to *Tennessee Commerce*, only the Second Circuit, in *Bechtel v. Competitive Technologies, Inc.*, had squarely confronted an attempt to enforce a preliminary order by the DOL—and that case did not produce a clear holding with regard to jurisdiction. Two out of three judges on the Second Circuit panel declined to enforce the preliminary order, but there was no consensus regarding jurisdiction. Although the majority opinion stated that SOX's statutory scheme did not grant the federal courts authority to enforce a preliminary reinstatement order, the concurring judge agreed to reverse on other grounds.

Unfortunately, like *Bechtel*, the decision issued by the Sixth Circuit in *Tennessee Commerce* fails to definitively answer the jurisdictional question. While recognizing the "substantial question as to the authority of the district court to issue the preliminary injunction," the Sixth Circuit panel declined to rule on that issue. Instead, the court found that the potential harm to Tennessee Commerce if forced to temporarily reinstate Mr. Fort outweighed the harm to Mr. Fort of not

being immediately reinstated. By reversing the lower court's order but declining to decide the jurisdictional issue, the Sixth Circuit impliedly recognized the jurisdiction of the federal courts to hear actions arising out of preliminary reinstatement orders.

In the wake of *Tennessee Commerce*, whistleblowers will still clearly face a high threshold to demonstrate that the balance of harms tilts in favor of their reinstatement under a preliminary order. However, Secretary of Labor Hilda Solis has clearly shown herself willing to bring enforcement actions on the basis of preliminary orders and the possibility remains open that other federal courts could enforce such orders.

In the face of this continuing uncertainty, it remains important that employers adhere to the best practices to avoid and defend SOX whistleblower claims. Such preemptive measures include the implementation of adequate internal complaint procedures and the maintenance of confidentiality throughout the investigation of a potential whistleblower's complaint. To prevent and manage retaliation, employers should avoid disclosure of a complaining employee's identity to his reporting chain, consider separating the employee from an accused manager, and assure that any disciplining of a complainant is comparable to that of other employees in similar situations. Finally, it is essential that covered companies produce and maintain accurate and complete documentation of the investigation of SOX-related complaints and terminations of employees for cause.