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Sarbanes-Oxley
Whistleblower Claims & Reinstatement

Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002 (the "Act") provides certain employees with the right to bring a civil claim of retaliation in fraud cases. As a procedural matter, an employee must file a complaint with OSHA within ninety days of the alleged violation prior to filing a complaint in federal court, as required by 18 U.S.C. § 1514A and 29 C.F.R. § 1980.103. OSHA then determines whether there has been a violation under the Act. To prove discriminatory treatment under the Act, the complainant must demonstrate that (1) he engaged in protected activity, (2) the employer knew of the protected activity, (3) he was the subject of an adverse employment action, and (4) circumstances exist suggesting that the protected activity was a contributing factor to the adverse action. Once the complainant has met this burden, the employer can avoid liability if it can show, by clear and convincing evidence, that it would have taken the same adverse employment action despite the protected activity.

OSHA's findings must be set forth in a preliminary order if it grants relief to the complainant. If a party disagrees with the findings, then the party may file objections to the findings or the preliminary order, or both, and request a hearing on the record. All provisions in the preliminary order are stayed pursuant to 29 C.F.R. § 1980.106(b)(1), except for reinstatement, which is effective immediately upon the receipt of the finding and preliminary order pursuant to 29 C.F.R. § 1980.105(c). 29 C.F.R. § 1980.106(b)(1) also provides that the party may request that the Administrative Law Judge ("ALJ") stay OSHA's preliminary order of restatement pending a final decision on the merits.

Recent Decisions. In a recent opinion, an ALJ held that a manager had not demonstrated that his termination was related to protected activity, and ruled for the employer. In another case, the ALJ refused to stay an order reinstating two vice-presidents to their former positions based on OSHA's preliminary finding that the employer had violated the Act.

In *Trodden v. Overnite Transportation Co.*, 2004-SOX-00064 (March 29, 2005), the complainant, a manager, alleged that he was terminated because he resisted express and implied orders to inflate performance measures that were reported to the SEC. Specifically, he testified that he disobeyed these orders for approximately two months during his three years of employment, and claimed he was told that he was discharged for causing problems during this time of disobedience. The complainant admitted, however, that he had not told a superior, a member of Congress or any federal officer that his employer was engaging in questionable activities, as required under the Act. Meanwhile, the complainant's supervisor denied the foregoing allegations and testified that the complainant was discharged after providing employment verification information for a subordinate in violation of company policy. The supervisor also testified that the complainant had misstated the number of hours worked and the amount of money earned by that employee, who in turn provided that incorrect information to a government agency. Another employee who had assisted the complainant in providing the incorrect employment information was issued a verbal warning for her involvement, but was not fired.

The ALJ affirmed OSHA's ruling for the employer, finding that the employer had a legitimate reason for terminating the complainant's employment. Thus, the employer prevailed because it demonstrated that it would have terminated the complainant regardless of whether he had engaged in protected activity.

In the second case, *Bechtel v. Competitive Technologies, Inc.*, 2005-SOX-00033 (March 29, 2005), the ALJ identified and applied a difficult standard in evaluating whether to stay an employee's reinstatement after a preliminary finding of a violation under the Act. The ALJ held that the employer did not meet the standard, and denied the stay.

In *Bechtel*, OSHA preliminarily found that the employer had violated the Act. OSHA ordered the employer to reinstate the complainants, who were vice-presidents of the company, in

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addition to awarding money damages in its preliminary order. The employer moved to stay the order of reinstatement, arguing that it had acquired evidence of misconduct by the complainants that would have led to their termination. The employer further argued that one of the complainants demonstrated such animosity to his employer that reinstatement was impractical. Moreover, the employer cited the fact that it was a small business with a small workforce, and argued that reinstatement would interfere with the employer's discovery efforts and trial preparations.

The ALJ held that a party seeking to set aside a preliminary order for restatement must satisfy the same test applicable to a party seeking preliminary injunctive relief. Thus, the employer needed to demonstrate that (1) it was likely to succeed on the merits, (2) it would suffer irreparable injury if the motion was not granted, and (3) the harm to the employer outweighed that to the other party and to the public. The judge held that the employer could not meet this test, especially because the complainants were unemployed. It explained that "the purpose of preliminary reinstatement is to guarantee the protections of the Act to employees whose complaints are found to be reasonable after investigation by DOL. The fact that the statute mandates reinstatement upon such finding strongly militates in favor of finding that public policy supports reinstatement of the Complainants, even given the uncomfortable circumstances that would reasonably accompany their return to the workplace."

Employment Discrimination

Second Circuit Rejects "Gender Stereotyping" Theory As Basis for Sexual Orientation Discrimination Claim

In *Dawson v. Bumble & Bumble*, 398 F.3d 211 (2d Cir. 2005), the Court of Appeals for the Second Circuit held that a lesbian who does not conform to stereotypical notions of femininity did not state a claim for illegal sex stereotyping under Title VII of the 1964 Civil Rights Act ("Title VII"). Recognizing that discrimination based upon sexual orientation was not actionable under Title VII, Dawson attempted to avail herself of the "gender stereotyping" theory that was developed in the landmark U.S. Supreme Court decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). *Price Waterhouse* and subsequent lower court opinions, including *Back v. Hastings on the Hudson Union Free School District*, 365 F.3d 107 (2d Cir. 2004), hold that propounding gender stereotypes can constitute illegal sex discrimination, in that individuals who do not subscribe to conventional gender roles can be members of a protected class. In *Price Waterhouse*, the Court found that comments that the female plaintiff was "too aggressive" and should act more "femininely" constituted discriminatory gender stereotyping. Similarly, in *Back*, the Second Circuit ruled that the plaintiff, a working mother, was discriminatorily denied tenure because of her employer's reliance on stereotypes about gender and motherhood.

Dawson, a former hair assistant with Bumble & Bumble, a New York City salon, alleged that she was denied a promotion to a hair stylist position, subjected to a hostile work environment and eventually terminated based on her non-conformity to gender stereotypes. Bumble and Bumble argued that Dawson's performance was sub par and that its training program was rigorous, with only about 10 to 15 percent of hair assistants successfully completing the program. Dawson countered that her performance had been consistently praised by her supervisors. She also alleged that she was repeatedly harassed about her appearance, told that she did not conform to the image of a woman, and advised that she should act less like a man and more like a woman.

The Dawson court noted that the use of the gender stereotyping theory by an avowedly lesbian plaintiff presented a difficult analytical challenge, because stereotypes about men and women often blur into notions about heterosexuality and homosexuality. The Court, however, resolved this conundrum by strictly applying Title VII and rejecting the plaintiff's attempt to bootstrap her sexual orientation claim to the gender stereotyping theory. Specifically, the Court noted that the facts as presented by Dawson did not establish her claim of discrimination based on gender stereotyping, because the alleged harassing comments were not sufficiently severe or pervasive and the record contained no facts to establish that she was denied a promotion on the basis of her appearance. Parenthetically, the Court also took notice of the fact that the salon had a particularly diverse workforce.

While it is clear that Title VII does not recognize sexual orientation as a protected class, employers doing business in New York, New Jersey and Connecticut must be mindful of state and local anti-discrimination law, as each state's anti-discrimination statute recognizes sexual orientation as a protected class. Similarly, many cities and townships, including New York City, have enacted their own ordinances prohibiting sexual orientation discrimination. Indeed, both New York City law and New Jersey law, treat both actual and *perceived* sexual orientation as a protected class. As such, Tri-State area employers should ensure that their human resources professionals and managers are aware of the differences in coverage, and should also review their policies and statements on equal opportunity, anti-discrimination, and retaliation to confirm that they include sexual orientation as a protected category. Further, employers should take steps to integrate training on sexual orientation discrimination and harassment into their overall training programs.

Immigration

PERM: The New Electronic Labor Certification Program

The Labor Certification Program has been mired in back-logs for the past several years due to lack of staff, multiple levels of processing, and a heavy volume of applications. Under this system, applications routinely took between two and five years to process. On May 6, 2002, the Department of Labor ("DOL") proposed a new stream-lined, web-based Labor Certification Program known as PERM. After several rounds of revisions and aborted implementation dates, the DOL published the final regulations for the new program on December 27, 2004. PERM went live on March 28, 2005, and is now the exclusive system for filing Labor Certification Applications. Applications pending under the prior program will continue to

be processed under the old system, however, as explained below, a conversion mechanism has been provided which allows the transfer of some applications to PERM.

The majority of employers who wish to obtain U.S. permanent residence for foreign national employees must do so by utilizing the Labor Certification Program as administered by the DOL. Labor Certification is the first of what is, conceptually, a three step process to obtain U.S. permanent residence. The purpose of the labor certification process is to determine whether, for a given occupation, there are U.S. workers who are qualified, able, and willing to fill the proffered position. If an appropriate U.S. worker is not identified, the employer may sponsor the foreign national employee for lawful permanent residence status. If a qualified U.S. worker is identified, the employer will lose its ability to employ the foreign national employee on a permanent basis since it has been determined that the required skill-set is available in the local U.S. labor market.

The Labor Certification Program requires a recruitment process to determine whether a qualified, able, and willing U.S. worker is available to fill the proffered position. This "test of the labor market" requires the placement of advertisements in print publications such as newspapers and industry journals, as well as other forms of recruitment, in order to conclusively determine that a qualified U.S. worker cannot be found.

In contrast to the multi-year waiting periods which pervaded the prior system, the DOL estimates an application processing time of 45 to 60 days under PERM. Please note, however, that a recruitment process, which is likely to last several months, must precede the filing.

New Recruitment Process. PERM introduces a new standardized recruitment regimen. Under the prior system, recruitment requirements varied by DOL Region. PERM requires the employer to perform three primary types of recruitment: placement of two advertisements on two different Sundays in a newspaper of general circulation; placement of a job order for 30 days in the appropriate State job bank; and posting of a detailed position announcement at the place of employment for 10 business days. All recruitment must have been completed within the 180 day period prior to the filing of the application and must be concluded at least 30 days before the filing.

Applications for professional jobs require additional recruitment. A professional position is generally considered to include any job that requires at least a Bachelor's Degree for hire. Three types of additional recruitment must be performed as chosen from a list of 10 eligible categories. These include: 1) job fairs, (2) employer's web site, (3) job search web site other than employer's, (4) on-campus recruiting, (5) trade or professional organizations, (6) private employment firms, (7) an employee referral program (if it includes identifiable incentives), (8) a notice of the job opening at a campus placement office if the job requires a degree but no experience, (9) local and ethnic newspapers to the extent they are appropriate for the job opportunity, and (10) radio and television advertisements.

Recruitment Report. Once all necessary recruitment is complete, the employer must prepare a recruitment report that describes the recruitment steps taken and the result achieved. This would include the number of resulting hires and, if applicable, the number of U.S. workers who were rejected for the position in question, categorized by the lawful job related reasons for such rejection. Though this detailed report is not filed with the Labor Certification application, the DOL Certifying Officer, after reviewing the application, may request a copy of the report along with U.S. workers' resumes, sorted by the reasons the workers were rejected. The recruitment report must be retained for five years in the event that an audit is required.

The DOL Certifying Officer will deem a U.S. worker qualified for the job if the worker is able, willing, qualified, and available for the job opportunity. The U.S. worker must be able to perform the job in a normally accepted manner and as customarily performed by other U.S. workers similarly employed. The worker cannot be rejected if he or she is unable to perform the job but can be trained to do the job in a "reasonable period of on-the-job training."

Decision on Application. The DOL estimates that a decision on the case will be issued within 45 to 60 days following online submission. In some cases, an audit letter will be sent if the DOL believes that there is a problem with the case or if the case is randomly selected for auditing. Upon receipt of the approved Labor Certification, the employer may continue to sponsor the foreign national employee through the final phases of the permanent residence process.

Changes to Prevailing Wage Requirement. Under PERM, there continues to be a prevailing wage requirement, although in a slightly modified form. For all Labor Certification applications, the prevailing wage must be determined and certified by the DOL prior to the filing of the PERM application. This wage is the average wage paid to the position within the local area of employment. The employer is required to pay 100% of the prevailing wage to the foreign national employee at the time permanent residence is conferred. Under the old program 95% of the prevailing wage could be paid. The 5% variance is no longer allowed. Additionally, under PERM, governmental surveys now provide four levels of prevailing wages commensurate with experience, education, and level of supervision rather than the two levels available under the old system. This more sophisticated system is designed to allow for the designation of prevailing wages which better reflect those found in the market place.

Conversion of Applications filed under the Old Program. Certain applications filed under the old Labor Certification program may be converted to PERM for faster processing. The regulation allows the withdrawal and re-filing of any application so long as a job-order has not been issued by the State Workforce Agency for the old application. An employer who successfully withdraws and re-files a pending application will preserve the original filing date. However, re-filed cases must comply with all the requirements of the new PERM final rules, including recruitment, minimum requirements, business necessity, audit procedures, and prevailing wage. Additionally, only applications which are withdrawn and re-filed for an "identical job opportunity" may be converted to PERM. To qualify as an identical job opportunity, an applica-

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tion must have the same employer, alien beneficiary, job title, job location, job description, and minimum requirements. Please note that many applications will not benefit from a conversion to PERM and, in fact, may be adversely affected by a conversion. Each application must be closely analyzed on a case-by-case basis.

Conclusion. The new PERM program implements changes in legal substance and procedure which are far-reaching and complex. Employers will need to closely analyze the impact of these legal changes on current hiring practices and permanent residence sponsorship programs. We encourage you to contact Seyfarth Shaw LLP in order to discuss and better understand this new program.

New York Raises Minimum Wage

New York has become the latest state to increase its minimum wage rate beyond the $5.15 per hour federal minimum rate mandated by the Fair Labor Standards Act. On December 6, 2004, the New York State Senate overrode a veto by Governor George Pataki and approved a bill that will increase the state's minimum wage rate incrementally over the next two years. The law took effect on January 1, 2005; increasing the state's minimum rate to $6.00 per hour. This rate will increase to $6.75 on January 1, 2006 and then to $7.15 on January 1, 2007.

The law also increases the minimum rate for those wage earners who rely on tips, such as waitresses and bartenders. The minimum wage rate of $3.30 per hour that had applied to these workers was increased to $3.85 effective January 1, 2005. It will likewise increase over the next two years, jumping to $4.35 in 2006 and $4.60 in 2007. With this law, New York joins Alaska, California, Connecticut, Delaware, the District of Columbia, Florida, Hawaii, Illinois, Maine, Massachusetts, New Jersey, Oregon, Rhode Island, Vermont and Washington in raising the minimum rate above the federal rate of $5.15.

Connecticut Adopts Civil Union Act

On April 20, 2005, the governor of Connecticut signed a new state law permitting same-sex couples to enter into civil unions. Connecticut thus became the second state after Vermont to legalize civil unions for gay couples, and the first state to do so without intervention by the courts. Massachusetts began allowing same-sex couples to marry in 2004, after its highest court ruled that limiting marriage to heterosexual couples violated its state constitution.

Connecticut's "Act Concerning Civil Unions" sets forth the eligibility and procedural requirements for entering into a civil union. Notably, the new law provides that parties to a civil union "shall have the same benefits, protections and responsibilities under the law … as are granted to spouses in a marriage, which is defined as the union of one man and one woman." Among other things, the law extends state family leave benefits and workers' compensation to employees with civil union partners. Additionally, under the provisions of the law, an employer's contribution to health insurance for an employee's civil union partner will be exempt from Connecticut personal income tax.

This law becomes effective on October 1, 2005.

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