



FENWICK & WEST LLP

# Fenwick Employment Brief

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## FEATURED CASE NOTES

### **CITING PROCEDURAL CONFUSION, FEDERAL COURT REFUSES TO REINSTATE FIRST SUCCESSFUL SOX WHISTLEBLOWER**

On appeal, a Virginia federal judge recently refused to enforce a Labor Department administrative law judge's order reinstating the first plaintiff to bring a successful claim under the Sarbanes-Oxley Act's whistleblower protections. The plaintiff, Welch, brought suit in 2002 after he was terminated from his position as CFO of Cardinal Bankshares. As CFO, Welch refused to certify a quarterly financial statement due to what he viewed as financial irregularities involving individuals with significant roles in internal controls. Welch was discharged two weeks later after he refused to meet with company officials without his counsel present.

In 2004, the ALJ found that Cardinal unlawfully retaliated against Welch in violation of SOX, and in 2005 it ordered reinstatement along with a monetary award of \$172,839.71. On appeal, the federal court reversed the reinstatement order saying it was unclear whether the initial reinstatement order was "final," and explaining that the confusion was created by the SOX enforcement process. It emphasized that its refusal to enforce the reinstatement order was driven by procedural grounds, i.e., whether Cardinal had sufficient notice that it was expected to request a stay of reinstatement during the appeal. *Welch v. Cardinal Bankshares Corp.*, W.D. Va., No. 05-00546, January 26, 2006. However, the federal court did not change the order that Cardinal unlawfully retaliated against Welch in violation of SOX.

As a result of this decision, the procedural framework for enforceable reinstatement orders under SOX is clouded with uncertainty. It is best, of course, to avoid such a "retaliation" predicament in the first instance.

## NEWS BITES

### **IBM FACES MASSIVE OVERTIME CLASS ACTION**

The world's largest technology services provider, IBM, faces a nationwide lawsuit filed in the U.S. District Court for Northern District of California accusing it of misclassifying tens of thousands of current and former installers and maintenance workers. *Rosenburg v. IBM*. The lawsuit seeks compensation on behalf of such employees nationwide. Plaintiffs' lawyers associated with the IBM lawsuit, who previously obtained a settlement against Computer Sciences Corp. on behalf of 30,000 computer workers, have indicated that the potential class in the IBM suit is larger. Attorneys on both sides of the bar speculate that the IBM suit foretells a trend toward increasing overtime class action litigation targeting technology companies.

### **HOME DEPOT DEFEATS CLASS ACTION CERTIFICATION**

In a significant win for employers, a California trial court judge recently ruled against Home Depot employees seeking class certification in a large wage/hour case. *Home Depot Overtime Cases*, Cal. Sup. Ct., No. JCCP4229, February 2, 2006. The judge rejected an "all or nothing" approach to handling the claims of up to 2,800 managers, explaining that the claims were too individualized to proceed as a class. The judge noted that the purported class representatives recognized that a sizable percentage of the 2,800 managers were rightly classified as exempt, and that if the number of correctly classified employees exceeded 50 percent, the truly misclassified employees would receive no compensation under class action procedures.

### **UBS TO PAY \$89 MILLION TO SETTLE MISCLASSIFICATION AND OVERTIME CLAIMS**

On February 9, UBS announced that it will pay up to \$89 million to settle four lawsuits, which accuse the financial firm of improperly classifying as many as 25,000 financial advisors as exempt employees. The lawsuits allege that the financial advisors do not meet the requirements of the administrative exemption under which they were classified. The lawsuits claim that the financial advisors are essentially salespeople hired to sell securities, and do not qualify for the administrative exemption which requires that they perform significant management responsibilities closely aligned with business operations.

### **CALIFORNIA APPELLATE COURT UPHOLDS CLASS ACTION WAIVER**

A California appellate court recently considered whether the California Supreme Court's decision in *Discover Bank v. Superior Court*, which invalidated a class action waiver in a consumer contract of adhesion, also invalidated waivers of class actions in employment contracts. Circuit City's Dispute Resolution Rules and Procedures included an option to elect binding arbitration that waived the right to bring class action claims. Distinguishing Circuit City's policy from the adhesive consumer agreement in *Discover Bank*, the appeals court concluded that the optional waiver of class actions was enforceable. *Gentry v. Circuit City Stores, Inc.*

### **DOL'S OVERALL COLLECTIONS FALL WHILE RECOVERY FOR LOW-WAGE WORKERS INCREASE**

The Labor Department's Wage and Hour Division collected \$166 million in back wages during 2005. While the number of overall complaints filed with the Division dropped, collections on behalf of low-wage workers actually increased by 13 percent.