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**LABOR & EMPLOYMENT DEPARTMENT**

# ALERT

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## **Department of Defense Implements Interim Rule Prohibiting Government Contractors From Enforcing Provisions That Require Arbitration of Title VII and Sexual Assault Claims**

By Scott M. Badami, Andrez S. Carberry and John D. Horowitz

On May 19, 2010, the Department of Defense (DOD) published an [interim rule](#) implementing Section 8116 of the Department of Defense Appropriations Act of 2010 (Act), which restricts a defense contractor's use of mandatory arbitration for claims under Title VII of the Civil Rights Act of 1964 (Title VII) and sexual assault or harassment claims brought by its employees or independent contractors.

Specifically, the interim rule prohibits the use of Fiscal Year 2010 funds for any DOD contract awarded after February 17, 2010, in excess of \$1 million, unless the contractor agrees that it will not:

- Enter into any agreement with its employees or independent contractors that requires, as a condition of their employment, they agree to arbitrate any claim under Title VII, or any tort related to or arising out of sexual assault or harassment, including assault and battery; intentional infliction of emotional distress; false imprisonment; or negligent hiring, supervision or retention; or
- Take any action to enforce a provision of an existing agreement with an employee or independent contractor that requires them to arbitrate any claim under Title VII, or any tort related to or arising out of sexual assault or harassment, including assault and battery;

intentional infliction of emotional distress; false imprisonment; or negligent hiring, supervision or retention.

Additionally, the DOD provided the following examples of contracts that are subject to Section 8116 of the Act:

(1) A new order that exceeds \$1 million using funds appropriated or otherwise made available by the Act, placed against an indefinite-delivery/indefinite-quantity contract; and

(2) A bilateral modification adding new work that uses funds appropriated or otherwise made available by the Act in excess of \$1 million.

Also, effective June 18, 2010, a covered DOD contractor must certify that, "[i]t requires each covered subcontractor to agree not to enter into, and not to take any action to enforce any provision of any [arbitration] agreement" covered by the interim rule. Although the Secretary of Defense is authorized to waive the application of the interim rule to a particular contract or subcontract, such waiver is going to be limited to matters that are deemed "[n]ecessary to avoid harm to national security interests." However, the DOD indicated that the interim rule does not apply to contractor/subcontractor agreements that may not be enforced in a U.S. court.

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Looking ahead, contractors and subcontractors covered by the new legislation should review their agreements with employees and independent contractors – including their employment agreements, arbitration agreements and collective bargaining agreements – to ensure they are not requiring arbitration of the claims set forth in Section 8116 of the Act. Interestingly, the interim rule did not provide any clarification on how DOD contractors should proceed in pending arbitration cases; thus, DOD contractors should immediately contact legal counsel for guidance.

In addition, DOD contractors should review agreements currently being drafted to ensure compliance with Section 8116. Contractors should also monitor the

DOD's enforcement of the interim rule, as well as the Arbitration Fairness Act of 2009, that could prohibit enforcement of any agreement that requires arbitration of employment or civil rights disputes.

For more information about this Alert, please contact John D. Horowitz at 212.878.7963 or [jhorowitz@foxrothschild.com](mailto:jhorowitz@foxrothschild.com), Andrez S. Carberry at 212.878.7964 or [acarberry@foxrothschild.com](mailto:acarberry@foxrothschild.com), Scott M. Badami at 610.397.7974 or [sbadami@foxrothschild.com](mailto:sbadami@foxrothschild.com) or any member of the [Labor & Employment Department](#). Visit us on the web at [www.foxrothschild.com](http://www.foxrothschild.com).



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