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LEGAL ALERT

Legal Alert: Federal Defense Contractors Cannot Require Arbitration of Discrimination Claims

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The Department of Defense Appropriations Act of 2010 (the "Act"), enacted on December 19, 2009, does more than dole out funds to the Department of Defense (DOD). Of particular note to federal contractors, the Act restricts DOD contractors with qualifying contracts from requiring their employees, as a condition of employment, to arbitrate claims brought under Title VII of the Civil Rights Act of 1964 and torts "related to or arising out of sexual assault or harassment."

The so-called "Franken Amendment," after its co-sponsor and driving force, Senator Al Franken (D-Minn.), prevents any money appropriated in the Act from being paid to a federal contractor with a DOD contract worth more than $1,000,000 and awarded more than 60 days after the Act's effective date, unless that contractor agrees not to: (1) enter into agreements as a condition of employment with its employees or independent contractors requiring arbitration of Title VII claims and any sexual assault or harassment-related tort; or (2) enforce any existing agreement with an employee or independent contractor requiring arbitration of Title VII claims and any sexual assault or harassment-related torts. The Act specifically lists sexual assault and harassment-related torts to include assault and battery, intentional infliction of emotional distress, false imprisonment, and negligent hiring, supervision, or retention.

Of note is that the contractors' agreement not to require arbitration covers all Title VII causes of action while the limitation on arbitration of torts only covers those torts stemming from sexual assault and harassment. Coverage of all Title VII causes of action is a departure from the origin of the Amendment, which involved a defense contractor employee stationed in Iraq who alleged that she was raped by co-workers, but whose employer tried to enforce mandatory arbitration language in her employment contract.

The Franken Amendment further stipulates that a prime contractor with a qualifying DOD contract awarded more than 180 days after December 19, 2009, must certify that it requires each subcontractor to that contract with a subcontract worth more than $1,000,000 to agree not to enter into any new agreement or enforce any existing agreement with its employees or independent contractors to arbitrate Title VII and sexual assault or harassment-related torts. While the contractor provision applies to all employees of the contractor, the subcontractor provision only applies to agreements with individuals performing work related to the qualifying subcontract.

The Franken Amendment will cover qualifying prime contracts awarded by the DOD after February 17, 2010 (60 days after December 19, 2009), unless Congress specifies an effective date other than the Act's December 19 passage. The Amendment will cover qualifying subcontracts of those qualifying prime contracts after June 17, 2010 (180 days after December 19, 2009).

The Franken Amendment is a substantial change to the enforceability of arbitration clauses for those employers with qualifying DOD contracts. However, it is significant that the Act only covers those DOD contractors receiving funds appropriated by the Act and only for contracts for those funds awarded after February 17, 2010.

Also, of note, the imprecise language of the Franken Amendment leaves several unanswered questions. For example, does the provision requiring contractors not to enforce "existing agreement[s]" only apply to existing employment agreements or does it broadly cover agreements entered into after a dispute arises such as settlement or severance agreements? And, how does the "condition of employment" provision apply to independent contractors, if at all? Finally, the Act appears to place all obligations on the prime contractor. Therefore, if a subcontractor violates the Act despite the fact that the prime contractor requires the subcontractor to comply, who is liable, and for what are they liable?

DOD contractors should prepare for the Act by: (1) determining whether they will receive appropriations from the Act; (2) reviewing their employment agreements and other uses of arbitration clauses; (3) examining their subcontracts for potentially qualifying subcontracts; and (4) determining how to make their arbitration practices compliant with the law. If you have questions regarding these issues or other labor or employment related issues, please contact the Ford & Harrison attorney with whom you usually work or the authors of this Alert, Wade Ballard, wballard@fordharrison.com, or Grant Close, gclose@fordharrison.com.