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LABOR, EMPLOYMENT AND EMPLOYEE BENEFITS PRACTICE GROUP

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"What keeps you up at night?"

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Mandatory arbitration of Title VII claims against defense contractors curtailed

By Henry A. Platt

On December 21, 2009, President Obama signed into law the Department of Defense Appropriations Act of 2010 (the "Act"), which contained a little-noticed provision (Section 8116) significantly limiting the ability of employers with contracts with the DoD to make or enforce agreements compelling employees or independent contractors to arbitrate any claims under Title VII of the Civil Rights Act of 1964, or any tort related to or arising out of sexual harassment or assault. The provision was originally introduced by Senator Al Franken of Minnesota in response to a recent high-profile case in which an employee of a government contractor, stationed in Iraq, was compelled to arbitrate her claims against her employer related to an incident in which she was allegedly drugged and raped by co-workers after she had complained of prior harassment.

The new law, known as the Franken Amendment, requires recipients of contracts with the DoD in excess of $1,000,000, awarded 60 days or more after the effective date of the Act, to agree not to:

(1) enter into any agreement with any of its employees or independent contractors that requires, as a condition of employment, that the employee or independent contractor agree to resolve through arbitration any claim under Title VII of the Civil Rights Act of 1964 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

(2) take any action to enforce any provision of an existing agreement with an employee or independent contractor that mandates that the employee or independent contractor resolve through arbitration any claim under Title VII of the Civil Rights Act of 1964 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.

The law further stipulates that no funds appropriated under the Act may be expended for any federal contract awarded more than 180 days after the Act's effective date unless the contractor certifies that it requires each covered subcontractor to agree not to enter into, and not to take any action to enforce any provision of, any agreement described above, with respect to any employee or independent contractor performing work related to the subcontract. A "covered

subcontractor" is an entity that has a subcontract in excess of $1,000,000 on a contract covered by the Act. The Act grants the Secretary of Defense the right to waive any of these requirements, however, if the Secretary determines that the waiver is necessary to avoid harm to national security interests.

These are extremely broad prohibitions regarding the arbitrability of claims under Title VII (which prohibits race, sex, national origin and religious discrimination), as well as the arbitrability of tort claims relating to sexual assault or harassment. Notably absent from the Act, however, is any prohibition of the mandatory arbitration of any other employment discrimination claims, including claims of discrimination arising under the Age Discrimination in Employment Act (ADEA), the Americans with Disabilities Act (ADA), Section 1981, or state anti-discrimination statutes. It likewise does not prohibit the arbitration of contractual disputes, state law claims (unless related to sexual assault or harassment), or claims under other federal employment statutes, such as the Family Medical Leave Act (FMLA) and the Uniformed Services Employment and Reemployment Act (USERRA). Finally, nothing in the Act prohibits a contractor from entering into a voluntary, post-dispute agreement to arbitrate Title VII claims, as long as the employee is not required to enter into the agreement as a condition of employment.

Employers must note that the Act's prohibitions against employer-mandated arbitration agreements are not limited to the employees working under newly awarded contracts – they apply to all employees of the contractor. Likewise, the Act's limitations on the enforceability of existing arbitration agreements does not appear to be limited to agreements imposed "as a condition of employment;" they arguably also include individually negotiated contracts (such as executive employment agreements). The Act's impact on collective bargaining agreements is much less clear, however, and will likely be the subject of extensive litigation.

Although the Act does not expressly provide the referenced "effective date," covered contractors should plan on compliance no later than February 17, 2010 – 60 days after enactment – and ensure that all subcontracts are in compliance no later than June 17, 2010 – 180 days after enactment. It is therefore incumbent upon all employers with DoD contracts to quickly take steps to comply with the new law, including revising applications or agreements presented to new hires that mandate arbitration of these claims, and modifying any dispute resolution policies concerning the use of mandatory arbitration to provide that the company will not enforce such existing agreements. Steps should also be immediately taken to ensure that all future subcontracts include the required certifications as well.

The Franken Amendment represents a significant change in federal policy, which currently encourages the use of arbitration and other forms of alternative dispute resolution. While the Franken Amendment only applies to defense contractors, it is extremely likely that similar limitations will be worked into other appropriations bills in the near future. Most significantly, the Arbitration Fairness Act currently winding its way through congressional committees would, if passed, prohibit the use of all mandatory arbitration agreements in the employment context (except collective bargaining agreements).

This Alert was written by Henry A. Platt, a member of the firm's Labor, Employment and Employee Benefits Practice Group. Henry can be reached at 202.342.3447 or hplatt@saul.com. This publication has been prepared by the Labor, Employment and Employee Benefits Practice Group for information purposes only.

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