A Possible Harbinger of Things to Come: DOD Appropriations Bill Restricts Use of Arbitration Agreements in Employment Contracts by Federal Contractors

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As 2009 came to a close, Congress passed and President Obama signed into law the Fiscal Year 2010 Department of Defense Appropriations Act (the "Act"). The Act prohibits some Department of Defense ("DOD") contractors from enforcing pre-dispute arbitration agreements that would force their employees to arbitrate claims under Title VII of the Civil Rights Act of 1964 ("Title VII") or common law torts relating to sexual assault or harassment in arbitration, rather than bringing them in court. Affected contractors also must certify that subcontractors working with them on these contracts agree to the same prohibitions. This new limitation on the enforcement of arbitration agreements may be a harbinger of things to come, as both the House and Senate are considering legislation that would more broadly prohibit mandatory arbitration of employment law claims, as well as consumer claims.

Origination of the Arbitration Provision

Senator Al Franken (D-MN) originally proposed an amendment to the Act that would proscribe the use of pre-dispute arbitration agreements by defense contractors in certain circumstances after learning that an employee of such a contractor allegedly was sexually assaulted by her coworkers while stationed in Iraq, but was required by her employment contract to arbitrate her claims rather than bringing them in court. 115 Cong. Red. S10028 (Oct. 1, 2009). Senator Franken’s proposed amendment provided that no appropriated DOD funds could be used by a contractor or subcontractor that required its employees or independent contractors to sign an agreement requiring arbitration of claims 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. That amendment was passed by the Senate by a vote of 68-30.

The Arbitration Provision as Enacted

Congress made several changes to Senator Franken’s amendment before settling on a final version. Specifically, while Senator Franken’s original proposal applied to all contractors receiving appropriated DOD funds, the final provision applies only to contracts exceeding $1,000,000. In addition, contractors receiving funds appropriated by the Act also must certify that they have required each of their covered subcontractors to agree to the same limitations on arbitration agreements, but only with respect to
those employees and independent contractors actually performing work related to those subcontracts. In other words, subcontractors are free to require arbitration for the types of claims referenced above with respect to non-DOD subcontracts. Only DOD subcontracts that exceed $1 million are covered by the arbitration provision.

Contractors and subcontractors should note several important dates regarding implementation of these new restrictions. First, the arbitration restriction applies only to DOD contracts awarded after February 17, 2010. The provision does, however, prohibit covered contractors and subcontractors from enforcing the arbitration provisions of existing agreements related to the claims described. Further, defense contractors are not required to provide certification with respect to their subcontractors’ compliance until 180 days after enactment, or June 17, 2010.

Exclusions and Exceptions

As noted above, the arbitration restriction applies to all claims related to sexual assault and harassment and all claims arising under Title VII, which covers claims of discrimination based on race, sex, national origin, and religion. It does not prohibit mandatory arbitration of claims regarding disability, age, or other employment issues, including claims brought under the Americans with Disabilities Act, the Age Discrimination in Employment Act, the Family and Medical Leave Act, the Fair Labor Standards Act, or state labor and fair employment statutes.

These new limitations on arbitration do not apply to a contractor’s or subcontractor’s agreements with employees or independent contractors that cannot be enforced in the United States. Finally, the Secretary of Defense may waive the requirements described above if he or she determines that such a waiver is “necessary to avoid harm to national security interests of the United States, and that the term of the contract or subcontract is not longer than necessary to avoid such harm.”

Issues for Employers

Employers with existing DOD contracts or subcontracts, or those employers planning to bid for such contracts, should evaluate their employment agreements to determine if they contain provisions mandating arbitration for the types of claims covered by the Act. Covered contractors also should evaluate all pending or new Title VII or sexual assault or harassment claims to determine if they contain claims that can no longer be channeled into arbitration through the enforcement of a pre-dispute agreement.

Perhaps the thorniest problem facing covered contractors relate to its obligations with respect to its subcontractors. Significantly, contractors are expected to do far more under this legislation than they are under analogous provisions of Executive Order 11246, pursuant to which a contractor is obliged only to put subcontractors and vendors on notice of their possible status as covered subcontractors by incorporating the so-called equal opportunity clause into subcontracts and purchase orders.1 Under the new arbitration law, covered contractors must actually seek compliance certification from those subcontractors. Whether there will be implementing regulations that will set forth the method or form of such certification remains to be seen.

Finally, employers should be aware that this legislation may be a precursor to passage by Congress of the Arbitration Fairness Act (“AFA”). The AFA is far broader than the DOD Appropriations Act, and, if enacted as currently drafted, would prohibit mandatory pre-dispute arbitration agreements as to employment, consumer, franchise, or civil rights disputes. The AFA bills are still in committee and it is
unclear where the AFA currently rests on the legislative agenda, but unlike many of the employment related bills being pursued by the Democrats, the AFA does have some bipartisan support.

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1 The Act also differs from the Executive Order in that jurisdiction will arise under the Executive Order whether a contractor is receiving appropriated federal funds or the government is receiving payment from the contractor. The Act applies only to contractors receiving funds appropriated to the Department of Defense.