New Law Bars Government Contractors from Requiring Arbitration of Employee Claims

by Christine Nicolaides Kearns, John E. Jensen and Joanna Liberman

On February 17, 2010, the "Franken Amendment" went into effect, putting broad constraints on government contractors' ability to resolve employee disputes through arbitration. The Amendment is a provision of the Fiscal Year 2010 Department of Defense ("DoD") Appropriations Act (Pub. L. 111-118).

The Amendment imposes conditions on the receipt of funds through the 2010 DoD Appropriations Act for contracts of over $1,000,000 and entered into after February 17, 2010. Specifically, contractors may not:

1. enter into any agreements with any employees or independent contractors that require, 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 any 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 existing agreements with employees or independent contractors that mandate that the employee or independent contractor resolve such claims through arbitration.

The Amendment also requires that, for contracts entered into after June 17, 2010, the prime contractor must certify that it requires each of its subcontractors to agree not to enter into and not to take action to enforce any provision of any contracts requiring the arbitration agreements described above for "any employee or independent contractor performing work related to such subcontract." This requirement applies to subcontracts of over $1,000,000 under prime contracts that are covered by the Amendment.

Notably, the requirements for prime contractors apply to **all** employee contracts, not just those of the employees working on contracts funded through the 2010 DoD Appropriations Act. By contrast, the requirements for subcontractors only apply to contracts with employees or independent contractors who are performing work under the government contract. If a contractor refuses to comply with the Amendment, they will be prohibited from receiving FY2010 funds.

The Amendment does not apply to contracts for commercial items or contracts for commercially available off-the-shelf ("COTS") items. Also, the Secretary of Defense is allowed to waive the Amendment's requirements with respect to a particular contract where "waiver is necessary to avoid harm to national security interests of the United States" and where "the term of the contract or subcontract is not longer than necessary to avoid such harm." The Amendment states that waivers must be transmitted to Congress and simultaneously made public. These added requirements of public disclosure could effectively chill application of the waiver.

Finally, the Amendment does not apply to employment agreements that "may not be enforced in a court of the United States." Thus, arbitration clauses will still be permitted and enforceable in contracts that may be enforced only in foreign jurisdictions.

As a result, prime contractors awarded contracts for over $1,000,000 funded by the 2010 DoD Appropriations Act should:

- Review **all** of their independent contractor agreements and employment contracts entered into after February 17, 2010, and remove any requirement that employees and independent contractors agree to arbitrate claims under Title VII or any tort related to or arising out of any sexual assault or harassment.

- Going forward, ensure that all independent contractor agreements and employment contracts contain no language requiring employees or independent contractors to arbitrate such claims.

- Take no action to enforce any such arbitration agreements that existed in agreements entered into before February 17, 2010.

- Establish protocols to ensure that arbitration agreements are not inadvertently enforced where, for example, another division of the company is a recipient of DoD funding. This can be done by having the General Counsel or outside counsel review all decisions to enforce employment contract arbitration agreements.

- Include provisions in any new subcontracts (excluding commercial items and COTS items contracts) entered into on or after June 17, 2010 for over $1,000,000 whereby the subcontractor agrees not to require employees performing work related to the subcontract to sign any such arbitration agreements or to enforce any existing agreements.

- Prepare a form certification for submission to DoD stating that all covered subcontractors have been required, in accordance with the Franken Amendment, not to enter into and not to take any action to enforce any of the arbitration agreements described above.

Subcontractors awarded contracts for over $1,000,000 should do all of the above except they are not required to prepare a form certification for submission to the DoD and they are not required to eliminate arbitration clauses relating to employee disputes in contracts with employees or independent contractors who are not performing work under a government contract.

A proposed interim Department of Defense Federal Acquisition Regulation ("DFARS") rule providing further direction on the Franken Amendment is expected in the upcoming months.

If you have any questions about the content of this advisory, please contact the Pillsbury attorney with whom you regularly work or the authors below.

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