A Timely Analysis of Legal Developments

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The Fiscal Year 2010 Department of Defense Appropriations Act recently signed by President Obama contains a provision that prohibits federal contractors receiving Defense Department funds for contracts in excess of $1,000,000 from requiring their employees or independent contractors to arbitrate certain disputes, including claims under Title VII of the Civil Rights Act of 1964. Such federal contractors also will be required to certify that their subcontractors agree to these same restrictions.

Defense Appropriations Bill Restricts Federal Defense Contractors' Use of Arbitration Agreements

By Ilyse W. Schuman and Henry D. Lederman

On December 19, 2009, President Obama signed into law the Fiscal Year 2010 Department of Defense Appropriations Act (the "Act").[1] Embedded in this $636 billion spending measure is a provision that prohibits federal contractors receiving Defense Department funds for contracts in excess of $1,000,000 from requiring their employees or independent contractors to arbitrate certain disputes, including claims under Title VII of the Civil Rights Act of 1964. Such federal contractors also will be required to certify that their subcontractors agree to these same restrictions.

Background

The arbitration provision that ultimately was included in the Act was a modified version of an amendment submitted by Senator Al Franken (D-Minn.) during Senate consideration of Defense Appropriations legislation. Upon offering the amendment, Senator Franken noted that he was "inspired by the courageous story" of Jamie Leigh Jones, a defense contractor employee stationed in Iraq who was allegedly sexually assaulted by coworkers and whose employment contract required her to arbitrate any dispute against her employer.[2]

Senator Franken's amendment provided that no funds appropriated under the bill could be used for an existing or new contract if the contractor or subcontractor required an employee or independent contractor, as a condition of employment, to sign a contract mandating that the employee or independent contractor performing work under the contract or subcontract resolve through arbitration claims 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 Senate approved the amendment on October 6, 2009, by a vote of 68 – 30.

Restrictions on the Use of Arbitration Agreements in the Act

While the substance of Senator Franken's amendment was generally included in the

final Defense Appropriations bill, a number of changes were made to it by the conference committee in reconciling the different House and Senate versions of the bill. Notably, the Act imposes the new arbitration restrictions on employers' use of arbitration when they receive contracts or subcontracts funded by the Act that exceed $1,000,000. Specifically, Section 8116(a) of the Act requires that:

> None of the funds appropriated or otherwise made available by this Act may be expended for any Federal contract for an amount in excess of $1,000,000 that is awarded more than 60 days after the effective date of this Act, unless the contractor agrees not to:
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> (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
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> (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.

Additionally, beginning 180 days after enactment, defense contractors will be required to certify that their subcontractors have also agreed to the arbitration restrictions for their employees and any independent contractors who perform work on the contract. Only subcontractors with subcontracts of more than $1,000,000 on the defense project are affected, however.

There are a several important points about the arbitration restrictions imposed by the Act. First, they will be broadly applied since many defense contracts exceed the $1,000,000 threshold. Second, although the original Franken amendment was positioned as a response to a sexual assault claim, the restrictions in the Act apply to all Title VII claims (*e.g.*, claims of race, sex, national origin and religious discrimination), and, apparently, to any tort claims arising out of a claim of sex harassment or sexual assault. Third, the Act does not address the arbitration of common law claims unrelated to sexual harassment or sexual assault, non-Title VII federal employment-related claims, such as claims under the Americans with Disabilities Act, the Age Discrimination in Employment Act, the Fair Labor Standards Act, or employment claims brought under state statutes.

While the restriction only applies to contracts awarded after February 17, 2010 and prohibits covered contractors and subcontractors from entering into new mandatory arbitration agreements with respect to claims listed above, the new law has important implications for existing mandatory arbitration agreements as well. The Act would prohibit covered defense contractors and subcontractors from enforcing the provisions of existing agreements with employees and independent contractors requiring arbitration of any of the listed claims.

Finally, there are two important exceptions to these new restrictions on the use of mandatory arbitration. The arbitration provisions do not apply to agreements that cannot be enforced in this country. Also, the Secretary of Defense may waive these restrictions on a case-by-case basis if the Secretary or the Deputy Secretary personally determines that the waiver is necessary to avoid harm to national security interests of the United States, and that the term of the contract or subcontract is no longer than necessary to avoid such harm.

Practical Implications for Employers

A number of questions remain about the implementation of the arbitration restrictions. For example, how will the Secretary of Defense interpret and apply the national security waiver? If employers allow employees to opt out of arbitration, will that be sufficient to show that arbitration is not a "condition of employment," as the amendment now specifies? If a covered defense contractor or subcontractor requires its employees to arbitrate their disputes, will the Act invalidate the agreement to arbitrate, jeopardize the defense contract, or both?

However these and other questions ultimately are resolved, it is clear that defense contractors or subcontractors, or those seeking contracts with the Department of Defense, need to carefully evaluate their arbitration agreements with their employees and independent contractors for compliance with the new law. They also will need to obtain certifications from their subcontractors that the subcontractors are complying with it.

New arbitration agreements may have to address the possibility that employee claims may be covered by the Act's arbitration restrictions. Furthermore, defense contractors and subcontractors with contracts over $1,000,000 awarded after February 17, 2010, will no longer be able to enforce provisions in existing agreements that mandate arbitration of these claims, without at least jeopardizing their defense contract.

Conclusion

All employers who have arbitration agreements with their employees should take note of this development. Whether it is a precursor to the passage of the proposed Arbitration Fairness Act (S. 931/H.R. 1020) which would prohibit implementation of mandatory pre-dispute employment arbitration agreements or the end of Congressional efforts to limit employment arbitration remains to be seen. What is clear is that Congress is taking a critical look at mandatory arbitration agreements in the employment context.

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[1] The Department of Defense Appropriations Act, 2010, Pub. L. No. 111-118, Dec. 19, 2009.

[2] 115 Cong. Rec. S10028 (Oct. 1, 2009). Ms. Jones was allegedly "drugged and gang-raped" and pursued a lawsuit against her employer, who "sought to enforce the arbitration clause in Ms. Jones' contract" according to Senator Franken's statement. Id.