

To: Our Clients and Friends

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New Law Bars Certain Mandatory Arbitration Provisions in Employment Contracts Used by Department of Defense Contractors

On December 19, 2009, President Obama signed into law the Fiscal Year 2010 Department of Defense Appropriations Act, Pub L. No. 111-118, which contains the “Franken Amendment” that will require many government contractors to eliminate provisions requiring the arbitration of certain claims from the employment agreements they use for new employees and will prevent them from enforcing such arbitration provisions in existing agreements.

Specifically, the Franken Amendment bars the expenditure of the money appropriated by the Act on any Federal contract in excess of \$ 1 million awarded after February 17, 2010,^{1/} unless the contractor agrees not to:

- 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 1964 Civil Rights Act 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
- Take any action to enforce any provision of an existing agreement with an employee or independent contractor that requires the arbitration of such claims.

The Franken Amendment also provides that no funds may be used for any contract awarded after June 17, 2010, unless the contractor certifies that each of its subcontractors performing subcontracts in excess of \$ 1 million has agreed not to enter into or take any action to enforce similar arbitration agreements with respect to any employee or independent contractor “performing work related to such

^{1/} The Franken Amendment says that its provisions take effect a certain number of days after the “effective date” of the Appropriations Act. That act does not set out an effective date, and this comment assumes the effective date is the date it was signed into law.

subcontract.” Although the Amendment limits the arbitration bar to agreements with subcontractor employees performing work related to the subcontract, no comparable limitation exists for the prime contractor. The bar applies to agreements with all prime contractor employees and independent contractors, regardless of whether they are working on a contract funded through the Appropriation Act.

The Act permits the Secretary or Deputy Secretary of Defense to waive the requirements of the Franken Amendment when such a move is “necessary to avoid harm to national security interests” of the United States. The requirement that all such determinations be sent to Congress and be made public is likely to ensure that few such waivers are issued.

The Amendment also contains a strange exception for employment agreements “that may not be enforced in a court of the United States.” Although the exception can be read to allow contractors to enter into and seek to enforce these agreements, but only when a U.S. court will find the agreement to be unenforceable(!), it is likely that its intent is to allow such mandatory arbitration provisions in agreements that can be enforced solely in a foreign court.

The Franken Amendment was prompted by the story of a KBR employee who alleged that fellow employees drugged and gang-raped her at a complex in Baghdad. When she brought suit against the company, it sought to compel arbitration of her claims pursuant to her employment agreement (an effort that ultimately was unsuccessful when the court ruled that such claims were not covered by the agreement). Contrary to various media reports, however, the Franken Amendment is not limited to claims for sexual assault. It also prohibits mandatory arbitration of claims relating to or arising out of sexual harassment (including when such harassment allegedly arises out of negligent hiring, supervising, or retention of employees) and arbitration of claims arising under Title VII of the Civil Rights Act of 1964, such as discrimination based on race, color, religion, sex, or national origin. Arguably, not all Title VII claims are covered, just those that relate to or arise out of sexual assault or harassment.

Companies that are awarded contracts funded with money appropriated by the FY 2010 DoD Appropriations Act will need to review their employment agreements to ensure they comply with these new restrictions and will need to require their major subcontractors to do so as well.

This client alert was prepared by Stephen S. Kaye and Angela L. Nadler.

If you have any questions regarding what is discussed in this client alert, please contact a member of the Bryan Cave Government Contracts Industry Team, who are listed below.

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