February 25, 2010

Signed into law on December 19, 2009, the Department of Defense Appropriations Act (the "Act") has potentially broad and sweeping ramifications for defense contractors. Buried within this $636 billion spending measure is a clause prohibiting contractors and subcontractors that receive over $1 million in funds from the Department of Defense ("DOD") and certain subcontractors from requiring their employees and independent contractors to enter into arbitration agreements mandating the arbitration of claims arising under Title VII of the Civil Rights Act of 1964 ("Title VII") and common law tort claims relating to sexual assault or harassment.

Background

Senator Al Franken (D-MN) introduced the original version of the provision prohibiting arbitration clauses after he was moved by the story of a defense contractor employee, Jamie Leigh Jones, who was allegedly sexually assaulted by co-workers and was unable to litigate her claims due to an arbitration agreement she had with her employer. Under his proposal, no defense contractor could have receive DOD funds if it required its employees or independent contractors to sign agreements requiring the arbitration of claims under Title VII and torts arising out of sexual harassment or assault, including intentional infliction of emotional distress, false imprisonment, or negligent hiring, retention, or supervision.

New arbitration limitations

Although the final version provided some exceptions to Senator Franken's initial, more restrictive proposal, the heart of his proposal remains intact. Under the Act, only prime contractors that receive DOD funds exceeding $1 million, are covered. A subcontractor is covered only if it (1) performs work directly related to a covered defense contract and (2) the subcontract exceeds the $1 million threshold. In addition, a qualifying contractor must certify that it has required each of its subcontractors to agree to the arbitration restrictions.

Once a contractor meets the threshold requirements, the Act prohibits them from entering new agreements or taking any action to enforce existing agreements that require an employee or independent contractor to resolve through arbitration the following categories of claims:

- Any claim under Title VII, which includes claims of race, sex, national origin and religious discrimination; 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.

Effective dates of the arbitration limitations

The arbitration restrictions only apply to contracts awarded after February 17, 2010. Nevertheless, covered contractors cannot enforce arbitration provisions of *existing* agreements related to the claims described above. Consequently, a covered contractor cannot use an existing arbitration provision to prohibit an employee from bringing a claim under Title VII or a tort claim related to sexual harassment or assault in a court of law. In addition, prime contractors have until June 17, 2010 to certify that their subcontractors are compliant with the Act.

What is not included

Despite its coverage of Title VII claims, the Act does not prevent contractors from entering into or enforcing arbitration agreements relating to the Americans with Disability Act, the Age Discrimination in Employment Act, the Fair Labor Standards Act, the whistleblower provisions of the False Claims Act, other state and federal employment and whistleblower statutes, or common law claims that do not involve sexual harassment or assault. Finally, the Secretary of Defense has the authority to waive the arbitration restrictions if the Secretary determines that a waiver is necessary to avoid harm to the 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.

DOD notice concerning the Act

On February 17, 2010, DOD's Director of Defense Procurement and Acquisition Policy issued a memorandum that requires contracting officers to implement the arbitration restrictions under the Act in all qualifying contracts. The memorandum also includes a new clause to be used on covered contracts, DFARS 252.222-7999 ("Additional Requirements and Responsibilities Restricting the Use of Mandatory Arbitration Agreements"). Critically, the DOD memorandum specified that the Act will not apply to contracts for the acquisition of commercial items or commercially available off-the-shelf (COTS) items.

DOD stated in the notice that it intends to publish an interim DFARS rule and will be considering comments from the contractor community in drafting the final rule. Given the significant implications of this Act, contractors are encouraged to provide comments to the DOD by contacting Mr. Julian Thrash at 703/602-0310 or **julian.thrash@osd.mil**.

Implications of the Act

Many questions remain unanswered concerning the Act, including whether the use of employment agreements containing a prohibited arbitration clause will simply be unenforceable or will result in a contractor facing hefty monetary penalties, suspension, or debarment. Moreover, the Act does not address how prime contractors should certify that their subcontractors are complaint with the provision. Presumably, many of these issues will be address in the regulations implementing the Act, but it is unclear when regulations will be issued.

Covered contractors and employers planning to bid on covered contracts should take the following actions to comply with the Act:

- Contractors should immediately notify employees who have existing arbitration agreements including Title VII and/or common law sexual harassment or sexual assault claims that the contractor will not arbitrate those claims.
- They should also follow up promptly to modify existing agreements and policies that contain arbitration provisions requiring the arbitration of claims under Title VII or common law sexual harassment or sexual assault claims. Contractors should note that the Act appears to cover all employees and independent contractors of a covered contractor, not just those working on the covered contract.
- Contractors should also omit provisions prohibited by the Act from new agreements. In their new arbitration agreements, contractors should clearly specify that they do not apply to "claims under Title VII or common law sexual harassment or sexual assault claims." However, if the employer is likely to fall out of covered status in the near future, it may be possible to include a provision exempting the prohibited provisions only for the period the employer is a covered contractor.
- They should notify covered subcontractors of their obligations under the Act, certify that covered subcontractors are compliant by June 17, 2010, and require all future subcontractors to certify compliance in their subcontracts.
- Note that, if the arbitration agreement is amended to exclude prohibited claims but not other types of employment-related claims, an employee or former employee who brings prohibited and non-prohibited claims will be required to bring some of them in court and others through arbitration. Contractors should consider whether it would be preferable to retain arbitration for some claims or, alternatively, to eliminate the arbitration agreement entirely.

If you would like to discuss these issues further or have questions about this *Alert,* please contact one of the attorneys listed above.