CONGRESS PROSCRIBES THE RIGHT OF DEFENSE CONTRACTORS TO MANDATE ARBITRATION OF CERTAIN EMPLOYMENT MATTERS

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By February 17, 2010, defense contractors must assure that their employment agreements comply with the Department of Defense Appropriations Act for 2010, Pub. L. No. 111-118. Section 8116 of the Act, a modified version of an amendment offered by Senator Al Franken, prohibits defense contractors and certain of their subcontractors from requiring employees and independent contractors to arbitrate various employment claims.[1] Section 8116 implements this prohibition by creating several conditions for award of Department of Defense (DOD) contracts in amounts greater than US$1 million.

The first condition, which, regardless of when the solicitation was issued, applies to any covered contract *award* made after February 17, 2010, requires the contractor to agree ***not*** to:

> (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 [such claims]. . . .[2]

This condition prohibiting mandatory arbitration clauses and their enforcement by DOD contractors is written broadly and appears to cover all employees and independent contractors of the subject contractor rather than to be limited expressly to those employees and independent contractors performing work under the covered DOD contract. Contractors should take note of the specific

1 Pub. L. 111-118, Dec. 19, 2009, 123 Stat. 2409, § 8116.
2 *Id.* at § 8116(a) (emphasis added).

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claims covered by the proscription: *all* Title VII claims (i.e., claims relating to race, sex, national origin, and religious discrimination) and tort claims related to or arising out of a claim of sexual harassment or assault. Section 8116 does not cover employment claims brought under any other federal statute (e.g., the Americans with Disabilities Act or the Age Discrimination in Employment Act) or to unspecified employment claims brought under state statutes.

The second Section 8116 condition, which again, regardless of when solicited, applies to any covered contract *award* after June 17, 2010, requires the contractor to *certify* that each covered subcontractor agrees not to enter into or take any action to enforce agreements mandating arbitration of the employment-related claims covered by Section 8116.[3] Section 8116(b) defines a "covered subcontractor" as an entity that has a subcontract in excess of US$1 million on a contract covered by Section 8116.[4] Unlike the seemingly broad proscription applicable to prime contractors, the covered subcontractor proscription expressly applies only to employment agreements with "any employee or independent contractor performing work related to such subcontract."[5]

Section 8116 exempts from coverage any contractor or subcontractor employment agreements with employees or independent contractors that may not be enforced in a court of the United States.[6] The section also permits the Secretary of Defense to waive the conditions for a particular contractor or subcontractor if the Secretary or the Deputy Secretary personally determines in a writing, which is transmitted to Congress and made public, 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 not longer than necessary to avoid such harm."[7]

It is unclear whether or when the DOD will issue acquisition regulations to implement these statutory requirements. Nevertheless, in light of Section 8116's rapidly approaching effective dates, DOD contractors should promptly and carefully evaluate their employment practices to determine whether they must revise their employment agreements and dispute resolution programs to comply with the Section 8116 requirements effective after February 17, 2010. Covered prime contractors also must implement procedures to ensure that, after February 17, 2010, they no longer enforce provisions included in pre-February 17, 2010 employment agreements which mandate arbitration of the claims covered by Section 8116. Further, DOD contractors should evaluate their subcontracting processes and agreements to ensure that their covered subcontractors understand and agree to the specific flow-down provisions in Section 8116. Finally, DOD contractors and subcontractors should educate their relevant human resources and related personnel on these Section 8116 requirements.

The enactment of this provision prohibiting mandatory arbitration clauses in defense contractor and subcontractor employment agreements is a marked departure from past Congressional action. For many years, Congress has considered, yet failed to enact, proposed legislation targeting mandatory agreements to arbitrate employment-related claims.[8] It remains to be seen whether Section 8116 is a forerunner to broader Congressional action in this arena.

We hope that you have found this advisory useful. If you have additional questions, please contact your Arnold & Porter attorney or:

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3 *Id.* at § 8116(b).
4 *Id.*
5 *Id.*
6 *Id.* at § 8116(c).
7 *Id.* at § 8116(d).

8 *See*, e.g., Fairness in Nursing Home Arbitration Act of 2008 (H.R.6126 and S.2838, 110th Cong.) and of 2009 (H.R.1237 and S.512, 111th Cong.); Arbitration Fairness Act of 2007, (H.R.3010 and S.1782, 109th Cong), and of 2009 (H.R.1020 and S.931, 111th Cong.); see also Civil Rights Procedures Protection Act of 1997 (H.R.983 and S.63, 105th Cong.).