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Franken Amendment

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On February 17, 2010 the anti-arbitration “Franken Amendment” went into effect, barring many defense contractors from utilizing pre-dispute arbitration agreements as a condition of employment. This provision of the Department of Defense Appropriations Act of 2010 prohibits employers from receiving contracts for over \$1 million if they enter into or enforce certain arbitration agreements. Specifically, contractors cannot receive funds in 2010 if they enter into or enforce agreements that require, as a condition of employment, that employees or independent contractors arbitrate their claims under Title VII 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. After June 17, 2010, a similar restriction on subcontractors will go into effect, barring defense appropriations funds from being spent on contractors unless they require each subcontractor to agree not to enter into such arbitration agreements with respect to any employee or independent contractor performing work related to the subcontract.

The amendment broadly applies to all contractor employees and independent contractors, not just those working on a defense contract. In contrast, the requirement for subcontractors only applies to those people performing work related to the defense subcontract. The ban on pre-dispute arbitration agreements does not apply to contracts for the acquisition of commercial items or commercially available off-the-shelf items. The provision also allows the Secretary of Defense to waive this bar for a particular contract or subcontract, if necessary to avoid harm to national security interests.

Contractors and subcontractors will not have to rewrite their existing employment agreements, but they are prohibited from enforcing the arbitration clause in an existing agreement. Federal defense contractors who have or are considering entering into arbitration agreements with their employees must carefully consider how to comply with this new provision. Proskauer continues to monitor legal developments as the contours of this provision develop. Please contact your Proskauer relationship attorney or any of the attorneys listed below for more information.

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- **Paul Salvatore**

Partner