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The "Franken Amendment": A Blow to Arbitration and Increased Litigation and Compliance For Government Contractors

In October, the United States Senate, by a 68-30 vote, approved an amendment to the Department of Defense ("DoD") appropriations bill for fiscal year 2010 which *prohibits the use of appropriated funds*, if such funds are to be paid to any contractor or subcontractor, at any tier, which requires its employees or independent contractors to resolve certain claims through arbitration. The amendment, which passed despite DoD objections, was introduced by Sen. Al Franken (D-MN) (the "Franken Amendment").

The impetus for the Franken Amendment was the story of Jamie Leigh Jones, a former employee of KBR, who alleges that seven KBR employees drugged her and gang-raped her in 2005 at Camp Hope in Baghdad, Iraq.

Ms. Jones filed a lawsuit in 2007 against KBR, its related entities, and its former parent company, Halliburton. Pursuant to Ms. Jones' employment agreement, KBR sought to compel arbitration. In May 2008, the United States District Court for the Southern District of Texas, in a case titled Jones v. Halliburton Co., 625 F. Supp. 2d 339 (S.D. Tex. 2008), while holding that the mandatory arbitration provision was valid, found that several of Ms. Jones' claims were outside of the scope of that provision, and therefore, not subject to mandatory arbitration. The four claims which the Court found to be outside the scope of the provision were: vicarious liability for assault and battery, intentional infliction of emotional distress; negligent hiring, retention, and supervision; and false imprisonment.

In September 2009, the United States Court of Appeals for the Fifth Circuit affirmed that holding in Jones v. Halliburton Co., 583 F.3d 228 (5th Cir. 2009). The Fifth Circuit held that the District Court was correct in determining that the claims listed above were outside the scope of the arbitration clause because "in most circumstances, a sexual assault is independent of an employment relationship." The Court held that the factors supporting the conclusion that this was such an occurrence were that: "(1) Jones was sexually assaulted by several Halliburton/KBR employees in her bedroom, after-hours, (2) while she was off-duty, (3) following a social gathering outside of her barracks, (4) which was some distance from where she worked, (5) at which social gathering several co-workers had been drinking (which, notably, at the time was only allowed in 'non-work' spaces)."

Prior to its passage, Ms. Jones testified before the Senate Committee on the Judiciary regarding the Franken Amendment. As a result, the Franken Amendment received significant media attention because it was reported that it was designed *solely* to prohibit Federal contractors from requiring their employees to arbitrate sexual assault claims. This is not the case.

> **In fact, while sexual assault claims are among the categories of claims of which the Franken Amendment prohibits mandatory arbitration, it also prohibits mandatory arbitration of any claims related to or arising out of sexual assault *or harassment*, including: assault and battery; intentional infliction of emotional distress; false imprisonment; and negligent, hiring, supervision, or retention. And no payment of appropriated funds can be made to a contractor or subcontractor who violates the prohibition.**
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> **The Franken Amendment also prohibits the payment of appropriated funds to contractors and subcontractors who require mandatory arbitration for any claims under Title VII of the Civil Rights Act of 1964, which incorporates claims of discrimination on the basis of race, color, religion, sex, or national origin. Thus, the scope of the amendment is significantly broader than that which has been reported in the media.**

DoD opposed the amendment in a message to Congress on October 6 stating that "[t]he Department of Defense, the prime contractor, and higher tier subcontractors may not be in a position to know about such things. Enforcement would be problematic, especially in cases where privity of contract does not exist between parties within the supply chain that supports a contract." Such niceties as lack of privity and difficulties of enforcement are not likely to dissuade enforcement officials from asserting that requests for payment by a contractor based on invoices submitted by noncompliant subcontractors/vendors in the supply chain result in false claims. And even if they do, it will not take long for the plaintiff's counsel to invoke the *qui tam* provisions of the FCA to increase their bargaining leverage with contractors.

The appropriations bill is currently awaiting conference negotiations between the House and Senate to reconcile different versions of the bill. The fate of the Franken Amendment is in question. Sen. Daniel Inouye (D-HI), Chairman of the Senate Committee on Appropriations, it is understood, is considering removing or modifying it.

If the amendment is included in the final bill, DoD contractors and subcontractors who currently have arbitration provisions likely will be required to sign new arbitration agreements with their employees in order to exclude the claims covered by the Franken Amendment. They also may be required to investigate the compliance of their subcontractors and vendors with the new law. Those businesses who are not currently engaged in DoD contracting (and subcontracting) but have an eye towards doing so, may wish to take the potential costs of litigation, compared to arbitration, into account when they do a cost-benefit analysis.

If the Franken Amendment does take effect, Federal contractors and subcontractors could be faced with the prospect of litigating certain types of employee claims which would previously

have been the subject to arbitration including:

- Sexual harassment claims
- Sexual or racial discrimination claims in areas such as:
    - Promotions
    - Terminations
    - Scheduling

However, other common employment claims may still properly be within the scope of arbitration clauses (provided that the basis of the claim is not discrimination of a protected class under Title VII, such as racial or sexual discrimination), such as:

- Wage and hour claims
- Whistleblower retaliation claims
- Routine wrongful termination claims

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