The Franken "Jamie Leigh Jones" Amendment Enacted Into Law! Forced Arbitration Prohibited In Defense Contracts

January 14, 2010

At the end of the last session of Congress, NELA celebrated a huge victory in our battle to eradicate forced arbitration of employment claims: enactment of the "Jamie Leigh Jones Amendment" (also known as the "Franken Amendment" in section 8116 of the Defense Appropriations Act for 2010). Signed by President Obama on December 19, 2009, *the Franken Amendment is the first federal legislation that prevents employers from forcing pre-dispute, binding arbitration on their employees*. It prohibits the award of Department of Defense contracts of over one million dollars to any company that forces its employees or independent contractors to submit to pre-dispute binding arbitration of Title VII and sexual assault-related tort claims (with certain exemptions as discussed below).

The Franken Amendment is significant for several reasons:

- First, it will protect hundreds of thousands of employees around the country from being forced to arbitrate their Title VII claims; it is estimated that 80% of defense contracts exceed the Amendment's one million-dollar threshold. A list of the top 100 defense contractors in 2009 can be found at http://washingtontechnology.com/toplists/top-100-lists/2009.aspx; or see a more comprehensive listing at http://www.governmentcontractswon.com/default.asp.

- Second, it provides a major new legal tool for employees to use to strike down forced arbitration clauses imposed by their employers who are federal defense contractors or subcontractors.

- Third, it sets an important precedent for efforts to eliminate forced arbitration in other employment and consumer contexts.

<u>Specific Requirements For Contractors</u>

Under the Franken Amendment, contractors with contracts over $1 million that are funded by 2010 appropriations are subject to three separate conditions regarding forced arbitration of Title VII and sexual assault-related tort claims:

1. Prospectively, they may not enter into forced arbitration agreements with their employees or independent contractors (§ (a)(1));

2. They may not enforce any existing contracts with employees or independent contractors that force arbitration (§ (a)(2)); and

3. After expiration of a waiting period, they must certify that their subcontractors do not enter into forced arbitration agreements with any employee or independent contractor performing work related to such subcontract (§ (b)).

The list of covered sexual assault-related tort claims is quite extensive and encompasses "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."

As a practical matter, the most important of the three conditions is probably the second - the prohibition on enforcing existing forced arbitration agreements - because it applies whether or not the company changes its practices in accordance with the new law. Employees protected by the Franken Amendment can invoke it to defeat motions to compel forced arbitration.

Note that on their face, the first two conditions apply to "any" employee of a covered contractor, not just those who perform work related to the contract. This could potentially have broad impact on large defense contractors' workforces.

Limitations

- With respect to employment-related claims, the Franken Amendment only prohibits forced arbitration of claims arising under Title VII of the Civil Rights Act. It does not cover forced arbitration of claims under any other federal employment laws (e.g., the Americans with Disabilities Act, the Age Discrimination in Employment Act, the Fair Labor Standards Act, and others).

- The Franken Amendment only applies to contracts funded out of 2010 appropriations (whenever they are received). Unless Congress acts to incorporate it into the Defense Authorization Act, the Amendment would have to be enacted every fiscal year to continue in effect in future years.

- The Franken Amendment does not apply "with respect to a contractor's or subcontractor's agreements with employees or independent contractors that may not be enforced in a court of the United States" (§ (c)).

- The Secretary of Defense may waive the Franken Amendment's prohibitions for national security reasons (§ (d)); however, invoking this waiver provision is extremely onerous. For example, the waiver must be made contract-by-contract; it requires a personal determination by the Secretary of Defense; it must be in writing; and it must be made public.

- The first two conditions (§§ (a)(1) and (a)(2)) apply to defense contracts "awarded more than 60 days after the effective date of" the Act.

- The third condition (§ (b)) does not become effective until 181 days after the effective date of the Act.

* * *

Employees have many people to thank for this victory. First, of course, is Senator Al Franken (D-MN), whose leadership and dedication struck a colossal blow to the pervasive practice of forced arbitration. Senator Franken's staff were exemplary in their organization and strategic implementation. Senate and House Appropriations Committee Chairmen Daniel Inouye (D-HI) and John Murtha (D-PA), respectively, showed enormous courage in bucking the defense establishment. Key leaders in the White House kept the pressure up for a successful outcome. Our allied partners, especially the Leadership Conference on Civil Rights, American Association for Justice, Public Citizen, and Fair Arbitration Now Coalition, worked tirelessly with us in pushing for the Franken Amendment. *The Huffington Post*, Jon Stewart, and Rachel Maddow sparked a viral reaction in the liberal blogosphere, elevating the debate about the Amendment and the injustice of forced arbitration in our national discourse. Finally, NELA members played a vital and powerful role by lobbying their Congressmembers to pass the Franken Amendment.

Thank you and congratulations to all!

H.R.3326

Department of Defense Appropriations Act, 2010 (Enrolled as Agreed to or Passed by Both House and Senate)

One Hundred Eleventh Congress
of the
United States of America
AT THE FIRST SESSION
Begun and held at the City of Washington on Tuesday,
the sixth day of January, two thousand and nine

An Act
Making appropriations for the Department of Defense for the fiscal year ending September 30, 2010, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the `Department of Defense Appropriations Act, 2010'.

SEC. 2. TABLE OF CONTENTS.

The table of contents of this Act is as follows:

Sec. 1. Short title.
Sec. 2. Table of contents.
Sec. 3. References.

DIVISION A--DEPARTMENT OF DEFENSE APPROPRIATIONS

Title I--Military Personnel
Title II--Operation and Maintenance
Title III--Procurement
Title IV--Research, Development, Test and Evaluation
Title V--Revolving and Management Funds
Title VI--Other Department of Defense Programs
Title VII--Related Agencies
Title VIII--General Provisions
Title IX--Overseas Contingency Operations

DIVISION B--OTHER MATTERS

....

Title VIII--General Provisions

....

Sec. 8116. (a) None of the funds appropriated or otherwise made available by this Act may be expended for any Federal contract for an amount in excess of $1,000,000 that is awarded more than 60 days after the effective date of this Act, unless the contractor agrees 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

(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 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.

(b) None of the funds appropriated or otherwise made available by this Act may be expended for any Federal contract awarded more than 180 days after the effective date of this Act unless the contractor certifies that it requires each covered subcontractor to agree not to enter into, and not to take any action to enforce any provision of, any agreement as described in paragraphs (1) and (2) of subsection (a), with respect to any employee or independent contractor performing work related to such subcontract. For purposes of this subsection, a `covered subcontractor' is an entity that has a subcontract in excess of $1,000,000 on a contract subject to subsection (a).

(c) The prohibitions in this section do not apply with respect to a contractor's or subcontractor's agreements with employees or independent contractors that may not be enforced in a court of the United States.

(d) The Secretary of Defense may waive the application of subsection (a) or (b) to a particular contractor or subcontractor for the purposes of a particular contract or subcontract if the Secretary or the Deputy Secretary personally determines 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. The determination shall set forth with specificity the grounds for the waiver and for the contract or subcontract term selected, and shall state any alternatives considered in lieu of a waiver and the reasons each such alternative would not avoid harm to national security interests of the United States. The Secretary of Defense shall transmit to Congress, and simultaneously make public, any determination under this subsection not less than 15 business days before the contract or subcontract addressed in the determination may be awarded.