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Mandatory Workplace Arbitration Now A "No Go"

By Hope Eastman

Recent legislation prohibits mandatory arbitration of employment disputes for defense contractors. The new law may well reflect a trend destined to spread to other businesses.

Congress has passed and President Obama has signed the 2010 Defense Department Appropriations Act. It contains language barring defense contractors from requiring employees and independent contractors to arbitrate employment-related disputes. The act is part of a longtime effort to place these disputes back into the hands of juries instead of having arbitrators continue to handle them. The law covers all claims under Title VII of the Civil Rights Act of 1964 and any common-law torts relating to sexual assault or harassment, including assault and battery, intentional infliction of emotional distress, false imprisonment, and negligent hiring, supervision or retention. Defense contractors with contracts of $1 million or more cannot use mandatory pre-dispute arbitration agreements. It's incumbent upon contractors to also certify that subcontractors holding subcontracts of $1 million or more have agreed to the same restrictions. The law prohibits enforcement of existing agreements, as well as the entry into new ones.

Sponsored by Senator Al Franken (D.-Minn.), the amendment was a legislative response to a particularly horrendous sexual assault and alleged cover-up by Halliburton/KBR in Iraq. It passed the Senate by a vote of 88-10 and the House by 395-44., signaling trouble ahead for other employers who use these agreements.

The passing of the Franken Amendment was the first success by employee and civil rights advocates, in alliance with consumer groups, seeking to bar all such agreements. Now pending before Congress is the Arbitration Fairness Act (H.R. 1020 and S. 931), featuring bills that would ban all pre-dispute arbitration agreements for employees, consumers and franchisees. The findings cited in these bills say it all:

- the supposed federal policy favoring arbitration of disputes really was intended only to apply to commercial entities with equal bargaining power;
- consumers and employees do not really have options when presented with these agreements
- decision-making in arbitration is not transparent as it is in the courts
- arbitration undermines public law enforcement.

Although both bills are still in committee, advocates are pushing hard for their passage. The business community, including the U.S. Chamber of Commerce, is working to persuade Congress that arbitration is fairer, quicker, less costly and more likely to result in settlements, thereby not further clogging the courts.

Employers need to begin re-thinking the use of these provisions which are common in employment and non-compete agreements as well as in other pre-hire documents. Advocates for employers are exploring the use of other mechanisms, including jury trial waivers, to help resolve the growing number of employment disputes facing employers today without prolonged and costly litigation.

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