In one of his first actions since becoming Senator in July 2009, Minnesota Senator Al Franken successfully added an amendment to the 2010 Defense Appropriations Act that would prevent the award of defense contracts to companies that mandate use of alternate dispute resolution (ADR) procedures instead of litigation when employees sue them for such crimes as sex discrimination or workplace sexual assault.

Commonly known as the “Franken Amendment,” its creation was traced back to the case that Jamie Leigh Jones tried to bring against her employer (Halliburton) in 2007. Ms. Jones alleged she was raped by multiple co-workers while in Iraq performing on Halliburton/KBR contracts. Although she attempted to litigate the matter, her employment agreement mandated use of arbitration instead. When binding arbitration is used, there are only limited rights of appeal.

This article summarizes the amendment thusly—

Specifically, the amendment would bar federal funds from going to defense contractors that continue to apply mandatory arbitration clauses to claims of sexual assault, assault and battery, intentional infliction of emotional distress, and negligent hiring, retention and supervision. The amendment also covers civil rights claims of workplace discrimination, according to Franken's office.

The amendment does not require contractors to change or modify existing employment contracts.

Not everybody was happy that the Franken amendment passed and was signed into law by President Obama. This **op/ ed piece** rails against it, calling it a victory for trial lawyers and the plaintiff's bar. Nonetheless, it is current law and the DoD has been forced to implement it.

So on February 17, 2010, Mr. Shay Assad (Director, Defense Procurement and Acquisition Policy) issued a "Class Deviation to Implement Additional Contractor Requirements and Responsibilities Restricting Use of Mandatory Arbitration Agreements." The Class Deviation memo can be found **here** .

The Class Deviation provides DoD contracting officers with a new contract clause (DFARS Clause 252.222-7999) that must be used in all
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contracts in excess of $1 million that utilize FY 2010 Defense funds. Exceptions are made for acquisitions of commercial items and commercially available off-the-shelf items.
The clause must be used in the following circumstances:

1. An order valued at more than $1 million that uses FY 2010 funds, placed against an ID/IQ contract, is covered by the Franken restriction "regardless of whether the basic ID/IQ contract was covered."

2. An order valued at more than $1 million that uses FY 2010 funds, placed against a GSA Schedule, is covered.

3. A contract modification adding more than $1 million in FY 2010 funds to a contract awarded before February 17, 2010, is not covered by the restriction. However, a “bilateral modification adding new [contract] work after February 17, 2010 to such a contract is covered” by the restriction.

The clause requires a contractor executing the awarded contract to agree to the following –

1. Not to enter into an 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 arising from a sexual assault or harassment, or negligent hiring, supervision, or retention (among other matters).

2. Not to take any action to enforce any provision of an existing agreement that mandates the above actions.

3. Pass the foregoing restrictions to all covered subcontracts (i.e., those valued in

excess of $1 million that use FY 2010 funds, excepting commercial item acquisitions and acquisitions of commercially available off-the-shelf items.

It's difficult to estimate the impact from the Franken Amendment and its associated ADR restrictions on defense contractors. Certainly, one might speculate that legal costs will increase as ADR use drops. We might also guess that procurement systems will have to be revised to add the new clause into covered subcontracts—and that somebody (or bodies) will need to verify that covered subcontractors are complying with the restrictions. The impact may be minimal, or could be disruptive if implemented poorly. More importantly, contractors now have one more certification to comply with. A knowing failure to comply may result in allegations of violation of the False Statements Act, which could be **expensive** to resolve.