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The Devil's In The Details - Make Sure Your Agreements Mirror Your Intentions

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In an unpublished decision issued this month, U.S. ex rel. Paige, et al. v. BAE Systems Tech. Solutions & Servs., Inc., the U.S. Court of Appeals for the Sixth Circuit reversed the district court's dismissal of two whistleblowers' False Claims Act ("FCA") retaliatory discharge claims, while issuing a warning to employers that the meticulous crafting of arbitration provisions within employment agreements is critical to enforcement. The Relators in this case were former employees of BAE Systems who had alleged they had complained of purported fraud relating to Government contracts throughout their employment; that such complaints were not appropriately addressed; and that in retaliation for their complaints and alleged protected activities, they were retaliated against in a variety of ways, including via separation of employment. The Sixth Circuit noted that each of these individuals had worked under an Employment Agreement that contained a mediation and arbitration provision requiring, in relevant part:

> The Employee agrees that . . . . any dispute a*rising from this Agreement*, which cannot be resolved through normal practices and procedures of the Company, shall be resolved through a mediation/arbitration approach. The Employee agrees to select, with the Company, a mutually agreeable, neutral third party to help mediate any dispute, *which arises under the terms of this Agreement*. If the mediation is unsuccessful, Employee further agrees that *the dispute* shall be decided by binding arbitration under the rules of the American Arbitration Association. (emphasis added)

The court further noted that the "terms and conditions" portion of the Employment Agreement covered provisions on job duties, salary, confidentiality, work product, and non-competition, and provided for at-will termination of employment by either BAE Systems or the employee at any time and with or without cause. With these provisions in mind, the Sixth Circuit disagreed with the lower court's finding that the Employment Agreement mandated that the Relators' retaliation claims under the FCA be arbitrated. Rather, it found that courts could not require the arbitration of claims not covered by an arbitration clause when the clause by its terms only extended to a specific type of dispute. Looking at the plain language of the Relators' agreement, the Sixth Circuit found the arbitration clause only extended to "any dispute, which arises under the terms of this Agreement." As an FCA retaliation claim did not "arise under the terms" of the Employment Agreement, but rather was a statutory claim completely separate

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from the contract that existed apart from any contract, the Sixth Circuit held such claim did not fall within the parameters of the arbitration clause. The Court further noted the Relators had not alleged any violation of the "terms and conditions" of the Employment Agreement itself, instead focusing on their retaliation claims for having alleged participated in statutorily protected conduct not addressed in the Employment Agreement. Perhaps most significant to employers, and most helpful in guiding future draftsmanship of agreements, is the Sixth Circuit explicit discussion of the fact that the Employment Agreement was void of any reference to the FCA, retaliation, or statutory claims. Further, it noted that the arbitration provision at issue was very narrow as written, limiting the scope of the clause to only those disputes arising "under the terms of this Agreement," as opposed to including any claims "related to" the Agreement or otherwise arising out of the relationship between the Relator(s) and BAE Systems. Due to such limitations, the Sixth Circuit ultimately held that the arbitration provision could not be extended to the FCA retaliation claim, as to do so would effectively rewrite the parties' agreement as to what was to be arbitrated. Accordingly, the district court's dismissal in favor of arbitration was reversed and the matter remanded. This case serves as a valuable reminder to employers that careful scrutiny must be given to the precise language included in agreements, in order to ensure they are receiving the benefits of the bargain that they seek.