Navigating Nondisplacement Rule Reboot For Gov't Contracts

By **Nichole Atallah** (December 7, 2021)

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On Nov. 18, the Biden administration issued an executive order bringing back to life provisions of the 2009 Executive Order No. 13495 on the nondisplacement of qualified workers under service contracts.

The executive order establishes that where a federal government contract subject to the Service Contract Act, or SCA, expires and a follow-on contract is awarded for the same or similar services at the same location, a successor contractor must grant a right of first refusal to the predecessor contractor's employees before offering the positions to nonpredecessor employees.

Hiring predecessor employees is not new to most government contractors who bid on SCA contracts. It is frequently the preferred method of quickly staffing contract work and provides continuity of services to the federal government client. However, it is the practical application of all the requirements that were baked into the regulations under the Obama administration that many government contractors found challenging.

The new executive order is very similar to the former provisions, which were revoked by the Trump administration. The key provisions include:

- Incumbent contractors must provide a list of incumbent employees to the contracting officer prior to the end of the contract term, to which the incoming contractor is entitled;

- Incoming service contractors will be required to make a written offer of employment to all incumbent service employees to the extent there is a position available, providing at least 10 days to respond;

- Prime contractors must flow down the provisions to subcontractors and ensure in the subcontract that subcontractors have an obligation to provide employee information as needed to comply with the executive order; and

- The executive order will not apply to contracts under the simplified acquisition threshold or to employees hired to work as part of a single job to the extent the hiring was not structured to avoid this executive order.

The secretary of the U.S. Department of Labor is slated to issue final regulations no later than May 17, 2022, and the Federal Acquisition Regulatory Council will issue an applicable Federal Acquisition Regulation clause 60 days following the issuance of the final regulations.

The reboot of the executive order offers the DOL an opportunity to reflect on the challenges federal government contractors faced in implementing the prior regulations and, ideally, issue improved regulations.

While new regulations are forthcoming, the DOL's implementation and enforcement of the executive order under the Obama administration give us some insight regarding how to prepare for the forthcoming requirements.

First, the executive order applies to contracts subject to the SCA at FAR 52.222-41. Identifying whether a new contract is subject to the SCA and whether employees are considered service employees subject to the regulations has always been important.

Doing so ensures compliance with the SCA and is now additionally important in determining a contractor's obligations to provide those employees with a right of first refusal to provide similar services on the follow-on contract.

One critical component of this determination is whether an employee is exempt or nonexempt from the overtime requirements of the Fair Labor Standards Act.

In contracts that incorporate FAR 52.222-41, nonexempt, hourly employees are considered service employees and must be paid the wages and fringe benefits contained in an attached or incorporated wage determination.

Exempt, salaried employees, such as managers and supervisors, are not considered service employees. Contractors will not be expected to provide a right of first refusal to any exempt personnel, only service employees.

Proper classification of employees as exempt or nonexempt is a primary concern within DOL's Wage and Hour Division and contractors should expect continued scrutiny of classification determinations for purposes of determining their obligations under the nondisplacement rules.

Under the past regulations, contractors who failed to offer a right of first refusal to an employee they misclassified as exempt could be subject to damages such as back wages for the aggrieved employee.

The prior regulations provided very limited exceptions to the requirement to offer a right of first refusal to predecessor employees.

We expect some, if not all, of the same exceptions to be incorporated in the forthcoming regulations. Contractors were given the right to determine how many employees they needed to perform the work, and based on this number, were not required to hire all predecessor employees.

Follow-on contractors were also not required to offer the same job classification at the same rates of pay or benefits — although they would have to take into account any prevailing wage floors.

Additionally, contractors were permitted to use their own existing employees and count them toward that number before offering employment to predecessor employees.

It is important to note that predecessor employees were presumed qualified if they performed work in the job classification for a short period of time before the predecessor

contract ended.

One of the more controversial issues that arose during the life of the prior regulations was the issue of poor performance. The regulations provided that an employee could be denied a right of first refusal if there was written credible evidence of poor performance. There was little guidance as to what that phrase meant.

While every situation is factually unique, in cases where an agency expressed its desire not to have an employee return, follow-on contractors struggled to find a balance between an agency's request as their client and the legal requirement to make the employee an offer of employment.

In those cases, it was important the contractor request and receive written evidence of poor performance or fulfill the obligation to provide the offer of employment. Should the employee later fail to perform satisfactorily, a contractor could terminate the employee if the termination was made in good faith and not an attempt to circumvent the regulations.

Contractors will be obligated to provide a written offer letter that gives a predecessor worker at least 10 days to respond to the offer. Contractors should review their offer letter language to ensure the offer is both compliant and not left open for an undetermined period of time.

Under the prior rules, follow-on contractors often had a difficult time getting a list of predecessor employees and relied on onsite meetings and word of mouth to achieve good faith compliance. If an employee fails to respond in a timely manner to the written offer or declines the offer, the contractor can proceed in hiring another qualified worker.

This provision was often challenging in practice, particularly when the time between an award of a contract and the time to begin performance was short.

When performance must begin quickly, the 10-day period can delay onboarding and fully staffing a contract. Communication with the contracting officer is critical during these periods given the statutory obligations of the follow-on contractor.

It is important to note that under the prior regulations, the obligation to offer a right of first refusal stayed open for 90 days following the start of performance. We expect a similar requirement in the forthcoming regulations.

Practically, this meant that a contractor who had a vacancy on the contract within that 90-day period would have to go back to any person who was not originally offered employment and make them an offer. Contractors did not have to reoffer employment to anyone who previously did not respond to, or who declined, an offer.

Additionally, terminations during the 90-day period should be carefully vetted and documented to refute any allegation that a termination decision was made in bad faith to circumvent the regulations. Contractors should have their human resources teams evaluate their processes to integrate this requirement.

Finally, the executive order requires flow down of the forthcoming FAR provision and a higher-tiered contractor must have provisions in their subcontracts granting them access to information demonstrating compliance.

As contractors undergo periodic evaluation of their standard subcontract language, they

should consider adding language that gives the contractor the right to inspect subcontractor documents for wage and hour compliance, including this executive order.

The DOL's Wage and Hour Division will have enforcement authority once the final rules are effective. The executive order will apply to solicitations issued on or after the effective date of the final regulations issued by the FAR Council.

This process is positioned to proceed quickly given the language of the prior regulations that already underwent review and evaluation. However, it will be important to evaluate whether the DOL takes into account any lessons learned from the implementation of the nondisplacement rules during the Obama administration and makes changes to improve the process for workers and contractors attempting in good faith to comply.

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