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Non-Displacement of Federal Government Contractor Employees is Back

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President Biden recently issued an Executive Order titled [Executive Order on Nondisplacement of Qualified Workers Under Service Contracts](#) ("EO"). The EO reinstates the requirement first introduced by President Obama, and later revoked by the Trump Administration, directing Federal Agencies to include a clause in Federal Government service contracts requiring the follow-on contractor to offer predecessor contractor employees the right of first refusal to continue in their jobs. A "service contract" includes any contract or subcontract for services covered by the Service Contract Act of 1965, as amended, 41 U.S.C. 6701, *et seq.*

What You Need to Know:

- The right of first refusal applies to government contracts subject to the Service Contract Act, of 1965, as amended, 41 U.S.C. 6701, *et seq.*
- The right of first refusal applies to prime contractors and subcontractors.
- Failure to comply may result in an order to reinstate employees, liability for back wages as well as debarment.

Significantly, the EO includes the text of the clause to be included in newly issued contracts. That clause provides:

- Where a follow-on federal government service contract is awarded, contractors must determine the number of employees required to perform the work and provide a right of first refusal to employees of the predecessor contractor;
- The follow-on contractor generally must provide written offers of employment to the predecessor contractor's employees, and such offers must remain open for at least 10 business days;
- The follow-on contractor is not required to extend an offer of employment to a predecessor contractor employee for whom the follow-on contractor "reasonably believes, based on reliable evidence" of the employee's past performance, that there would be "just cause to discharge the employee(s) if employed by the contractor"; and
- The follow-on prime contractors must include the new clause in its subcontractors and subcontractors are required to comply with its provisions.

Failure to comply with the clause may result in an order to reinstate employees, liability for back wages as well as debarment.

The EO directs the Federal Acquisition Regulation ("FAR") Council and the Department of Labor to issue implementing regulations no later than May 17, 2022. Agencies are encouraged to include the new clause before final regulations have been issued, as the order is effective immediately.

The EO does not apply to contracts under the Simplified Acquisition Threshold, which currently is \$250,000.

Contractors should take immediate steps to take this EO into account in upcoming bids, as it will have a significant impact on the size, scope, location and costs associated with any proposed workforce under a new contract.

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