

ALERT: Requirement to Hire or Offer Jobs to Predecessor Employees is Back for Federal Contractors under the Service Contract Act

AUTHOR: JAMES KEANEY

On November 18, 2021, President Biden issued an Executive Order on “Nondisplacement of Qualified Workers Under Service Contracts.” This Executive Order largely mirrors one previously issued by former President Obama (but later revoked by former President Donald Trump) that had required successor employers on federal contracts under the Service Contract Act (“SCA”) to hire or offer employment to the employees of the predecessor employer.

In his Executive Order, President Biden justifies the reinstatement of this requirement based on his policy statement that “procurement interests in economy and efficiency are best served when the successor contractor or subcontractor hires the predecessor’s employees, thus avoiding displacement of these employees,” “reduc[ing] disruption in the delivery of services during the period of transition between contractors,” “maintain[ing] physical and information security,” and “provid[ing] the Federal Government with the benefits of an experienced and well-trained workforce that is familiar with the Federal Government’s personnel, facilities, and requirements.”

Under the Executive Order, contracts under the SCA valued at or above \$250,000 must contain specific clauses that essentially require successor contractors and subcontractors to hire or offer employment with a right of first refusal to the predecessor employees under the prior contract. Offers of employment must be expressly made and kept open for at least 10 business days.

However, the required contract language makes clear that these predecessor employees must still be “qualified” for the particular positions of employment. Moreover, successor contractors “are not required to offer a right of refusal to any employee(s) of the predecessor contractor for whom the contractor or any of its subcontractors reasonably believes, based on reliable evidence of the particular employees’ past performance, that there would be just cause to discharge the employee(s) if employed by the contractor or any subcontractors.”

The Executive Order addresses other requirements and issues, such as the timely exchange of employee lists between predecessor and successor contractors during the contract transition period, the possibility of exceptions to the rule, and the potential for enforcement actions and sanctions in the event of non-compliance (which include, but are not limited to, orders requiring employment, payment of lost wages, and debarment from federal contracts for up to three years).

The Executive Order directs the Secretary of Labor to issue final regulations within 180 days and, within 60 days thereafter, for the Federal Acquisition Regulatory Council (“FAR Council”) to adopt them into its regulations.

However, it states that it is “effective immediately” and will “apply to solicitations issued on or after the effective date of the final regulations issued by the FAR Council.” For other solicitations outstanding or issued before that time, the Executive Order “strongly” encourages the adoption of this new requirement in them.

If you’re an SCA federal contractor, do not wait or hesitate to reach out to a member of our Labor & Employment Team at Sandberg Phoenix to understand how this new regulatory requirement may impact your business or business prospects and, if it will, how to prepare for such changes.