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On August 29, 2011, the Department of Labor's Wage and Hour Division ("WHD") issued a final rule to implement President Obama's Executive Order 13495, Nondisplacement of Qualified Workers Under Service Contracts (the "Executive Order"). **The Executive Order requires federal contractors and subcontractors that are successors to certain government contracts to offer employment on a "first right of refusal" to employees (not including managerial or supervisory employees) employed under the predecessor contract, whose employment would be otherwise terminated at the end of the predecessor contract.** The Order applies to federal contracts and subcontracts that: (i) involve amounts that exceed the simplified acquisition threshold (currently $150,000) and (ii) are covered by the Service Contract Act ("SCA"). The WHD will announce the effective date of the final rule after the Federal Acquisition Regulatory Council issues its own regulations on the Executive Order.

The final rule adopts many of the provisions from the proposed regulations, issued on March 19, 2010 (see our March 29, 2010 *Alert* for a summary of the proposed regulations). The final rule largely preserved the proposed regulations relating to contractors' general obligation to offer to employ predecessor employees (with certain exceptions), and contractors' obligations at the end of the predecessor contract. However, **the WHD made several changes in the final rule in response to the comments it received on the proposed regulations. The following is a summary of some of the more significant changes:**

"Same or Similar Service" Definition Revised: Contractors are required to comply with the Executive Order only if they undertake a pre-existing SCA contract for the "same or similar" service. Under the final rule, "same or similar service" is defined as "a service that is either identical to or has characteristics that are alike in substance to a service performed at the same location on a contract that is being replaced by the Federal Government or a contractor on a Federal service contract."

Screening Predecessor Employees: The Executive Order requires successor contractors to make offers to predecessor employees if it plans to hire additional workers to fulfill its obligations under the contract. Under the proposed regulations, successor contractors were only required to hire predecessor employees who were qualified. Although the proposed regulations stated that contractors could review the predecessor employee's employment history and qualifications to determine if he or she was qualified, it was not clear whether a successor contractor could apply other screening criteria, such as drug tests and background checks. The final rule clarifies that a "successor contractor may apply employment screening processes (i.e., drug tests, background checks, security clearance checks, and similar pre-employment screening mechanisms) only when such processes are provided for by the contracting agency, are conditions of the service contract, and (in addition to being otherwise consistent with applicable Federal and state law) are consistent with the Executive Order." The WHD also clarified that a "successor contractor cannot impose its own hiring standards (such as college degree requirements for particular positions) in making determinations regarding whether an employee of a predecessor contractor is qualified."

Complaint Filed Directly with WHD: Under the proposed rule, a predecessor employee was required to file a complaint with the contracting agency. Under the final rule, a predecessor employee or an authorized representative of the predecessor employee can file a complaint directly with the WHD "within 120 days from the first date of contract performance."

Contractor Responsible for Notification of Exemption: The Executive Order authorizes the head of a contracting agency or department to exempt any of its contracts from the Executive Order if the agency finds that the requirements of the Executive Order would "not serve the purposes of the Order or would impair the federal government's ability to procure services economically and efficiently." Under the proposed rule, the contracting agency was responsible for notifying predecessor employees when it decided to use this exemption. The final rule changes this to require the contractor (not the contracting agency) to provide the notice in writing to the predecessor employees and their collective bargaining representative within five business days after the solicitation date.

Electronic Notification: Under the proposed regulations, the contracting officer was required to notify predecessor employees if the contract on which they were working was being awarded to a successor contractor by either posting a conspicuous notice in the workplace or providing it to employees individually. Under the final rule, contractors are responsible for providing this notification to employees. The WHD, however,

clarified that this notice could be provided to predecessor employees by email.

Practical implications

Contractors with unrepresented workforces should be aware that soliciting existing federal service contracts may require them to hire predecessor employees and inherit any union bargaining obligations that may exist. Under the National Labor Relations Act ("NLRA"), once a union becomes a representative of employees working under a contract, the union continues to represent the employees performing the work under the successor contract so long as the successor (1) hires a majority of its workforce from the predecessor contractor's workforce and (2) performs the same or similar work.

Given that contractors must give a first right of refusal to the predecessor's employees performing similar work at similar locations, federal contractors are much more likely to be deemed a "successor" under the NLRA, and, therefore, required to bargain in good faith with the union. Although a successor is not bound by the collective bargaining agreement of the predecessor contractor, the successor must negotiate with the union over the terms of a new agreement. In some circumstances, the *status quo* terms of the predecessor's collective bargaining agreement may form the "starting point" for hiring of the unit and bargaining by the successor. Even if the predecessor's workforce is not represented by a union, any union organizing efforts that were underway during the previous contract will be permitted to continue under the new contract.

Consequently, before bidding on an existing federal service contract, contractors should consider whether employees under the existing contract are represented by a union and how many of the predecessor's employees it will be required to hire. Contractors do not want to find themselves in a situation where they have unexpectedly inherited employees or a collective bargaining duty.

Because predecessor employees now have an avenue for directly complaining to the WHD, contractors should be prepared to defend any decision not to offer employment to predecessor employees. The Executive Order allows a successor contractor the right not to offer employment to employees it reasonably believes, based on past performance, have "failed to perform suitably on the job." However, before contractors refuse to offer employment to predecessor employees, it would be wise to carefully articulate and document their reasons—for example, whether the reason is that predecessor employees are not qualified or that they otherwise do not meet the contractor's criteria for employment. Under the NLRA, it is an unfair labor practice to refuse to hire an individual because of union activities or membership.

If you would like to discuss these issues further or have questions about this *Alert,* please contact one of the attorneys listed above.

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