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On March 19, 2010, the Department of Labor ("DOL") published its much anticipated proposed regulations concerning Executive Order 13495, Nondisplacement of Qualified Workers Under Service Contracts (the "Order"). The Order drew scrutiny immediately after it was issued on January 30, 2009 because it was viewed as an effort to increase union membership.

In essence, the Order requires federal contractors and subcontractors that succeed certain government contracts to offer employment on a "first right of refusal" to employees employed under the predecessor contract. The obligations under the Order apply "to contracts resulting from solicitations on or after the effective date" of the DOL's implementing regulations. Although the proposed regulations have not been finalized, they could result in non-unionized federal contractors that win service contracts "inheriting" employees and collective bargaining obligations that they did not anticipate from predecessor contractors.

Obligations under the proposed regulations

The proposed regulations apply to contractors or subcontractors that undertake pre-existing Service Contract Act contracts for the same or similar services at the same location. The successor contractor cannot fill any openings under such a contract without first making good faith offers of employment to qualified employees of the predecessor whose employment will be terminated as a result of the new contract. The contractor only has to make offers to predecessor employees if it plans to hire additional workers to fulfill its obligations under the contract.

In these circumstances, the successor contractor is required to make an "express" written or oral offer of employment to qualified employees and provide those employees with at least ten days to accept or decline the offer. This express offer is required even if the predecessor contractor has not provided the contractor with a list of employees or provided only a partial list. The contractor's obligation to offer a first right of refusal continues for a period of ninety days after the first date of performance under the new contract.

The offer must be a "bona fide" offer, which means that the contractor may not make the offer with the desire that the employee will decline it. So long as the contractor makes a bona fide offer, however, it is free, consistent with contract terms, to change the predecessor employee's terms and conditions of employment or offer a position that is different from the one the employee previously held. This obligation continues until all qualified predecessor employees have been offered a job or the expiration of the ninety day window.

Exemptions

The clause implementing these requirements will only be inserted into federal service contracts and subcontracts over the simplified acquisition threshold of $100,000. Covered contractors are responsible for flowing down the nondisplacement provision to its covered subcontractors.

The first right of refusal does not apply to all employees. The new contractor can refuse to hire:

- Any employee whom the new contractor reasonably believes, based on the employee's past performance, has "failed to perform suitably on the job"; and
- Managerial and supervisory employees, who are defined as anyone employed in a bona fide executive, administrative, or professional capacity.

In addition, a covered contractor can use fewer employees than the predecessor on the contract based on its anticipated staffing patterns. It is important to note that a contractor can also retain its own employees with at least three months service prior to the commencement of the new contract and who would otherwise face a lay-off or discharge if a first right of refusal was given to a predecessor employee.

Recordkeeping

Contractors must maintain for at least three years copies of any written or oral offers of employment it makes to predecessor employees as well as a copy of the employee list it receives from the predecessor.

Penalties for non-compliance

The Order authorizes the Secretary of Labor to debar for up to three years any contractor or subcontractor who violates the Order or its implementing regulations. The Secretary is also empowered to require violators to hire employees who worked under the old contract or award those employees lost wages.

Impact of the proposed regulations and proactive steps

Non-unionized contractors should be aware that soliciting existing federal service contracts may require them to hire predecessor employees and, if they are represented by a union, inherit bargaining obligations. Under the National Labor Relations Act ("NLRA"), once a union becomes a representative of employees working under a government contract, the union continues to represent the employees performing the work under the successor contract so long if the successor (1) hires a majority of its workforce from the predecessor employees and (2) performs the same or similar work.

Given that the proposed regulations require contractors to 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 bargaining agreement of the predecessor contractor, the successor must negotiate with the union over the terms of a new agreement. Even if the predecessor's workforce is not represented, any organization 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.

We advise all affected and interested parties to submit their comments and concerns on the proposed regulations to the DOL no later than May 18, 2010. 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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