

Electronic Alert

Volume 26, Issue 43

December 20, 2023

DOL's New Nondisplacement Rule Creates Challenges for Federal Contractor Employers

By Nicole Elgin & Bruce Garrett

On December 14, 2023, the Department of Labor announced a final rule implementing Executive Order 14055 that places numerous nondisplacement employment requirements on federal contractors and subcontractors.

The core requirement of the rule, known as the nondisplacement clause, provides that a successor contractor must extend employment offers to covered service employees who were employed under a predecessor contract when the two contracts involve “the same or similar work.” The rule gives those employed on a predecessor contract the right of first refusal of employment on a successor contract under most circumstances.

The successor contractor is permitted to employ more or fewer employees than were employed under the predecessor contract, depending on what is most efficient for the performance of the contract. A successor contractor is required to make a written bona fide offer of employment to each service employee who worked during the last month of the predecessor contract. The DOL's nondisplacement requirements apply regardless of the location of the successor contract, which represents a shift from prior nondisplacement requirements that only applied to same or similar services at the same location. The Final Rule is effective February 12, 2024, and will apply to solicitations issued on or after the effective date.

Notice Requirements

The Final Rule creates a detailed procedure for predecessors, contractors and subcontractors, including:

- At least 30 days prior to completion of the contract, the predecessor contractor must provide a list of service employees working under the contract to the Contracting Officer.
- The nondisplacement clause must be included in all covered contracts and subcontracts.
- Offers must be made in writing and the employee needs to be allowed 10 business days to consider the offer.

Exceptions

There are numerous exemptions to the nondisplacement clause, most notably, it does not apply:

- When there is reliable evidence that a particular employee's past performance would give “just cause” to discharge the employee if the employee were employed by a contractor or

subcontractor. However, the nondisplacement clause provides that there is a presumption that there is no just cause to discharge an employee.

- To contracts that are below the “simplified acquisition threshold” (currently, those under \$250,000).
- To employees who are employed under a federal service contract and a non-federal service contract that is part of a single job.
- When a government agency determines that the nondisplacement rules are inefficient for effectuating a particular contract.

The technical nature of the nondisplacement clause creates administrative and recordkeeping compliance risk for contractors. Federal contractor employers who are entering successor contracts should consult an employment attorney to ensure they are not running afoul of the DOL’s new nondisplacement requirements.

For questions about this new rule, or for any other labor and employment questions, contact Nicole Elgin at 503-276-2109 or nelgin@barran.com, or Bruce Garrett at 503-276-2175 or bgarrett@barran.com.