More than two years ago, President Barack Obama issued Executive Order 13495, “Nondisplacement of Qualified Workers Under Service Contracts.” The Executive Order requires contractors (including subcontractors) under a contract that succeeds a contract for performance of the same or similar services at the same location offer the predecessor contractor's employees a right of first refusal of employment under the contract. On August 29, 2011, the U.S. Department of Labor published its final rule implementing the Executive Order. The Rule will not take effect until the Federal Acquisition Regulatory Council (FAR Council) issues regulations. Federal service contractors should start preparations for the Rule's implementation.

Right of First Refusal and Union Successorship Concerns
The requirement that the predecessor contractor's employees be given a right of first refusal will impact affected contractors in two significant ways. First, with limited exceptions, the successor contractor will be compelled initially to offer employment to the predecessor contractor's employees, regardless of whether they meet the successor's employment standards and qualifications. Employers would not be allowed to apply their own hiring and screening criteria (i.e., college degree requirements, background and security clearance checks, and drug tests) unless they are required to do so by the contract or the contracting agency. The practical effect will be that the successor's workforce will comprise of the predecessor's employees rather than employees selected or employed by the contractor.

Second, if the predecessor's workforce is unionized, the successor contractor may be required to recognize the union under the National Labor Relations Act successorship rules. Additionally, if the predecessor workforce was in the process of being organized by a union, then those efforts may continue with the new employer.

Highlights of DOL’s Rule
Key requirements of the Rule include:

1. Covered successor contractors and subcontractors must offer employment on a “first right of refusal” basis to service employees (except managerial and supervisory employees) employed under the predecessor contract whose employment would otherwise be terminated at the end of the contract;
2. The offer of employment must be for positions for which the employees “are qualified”;
3. Employees generally are presumed to be qualified for any position they held under the predecessor contract, unless the successor employer “reasonably believes” based on “written credible information” from a “reliable source” that an employee has failed to perform suitably on the job;
4. Predecessor contractors and subcontractors must provide a list of service employees to the contracting agency at least 30 days prior to the contract completion date;
5. Successor contractors and subcontractors must notify the predecessor employer's service employees that the contract or subcontract they were working on has been awarded to a new contractor or subcontractor; and
6. Aggrieved employees of the predecessor contractor or subcontractor can file a complaint with the contracting agency or directly with the DOL's Wage and Hour Division.

Violations of the Rule can result in any of the following:
1. An order to hire the predecessor contractor's or subcontractor's employee;
2. Payment of lost wages and benefits and the provision of other “terms, conditions and privileges” of employment;
3. Withholding contract funds for unpaid wages or other relief;
4. Suspension of payment of contract funds to the predecessor employer where the predecessor fails to provide to the contracting agency a list of names of service employees working on the contract; and
5. Debarment for up to three years for failure to comply with the DOL's orders for hiring and other relief or for willful or aggravated violations of the Rule.

Jackson Lewis attorneys will conduct a webinar for interested federal service contractors in November. We will discuss the Rule, areas of key concern for contractors, and strategies to help maximize flexibility and performance while complying with the Rule. Please check www.jacksonlewis.com for information on the webinar.

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