

## Back Again: U.S. Department of Labor Issues Final Rule on Nondisplacement of Qualified Workers

The U.S. Department of Labor's Nondisplacement of Qualified Workers Under Service Contracts Rule is back. After publication as a final rule in December 14, 2023, the Rule is now in effect and will apply to all new Service Contract Act (SCA)-covered solicitations and contracts issued after February 12, 2024. This is true despite the fact that the relevant Federal Acquisition Regulation (FAR) clause has yet to be published.

The Rule is largely a revival of the Obama era nondisplacement rule that was rolled back during the Trump Administration. It implements President Biden's Executive Order 14055, which requires SCA contractors to make a good faith bona fide right of first refusal employment offer to service employees from predecessor contracts. To pass muster under the Rule, a bona fide offer must not be designed to discourage the employee from accepting the offer, and must expire no sooner than ten business days after the offer is made.

The Rule also requires that the predecessor contractor provide the contracting officer with a certified list of employees 30 days before performance under the contract is complete, and that the predecessor contractor give its employees notice of their possible right to employment under the successor contract.

These nondisplacement requirements apply across all tiers of SCA-covered contracts and subcontracts, and the FAR clause that will be issued pursuant to the Rule will be a mandatory flow down clause. However, the Rule does include some limitations on the nondisplacement requirements. First, the requirements do not apply to SCA contracts that are for less than \$250,000. Second, the Rule only applies to offers made to service employees as defined under the SCA (i.e. an individual engaged in the performance of an SCA-covered contract, excluding individuals employed in a bona fide executive, administrative, or professional capacity). Third, the requirements only extend to offers made to employees that are qualified and can perform suitably under the successor contract. Lastly, a successor contractor is not required to make offers to all of the employees of a predecessor contract if the successor contractor has proposed to utilize a smaller workforce than the predecessor contractor.

Although contractors will largely be familiar with the requirements under the Rule, as it generally reinstates the nondisplacement rule that was in effect during the Obama Administration, there are a few notable differences. Most significantly, contractors will now have to contend with the lack of location boundaries in the new nondisplacement rule. The Rule requires that contracting agencies issue a location continuity determination if the agency reasonably determines that the successor contract must be performed in the same or similar locality. The Obama era rule was limited to such successor contracts for the same or similar services performed in the same location as the new contract, but the new Rule extends the nondisplacement obligation to contractors regardless of where the successor intends to perform. The removal of this limitation now means that a successor contractor performing in a completely different location than the predecessor still must make offers where required by the Rule to employees working in another geographic location as well as those working remotely.

Additionally, the Rule makes it more difficult for successor contractors to avoid the obligation to offer employment to a specific employee under the successor contract. Where previously a successor contractor did not have to offer employment when there was a reasonable belief that an employee previously failed to perform suitably on the job, now if the successor contractor wishes to forgo making an employment offer to a predecessor employee it must have reliable evidence that it would have just cause to discharge the employee. In practice, this standard will make it very difficult (if not nearly impossible) to avoid making an offer to a qualified predecessor employee.



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Other notable changes in the Rule include imposing an affirmative obligation on contractors to inform the agency contracting officer if the nondisplacement requirements are omitted from an otherwise covered contract as well as the potential for enhanced penalties, including contract withholds, for violations.

Overall, while Rule brings life back to a set of requirements that many SCA-contractors are quite familiar with, contractors should be prepared to navigate the broadened scope of the new requirements and burdens imposed on contractors. The full text of the Rule can be found [here](#). We will continue to monitor the implementation and impacts of this Rule, and remain available to advise on this and other SCA matters.

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