

Client Alert: Here We Go Again— Nondisplacement Rule Back in Effect for Contractors?

Publications

July 15, 2022

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The Biden Administration just issued a proposal to reinstitute the nondisplacement rule, which requires services contracts that succeed contracts for the same or similar services—as well as solicitations for such contracts—to include a clause offering qualified service employees under the predecessor contract a right of first refusal of employment.

At least 10 business days before contract expiration, departing contractors must provide the incoming contractor a list of all service employees working on the contract during the last month of performance. The incoming contractor must then give incumbent employees express *bona fide* offers for employment in positions for which they are qualified. Employees must be given at least 10 business days to accept the offer.

Contractors will be familiar with this rule, which existed during the Obama Administration—albeit with a few differences—and was canceled during the Trump Administration. Contractors should keep in mind the following to help ensure compliance:

- Unlike its Obama-era predecessor, the new rule applies to contractors performing work at a different location than the predecessor contractor.
- The departing contractor is responsible for providing the contracting officer a list of the names of all service employees employed under the contract and subcontracts within the last month of contract performance. The departing contractor must also provide written notice to service employees of their possible right of first refusal for employment under the successor contract.
- The incoming contractor cannot fill any openings for positions subject to the Service Contract Act before first making good faith offers of employment to incumbent employees, although the offer need not be for the same position as the employee had previously held. The incoming contractor also retains the right to determine the number of employees necessary for efficient performance and can hire more or fewer employees than the previous contractor.

- The incoming contractor is not required to offer a right of first refusal to an employee where, based on reliable evidence of past performance, the contractor or its subcontractors reasonably believe that there would be just cause to discharge that employee.

Jenner & Block government contracts and grants attorneys stand ready to assist with any questions about the reimposition of this rule.

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