

# Federal Service Contractors Should Start Preparing Now for New Biden Executive Order ‘Nondisplacement of Qualified Workers Under Service Contracts’

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Through a new [Executive Order](#), President Joe Biden has revived and revamped the Obama-era requirement that successor contractors with Service Contract Act contracts hire their predecessor’s employees.

### History

In 2009, President Barack Obama issued Executive Order 13495, “Nondisplacement of Qualified Workers under Service Contracts,” which provided protection in the form of a right of first refusal for continued employment to qualified service workers when a government contract was replaced with a new contract and a successor contractor at the same location. EO 13495 and its implementing regulations applied to any contract or subcontract for services entered into by the federal government or its contractors covered by the McNamara-O’Hara Service Contract Act (SCA). EO 13495 required that qualified workers, *i.e.*, non-exempt workers covered by the SCA’s requirements on a covered contract who stood to lose their jobs because of the completion or expiration of a contract be given a right of first refusal for employment with the successor contractor.

Generally, the successor contractor was prohibited from hiring any new employees under the successor contract until qualified workers performing the prior contract were provided the opportunity to accept a job with the successor. EO 13495 applied only to successor contracts for the performance of the same or similar services at the same location. President Donald Trump revoked EO 13495 on October 31, 2019, through Executive Order 13897.

### Biden Executive Order

The new **Biden Executive Order** is similar to Executive Order 13495, but includes an implementation clause that contracting agencies may use pending issuance of final implementing regulations by the Department of Labor (DOL) within 180 days of November 18, and an amendment of the Federal Acquisition Regulation by the FAR Council within 60 days of the DOL’s final rule.

#### *Key requirements include:*

1. Covered successor contractors and subcontractors must offer employment on a “first right of refusal” basis to service 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.” Employers are not required to offer a right of first refusal to any employee(s) of the predecessor contractor for whom the contractor or any of its subcontractors reasonably believes, based on reliable evidence of the particular employees’ past

performance, that there would be just cause to discharge the employee(s) if employed by the contractor or any subcontractors`

3. Successor contractors will be required to make a written offer of employment to all covered incumbent employees to the extent there is a position available, and the incumbent employees will have at least 10 business days to accept the offer; and
4. Predecessor contractors and subcontractors must provide a list of service employees, with their anniversary dates, to the contracting agency at least 30 days prior to the contract completion date.

### Exclusions

The requirements will not apply to:

- Contracts under the simplified acquisition threshold as defined in 41 U.S.C. 134 (currently \$250,000); or
- Employees who were hired to work under a federal service contract and one or more nonfederal service contracts as part of a single job, provided that the employees were not deployed in a manner that was designed to avoid the purposes of this order.

In addition, under certain limited circumstances, agencies can apply for an exemption from the requirements for specific contracts.

### Effective Date

The Executive Order is effective immediately and will apply to solicitations issued on or after the effective date of the final regulations issued by the FAR Council. For solicitations issued between the date of the Executive Order and the FAR Council's issuance of final regulations or solicitations that have already been issued and are outstanding as of the date of this order, *agencies are strongly encouraged, to the extent permitted by law, to include in the relevant solicitation the contract clause in the Executive Order.*

### Violations

Violations can result in:

1. An order to hire the predecessor contractor/subcontractor's employees;
2. Payment of lost wages and benefits;
3. Debarment for up to three years for failure to comply with the DOL's orders for hiring and other relief or for willful violations of the Executive Order.

### Getting Ready Now

Although we await further details in the rulemaking process, federal contractors with contracts/subcontract covered by the Service Contract Act, or such contracting opportunities should:

- Be on the lookout for agencies modifying contracts and new solicitations with the requirements *prior to* the issuance of DOL and FAR Council regulations;
- Consider union successorship issues under which winning a follow-on contract may

require contractors to bargain with and hire a union workforce; and

- Consider participating in the notice and rulemaking process.

Please contact a Jackson Lewis attorney with any questions.

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