

Department of Labor Releases Final Non-Displacement Rule for Contracts Covered by the Service Contract Act

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On August 29, 2011, the Department of Labor (DoL) issued a final rule for limiting displacement of employees who work on contracts covered by the McNamara-O'Hara Service Contract Act (SCA), 41 U.S.C. § 351 *et seq.* 76 Fed. Reg. 53720 (Aug. 29, 2011). The final rule is largely unchanged from those proposed by DoL in March 2010. The rule in effect requires many successor contractors to offer employment to their predecessor's workforces, although as we explained previously, many exceptions and other nuances apply.

Although the rule largely mirrors the proposed rule, five notable changes were made:

1. Under § 9.4(d)(2), incumbent contractors must inform their employees (and collective-bargaining representatives, when appropriate) when a contracting agency has exercised its authority to exempt a contract from the non-displacement rule, and must do so within five days of the solicitation date for the follow-on award. Under the proposed rule, contracting agencies were required to inform predecessor contractors' employees directly, and had until the award date to do so.
2. Also under § 9.4(d)(2), if a contracting agency fails to ensure that a predecessor has informed its employees of the agency's decision to exempt the follow-on award, the agency's exemption is rendered inoperative. This provision did not appear in the proposed rule.
3. Under § 9.12(b)(1), successor contractors may use employment screening processes, such as background checks

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and drug tests, "only when such processes are provided for by the contracting agency, are conditions of the service contract, and are consistent with the Executive Order" on which this DoL rule is based. This limitation did not appear in the proposed rule.

4. In both the proposed and final rule, under § 9.12(c)(1)(ii)(A), contractors are not required to hire particular incumbent employees upon demonstrating a "reasonable belief" that the employee had not "performed suitable work" on the incumbent's contract. In the final rule, the "credible information" that supports this belief must be written, whereas the proposed rule did not specify the format of such credible information.
5. In a change that does help successor contractors, under the final § 9.12(e)(1) outgoing incumbents must provide a certified list of employees performing the incumbent contract at least 30 days before contract completion, rather than the 10 days required under the proposed rule.

Overall, the final non-displacement rule is largely unchanged and somewhat self-contradictory: to accomplish its stated goal of furthering "the Federal Government's procurement interests in economy and efficiency," DoL has imposed numerous administrative burdens on predecessors, successors and contracting agencies alike. In the end, the rule is complex and contractors are well advised to work closely with competent counsel to analyze solicitations and contract provisions in order to determine how best to comply with these new obligations.

The DoL's non-displacement rule will not take effect until the corresponding rule is issued by the Federal Acquisition Regulation (FAR) Council.