

Department of Labor Proposes Rule Implementing EO 14055 Nondisplacement Obligations for SCA-Covered Contracts

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WHAT: The nondisplacement rule's revival continues as the U.S. Department of Labor (DoL) has published its proposed rule to implement Executive Order (EO) 14055, Nondisplacement of Qualified Workers under Service Contracts. EO 14055's basic obligation would require many Service Contract Act (SCA)-covered contractors to offer employment to service employees of their predecessor contractors. The obligations will be familiar to many contractors in the federal services market, given the pendulum swings of executive orders adding and withdrawing the obligations over the prior four presidential administrations. For a broader discussion on the potential impacts of these changes see our alert on EO 14055. All SCA-covered contractors, whether experienced with the nondisplacement rule or not, should focus on two changes discussed below from the current iteration.

WHEN: DoL published its proposed rule on July 15, 2022. Comments are due by August 15, 2022. Per the EO, the nondisplacement obligations would take effect after both DoL's rule and a companion Federal Acquisition Regulation (FAR) rule are final, though the EO "strongly encouraged" agencies to add the obligations to active solicitations and those released before the DoL and FAR rules are final.

WHAT DOES IT MEAN FOR INDUSTRY: Contractors may perceive a relatively modest impact from the nondisplacement rule because hiring predecessor employees in the services industry is a common competitive strategy. But as we noted in discussing EO 14055's issuance, this latest nondisplacement iteration saddles service

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contractors with even more administrative burden and compliance risk than the prior iterations.

First, DoL proposed removing the prior nondisplacement rule's limitation to successor contracts for the same or similar services *performed in the same location*. The nondisplacement obligation would thus apply no matter where the successor performs. This geographic expansion includes hybrid and remote workforces. So successor contractors, armed with a list of only names and dates of hire, now may have to locate the predecessor contractor's service employees literally from coast to coast. Relocation costs need not be offered under the proposed rule, but remote options may need to be.

Second, DoL followed EO 14055 in raising the bar to not offer employment to a predecessor employee even higher. In nondisplacement's prior iteration, a successor did not have to offer a job when there was reasonable belief based on the particular employee's past performance that the predecessor employee had "failed to perform suitably on the job." Now the standard would be "reliable evidence" that the successor contractor would have "just cause to discharge" the employee. The purpose of this change appears to be making it impossible not to hire a predecessor employee unless the successor has evidence to justify firing the employee—perhaps an unintentionally signature feature of reviving a nondisplacement rule that continues to be a solution in search of a problem.