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NEWSLETTER

Some Obama-Era Labor and Employment Executive Orders Remain in Effect and Continue to Present Compliance Challenges

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Two years ago, President Trump took office promoting deregulation and plans to reverse regulatory actions of the Obama Administration. Many federal contractors expected the rollback to include executive orders that had created new labor and employment obligations, such as Fair Pay and Safe Workplaces (EO 13673), Nondisplacement of Qualified Workers under Service Contracts (EO 13495), and Establishing Paid Sick Leave for Federal Contractors (EO 13706). Although the Fair Pay and Safe Workplaces implementation was fully withdrawn, the Nondisplacement and Paid Sick Leave Rules remain in effect.

Agency guidance on how to comply with these rules, however, has been sparse. The Department of Labor has issued little formal guidance beyond the initial implementation, perhaps due to the slow pace of filling vacancies at DOL under the current administration. Meanwhile, DOL adjudicative bodies and the courts have so far provided few decisions to fill the gaps. This article focuses on some of those gaps and how contractors can reduce compliance risks in those important areas.

Nondisplacement Rule (EO 13495)

EO 13495 requires "a successor contractor and its subcontractors to offer employees working under the predecessor contract whose employment will be otherwise terminated, a right of first refusal of employment under the successor contract in positions for which they are qualified." Contractors raised concerns during the rulemaking process about the risks associated with forced hiring of unqualified or

Authors

Craig Smith
Partner
202.719.7297
csmith@wiley.law

Colin J. Cloherty
Associate
202.719.3564
ccloherty@wiley.law

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sub-par incumbent employees. DOL's answers in the final rule provided little practical guidance on that issue, and interpretive guidance since then has remained limited. Administrative decisions, however, show that DOL's Wage and Hour Division (WHD) has pursued enforcement actions over predecessor employees who were not hired by successor contractors—validating contractors' initial concerns about potentially hiring lower-quality employees, or facing the risk of an investigation and enforcement action. These decisions highlight three important takeaways.

First, WHD applies the rule strictly and is willing to pursue enforcement actions on behalf of lone individuals, even where the successor contractor makes good faith efforts to comply. The rule tasks successor contractors with the responsibility to identify all incumbent employees eligible for job offers under the rule, who have a right of first refusal to their position "even if the successor contractor has not been provided a list of the predecessor contractor's employees or the list does not contain the names of all persons employed during the final month of contract performance." 29 C.F.R. § 9.12(a)(2). A recent ALJ decision, *Waters v. Metro Contracting Services*, 2018-NQW-00002, 15 (Jan. 4, 2019), shows WHD will pursue successor contractors for allegedly failing to offer employment to a single predecessor employee, even where the contractor goes to great lengths to identify and make offers to all other predecessor employees.

If near "strict liability" is the enforcement standard, then there is no foolproof way to avoid this problem under every single circumstance. But contractors should take care to carefully document (a) requests for lists of predecessor employees covered by the nondisplacement rule; (b) attempts to confirm that the lists include all qualified employees; and (c) all additional efforts to identify any other incumbent employees covered by the rule, such as meetings, phone calls, emails, and other outreach. Yet even with these efforts, WHD may still investigate complaints that a contractor missed an incumbent employee who allegedly should have received an offer. A well-documented hiring effort can help reduce the disruption of these investigations and possible enforcement actions.

Second, maintain appropriate records supporting any affirmative decisions not to hire eligible incumbent employees. Contractors may rely on "credible evidence" to determine an employee is not qualified to perform the successor contract. 29 C.F.R § 9.12(a)(3). But the individuals most likely to be found unqualified—those lacking credentials or with a poor performance record—are perhaps the most likely to complain to DOL if not offered jobs. Contractors can reduce (but not eliminate) this enforcement risk by basing their hiring decisions on objective terms in the successor contract's requirements.

In two DOL ALJ decisions, WHD had pursued enforcement actions when successor contractors did not offer jobs to longstanding predecessor employees who lacked credentials required by successor contracts. WHD argued that the employees' experience on the prior contracts could substitute for the qualifications at issue. Both times, a DOL ALJ disagreed, finding that contracting agencies have authority to establish the terms of their own contracts, including educational and training requirements. *See WHD v. Metropolitan Security Services, Inc.*, 2016-NQW-00001, 7-8 (Dec. 19, 2018); *Moss et al. v. Sabre88, LLC.*, 2015-NQW-00001-2015-NQW-00003 at 23-24 (Oct. 16, 2015). Employees lacking contractually required credentials can reasonably be found not to qualify for the successor contract. In one of those cases, the ALJ also agreed that a contractor

had properly followed a contracting officer's suggestion not to rehire one individual that the contracting officer believed to be unqualified.

Third, successors should carefully document the job offers they do make. Covered successors must make a good faith offer of employment to qualified incumbent employees. *See* 29 C.F.R. § 9.12(a)(1). DOL appears to use common-law principles to determine whether a successor contractor has extended such an offer, which can take many forms. For example, in *Waters* the ALJ held that an invitation to submit a job application constituted a bona fide offer because the successor had hired every incumbent employee who applied. Other forms of offers may satisfy the requirements, such as an offer made orally during a group meeting, though they're subject to dispute after the fact even if the successor documents the offer contemporaneously. The approach that best minimizes any ambiguity, however, is an unconditional written offer of employment delivered to the employee with confirmation of receipt (such as a signed acknowledgement or certified-mailing receipt). But that level of detail may be impractical in some circumstances, leaving contractors to balance hiring employees efficiently with protecting against complaints from predecessor employees who may have not received an offer, not accepted an offer, or complained an offer was for the "wrong" position.

According to the EO, these nondisplacement requirements are intended to improve efficiency by codifying standard industry practice of a successor's hiring ("rebadging") the predecessor workforce. The past decade of practice—and the few decisions actually applying the rule—show that the rule can drag efficiency and expose even reasonably diligent contractors to enforcement risk over individuals who may simply not merit rehiring.

Sick Leave Rule (EO 13706)

There's been even less compliance guidance issued for the sick leave rule. DOL added informal "frequently asked questions" when it issued the final rule, but has not subsequently published any further public guidance. Nor have there been reported DOL or federal court decisions applying the rule in the two years since it became applicable.

This lack of updates leaves contractors on their own to apply EO 13706's outmoded approach to providing sick leave, which has prompted numerous questions from industry. For example, DOL has not amended the rules to account for how most contractors provide fringe benefits, nor has the EO been revised to that effect.

Contractors should be aware of how other developments are affecting their obligations under EO 13706. Since DOL's implementing rules started applying, seven states have implemented their own sick leave (Vermont, Arizona, Washington, Rhode Island, Maryland, New Jersey, and Michigan's forthcoming implementation), more than doubling those that were already in place (four states plus the District of Columbia). Local jurisdictions continue to add sick leave laws as well.

This expansion may force contractors to develop multiple compliance strategies for discrete groups of employees, depending on where they work and what contracts they support. For example, on a contract subject to EO 13706, some employees might be subject to a state sick leave law while others are not. Likewise, an employee might perform on two or more contracts, at least on one subject to EO 13706 but

others that are not not, which can affect the employee's entitlement to fringe benefits if covered by the Service Contract Act.

Many modern payroll and other business systems often cannot readily accommodate these types of patchwork fringe-benefit requirements in a cost-effective manner. Yet contractors need to evaluate each sub-group of employees carefully to devise strategies for compliance (including any needed risk assessments) with EO 13706's highly prescriptive requirements.

Contractors with unionized workforces should take note of an upcoming development. DOL's implementing rules provided a partial exclusion from EO 13706's requirements for employees covered by certain collective bargaining agreements through January 1, 2020. 29 C.F.R. 13.4(f). New CBAs will not be excluded, so contractors should start planning now to negotiate CBAs that expressly account for EO 13706 requirements and, as applicable, any new state and local sick leave requirements. Clearly worded agreements incorporating the applicable requirements will best help reduce the risk of misunderstanding and complaints to DOL.

Setting aside one's views on the merits of the nondiscplacement and federal sick-leave rules as public policies, their implementation has been a burden because the compliance obligations often fail to match how modern companies hire and compensate employees. The rules were already outmoded when issued and DOL has done little to modernize the rules or its interpretive guidance. Contractors thus must be careful to assess their obligations and fully document all efforts to comply—and should do so long before any employees start performing on a contract subject to these rules.