

CLIENT ALERT

President Trump Revokes Obama-Era Executive Order Requiring Successor Service Contractors to Offer Right of First Refusal of Employment to Certain Qualified Workers of Predecessor Contractors

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On October 31, 2019, President Donald Trump revoked Executive Order 13495 (EO 13495), known as “Nondisplacement of Qualified Workers under Service Contracts.” EO 13495, which was signed by former President Barack Obama on January 30, 2009 and went into effect on January 18, 2013, required successor federal contractors who performed work on contracts covered by the McNamara-O’Hara Service Contract Act (the SCA) to offer a “right of first refusal” of employment to certain service employees who worked on predecessor contracts. The October 31, 2019 Executive Order requires the “Secretary of Labor [], the Federal Acquisition Regulatory Council, and heads of executive departments and agencies” to “promptly move to rescind any orders, rules, regulations, guidelines, programs, or policies implementing or enforcing [EO] 13495.” It further directs the Secretary of Labor to immediately terminate all investigations or compliance actions based on EO 13495.

EO 13495’s Requirements

EO 13495 and its implementing regulations protected qualified service workers on a service contract or subcontract covered by the SCA from being displaced when the contract or contractor for which they furnished services was replaced with a new contract and contractor for the same or similar services at the same location. Under EO 13495, the successor contractor was required to provide certain incumbent service workers a right of first refusal for employment and the opportunity to accept the job offers before hiring new employees for the contract. EO 13495 also required predecessor contractors to provide written notices of the incumbent workers’ right to continuing employment through workplace postings or notices delivered to these workers. Other obligations imposed by EO 13495 on federal service contractors included: (1) requiring successor contractors to hold positions open for ten days before advertising positions to outside applicants, and (2) requiring predecessor contracts to compile a certified list of its employees, who were entitled to an offer of employment, for submission to the responsible contracting agency. When incorporated by the federal government, EO 13495 also required higher tier contractors to flow down FAR Clause 52.222-17 (which codified the rights and obligations under EO 13495) to lower tier contractors.

What Revocation of EO 13495 Means for Contractors

While most contractors hire from the incumbent workforce of the predecessor contractor regardless of EO 13495, its revocation will provide contractors welcomed flexibility in workforce management. Contractors can now exercise their discretion when making hiring and/or staffing decisions on their federal service contracts without violating the EO’s mandate to employ the workers of predecessor contractors. Incumbent contractors will also be able to better protect their workforce from competitors through the implementation and enforcement of lawful post-employment restrictions, such as non-compete or non-solicitation agreements, to the extent permitted by state law. EO 13945 frequently proved to be an impediment to precluding workers from accepting job offers from a successor contractor who is also a competitor. The revocation of EO 13495 may also create new opportunities for contractors to impose post-employment restrictive covenants and to argue successfully for their enforcement.

The revocation of EO 13495 also means that unions may not claim that nonunion contractors are bound by the collective bargaining obligations of their unionized predecessor contractors because the successors were required by law to hire from the unionized predecessors' workforce. Previously, under EO 13495, a non-union successor contractor could find itself bound by the unionized predecessor's bargaining obligations by virtue of the *Burns* successorship doctrine, established under the National Labor Relations Act, if it were required to hire more than 50% of the predecessor's employees.

Further, the October 31, 2019 Executive Order requires immediate termination of all ongoing investigations and enforcement actions concerning EO 13495. To the extent that a contractor is under investigation for alleged violation of EO 13495, we recommend that the contractor immediately contact the appropriate enforcement agency (*e.g.*, the United States Department of Labor) to confirm the termination of the investigation.

The October 31 Executive Order does not provide a rationale or explanation for the President's decision to revoke EO 13495. Given the potential adverse impact of this action on unionization, labor unions and other workers' rights groups may well be tempted to assert legal challenges in an attempt to stay the rescission of EO 13495.

We will continue to monitor the revocation of EO 13495 and its impact, and will provide any further developments and updates as warranted.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

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