

DOL Prepares to Implement the Executive Order on Mandatory Hiring of Predecessor Employees Under the Service Contract Act

March 23, 2010

Almost 14 months after President Obama signed Executive Order 13495, the Department of Labor issued a Notice of Proposed Rulemaking on March 19, 2010 to implement the order. Signed on January 30, 2009 and titled “Nondisplacement of Qualified Workers Under Service Contracts,” the order mandates that all federal service contracts include a clause granting a “right of first refusal” to all employees (except managerial and supervisory employees) employed by the predecessor contractor. This order reinstated a similar order implemented by President Clinton (Executive Order 12933) and later rescinded by President Bush in 2001 (Executive Order 13204).

Successor contractors and covered subcontractors remain free to determine how many employees are needed to perform a government contract, and to use fewer employees than the predecessor. Once that decision is made, however, offers of employment to the predecessor contractor’s employees must be made and remain open for at least 10 days. This Executive Order virtually guarantees that any existing workforces that are unionized will remain so once the successor begins performing the service contract.

The proposed rules for implementing the order, issued by the Department of Labor’s Wage and Hour Division, contain some interesting and noteworthy developments:

- The order exempts “managerial and supervisory employees,” which the proposed rule defines as those employees similarly exempt from the Fair Labor Standards Act under the bona fide executive, administrative, or professional exemptions.
- Successor contractors must consider the language or languages spoken by covered employees before communicating offers of employment to predecessor employees.
- Successor contractors must continue to offer employment to any predecessor employee up to 90 days after the start of contract performance, as long as the predecessor employee has not received a prior offer from the successor.
- Successor contractors who deny employment based on lack of qualification or poor performance bear the burden of proof if that decision is challenged.
- Notable exceptions to the duty to hire predecessor employees include:

- Where the predecessor employees will be retained by the predecessor contractor
 - Where the successor's current employees, who have worked for the successor contractor for at least three months immediately preceding the commencement of the contract, would face layoff or discharge.
- Individual employees or union representatives will not have a private right of action to enforce the order. Instead, claimants must file an administrative complaint with the contracting agency within 120 days of the alleged violation or with the DOL Wage and Hour Division within 180 days of the alleged violation.
 - Penalties for violating the Executive Order include payment of back pay and/or offers of employment to predecessor employees, and/or contract debarment for "willful or aggravated" violations.

The public may submit comments on these proposed rules no later than May 18, 2010. Final implementation of the rules is likely to happen in the latter half of 2010. Only after the final rules are issued will the hiring stipulation be included in federal service contracts.

The implementation of Executive Order 13495 runs in conjunction with the implementation of three other labor-related Executive Orders issued by President Obama in early 2009: Executive Order 13494 (barring reimbursement for costs related to persuader activities), 13496 (notification of employee rights under federal labor laws), and 13502 (governmental use of project labor agreements). (For more information, see two previous Morgan Lewis LawFlashes, "DOL Publishes Proposed Regulations on Labor Law Posting for Federal Contractors," dated August 4, 2009, available at http://www.morganlewis.com/pubs/LEPG_FederalContractors_LF_04aug09.pdf, and "New Executive Orders on Labor Relations Will Impact All Federal Contractors," dated February 2, 2009, available at http://www.morganlewis.com/pubs/LEPG_LaborRelationsExecOrders_LF_02feb09.pdf.) While the federal agencies have taken steps to implement Executive Orders 13496 and 13502, with final rules likely to be promulgated within months, a Notice of Proposed Rulemaking for Executive Order 13494 (persuader activities) has yet to issue.

The Obama administration appears fully committed to the implementation of all four orders. These initiatives will greatly enhance pressure on government contractors to adopt and conform their policies and procedures to comply with the final rules.

If you have any questions about the information contained in this LawFlash, please speak with any of the members of the firm's Labor and Employment Practice, or with one of the following attorneys:

Washington, D.C.

| | | |
|---------------------|--------------|--|
| James J. Kelley, II | 202.739.5095 | jkelly@morganlewis.com |
| Howard M. Radzely | 202.739.5996 | hradzely@morganlewis.com |
| Joseph E. Santucci | 202.739.5398 | jsantucci@morganlewis.com |

Chicago

| | | |
|----------------------|--------------|--|
| Philip A. Miscimarra | 312.324.1165 | pmiscimarra@morganlewis.com |
|----------------------|--------------|--|

Houston

| | | |
|-------------------|--------------|--|
| A. John Harper II | 713.890.5199 | aharper@morganlewis.com |
|-------------------|--------------|--|

Los Angeles

Clifford D. Sethness

213.612.1080

csethness@morganlewis.com**Philadelphia**

Doreen S. Davis

215.963.5376

dsdavis@morganlewis.com**About Morgan, Lewis & Bockius LLP**

With 22 offices in the United States, Europe, and Asia, Morgan Lewis provides comprehensive transactional, litigation, labor and employment, regulatory, and intellectual property legal services to clients of all sizes—from global Fortune 100 companies to just-conceived startups—across all major industries. Our international team of attorneys, patent agents, employee benefits advisors, regulatory scientists, and other specialists—more than 3,000 professionals total—serves clients from locations in Beijing, Boston, Brussels, Chicago, Dallas, Frankfurt, Harrisburg, Houston, Irvine, London, Los Angeles, Miami, Minneapolis, New York, Palo Alto, Paris, Philadelphia, Pittsburgh, Princeton, San Francisco, Tokyo, and Washington, D.C. For more information about Morgan Lewis or its practices, please visit us online at www.morganlewis.com.

This LawFlash is provided as a general informational service to clients and friends of Morgan, Lewis & Bockius LLP. It should not be construed as, and does not constitute, legal advice on any specific matter, nor does this message create an attorney-client relationship. These materials may be considered **Attorney Advertising** in some states.
Please note that the prior results discussed in the material do not guarantee similar outcomes.

© 2010 Morgan, Lewis & Bockius LLP. All Rights Reserved.