

**NONDISPLACEMENT OF
QUALIFIED WORKERS UNDER
FEDERAL SERVICE CONTRACTS

EXECUTIVE ORDER 13495**

INTRODUCTION

EXECUTIVE ORDER (E.O.) 13495

PURPOSE

IMPLEMENTING REGULATIONS

COVERAGE

SCA COVERED CONTRACTS & “SERVICE EMPLOYEES”

CONTRACTS EXCLUDED FROM COVERAGE BY E.O. 13495

FEDERAL AGENCY EXEMPTION (WAIVER) AUTHORITY

CONTRACTING AGENCY & PREDECESSOR CONTRACTOR OBLIGATIONS

NONDISPLACEMENT CONTRACT CLAUSE

NOTIFICATION TO CONTRACTORS & SERVICE EMPLOYEES

**CERTIFIED LIST OF NAMES OF SERVICE EMPLOYEES UNDER
THE PREDECESSOR CONTRACT**

SUCCESSOR CONTRACTOR OBLIGATIONS

**BONA FIDE OFFERS & THE SERVICE EMPLOYEES’ RIGHT OF
FIRST REFUSAL**

**EXCEPTIONS TO THE REQUIREMENT THAT THE SUCCESSOR
CONTRACTOR & SUBCONTRACTORS OFFER A RIGHT OF FIRST
REFUSAL OF EMPLOYMENT TO THE PREDECESSOR’S SERVICE
EMPLOYEES**

SUBCONTRACTS

RECORDKEEPING

COOPERATION WITH INVESTIGATION & REMEDIAL ACTION

COMPLAINTS

ENFORCEMENT

WHD INVESTIGATION

REMEDIES & SANCTIONS

MEDIATION & APPEALS

FEDERAL AGENCY EXEMPTION (WAIVER) PROCEDURES

INTRODUCTION

Executive Order (E.O.) 13495

- ◇ President Obama signed E.O. 13495 – “Nondisplacement of Qualified Workers Under Service Contracts” – on January 30, 2009.
- ◇ E.O. 13495 “establishes a general policy of the Federal Government concerning service contracts and solicitations for service contracts for performance of the same or similar services at the same location.” E.O. § 1.
 - ◇◇ Specifically, the E.O. mandates the inclusion of a contract clause entitled “Nondisplacement of Qualified Workers” in covered contracts requiring the 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.
- ◇ The E.O. required the issuance of DOL and FAR regulations in order for its implementation to take effect. E.O. § 10.

Purpose

- ◇ E.O. 13495 recognizes that prior to its issuance successor contractors and subcontractors often hired the majority of predecessor contractors’ employees when a service contract expired and a follow-on contract was awarded for the same or similar services at the same location.
 - ◇◇ However, sometimes successor contractors or subcontractors would displace a predecessor contractor’s employees and hire a new work force.
- ◇ As the E.O. states, the Federal Government’s procurement interests in economy and efficiency are served when a successor contractor hires the predecessor’s employees.
 - ◇◇ A carryover work force provides the Federal Government the benefits of an experienced and trained workforce familiar with the Federal Government’s personnel, facilities, and requirements, and
 - ◇◇ reduces disruption to the delivery of services during the period of transition between the predecessor and successor contractors.

Implementing Regulations

- ◇ The DOL and FAR regulations implementing E.O. 13495 took effect on January 18, 2013, and apply to solicitations issued on or after that effective date. (*See* 76 FR 53720-53762, August 29, 2011, and 77 FR 75760-75781, December 21, 2012.)

- ◇◇ DOL Regulations – 29 C.F.R. Part 9.
 - ◇◇ DOL Contract Clause – 29 C.F.R. Part 9, Appendix A.
 - ◇◇ FAR Regulations – 48 C.F.R. Part 22, Subpart 22.12.
 - ◇◇ FAR Contract Clause – 48 C.F.R. § 52.222-17.
- ◇ The FAR contract clause applies to all covered contracts except those not subject to the FAR, such as those of the United States Postal Service, which are subject to the DOL contract clause.

COVERAGE

SCA covered contracts & “service employees”

- ◇ E.O. 13495 defines “service contract” or “contract” to mean “any contract or subcontract for services entered into by the Federal Government or its contractors” covered by the SCA. E.O. § 2(b).
- ◇ Each federal agency solicitation and each resulting contract that succeeds such a contract or subcontract for the same or similar services at the same location must include the “Nondisplacement of Qualified Workers” contract clause (FAR 48 C.F.R. § 52.222-17), unless a specific exception applies.
 - ◇◇ *Same or similar service* means a service that is either identical to or has one or more characteristics that are alike in substance to a service performed at the same location on a contract that is being replaced by the Federal Government or a contractor on a Federal service contract. 29 C.F.R. § 9.2.
- ◇ The E.O.’s nondisplacement requirements apply to “service employees” as defined by the SCA. E.O. § 2(b).
 - ◇◇ Under the SCA, all employees performing work on the contract are considered service employees unless they are defined as executive, administrative, or professional employees exempt under the FLSA and its regulations at 29 C.F.R. Part 541.

E.O. 13495 exclusions from coverage E.O. § 3 *Exclusions*; see also 29 C.F.R. § 9.4 *Exclusions* and FAR 48 C.F.R. § 22.1203-2 *Exemptions*.

- ◇ E.O. 13495, by its terms, does **not** apply to:
 - ◇◇ Contracts or subcontracts under the simplified acquisition threshold (currently \$150,000). FAR 48 C.F.R. § 22.1203-2(a)(1); see also FAR 48 C.F.R. Part 13.
 - ◇◇ Contracts or subcontracts awarded under 41 U.S.C. chapter 85, Committee for Purchase from People Who Are Blind or Severely Disabled (traditionally known as the Javits-Wagner-O’Day Act);
 - ◇◇ Agreements for the operation of vending facilities in federal buildings entered into pursuant to the preference regulations issued under the Randolph-Sheppard Act (20 U.S.C. § 107), which authorizes priority to be given to licensed blind persons); or
 - ◇◇ Guard, elevator operator, messenger, or custodial services provided to the federal government under contracts or subcontracts with sheltered workshops employing

the “severely handicapped” as described in 40 U.S.C. § 593 (which provides protection for certain veterans preference employees).

FAR 48 C.F.R. § 22.1203-2(a)(2), (3) and (4).

- ◇◇ Service employees who were hired to work under a federal service contract and one or more nonfederal service contracts as part of a single job, provided that the service employees were not deployed in a manner that was designed to avoid the purposes of the E.O. and its implementing regulations. FAR 48 C.F.R. § 22.1203-2(a)(5).

CONTRACTING AGENCY AND PREDECESSOR CONTRACTOR OBLIGATIONS

Nondisplacement Contract Clause E.O. § 5; 29 C.F.R. § 9.11; FAR 48 C.F.R. § 52.222-17; 29 C.F.R. Part 9, Appendix A (Non-FAR-covered contracts only).

- ◇ E.O. 13495, § 5 requires the contracting agency to include a contract clause entitled “**Nondisplacement of Qualified Workers**” to “be included in solicitations for and service contracts that succeed contracts for performance of the same or similar work at the same location.” The implementing DOL and FAR regulations reiterate this requirement. 29 C.F.R. § 9.11(a) and FAR 48 C.F.R. §§ 22.1207 and 52.222-17.
- ◇ The FAR, at 48 C.F.R. § 22.1207, requires that:
 - The contracting officer shall insert the clause at 52.222-17, Nondisplacement of Qualified Workers, in solicitations and contracts for
 - (1) service contracts
 - (2) that succeed contracts for performance of the same or similar work at the same location and
 - (3) that are not exempted by 22.1203-2 or waived in accordance with 22.1203-3.
- ◇ As noted above, the clause at 29 C.F.R. Part 9, Appendix A shall be inserted in all such solicitations and contracts that are not subject to the FAR.

Notification to contractors and service employees 29 C.F.R. § 9.11(b); FAR 48 C.F.R. § 22.1205.

- ◇ Where a contract will be awarded to a successor for the same or similar services to be performed at the same location:
 - ◇◇ The contracting officer shall direct the predecessor contractor to provide written notice to the service employees employed on the predecessor contract of their possible right to an offer of employment with the successor contractor.
- ◇ The written notice shall be—
 - ◇◇ Posted in a conspicuous place at the worksite; or
 - ◇◇ Delivered to the service employees individually.

- ◇◇ If such delivery is via email, the notification must result in an electronic delivery receipt or some other reliable confirmation that the intended recipient received the notice.
- ◇◇ Appendix B to 29 C.F.R. Part 9 provides a notice that contracting officers may advise contractors to use to provide the written notice. 29 C.F.R. § 9.11(b); FAR 48 C.F.R. § 22.1205(b).
- ◇◇ Where a significant portion of the predecessor contractor's workforce is not fluent in English, the contractor must provide the notice in English and the language(s) with which service employees are more familiar. (English and Spanish versions of the notice are available on the Department of Labor Web site at <http://www.dol.gov/whd/govcontracts>.)
- ◇◇ Any particular determination of the adequacy of a notification, regardless of the method used, must be fact-dependent and made on a case-by-case basis.

Predecessor's certified service employee lists 29 C.F.R. § 9.12(e) and FAR 48 C.F.R. § 22.1204.

- ◇ Not less than 30 days before completion of the contract, the predecessor contractor is required to furnish to the contracting officer a certified list of the names of all service employees working under the contract and its subcontracts at the time the list is submitted.
 - ◇◇ The certified list must also contain anniversary dates of employment of each service employee under the contract and subcontracts for services.
 - ◇◇ The information on this list is the same as that on the seniority list required by the SCA contract clause at FAR 48 C.F.R. § 52.222-41(n).
- ◇ When there are changes to the workforce after submission of the 30-day list, the predecessor contractor shall submit a revised certified list not less than 10 days prior to contract performance completion.
 - ◇◇ If there are no changes to the workforce before 10 days prior to the completion of the predecessor contract, then the predecessor contractor is not required to submit a revised list.
- ◇ Immediately upon receipt of the certified service employee list, but not before contract award:
 - ◇◇ The contracting officer shall provide the certified service employee list to the successor contractor, and,
 - ◇◇ If requested, also provide the list to employees of the predecessor contractor or subcontractors or their authorized representatives.

NOTE:

- ◇ Federal contracting agency obligations for enforcement of requirements under E.O. 13495 and its implementing regulations are discussed in the “Enforcement” section of this chapter of the *DOL Prevailing Wage Resource Book*.

SUCCESSOR CONTRACTOR OBLIGATIONS

Bona fide offers of employment and service employees' right of first refusal E.O. §§ 1 & 5; 29 C.F.R. §§ 9.2 and 9.12; FAR 48 C.F.R. §§ 22.1202(a), 22.1203-4, and 52.222-17(b).

- ◇ When a federal service contract succeeds a contract for performance of the same or similar services (as defined at 29 C.F.R. § 9.2) at the same location, the successor contractor and its subcontractors must:
 - ◇◇ Make a bona fide express offer of employment on the successor contract to each service employee employed under the predecessor contract whose employment will be terminated as a result of award of the successor contract or the expiration of the contract under which the service employees were hired, and
 - ◇◇ Give each such individual a “right of first refusal” in response to the offer of employment under the successor contract.
 - ◇◇ Such offers are required to be for employment in positions for which the service employees are qualified.

29 C.F.R. §§ 9.2 and 9.12(b)(1); FAR 48 C.F.R. § 22.1202(a).

- ◇ There shall be no employment opening under a covered contract, and the contractor and any subcontractors shall not offer employment under such a contract, to any person prior to having complied fully with this obligation. E.O. § 5 (b); 29 C.F.R. Part 9, Appendix A, paragraph (a); FAR 48 C.F.R. §§ 52.222-17(b)(2) and (c).
- ◇ The obligation to offer employment shall cease upon the employee’s first refusal of a bona fide offer of employment on the contract. 29 C.F.R. § 9.12(b).

Method of job offer FAR 48 C.F.R. § 22.1203-4; 29 C.F.R. § 9.12(b).

- ◇ The offer may be made in writing or orally, and
 - ◇◇ To ensure that the offer is effectively communicated, the successor contractor should take reasonable efforts to make the offer in a language that each worker understands.
 - ◇◇◇ For example, if the contractor holds a meeting for a group of employees on the predecessor contract in order to extend the employment offers, having a co-worker or other person who fluently translates for employees who are not fluent in English would satisfy this provision. 29 C.F.R. § 9.12(b)(3).
- ◇ Each bona fide express offer of employment made to a qualified service employee on the predecessor contract must state a time limit of not less than 10 days for an employee response.

- ◇◇ Prior to the expiration of the 10-day period, the contractor is prohibited from offering employment on the contract to any other person, except as otherwise allowed or required under provisions set forth in E.O. 13495 and its implementing regulations, as discussed below.

E.O. § 5(a); 29 C.F.R. § 9.12(b)(2); FAR 48 C.F.R. § 22.1203-4.

Bona fide offer of employment

- ◇ As a general matter, an offer of employment to a position on the successor contract will be presumed to be bona fide:
 - ◇◇ Even if it is not for a position similar to the one the employee previously held, but is one for which the employee is qualified, and
 - ◇◇ Even if it is subject to different employment terms and conditions, including changes to pay or benefits, than those of the position the employee held with the predecessor contractor.
 - ◇◇◇ For example, an offer of employment to a position providing lower pay or benefits than those of the position the employee held with the predecessor contractor may be considered bona fide if the business reasons for the offer are valid – *i.e.*, not related to a desire that the employee refuse the offer or that other employees be hired for the position.

29 C.F.R. § 9.12(b)(4) and FAR 48 C.F.R. § 22.1203-4.

- ◇ Note: Where an employee has been terminated under circumstances suggesting that the successor contractor's offer of employment may not have been bona fide, the facts and circumstances of the offer and the termination will be closely examined during any compliance action to ensure the offer was bona fide. 29 C.F.R. § 9.12(b)(6).

Employee eligibility & qualifications

- ◇ E.O. 13495 generally requires that successor contractors performing on federal service contracts offer a right of first refusal of suitable employment, *i.e.*, a job for which the employee is qualified. 29 C.F.R. § 9.12(a).
- ◇ A contractor must base its decision regarding an employee's qualifications on written credible information provided by a knowledgeable source such as the predecessor contractor, the local supervisor, the employee, or the contracting agency. 29 C.F.R. § 9.12(c)(4).
 - ◇◇ The successor contractor may utilize employment screening processes only when such processes are provided for by the contracting agency, are conditions of the

**U.S. DEPARTMENT OF LABOR
PREVAILING WAGE RESOURCE BOOK**

NONDISPLACEMENT
E.O. 13495

service contract, and are consistent with E.O. 13495. 29 C.F.R. § 9.12(b)(1); FAR 48 C.F.R. § 22.1203-4.

- ◇ Usually a person's entitlement to a job offer under E.O. 13495 and the implementing regulations will be based on whether he or she is named on the certified list of all service employees working under the predecessor's contract or subcontracts during the last month of contract performance.
 - ◇◇ However, a contractor must also accept other credible evidence of an employee's entitlement to a job offer under 29 C.F.R. Part 9.
 - ◇◇◇ For example, even if a person's name does not appear on the list of employees on the predecessor contract, an employee's assertion of an assignment to work on a contract during the predecessor's last month of performance coupled with contracting agency staff verification could constitute credible evidence of an employee's entitlement to a job offer.
 - ◇◇◇ Similarly, an employee could demonstrate eligibility by producing a paycheck stub identifying the work location and dates worked.
- 29 C.F.R. § 9.12(a)(3).
- ◇◇ The successor contractor's obligation to offer a right of first refusal exists 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).
- ◇ The successor contractor and its subcontractors shall decide any question concerning an employee's qualifications based on the individual's education and employment history, with particular emphasis on the employee's experience on the predecessor contract. 29 C.F.R. § 9.12(b)(4); FAR 48 C.F.R. § 22.1203-4.

Reduced staffing FAR 48 C.F.R. § 22.1203-6; 29 C.F.R. § 9.12(d).

- ◇ A successor contractor and its subcontractors may employ fewer service employees than the predecessor contractor employed in connection with performance of the work.
- ◇ Thus, the successor contractor need not offer employment on the contract to all service employees on the predecessor contract, but must offer employment only to the number of eligible service employees the successor contractor believes necessary to meet its anticipated staffing pattern, except that:
 - ◇◇ Where a successor contractor does not initially offer employment to all the predecessor contract service employees, the obligation to offer employment shall continue for 90 days after the successor contractor's first date of performance on the contract. 29 C.F.R. § 9.12(d)(3) and FAR 48 C.F.R. § 22.1203-6.

- ◇◇ DOL regulations also provide that if there are staffing pattern changes when a contractor reduces the number of employees in any occupation on a contract with multiple occupations, resulting in some displacement, the contractor shall scrutinize each employee's qualifications in order to offer positions to the greatest number of predecessor contract employees possible. For examples, *see* 29 C.F.R. § 9.12(d)(3).
- ◇ The contractor's obligation to offer employment opportunities and to implement the right of first refusal under E.O. 13495 and the implementing regulations will end when all of the predecessor contract employees have received a bona fide job offer (including stating the time within which the employee must accept such offer, which must be no less than 10 days) or the 90-day window of obligation has expired. (Three examples that demonstrate this principle are provided at 29 C.F.R. § 9.12((d)(1)(ii)(A), (B) & (C)).
- ◇ DOL guidance at 29 C.F.R. § 9.12(d) addresses circumstances in which reduced staffing can occur.
 - ◇◇ The contractor and its subcontractors:
 - ◇◇◇ Determine the number of service employees necessary for efficient performance of the successor contract, and
 - ◇◇◇ May elect to employ fewer service employees than the predecessor contractor employed in connection with performance of the work, for bona fide staffing or work assignment reasons.
- E.O. § 5(a); 29 C.F.R. § 9.12(d)(3); 29 C.F.R. Part 9, Appendix A, paragraph (a); FAR 48 C.F.R. § 52.222-17(b)(1).
- ◇◇ The successor contractor, subject to certain restrictions – such as under non-discrimination laws and regulations – will determine which of the predecessor contractor's employees will receive its offers of employment while the process described above is implemented.

E.O. 13495 exceptions to the requirement to offer the right of first refusal of employment to the predecessor's service employees E.O. § 5; 29 C.F.R. §§ 9.4, 9.12(c) and (d); FAR 48 C.F.R. § 22.1203-5.

- ◇ The E.O. contract clause at § 5(b) states specific exceptions to the general requirement that the successor contractors offer a right of first refusal of employment.
- ◇ The successor contractor bears the responsibility of demonstrating the appropriateness of claiming any of the five exceptions discussed below, from the otherwise applicable obligation to offer a right of first refusal of employment to the predecessor contractor's service employees.

**U.S. DEPARTMENT OF LABOR
PREVAILING WAGE RESOURCE BOOK**

NONDISPLACEMENT
E.O. 13495

- ◇ Under the successor contract, a successor contractor or its subcontractors may employ any of its current service employees who:
 - ◇◇ Have worked for the successor contractor or its subcontractors for at least three months immediately preceding the commencement of the successor contract, and
 - ◇◇ Would otherwise face lay-off or discharge.
- ◇ A successor contractor or its subcontractors are not required to offer employment to any service employee of the predecessor contractor who will be retained by the predecessor contractor.
 - ◇◇ The successor contractor must presume that all service employees hired to work under a predecessor's federal service contract will be terminated as a result of the award of the successor contract, absent an ability to demonstrate a reasonable belief to the contrary that is based upon credible information provided by a knowledgeable source such as the predecessor contractor or the employee.
- ◇ A contractor or subcontractor is not required to offer employment to any employee of the predecessor contractor for whom the successor contractor or any of its subcontractors reasonably believes, based on the particular service employee's past performance, has failed to perform suitably on the job.
 - ◇◇ The contractor must presume that all employees working under the predecessor contract in the last month of performance performed suitable work on the contract, absent an ability to demonstrate a reasonable belief to the contrary. that is:
 - ◇◇◇ Based upon written credible information provided by a knowledgeable source such as the predecessor contractor and its subcontractors, the local supervisor, the employee, or the contracting agency. (*See examples at 29 C.F.R. § 9.12(c)(4)(ii)(B).*)
 - ◇◇◇ The performance determination must be made on an individual basis for each employee. Information regarding the general performance of the predecessor contractor is not sufficient to claim this exception.

FAR 48 C.F.R. § 22.1203-5(a)(2) and 29 C.F.R. § 9.12(c)(4).
- ◇ A contractor or subcontractor is not required to offer employment to any employee hired to work under a predecessor's federal service contract and one or more nonfederal service contracts as part of a single job, provided that the employee was not deployed in a manner that was designed to avoid the purposes of the E.O. or 29 C.F.R. Part 9. However, the successor contractor must presume that no employees hired to work under a predecessor's Federal service contract worked on one or more nonfederal service contracts as part of a single job, unless the successor can demonstrate a

**U.S. DEPARTMENT OF LABOR
PREVAILING WAGE RESOURCE BOOK**

NONDISPLACEMENT
E.O. 13495

reasonable belief to the contrary. *See* 29 C.F.R. § 9.12(c)(5) and FAR 48 C.F.R. § 22.1203-2(a)(5).

- ◇ Compliance with any other E.O., regulation, or law of the United States E.O. § 1; 29 C.F.R. § 9.1(b)(2); 48 C.F.R. § 22.1202(b).
 - ◇◇ As stated in E.O. 13495, § 1, and reiterated at 29 C.F.R. § 9.1(b):
 - ◇◇◇ “Nothing in this order shall be construed to permit a contractor or subcontractor to fail to comply with any provision of any other Executive Order or law of the United States.”
 - ◇◇ As further explained at FAR 48 C.F.R. § 22.1202(b):
 - ◇◇◇ In certain circumstances, certain other legal requirements may conflict with the requirements of E.O. 13495. For example:
 - ◇◇◇◇ The requirements of the HUBZone Program (*see* FAR 48 C.F.R. § 19.13),
 - ◇◇◇◇ E.O. 11246 (Equal Employment Opportunity), and
 - ◇◇◇◇ The Vietnam Era Veterans’ Readjustment Assistance Act of 1974.
 - ◇◇ All applicable laws and executive orders must be satisfied in tandem with, and if necessary prior to, the requirements of E.O. 13495 and its implementing regulations. 48 C.F.R. § 22.1202(b).

Subcontracts E.O. § 5(e); 29 C.F.R. Part 9, Appendix A, paragraph (e); FAR 48 C.F.R. §§ 52.222-17(1).

- ◇ The nondisplacement contract clause required to be included in covered contracts includes a section concerning subcontracts, which provides that:
 - ◇◇ In every subcontract entered into in order to perform services under this contract, the contractor will include provisions that ensure that each subcontractor will honor the nondisplacement contract clause requirements with respect to the service employees of
 - ◇◇◇ A predecessor subcontractor or subcontractors working under this contract,
 - ◇◇◇ As well as of a predecessor contractor and its subcontractors.
 - ◇◇ The subcontract must also include provisions to ensure that the subcontractor will provide the contractor with the information about its employees needed by the contractor to comply with the requirement to furnish the list(s) of names and

anniversary dates of service employees working under the contract and its subcontracts during the last month of contract performance.

- ◇◇ The contractor will take such action with respect to any such subcontract as may be directed by the Secretary of Labor as a means of enforcing such provisions, including the imposition of sanctions for noncompliance:
 - ◇◇◇ provided, however, that if the contractor, as a result of such direction, becomes involved in litigation with a subcontractor, or is threatened with such involvement, the contractor may request that the United States enter into such litigation to protect the interests of the United States.

Recordkeeping 29 C.F.R. § 9.12(f).

- ◇ The nondisplacement contract clause requires that “Contractor and subcontractor shall maintain the following records (regardless of format, *e.g.*, paper or electronic) of its compliance with this clause for not less than a period of three years from the date the records were created.” 29 C.F.R. Part 9, Appendix A, paragraph (g); FAR 48 C.F.R. § 52.222-17(f).
- ◇ DOL regulatory requirements are set forth in 29 C.F.R. 9.12(f) and at FAR 48 C.F.R. §§ 52.222-17(f), and require the following:
 - ◇◇ The contractor (and subcontractors) shall maintain copies of any written offers of employment or a contemporaneous written record of any oral offers of employment, including:
 - ◇◇◇ The date, location, and attendance roster of any employee meeting(s) at which the offers were extended, and a summary of each such meeting,
 - ◇◇◇ A copy of any written notice that may have been distributed, and
 - ◇◇◇ The names of the employees from the predecessor contract to whom an offer was made.
 - ◇◇ The contractor (and subcontractors) shall maintain a copy of any record that forms the basis for any exclusion or exemption (including any federal agency waiver) claimed under the nondisplacement rules under E.O. 13495 and its implementing regulations.
 - ◇◇ The contractor (and subcontractors) shall maintain a copy of the employee list(s) provided to and received from the contracting agency.

29 C.F.R. § 9.12(f)(2).

- ◇◇ No particular order or form of records is prescribed for contractors (including subcontractors).

◇◇◇ A contractor may use records developed for any purpose to satisfy these requirements, provided the records otherwise meet the requirements and purposes of the regulations and are fully accessible.

29 C.F.R. § 9.12(f)(1).

- ◇◇ The contractor must provide copies of such documentation upon request of any authorized representative of the contracting agency or DOL. 29 C.F.R. § 9.12(f)(4).
- ◇ Additional recordkeeping requirements apply to each contractor who makes retroactive payment of wages or compensation under the supervision of the WHD Administrator pursuant to 29 C.F.R. § 9.24(b), as a remedy for “unpaid wages or other relief due” for violations of 29 C.F.R. Part 9.
 - ◇◇ *See* 29 C.F.R. § 9.12(f)(2)(iv) and § 9.24(b), and FAR 48 C.F.R. § 52.222-17(g)(4) for additional information regarding those requirements.

Cooperation with investigations & remedial action

- ◇ The contractor (and subcontractors) shall cooperate in any review or investigation conducted pursuant to 29 C.F.R. Part 9, and
 - ◇◇ shall not interfere with the investigation or intimidate, blacklist, discharge, or in any other manner discriminate against any person because such person has cooperated in an investigation or proceeding under 29 C.F.R. Part 9 or has attempted to exercise any rights afforded under E.O. 13495 and the implementing regulations.
 - ◇◇ This obligation to cooperate with investigations is not limited to investigations of the contractor’s own actions, but also includes investigations related to other contractors (*e.g.*, predecessor and subsequent contractors) and subcontractors.

29 C.F.R. § 9.12(g).

- ◇ In addition to satisfying any costs imposed against the contractor by an ALJ or the ARB pursuant to 29 C.F.R. §§ 9.34(j) or 9.35(d), a contractor who violates any provision of 29 C.F.R. Part 9 shall take appropriate action to abate the violation, which may include:
 - ◇◇ Hiring each affected employee in a position on the contract for which the employee is qualified,
 - ◇◇ Together with compensation (including lost wages), terms, conditions, and privileges of that employment.

29 C.F.R. § 9.24(b).

COMPLAINTS

Complaints 29 C.F.R. § 9.21.

- ◇ Any employee of the predecessor contractor or authorized representative of such employee(s) who believes the successor contractor has violated the DOL regulations at 29 C.F.R. Part 9:
 - ◇◇ May file a complaint with the WHD Branch of Government Contracts Enforcement,
 - ◇◇ Within 120 days from the first date of contract performance by the successor contractor.
 - ◇◇ The complaint may be sent by email to displaced@dol.gov, or mailed to:

Branch of Government Contracts Enforcement
Wage and Hour Division
U.S. Department of Labor
200 Constitution Avenue, N.W., Room S-3006
Washington, D.C. 20210
 - ◇◇ To contact WHD about the nondisplacement requirements under E.O. 13495, the public and interested parties can call (202) 693-1399.
- ◇ The phone line and the email address stated here are dedicated lines for complaints and other contacts regarding implementation and enforcement of the nondisplacement requirements under E.O. 13495 and its implementing regulations.

ENFORCEMENT

WHD investigation E.O. § 6; 29 C.F.R. § 9.23; FAR 48 C.F.R. § 22.1206(b).

- ◇ The Secretary of Labor is responsible for investigating and obtaining compliance with E.O. 13495.
- ◇ The WHD Administrator may initiate an investigation under 29 C.F.R. Part 9 either:
 - ◇◇ As the result of the unsuccessful conciliation of a complaint or
 - ◇◇ At any time on his or her own initiative.
- ◇ As part of the investigation, the Administrator may:
 - ◇◇ Inspect the records of the predecessor and successor contractors (and make copies or transcriptions thereof),
 - ◇◇ Question the predecessor and successor contractors and any employees of these contractors, and
 - ◇◇ Require the production of any documentary or other evidence deemed necessary to determine whether a violation of 29 C.F.R. Part 9 has occurred. (Such evidence may reflect conduct warranting imposition of ineligibility sanctions pursuant to § 9.24(d).)

Contracting agency action on complaints 29 C.F.R. § 9.11(d).

- ◇ Within 14 days of being contacted by the WHD, the Contracting Officer shall forward all information listed at 29 C.F.R. 9.11(d)(1)(ii), shown below, to the Branch of Government Contracts Enforcement, Wage and Hour Division, U.S. Department of Labor, Washington, DC 20210.
- ◇ The required report contents are detailed at 29 C.F.R. § 9.11(d)(1)(ii):
 - ◇◇ The contracting officer shall forward to the WHD Branch of Government Contracts Enforcement any:
 - ◇◇◇ Complaint of contractor noncompliance with 29 C.F.R. Part 9;
 - ◇◇◇ Available statements by the employee or the contractor regarding the alleged violation;
 - ◇◇◇ Evidence that a seniority list was issued by the predecessor and provided to the successor;

- ◇◇◇ A copy of the seniority list;
- ◇◇◇ Evidence that the nondisplacement contract clause was included in the contract or that the contract was exempted by the contracting agency;
- ◇◇◇ Information concerning known settlement negotiations between the parties, if applicable;
- ◇◇◇ Any other relevant facts known to the Contracting Officer or other information requested by the Wage and Hour Division.

WHD Conciliation 29 C.F.R. § 9.22.

- ◇ After obtaining information regarding alleged violations, WHD may:
 - ◇◇ Contact the successor contractor about the complaint and
 - ◇◇ Attempt to conciliate and reach a resolution that is:
 - ◇◇◇ consistent with the requirements of 29 C.F.R. Part 9 and
 - ◇◇◇ is acceptable to both the complainant(s) and the successor contractor.

29 C.F.R. § 9.22.

Conclusion of Investigation

- ◇ Upon completion of a WHD investigation, and if a resolution is not reached by conciliation consistent with the regulatory requirements, the Administrator will issue a written determination of whether a violation has occurred, including a statement of the investigation findings and conclusions.
 - ◇◇ A determination that a violation occurred shall address appropriate relief and the issue of ineligibility sanctions where appropriate.
 - ◇◇ The Administrator will provide notice of the investigation findings to any complainant(s); employee representative(s); contractor, including the prime contractor if a subcontractor is implicated; and contractor representative(s).

29 C.F.R. § 9.31(a).

Subsequent Investigation

- ◇ The Administrator may conduct a subsequent, new investigation or issue a new determination if the Administrator concludes circumstances warrant, such as:

**U.S. DEPARTMENT OF LABOR
PREVAILING WAGE RESOURCE BOOK**

NONDISPLACEMENT
E.O. 13495

- ◇◇ Where the proceedings before an Administrative Law Judge reveal that there may have been violations with respect to other employees of the contractor,
- ◇◇ Where imposition of ineligibility sanctions is appropriate, or
- ◇◇ Where the contractor has failed to comply with an order of the Secretary of Labor.

29 C.F.R. § 9.23(b).

Remedies and sanctions E.O. §§ 5 & 6; FAR 48 C.F.R. §§ 22.1206 and 52.222-17; 29 C.F.R. § 9.24.

- ◇ The Secretary of Labor has the authority to issue final orders prescribing appropriate sanctions and remedies, including, but not limited to, orders requiring the successor contractor to offer employment, in positions for which the employees are qualified, to service employees from the predecessor contract and payment of wages lost. E.O. § 6; FAR 48 C.F.R. § 22.1206(a); 29 C.F.R. § 9.24(a).
- ◇ The nondisplacement contract clause required to be included in covered contracts states that:
 - ◇◇ If it is determined that the contractor or its subcontractors are not in compliance with the requirements of this clause or any regulation or order of the Secretary,
 - ◇◇◇ appropriate sanctions may be imposed and remedies invoked against the contractor or its subcontractors, as provided in E.O. 13495, the regulations, and relevant orders of the Secretary, or as otherwise provided by law.

FAR 48 C.F.R. § 52.222-17(i); 29 C.F.R. Part 9, Appendix A, paragraph (d).

- ◇ If the contracting officer or WHD finds that the predecessor contractor has failed to provide the list of the names of employees working under the contract required by FAR 48 C.F.R. § 22.1204 (in accordance with 29 C.F.R. § 9.12(e)), the contracting officer may, in his or her discretion, or on request by WHD, take action to suspend the payment of contract funds until such time as the contractor provides the list to the contracting officer. FAR 48 C.F.R. § 22.1206(c).
- ◇ **Withholding of funds & debarment** E.O. § 6; 29 C.F.R. § 9.24(c); FAR 48 C.F.R. § 22.1206(b).
 - ◇◇ After an investigation and a determination by WHD that lost wages or other monetary relief is due, WHD may direct that so much of the accrued payments due on either the contract or any other contract between the contractor and the Government shall be withheld as are necessary to pay the monies due.

- ◇◇ Upon the final order that such monies are due, WHD may direct that such withheld funds be transferred to DOL for disbursement. 29 C.F.R. 9.24(c); 22.1206(b).
 - ◇◇ Where the WHD finds that a contractor or subcontractor
 - ◇◇ has failed to comply with any order of the Secretary or
 - ◇◇ has committed willful violations of E.O. or the implementing regulations or aggravated violations of 29 Part 9,
 - ◇◇ WHD may order that the contractor or subcontractor, and its responsible officers, and any firm in which the contractor or subcontractor has a substantial interest, shall be ineligible to be awarded any contract of the United States for a period of up to 3 years.
- E.O. § 6; 29 C.F.R. § 9.24(d); FAR 48 C.F.R. § 22.1206(d).
- ◇◇ Neither an order for debarment of any contractor or subcontractor from further Government contracts under this section nor the inclusion of a contractor or subcontractor on a published list of noncomplying contractors shall be carried out without affording the contractor or subcontractor an opportunity for a hearing. E.O. § 6; 29 C.F.R. § 9.24(d).

Mediation & Appeals 29 C.F.R. § 9.32 through 29 C.F.R. § 9.35.

- ◇ If any party desires review of the determination of the WHD Administrator, including judicial review, a request for an Administrative Law Judge (ALJ) hearing or petition for review by the Administrative Review Board (ARB) must first be filed in accordance with 29 C.F.R. § 9.31(b).
- ◇◇ Where efforts to resolve disputes in accordance with the conciliation procedures set forth at 29 C.F.R. § 9.22 have failed, the parties are encouraged to utilize settlement judges to mediate settlement negotiations pursuant to 29 C.F.R. § 18.9 when those provisions apply.
- ◇◇ At any time after commencement of a proceeding, the parties jointly may move to defer the hearing for a reasonable time to permit negotiation of a settlement or an agreement containing findings and an order disposing of the whole or any part of the proceeding.

ALJ hearings & ARB proceedings 29 C.F.R. §§ 9.34 and 9.35.

- ◇ The Office of Administrative Law Judges (OALJ) has jurisdiction to hear and decide cases pursuant to 29 C.F.R. § 9.31(b)(1) concerning questions of law and fact from determinations of the Administrator issued under 29 C.F.R. § 9.31.

- ◇◇ In considering the matters within the scope of its jurisdiction, the ALJ shall act as the authorized representative of the Secretary of Labor and shall act fully and finally on behalf of the Secretary of Labor concerning such matters, subject to an appeal filed under 29 C.F.R. § 9.32(b)(2). 29 C.F.R. § 9.34(a).
- ◇ The ARB has jurisdiction to hear and decide appeals pursuant to § 9.31(b)(2) concerning questions of law and fact from determinations of the Administrator issued under 29 C.F.R. § 9.31 and from decisions of Administrative Law Judges issued under 29 C.F.R. § 9.34.
 - ◇◇ In considering the matters within the scope of its jurisdiction, the ARB shall act as the authorized representative of the Secretary of Labor and shall act fully and finally on behalf of the Secretary of Labor concerning such matters.
- ◇ If an order finding the successor contractor violated 9 C.F.R. Part 9 is issued, the ALJ or the ARB, respectively, may assess against the contractor a sum equal to the aggregate amount of all costs (not including attorney fees) and expenses reasonably incurred by the aggrieved employee(s) in the proceeding, to be awarded in addition to any unpaid wages or other relief due under 29 C.F.R. § 9.24(b). 29 C.F.R. § 9.34(j) and 9.35(d), respectively.
- ◇ A decision of the ALJ shall become the final order of the Secretary of Labor, unless a petition for review is timely filed with the ARB as set forth in § 9.32(b)(2). 29 C.F.R. § 9.34(k).
- ◇ A decision of the ARB shall become the final order of the Secretary of Labor. 29 C.F.R. § 9.35(e).

FEDERAL AGENCY EXEMPTION (“WAIVER”) PROCEDURES

E.O. § 4 *Authority to Exempt Contracts*;
29 C.F.R. § 9.4 *Contracts Exempted by Federal agency*; and
FAR 48 C.F.R. § 22.1203-3 *Waiver*.

- ◇ The head of a contracting department or agency, or, under the FAR, the senior procurement executive, without delegation, may waive the application of some or all of the provisions of E.O. 13495 and its implementing regulations:
 - ◇◇ **if**, he/she finds that the application of any of the requirements of the E.O and its implementing regulations:
 - ◇◇◇ would not serve the purposes of E.O. 13495, or
 - ◇◇◇ would impair the ability of the Federal Government to procure services on an economical and efficient basis.

FAR 48 C.F.R. § 22.1203-3(a).
- ◇ Such executive waivers, exempting specified procurement actions from the E.O. and related regulatory requirements, may be made for:
 - ◇◇ a contract, subcontract, or purchase order, or
 - ◇◇ with respect to a class of contracts, subcontracts, or purchase orders.

E.O. § 4; 29 C.F.R. § 9.4(d)(1); and FAR 48 C.F.R. § 22.1203-3(a).
- ◇ **The senior procurement executive shall not redelegate this waiver authority.** FAR 48 C.F.R. § 22.1203-3(a).
- ◇ In order for such a federal agency waiver to be operative, a written analysis supporting the waiver determination must be completed **by the solicitation date**.
 - ◇◇◇ If the written analysis supporting exemption by an agency waiver is not completed by the contract solicitation date, the waiver is **inoperative**.
 - ◇◇◇ In such a circumstance the nondisplacement contract clause shall be included in, or added to, the covered service contract(s) and their solicitation(s).

29 C.F.R. §§ 9.4(d)(1) and 9.4(d)(4)(i); 48 C.F.R. § 22.1203-3(b)(1) and (2).
- ◇ The written analysis must be retained in accordance with FAR 48 C.F.R. § 4.805.

Content of the written analysis

- ◇ The FAR directs the federal agency that “[t]he waiver must be reflected in a written analysis as described in 29 C.F.R. 9.4(d)(4)(i)” FAR 48 C.F.R. § 22.1203-3(a).
- ◇ The DOL regulation at 29 C.F.R. § 9.4(d)(4)(i) requires that:
 - ◇◇ The written analysis must compare the anticipated outcomes of hiring predecessor contract employees with those of hiring a new workforce.
 - ◇◇ The agency’s consideration of cost and other factors in exercising its exemption (waiver) authority, and in the required written analysis, shall reflect the general finding made by E.O.13495 that the government’s procurement interests in economy and efficiency are normally served when the successor contractor hires the predecessor’s employees.
 - ◇◇ The written analysis must also specify how the particular circumstances support a contrary conclusion. *See* 29 C.F.R. § 9.4(d)(4)(i) for more detailed requirements.
- ◇ The FAR also directs the federal agency to “See 29 C.F.R. § 9.4(d)(4) for regulatory provisions addressing circumstances in which a waiver could or would **not** be appropriate.” 48 C.F.R. § 22.1203-3(a). Pursuant to § 9.4(d)(4):
 - ◇◇ The head of a contracting department or agency/senior procurement executive of the procuring agency must not consider wage rates and fringe benefits of service employees in making an exemption/waiver determination except in the specific exceptional circumstances stated at 29 C.F.R. § 9.4(d)(4)(iii).
 - ◇◇ Also, the head of a contracting department or agency/senior procurement executive of the procuring agency **shall not consider** certain other factors in making a waiver determination, because they would contravene the E.O.’s purposes and findings. Such factors are identified at 29 C.F.R. § 9.4(d)(4)(iii).

Notification to workers and DOL

- ◇ In order for the federal agency exemption by a waiver issued under FAR 48 C.F.R. § 22.1203-3 to be operative, certain notification requirements must be met.
 - ◇◇ If the following notification requirements are **not met** within no later than **five business days after the solicitation issuance date**, the agency exercise of its exemption/waiver authority **shall be inoperative**:
 - ◇◇◇ When an agency exercises its waiver authority with respect to any contract, subcontract, or purchase order, the contracting officer shall direct the contractor to notify affected workers and their collective bargaining representative in writing, of the agency’s determination.

**U.S. DEPARTMENT OF LABOR
PREVAILING WAGE RESOURCE BOOK**

NONDISPLACEMENT
E.O. 13495

- ◇◇◇ Where a contracting agency waives application to a class of contracts, subcontracts, or purchase orders, the contracting officer shall, with respect to each individual solicitation, direct the contractor to notify incumbent workers and their collective bargaining representatives of the agency's determination.

- ◇◇◇ The agency shall notify the DOL of its waiver decision and provide the DOL with a copy of its written analysis. The waiver decision and related written analysis shall be sent to the following address: U.S. Department of Labor, Wage and Hour Division, Branch of Government Contracts Enforcement, 200 Constitution Avenue, N.W., Room S-3006, Washington, D.C. 20210, or by email to: *Displaced@dol.gov*

- ◇◇ If these notification requirements are not met, the contracting officer shall include the nondisplacement clause in the solicitation and contract.

FAR 48 C.F.R. § 22.1203-3(b) and 29 C.F.R. § 9.4(d)(2).