

Small Entity Compliance Guide

to the

Nondisplacement of Qualified Workers Under Service Contracts

December 2023

Table of Contents

Table of Contents	1
1. Introduction.....	2
<i>1.1. Scope of this Guide</i>	2
2. Overview of the Nondisplacement Requirements.....	3
<i>2.1. Who must comply with the nondisplacement requirements?</i>	3
<i>2.2. What prime contracts are covered by the nondisplacement requirements?</i>	3
<i>2.3. What subcontracts are covered by the nondisplacement requirements?</i>	4
<i>2.4. What is a “contract or contract-like instrument”?</i>	4
<i>2.5. Can agencies make exceptions to the nondisplacement requirements?</i>	4
2.5.1. Contracts Awarded Under the HUBZone Program Statute, the JWOD Act, and the Randolph-Sheppard Act.	5
<i>2.6. When do the nondisplacement requirements apply?</i>	5
<i>2.7. What are the key requirements for contractors?</i>	6
2.7.1. Key Requirements At the Beginning of a Contract.....	6
2.7.2. Key Requirements During the Contract.....	9
2.7.3. Key Requirements At the End of the Contract.....	9
2.7.4. Recordkeeping Requirements	10
<i>2.8. What do contracting agencies have to do?</i>	11
2.8.1. Contracting Agency Responsibilities.....	11
2.8.2. Location Continuity Analysis	12
2.8.3. Incorporation of Omitted Contract Clause.....	12
3. Enforcement	13
<i>3.1. Who enforces the nondisplacement requirements?</i>	13
<i>3.2. How are possible nondisplacement violations investigated?</i>	13
<i>3.3. What are the consequences for not following the nondisplacement requirements?</i>	13
<i>3.4. What is debarment?</i>	13
<i>3.5. Are there protections against retaliation?</i>	14
<i>3.6. What is the appeals process?</i>	14
4. Key Terms.....	14
5. Additional Information	16

1. Introduction

On December 14, 2023, the Department of Labor (Department) published the final rule, *Nondisplacement of Qualified Workers Under Service Contracts*,¹ to implement Executive Order 14055, “Nondisplacement of Qualified Workers Under Service Contracts.” President Joseph R. Biden, Jr. signed the Executive Order on November 18, 2021.² The Executive Order states that when a service contract expires and a follow-on contract is awarded for the same or similar services, the Federal Government’s procurement interests in economy and efficiency are best served when the successor contractor or subcontractor hires the predecessor’s employees, thus avoiding displacement of these employees.

Executive Order 14055 mandates the inclusion of a contract clause titled “Nondisplacement of Qualified Workers” in covered service contracts. This contract clause provides that contractors and subcontractors performing on covered federal service contracts must in good faith offer service employees employed under the predecessor contract a right of first refusal of employment. In this guide, the term “contract clause” refers to the contract clause contained in the Department’s final rule and a similar contract clause that will be issued by the Federal Acquisition Regulatory Council (FAR Council) and used for contracts subject to the Federal Acquisition Regulation (FAR).

The final rule codifies requirements of Executive Order 14055 in 29 CFR part 9 of the Code of Federal Regulations (CFR). These nondisplacement requirements, as they are referred to in this guide, are enforced by the Department’s Wage and Hour Division (WHD). The nondisplacement requirements will apply to solicitations issued on or after the effective date of final regulations that the FAR Council issues to implement Executive Order 14055. For solicitations issued between the date of Executive Order 14055 and the effective date of the FAR Council’s regulations, contracting agencies are strongly encouraged, to the extent permitted by law, to include in the relevant solicitation the contract clause described in section 3 of Executive Order 14055.

1.1. Scope of this Guide

This guide includes a summary of the final rule’s requirements.³ Except when specifically needed to explain the final rule, this guide does not discuss other laws, regulations, or regulatory guidance that may apply. The content of this guide does not include any rules, bulletins, guidance, or other interpretations issued or released after the date on the guide’s cover page.

¹ [Final Rule: Nondisplacement of Qualified Workers under Service Contracts \(Executive Order 14055\) | U.S. Department of Labor \(dol.gov\)](https://www.dol.gov/eis/whd/2023/12/14/final-rule-nondisplacement-qualified-workers-under-service-contracts)

² 86 FR 66397 (Nov. 23, 2021), <https://www.federalregister.gov/d/2021-25715>

³ This guide meets the requirements of section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), with regard to the final rule. The Department’s Office of Small and Disadvantaged Business Utilization (OSDBU) serves as Ombudsman for small businesses under SBREFA. See <https://www.dol.gov/agencies/oasam/centers-offices/business-operations-center/osdbu/compliance-assistance/resources>.

This guide is intended as general information only. Users of this guide should review the final rule as well as this guide. The final rule is available on the *Federal Register* website at [Federal Register :: Nondisplacement of Qualified Workers Under Service Contracts](#). The *Federal Register* and the Code of Federal Regulations remain the official sources for regulatory information published by the Department.

2. Overview of the Nondisplacement Requirements

Executive Order 14055 mandates the inclusion of a contract clause titled “Nondisplacement of Qualified Workers” in covered service contracts. This contract clause provides that contractors and subcontractors performing on covered federal service contracts must in good faith offer service employees employed under the predecessor contract a right of first refusal of employment.

2.1. Who must comply with the nondisplacement requirements?

The nondisplacement requirements apply to contractors and subcontractors of any tier on federal service contracts that are covered by the Executive Order and therefore include the applicable nondisplacement contract clause.

2.2. What prime contracts are covered by the nondisplacement requirements?

A prime contract is covered if it is:

- with an agency or instrumentality of the Federal Government;
- subject to the Service Contract Act (SCA);⁴
- a new contract entered into on the basis of a solicitation issued on or after the effective date of the implementing regulations issued by the FAR Council;⁵ and
- for an amount that equals or exceeds the simplified acquisition threshold as defined by federal statute in 41. U.S.C. 134. As of December 14, 2023, the threshold amount is \$250,000.

Contracts awarded by the District of Columbia or any territory or possession of the United States are not covered by the nondisplacement requirements.

⁴ The SCA is a federal labor standards statute that, in general, applies to every contract in excess of \$2,500 entered into by the United States, the principal purpose of which is to furnish services in the United States through the use of service employees. Contractors and subcontractors performing on such federal contracts must observe certain minimum wage and safety and health standards, and must maintain certain records, unless a specific exemption applies. *See* 41 U.S.C. 6701 *et seq.* Examples of types of contracts covered by the SCA include, but are not limited to, cafeteria and food service; janitorial services; data collection, processing, and/or analysis services; security services; and support services at military installations. *See* 29 CFR 4.130.

⁵ For solicitations issued before the effective date of the FAR Council’s regulations, agencies are encouraged (but not required) to include the nondisplacement contract clause, and where an agency has added the contract clause in this situation, the contract is subject to the requirements of the clause.

Contracts awarded on the basis of the HUBZone program statute, Javits-Wagner-O'Day Act (the program statute for AbilityOne), or the Randolph-Sheppard Act may be covered by the nondisplacement requirements. However, the final rule provides an exception to the nondisplacement requirements where necessary (and only to the extent necessary) to enable compliance with these statutory provisions. See section 2.4.3. below for additional information about these types of contracts.

2.3. What subcontracts are covered by the nondisplacement requirements?

If a prime contract is covered by the nondisplacement requirements, all subcontracts for services under that prime contract are also covered. The simplified acquisition threshold exclusion applies only to prime contracts. This means that even if a subcontract is for an amount below the simplified acquisition threshold, it is covered as long as the prime contract is covered.

2.4. What is a “contract or contract-like instrument”?

The nondisplacement requirements apply to any contract or contract-like instrument that meets the coverage requirements. As provided in 29 CFR 9.2, for the purpose of the nondisplacement coverage requirements, the term “contract or contract-like instrument” means an agreement between two or more parties creating obligations that are enforceable or otherwise recognizable by law. This definition includes, but is not limited to, a mutually binding legal relationship obligating one party to furnish services and another party to pay for them. The term “contract” includes all contracts and any subcontracts of any tier under a prime contract. The term includes any procurement actions, cooperative agreements, provider agreements, intergovernmental service agreements, service agreements, temporary interim contracts, licenses, permits, or any other type of agreement, regardless of name, type, or particular form. Contracts may be the result of competitive bidding or awarded to a single source under applicable authority to do so. Contracts also include, but are not limited to, awards and notices of awards; job orders or task letters issued under basic ordering agreements; letter contracts; orders, such as purchase orders, under which the contract becomes effective by written acceptance or performance; and bilateral contract modifications.

2.5. Can agencies make exceptions to the nondisplacement requirements?

The regulations at 29 CFR 9.5 covers an agency-exception procedure through which contracting agencies can waive the application of some or all of the requirements of the Executive Order and the final rule to a prime contract under certain circumstances. A contracting agency can waive the requirements and then omit the nondisplacement contract clause from the solicitation if the senior procurement executive within the agency issues a written determination that at least one of the following circumstances exists with respect to that contract:

- Adhering to the requirements of the Executive Order or its implementing regulations would not advance the Federal Government’s interest in achieving economy and efficiency in federal procurement;
- Based on a market analysis, adhering to the requirements of the Executive Order or its implementing regulations would substantially reduce the number of potential bidders so

as to frustrate full and open competition and not be reasonably tailored to the agency's needs for the contract; or

- Adhering to the requirements of the Executive Order or its implementing regulations would otherwise be inconsistent with statutes, regulations, Executive Orders, or Presidential Memoranda.

Contracting agencies will publish written determinations of agency exceptions on a publicly available centralized website. Each agency must also ensure that the predecessor contractor notifies affected workers and their collective bargaining representatives, if any, in writing of the agency's determination to grant an exception in the solicitation for the successor contract. The regulation at 29 CFR 9.5(c), (d), and (e) contains additional requirements and guidance for agencies regarding this determination.

2.5.1. Contracts Awarded Under the HUBZone Program Statute, the JWOD Act, and the Randolph-Sheppard Act.

The nondisplacement requirements provide, in paragraph (j) of the nondisplacement contract clause, that to the maximum extent possible, contractors that are awarded contracts under the HUBZone program statute, the JWOD Act, or the Randolph-Sheppard Act must comply with both the relevant requirements of those statutes and the nondisplacement requirements. When the requirements of those contracting laws would conflict with the nondisplacement requirements in connection with a particular contract, then it is permissible for the contractor to satisfy the requirements of those laws together with and, if necessary, prior to the nondisplacement requirements. In those circumstances, contractors or subcontractors must, whenever possible, also comply with the nondisplacement requirements, to the extent that such compliance would not result in a violation of the requirements of the relevant program.

For example, the JWOD Act requires that 75 percent of direct labor hours be performed by workers with significant disabilities or visual impairment. *See* 41 U.S.C. 8501(6)(c). A successor contractor operating under the JWOD Act can take the necessary actions to ensure that this 75 percent threshold is met, but also must satisfy the nondisplacement requirements where possible. In a situation like that, the successor contractor would be required to provide a right of first refusal to all workers from the predecessor contract who have significant disabilities or visual impairment, as defined by the JWOD Act, and whose employment therefore would help to ensure that the 75 percent threshold is met. If it is needed to meet the 75 percent threshold requirement of the JWOD Act, the AbilityOne successor contractor could then hire contract workers with significant disabilities or visual impairment who did not work on the predecessor contract. However, after the successor contractor meets the JWOD Act's 75 percent threshold requirement, the successor contractor would then be required to provide the right of first refusal to the remaining predecessor contract employees to fill any remaining positions on the successor contract for which those employees are qualified.

2.6. When do the nondisplacement requirements apply?

The nondisplacement requirements do not apply to existing contracts. Contractors and subcontractors must comply with the nondisplacement contract clause when an agency incorporates the clause into a solicitation and subsequent award. The regulations apply to solicitations issued on or after the effective date of the final regulations issued by the FAR

Council. Covered contracts awarded as a result of those solicitations must include the nondisplacement contract clause, and contractors on those contracts must provide the right of first refusal of employment to workers on predecessor contracts. For solicitations issued between the date of Executive Order 14055 and the effective date of the FAR Council's regulations, contracting agencies are strongly encouraged, to the extent permitted by law, to include in the relevant solicitation the contract clause described in section 3 of Executive Order 14055.

2.7. What are the key requirements for contractors?

2.7.1. Key Requirements At the Beginning of a Contract

Nondisplacement Clause: Contractors and subcontractors have an affirmative obligation to ensure a covered contract contains the nondisplacement contract clause and must notify the contracting officer as soon as possible if it appears the clause was wrongly omitted.

Job Offers: On a covered service contract, successor contractors (meaning, contractors awarded contracts that follow another contract for the same or similar work) and their subcontractors must not fill any employment opening for positions subject to the SCA under the contract before making a bona fide, express offer of employment in writing to each service employee on the predecessor contract for a position for which the employee is qualified.

These job offers must be in writing. If a written offer is not delivered in person, then the offer should be sent by registered or certified mail to the employees' last known address or by any other way that normally ensures delivery. Examples of other ways include, but are not limited to:

- Email to the last known email address;
- Delivery to the last known address by commercial courier or express delivery services; or
- By personal service to the last known address.

The job offer must state how much time the employee has to accept the offer. The contractor must give an employee at least 10 business days to consider and accept.

The offer does not need to be for a position similar to the one the employee previously held, as long it is a position that the employee is qualified for. To determine whether an employee is qualified, a contractor may only use employment screening processes when the screening processes are provided by the contracting agency, are conditions of the service contract, and are consistent with Executive Order 14055. Employment screening processes include drug tests, background checks, security clearance checks, and similar pre-employment screening mechanisms.

The job offer may include different employment terms and conditions, including changes to pay or benefits or remote work, as long as the different terms are not offered to discourage the employee from accepting the offer.

Where the successor contractor has or will have any employees in the same or similar occupational classifications on the contract who work or will work entirely in a remote capacity, the successor contractor generally—absent a legitimate operational rationale to do otherwise—must offer employees of the predecessor contractor the option of remote work under reasonably

similar terms and conditions. Where the contracting agency has specified in the solicitation a particular instruction regarding remote work that is not consistent with how the successor contractor has been treating remote work for similar employees on other contracts, then such specifications—and not the successor contractor’s comparable practices—would govern remote work on the successor contract.

The contractor must offer employment to qualified workers even if it does not receive a list of workers on the predecessor contract. When a contractor does not receive a certified list, it is required to accept other reliable evidence of a worker’s right to receive a job offer. This would include, for example, a worker’s assertion of an assignment to work on the contract during the predecessor’s last month of performance, coupled with verification by the contracting agency staff.

Exceptions to General Obligation to Offer Employment: Sometimes, even though a contract or subcontract as a whole is covered by the nondisplacement requirements, a contractor or subcontractor does not have to make a bona fide offer of employment to certain employees. A successor contractor is responsible for demonstrating that an exception applies.

Below are some of the exceptions that could apply. For information on all exceptions, see 29 CFR 9.12(c) and (d).

- **Non-service Employees:** A successor contractor or subcontractor is not required to offer a job to any person working on the predecessor contract who is not a service employee as defined in 29 CFR 9.2. Examples of non-service employees include individuals employed on the predecessor contract in a bona fide executive, administrative, or professional capacity, as defined in 29 CFR part 541.
- **Past Performance of Employee:** A successor contractor or subcontractor is not required to offer a job to an employee of the predecessor contractor if the successor contractor reasonably believes, based on reliable evidence of the particular employee’s past performance, that there would be just cause to fire the employee if employed by the successor contractor. A successor contractor must presume that there would be no just cause to discharge any employees working under the predecessor contract in the last month of performance, unless it can demonstrate a reasonable belief to the contrary that is based upon reliable evidence from a knowledgeable source, such as the predecessor contractor and its subcontractors, the local supervisor, the employee, or the contracting agency. This 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.

Example: A successor contractor may demonstrate its reasonable belief that there would be just cause to discharge an employee through reliable written evidence that the predecessor contractor started a process to terminate the employee for conduct clearly warranting termination prior to the expiration of the contract, but the termination process was not completed before the contract expired. Written evidence of disciplinary action taken without a recommendation of termination might be reliable evidence of just cause to discharge the employee, depending on the specific facts and circumstances.

- **Employees on Federal and Nonfederal Service Contracts:** A successor 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 nondisplacement requirements. However, the successor contractor must presume that no employees who worked under a predecessor's federal service contract also worked on one or more nonfederal service contracts as part of a single job, unless the successor can demonstrate a reasonable belief based on reliable evidence to the contrary.
- **Contractor Determines How Many Employees:** The successor contractor is not required to offer employment to all employees on the predecessor contract, but must offer employment only to the number of eligible employees it thinks is necessary to meet its staffing needs. However, where a successor contractor does not offer employment to all the predecessor contract employees, the obligation to offer employment continues for 90 calendar days after the successor contractor's first date of performance on the contract. The contractor's obligation under the nondisplacement requirements ends when all of the predecessor contract employees have received a bona fide job offer, as described in 29 CFR 9.12(b), or when the 90-day window of obligation has closed. For additional information and examples on this topic, see 29 CFR 9.12(d).

Example: A contractor with 18 employment openings and a list of 20 employees from the predecessor contract must continue to offer employment to individuals on the list until 18 of the employees accept the offer or until the remaining employees have rejected the offer. If an employee quits or is terminated from the successor contract within 90 calendar days of the first date of contract performance, the contractor must first offer that open job to any remaining eligible employees of the predecessor contract.

- **Changes to Staffing Pattern:** If a contractor reduces the number of employees in any occupation on a contract with multiple occupations, resulting in some displacement, the contractor must study each employee's qualifications and offer the greatest possible number of predecessor contract employees positions equivalent to those they held under the predecessor contract.

Example: A successor contract is awarded for a food preparation and services contract with Cook II, Cook I, and dishwasher positions. The Cook II position requires a higher level of skill than the Cook I position. The successor contractor changes staffing on the contract by increasing the number of persons employed as Cook IIs and Dishwashers and reducing the number of Cook I employees. The successor contractor must look at the qualifications of each Cook I to see if they are qualified for either a Cook II or Dishwasher position. Conversely, if the contractor increased the number of Cook I employees, decreased the number of Cook II employees, and kept the same number of Dishwashers, the contractor would generally be able to offer Cook I positions to some Cook II employees, because the Cook II performs a higher-level occupation.

- **Contractor Determines Which Employees:** The successor contractor, subject to the nondisplacement requirements and other applicable restrictions (including non-discrimination laws and regulations), determines which employees it will offer employment.

Relocation Costs: If the contract is performed in a new location, a contractor is not required to pay the relocation costs of employees who accept a job offer.

2.7.2. Key Requirements During the Contract

Subcontractor Flow-Down: For all covered contracts and subcontracts,⁶ the contractor or subcontractor must insert the nondisplacement clause in any subcontracts. The contractor or subcontractor must also insert a clause into any subcontracts to require the subcontractor to include the nondisplacement clause in any lower-tier subcontracts. The prime contractor is responsible for the compliance of any subcontractor or lower-tier subcontractor with the contract clause. Flow-down of the contract clause should occur whenever a subcontract of any tier is entered into. So, flow-down can occur at the beginning of a covered contract as well as during the contract term.

Discontinuation of Subcontractor Services: When a prime contractor that is subject to the nondisplacement requirements discontinues the services of a subcontractor at any time during the contract and performs those services itself, the prime contractor must offer employment on the contract to the subcontractor's qualified employees who would otherwise lose their jobs.

2.7.3. Key Requirements At the End of the Contract

Certified List: Not fewer than 30 calendar days before completion of the predecessor contractor's performance of services on a contract, the predecessor contractor must give the contracting officer a certified list of the names, mailing addresses, and if known, phone numbers and email addresses of all service employees working under the contract and its subcontracts at the time the list is submitted. The list must also contain anniversary dates of employment of each service employee under the contract and its predecessor contracts with either the current or predecessor contractors or their subcontractors. Assuming there are no changes to the workforce prior to 10 business days before the contract is completed, this list allows a contractor to satisfy the requirements of the SCA contract clause specified at 29 CFR 4.6(1)(2).

If changes to the contractor's workforce are made after submitting the certified list, the contractor must, not less than 10 business days before completion of the contractor's performance of services on a contract, give the contracting officer an updated certified list of names, mailing addresses, anniversary dates, and if known, phone numbers and email addresses of all service employees.

Written Notice to Employees of Possible Right to an Offer of Employment: Before contract completion, the contractor must provide written notice to service employees employed under the contract of their possible right to an offer of employment on the successor contract. Such notice must either be posted in a conspicuous place at the worksite or delivered to the employees individually. If the workforce on the predecessor contract is comprised of a significant portion of workers who are not fluent in English, the notice must be provided in both English and a language that the employees are fluent in. Multiple language notices are required where significant portions of the workforce speak different languages and there is no common language. Contractors may provide the notice found in Appendix B of the final rule in either a

⁶ See sections 2.2.–2.4., and 2.6. above for details regarding which contracts and subcontracts are covered by the nondisplacement requirements.

physical posting at the job site or in another manner that effectively provides individual notice such as individual paper notices or effective email notification to the affected employees. Any form with the same information can be used. To be effective, email notification must result in an electronic delivery receipt or some other reliable confirmation that the intended recipient received the notice.

Notice of an Exception for a Successor Contract: Employees working on the predecessor contract must be notified when a contracting agency follows the procedure to apply an exception from the nondisplacement requirements for a successor contract. When that happens, the predecessor contractor must provide written notifications to employees under the predecessor contract (including employees of any subcontractors under the contract), and their collective bargaining representatives, if any, in the timeframes requested by the contracting agency, telling employees that the exception has been exercised and the successor contractor will not be required to make offers to them. More information about this exception is found at 29 CFR 9.5.

Notice of Opportunity to Provide Information Relevant to Location Continuity: Where an incumbent contractor's employees are covered by a collective bargaining agreement and a contract location change is possible and under consideration, the agency must, to the extent consistent with mission security, provide the employees with an opportunity to submit information relevant to the agency's location-continuity analysis before the solicitation is issued. Under such circumstances and at the earliest reasonable time in the acquisition planning process, the agency must direct the incumbent contractor to tell the collective bargaining representative(s) for the affected employees how to communicate such information. Then the predecessor contractor must notify the employees' representative(s) in writing about this opportunity in the same way the contractor usually communicates with the representative(s). A model notice is provided in the regulations at 29 CFR 9.11(c)(4)(ii).

2.7.4. Recordkeeping Requirements

There are several recordkeeping requirements for contractors. A contractor may use records developed for any purpose as long as the records are fully accessible and meet the requirements of the nondisplacement requirements. There is no particular form for keeping these records. Every contractor must keep the records required by the final rule for not less than a period of three years from the date the records were created. Every contractor must also provide copies of such documentation upon request to any authorized representative of the contracting agency or the Department. The contractor must maintain the following records:

General

- Copies of written offers of employment, including the date of the offer;
- A copy of any record that forms the basis for any exclusion or exception claimed; and
- A copy of any employee list received from the contracting agency and any employee list provided to the contracting agency.

Retroactive Payment of Wages

Every contractor that makes retroactive payment of wages or compensation under the supervision of the Administrator pursuant to 29 CFR 9.23(b), must record and keep, as an entry on the pay records:

- The amount of such payment to each employee;
- The period covered by such payment; and
- The date of payment.

When a contractor makes retroactive payments of wages, the contractor must make a record of each payment on a receipt form provided by or authorized by WHD, preserve a copy as part of the records, give a copy to the employee, and file the original, as evidence of payment by the contractor and receipt by the employee, with the Administrator within 10 business days after payment is made.

Notices

The contractor must keep evidence of any notices that they have provided to workers and/or workers' collective bargaining representatives to satisfy the nondisplacement requirements, including:

- Notices of the possibility of employment on the successor contract;
- Notices of agency exceptions that a contracting agency requires a contractor to provide to its employees; and
- Notices to workers' representatives of the opportunity to provide information relevant to the contracting agency's location continuity determination for a successor contract.

2.8. What do contracting agencies have to do?

2.8.1. Contracting Agency Responsibilities

- Determine whether a solicitation and ensuing contract are covered by the nondisplacement requirements.
- Decide whether to exercise the authority to grant exceptions from the nondisplacement requirements. If the agency decides no exception is warranted for that contract, then the agency must insert the contract clause into the solicitation and contract.
- Conduct a "location continuity" analysis to consider whether to include a location-continuity requirement or preference in a covered solicitation.
- Ensure that contractors provide written notice to service employees employed under the predecessor contract of their possible right to an offer of employment on the successor contract.
- Ensure, where relevant, that contractors provide notices to workers' representatives about the location continuity analysis and agency exceptions.
- Within the last month of contract completion, generally no later than 21 calendar days prior to the start of the performance on the successor's contract, send to the successor contractor a certified list of names (provided to the agency by the predecessor contractor) of all the employees working under the prime contract and any subcontract.

2.8.2. Location Continuity Analysis

When an agency prepares a solicitation for a covered contract, the agency must consider whether performance of work in the same locality or localities where the contract is currently being performed is reasonably necessary to ensure economical and efficient provision of services.

Where there is a possibility that the successor contract could be performed in a different locality, an agency must complete a location continuity analysis prior to the issuance of the solicitation. Such analysis should generally include, but is not limited to, the following factors:

- Whether the employment of a new workforce at a new location would increase the potential for disruption to the delivery of services during the period of transition between contracts (e.g., the large size of the workforce to be replaced or the relatively significant level of experience or training of the predecessor workforce);
- Whether the employment of a new workforce at a new location would unnecessarily increase physical or informational security risks on the contract (e.g., whether workers on the contract have had and will have access to sensitive, privileged, or classified information);
- Whether the workforce on the predecessor contract has demonstrated prior successful performance of contract objectives so as to warrant a preference to retain as much of the current workforce as possible; and
- Whether program-specific statutory or regulatory requirements govern the method through which the location of contract performance must be determined or evaluated, or other contract-specific factors favor the performance of the contract in a particular location.

Where an incumbent contractor's employees are covered by a collective bargaining agreement and a contract location change is possible and under consideration, the agency must, to the extent consistent with mission security, provide the employees with an opportunity to submit information relevant to the agency's location-continuity analysis before the solicitation is issued. Under such circumstances and at the earliest reasonable time in the acquisition planning process, the agency must direct the incumbent contractor to notify the collective bargaining representative(s) for the affected employees of the appropriate method to communicate such information. Then the predecessor contractor must notify the employees' representative(s) in writing regarding this opportunity.

2.8.3. Incorporation of Omitted Contract Clause

Where the Department or the contracting agency determines that a contracting agency has wrongly determined that the nondisplacement requirements do not apply to a particular contract and/or failed to include the applicable contract clause in a covered contract, the contracting agency will incorporate the contract clause in the contract. Where necessary, it may exercise its authority to negotiate or amend the contract, its authority to pay any necessary additional costs, and its authority under any contract provision to authorize changes, cancel, and terminate a contract. If the Department has made the determination that the contract clause needs to be incorporated, the contracting agency must take action to incorporate it within 15 calendar days of notification by the Department. Where the circumstances warrant, the Administrator may require

retroactive application of the contract clause to the beginning of the contract or another date the Administrator determines to be appropriate.

3. Enforcement

3.1. Who enforces the nondisplacement requirements?

WHD is authorized to enforce the nondisplacement requirements. Remedies include payment of back wages, front pay, offer of employment, reinstatement, and debarment, as appropriate.

3.2. How are possible nondisplacement violations investigated?

Complaints may be filed with any WHD office. After receipt of the complaint, WHD may initiate an investigation. In an investigation, WHD may inspect relevant records (e.g., contracts, offers of employment, and payroll), make copies and transcriptions of such records, and require the production of any documents or evidence necessary to determine whether a violation of the nondisplacement requirements occurred. WHD may also interview predecessor and successor contractors and conduct confidential interviews with workers. These confidential interviews usually happen at the worksite during normal work hours. Contracting agencies and contractors are required to cooperate with authorized representatives of WHD in all aspects of the investigation. WHD will keep any complainant(s) information confidential to the maximum extent possible under existing law.

3.3. What are the consequences for not following the nondisplacement requirements?

If WHD finds that a contractor has not complied with nondisplacement requirements, WHD will request that the contractor remedy the violation. WHD may order the contractor to hire the affected employee(s), to pay compensation (including lost wages and interest), and to provide other terms, conditions, and privileges of that employment. WHD may also direct the contracting agency to withhold payments due to the contractor in order to pay workers the full amount of lost wages due under nondisplacement requirements. In addition, contractors found to be in violation of nondisplacement requirements may be subject to debarment from future contracts for a period up to three years.

3.4. What is debarment?

Debarment is when a contractor is declared ineligible for future contracts where the Secretary of Labor (Secretary) finds that a contractor has failed to comply with any order of the Secretary or has committed willful violations of [Executive Order 14055](#) or 29 CFR part 9. The Secretary may order that the contractor and its responsible officers, and any firm in which the contractor has a substantial interest, will be ineligible to be awarded any contract or subcontract of the United States for a period of up to three years. 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 will be carried out without affording the contractor or subcontractor an opportunity for a hearing. *See* 29 CFR 9.23.

3.5. Are there protections against retaliation?

The nondisplacement regulations include a broad prohibition against retaliation. The Administrator may require a contractor to provide relief to an employee if the contractor has interfered with an investigation of the Administrator under the final rule or has discriminated against any person because they cooperated in an investigation under the final rule or attempted to exercise any rights provided by the rule.

3.6. What is the appeals process?

After completion of an investigation, the WHD Administrator will issue a written determination of whether a violation occurred and will address appropriate relief and the issue of debarment where appropriate. The determination will be sent to the complainant(s); employee representative(s); contractors, including the prime contractor if a subcontractor is implicated; contractor representative(s); and the contracting officer. Any aggrieved party will be provided an opportunity to request a hearing with the Department of Labor's Office of Administrative Law Judges. After the Administrative Law Judge issues an order, any party may appeal that order to the Administrative Review Board.

4. Key Terms

The following is a list of nondisplacement definitions as set forth in 29 CFR 9.2.

Administrative Review Board (ARB) means the Administrative Review Board, U.S. Department of Labor.

Administrator means the Administrator of the Wage and Hour Division and includes any official of the Wage and Hour Division authorized to perform any of the functions of the Administrator under this part.

Agency means an executive department or agency, including an independent establishment subject to the Federal Property and Administrative Services Act.

Business day means Monday through Friday, except the legal public holidays specified in [5 U.S.C. 6103](#), any day declared to be a holiday by Federal statute or executive order, or any day with respect to which the U.S. Office of Personnel Management has announced that Federal agencies in the Washington, DC, area are closed.

Contract or service contract means any contract, contract-like instrument, or subcontract for services entered into by the Federal Government or its contractors that is covered by the Service Contract Act (SCA). Contract or contract-like instrument means an agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law. This definition includes, but is not limited to, a mutually binding legal relationship obligating one party to furnish services and another party to pay for them. The term *contract* includes all contracts and any subcontracts of any tier thereunder, whether negotiated or advertised, including any procurement actions, cooperative agreements, provider agreements, intergovernmental service agreements, service agreements, temporary interim contracts, licenses, permits, or any other type of agreement, regardless of nomenclature, type, or particular form, and whether

entered into verbally or in writing, to the extent such contracts and subcontracts are subject to the SCA. Contracts may be the result of competitive bidding or awarded to a single source under applicable authority to do so. In addition to bilateral instruments, contracts include, but are not limited to, awards and notices of awards; job orders or task letters issued under basic ordering agreements; letter contracts; orders, such as purchase orders, under which the contract becomes effective by written acceptance or performance; and bilateral contract modifications.

Contracting officer means an agency official with the authority to enter into, administer, and/or terminate contracts and make related determinations and findings. This term includes certain authorized representatives of the contracting officer acting within the limits of their authority as delegated by the contracting officer.

Contractor means any individual or other legal entity that is awarded a Federal Government service contract or subcontract under a Federal Government service contract. Unless the context of the provision reflects otherwise, the term “contractor” refers collectively to a prime contractor and all of its subcontractors of any tier on a service contract with the Federal Government. The term “employer” is used interchangeably with the terms “contractor” and “subcontractor” in various sections of this part. The U.S. Government, its agencies, and instrumentalities are not contractors, subcontractors, employers, or joint employers for purposes of compliance with the provisions of the Executive order.

Employee means a service employee as defined in the Service Contract Act, [41 U.S.C. 6701\(3\)](#), and its implementing regulations.

Employment opening means any vacancy in a position on the contract, including any vacancy caused by replacing an employee from the predecessor contract with a different employee.

Federal Government means an agency or instrumentality of the United States that enters into a contract pursuant to authority derived from the Constitution or the laws of the United States. This definition does not include the District of Columbia or any Territory or possession of the United States.

Month means a period of 30 consecutive calendar days, regardless of the day of the calendar month on which it begins.

Office of Administrative Law Judges means the Office of Administrative Law Judges, U.S. Department of Labor.

Same or similar work means work that is either identical to or has primary characteristics that are alike in substance to work performed on another service contract.

Secretary means the U.S. Secretary of Labor or an authorized representative of the Secretary.

Service Contract Act means the McNamara-O’Hara Service Contract Act of 1965, as amended, [41 U.S.C. 6701](#) *et seq.*, and the implementing regulations in this subtitle.

Solicitation means any request to submit offers, bids, or quotations to the Federal Government.

United States means the United States and all executive departments, independent establishments, administrative agencies, and instrumentalities of the United States, including

corporations of which all or substantially all of the stock is owned by the United States, by the foregoing departments, establishments, agencies, instrumentalities, and including non-appropriated fund instrumentalities. When used in a geographic sense, the United States means the 50 States, the District of Columbia, Puerto Rico, the Virgin Islands, Outer Continental Shelf lands as defined in the Outer Continental Shelf Lands Act, American Samoa, Guam, the Commonwealth of the Northern Mariana Islands, Wake Island, and Johnston Island.

Wage and Hour Division means the Wage and Hour Division, U.S. Department of Labor.

5. Additional Information

For more information regarding nondisplacement regulations, please visit our website at <https://www.dol.gov/agencies/whd/government-contracts/service-contracts/final-rule-nondisplacement>.

Questions on nondisplacement compliance and enforcement should be directed to the nearest WHD district office. Locate the nearest office by calling the WHD's toll-free help line at (866) 4US-WAGE ((866) 487-9243) during business hours or log onto WHD's website at <https://www.dol.gov/agencies/whd/contact/local-offices> for a nationwide listing of WHD district and area offices.