

# USDOL Finalizes Right of First Refusal Regulation for Federal Contractors

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On December 14, 2023, the U.S. Department of Labor (DOL) published a final rule that restricts federal contractors in who they can employ when carrying out federal service contracts under the Service Contract Act (SCA). The final rule implements President Biden's Executive Order signed on November 18, 2021, and goes into effect on February 12, 2024. The DOL estimates that this rule will affect 1.4 million workers on service contracts.

Under the rule, federal contractors who obtain a SCA covered contract previously performed by another contractor are required to first make a "good faith" offer of employment to the employees of the prior contractor to perform work on the subsequent contract. The rule requires the contractor to give the employee at least ten days to accept or reject the offer of employment. The stated purpose of this rule is to increase efficiencies for the government and to prevent the displacement of employees whose employment would otherwise be terminated.

There are, however, several limits on the right of first refusal requirement. The employee must be qualified for the position and must be included in the definition of "employee" under the SCA. Moreover, the successor contractor is not required to offer employment to an employee if the contractor "reasonably believes, based on reliable evidence of the particular employee's past performance, that there would be just cause to discharge the employee if employed by the successor contractor." Finally, the contractor is allowed to establish their own terms and conditions of employment so long as they were not implemented with the purpose of discouraging the worker to accept an employment offer with the contractor.

The DOL's final rule is just the latest step by the Biden Administration to increase protections for employees of federal contractors. Contractors will want to consult with experienced counsel to navigate these issues.

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