

ALERT

New Executive Order Requires Review of Temporary Foreign Labor in Government Contracting

August 6, 2020

WHAT: President Trump issued an executive order (EO), "Aligning Federal Contracting and Hiring Practices With the Interests of American Workers," requiring agencies to review and assess the use of foreign workers in government contracting.

The EO requires executive agencies to review FY2018 and FY2019 contracts and subcontracts that used temporary foreign labor or were performed in a foreign country (when services were previously performed in the U.S.) and assess potential negative impacts on the U.S. workforce, national security, and the economy and efficiency of Federal procurement. Agency heads must submit a report to the Office of Management and Budget by early December.

In addition, the EO directs the U.S. Departments of Labor (DOL) and Homeland Security (DHS) to take action as appropriate "to protect United States workers from any adverse effects on wages and working conditions caused by the employment of H-1B visa holders at job sites." This includes measures within 45 days to ensure that all employers of H-1B visa holders comply with requirements to provide the H-1B visa holders with wages and working conditions comparable to those for similarly employed nonimmigrant workers.

WHEN: The President issued the EO on August 3, 2020.

WHAT DOES IT MEAN FOR INDUSTRY: The EO is the latest in a series of orders calling for oversight and compliance with laws and policies on domestic preferences: EO 13788, Buy American and Hire American (April 2017); followed by EO 13858, Strengthening Buy-American

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Preferences for Infrastructure Projects (January 2019); and EO 13881, Maximizing Use of American-Made Goods, Products, and Materials (July 2019).

Like EOs 13788, 13858, and 13881, this new EO's most immediate impact will be on agencies that must assess current contracts, compliance, and policies. Here, contractors should plan for requests for information or data from agencies in the coming months. The EO leaves unstated what contract terms, or other legal rights, agencies would rely on for these requests or what information and data they would seek. It's likewise unclear how, or even whether, agencies will define "use" of temporary foreign labor "for" government contracts and contracts. That definition may be straightforward for a cost-type contract with hourly labor charges, but it's much less so for fixed-price contracts, including the many contracts for commercial products and services performed by companies not obligated to segregate employee time spent on government contracts.

Still, the EO may well lead, at varying degrees and through varying methods, to additional scrutiny of contractor compliance with laws and regulations governing use of temporary foreign workers. Contractors should ensure they have at hand documentation to address and rebut any concerns suggested by agencies over the medium and longer term—whether through contract channels or from the U.S. Department of Labor directly.

Contractors should also monitor agency outlets and websites for any agency-proposed corrective actions or changes in policies that follow from the agencies' reports due to OMB. As was the case with prior EOs, agencies might not release EO-mandated reports publicly in response to this EO but might release policy changes or decisions impacting contracts—and might do so sooner than later if a change in administration is forthcoming.

Finally, Section 3 of the EO, which directs the U.S. Departments of Labor and Homeland Security to take action to ensure employer-compliance with laws and regulations surrounding H-1B visa holders in the next 45 days might affect contractors to the extent these measures affect the technology and other sectors generally. Examples could include an uptick in investigations and enforcement actions involving the use of temporary foreign workers. This has been an outcome, to a degree, of EO 13788 (Buy American and Hire American), which spurred the U.S. Department of Justice's Immigrant and Employee Rights Section (IER) of the Department's Civil Rights Division to launch the Protecting U.S. Workers Initiative in 2017. Under this initiative, the Department "targets, investigates, and brings enforcement actions against employers that intentionally discriminate against U.S. workers due to a preference for temporary visa workers." Although it is not clear whether current enforcement actions are targeted towards contractors, it is possible that, under the latest EO, investigations and enforcement actions could ramp up against contractors, especially given the potentially broad application to secondary employers and third-party worksites.

Wiley will continue to monitor developments and provide updates from the administration when available.