

**DEPARTMENT OF LABOR****Office of the Secretary****29 CFR Part 9**

RIN 1215-AB69;1235-AA02

**Nondisplacement of Qualified Workers Under Service Contracts****AGENCY:** Wage and Hour Division, Labor.**ACTION:** Final rule.

**SUMMARY:** In this final rule, the Department of Labor (Department or DOL) issues final regulations to implement Executive Order 13495, Nondisplacement of Qualified Workers Under Service Contracts. The Executive Order 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. This policy mandates the inclusion of a contract clause requiring the successor contractor and its subcontractors to offer those employees employed under the predecessor contract, whose employment will be otherwise terminated as a result of the award of the successor contract, a right of first refusal of employment under the successor contract in positions for which they are qualified.

**DATES:** The effective date for this final rule is pending, and the Department will publish a notice in the **Federal Register** announcing the effective date once it is determined.

**FOR FURTHER INFORMATION CONTACT:** Timothy Helm, Branch Chief, Division of Enforcement Policies and Procedures, Branch of Government Contracts Enforcement, Wage and Hour Division, U.S. Department of Labor, Room S-3014, 200 Constitution Avenue, NW., Washington, DC 20210; telephone: (202) 693-0064 (this is not a toll-free number). Copies of this notice may be obtained in alternative formats (Large Print, Braille, Audio Tape or Disc), upon request, by calling (202) 693-0023 (not a toll-free number). TTY/TDD callers may dial toll-free (877) 889-5627 to obtain information or request materials in alternative formats.

**SUPPLEMENTARY INFORMATION:** This regulatory action first appeared on the Spring 2009 Regulatory Agenda with regulatory identification number (RIN) 1215-AB69. Due to an organizational restructuring which resulted in the Wage and Hour Division becoming a free-standing agency within the Department, the RIN changed to 1235-AA02. Throughout this final rule,

citations to various statutes such as the Service Contract Act have been revised to reflect the recodification of those Acts in January 2011.

**I. Executive Order 13495 Requirements and Background**

On January 30, 2009, President Barack Obama signed Executive Order 13495, Nondisplacement of Qualified Workers Under Service Contracts (Executive Order 13495, E.O. 13495, or Order). 74 FR 6103 (Feb. 4, 2009). This Order establishes that when a service contract expires and a follow-on contract is awarded for the same or similar services at the same location, the Federal Government's procurement interests in economy and efficiency are better served when a successor contractor hires the predecessor's employees. A carryover workforce reduces disruption to the delivery of services during the period of transition between contractors and provides the Federal Government the benefits of an experienced and trained workforce that is familiar with the Federal Government's personnel, facilities, and requirements. As explained in the Order, the successor contractor or its subcontractors often hires the majority of the predecessor's employees when a service contract ends and the work is taken over from one contractor to another. Occasionally, however, a successor contractor or its subcontractors hires a new workforce, thus displacing the predecessor's employees.

Section 1 of Executive Order 13495 sets forth a general policy of the Federal Government that service contracts and solicitations for service contracts shall include a clause that requires the contractor and its subcontractors, under a contract that succeeds a contract for performance of the same or similar services at the same location, to offer those employees (other than managerial and supervisory employees) employed under the predecessor contract, whose employment will be terminated as a result of the award of the successor contract, a right of first refusal of employment under the contract in positions for which they are qualified. Section 1 also provides that there shall be no employment openings under the contract until such right of first refusal has been provided. Section 1 further stipulates that nothing in Executive Order 13495 is to 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 discussed above in the **DATES** section, this rule will not be effective until the Federal Acquisition Regulatory

Council (FARC) issues regulations. The Executive Order requires the FARC to issue regulations in Section 6 of the Order, which is discussed in further detail below.

Section 2 of Executive Order 13495 defines *service contract* or *contract* to mean any contract or subcontract for services entered into by the Federal Government or its contractors that is covered by the McNamara-O'Hara Service Contract Act of 1965 (SCA), as amended, 41 U.S.C. 6701 *et seq.*, and its implementing regulations. Section 2 also defines *employee* to mean a service employee as defined in the SCA. 74 FR 6103 (Feb. 4, 2009). *See* 41 U.S.C. 6701(3).

Section 3 of the Order exempts from its terms (a) contracts or subcontracts under the simplified acquisition threshold as defined in 41 CFR 2.101; (b) contracts or subcontracts awarded pursuant to the Javits-Wagner-O'Day Act, 41 U.S.C. 8501-8506; (c) 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 section 505 of the Treasury, Postal Services and General Government Appropriations Act, 1995, Public Law 103-329; (d) agreements for vending facilities entered into pursuant to the preference regulations issued under the Randolph-Sheppard Act, 20 U.S.C. 107; and (e) 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 employees were not deployed in a manner that was designed to avoid the purposes of the Order. 74 FR 6103-04 (Feb. 4, 2009).

Section 4 of Executive Order 13495 authorizes the head of a contracting department or agency to exempt its department or agency from the requirements of any or all of the provisions of the Executive Order with respect to a particular contract, subcontract, or purchase order or any class of contracts, subcontracts, or purchase orders, if the department or agency head finds that the application of any of the requirements of the Order would not serve the purposes of the Order or would impair the ability of the Federal Government to procure services on an economical and efficient basis. 74 FR 6104 (Feb. 4, 2009).

Section 5 of the Order provides the wording for the required contract clause regarding the nondisplacement of qualified workers that is to be included in solicitations for and service contracts that succeed contracts for performance of the same or similar services at the

same location. 74 FR 6104–05 (Feb. 4, 2009). Specifically, the new contract clause provides that the contractor and its subcontractors shall, except as otherwise provided by the clause, in good faith offer those employees (other than managerial and supervisory employees) employed under the predecessor contract whose employment will be terminated as a result of award of the contract or the expiration of the contract under which the employees were hired, a right of first refusal of employment under the contract in positions for which they are qualified. The successor contractor and its subcontractors determine the number of employees necessary for efficient performance of the contract, and may elect to employ fewer employees than the predecessor contractor employed in performance of the work. Except as provided by the contract clause, there is to be no employment opening under the contract, and the successor contractor and any subcontractors shall not offer employment under the contract to any person prior to having complied fully with the obligation to offer employment to employees on the predecessor contract. The successor contractor and its subcontractors must make a bona fide, express offer of employment to each employee including stating the time within which the employee must accept such offer, which must be no less than 10 days. The clause also provides that, notwithstanding the obligation to offer employment to employees on the predecessor contract, the successor contractor and any subcontractors (1) May employ under the contract any employee who has worked for the contractor or subcontractor for at least 3 months immediately preceding the commencement of the contract and who would otherwise face lay-off or discharge; (2) are not required to offer a right of first refusal to any employee(s) of the predecessor contractor who are not service employees within the meaning of the SCA, 41 U.S.C. 6701(3); and (3) are not required to offer a right of first refusal to any employee(s) of the predecessor contractor whom the successor contractor or any of its subcontractors reasonably believes, based on the particular employee's past performance, has failed to perform suitably on the job. The contract clause also provides that, in accordance with Federal Acquisition Regulation (FAR) 52.222–41(n), not less than 10 days before completion of the contract, the contractor must furnish the Contracting Officer a certified list of the names of all service employees working under the contract and its subcontracts during the

last month of contract performance. The list must also contain anniversary dates of employment of each service employee under the contract and its predecessor contracts either with the current or predecessor contractors or their subcontractors. The Contracting Officer must provide the list to the successor contractor, and the list must be provided on request to employees or their representatives. If it is determined, pursuant to regulations issued by the Secretary of Labor, 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 the Executive Order, the regulations, and relevant orders of the Secretary, or as otherwise provided by law. Finally, the clause provides that in every subcontract entered into in order to perform services under the contract, the contractor will include provisions that ensure that each subcontractor will honor the requirements of the clause in the prime contract with respect to the employees of a predecessor subcontractor or subcontractors working under the contract, as well as employees 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 the employees of the subcontractor needed by the contractor to comply with the prime contractor's requirement, in accordance with FAR 52.222–41(n). The contractor must also take action with respect to any such subcontract as may be directed by the Secretary of Labor as a means of enforcing these 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 the litigation to protect the interests of the United States. 74 FR 6104–05 (Feb. 4, 2009).

Section 6 of the Order assigns responsibility for investigating and obtaining compliance with the Order to the Department. In such proceedings, this section also authorizes the Department to issue final orders prescribing appropriate sanctions and remedies, including, but not limited to, orders requiring employment and payment of wages lost. The Department also may provide that where a contractor or subcontractor has failed to comply with any order of the Secretary

of Labor or has committed willful violations of Executive Order 13495 or its implementing regulations, the contractor or subcontractor, its responsible officers, and any firm in which the contractor or subcontractor has a substantial interest will be ineligible to be awarded any contract of the United States for a period of up to 3 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 noncompliant contractors is to be carried out without affording the contractor or subcontractor an opportunity for a hearing. Section 6 also specifies that Executive Order 13495 creates no rights under the Contract Disputes Act, and disputes regarding the requirement of the contract clause prescribed by Section 5, to the extent permitted by law, will be disposed of only as provided by the Department in regulations issued under the Order. To the extent practicable, such regulations shall favor the resolution of disputes by efficient and informal alternative dispute resolution methods. Finally, Section 6 provides that, to the extent permitted by law and in consultation with the FARC, the Department will issue regulations to implement the requirements of the Executive Order. In addition, to the extent permitted by law, the FARC is to issue regulations in the Federal Acquisition Regulation to provide for inclusion of the contract clause in Federal solicitations and contracts subject to the current Order. See 74 FR 6105 (Feb. 4, 2009).

Section 7 of Executive Order 13495 revokes Executive Order 13204 of February 17, 2001, rescinding Executive Order 12933 of October 20, 1994, Nondisplacement of Qualified Workers Under Certain Contracts. *Id.* See also 59 FR 53559 (Oct. 24, 1994), 66 FR 11228 (Feb. 22, 2001).

Section 8 of the Order provides that if any provision of the Order or its application is held to be invalid, the remainder of the Order and the application shall not be affected.

Section 9 of the Order specifies that nothing in Executive Order 13495 is to be construed to impair or otherwise affect the authority granted by law to an executive department, agency, or the head thereof; or functions of the Director of the Office of Management and Budget (OMB) relating to budgetary, administrative, or legislative proposals. In addition, the Order is to be implemented consistent with applicable law and subject to the availability of appropriations, and the Order is not intended to, and does not, create any

right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person. Section 9 clarifies, however, that the Order is not intended to preclude judicial review of final decisions by the Department in accordance with the Administrative Procedure Act, 5 U.S.C. 701 *et seq.* 74 FR 6105–06 (Feb. 4, 2009).

As indicated, Section 7 of Executive Order 13495, revoked Executive Order 13204, signed by President Bush on February 17, 2001, which rescinded Executive Order 12933, Nondisplacement of Qualified Workers Under Certain Contracts, signed by President Clinton on October 24, 1994. More specifically, these rescinded Executive Orders pertained to the obligations of successor contractors to offer employment to employees of predecessor contractors on Federal contracts to maintain public buildings. *See* 59 FR 53559 (Oct. 24, 1994), 66 FR 11228 (Feb. 22, 2001). The Department promulgated regulations, 29 CFR part 9 (62 FR 28185) to implement Executive Order 12933 (62 FR 28176 (May 22, 1997)) and, per Executive Order 13204, rescinded them through a Notice appearing in the **Federal Register**. 66 FR 16126 (Mar. 23, 2001). There are some notable differences between Executive Order 13495, and Executive Order 12933. For example, Executive Order 13495 covers all contracts covered by the SCA above the simplified acquisition threshold, whereas Executive Order 12933 was limited to building services contracts in excess of the simplified acquisition threshold for maintenance of public buildings. In addition, exemptions listed for U.S. Postal Service, NASA, military, and Veterans Administration installations (among others) in Executive Order 12933 have been eliminated. A new provision authorizes the head of a contracting department or agency to exempt any of its contracts from the current Order if the agency finds the requirements would not serve the purposes of the Order or would impair the Federal Government's ability to procure services economically and efficiently. In addition, the current Order expressly provides that it applies to subcontracts awarded in amounts equal to or above the simplified acquisition threshold, while coverage under Executive Order 12933 was determined at the prime contract level. Subsequent to publication of the proposed rule upon which this final rule is responsive, the simplified

acquisition threshold was raised to \$150,000 from \$100,000. 75 FR 53129 (August 30, 2010) (codified at 41 CFR 2.101).

## II. Discussion of Final Rule

The Department published and sought comments on a proposed rule implementing the provisions of Executive Order 13495 on March 19, 2010 (75 FR 13382 (Mar. 19, 2010)). A total of 21 comments were received from labor organizations, government contractors, and government agency contract personnel, among others. These comments are discussed in the following section-by-section analysis of the final rule.

### Subpart A—General

Executive Order 13495 does not establish wage or fringe benefit rates. The minimum wage and fringe benefit rates established under the SCA to be paid service employees will apply to work performed on service contracts covered by the Executive Order. SCA rates will apply equally to successor contracts with a workforce made up of employees who worked under the predecessor contract and to successor contracts with, under one of the Executive Order's exceptions, a workforce not made up of employees who worked under the predecessor contract. The SCA requires contractors and subcontractors performing services on prime contracts in excess of \$2,500 to pay service employees in various classes no less than the wage rates and fringe benefits found prevailing in the locality, or the rates (including prospective increases) contained in a predecessor contractor's collective bargaining agreement as provided in wage determinations issued by the Department. These determinations are incorporated into the service contract.

The Department received several comments opposing the Executive Order and questioning its stated purpose. For example, the Professional Services Council (PSC) questioned when private employment under a government contract became an immutable entitlement. The PSC and the Society for Human Resource Management (SHRM) doubted whether the Executive Order would fulfill its stated goals of promoting economy and efficiency in government procurement, and the Associated Builders and Contractors, Incorporated (ABC, Inc.), stated that there was no evidentiary support that nondisplacement of workers would result in greater efficiency. Comments questioning the legality of and rationale for the Executive Order are clearly not within the purview of this rulemaking

action. All other comments are summarized in the preamble under the relevant subsections.

Proposed subpart A addressed general matters, including the purpose and scope of the rule, its definitions, coverage under the Order, and the exclusions it provides.

### Section 9.1 Purpose and Scope

The Department proposed in § 9.1 to explain the purpose of the proposed rule and to reiterate policy statements from the Executive Order. This section articulates the Executive Order's general requirement that successor service contractors performing on Federal contracts offer a right of first refusal to suitable employment (i.e., a job for which the employee is qualified) under the contract to those employees under the predecessor contract whose employment will be terminated as a result of the award of the successor contract, and emphasizes the Executive Order's underlying principle that the Federal Government's procurement interests in economy and efficiency are served when the successor contractor hires the predecessor's employees and that a carryover workforce both minimizes disruption in the delivery of services during a period of transition between contractors and provides the Federal Government the benefit of an experienced and trained workforce that is familiar with the Federal Government's personnel, facilities, and requirements. No comments were received on this section; the final rule therefore implements § 9.1 as proposed, except with one additional sentence as discussed below.

Specifically, § 9.1 has been revised to include the following sentence: "Additionally, the Order also provides that it is to be implemented consistent with applicable law and subject to the availability of appropriations." This sentence has been added to emphasize in particular that, as stated in Section 9 of the Order, the Order is to be implemented consistent with applicable law. Along similar lines, Section 1 of the Order provides, as noted, that nothing in the 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. The applicable law encompassed by these Sections includes, for example, the HUBZone program established by title VI of the Small Business Reauthorization Act of 1997, Executive Order 11246 (Equal Employment Opportunity), and the Vietnam Era Veterans' Readjustment Assistance Act of 1974. When (and only when) the requirements of such laws

would conflict with the requirements of Executive Order 13495 under the particular factual circumstances of a specific situation, then the requirements of such laws may be satisfied in tandem with—and, when necessary, prior to—the requirements of Executive Order 13495.

For example, HUBZone small business concerns (SBCs) are required to have 35 percent of all of their employees reside in a HUBZone. When both the successor and the predecessor contractors are SBCs, the residence requirement threshold normally could be met through a standard application of this final rule. Under circumstances where the successor is a SBC but the predecessor is not, we believe that HUBZone SBCs can still meet both the requirements of the HUBZone program and the Executive Order. For instance, the successor SBC awardee could first extend offers of employment to the qualified predecessor awardee's employees that reside in a HUBZone. If necessary to reach the residency threshold, the successor HUBZone SBC would next extend offers of employment to qualified residents of a HUBZone who were not employees of the predecessor. The HUBZone SBC could next extend offers for the remaining vacancies to non-HUBZone resident qualified employees of the predecessor awardee. The HUBZone SBC would need to first ensure that it meets the statutory requirements of the HUBZone program so that it is not decertified, and must consider the predecessor's employees pursuant to the Executive Order in doing so. This approach would also apply in other circumstances, such as where the predecessor HUBZone SBC did not maintain the HUBZone residence requirement but was permitted to remain in the program. While the HUBZone SBC must maintain the 35 percent HUBZone residency requirement at all times while certified in the program, there is an exception: an SBC may "attempt to maintain" this requirement when performing on a HUBZone contract. When that occurs and the HUBZone SBC is permitted to fall below the 35 percent threshold, it still must meet the requirement any time it submits a subsequent offer and wins a HUBZone contract.

#### Section 9.2 Definitions

The proposed rule included definitions of several important terms, such as "contractor", "month", "same or similar service", "managerial employee and supervisory employee", and "employee or service employee". The Department received comments on only two of the proposed definitions.

The Department proposed to define "employee or service employee" to mean a service employee as defined in the Service Contract Act of 1965, 41 U.S.C. 6701(3). The Service Employees International Union (SEIU) and Change to Win commented that they agreed with this proposed definition as it is based on the definition under the SCA. No other comments were received on this definition and it is adopted as proposed.

The Department proposed to define "managerial or supervisory employee" to mean a person engaged in the performance of services under the contract who is employed in a bona fide executive, administrative, or professional capacity, as those terms are defined in 29 CFR part 541, and specifically sought comments on this proposed definition. The PSC and American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) supported the proposed definition. The PSC commented that "adopting a different definition would lead to unnecessary confusion about the proper standard to apply in different situations, could lead to unintended consequences regarding coverage, and would create a trap for unwary contractors."

The American Maritime Officers Union (AMOU) suggested the Department define the term "managerial or supervisory employee" through reference to definitions set forth in the National Labor Relations Act (NLRA) or established by the National Labor Relations Board (NLRB). The American Maritime Association (AMA) stated that the proposed definition will not clarify the scope of the supervisory and managerial exclusion and would result in the unintended consequence of removing most "supervisors" from the scope of the exclusion. The AMA further commented that the proposed definition of managerial and supervisory employee would require the successor contractor to hire supervisory employees of the predecessor contractor, which would contradict the intent of the Executive Order. The Chamber of Commerce of the United States of America (Chamber) commented that the definition of managerial and supervisory employees should be more expansive than the Department proposed. The Chamber also suggested, like the AMOU, that the Department use the definitions of these terms under the NLRA. The Chamber added that the definition proposed by the Department renders the words "other than managerial and supervisory employee" in the Executive Order superfluous because any employee

employed in a bona fide executive, administrative, or professional capacity, as those terms are defined in 29 CFR Part 541, is not a service employee under the SCA. The SHRM similarly urged the Department to embrace the definition of "supervisor" under the NLRA and recommended that the Department consider how NLRB case law treats the term "manager." This recommendation, according to the commenter, would "avoid a proliferation and possible contradiction of statutory and regulatory definitions making good-faith compliance more difficult."

The Department carefully considered the comments received on the definition of "managerial or supervisory employee" but is unconvinced that defining the term in accordance with the NLRA or NLRB caselaw is appropriate for the purpose of this Executive Order. As discussed in the preamble to the proposed rule, Sections 1 and 5 of the Executive Order parenthetically exclude from its requirements managerial and supervisory employees, without defining the term. It is the Department's view that this is a reiteration, not an expansion, of the exemption included in the SCA. Defining "managerial or supervisory employee" consistent with the SCA definition excludes any person employed in a bona fide executive, administrative, or professional capacity as those terms are defined in the regulations issued under the Fair Labor Standards Act (FLSA), 29 U.S.C. 203 *et seq.*, at 29 CFR part 541. Such employees are exempt from the provisions of the SCA and need not be offered employment on the successor contract. Thus, the successor contractor has complete discretion to decide whom to employ as managers and supervisors on the contract. If a service employee of the predecessor contractor is qualified for a managerial or supervisory position, an offer of employment in that classification would satisfy the successor's obligation to offer the employee employment on the contract, but the successor contractor is under no obligation to make an offer to such a position. Of course, the Department does not administer or enforce the NLRA and it is the Department's view that use of SCA definitions with which contractors are already familiar will facilitate good-faith compliance, rather than making compliance more difficult. Contrary to the view of the Chamber, the Department believes this definition supports and clarifies the policy statement in the Executive Order, which affords the right to an offer of

employment to those service employees who are not managerial or supervisory employees.

The proposed rule defined “same or similar service”, in relevant part, to mean a service that is either identical to or has characteristics that are alike in substance and essentials to another service. After consideration, the Department has altered this definition to avoid inconsistency with the Executive Order. The language of the proposed definition could have resulted in the exclusion of some “similar” services in contravention of the Order. For example, it is the Department’s understanding that the term “same or similar service” is broader and more inclusive than the term “substantially the same services” that is used in the SCA. *See* 41 U.S.C. 6707(c). Therefore, the Department has refined the proposed definition at § 9.2(13) to mean a service that is either identical to or has 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. Apart from that change, the final rule implements the definitions as proposed.

#### *Section 9.3 Coverage*

Proposed § 9.3 discussed application of the rule and the Executive Order to all service contracts and their solicitations that succeed contracts for the same or similar service at the same location, except those specifically excluded by § 9.4. No comments were received on this proposed section and the final rule adopts proposed § 9.3 without change.

#### *Section 9.4 Exclusions*

Proposed § 9.4 would implement the exclusions contained in Sections 3 and 4 of Executive Order 13495. Proposed § 9.4(a)(1) addressed the exclusion for contracts or subcontracts under the simplified acquisition threshold, as defined in 41 CFR 2.101. 74 FR 6103 (Feb. 4, 2009). The simplified acquisition threshold, at the time the NPRM was published was \$100,000; it has since been increased to \$150,000. 41 CFR 2.101. In contrast to the prior version of part 9, the proposal did not state that amount in the regulatory text so that in the event that a future statutory amendment changes the amount, any such change would automatically apply to contracts subject to part 9.

Proposed § 9.4(a)(2) explained how the exclusion applies to subcontracts, including when a successor contractor discontinues the services of a

subcontractor. The Department interprets the exclusion for contracts and subcontracts under the simplified acquisition threshold as applying to subcontracts of less than \$150,000, even when the prime contract is for a greater amount because of the definition of a service contract in Section 2(a) of the SCA and the express terms of the exclusion in Section 3(a) of Executive Order 13495. However, while the proposed § 9.4(a)(1) exclusion would apply to subcontracts of less than \$150,000, the covered prime contractor or higher tier subcontractor would still be required to comply with the requirements of this part. Moreover, if a covered contractor that is subject to the nondisplacement requirements were to discontinue the services of a subcontractor at any time during the contract and perform those or similar services itself at the same location, the contractor would be required to offer employment to the subcontractor’s employees who would otherwise be displaced and would otherwise be covered in accordance with this part but for the size of the subcontract. As noted in the preamble to the proposed rule, the earlier Executive Order 12933 excluded prime contracts under the simplified acquisition threshold but did not mention subcontracts. The Chamber requested additional guidance regarding the application of the Executive Order to subcontracts. The Department has concluded that proposed § 9.4(a)(2) is sufficiently instructive; as no other comments were received on this paragraph, no revisions have been made to proposed § 9.4(a) and it is implemented in the final rule without change.

Proposed § 9.4(b) implemented the exclusions applicable to certain contracts or subcontracts awarded for services produced or provided by persons who are blind or have severe disabilities. 74 FR 6103–4 (Feb. 4, 2009). Proposed § 9.4(b)(4) clarified that the exclusions provided by § 9.4(b)(1) through (b)(3) apply when either the predecessor or successor contract has been awarded for services produced or provided by the blind or severely disabled, as described. To require Federal service contractors who obtain their work under the specified set-aside programs to offer employment to the predecessor contractor’s employees would defeat the purpose of these programs to allow people to participate in the workforce who otherwise would not be able to do so. No comments were received on this paragraph and the final rule implements proposed § 9.4(b) without change.

Proposed § 9.4(c) implemented the exclusion in Section 3(e) of Executive Order 13495 relating to employment where Federal service work constitutes only part of the employee’s job. 74 FR 6104 (Feb. 4, 2009). This exclusion applies to an employee who was hired to work on the predecessor’s contract and one or more nonfederal jobs. No comments were received on this paragraph and the final rule adopts proposed § 9.4(c) without change. *See* § 9.12(c)(5) (discussion of implementation of section 3(e) of the Executive Order).

#### *Section 9.4(d) Contracts Exempted by Federal Agency*

Section 9.4(d) implements the Section 4 exclusion in the Executive Order that provides that the head of a contracting department or agency may exempt its department or agency from the requirements of any or all of the provisions of the Executive Order with respect to a particular contract, subcontract, or purchase order, or any class of contracts, subcontracts, or purchase orders, if the department or agency head finds that the application of any of the requirements of the Executive Order would not serve the purposes of the Executive Order or would impair the ability of the Federal Government to procure services on an economical and efficient basis. 74 FR 6104 (Feb. 4, 2009).

A number of commenters addressed issues relating to proposed language concerning the exemption authority of Federal agencies, including the notification and timing requirements relating to the exemption process, the factors agencies should use when considering whether to exempt contracts, and whether exemption decisions should be reviewable by and appealable to the Secretary of Labor.

The introductory language of paragraph (d) remains as proposed except for a minor clarification specifying that the authority for contracting department or agency heads to exempt certain contracts from the Executive Order stems from Section 4 of the Order.

#### *Section 9.4(d)(1) Agency Determination No Later Than the Solicitation Date*

Section 9.4(d)(1) of the proposed rule limited the time in which an agency may decide to exempt contracts to no later than the solicitation date. This limitation was intended to ensure that the contract clause is included in the solicitation, if applicable, as required by the Executive Order.

Two commenters addressed this issue. The Chamber opposed the

requirements that the agency exemption decision be made by the solicitation date and that the decision be supported by a written analysis in which the agency compares anticipated outcomes under both a carryover workforce and a non-carryover workforce scenario. It asserted that these requirements would significantly limit the contracting agency's exercise of its waiver authority and would prevent the contracting agency from having "the full benefit of the contractors' bids/proposals, many of which might include significant cost savings or other improvements in contract performance if the contract was exempted from coverage."

A labor advisor with the United States Navy (Navy Labor Advisor), asserted that the final regulations should remove the time limitation for agency exemption decisions, which he characterized as "an unwarranted infringement on agency deliberations and decisions that are essential to the mission of each agency." He added that the time limitation was not needed to ensure that the contract clause is included in the solicitation because, under procurement practices and the Federal Acquisition Regulation, "any solicitation may be amended to correct oversights, errors, or changes to the originally issued document \* \* \*".

After carefully considering the comments, the Department has decided to adopt the proposed time limitation for agency exemption decisions to ensure that solicitations accurately reflect agency exemption determinations, either including the contract clause required by the Executive Order or omitting it following an agency exemption determination. This time limitation will ensure that the predecessor contractor's service employees, as well as prospective bidders, receive timely notice of the agency's decision. The Department has added language providing that the failure to follow this procedural requirement shall render any agency exemption decision inoperative and require the inclusion or addition of the clause in Appendix A of the final rule in the solicitation and any resulting contract, subcontract, or purchase order, or class of contracts, subcontracts, or purchase orders.

Section 9.4(d)(2) and § 9.4(d)(3) Written Notice to Affected Workers of Finding and Decision No Later Than Solicitation Date Using the Notification Method Specified in § 9.11(b)

Under § 9.4(d)(2) and § 9.4(d)(3), the Department proposed that when an agency exercises its exemption authority, it is required to notify

"affected workers in writing of the finding and decision no later than the award date" either in an individual notice given to each worker or through a posting at the location where the work is performed. The notification would need to include facts supporting the decision and use the method specified in proposed § 9.11(b).

A number of commenters addressed this issue. The Chamber stated that requiring an agency to provide written notification to all affected workers that it will be exercising its exemption authority—including the facts supporting its decision—would significantly limit the agency's exercise of its authority.

A Navy Labor Advisor commented that the notification requirement is not supported by the language of the Executive Order and is not possible for agencies to fulfill under current recordkeeping rules for employment and protection of personally identifiable information. He further indicated that the prime contractor, not the contracting agency, should be required to notify affected workers of a waiver. He also stated that agencies lack "access to workers or the ability to require personally identifiable information," and that under certain circumstances, contracting agencies may lack knowledge of who these service employees are or how to provide them with notice of the waiver decision. He added that agencies do not retain postal or e-mail addresses for these service employees; that under certain circumstances, there may be no appropriate place for a contracting agency to post a notice; that the methods called for in the proposed rule would infringe on the privacy of workers in question; that "neither the Service Contract Act nor the Executive Order provides any rationale or authority to collect such information and no other laws or regulations would require or allow contractors to provide this personal identifiable information (PII) to the contracting agencies," and that agencies seek to avoid establishing a "'personal service' type relationship where employees are perceived to be directly employed by the contracting agency." An individual commenter also expressed concern that the proposed rule could lead to the appearance of personal services contracts.

The AFL-CIO stated that the final rule should clarify that agencies must provide written notice of their intent to exempt a contract to the labor union, if any, that represents the incumbent workers. It also asserted that instead of the date of contract award, notice should be provided at least 180 days

before the contract award to "allow employees and their bargaining representative to have sufficient time to analyze the asserted reasons for the proposed exemption, and, if warranted, to challenge the exemption."

The SEIU and Change to Win supported the requirement that contracting agencies provide written notice of an exemption decision to affected workers, but stated that the final rule should clarify that notice must also be provided to the labor union, if any, that represents the incumbent workers. They noted that other provisions of the proposed rule provided for the worker representative to receive notice or to make a complaint on behalf of service workers. They also stated that the final rule should require notice of an exemption decision "sufficiently in advance of the solicitation to bid" to allow affected workers and their representatives the opportunity to respond to the exemption, and if necessary contest it through an administrative review process. They suggested that such notice be provided no later than 120 days before the solicitation date.

After careful consideration of the comments, the Department has decided to adopt the proposed language requiring notification with five changes. It remains the Department's view that service employees are entitled to written notice of an agency exemption decision. However, we agree with the aforementioned commenters that the obligation to provide the notice should rest with the contractor, and not the contracting agency. Section 9.4(d)(2) and § 9.4(d)(3) have been revised to reflect that the "contracting agency shall ensure that the predecessor contractor notify affected workers and their collective bargaining representatives in writing of its determination no later than five business days after the solicitation date" and that "the agency shall ensure that the predecessor contractor uses the notification method specified in § 9.11(b) of this part to inform workers and their collective bargaining representatives of the exemption determination." An agency exercising exemption authority will need to ensure that affected workers "and their collective bargaining representatives" are notified of the finding and decision, in writing, no later than five business days after the "solicitation" date, i.e., the date the solicitation is issued. The added language is needed to keep the provision consistent with other provisions in the rule and to provide those affected by the exemption decision with additional time to

consider their employment options. (See § 9.11(b); § 9.21(a).) For clarity, the Department has also added language providing that the failure to follow this requirement shall render any agency exemption decision inoperative and require the inclusion of the clause in Appendix A of the final rule in the solicitation and any resulting contract, subcontract, or purchase order, or class of contracts, subcontracts, or purchase orders.

The Department considers that written notification be provided to affected workers and their collective bargaining representatives of its exemption finding and decision—including facts supporting the decision—by no later than the solicitation date as consistent with the President's commitment to openness and transparency in government. See January 21, 2009, Memorandum for the Heads of Executive Departments and Agencies. 74 FR 4685 (Jan. 21, 2009). Also in the interest of openness and transparency in government, language has been added to this subsection stating that the contracting agency shall notify the Department of its exemption decision and provide the Department a copy of its written analysis no later than 5 business days after the solicitation date, which the Department will post on its Web site at [www.dol.gov](http://www.dol.gov). Language has been added providing that the failure to follow this requirement shall render any agency exemption decision inoperative and require the inclusion of the clause in Appendix A of the final rule in the solicitation and any resulting contract, subcontract, or purchase order, or class of contracts, subcontracts, or purchase orders.

In response to comments stating that notice of the exemption decision needs to be made at an earlier time than the contract award date for affected workers or their collective bargaining representatives to contest the decision with the agency, the Department has changed the time by which notice of the exemption decision must be provided from the award date to no later than five business days after the solicitation date. This change provides increased time for affected workers and their collective bargaining representatives to seek reconsideration of an exemption decision by the head of the contracting department or agency without burdening the agency with providing notice prior to the solicitation date, the date by which the decision must be made. The notification requirement should not be burdensome to fulfill because service contractors on Federal service contracts are already required to maintain, and make available for

inspection and transcription, basic employment information concerning their employees, including their names and addresses. See 29 CFR 4.6.

#### Section 9.4(d)(4) Factors and Analysis for Written Agency Determination

Section 9.4(d)(4) of the proposed rule provided that when exercising the authority to exempt contracts, the agency shall prepare a written analysis supporting the determination that application of the nondisplacement provisions would not serve the purposes of the Executive Order or would impair the ability of the Federal Government to procure services on an economical and efficient basis. A number of commenters addressed this issue. Before addressing those comments individually, the Department believes that it may be helpful to summarize both what an exemption determination accomplishes and why the wage and fringe benefit costs of the predecessor contractor are rarely germane to such a determination.

Executive Order 13495 and this final rule simply require a successor contractor and its subcontractors to offer a right of first refusal of employment on a successor contract to qualified service employees who are employed under the predecessor contract and whose employment would otherwise be terminated as a result of the award of the successor contract. When a contracting agency decides to exempt a contract from the Executive Order, that decision reflects a determination that none of the service employees on the predecessor contract should have a right to employment on the successor contract. A decision not to provide a single employee on the predecessor contract with a right to employment on the successor contract generally runs counter to the purpose of Executive Order 13495, which recognizes that the Federal Government's procurement interests in economy and efficiency are served when a successor contractor hires the predecessor's employees.

Although an exemption decision can be expected to have a profound impact on whether the employees on a predecessor contract are discharged or retained, it would generally have little, if any impact on the successor's wage and fringe benefit costs. The Executive Order does not establish what wages or fringe benefits the successor employer pays any of its employees. Regardless of whether a contracting agency exempts a contract from the requirements of the Executive Order, SCA-mandated wage rates and fringe benefits still will apply to the successor contractor. An exemption determination simply determines who receives an offer of

employment on the successor contract at whatever rate the contracting agency and/or the successor contractor choose (as long as that rate at least equals the applicable SCA rate). Given these realities, any focus at the exemption stage on wage rates or related cost-savings is misplaced.

As noted, the SCA establishes the minimum wage rates and fringe benefits to be paid to service employees on a contract for services. These minimum wage rates and fringe benefits can result from the SCA prevailing wage and fringe benefit rates or, under Section 4(c) of the SCA, the wages and fringe benefits that service employees would have been paid under any collective bargaining agreement that would have applied had the predecessor contractor retained the service contract. 47 U.S.C. 6707(c); 29 CFR 4.163(a). In either case, the SCA sets a floor for wage rates and fringe benefits, and, as noted, that floor will apply regardless of whether an agency exempts a contract from the requirements of the Executive Order. The SCA's wage requirements thus buttress the Department's view that, as noted above, wage and fringe benefit costs on successor service contracts could rarely serve as the basis for any agency to exercise its exemption authority.

Finally, it is important to understand that a contracting agency remains free to consider wage rates and fringe benefits at other stages of the contracting process when it would normally consider such costs. A contracting agency can, for example, consider wage rates and fringe benefit costs at the solicitation stage for purposes other than exercising exemption authority, provided that the agency's consideration of such costs is in accordance with the SCA and other applicable law. Similarly, bidders on service contracts may base their bids on the minimum wage rates and fringe benefits required by the SCA (including, where applicable, wage rates and fringe benefits required by section 4(c) of the SCA). A contracting agency also may consider wage rates and fringe benefit costs at the contract award stage, and may award the contract (if it so chooses and if the award is otherwise consistent with applicable law) to a prospective contractor whose bid reflects the payment of the minimum wage rates and fringe benefits required by the SCA. Thus, the decision to exempt a successor from the requirement to offer jobs to the predecessor's workforce does not interfere with the agency's ability to consider the costs, including the labor costs, of potential contractors. However, the fact that wage rates thus may change between contracts should not be used to



deprive service employees on the predecessor contract of any right to an offer of employment on the successor contract.

Turning to the specific comments received, the Chamber stated that the determination of relevant factors in the agency exemption analysis should be left to the discretion of the contracting agency because “[t]he contracting agency knows better than DOL what costs and other factors are most significant to a particular contract.” It found unclear the purpose of a written determination in light of its conclusion that there does not appear to be any right of appeal regarding the agency’s decision.

The PSC stated that the contracting agency should be able to delegate its exemption authority to the Contracting Officer for use whenever it would be in the best interests of the government. It stated that the Contracting Officer is the government official best positioned to identify the government’s needs and act in its best interests and that the delegation and less rigorous standard would “eliminate the stigma that a waiver can only be considered in rare circumstances or represents a failure to adhere to government policy.” It found that the proposed standard “suggests that the government must first conduct a highly-technical, objective market survey or analysis to determine whether services can be economically and efficiently obtained.” The PSC also stated that “collective poor performance of an incumbent labor staff or its resistance to change management” may not impair the government’s ability to obtain services on an economical or efficient basis, but that in such circumstances the contract should be excludable because it may “prevent the government from obtaining the highest quality services.” Similarly, the HR Policy Association asked whether agency dissatisfaction with a predecessor contractor because of inefficient work or poor performance by service employees would provide a “sufficient justification for the contracting agency to exempt the contract or for the agency to authorize certain employees with performance issues” to be replaced. TechAmerica, an industry association representing the technology industry, requested that the Department consider an exception from the nondisplacement requirements when the predecessor contract has been terminated for default or cause.

A Navy Labor Advisor stated that the requirement of a written analysis supporting an agency’s determination of exemption is “an unnecessary and unsupportable directive to the

contracting agencies by DOL,” and requested that it be removed. An individual commenter stated that when an agency considers the cost of the nondisplacement requirements for a particular contract or class of contracts, it should also consider the savings to successor contractors derived from “a supply of qualified, experienced service employees.”

The AFL–CIO stated that agencies should only be permitted to exempt contracts based on non-cost factors, and not on anticipated labor cost savings, after making “a strong and affirmative showing that an exemption is required in order to provide an essential government service.” This commenter added that the need to provide an essential government service in emergency circumstances could provide an appropriate basis to exempt a service contract. For example, the government’s ability to provide necessary services could be seriously impaired as a result of “a natural disaster, an act of war, or a terrorist attack [that] physically displaces incumbent employees from the geographic location in which they are employed, [making] it impossible for a successor contractor to reach such employees through any economically-reasonable efforts in order to extend the job offers required by the nondisplacement rule.”

The SEIU and Change to Win asserted that the agency exemption authority should be narrowly construed and that agencies should be required to substantiate the findings on which they base an exemption. These commenters further stated that an agency should exempt a contract only if the agency can present clear proof that application of the Executive Order to the contract would seriously impair the ability of the Federal Government to procure services, such as in circumstances where “the agency cannot procure the needed services if the Executive Order is applied.” They added that there should exist an “irrebuttable presumption that the Executive Order does not impair the ability of the Federal Government to procure services” where, in the past, a Federal service contract has involved the successor hiring all or most of the predecessor’s workers, because it has been demonstrated that the agency is able to procure those services with a carryover workforce. Concerned that a broad application of the waiver authority could defeat the purpose of the Executive Order, the SEIU and Change to Win stated that the agency waiver provision of the Executive Order “could not have been meant to create a means by which agencies could easily exempt some or all of their service

contracts.” Like the AFL–CIO, they asserted that anticipated labor cost savings, including the use of a workforce with less seniority, should never be an appropriate justification for an agency exemption.

As with other exemptions applicable to labor standards, the Department interprets the exemption authority of the agencies under Section 4 of the Executive Order to be narrow. The Executive Order states that the Federal Government’s procurement interests in economy and efficiency are served when the successor contractor hires the predecessor’s employees. This conclusion is predicated on the determination that a carryover workforce reduces disruption to the delivery of services during the period of transition between contractors and provides the Federal Government the benefits of an experienced and trained workforce that is familiar with the Federal Government’s personnel, facilities, and requirements. Therefore, the Executive Order reflects a presumption that nondisplacement is in the interest of the Federal Government for each contract, class of contracts, subcontract, or purchase order, and the head of a contracting department or agency should only exercise exemption authority in those instances when the presumption can be clearly overcome based on a finding that nondisplacement would not serve the purposes of the Executive Order or would impair the ability of the Federal Government to procure services on an economical and efficient basis. The basis for such a finding must not be arbitrary and capricious. The regulations require a reasoned and transparent written analysis to support the decision to claim the exemption, because the Executive Order provides that it is normally in the government’s interest to use a carryover workforce.

In the proposal, the Department specifically requested comments concerning proposed § 9.4(d) and what, if any, specific guidance the regulation should provide regarding the consideration of cost and other factors in exercising an agency’s exemption authority, including guidance regarding what information should be included in the agency’s written analysis supporting a decision to exercise exemption authority. For example, the Department sought comments on what costs would be most appropriately considered in determining whether application of the Executive Order’s requirements would not serve the purposes of the Executive Order or would impair the ability of the Federal Government to procure services on an economical and efficient basis,



and how much weight should be given to such costs. Although the AFL-CIO and the SEIU and Change to Win responded concerning whether the regulation should restrict a contracting agency's ability to exercise the exemption based solely on a demonstration that the cost of the predecessor contractor's workers is greater than the cost of hiring new employees, no specific responses were received to other related inquiries, such as how an agency could project cost savings, whether a contracting agency should be prohibited from making projections based on how it believes a successor contractor may reconfigure the contract or wages to be paid, and what non-cost factors are most appropriately considered in determining whether application of the Executive Order's requirements would or would not serve the purposes of the Executive Order or impair the ability of the Federal Government to procure services on an economical and efficient basis, and how much weight should be given to such non-cost factors.

After careful consideration of the comments received, and based on the purposes of the Executive Order, the Department believes it is appropriate to add language to § 9.4(d)(4) explaining the framework and factors that may be used as well as what factors shall not be used, when conducting an analysis of relevant facts in order to make an exemption decision. Language has also been added to clarify that the failure to properly make such a written analysis shall render the exemption inoperative and require the inclusion of the clause in Appendix A of the final rule in the solicitation and any resulting contract, subcontract, or purchase order, or class of contracts, subcontracts, or purchase orders.

An agency determination that the nondisplacement requirements would not serve the purpose of the Executive Order, or would impair the ability of the Federal Government to procure the services on an economical and efficient basis, must be supported with a detailed written analysis. Such a written analysis, among other things, shall compare the anticipated outcomes of hiring predecessor contract employees against those of hiring a new workforce. The consideration of costs and other factors should reflect the basic finding in the Executive Order that the government's procurement interests in economy and efficiency are normally served when the successor contractor hires the predecessor's employees, and should demonstrate how, in the particular factual circumstances, the finding does not apply. As discussed

earlier, because the Executive Order simply requires the successor to offer a job to the predecessor's employees, and because of the minimum wage and fringe benefit rates applicable to employees that are independently established by the requirements of the SCA, the contracting agency's exemption decision should rarely take wage and fringe benefit rates into account. Therefore, a contracting agency's decision to exercise the exemption should rarely be based on a demonstration that the wages and fringe benefits paid to the predecessor contractor's workers are in some manner greater than the wages and fringe benefits to be paid to new employees. Instead, the written analysis typically must demonstrate that the cost savings other than wages and fringe benefits clearly outweigh the benefits of retaining the predecessor's workers under the criteria provided in Section 4 of the Executive Order.

As for factors other than cost, the Executive Order presumes that "a carryover work force reduces disruption to the delivery of services during the period of transition between contractors and provides the Federal Government the benefits of an experienced and trained work force that is familiar with the Federal Government's personnel, facilities, and requirements." In order for an agency to exempt itself from the requirements of the Executive Order, an agency must overcome this presumption by demonstrating why use of the carryover workforce would not be beneficial and would be inconsistent with economy and efficiency. When analyzing whether the application of the Executive Order's requirements would not serve the purpose of the Order and would impair the ability of the Federal Government to procure services on an economical and efficient basis, the head of a contracting department or agency shall consider the specific circumstances associated with the services to be acquired. General assertions or presumptions of an inability to procure services on an economical and efficient basis using a carryover workforce shall be insufficient. Factors that may be considered include, but are not limited to, the following:

- Whether the use of a carryover workforce would greatly increase disruption to the delivery of services, such as during the transition period between contracts, and in its entirety would not yield an experienced and trained workforce that is familiar with the Federal Government's personnel, facilities, and requirements as pertinent to the contract, subcontract, purchase

order, class of contracts, subcontracts, or purchase orders at issue and would require extensive training to learn new technology or processes that would not be required of a new workforce.

- Emergency situations, such as a natural disaster or an act of war, that physically displace incumbent employees from the locations of the service contract work and make it impossible or impracticable to extend offers to hire as required by the Order.

With respect to the job performance of the predecessor contractor's workforce, a contract, subcontract or purchase order may be exempted under Section 4 of the Order if the head of the contracting department or agency reasonably believes, based on the predecessor employees' past performance, that the entire predecessor workforce failed, individually as well as collectively, to perform suitably on the job and that it is not in the interest of economy and efficiency to provide supplemental training to the predecessor's workers. Under those circumstances, it would be futile to require the successor contractor to evaluate the predecessor service employees on an individualized basis, as provided in § 9.12 of the final rule, to determine whether they had performed suitably on the job. A reasonable belief that some subset of the predecessor's service employees failed to perform suitably on the job, standing alone, would not satisfy the exemption standards of Section 4 of the Executive Order because it would not serve the government's procurement interests in economy and efficiency to exercise exemption authority when the predecessor's workforce contains qualified service employees who are familiar with the contracting agency's personnel, facilities, and requirements. Similarly, the termination of a service contract for default, standing alone, would not satisfy the exemption standards of Section 4 of the Executive Order. Such defaults, as well as other performance problems not leading to default, may result from poor management decisions of the predecessor contractor that have been addressed by awarding the contract to another entity, and that do not warrant the exercise of exemption authority, even when such management decisions have negatively affected the overall performance of the workforce.

A head of the contracting department or agency that makes a reasonable determination that an entire predecessor contractor's workforce failed to perform suitably on the job must demonstrate that his or her belief is reasonable and is based upon credible information that

has been provided by a knowledgeable source such as department or agency officials responsible for monitoring performance under the contract. Absent an ability to demonstrate that this belief is based upon written credible information provided by such a knowledgeable source, the employees working under the predecessor contract in the last month of performance will be presumed to have performed suitable work on the contract. The head of a contracting agency or department may demonstrate a reasonable belief that an entire workforce, in fact, failed to perform suitably on the predecessor contract through written evidence that all of the employees, collectively and individually, did not perform suitably. Information regarding the general performance of the predecessor contractor is not sufficient to claim the exception. It is also unlikely that the agency will be able to make this showing where the predecessor employed a large workforce.

Narrowly circumscribing an agency's ability to exempt a contract, subcontract, or purchase order from the requirements of the Executive Order based on poor performance of the predecessor contractor's workforce is consistent with the Section 5(b)(3) of the Executive Order, which expressly contemplates evaluating employee performance on an individual basis. It also ensures that an agency will not claim the exemption based on deficiencies of the predecessor contractor, even when those deficiencies have negatively affected the quality of the predecessor contractor's workforce.

Further, we agree with the SEIU and Change to Win that the seniority of the workforce is an inappropriate and irrelevant consideration for exercising an exemption.

Finally, a contracting agency should not base an exemption determination on inherently speculative assessments of how a successor contractor might reconfigure contract work. Since a contractor may consider the size of its workforce and the job classifications that are needed in the course of determining which employees of the predecessor contractor should receive an offer of employment, the agency's interest in economy and efficiency can be preserved without having to exempt an entire contract or class of contracts from the requirements of the Executive Order.

As discussed, the successor's wage and fringe benefit costs on an aggregate basis do not generally depend on whether its employees come from the predecessor's workforce, and thus are

not a permissible basis for an agency exemption decision, absent exceptional circumstances. This is consistent with the presumption in the Executive Order that the Federal Government's procurement interests in economy and efficiency are served when the successor contractor hires the predecessor's employees. Moreover, except with respect to the nondisplacement obligation, the Executive Order does not preclude contracting agencies from considering aggregate wage and fringe benefit costs at the solicitation and award stages. For example, a contracting agency may reconfigure a contract at the solicitation stage in order to reduce costs (including aggregate wage and fringe benefit costs) by, for example, consolidating sites of performance, and it may also consider bidders' calculations of aggregate wage and fringe benefit costs in making contract awards as well. To consider such costs in connection with an exemption decision, however, would mean that service employees on the predecessor contract would have no right of first refusal of employment on such a reconfigured or lower-cost successor contract. Such an outcome would be neither consistent with the presumptions and findings of the Executive Order nor be necessary to ensure that contracting agencies have sufficient flexibility to consider the full range of potential costs at the solicitation and award stages.

Of course, there may be exceptional circumstances in which a contracting agency could consider wage and fringe benefit costs in exercising its exemption authority. As noted, a contracting agency could exercise its exemption authority in emergency situations, such as a natural disaster or an act of war, that physically displace incumbent employees from the locations of the service contract work and make it impossible or impracticable to extend offers to hire as required by the Order. It could also exercise its exemption authority when a carryover workforce in its entirety would not constitute an experienced and trained workforce that is familiar with the Federal Government's personnel, facilities, and requirements but rather would require extensive training to learn new technology or processes that would not be required of a new workforce. In each of these two scenarios—in which exigent circumstances may make the use of a carryover workforce prohibitively expensive—a contracting agency could consider wage and fringe benefit costs in deciding whether to exercise its exemption authority. There may be

other, similar circumstances in which the cost of employing a carryover workforce on the successor contract would be prohibitive, and wage and fringe benefit costs could be considered in such circumstances, as well. Absent such truly exceptional circumstances, however, a contracting agency may not consider wage and fringe benefit costs in making an exemption decision for the reasons described above.

The Department did not change the regulations to provide for an "irrebuttable presumption that the Executive Order does not impair the ability of the Federal Government to procure services" under a service contract where, in the past, the contract has involved the successor hiring all or most of the predecessor's workers, as requested by the SEIU and Change to Win. Circumstances surrounding service contracts can change. The Department concludes that such a provision would exceed the standard in Section 4 of the Executive Order.

Language has been added to § 9.4 stating that the written analysis shall be prepared no later than the solicitation date and retained in accordance with FAR 4.805. 48 CFR 4.805. This addition is intended to clarify that the written analysis and the exemption determination are to be made contemporaneously, and that the written analysis is to be retained and made available for disclosure in a manner consistent with the President's commitment to openness and transparency in government.

#### Section 9.4(d)(5) Reconsideration of Exemption Decisions

Three commenters addressed the issue of whether agency decisions to exempt contracts are subject to challenge or review. Both the Chamber and the SEIU and Change to Win noted that the proposed regulations do not provide for any review of an agency decision to exempt a contract, subcontract or purchase order from coverage of the Executive Order. The SEIU and Change to Win and the AFL-CIO asserted that exemption decisions should be reviewable by and appealable to the Secretary of Labor. The SEIU and Change to Win believe that some oversight is necessary to ensure that an agency exemption is in full compliance with the Executive Order; otherwise, "the Secretary would be abdicating her responsibility" to ensure compliance with the Executive Order and, by allowing agencies to exempt contracts without some form of external review, would be warranting "a breach of fundamental due process." They suggested an administrative process

through which interested parties could challenge, and the Department of Labor could review, an agency's exemption decision. The AFL-CIO requested that the final rule require administrative review and Departmental approval of an agency's contract exemption decision in advance of the contract solicitation date.

After careful consideration, the Department has decided not to add provisions for Departmental review of agency exemption decisions because it is the Department's view that the Executive Order does not provide for such review. The Department's final rule is intended to ensure that agencies exercise exemption authority appropriately based on proper consideration of the relevant factors. Such safeguards, rather than Departmental review, are designed to ensure that agencies do not exempt contracts from the nondisplacement protections of the Executive Order in an arbitrary or capricious manner. However, the Department has added language stating that any requests for reconsideration of an exemption decision shall be directed to the head of the relevant contracting department or agency. Such reconsiderations would, of course, be final agency actions appealable in accordance with the Administrative Procedure Act, 5 U.S.C. 701-06.

#### Contracts Involving the Marine Industry

Finally, the Marine Engineers Beneficial Association (MEBA) requested that the final rule exempt service contracts involving U.S. Coast Guard Licensed Officers because application of the nondisplacement requirements would allegedly disrupt longstanding hiring practices in the maritime industry. Similarly, the AMA and the Seafarers International Union (SIU) requested that the final rule exempt the maritime industry because application of the Executive Order would "over-ride and cancel long-established industry collectively bargained obligations and practices and frustrate, rather than further, the underlying goals of that Order." After consideration, the Department has decided not to add a provision exempting service contracts involving U.S. Coast Guard Licensed Officers specifically or the maritime industry in general because the Executive Order does not provide the Secretary with such authority.

In addition, the Department believes that the provisions governing exemption authority, as presently drafted, suffice to address the concerns raised by the MEBA, the AMA, and the SIU.

#### Subpart B—Requirements

Proposed subpart B established the requirements that contracting agencies and contractors shall undertake to comply with the nondisplacement provisions.

##### Section 9.11 Contracting Agency Requirements

Proposed § 9.11(a) provided the regulatory requirement to incorporate the contract clause specified in Appendix A in covered service contracts, and solicitations for such contracts, that succeed contracts for performance of the same or similar services at the same location. Appendix A of the proposed rule established the employee nondisplacement contract clause to implement Section 5 of Executive Order 13495. 74 FR 6105 (Feb. 4, 2009). Paragraph (e) of proposed Appendix A required the contractor to include, in every subcontract entered into in order to perform services under the prime contract, provisions to ensure that each subcontractor honors the requirements of paragraphs (a) through (b) of the employee nondisplacement contract clause with respect to the employees of a predecessor subcontractor or subcontractors working under the contract, as well as employees of a predecessor contractor and its subcontractors. Under proposed Appendix A, the subcontract must also include provisions ensuring that the subcontractor will provide the contractor with the information about the employees of the subcontractor needed by the contractor to comply with paragraph (c) of the employee nondisplacement clause. Paragraph (d) of proposed Appendix A concerned sanctions and remedies for noncompliance with the nondisplacement contract clause. Proposed Appendix A also set forth additional provisions necessary to implement the Order. With the exception of a provision that addressed recordkeeping, similar contract clause provisions appeared in the earlier version of part 9. *See* 62 FR 28188 (May 22, 1997). The additional provisions would appear in paragraphs (f) through (i) of the nondisplacement contract clause. Specifically, proposed paragraph (f) provided notice that under certain circumstances the Contracting Officer will withhold, or cause to be withheld, from the prime contractor funds otherwise due under the subject contract or any other Government contract with the same prime contractor for violations of the Executive Order or these regulations. Paragraph (g) of Appendix A required the contractor to

maintain certain records to demonstrate compliance with the substantive requirements of part 9, and specified the records to be maintained. Paragraph (h) required the contractor, as a condition of the contract award, to cooperate in any investigation by the contracting agency or the Department into possible violations of the provisions of the nondisplacement clause and to make records requested by such official(s) available for inspection, copying, or transcription upon request. Paragraph (i) provided that disputes concerning the requirements of the nondisplacement clause would not be subject to the general disputes clause of the contract. Instead, such disputes are to be resolved in accordance with the procedures in part 9.

The Department received three comments on the contract clause provision. The PSC commented that it was concerned that if the Department and the FARC contract clauses are not identical then it would prevent efficient administration of the Executive Order. The PSC recommended that the Department not include the contract clause proposed at Appendix A, but instead, explicitly incorporate by reference the mandatory contract clause promulgated in the FAR. The PSC also stated that the final rule should include a provision similar to that found in the SCA regulations at 29 CFR 4.5(c) indicating that when a contract is not initially considered to be covered by the SCA but is later determined to be, in fact, SCA-covered that the Contracting Officer unilaterally modify the contract to include the relevant SCA clause and wage determination. The PSC commented that a similar provision should be included in part 9 to ensure the incumbent contractor's obligation to timely deliver to the Contracting Officer a list of service employees performing on the contract. The Chamber commented that a "safe harbor" provision is necessary for circumstances where the contracting agency erroneously failed to include the nondisplacement contract clause in a contract. It asserted that retroactive application of the clause during the course of the contract would result in "chaos or significant liability." The Chamber stated that if contract performance had begun with non-predecessor contractor employees, the successor contractor would be required to terminate its workforce in sufficient numbers to accommodate any qualified workers or pay back wages to workers who were denied their right to an offer of employment. The Chamber also argued that a contracting agency's

determination that a contract is not subject to the provisions of the Executive Order because it is not for the same or similar service, or for any other reason, should be dispositive for the duration of the contract.

The Small Business Administration, Office of Advocacy (SBA) sought clarification concerning the effect compliance with the proposed rule would have on non-unionized successor contractors. Specifically, it asked whether a successor contractor who hires a predecessor contractor's employees under Executive Order 13495 will be deemed a successor to the predecessor's collective bargaining agreement under the NLRA, 29 U.S.C. 151–169. It also suggested that the Department disclose in contract bidding materials whether or not the predecessor contractor has a collective bargaining agreement and whether it is a union shop. The SHRM also inquired about the possible interaction of the proposed rule with the NLRA.

In response to the PSC's comments, the Department notes that the Executive Order requires the FARC and the Department to consult in regards to drafting regulations that are required for implementation of the Order. The Department has consulted with the FARC and will continue to work with the FARC to promote consistency in the regulations.

The Department understands the concern raised by the Chamber; however, we believe that inclusion of a "safe harbor" provision in the regulation would be inappropriate and would exceed the Secretary's authority under the Executive Order. The Department also notes that a mandatory contract clause expressing a "significant or deeply ingrained strand of public procurement policy," such as the clause mandated by Executive Order 13495 and its implementing regulations, "is considered to be included in a contract by operation of law." *S.J. Amoroso Constr. Co. Inc., v. United States*, 12 F.3d 1072, 1075 (Fed. Cir. 1993); see also *Office of Federal Contract Compliance Programs, United States Dep't of Labor v. UPMC Braddock, UPMC McKeesport, and UPMC Southside*, Case No. 08–048, 2009 WL 1542298, at \*3 (Admin. Rev. Bd. May 29, 2009). Therefore, the Department concludes that it is not necessary to include a provision in the final rule mirroring 29 CFR 4.5(c), as suggested by the PSC, in order to require the Contracting Officer to modify such a contract by adding the clause required by Executive Order 13495 and the final rule. However, where the provisions of the Executive Order were incorrectly

omitted from a contract or a contract solicitation, the Department shall, consistent with the Executive Order, employ informal alternative dispute resolution to remedy the situation and may require the retroactive application of the nondisplacement requirements of the Executive Order and its implementing regulations. Additionally, in those instances where the Department is notified of the potential misapplication, of the contract clauses (such as the improper inclusion or omission of those clauses) prior to contract award, the Department will notify the contracting agency and provide advice concerning how to revise the solicitation. In response to comments, the Department added paragraph (f)(1) to Appendix A to require the predecessor contractor to provide a certified seniority list to the Contracting Officer not less than 30 days before completion of the contract. Where changes to the workforce are made after the submission of the list provided 30 days before completion of the contract, the predecessor contractor shall furnish an updated certified list to the Contracting Officer not less than 10 days before completion of the contract. See § 9.12(e) for further discussion of this change to the contract clause. Proposed paragraph (f) has been renumbered as (f)(2).

Concerning the possible effect of the final rule on an employer's obligations under the NLRA, it is the Department's conclusion that any statement about the potential interplay between the nondisplacement provisions of this final rule and the NLRA would exceed Departmental authority; the Department does not administer or enforce the NLRA and the NLRB has not ruled on whether a successor contractor under these or similar circumstances would also be a successor in interest for NLRA purposes. The Department declines the SBA's suggestion that the Department supplement the bidding materials of contracting agencies with information concerning whether the predecessor has a collective bargaining agreement and a unionized workforce; such action would exceed the Department's responsibilities under Executive Order 13495. When a collective bargaining agreement governs the wage rates and fringe benefits of service employees employed on the predecessor contract, the provisions of section 4(c) of the SCA require the successor contractor to pay no less than the predecessor's contractor's collective bargaining agreement rates.

Proposed § 9.11(b) specified that contracting agencies must provide notice to incumbent service employees when the contract on which they are

employed will be awarded to a successor contractor. Under the proposed language in Appendix B, the Contracting Officer shall provide written notice to such service employees of their possible right to an offer of employment by either posting a notice in a conspicuous place at the worksite or delivering it to the employees individually. Under the proposal, where a significant portion of the incumbent contractor's workforce is not fluent in English, the notice shall be provided in both English and the language with which the employees are more familiar. The Department would translate the notice into several foreign languages and make the English and foreign language versions available in a poster format to contracting agencies via the Internet in order to allow easy access; however, another format with the same information may be used. Multiple foreign language notices would be required where significant portions of the workforce speak different foreign languages and there is no common language. If, for example, a significant portion of a workforce spoke Korean and another significant portion of the same workforce spoke Spanish, then the contracting agency would need to provide the information in English, Korean, and Spanish. Under those circumstances, providing the information only in English and Korean typically would not provide the notice in a language with which the Spanish speakers are more familiar than English.

Proposed § 9.11(b) did not provide for notice through electronic communications; instead, the Department sought comments as to whether allowing contracting agencies an electronic notification option, in lieu of physical posting or providing a paper copy to the worker, will provide the agencies greater flexibility and efficiency without sacrificing the quality of the information provided to workers, especially when contract work is performed at a location that is remote from procurement staff.

The Department received several comments on the notification requirements in proposed § 9.11(b). The U.S. Air Force Installations & Sourcing Division stated that because the Contracting Officer has no contact information for contractor employees, and because the contract clause already puts the contractor on notice regarding its responsibilities with respect to nondisplacement, the requirements for agency contracting personnel to notify employees and the contractor of their rights and responsibilities are burdensome and redundant.

A Navy Labor Advisor commented that requiring the successor contractor to distribute the notices would result in a collection of Personal Identifiable Information (PII) in the form of employee mailing and email addresses. He suggested that because the contracting agency has a direct relationship with only the prime contractor, the requirement for direct notice to the employees should be placed upon the prime contractor. Furthermore, this commenter expressed the concern that contracting agency acquisition personnel are already overburdened and that, "regardless of the good and honorable intentions of contracting agency acquisition officials, the notice requirements will likely *not* get accomplished routinely as currently written into the Part 9 regulations." However, if the requirement to provide the notice remains with the contracting agency, he added, the contracting agency should be allowed to distribute the notice via a general electronic posting, since service employees often work in facilities not controlled by the contracting agency. The AFL-CIO commented that providing electronic notification to employees is reasonable, assuming the agency has determined that the workforce has the ability to receive the e-mail. This commenter added that the agency should also be required to physically post a copy of the notice at the job site. The PSC stated that e-mail notification would encourage compliance with the proposed rule; however, such e-mail notification would only be sufficient when employees hold e-mail accounts maintained by the predecessor contractor or government.

Concerning the proposed requirement that notice be provided in English and, when appropriate, in other languages, the HR Policy Association suggested that the final rule clarify what constitutes a "significant" portion of the workforce in terms of how many employees speak a language other than English, as the notification requirement would put a burden on the successor contractor if it would have to create notices and new offer letters in multiple languages if it was determined that a significant portion of its workforce spoke a language other than English. A Navy Labor Advisor, along with the U.S. Air Force Installations and Sourcing Division, also stated that because the incumbent contractor knows best the languages of its employees, it should be responsible for distributing notices.

It remains the Department's view that notifying service employees of their possible right to an offer of employment is an effective means by which to ensure

compliance with the Executive Order. However, we do agree with the aforementioned commenters that the obligation to provide the notice should rest with the contractor, and not the contracting agency. Section 9.11(b) has been revised to reflect that the "Contracting Officer will ensure that the predecessor contractor provide written notice to service employees of the predecessor contractor of their possible right to an offer of employment" and that "Contracting Officers may advise contractors to provide the notice set forth in Appendix B \* \* \*". This is consistent with "existing" contractor obligations under the SCA with regards to providing notice of compensation through posting "or the delivery" of the applicable wage determination, and SCA poster. 29 CFR 4.183, 4.184. Therefore, the Department believes that placement of this obligation with the contractor is appropriate and best accomplishes the goal of employee notification.

Concerning providing notice through the use of electronic communications, the Department has decided, after careful consideration of the comments, to allow contractors to distribute the notices through the use of effective electronic communications. The Department has added language to the rule allowing contractors to use an effective electronic mail communication, and describing effective electronic communication. To be effective, such a communication must result in an electronic delivery receipt or some other reliable confirmation that the intended recipient received the notice. 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. The Department recognizes that reliance on electronic communication will increase in the future and often may provide an inexpensive and reliable way to communicate information quickly. For example, using electronic mail may be the most effective method to notify service employees who work in facilities not controlled by the contractor. The Department disagrees with the PSC that sufficient e-mail notification would require employees to have email accounts maintained by the predecessor contractor or the government. Additionally, the Department declines to implement the suggestion from the Navy Labor Advisor that contracting agencies be allowed to distribute the notice via a general electronic posting. The Department believes that providing for individual

electronic notices to workers will result in the affected workers receiving the notice and appropriately addresses the concern of providing notice to service employees.

Concerning the proposed requirement that the notice be provided in English and in other languages, as appropriate, the Department notes that this requirement is similar to regulatory requirements implementing other DOL-administered and enforced statutes, such as the Family and Medical Leave Act, the H-2A provisions of the Immigration and Nationality Act, the Migrant and Seasonal Agricultural Worker Protection Act, and Executive Order 13496, Notification of Employee Rights Under Federal Labor Laws. The term "significant portion" has not been defined under these other regulations, and the lack of a definition or bright-line test has not prevented employers from complying with the requirement. For these reasons, the term is not defined in the final rule. If there is a question of whether a portion of the workforce is significant and the Department has a poster in the language common to those workers, the notice should be posted in that language.

Proposed § 9.11(c) requires the Contracting Officer to provide the list of employees employed by the predecessor contractor, referenced in proposed § 9.12(e), to the successor contractor and, on request, to employees or their representatives. A Navy Labor Advisor suggested that two lists be required: an alphabetical list, provided long before the end of the predecessor contract and used to comply with the Executive Order, and a list organized by date of hire, provided at the beginning of contract performance and used for compliance with SCA-mandated wage and fringe benefit terms. This commenter asserted that the use of two separate lists would protect more senior employees from discrimination by concealing their seniority during the transition process. The Department's consideration of this comment can be found in the discussion of proposed § 9.12(e). No other comments were received on this provision and the final rule implements this paragraph as proposed.

Proposed § 9.11(d) addressed Contracting Officers' responsibilities regarding complaints of alleged violations of part 9. As under the prior version of part 9, the proposed rule provided that contracting agencies would initially receive complaints of alleged violations of the nondisplacement requirements and, in a compliance assistance mode, provide information to the complainant and

contractor about their rights and responsibilities under the employee nondisplacement provision of the contract.

Under the proposed rule, contracting agencies would not be obligated to forward to the Wage and Hour Division (WHD) any complaint that is withdrawn because of this compliance assistance. Thus, for example, a Contracting Officer would not need to forward to the WHD a complaint that an employee withdraws because the employee was previously not aware of the application of a particular exclusion. In all other cases, the contracting agency would forward certain information necessary for the Department to determine compliance. Under the proposal, the Contracting Officer, within 30 days of receipt of a complaint, would forward to the WHD headquarters any allegations of any violation of this part; 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 agency; information concerning known settlement negotiations between the parties (if applicable); and other pertinent information the Contracting Officer chooses to disclose. The proposal also required the Contracting Officer to provide copies of the information to the successor contractor and the complainant. To assist the contracting agency in providing information to the WHD and to protect the interests of the contracting agency, the proposal provided for the contracting agency to conduct an initial review of any nondisplacement complaint, including obtaining statements of the positions of the parties and inspecting the records of the predecessor and successor contractors (and making copies or transcriptions thereof); questioning the predecessor and successor contractors and any employees of these contractors; and requiring the production of any documentary or other evidence deemed relevant to determine whether a violation of this part had occurred. Contracting agencies would be obligated to refer questions of interpretations regarding part 9 to the nearest WHD local office.

The Department received few comments on this provision. The SEIU and Change to Win as well as the AFL-CIO both commented that the 30-day period for the contracting agency to forward complaints to the WHD

constituted an appropriate amount of time in order for complaints to be handled expeditiously. A Navy Labor Advisor requested the elimination of the entire provision, suggesting that WHD handle all complaints. This commenter claimed that "there is no basis for involving the contracting agency in the receipt or resolution of complaints." In addition, contracting officers from Federal agencies represented on the FARC expressed their concerns with the implementation of this proposed requirement. After careful consideration of these comments, the Department has revised § 9.11(d) to limit the Contracting Officer's responsibilities with regard to handling complaints. The Contracting Officer is no longer responsible for initial review of or compliance assistance with complaints. Instead, the Contracting Officer shall be responsible for reporting information to the WHD within 14 days of WHD's request. Because the contracting agency no longer has the responsibility of reviewing complaints, the Department believes 14 days is an appropriate timeframe within which to require production of information necessary to evaluate the complaint. Further consideration of this comment can be found in the discussion of § 9.21(a).

#### Section 9.12 Contractor Requirements and Prerogatives

##### General

Proposed § 9.12 articulated contractors' requirements and prerogatives under the nondisplacement requirements. The proposed section included the general obligation to offer employment, the method of the job offer, exceptions, permitted staffing reductions, obligations near the end of the contract, recordkeeping, and obligations to cooperate with reviews and investigations.

Proposed § (a)(1) of this section implemented the Executive Order requirement that no employment openings may be posted before the successor contractor has offered employment to the employees on the predecessor contract. Under the proposed rule, except as provided under the exclusions listed in proposed § 9.4 and the exceptions in proposed § 9.12 paragraphs (c) and (d), a successor contractor or subcontractor could not fill any employment openings under the contract prior to making bona fide, express offers of employment, in positions for which the employees are qualified, to those employees employed under the predecessor contract whose employment would be terminated as a result of award or expiration of the

contract under which they were hired. Except as provided under the aforementioned exclusions and exceptions, all employees working on the contract at the time of contract completion, regardless of length of tenure, would be entitled to such an offer. The successor contractor and its subcontractors would be required to make a bona fide, express offer of employment to each employee and state the time within which the employee must accept such offer, but in no case would the period within which the employee must accept the offer of employment be less than 10 days.

The HR Policy Association suggested that the final rule should permit a successor contractor to post and offer positions to non-predecessor employees within the same time frame—at least 10 days—during which the successor contractor offers positions to predecessor employees, in case the predecessor employees do not accept the job offers. The HR Policy Association also commented that proposed § 9.12(a)(1) implied that if an employee was laid off because, for instance, the successor contract has fewer positions in a particular job, the successor contractor must permit the otherwise displaced employee to be offered other positions for which he or she is arguably minimally qualified, including jobs he or she never performed before. This commenter recommended that the final rule clarify that the right of first refusal exists for predecessor employees who would perform the same job with the successor employer. The SEIU and Change to Win commented that proposed § 9.12(a)(1) did not specify the manner in which such offers should be made.

The Department disagrees with the HR Policy Association's assertion to the extent that it suggests that the successor contractor would be required to offer a position to an employee who is not qualified for the position. Proposed § 9.12(b)(4) described the criteria by which a successor contractor can determine whether an employee is qualified for the position, based upon the employee's education and employment history, with particular emphasis on the employee's experience on the predecessor contract, and the Department believes this section provides appropriate guidance to successor contractors for determining whether a particular employee is qualified. The Department also disagrees with this commenter's suggested revision to allow the successor contractor to make contingent offers of employment to non-predecessor employees in the period

during which predecessor employees are considering the successor's offer. The Department notes that the HR Policy Association's suggestions to provide contingent offers to non-predecessor employees would be contrary to the express language of the Executive Order.

Proposed § 9.12(a)(2) clarified that the successor contractor's obligation to offer a right of first refusal exists even if the successor contractor was not provided a list of the predecessor contractor's employees or the list did not contain the names of all persons employed during the final month of contract performance. The Navy Labor Advisor suggested that this requirement should be eliminated entirely, asserting that the successor contractor would have no reason to know, in the absence of a seniority list, to whom it is legally required to offer employment. He also suggested that responsibility should be placed upon the predecessor contractor to provide an accurate seniority list or other information on a timely basis rather than to place what he characterized as unreasonable demands upon the successor contractor and/or the contracting agency. The SBA Office of Advocacy also commented that if a list of employees is not provided by the predecessor contractor, then the successor contractor may incur costs in trying to determine to which employees it is supposed to extend job offers. An individual commenter recommended that if the predecessor contractor fails to provide a list of incumbent employees, then "the successor contractor [should] be permitted to offer probationary employment to incoming employees, with the understanding that employment may be revoked upon a good faith finding that the employee was not previously employed." The PSC also expressed concern about a predecessor contractor failing to furnish a list of employees, and suggested that the Contracting Officer should have the authority to allocate remedies to the responsible party in an effort to encourage compliance and allocate risks of non-compliance.

After carefully considering the comments, the Department has decided to adopt the proposed language without change. The Department notes that meeting the requirement to make an offer of employment should not be burdensome because the predecessor contractor may use the list submitted to satisfy the requirements of the SCA contract clause specified at 29 CFR 4.6(l)(2) to meet its list submission requirement under part 9. In those instances where the list is not provided or is incomplete, the Department

disagrees that the nondisplacement requirements should be extinguished or altered. While sympathetic to the successor contractor's needs in such circumstances, the Department concludes that waiving the predecessor employees' right of first refusal of employment is not consistent with the Executive Order. Furthermore, the Department is not authorized under the Executive Order to make such an exception. The Department also does not agree that a successor contractor should be permitted to offer probationary employment.

Proposed § 9.12(a)(3) discussed determining the employee's eligibility for the job offer and provided related guidance. While a person's eligibility for a job offer usually would be based on whether his or her name is included on the certified list of all service employees working under the predecessor's contract or subcontracts during the last month of contract performance, a successor contractor would also be required to accept other credible evidence of an employee's entitlement to a job offer. 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 for the predecessor. The successor could verify the claim with the contracting agency, the predecessor, or another person who worked at the facility.

The Chamber asserted that the presumption that all employees on the seniority list are entitled to a right of first refusal should be reciprocal, so that the successor contractor could presume that only those employees identified on the seniority list are entitled to a right of first refusal. A Navy Labor Advisor requested that the Department provide additional examples of proof of credible evidence of entitlement to a job offer, while SEIU and Change to Win recommended that the regulations make clear that the submission of any evidence of employment is acceptable as long as such evidence is credible.

The Department disagrees with the Chamber's suggestion that only those employees whose names appear on the seniority list should be entitled to an offer of employment under the Executive Order. To deny an employee an offer because of a failure of the

predecessor contractor to meet its obligations under the Executive Order would unfairly disadvantage the employee. The final rule adopts the proposed language without change.

#### Section 9.12(b) Method of Job Offer

Proposed § 9.12(b) discussed the method of the job offer. Proposed § 9.12(b)(1) stated that except as otherwise provided in part 9, a contractor must make a bona fide express offer of employment to each employee on the predecessor contract before offering employment on the contract to any other person. The obligation to offer employment would cease upon the employee's first refusal of a bona fide, express offer to employment on the contract. Proposed § 9.12(b)(2) provided that the contractor shall state the time period within which the employee must accept the employment offer, but in no case may that time period be less than 10 days. Proposed § 9.12(b)(3) required the successor contractor to make an oral or written employment offer to each employee, and, in order to ensure that the offer is effectively communicated, to take reasonable efforts to make the offer in a language that each worker understands.

Proposed § 9.12(b)(4) clarified that the employment offer may be for a different position on the contract than the position the employee held on the previous contract. An offer of employment on the successor's contract would generally be presumed to be a bona fide offer of employment even if it was not for a position similar to the one the employee previously held, provided that the position was one for which the employee was qualified. Questions concerning an employee's qualifications would be decided based upon the employee's education and employment history with particular emphasis on the employee's experience on the predecessor contract. A successor contractor would have to base its decision regarding an employee's qualifications on credible information provided by a knowledgeable source such as the predecessor contractor, the local supervisor, the employee, or the contracting agency. For example, an oral or written outline of job duties or skills used in prior employment, school transcripts, or copies of certificates and diplomas all would be credible information. Under proposed § 9.12(b)(5), the offer of employment could be for a position providing different terms and conditions of employment than those that applied to the employee's work for the predecessor contractor, where the different terms



and conditions are not related to a desire that the employee refuse the offer or that other employees be hired. Lastly, proposed § 9.12(b)(6) provided that, where an employee is terminated under circumstances suggesting the offer of employment may not have been bona fide, the facts and circumstances of the offer and the termination will be closely examined to ensure the offer was bona fide.

Many of the comments received on proposed § 9.12(b) expressed concern with the timing of required actions, particularly the time frame between the successor contractor's receipt of the list of the predecessor contractor's employees (seniority list) from the contracting agency, the timeframe within which employees must respond to an offer of employment, and the start date of the contract. This issue is discussed in greater detail with respect to proposed § 9.12(e).

CAE USA, Inc. commented that there is a possibility that positions will be unfilled at the start of the contract, since the obligatory offer of employment to the predecessor contractor employee has a deadline for acceptance on or after the contract start date. A Navy Labor Advisor commented that this section must be supplemented with additional information because it fails to address predecessor contractor employees that may, in fact, refuse a bona fide employment offer. This commenter also suggested that the Department include the full description of how determinations of qualification would be made in the text of the final rule. TechAmerica suggested that successor contractors be given the flexibility to review the qualifications of incumbent personnel before those employees are offered employment. The HR Policy Association, the Chamber, and TechAmerica commented concerning hiring practices, stating that the final rule should identify whether the application of the successor contractor's "higher standards for employment" or "normal hiring validation processes" (e.g., requiring passing a drug test as a condition of employment) would be permissible in determining whether an employee is qualified. The SBA Office of Advocacy sought clarification on whether successor contractors can vet the predecessor employees through means such as, but not limited to, interviews, drug tests, and security tests.

The AFL-CIO commented that the final rule should require all employment offers by successor contractors to be made in writing in order to reduce disputes about whether offers were made and whether they were bona fide. This commenter added that

having the offer in writing would be particularly helpful for workers who are not fluent in English. The SEIU and Change to Win stated that the proposed requirement that an employer "take reasonable efforts to make an offer in a language that each worker understands" should require that offers be made in English and in a language that the worker understands. The International Union of Operating Engineers (IUOE) commented that to ensure that service workers receive an offer that affords prevailing wage protection, there should be no presumption that an offer of employment to a lower paying job is a bona fide offer. The IUOE suggested that the positions offered should, as a general rule, be in the same classifications or in higher paid classifications for individual workers, stating that this section as proposed will exacerbate the existing problem of deliberate misclassification of prevailing wage workers by creating an additional incentive to misclassify workers. The AFL-CIO stated that offers for lesser pay or benefits cannot presumptively be considered bona fide, and should only be considered bona fide if the successor contractor proves by clear and convincing evidence that the reasons for the offer are not related to a desire to reduce labor costs, to induce the incumbent employee to refuse the offer, or to ensure that other employees are hired for the offer. The SEIU and Change to Win stated that to allow an employer to offer a lesser position when the person's equivalent position is available cannot be considered a "bona fide offer of employment." They suggested that the final regulations provide that a "bona fide offer of employment" must be for an equivalent or better position under the successor contract as long as such a position remains open. The SEIU and Change to Win also commented that the provision as proposed is inadequate because it would allow successor contractors to hire employees who did not work for the predecessor contractor at higher wages and benefits than it offers the predecessor's employees for the same position.

The Chamber commented that if the provision allowing the successor to offer employment to a position with different terms and conditions did not exist, Federal contractors would be significantly disadvantaged when attempting to craft appropriate bids and could easily be locked into inefficient business models that would further hinder the provision of economic and efficient services. This commenter suggested that clearer language creating

a presumption in favor of the employer and requiring more than a suggestion that the offer was not bona fide to rebut the presumption would go a long way toward making this important part of the regulations practically functional. The PSC expressed concern that the provision concerning termination after contract commencement would restrict companies from using policies of "at will" employment to terminate "employees who fail to deliver excellent services." It also stated that such examination of a successor Federal service contractor's termination decisions would contradict or preempt state at-will employment laws, and that the proposed rule does not indicate the standard that will be used in government investigations to determine whether a termination was bona fide or pretextual.

After a careful review of the comments, the Department has concluded that a successor contractor may apply employment screening processes (i.e., drug tests, background checks, security clearance checks, and similar pre-employment screening mechanisms) only when such processes are provided for by the contracting agency, are conditions of the service contract, and (in addition to being otherwise consistent with applicable Federal and state law) are consistent with the Executive Order. Conversely, a successor contractor may not impose its own hiring standards (such as college degree requirements for particular positions) in making determinations regarding whether an employee of a predecessor contractor is qualified. Contracting agencies and prospective bidders and successor contractors may exchange views during the contracting process about the need for particular employment screening processes. For example, a prospective bidder may inform a contracting agency that the bidder requires drug testing of all of its service employees and may recommend that the contracting agency provide for such drug testing in connection with the service contract; whether drug testing would be permitted in this circumstance would depend upon whether the contracting agency agrees with the bidder and provides for such testing as provided in this rule. With respect to determining employee qualifications, the Executive Order focuses on an employee's past performance, and it specifically provides that a right of first refusal need not be offered to an employee whom the contractor or any of its subcontractors reasonably believes, based on the particular employee's past performance, has failed to perform

suitably on the job. Consistent with the Executive Order, the final rule provides that questions concerning an employee's qualifications should be decided based upon the employee's education and employment history, with particular emphasis on the employee's experience on the predecessor contract. A contractor's hiring standards or employment screening processes typically would not measure the employee's performance on the predecessor contract, and use of such standards or processes thus could not be used to determine whether an employee is qualified unless a contracting agency provided for use of such standards or processes and made them a condition of the service contract. Such standards or processes would, of course, also need to be consistent with the Executive Order; a contracting agency or successor contractor could not, for example, determine that otherwise-qualified service employees on a predecessor contract would not be qualified to perform the same or similar services on a successor contract because they lack a college degree. The Department has added language to § 9.12(b)(1) to reflect these changes.

In response to concerns raised by some commenters regarding a successor contractor offering employment to a qualified employee on different terms and conditions than those under which the employee worked for the predecessor contractor, the Department notes that nothing in the Executive Order or in the SCA prevents a contractor from restructuring its staff and putting its employees into other positions for which they are qualified or from subjecting them to different terms and conditions of employment. The Department does not agree that continuing to provide contractors on Federal service contracts with such flexibility will lead to an increase in employee misclassification. The Department also disagrees that offers must be made in writing to be sufficient. Adequate oral or written offers could satisfy the requirements of the Executive Order.

The Department advises that proposed § 9.12(b)(6) concerns only those terminations that suggest earlier employment offers were not bona fide. Such terminations would circumvent the requirements of the Executive Order. Because the Secretary is charged with enforcing compliance with the Executive Order, it is appropriate for her to closely examine terminations that suggest a failure to provide a bona fide offer of employment. The Department does not agree that § 9.12(b)(6) will conflict with the requirements of state

employment laws, but notes that the Executive Order, and its implementing regulations, will provide controlling law concerning the nondisplacement of qualified workers under Federal Government service contracts. The Department also does not believe that it is necessary to articulate a standard in the final rule that will be used in termination investigations to determine whether an employee received a bona fide offer of employment. The final rule implements proposed § 9.12(b) with the modification noted above. No other changes were made to the proposed provision.

#### Section 9.12(c) Exceptions

In proposed § 9.12(c), the Department addressed the exceptions to the general obligation to offer employment under Executive Order 13495. These exceptions are included in the contract clause established in section 5 of the Order and are distinct from the exclusions discussed in § 9.4. The exceptions specify both certain classes of contracts and certain employees excluded from the provisions of Executive Order 13495. The exception from the successor contractor's obligation to offer employment on the contract to employees on the predecessor contract prior to making the offer to anyone else does not relieve the contractor of other requirements of this part (e.g., the obligation near the end of the contract to provide a list of employees who worked on the contract during the last month). The exceptions are to be construed narrowly and the contractor will bear the burden of proof regarding the appropriateness of claiming any exception.

Under proposed § 9.12(c)(1), a contractor or subcontractor would not be required to offer employment to any employee of the predecessor who will be retained by the predecessor contractor. The contractor would be required to presume that all 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 based upon credible information provided by a knowledgeable source such as the predecessor contractor, the employee, or the contracting agency.

Proposed § 9.12(c)(2) provided that a successor contractor or subcontractor would be allowed to employ under the contract any employee who has worked for the successor contractor or subcontractor for at least 3 months immediately preceding the commencement of performance under

the contract, i.e., the first date of performance of the contract, and who would otherwise face lay-off or discharge. As with any exception to the nondisplacement requirements, a successor contractor bears the burden of showing how the exception applies. For example, a successor contractor would have to demonstrate that an employee it has employed for at least 3 months will be discharged if a position on the contract is not offered because the employee's work on another contract has expired and there are no other openings for which the employee is qualified. A successor contractor could not claim this exception to reemploy an employee who was already terminated or laid off because such a person has not been employed for the 3 months preceding the commencement of the successor contract. However, an employee would still be considered to be employed during a period of leave, such as vacation or sick leave, or a similar short-term absence.

Under proposed § 9.12(c)(3), the contractor or subcontractor would not be required to offer employment to any employee of the predecessor contractor who is not a service employee. Typically, this exception would apply to a person who is a managerial or supervisory employee on the predecessor contract. The successor contractor would be required to presume that all persons appearing on the list required by § 9.12(e), or who have demonstrated they should have been included on the list were service employees under a predecessor's Federal service contract, absent an ability to demonstrate a reasonable belief to the contrary, based upon credible information provided by a knowledgeable source such as the predecessor contractor, the employee, or the contracting agency. Information regarding the general business practices of the predecessor contractor or the industry would not be sufficient for purposes of the exception.

The Department proposed in § 9.12(c)(4) that a contractor or subcontractor would not be required to offer employment to any employee of the predecessor contractor whom the contractor or any of its subcontractors reasonably believes, based on the particular employee's past performance, has failed to perform suitably on the job. The successor contractor would be required to 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 based upon credible

information provided by a knowledgeable source such as the predecessor contractor, the local supervisor, the employee, or the contracting agency. A successor contractor could demonstrate its reasonable belief that the employee in fact failed to perform suitably on the predecessor contract through evidence of disciplinary action taken for poor performance or evidence directly from the contracting agency that the particular employee did not perform suitably. Similarly, a successor contractor could use performance appraisal information in determining whether an employee failed to perform suitably on the job; however, the Department notes that this does not require a predecessor contractor to provide performance information. Information regarding the general performance of the predecessor contractor would not be sufficient for purposes of this exemption. The Department sought comments as to whether there should be any requirement that the information supporting the contractor's or subcontractor's reasonable belief that an employee of the predecessor contractor had failed to perform suitably on the job be in writing and relatively contemporaneous with the employee's past performance.

Under proposed § 9.12(c)(5), 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 this part. The successor contractor is required to presume that all employees hired to work under a predecessor's Federal service contract did not work on one or more nonfederal service contracts as part of a single job, unless the successor contractor can demonstrate a reasonable belief to the contrary based upon credible information provided by a knowledgeable source such as the predecessor contractor, the local supervisor, the employee, or the contracting agency. Information regarding the general business practices of the predecessor contractor or the industry would not be sufficient for purposes of this exception. For instance, claims from several employees stating that a janitorial contractor reassigned its janitorial workers who previously worked exclusively in a Federal building to both Federal and private clients as part of a single job may

indicate that the predecessor deployed workers to avoid the requirements of the nondisplacement provisions.

Conversely, where the employees on the predecessor contract were deployed to Federal and other buildings as part of their job, the successor contractor would not be required to offer employment to the workers. Knowledge that contractors generally deploy workers to both Federal and other clients would not be sufficient for the successor contractor to claim the exception because such general practices may not have been observed on the particular predecessor contract.

The Department received various comments on proposed § 9.12(c). A Navy Labor Advisor requested that the final rule at § 9.12(c)(2) include language concerning the eligibility of employees on leave. The HR Policy Association commented that proposed § 9.12(c)(3) is illogical because if a successor employer determines that certain positions will be supervisory or managerial positions, it should not be obligated to hire predecessor employees into these non-service positions, even if the predecessor employer elected to treat the positions as service employee positions. The Chamber commented that the Department should eliminate the presumption that all employees included on the list by the predecessor and competitor contractor are "service employees". The Chamber suggested that if the Department maintains the presumption that all workers are service employees, then the evidentiary standard for rebutting that presumption should be changed to require only that the successor contractor have a good faith belief that the employee is not a service employee and that the Department should provide additional guidance and allow the successor contractor to use information regarding general business practices.

The Chamber also commented that the requirement that the successor contractor presume the predecessor contractor's employees would be terminated, absent a reasonable belief to the contrary based on credible evidence from a knowledgeable source, involved evidentiary standards that are too difficult to meet because a successor contractor does not necessarily have access to the predecessor contractor or employees. The Chamber suggested that the final rule eliminate the presumption that all employees will be terminated as a result of the award of a successor contract and provide additional guidance regarding what type of evidence will support this exception.

The PSC commented that "unsuitable past performance" is inadequately

defined in the proposed rule and will result in confusion and litigation. The PSC also noted that the rule does not provide sufficient guidance regarding the "evidence" on which a successor contractor may rely to determine that a prospective employee's performance is unsuitable. The PSC also felt that since an employee's poor performance is often not reflected in any formal employment action, a formal record of "disciplinary action" should not be among the criteria that a contractor must demonstrate to justify employment decisions affecting unsuitable incumbent employees. The PSC stated that the proposed rule provides little guidance on what information the predecessor contractor must provide to the successor contractor concerning the performance of employees. The SBA Office of Advocacy stated that successor contractors may not receive information about employee performance because seniority lists do not contain performance reviews, and should the predecessor contractor provide employee information, it may not be reliable since the predecessor contractor may have lost the contract due to its inability to manage personnel. The SHRM commented that the predecessor contractor may not maintain, or provide, thorough employment records, and recommended that when this occurs, the successor contractor notify the contracting agency to be relieved of its obligation to offer a right of first refusal.

The PSC commented, and TechAmerica agreed, that an employee's prior work experience is not necessarily the sole qualification for the job, and recommended that the successor contractor be allowed to not make an offer of employment to those of the predecessor's employees who are "undesirable" for reasons other than past instances of unsuitable performance. The PSC opined that few contractors would be willing to try to satisfy the proposed rule's standard for excusing a successor contractor from the obligation to offer a predecessor's employee a position on the contract. This commenter recommended that, should the Department retain the presumption that an employee's prior experience on the predecessor contract makes the employee qualified for the successor contract, the time period should be expanded to six months of continuous employment on the predecessor contract. The SHRM recommended that the final rule relieve a successor contractor of any requirement to hire any of the predecessor's employees in any situation where a predecessor contractor

retains 10% or more of its workforce employed during the 90 days preceding the completion of the Federal contract because that may indicate that the predecessor has moved its more experienced and valuable employees off the contract. Similarly, the SBA Office of Advocacy and the PSC expressed concern that, under the proposed section, a predecessor contractor might keep its best performing employees and leave the successor contractor with less qualified employees. These commenters argued that the standard for establishing non-qualification should be changed to a good faith belief by the successor contractor. The Chamber suggested that the presumption of qualification be eliminated from the proposal because it provides an incentive for the predecessor contractor to “dump” low-performing employees from other contracts onto the contract it is about to lose. The Chamber further commented that the proposed section did not provide the successor contractor with access to the information required to disprove qualification. The PSC and TechAmerica added that predecessor contractors would not want to provide employee evaluations to successor contractors because of privacy and legal concerns. The SBA Office of Advocacy and the PSC recommended that the final rule contain a safe harbor provision for those predecessor contractors who provide employee information due to the high litigation risk disclosure produces. TechAmerica also requested a safe harbor provision to protect the successor contractor from litigation brought by employees of the predecessor contractor.

The AFL-CIO stated that the final rule should require a successor contractor to support its belief in an employee's unsuitable performance with written evidence of poor performance created contemporaneously with the relied-upon disciplinary action. The SEIU and Change to Win suggested that the final regulation require a successor contractor to support its belief in an employee's unsuitable performance with written evidence of poor performance created contemporaneously with the relied-upon disciplinary action, that any poor past performance relied on be sufficient under the contractor's own policies to justify termination, and that the poor performance be equivalent to “just or proper cause” as those terms are used under collective bargaining agreements. The SEIU and Change to Win agreed with the AFL-CIO's suggestion that the final rule require a successor contractor to show that an employee engaged in a “terminable offense” as a basis for

denying to extend the employee a job offer on the contract.

Regarding the exception from the requirement to offer employment to an employee who was hired to work on the predecessor's contract and one or more nonfederal jobs as part of a single job, the Chamber suggested that the final rule eliminate the presumption that no employee was hired for more than the contract at issue, or at least change the evidentiary standard for rebutting that presumption to require only that the successor contractor have a good faith belief that the employee was employed on one or more nonfederal jobs as part of a single job. The Chamber requested additional guidance on what type of evidence will support this exception. The SEIU and Change to Win commented that it would defeat the intent of the Executive Order if the requirement to offer employment was not applied to employees who worked relatively less time on nonfederal contracts and who would face layoff because of the award of the contract to another contractor. They suggested that the final regulations provide that an employee who spends at least 59% of his or her time working on a Federal service contract and who would face layoff as a result of the contract change should not be excluded from coverage under Section 3(e) of the Executive Order.

The Department disagrees with the Chamber that the evidentiary standard required to establish the exception in proposed § 9.12(c)(1) is too difficult to meet. As the proposal indicated, credible information may be obtained from the predecessor contractor, the employee, or the contracting agency. Therefore no changes have been made to proposed § 9.12(c)(1). The Department declines the Navy Labor Advisor's request that § 9.12(c)(2) include language concerning the eligibility of employees on leave as not necessary. Such employees would clearly still be employed by the predecessor while on leave. Therefore, § 9.12(c)(2) is also adopted as proposed.

After careful review of the comments, the Department has also decided to adopt § 9.12(c)(3) without change. It is the Department's conclusion that the provision, as proposed, suffices to ensure job protection for eligible employees of the successor contractor. 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 Fair Labor Standards Act, 29 U.S.C. 203 *et seq.*, and its regulation at 29 CFR Part 541.

Also under the SCA, the contractor already bears the burden to show that the workers working on a Federal service contract are not service employees.

The Department is not convinced that evidence of past poor performance would be difficult to obtain. The Department's experience from Executive Order 12933 showed that successor contractors were able to obtain information on the predecessor's employees' job performance. The Department does not agree that, under the proposed rule, predecessor contractors will be encouraged to “dump” unsuitable employees onto expiring contracts, nor that the inclusion of a “safe harbor” provision in the regulation is appropriate or authorized by the Executive Order. The Department also does not agree that a different standard from what was proposed is needed for determining a service employee's eligibility for an offer of employment from the successor contractor. Neither lengthening the period of employment prior to the end of the predecessor contract, nor eliminating the requirement for an offer of employment when the predecessor retains a certain percentage of its workforce, would address the stated concern that the predecessor contractor may retain some of its most qualified workforce. The Department also notes that where the predecessor contractor retains some, but not all, of the workforce employed on the contract during the last month of the contract, those remaining employees will likely have more experience with the contract and contracting agency than new hires recruited by the successor contractor for the purpose of filling the contract requirements.

In response to the comments, the Department has modified the exception for unsuitable performance in § 9.12(c)(4) to include the requirement that a successor contractor must support its belief that an employee has exhibited unsuitable job performance with written credible evidence provided by a knowledgeable source to enhance the reliability of such evidence. The final rule, however, does not require that such written evidence be contemporaneous or concern a workplace offense justifying termination because it is the Department's conclusion that such requirements would be overly restrictive.

Regarding the exception from the requirement to offer employment to an employee who was hired to work on the predecessor's contract and one or more nonfederal service contracts as part of a single job, the Department notes that

this exception is required by the Executive Order and would only apply to workers of a predecessor contractor who were deployed on Federal and nonfederal service contracts. It is the Department's conclusion that generally determining eligibility for this exception should not be difficult and the Department therefore has decided to adopt § 9.12(c)(5) without change.

#### Section 9.12(d) Reduced Staffing

Proposed § 9.12(d) addressed the provision in paragraph (a) of Executive Order 13495's contract clause that allows the successor contractor to reduce staffing. 74 FR 6104 (Feb. 4, 2009).

Proposed § 9.12(d)(1)(i) allowed the contractor or subcontractor to determine the number of employees necessary for efficient performance of the contract and, for bona fide staffing or work assignment reasons, to elect to employ fewer employees than the predecessor contractor employed in performance of the work. Thus, the successor contractor would not be required to offer employment on the contract to all employees on the predecessor contract, but would be required to offer employment only to the number of eligible employees the successor believes necessary to meet its anticipated staffing pattern. Where a successor contractor does not offer employment to all the predecessor contract employees, the obligation to offer employment would continue for 3 months after the successor contractor's first date of performance on the contract. In § 9.12(d)(1)(ii), the Department proposed that if a successor contractor did not offer employment to all the predecessor contractor's service employees, the obligation to offer employment would continue for 90 days after the successor contractor's first date of performance on the contract. The successor contractor's obligation under this part would end when all of the predecessor contract employees received a bona fide job offer or the 90-day window of obligation expired. The Department sought comments on this issue.

Proposed § 9.12(d)(2) allowed the contractor, subject to provisions of this part and other applicable restrictions (including non-discrimination laws and regulations), to determine to which employees it will offer employment. Proposed § 9.12(d)(3) allowed, in some cases, a successor contractor to reconfigure the staffing pattern to increase the number of persons employed in some positions while decreasing the number of employees in others, provided the contractor

examined the qualifications of each employee so as to minimize displacement. Consistent with proposed § 9.1(b), this exception should not be construed to permit a contractor or subcontractor to fail to comply with any provision of any Executive Order, regulation, or law of the United States; therefore, a contractor could not use this exemption to justify unlawful discrimination against any worker. While the WHD would not make compliance determinations regarding Federal contractors' compliance with nondiscrimination requirements administered by other regulatory agencies, a finding by the Department's Office of Federal Contract Compliance Programs, another agency, or a court that a contractor has unlawfully discriminated against a worker would be considered in determining whether the discriminatory action has also violated the nondisplacement requirements. Under the proposal, the successor contractor's obligation would end when all of the predecessor contract employees have received a bona fide job offer or the 90-day obligation period expires. The proposed regulation provided several examples to demonstrate the principle.

The Chamber commented that the requirement to provide a right of first refusal should cease once the contract has started, since it would otherwise create an unnecessary regulatory burden. The SEIU and Change to Win took the opposite position on this issue, stating that the 90-day limit should not be included in the final rule. They asserted that to require that the predecessor's employees be offered employment at any time there is an opening for which they are qualified is consistent with one of the purposes of the Executive Order, which is to provide an experienced and trained workforce. The Department notes that the proposal struck a balance with the obligation to provide the predecessor's employees with a right of first refusal of employment and successor contractor's need to address workforce needs during the contract term. It is the Department's conclusion that to require successor contractors to make offers to predecessor employees for subsequently vacant positions more than 90 days after the successor's first day of performance on the contract would be impractical and unduly burdensome. Ninety days was selected as a reasonable period for continuing to impose an obligation to offer a right of first refusal in order to ensure that any necessary staffing adjustments during the start-up period would be covered while at the same

time discouraging attempts to manipulate the starting workforce. No other comments were received for proposed § 9.12(d) and it is adopted as proposed.

#### Section 9.12(e) Contract Obligations Near End of Contract Performance

Proposed § 9.12(e) specified the predecessor contractor's obligations near the end of the contract—not less than 10 days before completion of the contract—to furnish the Contracting Officer with a certified list of the names of all service employees working under the contract and its subcontracts during the last month of contract performance, including their anniversary dates of employment with either the predecessor contractor or any subcontractors. The proposal noted that the contractor may use the seniority list submitted to satisfy the requirements of the SCA contract clause specified at 29 CFR 4.6(l)(2) to meet this provision. The earlier version of part 9 implementing Executive Order 12933 included a similar provision that did not specifically state that the single list could be used to satisfy the requirements of both parts 4 and 9; however, the Department stated that specifying this option in the regulations may help clarify that duplication of effort is not required to comply with this requirement of Executive Order 13495. The earlier version of part 9 also required that the list of employees be furnished 60 days before completion of the contract. The current proposal reflected the time frame used in the current Executive Order and is required under 29 CFR 4.6(l)(2). In his comments, a Navy Labor Advisor suggested that the Department require the predecessor to provide two lists, one without dates of employment, in an effort to combat seniority-based discrimination. The Chamber requested that the predecessor contractor be required to note which employees it planned to keep in its employment. The PSC commented that the predecessor contractor should be required to identify the employees covered by the SCA, the relevant labor category and job duties, and current contact information for each covered service employee, as this is basic information that any successor contractor would require to make employment decisions, and that the predecessor contractor certify the factual accuracy and completeness of this list. As the employee list is already a requirement of Federal service contractors under the SCA, the Department declines to make changes to its contents.

Several commenters also expressed concern that the time frames provided

in this section are too restrictive and would not give successor contractors the time necessary to evaluate and hire workers prior to contract performance. TechAmerica suggested that the predecessor provide the list earlier in the procurement process than 10 days before the completion of the contract to ease the burden on successors. Afognak and the SHRM recommended that the list be provided at least 30 days before performance is to commence. In making this recommendation, Afognak mentioned the particular complexities of classified contracts. The U.S. Air Force Installation and Sourcing Division suggested that the time frame be expanded to 20 days, whereas the SBA Office of Advocacy recommended that the list of employees be provided to the successor contractor at the time of the contract solicitation.

The requirement that the predecessor contractor furnish the Contracting Officer with the certified list not less than 10 days before completion of the contract is established in the Executive Order, and the Department therefore believes that it lacks authority to modify that time frame. However, in response to the comments received concerning this issue and the practical considerations they raise, the Department has modified § 9.12(e) to require the predecessor contractor to provide a certified seniority list to the Contracting Officer not less than 30 days before completion of the contract. Where changes to the workforce are made after the submission of the list provided 30 days before completion of the contract, the predecessor contractor would be required to furnish an updated certified list to the Contracting Officer not less than 10 days before completion of the contract. Requiring that a list be provided 30 days before completion of the contract will provide successor contractors with additional time to review employment needs and make employment offers to incumbent employees, which should promote the Executive Order's goal of economy and efficiency. The Department anticipates that a large portion of contractors will not make changes to their workforce in the final month of contract performance and will therefore not be required to submit a second certified list; in those cases where the submission of a second list is necessary, the Department anticipates that differences between the two certified lists will usually be minimal. The Department encourages contracting agencies to modify their existing service contracts (and suggests that relevant subcontracts likewise be modified) so that the requirement to

provide a preliminary seniority list not less than 30 days before completion of the contract would apply to existing contracts.

#### Section 9.12(f) Recordkeeping

Proposed § 9.12(f) established record keeping requirements for contractors under Executive Order 13495. Proposed § 9.12(f)(1) clarified that no particular order or form of records for contractors is prescribed, and the recordkeeping requirements apply to all records regardless of their format (e.g., paper or electronic). A contractor is allowed to use records developed for any purpose to satisfy the requirements of part 9, provided the records otherwise meet the requirements and purposes of this part.

Proposed § 9.12(f)(2) specified the records contractors must maintain, including 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, a summary of each meeting, a copy of any written notice that may have been distributed, the names of the employees from the predecessor contract to whom an offer was made, any written record that forms the basis for any exclusion or exemption claimed under this part, the employee list provided to the contracting agency, and the employee list received from the contracting agency. In addition, as proposed every contractor who makes retroactive payment of wages or compensation under the supervision of the WHD pursuant to proposed § 9.24(b) will be required to record and preserve for three years in the pay records the amount, the period covered, and the date of payment to each employee, and to report to WHD each such payment on a receipt form authorized by the WHD, with a copy delivered to each employee. Contracting agency and WHD staff will use these records in determining a contractor's compliance and the propriety of any further sanctions. No comments were received on § 9.12(f), and it is adopted as proposed.

#### Section 9.12(g) Investigations

Proposed § 9.12(g) outlined the contractor's obligations to cooperate during any investigation to determine compliance with part 9 and to not discriminate against any person because such person has cooperated in an investigation or proceeding under part 9 or has attempted to exercise any rights afforded under part 9. As proposed, 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. No comments were received on this provision and it is adopted as proposed.

#### Subpart C—Enforcement

Proposed subpart C addressed complaints, informal resolution attempts, investigations, and remedies and penalties for violations.

#### Section 9.21 Complaints

Under proposed § 9.21(a), any former employee of the predecessor contractor or authorized employee representative who believes that the successor contractor violated the provisions of this part may file a complaint with the Contracting Officer of the appropriate Federal agency within 120 days of the alleged violation. Proposed § 9.21(b) allowed a complainant to file the complaint with the WHD if a complainant has not been able to file a complaint with the Contracting Officer prior to the 120-day deadline or has filed a complaint with the Contracting Officer but has not received a report within 30 days of filing the complaint. It also stated that a complaint must be filed with the WHD within 180 days of the alleged violation.

A Navy Labor Advisor commented that the Department has no basis for involving contracting agencies in the receipt or resolution of complaints and that the Department has exceeded its authority by assigning such duties to the agencies. He recommended that the complaints be sent directly to the WHD because of the Contracting Officers' lack of training and expertise specific to enforcement of the Executive Order. He suggested omitting any reference to the Contracting Officer as the principal point of contact for filing complaints.

The SEIU and Change to Win likewise suggested that complaints be sent directly to the WHD without having to first file a complaint with the Contracting Officer. These commenters also suggested that the final rule define "authorized representative" to include a labor union representing the affected employees. The SEIU and Change to Win added that since the proposed regulations stated that only a complainant can file a complaint with the WHD, there is a question of whether an authorized representative or labor union could file a complaint. The SEIU and Change to Win and the AFL-CIO requested that the final rule at § 9.21 allow employees and their collectively bargained representatives to file a complaint against a contracting agency that fails to provide notice to incumbent

employees of a right to an offer of employment, as required by proposed § 9.11(b), or fails to provide notice of a decision to exempt a contract from the nondisplacement requirements, as required by proposed § 9.4(d)(2). These commenters also requested that the final rule specify that incumbent as well as former employees may file complaints because these issues may arise prior to the award of the successor contract. The AFL-CIO asked that the final rule remove the words “if the complainant has not been able to timely file the complaint with the Contracting Officer” to clarify that a complainant may choose to file a complaint with the WHD rather than with the Contracting Officer without condition.

After consideration, the Department has decided to change the language of proposed § 9.21 to remove the need to file a complaint with the Contracting Officer. Instead, an employee or authorized representative may file a complaint directly with the WHD, and the contracting agency will be responsible for forwarding certain information that the Department must have in order to make a determination of compliance, when such information is requested by the Department. It is the Department's conclusion that the proposed method for receiving and processing complaints allows compliance concerns to be resolved as expeditiously as possible without undue burdens on all parties. For these reasons, the Department also agrees to remove the words “if the complainant has not been able to timely file the complaint with the Contracting Officer” and all references to the Contracting Officer as the principal point of contact for filing complaints. The Department also concludes that § 9.21 as proposed provides sufficient guidance on filing complaints directly with the WHD.

The final rule adopts proposed § 9.21 with changes that allow an employee to file a complaint directly with the WHD “within 120 days from the first date of contract performance. Since the contractor's obligation to offer employment continues 90 days after the start of performance on the contract, we believe 30 days after the end of the contractor's obligation is appropriate, and will allow for the most practical implementation of the rule. In addition, the final rule replaces the term “former employee” with the term “employee” to allow for possible circumstances when an incumbent employee could file a complaint. The Department declines to alter the term “authorized representative” because the term encompasses an employee's collectively bargained representative. The

Department also declines to add language allowing the filing of a complaint under the Order against a contracting agency because the Executive Order does not furnish the Department with such authority.

#### Section 9.22 Wage and Hour Division Conciliation

Proposed § 9.22 established the informal complaint resolution process for complaints referred to the WHD. Specifically, after obtaining the necessary information from the Contracting Officer regarding the alleged violations, the WHD could contact the successor contractor about the complaint and attempt to conciliate and reach a resolution that is consistent with the requirements of this part. Other than comments that the Contracting Officer should not be involved in enforcement of the final rule, which are addressed elsewhere in this preamble, no comments were received on proposed § 9.22. It is adopted in the final rule without revision.

#### Section 9.23 Wage and Hour Division Investigation

Proposed § 9.23 outlined the authority for the WHD to investigate complaints under Part 9. Proposed § 9.23(a) addressed initial investigations and provided that the Administrator may initiate an investigation 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 would be able to 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 this part (including conduct warranting imposition of ineligibility sanctions pursuant to § 9.24(d)) has occurred. Proposed § 9.23(b) addressed subsequent investigations and allowed the Administrator to conduct a new investigation or issue a new determination if the Administrator concluded circumstances warrant the additional action, such as where the proceedings before an ALJ 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 failed to comply with an order of the Secretary. No comments were received on proposed § 9.23, and it is adopted without change.

#### Section 9.24 Remedies and Sanctions for Violations of This Part

This proposed section outlined the appropriate remedies and sanctions for violations of the final rule. Proposed § 9.24(a) stated that the Secretary shall have the authority to issue orders prescribing appropriate remedies, including, but not limited to, requiring the contractor to offer employment to employees from the predecessor contract and the payment of wages lost. Proposed § 9.24(b) provided that, in addition to satisfying any costs imposed by an administrative order under proposed §§ 9.34(j) or 9.35(d), a contractor that violates part 9 would be required to take appropriate action to abate the violation, which could include hiring the affected employee(s) 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. Proposed § 9.24(c) concerned the withholding of contract funds for non-compliance. Proposed § 9.24(c)(1) provided that, after an investigation and a determination that lost wages or other monetary relief is due, the Administrator could direct that accrued payments due on either the contract or any other contract between the contractor and the Government be withheld as necessary to pay the moneys due; and that, upon final order of the Secretary, the Administrator could direct that withheld funds be transferred to the Department for disbursement. Proposed § 9.24(c)(2) provided for the suspension of the payment of funds if the Contracting Officer or the Secretary finds that the predecessor contractor has failed to provide the required list of employees working under the contract as required by proposed § 9.12(e). Proposed § 9.24(d) provided for debarment from Federal contract work for up to three years for noncompliance with any order of the Secretary or for willful or aggravated violations of the regulations in this part.

The proposed withholding provisions mirror the withholding standards of other labor standards laws such as the Davis-Bacon Act, 40 U.S.C. 3141 *et seq.*, and the SCA. Those acts also provide for debarment from Federal contract work under certain circumstances. No comments were received on § 9.24 and it is implemented in the final rule without revisions.



*Subpart D—Administrator's Determination, Mediation, and Administrative Proceedings*

Proposed subpart D addressed informal and formal proceedings through which to determine compliance with the requirements of part 9 and the resolution of disputes. Specifically, it addressed the authority of the Administrator, Office of Administrative Law Judges (ALJ), and the Administrative Review Board (ARB); it also clarified the effects of various notices and filings. A number of commenters addressed matters concerning proposed language in subpart D. As a preliminary matter, the SEIU and the AFL-CIO asserted that the Department should provide administrative review of an agency decision to exempt a contract from coverage of the Executive Order. The SBA Office of Advocacy forwarded a suggestion from an attorney that the Department enforce penalties against predecessor employers who fail to provide a seniority list. The Department has decided not to add provisions for the administrative review of agency exemption decisions or the enforcement of penalties against predecessor contractors for failure to provide a seniority list because the Executive Order does not confer such authority on the Department. *See also* discussion at § 9.4(d)(5). The Department notes that proposed § 9.24(c) authorizes the suspension of contract funds under such circumstances and agrees that the Department should endeavor to pursue permissible enforcement action to remedy such violations.

**Section 9.31 Determination of the Administrator**

Proposed § 9.31(a) provided that when an investigation is completed without resolution, the Administrator will issue a written determination of whether a violation occurred. Under the proposal, the written determination shall contain a statement of the investigation findings that shall address the appropriate relief and the issue of ineligibility sanctions where appropriate. Proposed § 9.31(b) required notice of the determination to be sent by certified mail to the parties. Under proposed § 9.31(b)(1), for instances where there are relevant facts in dispute, the notice of determination becomes the final order of the Secretary that is not appealable in any administrative or judicial proceeding unless a request for an ALJ hearing is filed within 20 days. Under proposed § 9.31(b)(2), for instances where no relevant facts are in dispute, the notice

of determination becomes the final order of the Secretary and is not appealable in any administrative or judicial proceeding unless a petition for review is filed within 20 days with the ARB.

The SEIU and Change to Win noted that the proposed rules do not specify a time period in which the Administrator must issue a determination. These commenters asserted that the Administrator should be required to issue a determination within 60 days of a complaint being filed with the Wage and Hour Division because “[i]f a service employee has been wrongfully denied a job, the need by the employee to receive a prompt determination from the Administrator is of obvious importance” and a 60-day time period would give the Administrator “ample time to weigh the evidence and draft a decision while not placing an undue burden on the Wage and Hour Division” and “provid[ing] an affected employee with a relatively timely resolution of his or her grievance.”

After careful review, the Department has decided not to add the 60-day time limit for the Administrator's determinations. Although the Department supports the prompt investigation of complaints, followed by the efficient rendering of decisions by the Administrator, a uniform time limit could adversely affect complex and fact-intensive investigations by the Wage and Hour Division. Section 9.31 therefore is adopted as proposed.

**Section 9.32 Requesting Appeals**

Proposed § 9.32 addressed appeals of the Department's administrative decisions. Under proposed § 9.32(a) any party desiring review of the determination of the Administrator, including judicial review, must file a request for an ALJ hearing or petition for review by the ARB. Proposed § 9.32(b) provided procedures for requesting review of the Administrator's determination. Proposed § 9.32(b)(1) provided the process and requirements for filing a request for an ALJ hearing. Under the proposal, within 20 days of the issuance of the Administrator's determination any aggrieved party may file a request for an ALJ hearing, under the following conditions: The complainant or any other interested party may request a hearing where the Administrator determines that there is no basis for a finding that a contractor has committed violation(s); the complainant or any other interested party may request a hearing where the complainant or other interested party believes that the Administrator has

ordered inadequate monetary relief; and the contractor or any other interested party may request a hearing where the Administrator determines that the contractor has committed violation(s). Proposed § 9.31(b)(2) provided the process and requirements for filing a petition for review with the ARB. Under the proposal, any aggrieved party may seek review by the ARB of a determination of the Administrator in which there were no relevant facts in dispute, or of an ALJ's decision, within 20 days of the date of the determination or decision.

One commenter addressed the proposed language in this section. The PSC considered the language to be overbroad where it permits “[a]ny aggrieved party” or “any other interested party” to seek review, rather than limiting that right to “the actual displaced employee.” The PSC stated that “the rule invites parasitic litigation by employee groups or activists” and that, as a result, successor contractors will have to spend time and resources defending against claims “even when the successors have valid, fully documented reasons for declining to offer employment.” This commenter argued that these increased costs to successor contractors may be passed on to the taxpayer and also result in fewer contractors bidding on service contracts to “avoid the hassle of displacement decisions [and] \* \* \* the attendant cost and administrative burden.”

After carefully considering the comment, the Department has decided to adopt the proposed language without change. While sympathetic to potential litigation costs of contractors, the Department does not consider the language that permits aggrieved and interested parties to seek review to be overbroad. The Department also notes that the Executive Order does not contemplate a private right of action, which should reduce the potential litigation burden on successor contractors.

**Section 9.33 Mediation**

Proposed § 9.33 provided for the use of settlement judges to mediate settlement negotiations when efforts to resolve disputes have failed. Consistent with section 6(b) of Executive Order 13495, proposed § 9.33(a) generally encouraged parties to resolve disputes in accordance with the conciliation procedures set forth at § 9.22 or, where such efforts fail, to utilize settlement judges to mediate settlement negotiations pursuant to 29 CFR 18.9, when those provisions apply. At any time after commencement of a proceeding, the parties jointly could

move to defer the hearing for a reasonable time to permit negotiation of a settlement or an agreement disposing of the proceeding. Proposed § 9.33(b) established a procedure for appointing a settlement judge to mediate cases scheduled with the Office of Administrative Law Judges (OALJ). No comments were received on § 9.33, and it is adopted without change.

#### Section 9.34 Administrative Law Judge Hearings

Proposed § 9.34 provided procedures and rules applicable to ALJ hearings. Proposed § 9.34(a) provided for the OALJ to hear and decide appeals concerning questions of law and fact from determinations of the Administrator. Under the proposal, the ALJ would act fully as the authorized representative of the Secretary subject to certain limits. Specifically, the proposed rule would bar the ALJ from passing on the validity of any provision of part 9 and from awarding attorney fees and/or other litigation expenses pursuant to the provisions of the Equal Access to Justice Act (EAJA), as amended. 5 U.S.C. 504. The proposal stated that the provisions of the EAJA would not apply to any proceeding under this part because such proceedings would not be required by an underlying statute to be determined on the record after an opportunity for an agency hearing.

Under proposed § 9.34(b), absent a stay to attempt settlement, the ALJ shall notify the parties and any representatives within 15 calendar days following receipt of the request for hearing of the day, time, and place for hearing, which is to be held not more than 60 days from the date of receipt of the hearing request. Proposed § 9.34(c) allowed an ALJ to dismiss challenges for the failure to participate.

Proposed § 9.34(d) allowed the Administrator to participate as a party or as *amicus curiae* at any time in the proceedings; it also allowed the Administrator to petition for review of an ALJ decision in a case in which the Administrator has not previously participated, and added that the Administrator would participate as a party in any proceeding in which the Administrator has found any violation of this part, except where the challenge only concerns the amount of monetary relief. Under proposed § 9.34(e), a Federal agency that is interested in a proceeding may participate as *amicus curiae* at any time in the proceedings.

Proposed § 9.34(f) required that copies of the request for hearing and documents filed in all cases, whether or not the Administrator is participating, shall be sent to the Department's

Administrator, WHD, and the Associate Solicitor, Division of Fair Labor Standards.

Proposed § 9.34(g) established, with certain exceptions, that the rules of practice and procedure for administrative hearings before the OALJ at 29 CFR part 18, subpart A shall apply to administrative proceedings under this part 9. However, it also stated that the Rules of Evidence at 29 CFR part 18, subpart B, were inapplicable and provided that part 9 would be controlling to the extent it provides any rules of special application that may be inconsistent with the rules in part 18, subpart A.

Proposed § 9.34(h) required ALJ decisions (containing appropriate findings, conclusions, and an order) to be issued within 60 days after completion of the proceeding. Proposed § 9.34(i) allowed the ALJ, upon the issuance of a decision that a violation has occurred, to order appropriate relief, which could include that the successor contractor hire the affected employee(s) 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. Under the proposal, if the Administrator has sought ineligibility sanctions, the order would also be required to address whether debarment is appropriate. Proposed § 9.34(j) authorized the ALJ to assess against the contractor for a violation of this part an amount equal to the employees' costs and expenses (not including attorney fees). This amount would be awarded in addition to any unpaid wages or other relief due. Proposed § 9.34(k) stated that the decision of the ALJ shall become the final order of the Secretary, unless a petition for review is timely filed with the ARB. No comments were received on § 9.34 and it is implemented in the final rule without change.

#### Section 9.35 Administrative Review Board Proceedings

Proposed § 9.35 provided procedures and rules applicable to ARB appeals of an ALJ's decision or of an Administrator's determination wherein no facts are at issue. Proposed § 9.35(a)(1) provided that the ARB shall act as the authorized representative of the Secretary and shall act fully and finally on behalf of the Secretary concerning such matters. Proposed § 9.35(a)(2) added that the ARB shall review the entire record before it on the basis of substantial evidence and also placed limits on the scope of the ARB's review. Specifically, the proposed rule barred the ARB from passing on the validity of any provision of part 9,

accepting new evidence, or awarding attorney fees and/or other litigation expenses under the provisions of EAJA. Proposed § 9.35(b) required the ARB to issue final decisions within 90 days of the receipt of the petition for review and to serve the decisions upon all parties by mail to the last known address and upon the Chief ALJ in cases involving an appeal from an ALJ's decision. Proposed § 9.35(c) provided that if the ARB concluded that the contractor had violated this part, its final order should order action to abate the violation, which could 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. If the Administrator sought ineligibility sanctions, the proposed rule stated that the ARB's order should address whether debarment is appropriate. Proposed § 9.35(d) authorized the ARB to assess against contractors, for a violation of this part, 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. This amount would be awarded in addition to any unpaid wages or other relief due under § 9.24(b) of this part. Proposed § 9.35(e) declared that the decision of the ARB shall become the final order of the Secretary. No comments were received on this provision and no revisions have been made. The heading in the proposed table of contents for § 9.35 has been corrected to state "Administrative Review Board Proceedings" rather than "Administrative Review Board Hearings."

#### Appendix A to Part 9

Proposed Appendix A to part 9 contained the text of the contract clause required by proposed § 9.11(a). The Department received several comments concerning Appendix A. The PSC asserted that the contents of proposed Appendix A should be omitted consistent with its suggestion that the final rule should not include a contract clause but incorporate by reference the contract clause that will be promulgated in the FAR. A Navy Labor Advisor objected to paragraph (c) of the contract clause in proposed Appendix A that required the predecessor contractor to provide the seniority list to the Contracting Officer at least 10 days before the contract's end because that period would not allow sufficient time for compliance by all parties. The AFL-CIO requested that paragraphs (f) through (h) of the contract clause in

proposed Appendix A be amended to conform to their comments to the provisions of the proposed rule concerning the contents of the contract clause. In particular, the AFL-CIO suggested that the text remove any reference to oral offers of employment in section (g)(1) of the contract clause. TechAmerica commented that the requirements in paragraphs (a) and (b) of the contract clause in proposed Appendix A would result in eliminating those small businesses that do not have sufficient resources to replace their workforce with the workforce on the predecessor contract.

The Department disagrees with the PSC's suggestion that the final rule should omit any contract clause and, instead, incorporate by reference the contract clause that will appear in the FAR. The Department concludes that its charge to implement and enforce the requirements of the Executive Order includes providing the contract clause. The Department will work with the FARC concerning the implementation of the contract clause in the FAR. The comments of the Navy Labor Advisor and the AFL-CIO that repeat comments they made concerning the requirements of the proposed rule to provide a certified list of employees and the method for making an employment offer are addressed in subpart B of this preamble. TechAmerica's comment, in effect, challenges the contents of the Executive Order, and is beyond the purview of this rulemaking. Paragraphs (a) and (b) of the contract clause restate word for word the text of section 5(a) and (b) of Executive Order 13495. Appendix A has been modified for editorial and organizational purposes and to reflect changes made to the proposed rule.

#### *Appendix B to Part 9*

Proposed Appendix B contained the text for the notice that contracting agencies would be required to provide to service employees on covered contracts that have been awarded to a successor contractor. The proposed rule stated that the Department intended to make the text of Appendix B, should it appear in the final rule, available to contracting agencies on the Internet in a poster format. The proposal allowed the text of the notice to be provided to affected employees electronically in addition to or as an alternative to posting. As mentioned in the discussion of § 9.11(b), the final rule provides that the Contracting Officer will ensure that the predecessor contractor provides written notice of the possible right to an offer of employment to his employees.

A number of commenters addressed issues relating to the proposed text of the notice to service contract employees contained in proposed Appendix B. The AFL-CIO suggested that changes should be made to the notice in proposed Appendix B to reflect relevant comments they made to the proposed rule. Specifically, the AFL-CIO suggested that the complaints paragraph of the notice in Appendix B should be amended and expanded to permit employees and their collectively bargained representatives to file a complaint against a contracting agency that fails to provide notice to incumbent employees of a right to an offer of employment, as required by proposed § 9.11(b), or fails to provide notice of a decision to exempt a contract from the nondisplacement requirements, as required by proposed § 9.4(d)(2). This commenter also asked that the final rule remove the words "if the complainant has not been able to timely file the complaint with the Contracting Officer" to clarify that a complainant may chose to file a complaint with the WHD rather than with the Contracting Officer especially in instances where the complaint names the contracting agency. The AFL-CIO added that the notice should more clearly state that incumbent as well as former employees may file complaints. A Navy Labor Advisor suggested changes to the format of the notice to service contract employees and also suggested omitting any reference to the Contracting Officer as the principal point of contact for filing complaints.

After consideration, the Department has amended the notice in Appendix B to allow any employee(s) or authorized representative(s) of the predecessor contractor to file a complaint directly with the Department. The Department declines to amend the notice to state that incumbent and former employees of the predecessor contract may file complaints because the final rule has adequately addressed the matter through the use of the term "employee". The Department also removed the words "if the complainant has not been able to timely file the complaint with the Contracting Officer" and any reference to the Contracting Officer as the principal point of contact for filing complaints. The final rule adopts proposed Appendix B with changes that allow an employee to file a complaint directly with the WHD and to improve the clarity of the notice.

### **III. Paperwork Reduction Act**

*General:* In accordance with requirements of the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et*

*seq.*, and its attendant regulations, 5 CFR part 1320, the Department seeks to minimize the paperwork burden for individuals, small businesses, educational and nonprofit institutions, Federal contractors, State, local and tribal governments, and other persons resulting from the collection of information by or for the agency. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. *See* 5 CFR 1320.6. As required by the PRA, the Department has submitted the information collections contained in this rule to the OMB for approval and will publish a notice in the **Federal Register** upon its approval. Specifically, information collections for employment offers appear in §§ 9.12(a), (b), (e) and (f); the information collections related to the filing of complaints appear in § 9.21.

The PRA typically requires an agency to provide notice and seek public comments on any proposed collection of information contained in a proposed rule. *See* 44 U.S.C. 3506(c)(2)(B); 5 CFR 1320.8. The NPRM published in the **Federal Register** on March 19, 2010, invited comments on the information collection burdens imposed by these regulations, and also provided that comments regarding the information collections within the NPRM could be sent directly to OMB. *See* 75 FR 13394. As required by 5 CFR 1320.11, the Department also submitted the information collections to the OMB for approval at the same time as the NPRM appeared in the **Federal Register**. In response, the OMB filed a comment on April 9, 2010, asking the Department to resubmit the approval request after considering any public comments received on the information collections. The Department received no comments regarding ways to reduce the information collection burden; in fact, in order to facilitate the successor contractor's evaluation of the work force, several comments urged the Department to require predecessor contractors to submit the list of employees earlier than the 10 days before contract expiration proposed in the NPRM. (*See e.g.*, Chamber of Commerce and SBA). In response to these comments, the Department has revised the final rule to require a predecessor contractor to provide the list 30 days before contract expiration. The Chamber commented that, in its view, the Department's cost calculations omitted or underestimated several relevant costs of the rule, however; the Chamber did not provide any estimates

or alternative data sources for the Department's consideration. The Department consequently resubmitted the request, after considering the public comments, for OMB approval, and will publish a notice in the **Federal Register** upon its approval.

It should be noted that OMB cleared the employee list mentioned in § 9.12(e)(1) under Control Number 1235-0007, as this list also provides seniority information for vacation benefit purposes. The Department has submitted a change request for this Control Number to incorporate the additional regulatory citations and revise the timing of the list, and will publish a notice in the **Federal Register** upon its approval.

A copy of the information collection requests can be obtained at <http://www.reginfo.gov/public/do/PRAMain> or by contacting the Wage and Hour Division as shown in the **FOR FURTHER INFORMATION CONTACT** section of this preamble.

**Purpose and Use:** As previously explained, Executive Order 13495 applies to contracts or subcontracts at or above the simplified acquisition threshold of \$150,000 and requires service contracts and their solicitations to include an additional labor standards clause that requires the successor contractor, and its subcontractors, under a contract for performance of the same or similar services at the same location, to provide a right of first refusal of employment to those employees (other than managerial and supervisory employees) employed under the predecessor contract during the final month of contract performance whose employment will be terminated as a result of the award of the successor contract. The Order also requires the successor contractor and subcontractor to make a bona fide, express offer of employment to each predecessor employee, with some exceptions, stating the timeframe within which each employee must accept such offer. For purposes of the remaining PRA discussion, the term contractor covers both contractors and subcontractors, except as noted. The Department has strived to make the information disclosures intuitive.

Section 9.12 of the final rule describes the contractor's requirements and prerogatives. The section includes third party disclosures and recordkeeping requirements that are subject to the PRA. Sections 9.12(a) and (b) require the contractor to make a bona fide express offer of employment to each employee individually, either in writing or orally. Section 9.12(f) also requires the successor service contractor to maintain

for specific periods of time copies of records (regardless of format, e.g., paper or electronic) of its compliance, including: (1) 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; a summary of each 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; (2) any record that forms the basis for any exclusion or exemption claimed under this part; and (3) the employee list provided to or received from the contracting agency that meets contractor obligations near the end of a contract. Section 9.12(f) also requires every contractor who makes retroactive payment of wages or compensation after an investigation pursuant to § 9.24(b) of this part, to record and preserve the amount of such payment to each employee on a receipt form provided by or authorized by the Wage and Hour Division, deliver a copy to the employee, and file the original with the Administrator or an authorized representative within 10 days after payment is made.

The Department notes that the final rule does not require contractors to create any record regarding any basis for claiming an exclusion or exemption from the nondisplacement provisions of Federal service contracts; however, the contractor would need to retain any such record if created.

The final rule, in § 9.12(e)(1), requires a predecessor contractor near the end of a contract to provide a certified list of the names of all service employees working under that contract (and its subcontracts) during the last month of contract performance to the contracting agency no later than 30 days before completion of the contractor's performance of services on a contract. That requirement may be met by using the seniority list submitted to satisfy the requirements of the contract clause specified in the current SCA regulations at 29 CFR 4.6(l)(2). Therefore, this requirement imposes no additional burden for PRA purposes. The final rule, in § 9.12(e)(2), requires a predecessor contractor to also provide a certified list of the names of all service employees working under that contract (and its subcontracts) during the last month of contract performance to the contracting agency no later than 10 days before completion of the contractor's performance of services on a contract where changes to the workforce have been made after the submission of the

certified list described in § 9.12(e)(1). This requirement imposes a minimal additional burden for PRA purposes. The Department anticipates that a large portion of contractors will not make changes to their workforce in the final month of contract performance and will therefore not be required to submit a second certified list; in those cases where the submission of a second list is necessary, the Department anticipates that differences between the two certified lists will usually be minimal.

Section 9.21 of the final rule outlines the procedures for filing complaints under this part. The Department has imposed no specific reporting burden on what information complainants must provide; however, prudent persons asserting certain employment rights normally would provide their own contact information, contact information for their employer, and a basis for why they are filing the complaint.

**Information Technology:** There is no particular order or form of records prescribed by the final rule. A contractor may meet the requirements of this final rule using paper or electronic means.

**Public Burden Estimates:** The final rule contains information collection requirements for contractors and complainants. As in the NPRM, the Department bases the following burden estimates for this information collection on agency experience in administering the SCA, the prior version of part 9, and consultations with contracting agencies, except as otherwise noted.

According to the Federal Procurement Data System's (FPDS) 2006 Federal Procurement Report, slightly less than 75,000 (74,611) Federal government contract actions were subject to the SCA during that reporting period. A contract action is any oral or written action that results in the purchase, rent, or lease of supplies or equipment, services, or construction using appropriated dollars over the micro-purchase threshold, or modifications to these actions regardless of dollar value. Many contract actions are modifications to or extensions of existing Federal contracts or otherwise relate to actions where there is no successor contractor. The Department, therefore, assumes that about 15,000 per year (slightly more than 20 percent of all SCA covered contract actions in 2006) would be successor contracts subject to the nondisplacement provisions that carry a burden under the PRA. Subcontracts are not reported in the FPDS, and the Department has not found a reliable source on which to estimate the number of subcontracts per SCA prime contract. Based on consultations with Federal procurement

officials, the Department assumes that for PRA purposes a typical SCA contract has one prime contractor and three subcontractors; no comments were received from procurement officials or the public suggesting the Department use alternative data or providing an alternative estimate of the number of subcontractors per prime contractor. Therefore, the Department estimates the information collection requirements of part 9 would apply to approximately 60,000 contracts (15,000 covered contract actions  $\times$  4 contractors). A review of FPDS data suggests that, while about 110,000 contractors performed work on Federal service contracts in FY 2006, only 44,039 contractors performed work on service contracts in excess of \$25,000. See David Berteau, *et al.*, *Structure and Dynamics of the U.S. Federal Professional Services Industrial Base 1995–2007*, Center for Strategic and International Studies, February 2009, at 26, [http://www.csis.org/media/csis/pubs/090212\\_fps\\_report\\_2009.pdf](http://www.csis.org/media/csis/pubs/090212_fps_report_2009.pdf) (CSIS Report). Because of the \$150,000 threshold, some lesser number of contractors would perform work on contracts subject to the nondisplacement requirements; the Department estimates each year about 40,000 contractors and subcontractors will be subject to this information collection.

Based on the Wage and Hour Division's enforcement experience under the SCA, the Department estimates that each service contract covered by this information collection would involve an average of approximately 15 employees. Moreover, the Department expects successor contractors typically would make oral offers of employment at all-employee meetings where the successor contractor need only make notations on a copy of the employee roster of the offer of employment. Otherwise, the successor contractor would likely make offers of employment individually by mail or electronic means. Beyond making the offer of employment, the successor contractor would also be responsible for maintaining copies of any written offers of employment, or contemporaneous written records of any oral offers of employment, and copies of any records that formed the basis for any exclusion or exemption claimed under the proposed rule. As job offers will typically be made in a bulk fashion, the Department estimates it would take a successor contractor an average of approximately one and one-half minutes per employee to make an offer, whether oral, written, or electronic, and another half minute to file the associated

paperwork for each employee, including any paperwork forming the basis for any exclusion or exemption from the obligation to offer employment to a particular employee. Therefore, the Department estimates an annual disclosure and recordkeeping burden of 30 minutes per contract for a total annual burden of 30,000 hours (60,000 contracts  $\times$  15 third-party disclosures  $\times$  2 minutes).

The information collection requirement for contractors specified in proposed § 9.12(e)(1)—the certified list of employees provided 30 days before contract completion—is cleared under the SCA regulations, 29 CFR 4.6(l)(2), OMB control number 1235–0007, which requires a certified list be provided no later than 10 days before contract completion, and that burden is not duplicated in these estimates. However, contractors experiencing a change in their workforce between the 30 and 10 day periods will have to submit an additional list. Since a certified list would have already been compiled 30 days before completion of the contract, the list produced 10 days before contract completion would only require updating the initial list, if necessary. Therefore, the Department estimates the additional burden to be minimal. For the purpose of estimating burden associated with this requirement, the Department estimates that approximately 50% of contracts will experience a change in workforce between 30 and 10 days of completion of the contract, requiring an updated list. The Department recognizes that the actual number of contractors having to produce two lists is likely to be less, but uses 50% as an upper bound estimate. The Department estimates it would take a predecessor contractor an average of approximately one minute to update the employment status of each employee on a certified list. Therefore, the Department estimates the total burden for creating an updated certified list to be 7,500 hours (60,000 contracts  $\times$  .5 percent of contracts  $\times$  15 employees  $\times$  1 minute).

Estimates prepared for the nondisplacement rules promulgated pursuant to Executive Order 12933 suggested the rules applied to only 88 contract actions per year; however, the burdens calculated at that time did not include subcontracts. Using the same criteria as used to calculate burdens under this proposal, the Department estimates the total number of covered contracts and subcontracts for the earlier rule to be approximately 350; suggesting the current rule would apply to about 170 times more successor contracts. As previously noted the Wage

and Hour Division received approximately one complaint per year under the old rule. Extrapolating to the current estimate of contracts subject to the current rule, the Department estimates it will receive 170 nondisplacement complaints per year. The Department estimates that each complaint filing will take about 20 minutes; therefore, the Department estimates the total burden for filing complaints to be about 56.6 hours (170 responses  $\times$  20 minutes).

The Department acknowledges that for each investigation resulting in violations remedied through the payment of back wages or compensation under the supervision of the Administrator of the Wage and Hour Division, § 9.12(f)(2)(iv) imposes a recordkeeping requirement for the contractor to preserve a report of such payment to each employee on a receipt form provided by the Wage and Hour Division, deliver a copy to the employee, and file the original with the Administrator or an authorized representative within 10 days after payment is made. The Department estimates that approximately 20 percent of all complaints will result in investigations in which violations are found and the appropriate remedy is the payment of back wages and/or restitution, and it will take approximately one minute to record. The Department therefore estimates the total burden to contractors for keeping a record of retroactive payments to be about 34 minutes. (170 complaints  $\times$  .20  $\times$  1 minute).

The total burden estimates under the PRA (including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information) are as follows: 40,170 respondents; 1,350,170 responses; and 37,556.6 burden hours.

*Public Comments:* The Nondisplacement NPRM published on March 19, 2010, included a discussion of the information collections that are part of this regulation. The NPRM also invited public comments on the information collections during a 60-day period and provided that comments on the information collection aspects of the NPRM could be submitted directly to the OMB. The Department specifically sought public comments regarding the burdens imposed by information collections contained in this proposed rule. In particular, the Department sought comments that would: evaluate whether the proposed collection of information was necessary for the proper performance of the functions of

the agency, including whether the information would have practical utility; evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; enhance the quality, utility and clarity of the information to be collected; and minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submissions of responses. Other portions of this preamble discuss the substance of those comments and the Department's response.

The information collection burdens are summarized as follows:

*Type of Review:* New collection request. [Request for a new OMB control number for §§ 9.12(a), (b), (f), and 9.21]; 1235-0007, nonmaterial change to an information collection for § 9.12(e).

*Agency:* Wage and Hour Division, Department of Labor.

*Title:* Nondisplacement of Qualified Workers Under Service Contracts, Executive Order 13495.

*OMB Control Numbers:* 1235-XXXX for §§ 9.12(a), (b), (f), and 9.21; 1235-0007 for § 9.12(e).

*Affected Public:* Businesses or other for-profit institutions for paragraphs 9.12(a), (b), (e), and (f); individuals for § 9.21.

*Total Estimated Number of Respondents:* 40,170 for 1235-XXXX; 50,812 for 1235-0007.

*Total Estimated Number of Responses:* 1,350,170 for 1235-XXXX; 50,812 for 1235-0007.

*Response Frequency:* On occasion for both.

*Estimated Annual Burden Hours:* 37,556.6 for 1235-XXXX; 49,220 for 1235-0007.

*Estimated Annual Burden Cost (Capitol and Start-up Costs):* \$0.

*Estimated Annual Burden Cost (Maintenance and Operation):* \$0.

#### IV. Executive Orders 13563 and 12866

Executive Orders 13563 and 12866 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules,

and of promoting flexibility. This rule has been designated a "significant regulatory action" although not economically significant, under section 3(f) of Executive Order 12866. Accordingly, the rule has been reviewed by the Office of Management and Budget.

On January 30, 2009, President Barack Obama signed Executive Order 13495, Nondisplacement of Qualified Workers Under Service Contracts. 74 FR 6103 (Feb. 4, 2009). This Order establishes that when a service contract expires and a follow-on contract is awarded for the same or similar services at the same location, the Federal Government's procurement interests in economy and efficiency are better served when a successor contractor hires the predecessor's employees. A carryover workforce reduces disruption to the delivery of services during the period of transition between contractors and provides the Federal Government the benefits of an experienced and trained workforce that is familiar with the Federal Government's personnel, facilities, and requirements. As explained in the Order, the successor contractor or its subcontractors often hires the majority of the predecessor's employees when a service contract ends and the work is taken over from one contractor to another. Occasionally, however, a successor contractor or its subcontractors hires a new workforce, thus displacing the predecessor's employees. This final rule implements the Executive Order.

The first sentence of Executive Order 13495 recognizes that successor contractors often hire most of the employees who worked on the predecessor contract, if the contract work will continue at the same location. As further discussed below, the Department believes the rule will not have a significant economic impact, because the proposal would simply require contractors to follow a practice currently used in many cases as a good business practice. The Department expects that, as further explained in this section, there will be few changes in the way most contractors currently conduct business, with the exception that they will need to ensure the appropriate contract language appears in subcontracts. The Department also expects that a majority of remaining contractors will comply with the new requirements by simply replacing aspects of their existing staffing practices with similar practices that do not entail substantial additional burden but do assure compliance with the rule. In addition, the Department expects that in certain instances a contracting agency

will exercise its exemption authority to exclude contracts from these requirements if it is clear that application of the nondisplacement requirements would not serve the purposes of the Executive Order or would impair the ability of the agency to procure services on an economical and efficient basis.

In estimating the costs on contractors, the Department has also considered how current practices compare with expected actions contractors typically will take under the nondisplacement provisions. For example, those successor contractors that currently hire new employees for a contract must recruit workers and evaluate their qualifications for positions on the contract. In order to match employees with suitable jobs under this rule, successor contractors will evaluate the predecessor contract employees and available positions; thus, successor contractors are likely to spend an equal amount of time determining job suitability under the rule as under current practices. The costs for documenting these employment decisions will also be similar under both the rule and status quo.

For purposes of this analysis, the Department also believes the time contractors will save by not recruiting an entirely new workforce from the outset will be offset by the additional time a successor contractor will spend in recruiting a new employee when there is a vacant position because the contractor cannot find suitable work for an employee who worked on the predecessor contract or in considering how to minimize displacement when the successor contractor reconfigures how it will deploy employees performing on the successor contract. See § 9.12(d)(3). This rule will also not affect wages contractors will pay workers, because of the existing SCA requirement for the wage determination that establishes the minimum rate for each occupation to be incorporated into the contract; thus, existing regulatory requirements already set wage rates, including when the predecessor's collectively bargained rate is incorporated into the contract, that successors must pay. See 41 U.S.C. 6707(c); 29 CFR 4.6(b)(1). This rule does not require successor contractors to pay wages higher than the rate required by the SCA. The successor contractor also may offer employment under different terms and conditions, if the reasons for doing so are not related to a desire that the employee refuse the offer or that other employees be hired for the offer. See § 9.12(b)(5).

The proposal includes a contract clause provision requiring contractors to incorporate the nondisplacement contract clause into each covered subcontract. This provision comes directly from Executive Order 13495, and the Department estimates that it will take a combined total of 30 minutes for contractors to incorporate the contract clause into each covered subcontract and the subcontractor to review it. Thus, assuming covered contractors spend an additional two hours (accounting for any additional time spent in making job offers, inserting and reviewing the contract clause in subcontracts, and maintaining records) per contract to comply with this proposed rule and increasing the October 2009 average hourly earnings for professional and business workers by 40 percent to account for fringe benefits (a total of \$31.32 per hour), this rule is estimated to impose annual costs of \$3,758,400 on contractors (60,000 contracts  $\times$  2 hours  $\times$  \$31.32). See *The Employment Situation—December 2009*, at 28, Table B-3, Bureau of Labor Statistics, ([http://www.bls.gov/news.release/archives/empstat\\_01082010.pdf](http://www.bls.gov/news.release/archives/empstat_01082010.pdf)).

As explained in the PRA section of this preamble, the final rule requires a predecessor contractor to provide a certified list of the names of all service employees working under that contract (and its subcontracts) to the contracting agency no later than 30 days before completion of the contractor's performance of services on the contract. Where changes to the workforce have been made after the submission of the certified list described in § 9.12(e)(1), a predecessor contractor must submit an updated certified list no later than 10 days before completion of the contractor's performance of services on a contract. The clause makes clear that this is the same list as the seniority list provided under the SCA clauses. Since the list already exists and is used by contractors in making hiring decisions under the status quo, additional costs would only be incurred in the instance that there is a change in the workforce necessitating submission of an updated list. The Department does not anticipate that a large portion of contractors will experience a change in workforce between 30 and 10 days of completion of the contract period. However, for the purpose of estimating the cost and burden of this requirement, the Department assumes an upper bound estimate of approximately 50 percent of contracts will experience a change in workforce between 30 and 10 days of completion of the contract, requiring an

updated list. The Department estimates that it will take a predecessor contractor an average of approximately one minute to update the employment status of each employee on a certified list, and that each service contract covered by this rule would involve an average of approximately 15 employees (30,000 contracts  $\times$  15 minutes = 450,000 minutes, or 7,500 hours). Thus, this requirement is estimated to impose annual costs of \$234,900 on contractors (7500 hours  $\times$  \$31.32 = \$234,900).

Most contractors will obtain their information primarily from the contract clause, and Wage and Hour Division offices throughout the country are available to provide compliance assistance at no charge to employers; however, in the course of researching compliance options within the context of specific business needs, some contractors will incur additional legal, accounting, and/or other costs associated with complying with the nondisplacement requirements. For purposes of this analysis, the Department estimates 15 percent of covered contractors each will incur additional costs averaging \$5,000 because of the regulatory requirements, for a total of \$30,000,000 (40,000 contractors  $\times$  15%  $\times$  \$5000). The Department believes 10 percent of these 6,000 contractors will face complex issues that will require each spending an average of \$10,000 additional dollars, totaling \$6,000,000 (6000 contractors  $\times$  10%  $\times$  \$10,000). The Department estimates total costs contractors will incur to comply with this rule to be \$39,758,400. The Department expects some of these costs will be transferred to the Federal Government in the form of higher bids; however, the Department is not aware of a reasonable way to allocate those costs.

Executive Order 13495 and this final rule would improve Government efficiency and economy in those cases where the practice of offering a right of first refusal of employment would not otherwise have been followed because the requirements decrease or eliminate the loss of productivity that may occur when experienced employees are terminated. As previously indicated, the Department estimates 20 percent of all SCA covered contract actions in 2006 would be subject to this rule. Applying this same percentage to the total FPDS reported value of SCA contract actions during 2006, just under \$115,000,000,000 (\$114,935,252,182), the Department estimates the total value of contracts subject to the nondisplacement provisions to be \$23,000,000,000 (\$115,000,000,000  $\times$  0.2).

Some of the potential savings from any increase in economy and efficiency will be absorbed by the expenses contracting agencies will incur to administer the requirements. The Department has used the 2010 Rest of United States salary table to estimate salary expenses. See [http://www.opm.gov/oca/10tables/html/RUS\\_h.asp](http://www.opm.gov/oca/10tables/html/RUS_h.asp). The Department believes contracting agencies will spend 30 minutes on each insertion of the applicable contract clauses in a successor prime contract, for a total of 7500 hours (15,000  $\times$  0.5 hours). The Department assumes this work will be performed by a GS-11, step 4 Federal employee, earning \$30.26 per hour, for a cost of \$226,950 (7500 hours  $\times$  \$30.26). While it will be clear that in most cases there is no reason for a contracting agency to exempt a contract from the nondisplacement requirements, the Department estimates contracting agencies will spend an average of two hours on each covered contract and subcontract to make the determination and that a GS-13, step 4 Federal employee earning \$43.13 per hour will perform the work, for a cost of \$5,175,600 (60,000 contracts and subcontracts  $\times$  2 hours  $\times$  \$43.13). Once this analysis is done, the contracting agency must inform the contract employees of the decision to exempt the contract. The Department believes this notification will take about 30 minutes per contract and that the work will be performed by a GS-9, Step 4 Federal employee earning \$25.01, for a cost of \$750,300 (60,000 contracts and subcontracts  $\times$  0.5 hours  $\times$  \$25.01). This includes the time needed to prepare the notice and post it at the worksite or prepare a written notice that is provided in a bulk manner to the employees. The estimated general administrative costs equal \$6,152,850.

The rule also requires Contracting Officers to provide documentation to the Wage and Hour Division within 14 days of the original filing. § 9.11(d). The Federal costs associated with this requirement include the time it takes to gather the documents related to the complaint and the reproduction and mailing cost to forward the copies to the Wage and Hour Division. Federal costs will also include the cost for the Wage and Hour Division to review the complaint to determine what further action might be appropriate. The Department estimates the Wage and Hour Division will receive 170 nondisplacement complaints per year.

*GS-13, step 4 to review complaint at the Wage and Hour Division and determine whether to schedule compliance action:*



170 complaints  $\times$  10 minutes review time = 28 hours (rounded)  
 28 hours  $\times$  \$43.13 = \$1,208 (rounded)

*GS-11, step 4 to compile and review the complaint and supplemental documents for forwarding:*

170 complaints  $\times$  20 minutes = 57 hours (rounded)

57 hours  $\times$  \$30.26 = \$1,725 (rounded)

*GS-3, step 4 to photocopy & assemble complaint documents:*

170 complaints  $\times$  10 minutes = 28 hours (rounded)

28 hours  $\times$  \$13.14 = \$368 (rounded)

*Printing costs:*

170 complaints  $\times$  4 pages  $\times$  3 copies  $\times$  \$0.05 per page = \$102

*Postage:*

170 complaints  $\times$  3 mailings (DOL, contractor, and complainant)  $\times$  \$0.47 (\$0.44 each + \$0.03 per envelope) = \$240 (rounded)

*GS 12, step 4 to investigate complaints*

170 complaints  $\times$  20 hours = 3,400 hours

3400 hours  $\times$  \$36.27 = \$123,318

Printing 60,000 notices  $\times$  \$0.05 per notice = \$3,000

Enforcement Subtotal \$129,961

Total Gross Annual Federal Cost estimate = \$6,282,811

The Department estimates that some cost savings will result from this final rule. Some of these savings, however, may actually transfer to contractors who are bidding on the contract, especially in light of the additional costs they are likely to incur. After offsetting the potential savings attributed to the Federal government from the overall additional costs attributed to contractors, the Department estimates the nondisplacement provisions covered by this rule could result in a net cost savings, but is unable to estimate. The Department wishes to emphasize that while this analysis is presented in terms of contractor and Federal Government costs and savings, because costs and savings will factor into final bid proposals, some of the potential savings to the federal government are likely to transfer to contractors in the form of higher bids. In any event, this rule is expected to have an effect on the economy that is less than the \$100,000,000 threshold for a rule to be considered economically significant.

## V. Regulatory Flexibility Analysis

The Regulatory Flexibility Act of 1980 (RFA) as amended, requires agencies to prepare regulatory flexibility analyses and make them available for public comment, when proposing regulations that will have a significant economic

impact on a substantial number of small entities. *See* 5 U.S.C. 603. If the rule is not expected to have a significant economic impact on a substantial number of small entities, the RFA allows an agency to certify such, in lieu of preparing an analysis. *See* 5 U.S.C. 605. As explained in the Initial Regulatory Flexibility Analysis section of the proposed rule, the Department did not expect the proposed rule to have a significant economic impact on a substantial number of small entities. 75 FR 13396 (Mar. 19, 2010). However, in the interest of transparency and to provide an opportunity for public comment, the Department prepared an initial regulatory flexibility analysis rather than certifying that the proposed rule was not expected to have a significant economic impact on a substantial number of small entities. The Department specifically requested comments on the initial regulatory flexibility analysis, including the number of small entities affected by the nondisplacement requirements, and the existence of alternatives that would reduce burden on small entities while still meeting the requirements of Executive Order 13495. *See* 75 FR 13396–13399 (Mar. 19, 2010). The Department received five comments on the initial regulatory flexibility analysis.

TechAmerica commented that the proposed rule should be revised to address the negative impact on small businesses, particularly the requirement to make an offer of employment to the predecessor contractor's employees. This commenter stated that small businesses often do not possess sufficient resources to both retain their current employees and hire incumbent personnel, and it therefore recommended that the Department exempt small business prime contractors from the nondisplacement requirements in order to avoid displacement of incumbent small business employees. The Department notes that the potential for a contractor's current personnel to be displaced due to the requirement to offer employment to a predecessor's employees is alleviated by Section 5(b) of the Executive Order and Section 9.12(c)(2) of this final rule, which provide that a successor contractor may employ under the contract any employee who has worked for the contractor for at least 3 months immediately preceding the commencement of the contract and who would otherwise face lay-off or discharge. Therefore, the Department does not believe that revising the rule as suggested by this commenter is necessary or appropriate.

The Chamber stated that many of the Department's assumptions in the initial regulatory flexibility analysis and the Executive Order 12866 analysis were not appropriately explained, making the Department's calculations difficult to fully replicate. The Chamber specifically commented that there is no mention of the burden on small businesses created by the record keeping requirements of this rule. Similarly, TechAmerica commented that it believes that the Department's initial regulatory flexibility analysis underestimates the impact of the rule on small businesses and that the Department's estimates were unrealistic. TechAmerica asked the Department to conduct a more thorough analysis based on a realistic estimate of the burdens and costs that the requirements would impose on small businesses. The Department used the best data available for conducting its review of the rule under the PRA, Executive Order 12866, and the RFA. As discussed in the preamble of the proposed rule, where the Department was unable to find reliable data sources, the Department made reasonable assumptions and characterized the assumptions as such. 75 FR 13393–13399 (Mar. 19, 2010). Neither the Chamber nor TechAmerica offered any data sources or alternative assumptions for the Department to use in determining the impact of the rule. The Department does not believe that additional analysis of the impacts of the rule are warranted as the analyses included in the proposed rule were based on the best available data, the Department identified where it made assumptions, and the commenters did not provide any alternative data or data sources for the Department's consideration. However, in reviewing the analyses in light of these comments, the Department determined that it inadvertently omitted reference to the particular chart used to determine the number of contract actions subject to the SCA in FY 2006. The chart, *Subject to Labor Statute*, appears in the Federal Procurement Report FY 2006, Section III Agency Views, available at: [https://www.fpds.gov/fpdsng\\_cms/index.php/reports](https://www.fpds.gov/fpdsng_cms/index.php/reports).

Several commenters, including SBA Office of Advocacy, the PSC, and TechAmerica, suggested that the Department consider alternatives that provide flexibilities for small businesses. However, only two commenters offered alternatives for consideration. TechAmerica recommended that the Department revise the proposed rule to include an exception for small business prime

contractors, while the PSC recommended that the Department consider exempting contracts where ten or fewer employees are employed by the predecessor contractor. The Department appreciates these suggestions, but believes the suggested alternatives are beyond the scope of the Department's authority in implementing the Executive Order. The Executive Order excludes contracts or subcontracts below the simplified acquisition threshold, effectively excluding many small contractors from compliance with its provisions and provides no specific authority to the Department for creating other exemptions or exceptions from compliance with the provisions of the Executive Order.

The SBA Office of Advocacy questioned how this rule will work with other requirements applicable to Federal Government contractors, such as use of the Department of Homeland Security's e-Verify system. The Department does not believe that application of this final rule interferes with or impacts an employer's compliance with other applicable Federal laws. Pursuant to Executive Order 13465, which amended Executive Order 12989, contractors to all executive departments and agencies are required to electronically verify employment authorization of employees performing work under qualifying Federal contracts. See 73 FR 33285 (Jun. 11, 2008). Nothing in this final rule interferes with or impedes a contractor's compliance with Executive Order 12989 as amended. Additionally, based on Sections 1 and 9(b) of Executive Order 13495, and as discussed in connection with Section 9.1 of this final rule, the Department does not believe that application of this final rule will interfere with or a contracting agency's or contractor's compliance with other applicable Federal laws, such as Executive Order 11246 (Equal Employment Opportunity), the Vietnam Era Veterans' Readjustment Assistance Act of 1974, or the requirements of the HUBZone program established by title VI of the Small Business Reauthorization Act of 1997.

This commenter also stated that the Small Business Regulatory Enforcement Fairness Act (SBREFA) requires that the Department prepare a Small Business Compliance Guide to assist small entities in complying with this rule and to set up a response system to answer inquiries from small entities about the rule. The Department is committed to providing employers subject to this rule, regardless of whether or not the employer is a small business, with information and assistance on compliance with the provisions of this

final rule. However, because the Department is able to certify that this rule will not have a significant economic impact on a substantial number of small entities (as further discussed below), the Department is not required by SBREFA to develop a Small Business Compliance Guide with respect to this rule. The Department will provide compliance assistance to contracting agencies, contractors and employees through the publication of materials on the agency's Web site, outreach and education seminars, and through Wage and Hour Division offices throughout the country, which provide compliance assistance at no charge to employers.

Based on the analysis below, the Department has estimated the number of covered small contractors and subcontractors subject to the rule and the financial burdens to these small contractors and subcontractors associated with complying with the requirements of this final rule. The Department estimates that 28,800 small contractors will be subject to this rule, the majority of which will incur compliance costs of less than \$100. Therefore, the Department has certified to the Chief Counsel for the Office of Advocacy of the Small Business Administration that this rule will not have a significant economic impact on a substantial number of small entities.

Executive Order 13495 establishes that, when a service contract expires and a follow-on contract is awarded for the same or similar services at the same location, the Federal Government's procurement interests in economy and efficiency are better served when a successor contractor hires the predecessor's employees. A carryover workforce reduces disruption to the delivery of services during the period of transition between contractors and provides the Federal Government the benefits of an experienced and trained workforce that is familiar with the Federal Government's personnel, facilities, and requirements. This final rule implements the Executive Order.

This final rule applies to entities that perform work for the Federal Government on contracts or subcontracts subject to the SCA of \$150,000 or more. The Department has found no precise data with which to measure the precise number of small entities that would be covered by this final rule; however, certain available data allow for estimates. As discussed more fully in the Paperwork Reduction Act portion of this preamble, according to the Federal Procurement Data System's (FPDS) 2006 Federal

Procurement Report <sup>1</sup>, slightly less than 75,000 (74,611) Federal government contract actions were subject to the SCA during that reporting period. A contract action is any oral or written action that results in the purchase, rent, or lease of supplies or equipment, services, or construction using appropriated dollars over the micro-purchase threshold, or modifications to these actions regardless of dollar value. Many contract actions are modifications to or extensions of existing Federal contracts or otherwise relate to actions where there is no successor contractor. The Department, therefore, assumes that about 15,000 per year (slightly more than 20 percent of all SCA covered contract actions in 2006) would be successor contracts subject to the nondisplacement provisions. The Department also assumes, based on consultations with Federal procurement officials, that for PRA purposes a typical SCA contract has one prime contractor and three subcontractors; therefore, the Department estimates the requirements of part 9 would apply to approximately 60,000 contracts (15,000 covered contract actions  $\times$  4 contractors). A review of FPDS data suggests that only 44,039 contractors performed work on service contracts in excess of \$25,000 in FY 2006. See David Berteau, et al., *Structure and Dynamics of the U.S. Federal Professional Services Industrial Base 1995–2007*, Center for Strategic and International Studies, February 2009, at 26, [http://www.csis.org/media/isis/pubs/090212\\_fps\\_report\\_2009.pdf](http://www.csis.org/media/isis/pubs/090212_fps_report_2009.pdf) (CSIS Report). Because of the \$150,000 threshold, some lesser number of contractors would perform work on contracts subject to the nondisplacement requirements; the Department estimates each year about 40,000 contractors and subcontractors will be subject to this information collection. FPDS data also suggest that slightly less than 55 percent of all contract actions relate to small entities. Applying this percentage to the 40,000 estimated covered contractors and subcontractors (generically referred to as contractors in this analysis, unless otherwise noted), suggests this rule will apply to 22,000 small entities. The Chamber contends that multiplying a percentage of contract actions by the estimated number of covered contractors and subcontractors erroneously compares apples with oranges, given that small and large entities may not work on SCA contracts in equal proportions, particularly given

<sup>1</sup> See chart entitled *Subject to Labor Statute*, Federal Procurement Report FY 2006, Section III Agency Views, available at: <https://www.fpds.gov/fpdsng/cms/index.php/reports>.

the indication that there may be approximately three subcontractors for every prime contractor. However, the Chamber points to no specific data to substantiate its stated concern, nor does it provide any concrete basis for its own assumption that subcontractors are disproportionately likely to be small businesses. The Department remains persuaded that its calculation is valid based on the available data, as supplemented by reasonable assumptions.

The CSIS Report found that 31,700 small businesses in FY 2006 undertook contracts worth at least \$25,000 (72 percent of all contractors undertaking Federal professional service contracts of at least \$25,000). CSIS Report at 26. Again, this rule would apply only to a portion of these contractors; however, using this latter percentage suggests the rule might apply to 28,800 small businesses. This is an upper bound estimate, because (in addition to not applying to contracts or subcontracts of less than \$150,000) the final rule would not apply to small entities with certain contracts or subcontracts awarded for services produced or provided by persons who are blind or have severe disabilities or contracts exempted by the contracting agency. The earlier analysis showing 40,000 contractors will work on 60,000 successor contracts and subcontracts (generically referred to as contracts in this analysis, unless otherwise noted) subject to this rule suggests a typical contractor will work on 1.5 successor contracts subject to the nondisplacement provisions. For purposes of this analysis, the Department assumes each covered small contractor will also work on an average of 1.5 covered successor contracts each year, the same ratio as all contractors; thus, this final rule is expected to apply to no more than 43,200 successor contracts awarded to small contractors.

In estimating the costs on small contractors, the Department has considered how current practices compare with expected actions contractors typically will take under the nondisplacement provisions. For example, those successor contractors that currently hire new employees for a contract must recruit workers and evaluate their qualifications for positions on the contract. In order to match employees with suitable jobs under this final rule, successor contractors will evaluate the predecessor contract employees and available positions; thus, successor contractors are likely to spend an equal amount of time determining job suitability under the final rule as under current practices. The costs for

documenting these employment decisions will also be similar under both the final rule and status quo.

For purposes of this analysis, the Department also believes the time small contractors will save by not recruiting an entirely new workforce from the outset will be offset by the additional time a successor contractor will spend in recruiting a new employee when there is a vacant position because the contractor cannot find suitable work for an employee who worked on the predecessor contract or in considering how to minimize displacement when the successor contractor reconfigures how it will deploy employees performing on the successor contract. See § 9.12(d)(3). As previously mentioned, this final rule will also not affect wages that contractors will pay workers because of the existing SCA requirement for the wage determination that establishes the minimum rate for each occupation to be incorporated into the contract; thus, existing regulatory requirements already set wage rates, including when the predecessor's collectively bargained rate is incorporated into the contract, successors must pay. See 41 U.S.C. 353(c); 29 CFR 4.6(b)(1). This final rule does not require successor contractors to pay wages higher than the rate required by the SCA. The successor contractor also may offer employment under different terms and conditions, if the reasons for doing so are not related to a desire that the employee refuse the offer or that other employees be hired for the offer. See § 9.12(b)(5).

The final rule includes a contract clause provision requiring contractors to incorporate the nondisplacement contract clause into each covered subcontract. This provision comes directly from Executive Order 13495, and the Department estimates that it will take a combined total of 30 minutes for contractors to incorporate the contract clause into each covered subcontract and the subcontractor to review it. As will be further explained later in this analysis, 85 percent of all small contractors are expected to incur no additional costs under this final rule. Assuming covered contractors spend an additional two hours (accounting for any additional time spent in making job offers, inserting and reviewing the contract clause in subcontracts, and maintaining records) per contract to comply with this final rule and increasing the October 2009 average hourly earnings for professional and business workers by 40 percent to account for fringe benefits (a total of \$31.32 per hour), this rule is estimated to impose annual costs of less than \$100

on most small contractors (1.5 contracts per contractor  $\times$  2 hours  $\times$  \$31.32). See *The Employment Situation—December 2009*, at 28, Table B-3, Bureau of Labor Statistics, ([http://www.bls.gov/news.release/archives/empst\\_01082010.pdf](http://www.bls.gov/news.release/archives/empst_01082010.pdf)). Aggregate compliance costs for these general requirements are expected to be \$2,706,048 (28,800 contractors  $\times$  1.5 contracts  $\times$  2 hours  $\times$  \$31.32).

As explained in the PRA section of this preamble, the final rule requires a predecessor contractor to provide a certified list of the names of all service employees working under that contract (and its subcontracts) to the contracting agency no later than 30 days before completion of the contractor's performance of services on a contract. Where changes to the workforce have been made after the submission of the certified list described in § 9.12(e)(1), a predecessor contractor must submit an updated certified list no later than 10 days before completion of the contractor's performance of services on a contract. The clause makes clear that this is the same list as the seniority list provided under the Service Contract Act clauses. This list already exists and is used by contractors in making hiring decisions under the status quo. Additional costs would only be incurred when there is a change in the workforce necessitating submission of an updated certified list. The department anticipates that a large portion of contractors will not make changes to their workforce in the final month of contract performance and will therefore not be required to submit a second certified list. However, to assure the most inclusive approximation the Department estimates that 50 percent of small contractors' contracts will experience a change in workforce between 30 and 10 days of completion of the contract, requiring an updated list. The Department recognizes that the actual number of contractors having to produce two lists is likely to be less, but uses 50 percent as an upper bound estimate (28,800 contractors  $\times$  1.5 contracts  $\times$  .5 = 21,600 contracts). The Department estimates that it will take a predecessor contractor an average of approximately one minute to update the employment status of each employee on a certified list, and that each service contract covered by this rule would involve an average of approximately 15 employees. The Department has found no precise data with which to measure the precise number of employees on contracts awarded to small contractors, but applies the estimate used for the class of all contracts subject to the

nondisplacement provisions. The Department recognizes that this will be an upper bound estimate, since the number of employees employed on contracts awarded to small contractors is likely to be less than those in the class of all contracts subject to the nondisplacement provisions. Thus, this requirement is estimated to impose annual costs of \$169,128 on small contractors (21,600 contracts  $\times$  15 employees  $\times$  1 minute = 5,400 hours. 5,400 hours  $\times$  \$31.32 = \$169,128).

As with other contractors, most small contractors will obtain information about the nondisplacement requirements primarily from the contract clause, and Wage and Hour Division offices throughout the country are available to provide compliance assistance at no charge to employers. While the Department believes this rule has been drafted in a way that should enable the vast majority of contractors to comply with the nondisplacement requirements without the need of professional assistance from an attorney or accountant, the Department recognizes some contractors will seek such assistance in the course of researching compliance options within the context of specific business needs. As a result, for purposes of this analysis, the Department estimates 15 percent of covered contractors each will incur additional costs averaging \$5000 because of the final rule requirements, for a total of \$21,600,000 spent by 4320 small contractors (28,800 contractors  $\times$  15%  $\times$  \$5000). The Department estimates that ten percent of these 4320 contractors will face complex issues for which each will spend an average of \$10,000 additional dollars to address, totaling \$4,320,000 spent by 432 small contractors (4320 contractors  $\times$  10%  $\times$  \$10,000). The Department estimates total compliance costs that the 28,800 small contractors subject to this final rule will incur will be \$28,626,048, with more than 90 percent of costs being borne by 4320 of these contractors (\$26,325,907/\$28,626,048). As with other contractors, the Department expects some compliance costs will be transferred to the Federal Government in the form of higher bids; however, the agency is not aware of a reasonable way to allocate those costs.

## VI. Unfunded Mandates Reform Act

For purposes of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1532, this final rule does not include any Federal mandate that may result in excess of \$100 million in expenditures by state, local, and tribal governments in the aggregate or by the private sector.

## VII. Executive Order 13132 (Federalism)

The Department has (1) Reviewed this rule in accordance with Executive Order 13132 regarding federalism and (2) determined that it does not have federalism implications. The final rule would not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

## VIII. Executive Order 13175, Indian Tribal Governments

This final rule would not have tribal implications under Executive Order 13175 that would require a tribal summary impact statement. The final rule would not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

## IX. Effects on Families

The undersigned hereby certifies that the final rule would not adversely affect the well-being of families, as discussed under section 654 of the Treasury and General Government Appropriations Act, 1999.

## X. Executive Order 13045, Protection of Children

This final rule would have no environmental health risk or safety risk that may disproportionately affect children.

## XI. Environmental Impact Assessment

A review of this final rule in accordance with the requirements of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*; the regulations of the Council on Environmental Quality, 40 CFR part 1500 *et seq.*; and the Departmental NEPA procedures, 29 CFR part 11, indicates that the rule would not have a significant impact on the quality of the human environment. There is, thus, no corresponding environmental assessment or an environmental impact statement.

## XII. Executive Order 13211, Energy Supply

This final rule is not subject to Executive Order 13211. It will not have a significant adverse effect on the supply, distribution, or use of energy.

## XIII. Executive Order 12630, Constitutionally Protected Property Rights

This final rule is not subject to Executive Order 12630, because it does not involve implementation of a policy that has takings implications or that could impose limitations on private property use.

## XIV. Executive Order 12988, Civil Justice Reform Analysis

This final rule was drafted and reviewed in accordance with Executive Order 12988 and will not unduly burden the Federal court system. The final rule was: (1) Reviewed to eliminate drafting errors and ambiguities; (2) written to minimize litigation; and (3) written to provide a clear legal standard for affected conduct and to promote burden reduction.

## List of Subjects in 29 CFR Part 9

Employment, Federal buildings and facilities, Government contracts, Law enforcement, Labor.

Nancy J. Leppink,  
*Deputy Administrator, Wage and Hour Division.*

For the reasons set out in the preamble, the Department amends Title 29 of the Code of Federal Regulations by adding part 9 as set forth below:

## PART 9—NONDISPLACEMENT OF QUALIFIED WORKERS UNDER SERVICE CONTRACTS

### Subpart A—General

Sec.

- 9.1 Purpose and scope.
- 9.2 Definitions.
- 9.3 Coverage.
- 9.4 Exclusions.

### Subpart B—Requirements

- 9.11 Contracting agency requirements.
- 9.12 Contractor requirements and prerogatives.

### Subpart C—Enforcement

- 9.21 Complaints.
- 9.22 Wage and Hour Division conciliation.
- 9.23 Wage and Hour Division investigation.
- 9.24 Remedies and sanctions for violations of this part.

### Subpart D—Administrator's Determination, Mediation, and Administrative Proceedings

- 9.31 Administrator's determination.
  - 9.32 Requesting appeals.
  - 9.33 Mediation.
  - 9.34 Administrative Law Judge hearings.
  - 9.35 Administrative Review Board proceedings.
- Appendix A to Part 9—Contract Clause  
Appendix B to Part 9—Notice to Service Contract Employees.

**Authority:** 5 U.S.C. 301; section 6, E.O. 13495, 74 FR 6103; Secretary's Order 9-2009, 74 FR 58836.

## Subpart A—General

### § 9.1 Purpose and scope.

(a) *Purpose.* This part contains the Department of Labor's rules relating to the administration of Executive Order 13495, "Nondisplacement of Qualified Workers Under Service Contracts," and implements the enforcement provisions of the Executive Order. The Executive Order assigns enforcement responsibility for the nondisplacement requirements to the Department. The Executive Order states that the Federal Government's procurement interests in economy and efficiency are served when the successor contractor hires the predecessor's employees. A carryover workforce minimizes disruption in the delivery of services during a period of transition between contractors and provides the Federal Government the benefit of an experienced and trained workforce that is familiar with the Federal Government's personnel, facilities, and requirements. Executive Order 13495, therefore, generally requires that successor service contractors performing on Federal contracts offer a right of first refusal to suitable employment (*i.e.*, a job for which the employee is qualified) under the contract to those employees under the predecessor contract whose employment will be terminated as a result of the award of the successor contract.

(b) *Policy.* Executive Order 13495 establishes a Federal Government policy for service contracts and their solicitations to include a clause that requires the contractor and its subcontractors under a contract that succeeds a contract for performance of the same or similar services at the same location to offer a right of first refusal of employment to those employees (other than managerial and supervisory employees) employed under the predecessor contract whose employment will be terminated as a result of the award of the successor contract in positions for which the employees are qualified. Nothing in Executive Order 13495 or this part shall be construed to permit a contractor or subcontractor to fail to comply with any provision of any other Executive Order, regulation, or law of the United States.

(c) *Scope.* Neither Executive Order 13495 nor this part creates any rights under the Contract Disputes Act or any private right of action. The Executive Order provides that disputes regarding the requirement of the contract clause

prescribed by section 5 of the Order, to the extent permitted by law, shall be disposed of only as provided by the Secretary of Labor in regulations issued under the Order. It also provides for this part to favor the resolution of disputes by efficient and informal alternative dispute resolution methods to the extent practicable. The Order does not preclude judicial review of final decisions by the Secretary in accordance with the Administrative Procedure Act. Additionally, the Order also provides that it is to be implemented consistent with applicable law and subject to the availability of appropriations.

### § 9.2 Definitions.

For purposes of this part:

*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.

*Administrative Review Board* means the Administrative Review Board, U.S. Department of Labor.

*Contractor* means a prime contractor and all of its first or lower tier subcontractors on a Federal service contract.

*Contracting Officer* means the individual, a duly appointed successor, or authorized representative who is designated and authorized to enter into procurement contracts on behalf of the Federal contracting agency.

*Day* means, unless otherwise specified, a calendar day.

*Employee or service employee* means any person engaged in the performance of a service contract other than any person employed in a bona fide executive, administrative, or professional capacity, as those terms are defined in 29 CFR part 541. The term *employee or service employee* includes all such persons, as defined in the McNamara-O'Hara Service Contract Act of 1965, as amended, regardless of any contractual relationship that may be alleged to exist between a contractor or subcontractor and such persons.

*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 procurement contract pursuant to authority derived from the Constitution and the laws of the United States.

*Managerial employee and supervisory employee* mean a person engaged in the performance of services under the

contract who is employed in a bona fide executive, administrative, or professional capacity, as those terms are defined and delimited in 29 CFR part 541.

*Month* means a period of 30 consecutive 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.

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

*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.

*Service contract or contract* means any contract or subcontract for services entered into by the Federal Government or its contractors that is covered by the McNamara-O'Hara Service Contract Act of 1965, as amended, and its implementing regulations.

*Solicitation* means any request to submit offers or quotations to the 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.

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

### § 9.3 Coverage.

This part applies to all service contracts and their solicitations, except those excluded by § 9.4 of this part, that succeed contracts for the same or similar service at the same location.

### § 9.4 Exclusions.

(a) *Small contracts.* (1) *General.* The requirements of this part do not apply to contracts or subcontracts under the simplified acquisition threshold set by the Office of Federal Procurement Policy Act, as amended.

(2) *Application to subcontracts.* While the § 9.4(a)(1) exclusion applies to subcontracts that are less than the simplified acquisition threshold, the prime contractor must comply with the requirements of this part, if the prime contract is at least the threshold

amount. When a contractor that is subject to the nondisplacement requirements of this part discontinues the services of a subcontractor at any time during the contract and performs those services itself at the same location, the contractor shall offer employment on the contract to the subcontractor's employees who would otherwise be displaced and would otherwise be qualified in accordance with this part but for the size of the subcontract.

(b) *Certain contracts or subcontracts awarded for services produced or provided by persons who are blind or have severe disabilities.* (1) The requirements of this part do not apply to contracts or subcontracts pursuant to the Javits-Wagner-O'Day Act.

(2) The requirements of this part do not apply to contracts or subcontracts for 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 sec. 505 of the Treasury, Postal Services and General Government Appropriations Act, 1995.

(3) The requirements of this part do not apply to agreements for vending facilities entered into pursuant to the preference regulations issued under the Randolph-Sheppard Act.

(4) The exclusions provided by paragraphs (b)(1) through (3) of this section apply when either the predecessor or successor contract has been awarded for services produced or provided by the severely disabled, as described in paragraphs (b)(1)–(3) of this section.

(c) *Federal service work constituting only part of employee's job.* This part does not apply to 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 employees were not deployed in a manner that was designed to avoid the purposes of Executive Order 13495.

(d) *Contracts exempted by Federal agency.* This part does not apply to any contract, subcontract, or purchase order or any class of contracts, subcontracts, or purchase orders as to which the head of a contracting department or agency finds that the application of any of the requirements of this part would not serve the purposes of Executive Order 13495 or would impair the ability of the Federal Government to procure services on an economical and efficient basis.

(1) Any agency determination to exercise its exemption authority under Section 4 of the Executive Order shall be made no later than the solicitation date. As an alternative to exempting the

agency from all provisions of this part, the head of a contracting department or agency may exempt the agency from one or more individual provisions no later than the contract solicitation date. Any agency determination to exercise its exemption authority under Section 4 of the Executive Order made after the solicitation date shall be inoperative and in such a circumstance the contract clause set forth in Appendix A of this part shall be included in, or added to, the covered service contracts and their solicitations.

(2) When an agency exercises its exemption authority with respect to any contract, subcontract, or purchase order, the contracting agency shall ensure that the contractor notifies affected workers and their collective bargaining representatives in writing of the agency's determination no later than five business days after the solicitation date. The notification shall include facts supporting the determination that the application of one or more requirements of this part would not serve the purposes of Executive Order 13495 or would impair the ability of the Federal Government to procure services on an economical and efficient basis. Where a contracting agency exempts a class of contracts, subcontracts, or purchase orders, the contractor shall provide the notice to incumbent workers and their collective bargaining representatives for each individual solicitation. A contracting agency's failure to ensure that the contractor notifies incumbent workers and their collective bargaining representatives in writing of the agency's determination to exercise its exemption authority under Section 4 of the Executive Order no later than five business days after the solicitation date shall render the exemption decision inoperative and in such a circumstance the contract clause set forth in Appendix A of this part shall be included in, or added to, the covered service contracts and their solicitations. The contracting agency also shall notify the Department of its exemption decision and provide the Department with a copy of its written analysis no later than five business days after the solicitation date, which the Department will post on its Web site at <http://www.dol.gov>. The contracting agency's failure to follow this requirement shall render any agency exemption decision inoperative and in such a circumstance the clause in Appendix A of this part shall be included in, or added to, the covered service contracts and their solicitations.

(3) The agency shall ensure that the predecessor contractor uses the notification method specified in

§ 9.11(b) of this part to inform workers and their collective bargaining representatives of the exemption determination. The failure by a contracting agency to ensure that the contractor uses the notification method specified in § 9.11(b) of this part shall render the exemption decision inoperative and in such a circumstance the contract clause set forth in Appendix A of this part shall be included in, or added to, the covered service contracts and their solicitations.

(4)(i) In exercising the authority to exempt contracts under this section based on a finding that any of the requirements of Executive Order 13495 would not serve the purposes of the Order, or would impair the ability of the Federal Government to procure services on an economical and efficient basis, the agency shall prepare a written analysis by the solicitation date supporting such determination. The written analysis shall be retained in accordance with FAR 4.805. 48 CFR 4.805. Such a written analysis shall, among other things, compare the anticipated outcomes of hiring predecessor contract employees with those of hiring a new workforce. The consideration of cost and other factors in exercising the agency's exemption authority shall reflect the general finding made by the Executive Order that the government's procurement interests in economy and efficiency are normally served when the successor contractor hires the predecessor's employees, and shall specify how the particular circumstances support a contrary conclusion. Any agency determination to exercise its exemption authority under Section 4 of the Executive Order without a written analysis as required by this part shall be inoperative and in such a circumstance the contract clause set forth in Appendix A of this part shall be included in, or added to, the covered service contracts and their solicitations.

(ii) When analyzing whether the application of the Executive Order's requirements would not serve the purposes of the Order and impair the ability of the Federal Government to procure services on an economical and efficient basis, the head of a contracting department or agency shall consider the specific circumstances associated with the services to be acquired. General assertions or presumptions of an inability to procure services on an economical and efficient basis using a carryover workforce shall be deemed insufficient. Factors that may be considered include, but are not limited to the following:

(A) Whether the use of a carryover workforce would greatly increase disruption to the delivery of services during the period of transition between contracts (e.g., the carryover workforce in its entirety would not be an experienced and trained workforce that is familiar with the Federal Government's personnel, facilities, and requirements as pertinent to the contract, subcontract, purchase order, class of contracts, subcontracts, or purchase orders at issue and would require extensive training to learn new technology or processes that would not be required of a new workforce).

(B) Emergency situations, such as a natural disaster or an act of war, that physically displace incumbent employees from the location of the service contract work and make it impossible or impracticable to extend offers to hire as required by the Order.

(C) Situations where the head of the contracting department or agency reasonably believes, based on the predecessor employees' past performance, that the entire predecessor workforce failed, individually as well as collectively, to perform suitably on the job and that it is not in the interest of economy and efficiency to provide supplemental training to the predecessor's workers.

(iii) Factors the head of a contracting department or agency shall not consider in making an exemption determination (because consideration of such factors would contravene the Executive Order's purposes and findings) include whether the use of a carryover workforce, in general, would greatly increase disruption to the delivery of services during the period of transition between contracts; whether, in general, a carryover workforce would not be an experienced and trained workforce that is familiar with the Federal Government's personnel, facilities, and requirements; the job performance of the predecessor contractor; the seniority of the workforce; and the reconfiguration of the contract work by a successor contractor. The head of a contracting department or agency also shall not consider wage rates and fringe benefits of service employees in making an exemption determination except in the following exceptional circumstances:

(A) In emergency situations, such as a natural disaster or an act of war, that physically displace incumbent employees from the locations of the service contract work and make it impossible or impracticable to extend offers to hire as required by the Order;

(B) When a carryover workforce in its entirety would not constitute an experienced and trained workforce that

is familiar with the Federal Government's personnel, facilities, and requirements but rather would require extensive training to learn new technology or processes that would not be required of a new workforce; or

(C) Other, similar circumstances in which the cost of employing a carryover workforce on the successor contract would be prohibitive.

(5) Any request by interested parties for reconsideration of a contracting department or agency head's determination to exercise its exemption authority under Section 4 of the Executive Order shall be directed to the head of the contracting department or agency.

(e) *Managerial and supervisory employees.* This part does not apply to employees who are managerial or supervisory employees of Federal service contractors or subcontractors. See § 9.2(9) of this part, definition of *managerial employee* and *supervisory employee*.

## Subpart B—Requirements

### § 9.11 Contracting agency requirements.

(a) *Contract Clause.* The contract clause set forth in Appendix A of this part shall be included in covered service contracts, and solicitations for such contracts, that succeed contracts for performance of the same or similar services at the same location.

(b) *Notice.* 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 will ensure that the predecessor contractor provide written notice to service employees of the predecessor contractor of their possible right to an offer of employment. Such notice shall be either posted in a conspicuous place at the worksite or delivered to the employees individually. Where the predecessor contractor's workforce is comprised of a significant portion of workers who are not fluent in English, the notice shall be provided in both English and a language with which the employees are more familiar. Multiple foreign language notices are required where significant portions of the workforce speak different foreign languages and there is no common language. Contracting Officers may advise contractors to provide the notice set forth in Appendix B to this part in either a physical posting at the job site, or another format that effectively provides individual notice such as individual paper notices or effective email notification to the affected employees. To be effective, email notification must result in an electronic

delivery receipt or some other reliable confirmation that the intended recipient received the notice. 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.

(c) *Disclosures.* The Contracting Officer shall provide the incumbent contractor's list of employees referenced in § 9.12(e) of this part to the successor contractor and, on request, to employees or their representatives.

(d) *Actions on complaints.* (1) *Reporting.* (i) *Reporting time frame.* Within 14 days of being contacted by the Wage and Hour Division, the Contracting Officer shall forward all information listed in paragraph (d)(1)(ii) of this section to the Branch of Government Contracts Enforcement, Wage and Hour Division, U.S. Department of Labor, Washington, DC 20210.

(ii) *Report contents:* Except as provided by paragraph (d)(3) of this section, the Contracting Officer shall forward to the Branch of Government Contracts Enforcement, Wage and Hour Division, U.S. Department of Labor, Washington, DC 20210 any:

(A) Complaint of contractor noncompliance with this part;

(B) Available statements by the employee or the contractor regarding the alleged violation;

(C) Evidence that a seniority list was issued by the predecessor and provided to the successor;

(D) A copy of the seniority list;

(E) Evidence that the nondisplacement contract clause was included in the contract or that the contract was exempted by the contracting agency;

(F) Information concerning known settlement negotiations between the parties, if applicable;

(G) Any other relevant facts known to the Contracting Officer or other information requested by the Wage and Hour Division.

(2) [Reserved]

### § 9.12 Contractor requirements and prerogatives.

(a) *General.* (1) *No employment openings prior to right of first refusal.* Except as provided under the exclusions listed in § 9.4 of this part or paragraphs (c) and (d) of this section, a successor contractor or subcontractor shall fill no employment openings under the contract prior to making good faith offers of employment (i.e., a right of first refusal to employment on the contract), in positions for which the employees are qualified, to those employees employed under the predecessor



contract whose employment will be terminated as a result of award of the contract or the expiration of the contract under which the employees were hired. The contractor and its subcontractors shall make a bona fide, express offer of employment to a position for which the employee is qualified to each employee and shall state the time within which the employee must accept such offer, but in no case shall the period within which the employee must accept the offer of employment be less than 10 days.

(2) *No seniority list available.* 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.

(3) *Determining eligibility.* While a person's entitlement to a job offer under this part usually 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, a contractor must also accept other credible evidence of an employee's entitlement to a job offer under this part. 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, as otherwise provided for in this part. Similarly, an employee could demonstrate eligibility by producing a paycheck stub identifying the work location and dates worked.

(b) *Method of job offer.* (1) *Bona-fide offer.* Except as otherwise provided in this part, a contractor must make a bona fide express offer of employment to each qualified employee on the predecessor contract before offering employment on the contract to any other person. In determining whether an employee is entitled to a bona fide, express offer of employment, a contractor may consider the exceptions set forth in paragraph (c) of this section and may utilize employment screening processes (*i.e.*, drug tests, background checks, security clearance checks, and similar pre-employment screening mechanisms) only when such processes are provided for by the contracting agency, are conditions of the service contract, and are consistent with the Executive Order. The obligation to offer employment

under this part shall cease upon the employee's first refusal of a bona fide offer to employment on the contract.

(2) *Establishing time limit for employee response.* The contractor shall state the time within which an employee must accept an employment offer, but in no case may the period in which the employee has to accept the offer be less than 10 days.

(3) *Process.* The successor contractor must, in writing or orally, offer employment to each employee. *See also* paragraph (f) of this section, Recordkeeping. In order 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.

(4) *Different job position.* As a general matter, an offer of employment on the successor's contract will be presumed to be a bona fide offer of employment, even if it is not for a position similar to the one the employee previously held but one for which the employee is qualified. If a question arises concerning an employee's qualifications, that question shall be decided based upon the employee's education and employment history, with particular emphasis on the employee's experience on the predecessor contract. A contractor must base its decision regarding an employee's qualifications on credible information provided by a knowledgeable source such as the predecessor contractor, the local supervisor, the employee, or the contracting agency.

(5) *Different employment terms and conditions.* An offer of employment to a position on the contract under different employment terms and conditions, including changes to pay or benefits, than the employee held with the predecessor contractor will be considered bona fide, if the reasons are not related to a desire that the employee refuse the offer or that other employees be hired for the offer.

(6) *Termination after contract commencement.* Where an employee is terminated under circumstances suggesting the 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.

(c) *Exceptions.* The successor contractor will bear the responsibility of demonstrating the appropriateness of claiming any of the following exceptions to the nondisplacement provisions subject to this part.

(1) *Nondisplaced employees.* (i) A contractor or subcontractor is not required to offer employment to any employee of the predecessor contractor who will be retained by the predecessor contractor.

(ii) The contractor must presume that all 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.

(2) *Successor's current employees.* A contractor or subcontractor may employ under the contract any employee who has worked for the contractor or subcontractor for at least 3 months immediately preceding the commencement of the contract and who would otherwise face lay-off or discharge.

(3) *Predecessor contractor's non-service employees.* (i) A contractor or subcontractor is not required to offer employment to any employee of the predecessor who is not a service employee. *See* § 9.2 of this part for definitions of *employee*, *managerial employee* and *supervisory employee*.

(ii) The contractor must presume that all employees hired to work under a predecessor's Federal service contract are service employees, 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, the employee, or the contracting agency. Information regarding the general business practices of the predecessor contractor or the industry is not sufficient to claim this exemption.

(4) *Employee's past unsuitable performance.* (i) A contractor or subcontractor is not required to offer employment to any employee of the predecessor contractor for whom the contractor or any of its subcontractors reasonably believes, based on the particular employee's past performance, has failed to perform suitably on the job.

(ii)(A) The contractor must presume that all employees working under the predecessor contract in the last month of performance performed suitably 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.

(B) For example, a contractor may demonstrate its reasonable belief that the employee, in fact, failed to perform suitably on the predecessor contract through written evidence of disciplinary action taken for poor performance or evidence directly from the contracting agency that the particular employee did not perform suitably. 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.

(5) *Non-Federal work.* (i) 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 this part.

(ii) 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 reasonable belief to the contrary. The successor contractor must demonstrate that its belief is reasonable and is based upon credible information provided by a knowledgeable source such as the predecessor contractor, the local supervisor, the employee, or the contracting agency. Information regarding the general business practices of the predecessor contractor or the industry is not sufficient.

(iii) A contractor that makes a reasonable determination that a predecessor contractor's employee also performed work on one or more nonfederal service contracts as part of a single job must also make a reasonable determination that the employee was not deployed in such a way that was designed to avoid the purposes of this part. The successor contractor must demonstrate that its belief is reasonable and is based upon credible information that has been provided by a knowledgeable source such as the employee or the contracting agency. For example, evidence from a contracting agency that an employee worked only occasionally on a Federal service contract combined with a statement from the employee indicating fulltime employment with the predecessor would, absent other facts, constitute the

basis for a reasonable belief that there is no obligation to offer employment to the employee. On the other hand, information suggesting a change in how a predecessor contractor deployed employees near the end of the contract period could suggest an effort to evade the purposes of this part.

(d) *Reduced staffing.* (1) *Contractor determines how many employees.* (i) A contractor or subcontractor shall determine the number of employees necessary for efficient performance of the contract or subcontract and, for bona fide staffing or work assignment reasons, may elect to employ fewer 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 employees on the predecessor contract, but must offer employment only to the number of eligible employees the successor contractor believes necessary to meet its anticipated staffing pattern, except that:

(ii) Where, in accordance with this authority to employ fewer employees, a successor contractor does not offer employment to all the predecessor contract employees, the obligation to offer employment shall continue for 90 days after the successor contractor's first date of performance on the contract. The contractor's obligation under this part 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. The following three examples demonstrate the principle.

(A) 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 contractor's employment offer or until the remaining employees have rejected the offer. If an employee quits or is terminated from the successor contract within 90 days of the first date of contract performance, the contractor must first offer employment to any remaining eligible employees of the predecessor contract.

(B) A successor contractor originally offers 20 jobs to predecessor contract employees on a contract that had 30 positions under the predecessor contractor. The first 20 predecessor contract employees the successor contractor approaches accept the employment offer. Within a month of commencing work on the contract, the successor determines that it must hire

seven additional employees to perform the contract requirements. The first three predecessor contract employees to whom the successor offers employment decline the offer; however, the next four predecessor contract employees accept the offers. In accordance with the provisions of this section, the successor contractor offers employment on the contract to the three remaining predecessor contract employees who all accept; however, two employees on the contract quit five weeks later. The successor contractor has no further obligation under this part to make a second employment offer to the persons who previously declined an offer of employment on the contract.

(C) A successor contractor reduces staff on a successor contract by two positions from the predecessor contract's staffing pattern. Each predecessor contract employee the successor approaches accepts the employment offer; therefore, employment offers are not made to two predecessor contract employees. The successor contractor terminates an employee five months later. The successor contractor has no obligation to offer employment to the two remaining employees from the predecessor contract, because more than 90 days have passed since the successor contractor's first date of performance on the contract.

(2) *Contractor determines which employees.* The contractor, subject to provisions of this part and other applicable restrictions (including non-discrimination laws and regulations), will determine to which employees it will offer employment. See § 9.1(b) regarding compliance with other requirements.

(3) *Changes to staffing pattern.* Where 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. 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 reconfigures the staffing pattern on the contract by increasing the number persons employed as a Cook II and Dishwashers but reducing the number of Cook I employees. The successor contractor must examine the qualifications of each Cook I to see if a position as either a Cook II or Dishwasher is possible. Conversely,

were the contractor to increase the number of Cook I employees, decrease the number of Cook II employees, and keep 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. The contractor would also need to consider whether offering Dishwasher positions to Cook I employees would result in less overall displacement. Finally, should some Dishwashers decline the employment offer, the Contractor would need to consider the qualifications of the Cooks at both levels and offer positions on the contract in a way that results in the least displacement.

(e) *Contractor obligations near end of contract performance.* (1) Certified list of employees provided 30 days before contract completion. The contractor shall, not less than 30 days before completion of the contractor's performance of services on a contract, furnish the Contracting Officer with a list of the names of all service employees working under the contract and its subcontracts at the time the list is submitted. The list shall 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 before the contract is completed, the contractor may use the list submitted, or to be submitted, to satisfy the requirements of the contract clause specified at 29 CFR 4.6(l)(2) to meet this provision.

(2) Certified list of employees provided 10 days before contract completion. Where changes to the workforce are made after the submission of the certified list described in paragraph (e)(1) of this section, the contractor shall, not less than 10 days before completion of the contractor's performance of services on a contract, furnish the Contracting Officer with a certified list of the names of all service employees employed within the last month of contract performance. The list shall also contain anniversary dates of employment and, where applicable, dates of separation of each service employee under the contract and its predecessor contracts with either the current or predecessor contractors or their subcontractors. The contractor may use the list submitted to satisfy the requirements of the contract clause specified at 29 CFR 4.6(l)(2) to meet this provision.

(f) *Recordkeeping.* (1) *Form of records.* This part prescribes no particular order or form of records for contractors. A

contractor may use records developed for any purpose to satisfy the requirements of this part, provided the records otherwise meet the requirements and purposes of this part and are fully accessible. The requirements of this part shall apply to all records regardless of their format (e.g., paper or electronic).

(2) *Records to be retained.* (i) The contractor 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, a summary of each 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.

(ii) The contractor shall maintain a copy of any record that forms the basis for any exclusion or exemption claimed under this part.

(iii) The contractor shall maintain a copy of the employee list received from the contracting agency. See paragraph (e) of this section, contractor obligations near end of contract.

(iv) Every contractor who makes retroactive payment of wages or compensation under the supervision of the Administrator of the Wage and Hour Division pursuant to § 9.24(b) of this part, shall:

(A) Record and preserve, 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.

(B) Prepare a report of each such payment on a receipt form provided by or authorized by the Wage and Hour Division, and

(1) Preserve a copy as part of the records,

(2) Deliver a copy to the employee, and

(3) File the original, as evidence of payment by the contractor and receipt by the employee, with the Administrator or an authorized representative within 10 days after payment is made.

(3) *Records retention period.* The contractor shall retain records prescribed by section § 9.12(f)(2) of this part for not less than a period of three years from the date the records were created.

(4) *Disclosure.* The contractor must provide copies of such documentation upon request of any authorized representative of the contracting agency or Department of Labor.

(g) *Investigations.* The contractor shall cooperate in any review or investigation

conducted pursuant to this part 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 this part or has attempted to exercise any rights afforded under this part. 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.

## Subpart C—Enforcement

### § 9.21 Complaints.

*With Wage and Hour Division.* Any employee(s) or authorized employee representative(s) of the predecessor contractor who believes the successor contractor has violated this part may file a complaint with the Wage and Hour Division within 120 days from the first date of contract performance. The employee may file a complaint directly with the Branch of Government Contracts Enforcement, Wage and Hour Division, U.S. Department of Labor, Washington, DC 20210.

### § 9.22 Wage and Hour Division conciliation.

After obtaining information regarding alleged violations, the Wage and Hour Division may contact the successor contractor about the complaint and attempt to conciliate and reach a resolution that is consistent with the requirements of this part and is acceptable to both the complainant(s) and the successor contractor.

### § 9.23 Wage and Hour Division investigation.

(a) *Initial investigation.* The Administrator may initiate an investigation under this part 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 this part (including conduct warranting imposition of ineligibility sanctions pursuant to § 9.24(d) of this part) has occurred.

(b) *Subsequent investigations.* The Administrator may conduct a new

investigation or issue a new determination if the Administrator concludes circumstances warrant, such as 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.

#### **§ 9.24 Remedies and sanctions for violations of this part.**

(a) *Authority.* Executive Order 13495 provides that the Secretary shall have the authority to issue orders prescribing appropriate remedies, including, but not limited to, requiring the contractor to offer employment, in positions for which the employees are qualified, to employees from the predecessor contract and the payment of wages lost.

(b) *Unpaid wages or other relief due.* In addition to satisfying any costs imposed under §§ 9.34(j) or 9.35(d) of this part, a contractor who violates any provision of this part 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.

(c) *Withholding of funds.* (1) *Unpaid wages or other relief.* After an investigation and a determination by the Administrator that lost wages or other monetary relief is due, the Administrator 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 moneys due. Upon the final order of the Secretary that such moneys are due, the Administrator may direct that such withheld funds be transferred to the Department of Labor for disbursement.

(2) *List of employees.* If the Contracting Officer or the Administrator, upon final order of the Secretary, finds that the predecessor contractor has failed to provide a list of the names of employees working under the contract in accordance with § 9.12(e) of this part, the Contracting Officer may in his or her discretion, or upon request by the Administrator, take such action as may be necessary to cause the suspension of the payment of contract funds until such time as the list is provided to the Contracting Officer.

(d) *Ineligibility listing.* Where the Secretary finds that a contractor has failed to comply with any order of the Secretary, or has committed willful or

aggravated violations of this part, the Secretary may order that the contractor and its responsible officers, and any firm in which the contractor has a substantial interest, shall 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 shall be carried out without affording the contractor or subcontractor an opportunity for a hearing.

#### **Subpart D—Administrator's Determination, Mediation, and Administrative Proceedings**

##### **§ 9.31 Determination of the Administrator.**

(a) *Written determination.* Upon completion of an investigation under § 9.23 of this part, and provided that a resolution is not reached that is consistent with the requirements of this part and acceptable to both the complainant(s) and the successor contractor, the Administrator will issue a written determination of whether a violation has occurred. The determination shall contain 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 notify any complainant(s); employee representative(s); contractor, including the prime contractor if a subcontractor is implicated; and contractor representative(s) by personal service or by registered or certified mail to the last known address, of the investigation findings. Where service by certified mail is not accepted by the party, the Administrator may exercise discretion to serve the determination by regular mail.

(b) *Notice to parties and effect.* (1) *Relevant facts in dispute.* Except as provided in paragraph (b)(2) of this section, the determination of the Administrator shall advise the parties (ordinarily any complainant, the successor contractor, and any of their representatives) that the notice of determination shall become the final order of the Secretary and shall not be appealable in any administrative or judicial proceeding unless, postmarked within 20 days of the date of the determination of the Administrator, the Chief Administrative Law Judge receives a request for a hearing pursuant to § 9.32(b)(1) of this part. A detailed

statement of the reasons why the Administrator's ruling is in error, including facts alleged to be in dispute, if any, shall be submitted with the request for a hearing. The Administrator's determination not to seek ineligibility sanctions shall not be appealable.

(2) *Relevant facts not in dispute.* If the Administrator concludes that no relevant facts are in dispute, the parties and their representatives, if any, will be so advised and will be further advised that the determination shall become the final order of the Secretary and shall not be appealable in any administrative or judicial proceeding unless, postmarked within 20 days of the date of the determination of the Administrator, a petition for review is filed with the Administrative Review Board pursuant to § 9.32(b)(2) of this part. The determination will further advise that if an aggrieved party disagrees with the factual findings or believes there are relevant facts in dispute, the aggrieved party may advise the Administrator of the disputed facts and request a hearing by letter, which must be received within 20 days of the date of the determination. The Administrator will either refer the request for a hearing to the Chief Administrative Law Judge, or notify the parties and their representatives, if any, of the determination of the Administrator that there is no relevant issue of fact and that a petition for review may be filed with the Administrative Review Board within 20 days of the date of the notice, in accordance with the procedures at § 9.32(b)(2) of this part.

##### **§ 9.32 Requesting appeals.**

(a) *General.* If any party desires review of the determination of the Administrator, including judicial review, a request for an Administrative Law Judge hearing or petition for review by the Administrative Review Board must first be filed in accordance with § 9.31(b) of this part.

(b) *Process.* (1) *For Administrative Law Judge hearing.* (i) *General.* Any aggrieved party may file a request for a hearing by an Administrative Law Judge within 20 days of the determination of the Administrator. The request for a hearing shall be accompanied by a copy of the determination of the Administrator and may be filed by U.S. mail, facsimile (FAX), telegram, hand delivery, next-day delivery, or a similar service. At the same time, a copy of any request for a hearing shall be sent to the complainant(s) or successor contractor, and their representatives, if any, as appropriate; the Administrator of the Wage and Hour Division; and the

Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210.

(ii) *By the complainant.* The complainant or any other interested party may request a hearing where the Administrator determines, after investigation, that there is no basis for a finding that a contractor has committed violation(s), or where the complainant or other interested party believes that the Administrator has ordered inadequate monetary relief. In such a proceeding, the party requesting the hearing shall be the prosecuting party and the contractor shall be the respondent; the Administrator may intervene as a party or appear as amicus curiae at any time in the proceeding, at the Administrator's discretion.

(iii) *By the contractor.* The contractor or any other interested party may request a hearing where the Administrator determines, after investigation, that the contractor has committed violation(s). In such a proceeding, the Administrator shall be the prosecuting party and the contractor shall be the respondent.

(2) *For Administrative Review Board review.* (i) *General.* Any aggrieved party desiring review of a determination of the Administrator in which there were no relevant facts in dispute, or an Administrative Law Judge's decision, shall file a written petition for review with the Administrative Review Board that must be postmarked within 20 days of the date of the determination or decision and shall be served on all parties and, where the case involves an appeal from an Administrative Law Judge's decision, the Chief Administrative Law Judge. *See also* § 9.32(b)(1) of this part.

(ii) *Contents and service.* (A) A petition for review shall refer to the specific findings of fact, conclusions of law, or order at issue.

(B) Copies of the petition and all briefs shall be served on the Administrator, Wage and Hour Division, and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210.

(c) *Effect of filing.* If a timely request for hearing or petition for review is filed, the determination of the Administrator or the decision of the Administrative Law Judge shall be inoperative unless and until the Administrative Review Board issues an order affirming the determination or decision, or the determination or decision otherwise becomes a final order of the Secretary. If a petition for review concerns only the imposition of ineligibility sanctions, however, the

remainder of the decision shall be effective immediately. No judicial review shall be available unless a timely petition for review to the Administrative Review Board is first filed.

#### **§ 9.33 Mediation.**

(a) *General.* The parties are encouraged to resolve disputes in accordance with the conciliation procedures set forth at § 9.22 of this part, or, where such efforts have failed, to utilize settlement judges to mediate settlement negotiations pursuant to 29 CFR 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.

(b) *Appointing settlement judge for cases scheduled with the Office of Administrative Law Judges.* Upon a request by a party or the presiding Administrative Law Judge, the Chief Administrative Law Judge may appoint a settlement judge. The Chief Administrative Law Judge has sole discretion to decide whether to appoint a settlement judge, except that a settlement judge shall not be appointed when a party objects to referral of the matter to a settlement judge.

#### **§ 9.34 Administrative Law Judge hearings.**

(a) *Authority.* (1) *General.* The Office of Administrative Law Judges has jurisdiction to hear and decide appeals pursuant to § 9.31(b)(1) of this part concerning questions of law and fact from determinations of the Administrator issued under § 9.31 of this part. In considering the matters within the scope of its jurisdiction, the Administrative Law Judge shall act as the authorized representative of the Secretary and shall act fully and, subject to an appeal filed under § 9.32(b)(2) of this part, finally on behalf of the Secretary concerning such matters.

(2) *Limit on scope of review.* (i) The Administrative Law Judge shall not have jurisdiction to pass on the validity of any provision of this part.

(ii) The Equal Access to Justice Act, as amended, does not apply to hearings under this part. Accordingly, an Administrative Law Judge shall have no authority to award attorney fees and/or other litigation expenses pursuant to the provisions of the Equal Access to Justice Act for any proceeding under this part.

(b) *Scheduling.* If the case is not stayed to attempt settlement in accordance with § 9.33(a) of this part, the Administrative Law Judge to whom the case is assigned shall, within 15

calendar days following receipt of the request for hearing, notify the parties and any representatives, of the day, time, and place for hearing. The date of the hearing shall not be more than 60 days from the date of receipt of the request for hearing.

(c) *Dismissing challenges for failure to participate.* The Administrative Law Judge may, at the request of a party or on his/her own motion, dismiss a challenge to a determination of the Administrator upon the failure of the party requesting a hearing or his/her representative to attend a hearing without good cause; or upon the failure of said party to comply with a lawful order of the Administrative Law Judge.

(d) *Administrator's participation.* At the Administrator's discretion, the Administrator has the right to participate as a party or as amicus curiae at any time in the proceedings, including the right to petition for review of a decision of an Administrative Law Judge in a case in which the Administrator has not previously participated. The Administrator shall participate as a party in any proceeding in which the Administrator has found any violation of this part, except where the complainant or other interested party challenges only the amount of monetary relief. *See also* § 9.32(b)(2)(i)(C) of this part.

(e) *Agency participation.* A Federal agency that is interested in a proceeding may participate, at the agency's discretion, as amicus curiae at any time in the proceedings. At the request of such Federal agency, copies of all pleadings in a case shall be served on the Federal agency, whether or not the agency is participating in the proceeding.

(f) *Requesting documents.* Copies of the request for hearing and documents filed in all cases, whether or not the Administrator is participating in the proceeding, shall be sent to the Administrator, Wage and Hour Division, and to the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210.

(g) *Rules of practice.* (1) The rules of practice and procedure for administrative hearings before the Office of Administrative Law Judges at 29 CFR part 18, subpart A, shall be applicable to the proceedings provided by this section. This part is controlling to the extent it provides any rules of special application that may be inconsistent with the rules in 29 CFR part 18, subpart A. The Rules of Evidence at 29 CFR 18, subpart B, shall not apply. Rules or principles designed to assure production of the most

probative evidence available shall be applied. The Administrative Law Judge may exclude evidence that is immaterial, irrelevant, or unduly repetitive.

(h) *Decisions.* The Administrative Law Judge shall issue a decision within 60 days after completion of the proceeding at which evidence was submitted. The decision shall contain appropriate findings, conclusions, and an order and be served upon all parties to the proceeding.

(i) *Orders.* Upon the conclusion of the hearing and the issuance of a decision that a violation has occurred, the Administrative Law Judge shall issue an order that the successor contractor 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. Where the Administrator has sought ineligibility sanctions, the order shall also address whether such sanctions are appropriate.

(j) *Costs.* If an order finding the successor contractor violated this part is issued, the Administrative Law Judge 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. This amount shall be awarded in addition to any unpaid wages or other relief due under § 9.24(b) of this part.

(k) *Finality.* The decision of the Administrative Law Judge shall become the final order of the Secretary, unless a petition for review is timely filed with the Administrative Review Board as set forth in § 9.32(b)(2) of this part.

### **§ 9.35 Administrative Review Board proceedings.**

(a) *Authority.* (1) *General.* The Administrative Review Board has jurisdiction to hear and decide in its discretion appeals pursuant to § 9.31(b)(2) concerning questions of law and fact from determinations of the Administrator issued under § 9.31 of this part and from decisions of Administrative Law Judges issued under § 9.34 of this part. In considering the matters within the scope of its jurisdiction, the Board shall act as the authorized representative of the Secretary and shall act fully and finally on behalf of the Secretary concerning such matters.

(2) *Limit on scope of review.* (i) The Board shall not have jurisdiction to pass on the validity of any provision of this

part. The Board is an appellate body and shall decide cases properly before it on the basis of substantial evidence contained in the entire record before it. The Board shall not receive new evidence into the record.

(ii) The Equal Access to Justice Act, as amended, does not apply to proceedings under this part. Accordingly, for any proceeding under this part, the Administrative Review Board shall have no authority to award attorney fees and/or other litigation expenses pursuant to the provisions of the Equal Access to Justice Act for any proceeding under this part.

(b) *Decisions.* The Board's final decision shall be issued within 90 days of the receipt of the petition for review and shall be served upon all parties by mail to the last known address and on the Chief Administrative Law Judge (in cases involving an appeal from an Administrative Law Judge's decision).

(c) *Orders.* If the Board concludes that the contractor has violated this part, the final order shall order 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. Where the Administrator has sought imposition of ineligibility sanctions, the Board shall also determine whether an order imposing ineligibility sanctions is appropriate.

(d) *Costs.* If a final order finding the successor contractor violated this part is issued, the Board 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. This amount shall be awarded in addition to any unpaid wages or other relief due under § 9.24(b) of this part.

(e) *Finality.* The decision of the Administrative Review Board shall become the final order of the Secretary.

### **Appendix A to Part 9—Contract Clause Nondisplacement of Qualified Workers**

(a) Consistent with the efficient performance of this contract, the contractor and its subcontractors shall, except as otherwise provided herein, in good faith offer those employees (other than managerial and supervisory employees) employed under the predecessor contract whose employment will be terminated as a result of award of this contract or the expiration of the contract under which the employees were hired, a right of first refusal of employment under this contract in positions for which employees are qualified. The contractor and its subcontractors shall determine the number of employees necessary for efficient

performance of this contract and may elect to employ fewer employees than the predecessor contractor employed in connection with performance of the work. Except as provided in paragraph (b) there shall be no employment opening under this contract, and the contractor and any subcontractors shall not offer employment under this contract, to any person prior to having complied fully with this obligation. The contractor and its subcontractors shall make a bona fide, express offer of employment to each employee as provided herein and shall state the time within which the employee must accept such offer, but in no case shall the period within which the employee must accept the offer of employment be less than 10 days.

(b) Notwithstanding the obligation under paragraph (a) above, the contractor and any subcontractors (1) may employ under this contract any employee who has worked for the contractor or subcontractor for at least 3 months immediately preceding the commencement of this contract and who would otherwise face lay-off or discharge, (2) are not required to offer a right of first refusal to any employee(s) of the predecessor contractor who are not service employees within the meaning of the Service Contract Act of 1965, as amended, 41 U.S.C. 6701(3), and (3) are not required to offer a right of first refusal to any employee(s) of the predecessor contractor whom the contractor or any of its subcontractors reasonably believes, based on the particular employee's past performance, has failed to perform suitably on the job.

(c) In accordance with Federal Acquisition Regulation 52.222-41(n), the contractor shall, not less than 10 days before completion of this contract, furnish the Contracting Officer a certified list of the names of all service employees working under this contract and its subcontracts during the last month of contract performance. The list shall also contain anniversary dates of employment of each service employee under this contract and its predecessor contracts either with the current or predecessor contractors or their subcontractors. The Contracting Officer will provide the list to the successor contractor, and the list shall be provided on request, to employees or their representatives.

(d) If it is determined, pursuant to regulations issued by the Secretary of Labor (Secretary), 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 Executive Order 13495, the regulations, and relevant orders of the Secretary, or as otherwise provided by law.

(e) 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 requirements of paragraphs (a) through (b) with respect to the employees of a predecessor subcontractor or subcontractors working under this contract, as well as of a predecessor contractor and its subcontractors. The subcontract shall also include provisions to ensure that the

subcontractor will provide the contractor with the information about the employees of the subcontractor needed by the contractor to comply with paragraph (c), above. The contractor will take such action with respect to any such subcontract as may be directed by the Secretary 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.

(f)(1) The contractor shall, not less than 30 days before completion of the contractor's performance of services on a contract, furnish the Contracting Officer with a list of the names of all service employees working under the contract and its subcontracts at the time the list is submitted. The list shall 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. Where changes to the workforce are made after the submission of the certified list described in this paragraph (f) (1), the contractor shall, *in accordance with paragraph (c)*, not less than 10 days before completion of the contractor's performance of services on a contract, furnish the Contracting Officer with an *updated* certified list of the names of all service employees employed within the last month of contract performance. The *updated* list shall also contain anniversary dates of employment and, where applicable, dates of separation of each service employee under the contract and its predecessor contracts with either the current or predecessor contractors or their subcontractors. *Only contractors experiencing a change in their workforce between the 30- and 10-day periods will have to submit a list in accordance with paragraph (c).*

(2) The Contracting Officer shall withhold or cause to be withheld from the prime contractor under this or any other Government contract with the same prime contractor such sums as an authorized official of the Department of Labor requests, upon a determination by the Administrator, the Administrative Law Judge, or the Administrative Review Board that there has been a failure to comply with the terms of this clause and that wages lost as a result of the violations are due to employees or that other monetary relief is appropriate. If the Contracting Officer or the Administrator, upon final order of the Secretary, finds that the contractor has failed to provide a list of the names of employees working under the contract, the Contracting Officer may in his or her discretion, or upon request by the Administrator, take such action as may be necessary to cause the suspension of the

payment of contract funds until such time as the list is provided to the Contracting Officer.

(g) The contractor and subcontractor shall maintain the following records (regardless of format, *e.g.*, paper or electronic, provided the records meet the requirements and purposes of this subpart and are fully accessible) of its compliance with this clause for not less than a period of three years from the date the records were created:

(1) 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, a summary of each 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.

(2) A copy of any record that forms the basis for any exclusion or exemption claimed under this part.

(3) A copy of the employee list provided to or received from the contracting agency.

(4) An entry on the pay records of the amount of any retroactive payment of wages or compensation under the supervision of the Administrator of the Wage and Hour Division to each employee, the period covered by such payment, and the date of payment, and a copy of any receipt form provided by or authorized by the Wage and Hour Division. The contractor shall also deliver a copy of the receipt to the employee and file the original, as evidence of payment by the contractor and receipt by the employee, with the Administrator or an authorized representative within 10 days after payment is made.

(h) The contractor shall cooperate in any review or investigation by the contracting agency or the Department of Labor into possible violations of the provisions of this clause and shall make records requested by such official(s) available for inspection, copying, or transcription upon request.

(i) Disputes concerning the requirements of this clause shall not be subject to the general disputes clause of this contract. Such disputes shall be resolved in accordance with the procedures of the Department of Labor set forth in 29 CFR part 9. Disputes within the meaning of this clause include disputes between or among any of the following: the contractor, the contracting agency, the U.S. Department of Labor, and the employees under the contract or its predecessor contract.

#### Appendix B to Part 9—Notice to Service Contract Employees

The contract for (insert type of service) services currently performed by (insert name of predecessor contractor) has been awarded to a new (successor) contractor (insert name of successor contractor). The new contractor's first date of performance on the

contract will be (insert first date of successor contractor's performance). If the work is to be performed at the same location, the new contractor is generally required to offer employment to the employees who worked on the contract during the last 30 days of the current contract, except as follows:

Employees who will not be laid off or discharged as a result of the new contract award are not entitled to an offer of employment.

Managerial, supervisory, or non-service employees on the current contract are not entitled to an offer of employment.

The new contractor may reduce the size of the current workforce; therefore, only a portion of the existing workforce may receive employment offers. However, the new contractor must offer employment to the displaced employees for which they are qualified if any openings occur during the first 90 days of performance on the new contract.

The new contractor may employ its current employee on the new contract before offering employment to the existing contractor's employees only if the new contractor's current employee has worked for the new contractor for at least 3 months immediately preceding the first date of performance on the new contract and would otherwise face layoff or discharge if not employed under the new contract.

Where the new contractor has reason to believe, based on written credible information from a knowledgeable source, that an employee's job performance while working on the current contract has been unsuitable, the employee is not entitled to an offer of employment on the new contract.

An employee hired to work under the current Federal service contract and one or more nonfederal service contracts as part of a single job is not entitled to an offer of employment on the new contract, provided that the existing contractor did not deploy the employee in a manner that was designed to avoid the purposes of this part.

*Time limit to accept offer:* If you are offered employment on the new contract, you will have at least 10 days to accept the offer.

*Complaints:* Any employee(s) or authorized employee representative(s) of the predecessor contractor who believes that he or she is entitled to an offer of employment with the new contractor and who has not received an offer, may file a complaint, within 120 days from the first date of contract performance, with the Branch of Government Contracts Enforcement, Wage and Hour Division, U.S. Department of Labor, Washington, DC 20210.

For additional information: 1-866-4US-WAGE (1-866-487-9243) TTY: 1-877-889-5627, <http://www.wagehour.dol.gov>.

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