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Part III

Department of Labor

29 CFR Part 9

Nondisplacement of Qualified Workers Under Service Contracts; Proposed Rule

DEPARTMENT OF LABOR

Office of the Secretary

29 CFR Part 9

RIN 1215–AB69; RIN 1235–AA02

Nondisplacement of Qualified Workers Under Service Contracts

AGENCY: Wage and Hour Division, Labor.

ACTION: Notice of proposed rulemaking, request for comments.

SUMMARY: This document proposes regulations to implement Executive Order 13495, Nondisplacement of Qualified Workers Under Service Contracts, signed by President Obama on January 30, 2009. The Executive Order establishes a general policy of the Federal Government that service contracts and solicitations for such 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 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. The Executive Order also directs the Department of Labor (DOL), in consultation with the Federal Acquisition Regulatory Council (FARC), to issue regulations, within 180 days of the date of the Order to the extent permitted by law, to implement the requirements of this Order. The Regulatory Information Number (RIN) identified for this rulemaking will change with publication of the Spring Regulatory Agenda due to an organizational restructuring. The old RIN was assigned to the Employment Standards Administration, which no longer exists; a new RIN has been assigned to the Wage and Hour Division.

DATES: Comments must be submitted on or before May 18, 2010.

ADDRESSES: You may submit comments, identified by RIN 1235–AA02, by either one of the following methods:

Electronic comments: through the federal eRulemaking Portal: *http://www.regulations.gov.* Follow the instructions for submitting comments.

Mail: Regulatory Analysis Branch, Wage and Hour Division, U.S. Department of Labor, Room S–3502, 200 Constitution Avenue, NW., Washington, DC 20210.

Instructions: Please submit one copy of your comments by only one method. All submissions received must include the agency name and RIN identified above for this rulemaking. Comments received will become a matter of public record and will be posted to *http://www.regulations.gov,* including any personal information provided. Because we continue to experience delays in receiving mail in the Washington, DC, area, commenters are strongly encouraged to transmit their comments electronically via the federal eRulemaking Portal at *http://www.regulations.gov* or to submit them by mail early. For additional information on submitting comments and the rulemaking process, see the "Public Participation" heading of the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: For access to the docket to read background documents or comments received, go to the federal eRulemaking Portal at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Michel Smyth, Chief, Regulatory Analysis Branch, Wage and Hour Division, U.S. Department of Labor, Room S–3506, 200 Constitution Avenue, NW., Washington, DC 20210; telephone: (202) 693–0406 (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:

I. Electronic Access and Filing Comments

Public Participation: This notice is available through the **Federal Register** and the *http://www.regulations.gov* Web site. You may also access this notice via the Wage and Hour Division home page at *http://www.dol.gov/whd/regulations/EO13495_2010_NPRM.htm.* To comment electronically on federal rulemakings, go to the federal eRulemaking Portal at *http://www.regulations.gov,* which will allow you to find, review, and submit comments on federal documents that are open for comment and published in the **Federal Register**. Please identify all comments submitted in electronic form by the RIN docket number (1235–AA02). Because of delays in receiving mail in the Washington, DC, area, commenters should transmit their comments electronically via the federal eRulemaking Portal at *http://www.regulations.gov,* or submit them by mail early to ensure timely receipt prior to the close of the comment period. Submit one copy of your comments by only one method.

Request for Comments: The DOL requests comments on all issues related to this notice of proposed rulemaking (NPRM).

II. 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). 74 FR 6103. 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 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. 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. On some occasions, however, a successor contractor or its subcontractors hires a new work force, 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 such 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.

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. 351 *et seq.,* and its implementing regulations. Section 2 also defines *employee* to mean a service employee as defined in the SCA. 74 FR 6103. *See* 41 U.S.C. 357(b).

Section 3 of the Order exempts from its terms: (a) Contracts or subcontracts under the simplified acquisition threshold as defined in 41 U.S.C. 403 (*i.e.,* currently contracts less than $100,000); (b) contracts or subcontracts awarded pursuant to the Javits-Wagner-O'Day Act, 41 U.S.C. 46–48c; (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.

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.

Section 5 of the Order provides the wording for a 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 work at the same location. 74 FR 6104–05. 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 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 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 contractor and its subcontractors must make an express offer of employment to each employee and must state the time within which the employee must accept such offer, which must be at least 10 days. The clause also provides that, notwithstanding the obligation to offer employment to employees on the predecessor contract, the 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. 357(b), 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. 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 this 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 contract'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.

Section 6 of the Order assigns responsibility for investigating and obtaining compliance with the Order to the DOL. In such proceedings, this section also authorizes the DOL to issue final orders prescribing appropriate sanctions and remedies, including, but not limited to, orders requiring employment and payment of wages lost. The DOL 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 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 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 DOL 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 DOL 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.

Section 7 of Executive Order 13495 revokes Executive Order 13204 of February 17, 2001 (Bush Order), rescinding Executive Order 12933 of October 20, 1994, Nondisplacement of Qualified Workers Under Certain Contracts (Clinton Order). *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: 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 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 DOL in accordance with the Administrative Procedure Act, 5 U.S.C. 701 *et seq.* 74 FR 6105–06.

As indicated, Section 7 of Executive Order 13495 revoked the 2001 Bush Order rescinding the 1994 Clinton Order, Nondisplacement of Qualified Workers Under Certain Contracts. More specifically, the rescinded Clinton and Bush 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).

On May 22, 1997, the DOL promulgated regulations, 29 CFR part 9 (62 FR 28185) to implement the Clinton Order and, per the Bush Order, rescinded them in a Notice appearing in the **Federal Register** on March 23, 2001 (66 FR 16126). There are some notable differences between the current Order, Executive Order 13495, and the Clinton Order, Executive Order 12933. For example, Executive Order 13495 covers all contracts covered by the SCA above the simplified acquisition threshold (currently $100,000); the Clinton Order 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 the Clinton Order 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 or 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 the Clinton Order was determined at the prime contract level.

III. Discussion of Proposed Rule

The DOL proposes to implement the current Order with regulations based on similar requirements to those issued under the Clinton Order. While the current Order is broader in scope as to the types of service contracts covered, both the current and Clinton Orders established a Federal policy for successor contractors to offer employment in most cases to the employees on the predecessor contract when the new contract award would otherwise displace those workers. The DOL proposes to change the format of the regulation from questions and answers to the more common format of a descriptive section title. In addition, the DOL proposes a number of minor modifications to the enforcement and administrative procedures contained in this rule to clarify responsibilities of various Federal officials as compared to the prior rule. The following section-by-section discussion of this proposed rule presents the contents of each section and highlights significant differences between this proposal and the prior version of part 9 issued under the Clinton Order.

Proposed subpart A of part 9 relates to general matters, including the purpose and scope of the rule, its definitions, coverage under the current Order, and the exclusions it provides. Proposed § 9.1(a) explains that the purpose of the proposed rule is to implement E.O. 13495 and reiterates statements from the E.O. that the Federal Government's procurement interests in economy and efficiency are served when the successor contractor hires the predecessor's employees and why this is the case.

Proposed § 9.1(b) explains the general Federal Government requirement for successor service contracts and their solicitations to include a clause that requires the contractor and its subcontractors to offer employment under the contract 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. This section also clarifies that nothing in Executive Order 13495 or part 9 is to 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.

Proposed § 9.1(c) outlines the scope of this proposal and provides that neither Executive Order 13495 nor part 9 creates any rights under the Contract Disputes Act or any private right of action. The DOL does not interpret the E.O. as limiting existing rights under the Contract Disputes Act. The paragraph also restates the current Order's provision that disputes regarding the requirement of the prescribed contract clause, to the extent permitted by law, shall be disposed of only as provided by the Secretary of Labor in regulations issued under Executive Order 13495. This paragraph also restates the provision for DOL regulations to favor

the resolution of disputes by efficient and informal alternative dispute resolution methods to the extent practicable. Finally, the paragraph applies the provision in § 9(c) of Executive Order 13495 that neither the current Order nor this proposed rule would preclude judicial review of final decisions by the Secretary in accordance with the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*

Proposed § 9.2 defines terms for purposes of this rule. Most defined terms follow common applications and are based on either the current Order, the prior version of part 9, or other regulations. The definition of *day,* taken from the meaning given to the term in the FAR, is a calendar day, unless otherwise specified. 48 CFR 2.101; *see also* —.201.

The NPRM would adopt the FAR definition of *service employee* to define *employee* or *service employee and refer to the SCA, in order to preclude any ambiguity, because the Executive Order* defers to the statutory definition of *service employee* in the SCA at 41 U.S.C. 357(b). The DOL also proposes to adopt the definition of *service contract* or *contract* provided in section 2(a) of Executive Order 13495. 74 FR 6103. In addition, the DOL proposes substantially to adopt the definitions for the terms *Administrator, Contracting Officer, Federal Government, Secretary,* and *United States* from the prior version of part 9, as the current Order does not define those terms. *See* 62 FR 28192 (May 22, 1997). The DOL proposes to define *employment opening* to mean any vacancy in a position on the contract, including any vacancy caused by replacing an employee or service employee from the predecessor contract with a different employee.

The DOL also proposes to add a definition of *managerial and supervisory employee.* The general policy stated in section 1 of the current Order and in the contract clause parenthetically excludes managerial and supervisory employees from its requirements; however, the current Order does not define the term. *See* 74 FR 6103. The DOL notes that the job offer requirements of the Clinton Order also did not apply to management and supervisory workers, and it did not define the term either. *See* 59 FR 53559 (Oct. 24, 1994). The SCA definition of *employee* already excludes any person employed in a bona fide executive, administrative, or professional capacity, as those terms are defined in 29 CFR part 541. 41 U.S.C. 357(b). The prior version of part 9, while not including *managerial and supervisory employee* in the definitions section, implemented the exception by excluding persons engaged in the performance of services under the contract who are employed in a bona fide executive, administrative, or professional capacity—as those terms are defined in 29 CFR part 541—from the job offer requirements. 62 FR 28188 (May 22, 1997). The definition in proposed § 9.2(9) adopts this exclusionary concept in a new freestanding definition of *managerial and supervisory employee* that excludes from the requirements of this part managerial and supervisory employees, as discussed further in this NPRM. While the DOL does not believe the managerial and supervisory exception to the nondisplacement provisions was intended to apply to any person who performs managerial or supervisory tasks either infrequently or as an incident to their primary duties and responsibilities, the DOL welcomes specific comments on whether another definition should be adopted and requests supporters of an alternative definition to provide specific recommendations for the definition.

The DOL proposes to define *month* under the Executive Order as a period of 30 consecutive days, regardless of the day of the calendar month on which it begins. This definition was not included in the prior version of part 9; however, the DOL believes defining the term will clarify how to address partial months and will balance calendar months of different lengths. In order to eliminate confusion caused by similarly named components of various Departments and larger agencies (*e.g.,* Office of Administrative Law Judges), proposed § 9.2 defines certain agencies. The NPRM would define *same or similar service* to mean a service that is either identical to or has characteristics that are alike in substance and essentials to another service. *Solicitation* would be defined to mean any request to submit offers or quotations to the Government.

Proposed §§ 9.3 and 9.4 address the coverage and exclusionary provisions of the current Order. *See* 74 FR 6103–04. Specifically, proposed § 9.3 applies coverage under part 9 to all service contracts and their solicitations, except those excluded by § 9.4. Section 9.4 would implement the exclusions contained in sections 3 and 4 of Executive Order 13495. *Id.*

Proposed § 9.4(a) addresses the exclusion for contracts or subcontracts under the simplified acquisition threshold, as defined in 41 U.S.C. 403(11). 74 FR 6103. The simplified acquisition threshold currently is $100,000. 41 U.S.C. 403(11). The proposed regulations do not state that amount in the regulatory text, in contrast to the prior version of part 9, 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) explains how the exclusion applies to subcontracts, including when a successor contractor discontinues the services of a subcontractor.

Proposed appendix A establishes an employee nondisplacement contract clause to implement section 5 of Executive Order 13495. 74 FR 6105. Paragraph (e) of the nondisplacement contract clause requires the contractor to include, in every subcontract entered into in order to perform services under the prime contract, provisions to ensure each subcontractor honors the requirements of paragraphs (a) through (b) of the employee nondisplacement clause with respect to the employees of a predecessor subcontractor or subcontractors working under the successor contract as well as of a predecessor contractor and its subcontractors. *Id.* The subcontract must also include provisions ensuring 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. The DOL interprets the exclusion for contracts and subcontracts under the simplified acquisition threshold as applying to subcontracts of less than $100,000, 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 in such cases, the covered prime contractor or higher tier subcontractor would still have to comply with the requirements of this part. Were a covered contractor that is subject to the nondisplacement requirements to discontinue the services of a subcontractor at any time during the contract and perform those services itself at the same location, the contractor would have to offer employment 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. The DOL notes the Clinton Order excluded prime contracts under the simplified acquisition threshold and did not mention subcontracts. 59 FR 53560.

Proposed § 9.4(b) implements 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. Specifically, this paragraph excludes contracts or subcontracts awarded pursuant to the Javits-Wagner-O'Day Act, 41 U.S.C. 46–48c, from the requirements of part 9. Proposed § 9.4(b)(2) provides that the requirements of part 9 do not apply to 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. Proposed § 9.4(b)(3) specifies that the requirements of part 9 do not apply to agreements for vending facilities entered into pursuant to the preference regulations issued under the Randolph-Sheppard Act, 20 U.S.C. 107.

Proposed § 9.4(b)(4) clarifies 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 predecessor contract employees would defeat the purpose of these programs that allow people to participate in the workforce who otherwise would not be able to do so. Proposed § 9.4(c) implements 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.

Proposed § 9.4(d) implements the section 4 exclusion in Executive Order 13495, which provides that, if the head of a contracting department or agency finds that the application of any of the requirements of Executive Order 13495 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 head of such department or agency may exempt its department or agency from the requirements of any or all of the provisions of Executive Order 13495 with respect to a particular contract, subcontract, or purchase order or any class of contracts, subcontracts, or purchase orders. *Id.* The DOL proposes to limit the time in which an agency may decide to exempt contracts to no later than the solicitation date. This limitation is needed to ensure the contract clause is included in the solicitation, if applicable, as required by the Executive Order. In addition, when an agency exercises its exemption authority, the DOL proposes to require the contracting agency to notify affected workers in writing, either in an individual notice given to each worker or through a posting at the location where the work is performed, of the finding and decision no later than the award date. The notification would need to include facts supporting the decision. This notification to the workers is consistent with and supports 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.

As with other exemptions applicable to labor standards, the DOL interprets the exemption authority of the agencies 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. It is predicated on the determination 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. Given the Executive Order's underlying assumptions, the Executive Order creates a presumption that nondisplacement is in the interest of the Federal Government for each contract, class of contracts, subcontract, or purchase order. However, the presumption can be overcome based on a finding that nondisplacement 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. DOL believes that the basis for such a finding must be reasoned and transparent; therefore, the NPRM would require a written analysis to support the decision to claim the exemption. For example, where the decision to claim the exemption is based on a finding that the nondisplacement requirements would impair the ability of the Federal Government to procure the services on an economical and efficient basis, the DOL believes an agency would need to support a decision to claim the exemption with a written analysis that explains how application of the Executive Order's requirements would impair the ability of the agency to procure services on an economical and efficient basis.

In addition, the reasons provided for the exemption in the agency's analysis must be consistent with the Executive Order. The DOL proposes that such a written analysis would, *inter alia,* compare the anticipated outcomes of hiring predecessor contract employees against those of hiring a new workforce. At the same time, the DOL specifically seeks comments on what, if any, specific guidance the regulation should provide regarding the consideration of cost and other factors in exercising the agency's exemption authority, including guidance regarding what information should be included in the agency's analysis supporting a decision to exercise exemption authority. What costs 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? How much weight should be given to such costs? Should the regulation 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 hiring new employees? If so, how should the restriction be applied (*e.g.,* the exemption cannot be exercised based solely on a showing of marginal cost savings; or the exemption cannot be exercised based solely on a showing of cost savings in any amount unless such determination is coupled with an additional determination that the non-cost benefits of hiring new employees outweigh the benefits of retaining the predecessor's workers)? Should the guidance place any restrictions on how an agency projects cost savings? The EO leaves it to the contractor to determine the number of employees needed to perform the work and the SCA establishes the minimum wage rates to be paid workers. Therefore, should a contracting agency be prohibited from making projections based on how it believes a successor contractor may reconfigure the contract or wages to be paid? 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? How much weight should be given to such non-cost factors? What factual information and analysis should be required to be included in an agency's written finding underlying its exemption decision, and in what level

of detail? The DOL also specifically invites comments regarding the worker notification requirement, including what recourse might exist if an agency fails timely to provide the written notification to the workers or what specific requirements should be imposed.

Proposed § 9.4(e) implements the parenthetical exclusion for managerial and supervisory employees included in section 1 of Executive Order 13495, stating that the Order does not apply to employees who are managerial or supervisory employees of Federal service contractors or subcontractors. 74 FR 6103. While not included in the exclusions listed in section 3 of Executive Order 13495, the DOL believes including this proposed paragraph provides important compliance assistance to contractors and employees. The DOL notes this proposal is not different in substance from how the same parenthetical exception was implemented under the Clinton Order. 59 FR 53559; 62 FR 28188, (formerly 29 CFR 9.8(b)(1)).

Proposed subpart B of part 9 establishes the requirements that contracting agencies and contractors will undertake to comply with the nondisplacement provisions.

Proposed § 9.11 addresses contracting agency requirements, and proposed § 9.12 explains contractor requirements and prerogatives under the nondisplacement requirements.

Proposed § 9.11 specifies contracting agency responsibilities to incorporate the nondisplacement clause in applicable contracts, to inform service contract employees of when a contract has been awarded to a successor, to provide the list of employees on the predecessor contract to the successor, and to forward complaints and other pertinent information to the Wage and Hour Division when there are allegations of contractor non-compliance with this part.

Section 5 of Executive Order 13495 specifies a contract clause that must be included in solicitations and contracts for services that succeed contracts for the performance of the same or similar work at the same location. 74 FR 6104–05. Proposed § 9.11(a) provides 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. Contract clause paragraphs (a) through (e) of proposed appendix A repeat the clause in paragraphs (a) through (e) of the Executive Order verbatim, with three exceptions.

The first proposed modification would spell out the number three, instead of using the numeral 3 (as was done in the Executive Order). The second proposed modification would insert the number of the Order, 13495, to replace the blank line that appears in paragraph (d) of the contract clause contained in the Order, as its number was not known at the time the President signed the Order.

The final proposed modification is an alteration to accommodate the numbering scheme of contracts. Specifically, the internal contract clause paragraph (e) cross-reference to paragraph 5(c) is replaced simply with a (c). This modification will allow contracting agencies to implement the substantive requirements of the Order through the required contract language while adjusting to the numbering structure of the Federal Acquisition Regulation.

Proposed appendix A also sets forth additional provisions that are necessary to implement the Order. The additional paragraphs would appear in paragraphs (f) through (i) of the contract clause contained in part 9. With the exception of a paragraph addressing recordkeeping, similar contract clause paragraphs appeared in the earlier version of part 9. *See* 62 FR 28188 (May 22, 1997).

Specifically, proposed clause paragraph (f) provides 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. The withholding amount would equal sums an authorized official of the DOL requests, upon a determination by the Administrator, the Administrative Law Judge (ALJ), or the Administrative Review Board that the prime contractor failed to comply with the terms of the employee nondisplacement clause and that wages lost as a result of the violations are due or that other monetary relief is appropriate.

Proposed contract clause paragraph (g) requires the contractor to maintain certain records to demonstrate compliance with the substantive requirements of part 9. This proposed paragraph was not included in the prior part 9; however, including it in the contract will better enable contractors to understand their obligations and provide an easy reference. The proposed paragraph specifies that the contractor is required to maintain the particular records (regardless of format, *e.g.,* paper or electronic) for three years. The specified records include 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; a copy of any record that forms the basis for any exclusion or exemption claimed under part 9; a copy of the employee list received from the contracting agency, and an entry on the pay records for an employee of the amount of any retroactive payment of wages or compensation under the supervision of the Administrator of the Wage and Hour Division, 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 proposed clause also states that the contractor is to deliver a copy of the receipt to the employee and, as evidence of payment by the contractor, file the original receipt signed by the employee with the Administrator or an authorized representative within 10 days after payment is made.

Proposed contract clause paragraph (h) requires the contractor, as a condition of the contract award, to cooperate in any investigation by the contracting agency or the DOL 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. Proposed contract clause paragraph (i) provides that disputes concerning the requirements of the nondisplacement clause will 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.

Proposed § 9.11(b) specifies a notice that contracting agencies must provide when a contract will be awarded to a successor. A similar requirement existed in the prior version of part 9 (*see* 62 FR 28189, 28192), but it did not require agencies to provide both English language and translated notices where a significant portion of the predecessor's workforce is not fluent in English. Proposed § 9.11(b) requires the Contracting Officer to provide written notice to service employees of the incumbent contractor 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. The text of the notice is set forth in the appendix B to part 9. The DOL intends to translate the notice into several common foreign languages and make the English and translated versions available in a poster format to contracting agencies via the Internet, in order to allow easy access. Another form with the same information may be used. Multiple foreign language notices will 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 speaks Korean and another significant portion of the same workforce speaks Spanish, then the contracting agency would need to provide the information in English, Korean, and Spanish. Giving 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. While electronic communications were not part of the earlier part 9, the DOL recognizes that reliance on electronic communication will increase in the future and e-mail often may provide an inexpensive and reliable way to communicate information quickly. The DOL seeks 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, especially when contract work is performed at a location that is remote from procurement staff, without sacrificing the quality of the information provided to workers. For example, should the rule allow notices by e-mail from the contracting agency to service employees who routinely receive information from the agency by e-mail to meet the notification requirement, provided the notice otherwise meets the requirements of proposed § 9.11? If an e-mail option were allowed, would additional guidance for such communications need to be considered, and if so, what should that guidance be? Of course, minimally, 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.

Proposed § 9.11(c) requires the Contracting Officer to provide the predecessor contractor's list of employees referenced in proposed § 9.12(e) to the successor contractor and, on request, to employees or their representatives.

Proposed § 9.11(d) addresses Contracting Officers' responsibilities regarding complaints of alleged violations of part 9. As under the prior version of part 9, 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. Contracting agencies would not be obligated to forward to the Wage and Hour Division any complaint that is withdrawn because of this compliance assistance; thus, a Contracting Officer need not forward to the Wage and Hour Division 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 will forward certain information that the DOL must have in order to determine compliance. The DOL believes this proposal strikes a balance that allows compliance concerns to be resolved as expeditiously as possible without undue burdens on all parties. The proposal requires the Contracting Officer, within 30 days of receipt of a complaint, to forward to the headquarters of the Wage and Hour Division any complaint alleging 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 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 would require the Contracting Officer to provide copies to the contractor and the complainant. To assist the agency in providing information to the Wage and Hour Division or to protect the interests of the agency, the proposal would allow the contracting agency to conduct an initial review of any nondisplacement complaint. As part of the contracting agency's initial review, the Contracting Officer may obtain statements of the positions of the parties and 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 has occurred. The Contracting Officer may provide information about the contract clause to the complainant(s) and successor contractor, and would not be required to forward any complaint or related information when a complaint is withdrawn because of compliance assistance provided by the contracting agency. Contracting agencies would be obligated to refer questions of interpretations regarding part 9 to the nearest local office of the Wage and Hour Division. The DOL particularly seeks comments on whether the 30-day period for Contracting Officers to forward information to the Wage and Hour Division is necessary and appropriate, given the responsibilities envisioned if this proposed rule were adopted.

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

Proposed § 9.12(a)(1) implements the requirement that there be no employment openings prior to the contractor offering employment to the employees on the predecessor contract. 74 FR 6103. Specifically, the proposal provides that, except as provided under the exclusions listed in proposed § 9.4 or paragraphs (c) and (d) of proposed § 9.12, a successor contractor or subcontractor could not fill any employment openings under the contract prior to making good faith offers of employment, 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 would be required to make an 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. Proposed § 9.12(a)(2) would clarify 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. Proposed § 9.12(a)(3) discusses determining eligibility for the job offer and provides guidance that did not appear in the earlier part 9. While a person's entitlement to a job offer under this proposal 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 contractor would also be required to accept other credible evidence of an employee's entitlement to a job offer. The successor contractor would be allowed to verify the information as a condition of accepting it. 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 that identifies 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 guidance will provide more clarity to contractors and employees as to the level of proof needed to determine entitlement to a job offer.

Proposed § 9.12(b) discusses the method of the job offer, with § 9.12(b)(1) requiring 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 offer to employment on the contract. Proposed § 9.12(b)(2) discusses the time limit in which the employee has to accept the offer, which the contractor determines, but in no case can be less than 10 days. Proposed § 9.12(b)(3) provides the process for making the job offer. As proposed, the successor contractor is required 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. The proposed rule contains an example of how the contractor could satisfy this provision by having a co-worker or other person who can fluently translate for employees who are not fluent in English, if the contractor holds a meeting for a group of employees on the predecessor contract. Proposed § 9.12(b)(4) clarifies that the employment offer may be to a different job position on the contract. More specifically, an offer of employment on the successor's contract would generally be presumed to be a bona fide offer of employment, even if not for a position similar to the one the employee previously held but one for which the employee were qualified. If a question arises concerning an employee's qualifications, that question will 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 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. Proposed § 9.12(b)(5) allows for an offer of employment to a position providing different terms and conditions of employment than those the employee held with the predecessor contractor, where the reasons for the offer are not related to a desire that the employee refuse the offer or that other employees be hired. Proposed § 9.12(b)(6) provides 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.

Proposed § 9.12(c) addresses the exceptions to the general obligation to offer employment under Executive Order 13495, which are included in the contract clause established in section 5 of the Order and are distinct from the exclusions discussed in proposed § 9.4. The exclusions specify both certain classes of contracts and certain employees excluded from the provisions of Executive Order 13495. The exemptions 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 do 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 is required to presume that all employees hired to work under a predecessor's Federal service contract would 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.

Under proposed § 9.12(c)(2), a contractor or subcontractor would be allowed to employ under the contract any employee who has worked for the contractor or subcontractor for at least three months immediately preceding the commencement, *i.e.,* the first date of performance, of the contract and who would otherwise face lay-off or discharge. As would be the case with any exception to the nondisplacement requirements, a contractor bears the burden of showing how the exception applies. For example, a contractor would have to demonstrate through a preponderance of the evidence that an employee who it has employed for at least three months would face discharge were a position on the contract not offered because the employee's work on another contract has expired and there are no other openings for which the employee is qualified within the commuting area. A successor could not claim this exception to reemploy an employee who was already terminated or laid off, because such a person has already faced a discharge and such person has not been employed for the three months preceding the commencement of the successor contract. Of course, a person 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 who is not a service employee. Typically, this exemption 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) as employees hired to work under a predecessor's Federal service contract or who have demonstrated they should have been included on the list were service employees, 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 exemption.

Under proposed § 9.12(c)(4), 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. Again, the 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 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 can use performance appraisal information in determining whether an employee failed to perform suitably on the job; however, the DOL notes that this NPRM would 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 DOL seeks comments as to whether there should be any requirement that the information supporting the contractor's or subcontractor's reasonable belief be in writing and relatively contemporaneous with the 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 could 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 exemption. For example, claims from several employees who state 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 purposes of the nondisplacement provisions, which include Federal interests in economy and efficiency that are served when the successor hires the predecessor's employees. Conversely, were the employees on the predecessor contract traditionally deployed to Federal and other buildings as part of their job, the successor 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 to claim the exception, because such general practices may not have been observed on the particular predecessor contract.

Proposed § 9.12(d) addresses the provision in paragraph (a) of Executive Order 13495's contract clause that allows the successor contractor to reduce staffing. 74 FR 6104. Proposed § 9.12(d)(1) allows for 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 must 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 three months after the successor contractor's first date of performance on the contract. In some cases a successor contractor may reconfigure the staffing pattern to increase the number of persons employed in some positions while decreasing the number of employees in others, and in such cases § 9.12(d)(3) would require the contractor to examine the qualifications of each employee so as to minimize displacement. Of course, as already provided in § 9.1(b), this exception is not to 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 Wage and Hour Division would not make compliance determinations regarding Federal contractors' compliance with nondiscrimination requirements administered by other regulatory agencies, a finding by the DOL's Office of Federal Contract Compliance Programs, another agency, or by 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. The DOL invites comments on whether the rule should provide additional guidance in this regard and what any additional guidance should be. The 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 provides several examples to demonstrate the principle.

Proposed § 9.12(e) specifies an incumbent contractor's obligations near the end of the contract, not less than 10 days before completion of the contract, to 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, including their anniversary dates of employment with either the current or predecessor contractors or their subcontractors. The 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 this provision. The earlier version of part 9 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 DOL believes specifying this option in the regulations may help clarify that there is no duplication of effort in order 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 reflects the time frame used in the current Order and is identical to when the list must be provided under 29 CFR 4.6(l)(2).

Proposed § 9.12(f) addresses recordkeeping requirements. Proposed § 9.12(f)(1) clarifies that this part prescribes no particular order or form of records for contractors, 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) specifies 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, every contractor who makes retroactive payment of wages or compensation under the supervision of the Wage and Hour Division 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 each such payment on a receipt form authorized by the Wage and Hour Division. Contracting agency and Wage and Hour Division staff will use these records in determining a contractor's compliance and the propriety of any further sanctions.

Proposed § 9.12(g) outlines 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.

Proposed Subpart C pertains to enforcement activities under this part and provides for disputes to be resolved only as provided in regulations by the Secretary of Labor. Executive Order 13495 directs that the regulations, to the extent practicable, favor the resolution of disputes by efficient and informal alternative dispute resolution methods. This proposed subpart addresses the process for filing complaints, informal resolution attempts by the Wage and Hour Division, investigations, and remedies and penalties for violations.

Proposed § 9.21 establishes the procedure for filing complaints and adopts the complaint process used in the earlier version of part 9, with the exception of now establishing time frames in which complaints are to be filed. Proposed § 9.21(a) outlines the procedure for filing a complaint with the Contracting Officer of the appropriate Federal agency within 120 days of the alleged violation. As provided under the prior rule, the DOL believes that filing complaints first with the contracting agency creates the best avenue for displaced workers to begin the process of obtaining expeditious review of their rights. The proposal includes a time limit for filing a complaint, in order to assure that concerns are addressed promptly and the Federal Government's procurement interests in economy and efficiency are preserved. Proposed § 9.21(b) outlines the procedure for filing a complaint with the Wage and Hour Division if the complainant has not been able timely to file the complaint with the Contracting Officer or has not received, within 30 days of filing the complaint with the Contracting Officer, a copy of the report forwarded to the Wage and Hour Division under proposed § 9.11(d)(1). The complainant would be allowed to file the complaint directly with the Wage and Hour Division within 180 days of the alleged violation.

Proposed § 9.22 establishes the informal complaint resolution process for complaints referred to the Wage and Hour Division. After obtaining the necessary information from the Contracting Officer regarding the alleged violations, the Wage and Hour Division could contact the successor contractor about the complaint and attempt to conciliate and reach an acceptable resolution that is consistent with all applicable requirements.

Proposed § 9.23 outlines the authority for the Wage and Hour Division to investigate complaints under part 9. Proposed § 9.23(a) addresses initial investigations and provides 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) addresses subsequent investigations and allows the Administrator to conduct a new investigation or issue a new determination if the Administrator concludes 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 has failed to comply with an order of the Secretary.

Proposed § 9.24 discusses remedies and sanctions for violations. The Secretary will 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 payment of wages lost. Proposed § 9.24(b) provides 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) addresses the withholding of contract funds for non-compliance. 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. Upon final order of the Secretary, the Administrator may direct that withheld funds be transferred to DOL for disbursement.

Proposed § 9.24(c)(2) provides 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 § 9.12(e). As reflected in the earlier version of part 9, these proposed withholding provisions would mirror the withholding standards of other labor standards laws such as the Davis-Bacon Act and SCA.

Proposed § 9.24(d) provides 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.

Proposed subpart D addresses informal and formal proceedings to determine compliance with the requirements of part 9 and resolution of disputes. The proposal substantially reinstates provisions from the prior part 9, but proposes minor changes to accommodate the format of the proposed rule and to clarify various authorities of the Administrator, Office of Administrative Law Judges, and Administrative Review Board, and the effects of various notices and filings.

Proposed § 9.31 provides that when an investigation is completed and 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 occurred. A written determination will contain a statement of the investigation findings that will address the appropriate relief and the issue of ineligibility sanctions where appropriate, with notice of the determination sent by certified mail to the parties. The notice of determination becomes the final order of the Secretary and is not appealable in any administrative or judicial proceeding unless a request for a hearing is filed within 20 days or, where relevant facts are not in dispute, a petition for review is filed within 20 days with the Administrative Review Board.

Proposed § 9.32(b) provides procedures for requesting appeals. The proposed time limits are the same as under the earlier version of part 9, and the proposed language provides due process rights for those seeking appeals without needlessly delaying decisions from taking effect.

Executive Order 13495 provides for its implementing regulations to favor alternative dispute resolution methods to the extent practicable, and proposed § 9.33 generally encourages parties to resolve disputes in accordance with the conciliation procedures set forth at § 9.22 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 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) establishes the procedure for appointing a settlement judge to mediate cases scheduled with the Office of Administrative Law Judges.

Proposed § 9.34(a) provides for the Office of Administrative Law Judges to hear and decide in its discretion appeals concerning questions of law and fact from determinations of the Administrator. The ALJ would act fully and finally as the authorized representative of the Secretary, subject to any appeal filed to the Administrative Review Board, and subject to certain limits. Specifically, the regulations exclude from the ALJ's authority any jurisdiction to pass on the validity of any provision of part 9. In addition, as the proceedings are not required by an underlying statute to be determined on the record after an opportunity for an agency hearing, the Equal Access to Justice Act (EAJA), as amended (5 U.S.C. 504) does not apply to them; therefore, an ALJ would have no authority to award attorney fees and/or other litigation expenses pursuant to the provisions of the EAJA for any proceeding under this part.

Absent a stay to attempt settlement, the ALJ will 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 under proposed § 9.34(b).

Under proposed § 9.34(d), the Administrator may 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 ALJ in a case in which the Administrator has not previously participated. The Administrator would participate as a party in any proceeding in which the Administrator has determined that this part 9 has been violated. 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(g) applies, with certain exceptions, the rules of practice and procedure for administrative hearings before the Office of Administrative Law Judges at 29 CFR part 18, subpart A to administrative proceedings under this part 9. The exceptions declare inapplicable the Rules of Evidence at 29 CFR part 18, subpart B, and provide 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) requires ALJ decisions (containing appropriate findings, conclusions, and an order) to be issued within 60 days after completion of the proceeding. Upon the issuance of a decision that a violation has occurred, the ALJ may order appropriate relief, which may 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. If the Administrator has sought ineligibility sanctions, the order would also be required to address whether debarment is appropriate. The ALJ may assess against the contractor 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 § 9.35 provides the procedures for appealing an ALJ decision to the Administrative Review Board.

Finally, appendix A to part 9 contains the text of the contract clause required by § 9.11(a), and appendix B contains 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. If the final rule adopts this or a similar notice provision, the DOL intends to make the text of appendix B available in a poster format that will be available to contracting agencies on the Internet. In addition to or as an alternative to posting, this proposal would allow the text to be provided to affected employees electronically.

IV. Paperwork Reduction Act

As part of its continuing effort to reduce paperwork and respondent burden, the Department conducts a preclearance consultation program to provide the general public and federal agencies with an opportunity to comment on proposed and continuing collections of information in accordance with the Paperwork Reduction Act of

1995 (PRA), 44 U.S.C. 3506(c)(2)(A). This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. 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. Persons are not required to respond to the information collection requirements as contained in this proposal unless and until they are approved by the OMB under the PRA at the final rule stage. The Department has submitted the identified information collections contained in the proposed rule to the OMB for review under the PRA. *See* 44 U.S.C. 3507(d); 5 CFR 1320.11.

Purpose and Use: As previously explained, Executive Order 13495 applies to contracts or subcontracts at or above the simplified acquisition threshold of $100,000 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 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 an 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, excepted as noted. The DOL has strived to make the information disclosures intuitive.

Proposed § 9.12 describes the contractor's requirements and prerogatives under the proposed rule, which include third party disclosures and recordkeeping requirements that are subject to the PRA. Proposed § 9.12(a) and (b) requires the contractor to make a bona-fide express offer of employment to each employee individually, either in writing or orally. Proposed § 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 meet contractor obligations near the end of a contract.

The DOL notes that the proposed 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. In addition, while the proposed rule also 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, 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.

Proposed § 9.21 outlines the procedures for filing complaints under this part. This NPRM imposes 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 proposed regulations. A contractor may meet the requirements of this proposed rule using paper or electronic means.

Public Burden Estimates: The proposed rule contains information collection requirements for contractors and complainants. 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 DOL, 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 DOL 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 DOL assumes that for PRA purposes a typical SCA contract has one prime contractor and three subcontractors; therefore, the Department estimates the information collection requirements of part 9 would apply to approximately 60,000 contracts. 15,000 covered contract actions × 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 (CSIS Report).* Of course, some lesser number of contractors would perform work on contracts subject to the nondisplacement requirements; the DOL 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 DOL estimates that each service contract covered by this information collection would involve an average of approximately 15 employees. Moreover, the DOL 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 DOL 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 ½ 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 DOL estimates an annual disclosure and recordkeeping burden of 30 minutes per contract for a total annual burden of 30,000 hours. 60,000 contracts × 15 third-party disclosures × 2 minutes.

The information collection requirement for contractors specified in proposed § 9.12(e)—the seniority list—is cleared under the SCA regulations, 29 CFR 4.6(l)(2), OMB control number 1215–0150, and that burden is not duplicated in these estimates.

Estimates prepared for the nondisplacement rules promulgated pursuant to the Clinton Order suggested it 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 DOL 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 DOL estimates it will receive 170 nondisplacement complaints per year, half of which may include supplemental information filed directly with the Wage and Hour Division for a total number of complainant responses of 255. The DOL estimates that each complaint filing will take about 20 minutes; therefore, the DOL estimates the total burden for filing complaints to be about 85 hours. 255 responses × 20 minutes.

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; 900,255 responses; and 30,085 burden hours.

Public Comments: The DOL specifically seeks public comments regarding the burdens imposed by information collections contained in this proposed rule. In particular, the Department seeks comments that: evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will 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. Commenters may send their views about these information collections to the Department in the same way as all other comments (*e.g.,* through the regulations.gov Web site). While much of the information provided to the OMB in support of the information collection request appears in this preamble, interested parties may obtain a copy of the full supporting statement by sending a written request to the mail address shown in the **ADDRESSES** section at the beginning of this preamble or by visiting the *http://www.reginfo.gov/public/do/PRAMain* Web site. In addition to having an opportunity to file comments with the Department, comments about the paperwork implications of the proposed regulations may be addressed to the OMB. Comments to the OMB should be directed to: Office of Information and Regulatory Affairs, Attention OMB Desk Officer for the Wage and Hour Division (WHD), Office of Management and Budget, Room 10235, Washington, DC 20503, *Telephone:* 202–395–7316/*Fax:* 202–395–6974 (these are not toll-free numbers).

These paperwork burden estimates are summarized as follows:

Type of Review: Reinstatement with change of a previously approved collection.

Agency: Wage and Hour Division, Department of Labor.

Title: Nondisplacement of Qualified Workers Under Service Contracts.

OMB Control Number: 1215–0190.

Affected Public: Business or other for-profit and Individuals or Households.

Estimated Number of Respondents: 40,170.

Estimated Number of Responses: 900,255.

Frequency of Response: On occasion.

Estimated Annual Burden Hours: 30,085.

Estimated Annual Burden Costs (Operation and Maintenance): $0.

V. Executive Order 12866, Regulatory Flexibility

This NPRM is considered to be a significant regulatory action within the meaning of Executive Order 12866, and was submitted to OMB for review before publication, because the proposed rule may raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in Executive Order 12866. The first sentence of Executive Order 13495 recognizes that successor contractors often hire most of the employees who worked on predecessor contract, if the contract work will continue at the same location. The DOL believes the NPRM will not have a significant economic impact, because the proposal would simply require contractors to follow a practice currently used in most cases as a good business practice. The DOL expects that, as further explained in this section, there will be virtually no change 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 DOL 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 an additional burden but do assure compliance with the NPRM. In addition, the DOL 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 impair the ability of the agency to procure services on an economical and efficient basis.

In estimating the costs on contractors, the DOL 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 NPRM,

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 NPRM as under current practices. The costs for documenting these employment decisions will also be similar under both the NPRM and status quo.

For purposes of this analysis, the DOL also believes the time contactors 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 NPRM 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, successors must pay. *See* 41 U.S.C. 353(c); 29 CFR 4.6(b)(1). This NPRM does not require successor contractors to pay wages higher than the rate required by the SCA, even when the predecessor paid a higher rate. 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 predecessor contractor must provide a list of persons employed on the contract no less than 10 days before the end of the contractor's performance. The clause makes clear that this is the same list as the seniority list provided under the Service Contract Act clauses. § 9.12(e). As this list already exists and is used by contractors in hiring decisions under the status quo, the DOL baseline to calculate additional costs accounts for the current business practice among contractors to receive the employee list and make hiring decisions from there.

The proposal does include 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 DOL 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 × 2 hours × $31.32. *See The Employment Situation—December 2009,* at 28, Table B–3, Bureau of Labor Statistics, (*http://www.bls.gov/news.release/archives/empsit_01082010.pdf*).

While 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 DOL estimates 15 percent of covered contractors each will incur additional costs averaging $5,000 because of the NPRM requirements, for a total of $30,000,000. 40,000 contractors × 15% × $5,000. The DOL believes ten 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. 6,000 contractors × 10% × $10,000. The DOL estimates total costs contractors will incur to comply with this NPRM to be $39,758,400. The DOL expects some of these 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.

Executive Order 13495 and this proposal 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 DOL estimates 20 percent of all SCA covered contract actions in 2006 would be subject to this NPRM. 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 DOL estimates the total value of contracts subject to the nondisplacement provisions to be $23,000,000,000. $115,000,000,000 × 0.2. As also previously stated, nothing will change in a majority of these successor contracts; thus the Federal Government will not realize an increase in economy or efficiency from a reduced disruption in the delivery of services during the transition period between contractors or from the benefits of already experienced and trained service contract employees who are familiar with the Federal Government's personnel, facilities, and requirements. Assuming, however, an improvement in economy and efficiency that is equal to 1 percent on forty percent of the value of SCA covered contracts (*i.e.,* four tenths of a percent of all SCA contracts) the DOL estimates the nondisplacement provisions that are the subject of this NPRM will result in a gross savings of $92,000,000. $23,000,000,000 × 0.4 × 0.01.

Some of these savings will be absorbed by the expenses contracting agencies will incur to inform employees of their possible right to a job offer and costs to administer the requirements. The DOL has used the 2010 Rest of United States salary table to estimate salary expenses. *http://www.opm.gov/oca/10tables/html/RUS_h.asp.* The DOL 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 × 0.5 hours. The DOL 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 × $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 DOL estimates contracting agencies will spend an average of 2 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 × 2 hours × $43.13. Once this analysis is done, the contracting agency must inform the contract employees of either their possible right to a job offer or of the decision to exempt the contract. The DOL 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 × 0.5 hours × $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 NPRM also requires Contracting Officers to accept complaints from predecessor employees or their authorized representatives and to forward the complaints, along with other supporting documentation, to the Wage and hour Division within 30 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 to photocopy them for both the complainant and the contractor and the reproduction and mailing cost to forward the copies. 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 DOL 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 × 10 minutes review time = 28 hours (rounded)
28 hours × $43.13 = $1208 (rounded)

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

170 complaints × 20 minutes = 57 hours (rounded)
57 hours × $30.26 = $1725 (rounded)

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

170 complaints × 10 minutes = 28 hours (rounded)
28 hours × $13.14 = $368 (rounded)

Printing costs

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

Postage:

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

GS 12, step 4 to investigate complaints:

170 complaints × 20 hours = 3400 hours
3400 hours × $36.27 = $123,318
Printing 60,000 notices × $0.05 per notice = $3000
Enforcement Subtotal $129,961
Total Gross Annual Federal Cost estimate = $6,282,811

After offsetting the costs of administering the nondisplacement requirements from the savings, the DOL estimates economies and efficiencies arising from this NPRM would result in Federal cost savings equaling $85,717,189. $92,000,000 gross savings − $6,282,811 gross costs. 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 overall savings attributed to the Federal government from the overall additional costs attributed to contractors, the nondisplacement provisions covered by this NPRM will result in a net change to the economy of $45,958,789 in overall cost savings. $85,717,189 overall Federal savings − $39,758,400 contractor costs. The DOL 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 overall savings are likely to transfer to contractors. In any event, this NPRM will result in an effect on the economy that is less than the $100,000,000 threshold for a rule to be considered economically significant.

In addition, this NPRM would not be expected (1) To adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) to create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially to alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipient.

VI. Initial Regulatory Flexibility Analysis

The Regulatory Flexibility Act of 1980, as amended (RFA) 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. For the reasons explained in this section, the DOL believes this NPRM is not likely to have a significant economic impact on a substantial number of small entities, and therefore an initial regulatory flexibility analysis is not required by the RFA. However, in the interest or transparency and to provide an opportunity for public comment, DOL has prepared the following analysis to assess the impact of this regulation on small entities (as defined by the applicable SBA size standards). The DOL specifically requests comments on the following burden estimates, including the number of small entities affected by the nondisplacement requirements, and whether alternatives exist that will reduce burden on small entities while still meeting the requirements of Executive Order 13495. The Chief Counsel for Advocacy of the Small Business Administration was notified of a draft of this rule upon submission of the rule to the Office of Management and Budget under E.O. 12866, as amended, "Regulatory Planning and Review." 58 FR 51735, 67 FR 9385, 72 FR 2763.

Why agency is considering action: The DOL has published this NPRM to implement the enforcement provisions of Executive Order 13495, "Nondisplacement of Qualified Workers Under Service Contracts." The Executive Order assigns enforcement responsibility for the nondisplacement requirements to the DOL.

Objectives of and Legal Basis for Rule: This rule will provide guidance on how to comply with the nondisplacement requirements of Executive Order 13495 and how the DOL intends to administer and enforce them. Section 6(a) of the Executive Order assigns the responsibility of investigating and obtaining compliance with the nondisplacement requirements to the DOL. 74 FR 6105. Section 6(b) directs the Secretary of Labor, in consultation with the FARC, to issue regulations to implement the requirements of the Order. *Id.*

Description and number of small entities covered by the NPRM: This NPRM would apply to small entities that perform work for the Federal Government on contracts or subcontracts subject to the SCA of $100,000 or more. The DOL has found no precise data with which to measure the precise number of small entities that would be covered by this NPRM; however, certain available data allow for estimates. As already discussed in the Paperwork Reduction Act portion of this preamble, 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 DOL, 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. Subcontracts are not reported in the FPDS, and the DOL 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 DOL assumes 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 × 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* (*CSIS Report*). Of course, some lesser number of contractors would perform work on contracts subject to the nondisplacement requirements; the DOL 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 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 $100,000) the NPRM 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. Applying the same percentage (72 percent) to the total estimated value of $23,000,000,000 for all service contracts subject to this rule, suggests the value of those contracts held by small entities would equal $16,560,000,000. 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 DOL 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 NPRM is expected to apply to no more than 43,200 successor contracts awarded to small contractors.

Compliance requirements, including reporting and recordkeeping: This NPRM would impose a general requirement on 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 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. Specifically, the proposal provides that, except as provided under specific exclusions listed in proposed § 9.4 or paragraphs (c) and (d) of proposed § 9.12, a successor contractor or subcontractor could not fill any employment openings under the contract prior to making good faith offers of employment, 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 would be required to make an 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 employment offer may be to a different job position on the contract for which the employee is qualified.

The NPRM also addresses the exceptions to the general obligation to offer employment under Executive Order 13495. The exclusions specify both certain classes of contracts and certain employees excluded from the provisions of Executive Order 13495. The exemptions 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 do 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). Specifically, a contractor or subcontractor (1) Would not be required to offer employment to any employee of the predecessor who will be retained by the predecessor contractor; (2) would be allowed to employ under the contract any employee who has worked for the contractor or subcontractor for at least three months immediately preceding the commencement, *i.e.,* the first date of performance, of the contract and who would otherwise face lay-off or discharge; (3) would not be required to offer employment to any employee of the predecessor who is not a service employee; (4) would not be 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; (5) would not be 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; (6) would be required 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.

The NPRM would also require the contractor, not less than 10 days before completion of the contract, to 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, including their anniversary dates of employment with either the current or predecessor contractors or their subcontractors. The

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 this provision.

The NPRM prescribes no particular order or form of records for contractors, and the recordkeeping requirements apply to all records regardless of their format (*e.g.,* paper or electronic). A contractor would be 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. Contractors must 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, 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, every contractor who makes retroactive payment of wages or compensation under the supervision of the Wage and Hour Division 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 each such payment on a receipt form authorized by the Wage and Hour Division.

Contractors would be obligated to cooperate during any investigation to determine compliance with the nondisplacement requirements as a condition of the contract award 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.

All small entities subject to the nondisplacement requirements would be required to comply with all the provisions of the NPRM, and the work can be performed by a combination of management officials (*e.g.,* staff authorized to make job offers) and clerical staff (*e.g.,* staff to maintain the list of persons offered employment and file records). The compliance requirements are more fully described above in other portions of this preamble.

Executive Order 13495 mandates a practice that successor contractors already typically follow. As with other contractors, the DOL expects there will be virtually no change in the way most small contractors currently conduct business, with the exception that they will need to ensure the appropriate contract language appears in subcontracts. The DOL expects that a majority of small contractors making changes to their business operations will comply with the new requirements by simply replacing aspects of their existing staffing practices with similar practices that do not entail an additional burden but do assure compliance with the NPRM.

In estimating the costs on small contractors, the DOL 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 NPRM, 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 NPRM as under current practices. The costs for documenting these employment decisions will also be similar under both the NPRM and status quo.

For purposes of this analysis, the DOL 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 NPRM 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, successors must pay. *See* 41 U.S.C. 353(c); 29 CFR 4.6(b)(1). This NPRM 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 predecessor contractor must provide a list of persons employed on the contract no less than 10 days before the end of the contractor's performance. The clause makes clear that this is the same list as the seniority list provided under the Service Contract Act clauses. § 9.12(e). As this list already exists and is used by contractors in hiring decisions under the status quo, the DOL baseline to calculate additional costs for small entities accounts for the current business practice among contractors to receive the employee list and make hiring decisions from there.

The proposal does include 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 DOL 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 NPRM. 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 less than $100 on most small contractors. 1.5 contracts per contractor × 2 hours × $31.32. *See The Employment Situation—December 2009,* at 28, Table B–3, Bureau of Labor Statistics, (*http://www.bls.gov/news.release/archives/empsit_01082010.pdf*). Aggregate compliance costs for these general requirements are expected to be $2,706,048. 28,800 contractors × 1.5 contracts × 2 hours × $31.32.

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 DOL believes this rule has been drafted in a way that the vast majority of contractors should be able to comply with the nondisplacement requirements without the need of professional assistance from an attorney or accountant, the DOL recognizes some contractors will seek such assistance in the course of researching compliance options within the context of specific business needs. In recognition of this latter fact, for purposes of this analysis, the DOL estimates 15 percent of covered contractors each will incur additional costs averaging $5000 because of the NPRM requirements, for a total of $21,600,000 spent by 4320 small contractors. 28,800 contractors × 15% × $5000. The DOL believes ten percent of these 4320 contractors will face complex issues that will require each spending an average of $10,000 additional dollars, totaling $4,320,000 spent by 432 small contractors. 4320 contractors × 10% × $10,000. The DOL estimates total compliance costs that the 28,800 small contractors subject to this NPRM 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. Using the assumptions already discussed, this NPRM would impose additional costs equaling less than 3 percent of the combined estimated $248,400,000 value of contracts awarded to the 432 small contractors who will bear the greatest costs to comply with the nondisplacement requirements. $16,560,000,000 value of contracts subject to NPRM awarded to small contracts × 1.5 percent (percentage of contractors facing greatest costs 432/28,800) = $248,400,000. $6,520,591 total estimated compliance costs/$248,400,000 estimated compliance costs = 2.6 percent. As with other contractors, the DOL 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.

The DOL specifically requests comments on these burden estimates, including the number of small entities affected by the nondisplacement requirements, and on how the final rule can reduce burden on small entities while still meeting the requirements of Executive Order 13495.

Relevant Federal rules duplicating, overlapping or conflicting with the rule: Section 6(b) of the Executive Order requires the FARC to issue regulations to provide for inclusion of the applicable contract clause in Federal solicitations and contracts subject to the nondisplacement requirements; thus, the contract clause and some requirements applicable to contracting agencies will appear in both this part and in the FARC regulations. As noted above, the certified list of all service employees working under the contract and its subcontracts during the last month of contract performance is the same list a contractor covered by the SCA is already required to submit pursuant to 29 CFR 4.6(l). *See also,* section 5, contract clause paragraph (c) of Executive Order 13495. 74 FR 6104. The DOL is not aware of any relevant Federal rules that conflict with this NPRM.

Differing Compliance and Reporting Requirements for Small Entities: This NPRM provides for no differing compliance requirements and reporting requirements for small entities. The DOL has strived to have this proposal implement the nondisplacement requirements of Executive Order 13495 with the least possible burden for small entities. The NPRM provides a number of efficient and informal alternative dispute mechanisms to resolve concerns about contractor compliance, including allowing for complaints initially to be filed with the contracting agency and having the contracting agency provide compliance assistance to the contractor about the nondisplacement requirements and allowing for the Wage and Hour Division to attempt an informal conciliation of complaints instead of engaging in extensive investigations. These tools will provide contractors with an opportunity to resolve inadvertent errors rapidly and before significant liabilities develop.

Clarification, consolidation, and simplification of compliance and reporting requirements for small entities: This NPRM was drafted to clearly state the compliance and reporting requirements for all contractors subject to the nondisplacement provisions. The only reporting requirement is the 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 current or predecessor contractors or their subcontractors. The 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 this provision.

Use of Performance Rather Than Design Standards: This NPRM was written to provide clear guidelines to ensure compliance with the nondisplacement requirements. Many of the features incorporate standards geared to performance. For example, the NPRM would provide for the successor contractor to determine the number of employees needed to perform the work and allow the successor contractor to decide which predecessor contract employees would receive an offer of employment on the contract, provided the offers resulted in the least displacement possible.

Exemption from Coverage of the Rule for Small Entities: Executive Order 13495 establishes its own coverage and exemption requirements; therefore, the DOL has no authority to exempt additional small businesses from the nondisplacement requirements beyond the express language of Executive Order 13495.

VII. Unfunded Mandates Reform Act

For purposes of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1532, this NPRM 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.

VIII. Executive Order 13132 (Federalism)

The DOL has (1) reviewed this rule in accordance with Executive Order 13132 regarding federalism and (2) determined that it does not have federalism implications. The NPRM 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.

IX. Executive Order 13175, Indian Tribal Governments

This NPRM would not have tribal implications under Executive Order 13175 that would require a tribal summary impact statement. The NPRM 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.

X. Effects on Families

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

XI. Executive Order 13045, Protection of Children

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

XII. Environmental Impact Assessment

A review of this NPRM 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 1500 *et seq.;* and the Departmental NEPA procedures, 29 CFR part 11, indicates the NPRM 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.

XIII. Executive Order 13211, Energy Supply

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

XIV. Executive Order 12630, Constitutionally Protected Property Rights

This NPRM 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.

XV. Executive Order 12988, Civil Justice Reform Analysis

This NPRM was drafted and reviewed in accordance with Executive Order 12988 and will not unduly burden the Federal court system. The NPRM 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.

XVI. Dates of Applicability

This is a proposed rule, and any regulations to administer the nondisplacement requirements would only become effective upon issuance of a final rule. E.O. 13495 provides that its nondisplacement provisions will apply to solicitations issued on or after the effective date of the contract clause regulations to be implemented by the FARC.

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 DOL proposes to amend 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 hearings.
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 DOL. 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 work force 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 work force 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.

§ 9.2 Definitions.

For purposes of this part:

(1) *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.

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

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

(4) *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.

(5) *Day* means, unless otherwise specified, a calendar day.

(6) *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.

(7) *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.

(8) *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.

(9) *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.

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

(11) *Office of Administrative Law Judges* means the Office of Administrative Law Judges, U.S. Department of Labor.

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

(13) *Same or similar service* means a service that is either identical to or has characteristics that are alike in substance and essentials 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.

(14) *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.

(15) *Solicitation* means any request to submit offers or quotations to the Government.

(16) *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.

(17) *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) through (b)(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 if 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) The agency determination shall be made no later than the solicitation date. As an alternative to waiving all provisions of this part, the head of a contracting department or agency may waive one or more individual provisions no later than the contract solicitation date.

(2) When an agency exercises its exemption authority, the contracting agency will notify affected workers in writing of the finding and decision no later than the award date. The notification shall include facts supporting the conclusion 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. Where a contracting agency exempts a class of contracts, subcontracts, or purchase orders, the agency will provide the notice to incumbent workers for each individual award.

(3) The agency shall use the notification method specified in

§ 9.11(b) of this part to inform workers of the decision.

(4) In exercising the authority to exempt contracts under this section, based on a finding that any of the nondisplacement provisions would not serve the purposes of Executive Order 13495, 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.

(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 (or designee) will 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 provide the notice set forth in appendix B to this part in either a physical posting at the job site or another format (*e.g.,* individual paper notices or e-mail notification to the affected employees).

(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) *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.

(ii) *Additional distribution.* The Contracting Officer shall provide copies of the report to the contractor, including the prime contractor when the complaint alleges violations by a subcontractor, and the complainant. *See* § 9.21(a) of this part regarding filing complaints with the contracting agency.

(iii) *Reporting time frame.* All information shall be forwarded by the Contracting Officer to the Wage and Hour Division within 30 days of receipt of the complaint. *See also* § 9.21 of this part, Complaints.

(2) *Initial review.* The contracting agency may conduct an initial review of any complaint the agency receives under this part. As part of the contracting agency's initial review, the Contracting Officer may obtain statements of the positions of the parties and 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 has occurred.

(3) *Compliance assistance.* The Contracting Officer (or designee) shall provide information about the contract clause provisions of this part to the complainant(s) and successor contractor. Questions of interpretations of this part shall be referred to the nearest local office of the Wage and Hour Division. Contracting Officers need not refer to the Wage and Hour Division any complaint that is withdrawn because of compliance assistance provided by the contracting agency.

§ 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 an 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 employee on the predecessor contract before offering employment on the contract to any other person. 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(6), (9), respectively, 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 suitable work on the 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 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 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, and 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 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 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.* 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 working under the 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 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.

(a) *With contracting agency.* Any former 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 Contracting Officer of the appropriate Federal agency within 120 days of the alleged violation. *See also,* § 9.11(d) of this part, Contracting agency actions on complaints.

(b) *With Wage and Hour Division.* The complainant may file the complaint directly with the Branch of Government Contracts Enforcement, Wage and Hour Division, U.S. Department of Labor, Washington, DC 20210, if the complainant has not been able to timely file the complaint with the Contracting Officer or has not received, within 30 days of filing the complaint with the Contracting Officer, a copy of the report forwarded to the Wage and Hour Division under § 9.11(d)(1) of this part. The complaint must be filed with the Wage and Hour Division within 180 days of the alleged violation.

§ 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 payment of wages lost.

(b) *Unpaid wages or other relief due.* In addition to satisfying any costs imposed under §§ 9.34(j), 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 an 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 three 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. 357(b), 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) 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 successor contractor, (insert name of successor contractor). The successor 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, a successor contractor is generally required to offer employment to the employees who worked on the contract during the last 30 days of the predecessor performance, except in the following situations:

Employees who will not face layoff or discharge by 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 successor contractor may reduce the size of the current work force; therefore, only a portion of the existing work force may receive employment offers. However, the successor contractor must offer employment to the displaced employees if any openings occur during the first 90 days of performance on the successor contract.

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

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

An employee hired to work under a predecessor's 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 successor contract, provided that the employee was not deployed 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 or authorized employee representative who believes that he or she is entitled to an offer of employment with the successor contractor and who has not received an offer, may file a complaint with (insert Contracting Officer or representative name, address and telephone number). Any complaint must be filed with the contracting agency within 120 days of the alleged violation. The Contracting Officer will inform the parties of their rights and obligations regarding the nondisplacement of employees and, forward a report to the U.S. Department of Labor, Wage and Hour Division within 30 days. The employee may also file the complaint directly with the Administrator, Wage and Hour Division, U.S. Department of Labor, Washington, DC 20210, if the complainant has not been able timely to file the complaint with the Contracting Officer or received a copy of the information to be forwarded to the Wage and Hour Division within 30 days of the original filing. The complaint must be filed with the Wage and Hour Division within 180 days of the alleged violation.

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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