

**DEPARTMENT OF LABOR****Office of the Secretary**

ZRIN 1290-ZA02

**Guidance for Executive Order 13673, "Fair Pay and Safe Workplaces"****AGENCY:** Department of Labor.**ACTION:** Proposed guidance.

**SUMMARY:** The Department of Labor is proposing guidance to assist federal agencies in the implementation of Executive Order 13673, Fair Pay and Safe Workplaces (the Order). The Order was signed by President Barack Obama on July 31, 2014, and it contains several new requirements designed to improve the federal contracting process. The Order seeks to increase efficiency and cost savings in the work performed by parties that contract with the Federal Government by ensuring that the parties are responsible and comply with labor laws. The Order requires federal contractors to report whether there has been any administrative merits determination, civil judgment, or arbitral award or decision rendered against them during the preceding three-year period for violations of any of 14 identified federal labor laws and executive orders or equivalent State laws.<sup>1</sup> Contracting officers and Labor Compliance Advisors will assess these types of reported violations (considering whether the violations are serious, repeated, willful, or pervasive) as part of the determination of whether a contractor has a satisfactory record of integrity and business ethics. Labor Compliance Advisors will be available to consult with contractors that report these types of violations and will coordinate assistance with the relevant enforcement agencies. Contractors will require their subcontractors to report these types of violations of the identified labor laws and will similarly assess reported violations.<sup>2</sup> And to achieve further paycheck transparency for workers, contractors and subcontractors will be required to provide their workers on federal contracts with information each pay period regarding how their pay is calculated (a wage statement) and

<sup>1</sup> The Department will publish in the **Federal Register** at a future date a second proposed guidance addressing which State laws are equivalent to the 14 Federal labor laws and executive orders identified in the Order.

<sup>2</sup> The Department recognizes that the Federal Acquisition Regulatory Council is considering allowing contractors to direct their subcontractors to report violations to the Department, which would then assess the violations.

provide notice to those workers whom they treat as independent contractors.

The Order directs the Department of Labor to develop guidance to assist federal agencies in implementing the Order's requirements. Consistent with that direction, this proposed guidance, when final, will: define "administrative merits determination," "civil judgment," and "arbitral award or decision," and provide guidance on what information related to these determinations must be reported by contractors and subcontractors; define "serious," "repeated," "willful," and "pervasive" violations and provide guidance to contracting officers (or contractors with respect to their subcontractors) and Labor Compliance Advisors for assessing reported violations, including mitigating factors to consider; and provide guidance on the Order's paycheck transparency provisions, including identifying those States whose wage statement laws are substantially similar to the Order's wage statement requirement such that providing a worker with a wage statement that complies with any of those State laws satisfies the Order's requirement.

The Order builds on the existing procurement system, and changes required by the Order fit into established contracting practices that are familiar to both procurement officials and the contracting community. In addition, the Department of Labor will provide support directly to contractors and subcontractors so that they understand their obligations under the Order and can come into compliance with federal labor laws without holding up their contract bids. Finally, the Department will work with Labor Compliance Advisors across agencies to minimize the amount of information that contractors have to provide and to help ensure efficient, accurate, and consistent decisions across the government.

The objective of the Order is to help contractors come into compliance with federal labor laws, not to deny them contracts. To this end, this proposed guidance, when final, will provide a roadmap to contracting officers, Labor Compliance Advisors, and the contracting community for assessing contractors' history of labor law compliance with regard to their business integrity and ethics and considering mitigating factors, most notably efforts to remediate any reported labor law violations, including agreements entered into by contractors with enforcement agencies.

**DATES:** Comments must be received on or before July 27, 2015.

**ADDRESSES:** You may submit comments, identified by ZRIN 1290-ZA02, by either of the following methods:

*Electronic comments:* Comments may be sent via <http://www.regulations.gov>, a Federal E-Government Web site that allows the public to find, review, and submit comments on documents that agencies have published in the **Federal Register** and that are open for comment. Simply type in "guidance on fair pay and safe workplaces" (in quotes) in the Comment or Submission search box, click Go, and follow the instructions for submitting comments.

*Mail:* Address written submissions to Tiffany Jones, U.S. Department of Labor, Room S-2312, 200 Constitution Avenue NW., Washington, DC 20210.

*Instructions:* Please submit only one copy of your comments by only one method. All submissions must include the agency name and ZRIN, identified above, for this document. Please be advised that comments received will become a matter of public record and will be posted without change to <http://www.regulations.gov>, including any personal information provided. Comments that are mailed must be received by the date indicated for consideration. For additional information on submitting comments and the guidance process, see the "Invitation to Comment" section of the **SUPPLEMENTARY INFORMATION** provided later in this document.

*Docket:* For access to the docket to read background documents or comments, go to <http://www.regulations.gov>. Docket name: Fair Pay and Safe Workplaces. Docket ID: DOL-2015-0002.

**FOR FURTHER INFORMATION CONTACT:** Contact Kathleen E. Franks, Director, Office of Regulatory and Programmatic Policy, U.S. Department of Labor, Room S-2312, 200 Constitution Avenue NW., Washington, DC 20210; telephone: (202) 693-5959 (this is not a toll-free number). Copies of this proposed guidance may be obtained in alternative formats (large print, Braille, audio tape or disc), upon request, by calling (202) 693-5959 (this is not a toll-free number). TTY/TDD callers may dial toll-free [1-877-889-5627] to obtain information or request materials in alternative formats.

**SUPPLEMENTARY INFORMATION:****Background**

Although most federal contractors comply with applicable laws and provide quality goods and services to the government and taxpayers, a small

number of federal contractors have been responsible for a significant number of labor law violations in the last decade. In 2010, the Government Accountability Office issued a report that found that almost two-thirds of the 50 largest wage-and-hour violations and almost 40 percent of the 50 largest workplace health-and-safety penalties issued between FY 2005 and FY 2009 occurred at companies that later received government contracts.<sup>3</sup> In 2013, Senate Health, Education, Labor, and Pensions Committee Chairman Tom Harkin issued a report which revealed that dozens of contractors with significant health-and-safety and wage-and-hour violations continued to receive federal contracts.<sup>4</sup> Between 2007 and 2012, 49 federal contractors were cited for 1,776 separate federal labor law violations and paid \$196 million in damages and penalties.<sup>5</sup> In FY 2012, these same companies were awarded \$81 billion in federal contracts.<sup>6</sup>

Beyond their human cost, these violations create risks to the timely, predictable, and satisfactory delivery of goods and services to the Federal Government, and federal agencies risk poor performance by awarding contracts to companies with histories of labor law violations. Poor workplace conditions lead to lower productivity and creativity, increased workplace disruptions, and increased workforce turnover. For contracting agencies, this means receipt of lower quality products and services, and increased risk of project delays and cost overruns.

Contracting agencies can reduce execution delays and avoid other complications by contracting with contractors with track records of labor law compliance—and by helping to bring contractors with past violations into compliance. Contractors that consistently adhere to labor laws are more likely to have workplace practices that enhance productivity and to deliver goods and services to the Federal Government in a timely, predictable, and satisfactory fashion.

Moreover, by ensuring that its contractors are in compliance, the

Federal Government can level the playing field for contractors who comply with the law. Those contractors who invest in their workers' safety and maintain a fair and equitable workplace should not have to compete with contractors who offer slightly lower bids—based on savings from skirting labor laws—and then ultimately deliver poor performance to taxpayers. By contracting with employers who are in compliance with labor laws, the Federal Government can ensure that taxpayers' money supports jobs in which workers have safe workplaces, receive the family leave they are entitled to, get paid the wages they have earned, and do not face unlawful workplace discrimination.

### Overview of Guidance

The Order instructs federal agencies to work together to implement new contracting requirements and processes. The Order creates detailed implementation roles for the Federal Acquisition Regulatory Council (FAR Council), the Department of Labor (Department), the Office of Management and Budget (OMB), and the General Services Administration (GSA). These agencies will implement the Order in stages, on a prioritized basis.

The Order gives the Department several specific implementation and coordination duties. The Order directs the Secretary of Labor (the Secretary) to develop guidance that defines the “administrative merits determinations,” “civil judgments,” and “arbitral awards or decisions” that contractors and subcontractors must report, *see* § 2(a)(i); identifies the State laws that are “equivalent” to the 14 federal labor laws and executive orders for which violations must be reported, *see* § 2(a)(i)(O); assists contracting agencies (and contractors with respect to their subcontractors) in determining if reported violations are “serious,” “repeated,” “willful,” or “pervasive,” *see* § 4(b)(i); and specifies which State wage statement requirements are substantially similar to the Order's requirement such that providing a worker with a wage statement in compliance with one of those State's requirements satisfies the Order's wage statement requirement, *see* § 5(a). The Order also directs the Secretary to develop processes for coordination between newly designated Labor Compliance Advisors in each contracting agency and the Department and processes by which contracting officers and Labor Compliance Advisors may give appropriate consideration to determinations and agreements made by

the Department and other enforcement agencies. *See* § 4(b)(ii).<sup>7</sup>

This proposed guidance satisfies most of the Department's responsibilities for issuing guidance, and the Department will publish at a later date a second guidance that satisfies its remaining responsibilities. Section I below discusses the reasons for the Order and summarizes its requirements. Section II defines the terms “administrative merits determination,” “civil judgment,” and “arbitral award or decision,” and provides guidance regarding the types of information that contractors and subcontractors should report under the Order. Section III defines the terms “serious,” “repeated,” “willful,” and “pervasive.” It also provides guidance on how reported violations should be assessed and what mitigating factors should be considered. Section IV provides guidance on the Order's paycheck transparency provisions. It identifies and solicits comment on two options for determining those States whose wage statement laws are substantially similar to the Order's wage statement requirement. Section V is an invitation to comment, and Section VI describes next steps.

This proposed guidance also provides guidelines for how contracting officers and Labor Compliance Advisors may give appropriate consideration to determinations and agreements made between contractors and enforcement agencies. In addition, the Department will publish in the **Federal Register** at a future date a second proposed guidance addressing which State laws are equivalent to the 14 federal labor laws and executive orders identified in the Order for which contractors and subcontractors must report violations. For purposes of this initial proposed guidance, however, State plans approved by the Department's Occupational Safety and Health Administration (OSHA-approved State Plans) are equivalent State laws (*see* discussion below).

As part of the development of this proposed guidance, the Department has engaged with a range of interested parties (including contractors,

<sup>3</sup> U.S. Government Accountability Office, GAO-10-1033, *Federal Contracting: Assessments and Citations of Federal Labor Law Violations by Selected Federal Contractors*, Report to Congressional Requesters (2010), available at <http://www.gao.gov/new.items/d101033.pdf>.

<sup>4</sup> Majority Staff of Senate Committee on Health, Education, Labor, and Pensions, *Acting Responsibly? Federal Contractors Frequently Put Workers' Lives and Livelihoods at Risk*, 1 (2013), available at <http://www.help.senate.gov/imo/media/doc/Labor%20Law%20Violations%20by%20Contractors%20Report.pdf>.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> The Department will set up a structure within the Department to consult with Labor Compliance Advisors in carrying out their responsibilities and duties and to help ensure efficient, accurate, and consistent decisions across the government. In addition, the Department will be available to consult with contractors and subcontractors to assist them in fulfilling their obligations under the Order. Contractors and subcontractors, before bidding, will also be offered the opportunity to receive early guidance from the Department and other enforcement agencies on whether any of their violations of the labor laws are potentially problematic, as well as the opportunity to remedy any problems.

contracting agencies, and unions) to solicit their views on the Order. The White House hosted four listening sessions to hear their views, ideas, and concerns regarding the provisions of the Order. The Department found these listening sessions helpful and considered relevant information raised during those sessions in developing this proposed guidance.

Consistent with its efforts to engage with interested parties regarding the Order, the Department, in its discretion, is soliciting public comment on this proposed guidance in the manner and before the date specified above. Agencies are not required to provide notice and an opportunity for public comment on guidance documents before they are adopted, as is generally required for formal legislative rulemaking and other regulatory action.

### I. Purpose and Summary of the Order

The Order states that the Federal Government will promote economy and efficiency in procurement by contracting with responsible sources that comply with labor laws. *See* § 1. The Order seeks to increase efficiency and cost savings in the work performed by parties that contract with the Federal Government by ensuring that they understand and comply with labor laws. *Id.*

#### A. Existing Requirements for Contracting With Responsible Sources

By statute, contracting agencies are required to award contracts to responsible sources. *See* 10 U.S.C. 2405(b); 41 U.S.C. 3703. A “responsible source” means a prospective contractor that, among other things, “has a satisfactory record of integrity and business ethics.” 41 U.S.C. 113.

Part 9 of the Federal Acquisition Regulation (FAR) implements this statutory “responsibility” requirement. The FAR states that “[p]urchases shall be made from, and contracts shall be awarded to, responsible prospective contractors only.” 48 CFR 9.103(a). In accordance with the statutory definition of “responsible source,” the FAR states that “[t]o be determined responsible, a prospective contractor must . . . [h]ave a satisfactory record of integrity and business ethics. . . .” 48 CFR 9.104–1. In addition, the FAR requires contractors on certain contracts to disclose to contracting officers any “credible evidence” that the agents of the contractor or any of its subcontractors have committed violations of federal criminal laws involving fraud, conflict of interest, bribery, or gratuities or of the civil False Claims Act in connection with the

contract. 48 CFR 52.203–13; *see also* 48 CFR 52.209–5 and 52.209–7 (requiring disclosures). The FAR also provides that, generally, prospective prime contractors are responsible for determining the responsibility of their prospective subcontractors. *See* 48 CFR 9.104–4.

#### B. Legal Authority

The President issued the Order, as stated therein, pursuant to his authority under “the Constitution and the laws of the United States,” expressly including the Federal Property and Administrative Services Act (Procurement Act), 40 U.S.C. 101 *et seq.* The Procurement Act authorizes the President to “prescribe policies and directives that the President considers necessary to carry out” the statutory purposes of ensuring “economical and efficient” government procurement and administration of government property. 40 U.S.C. 101, 121(a). The Order establishes that the President considers the requirements included in the Order to be necessary to economy and efficiency in federal contracting (noting that “[c]ontractors that consistently adhere to labor laws are more likely to have workplace practices that enhance productivity and increase the likelihood of timely, predictable, and satisfactory delivery of goods and services to the Federal Government” and that “[h]elping executive departments and agencies (agencies) to identify and work with contractors with track records of compliance will reduce execution delays and avoid distractions and complications that arise from contracting with contractors with track records of noncompliance”). *See* § 1. The Order directs the Secretary to define certain terms used in the Order and to develop guidance “to assist agencies” in implementing the Order’s requirements. *See* §§ 2(a)(i), 4(b).

#### C. Summary of the Order’s Requirements and Interaction With Existing Requirements

The Order builds on the existing procurement system by instructing contracting officers to consider a contractor’s history of labor laws violations, if any, as a factor in determining if the contractor has a satisfactory record of integrity and business ethics and may therefore be found to be a responsible source eligible for contract award. *See* §§ 2(a)(ii)–(iii). To facilitate this determination, the Order provides that, for procurement contracts for goods and services, including construction, where the estimated value of the supplies acquired and services required exceeds \$500,000,

each agency shall ensure that provisions in solicitations require that the contractor represent, to the best of its knowledge and belief, whether there has been any administrative merits determination, civil judgment, or arbitral award or decision rendered against it within the preceding three-year period for violations of any of 14 identified federal labor laws or executive orders or any equivalent State laws (the Labor Laws). *See* § 2(a)(i). The 14 federal labor laws or executive orders identified in the Order are:

- The Fair Labor Standards Act (the FLSA);
- the Occupational Safety and Health Act of 1970 (the OSH Act);
- the Migrant and Seasonal Agricultural Worker Protection Act (MSPA);
- the National Labor Relations Act (the NLRA);
- 40 U.S.C. chapter 31, subchapter IV, also known as the Davis-Bacon Act (the DBA);
- 41 U.S.C. chapter 67, also known as the Service Contract Act (the SCA);
- Executive Order 11246 of September 24, 1965 (Equal Employment Opportunity);
- section 503 of the Rehabilitation Act of 1973;
- the Vietnam Era Veterans’ Readjustment Assistance Act of 1972 and the Vietnam Era Veterans’ Readjustment Assistance Act of 1974;<sup>8</sup>
- the Family and Medical Leave Act (the FMLA);
- title VII of the Civil Rights Act of 1964 (Title VII);
- the Americans with Disabilities Act of 1990 (the ADA);
- the Age Discrimination in Employment Act of 1967 (the ADEA); and
- Executive Order 13658 of February 12, 2014 (Establishing a Minimum Wage for Contractors).

Prior to making an award, contracting officers shall, as part of the responsibility determination, provide contractors with an opportunity to disclose any steps taken to correct any reported violations or improve compliance with the Labor Laws, including any agreements entered into with an enforcement agency. *See* § 2(a)(ii). Contracting officers, in consultation with the relevant Labor Compliance Advisor (LCA), shall then consider the information in determining if a contractor is a responsible source with a satisfactory record of integrity and business ethics. *See* § 2(a)(iii).

<sup>8</sup> Identifying these two statutes in their entirety reflects the Order as amended by section 3 of Executive Order 13683, Amendments to Executive Orders 11030, 13653, and 13673 (Dec. 11, 2014).

Similar requirements apply to subcontractors where the estimated value of the supplies acquired and services required in the subcontract exceeds \$500,000 and the subcontract is not for commercially available off-the-shelf items. Under the Order, contracting officers must require that, at the time of execution of the contract, contractors represent that they will require subcontractors performing covered subcontracts to disclose any administrative merits determination, civil judgment, or arbitral award or decision rendered against the subcontractor within the preceding three-year period for violations of any of the Labor Laws. *See* § 2(a)(iv). The contractor will (in most cases, before awarding the subcontract) consider the information submitted by the subcontractor in determining whether the subcontractor is a responsible source that has a satisfactory record of integrity and business ethics. *Id.* And the contractor will incorporate into covered subcontracts the requirement that the subcontractor disclose to the contractor any administrative merits determinations, civil judgments, or arbitral awards or decisions rendered against the subcontractor within the preceding three-year period for violations of any of the Labor Laws. *Id.*<sup>9</sup>

The Order's reporting requirement continues after an award is made. Semi-annually during the performance of the contract, contracting agencies shall require contractors to update the information provided about their own Labor Laws violations and to obtain the required information for covered subcontracts. *See* § 2(b)(i). If a contractor reports information regarding Labor Laws violations during contract performance, or similar information is obtained through other sources, a contracting officer, in consultation with the LCA, shall consider whether action is necessary. *See* § 2(b)(ii). Such action may include entering into agreements requiring appropriate remedial measures and measures to avoid further violations, as well as declining to exercise an option on a contract, contract termination in accordance with relevant FAR provisions, or referral to the agency suspending and debarring official. *Id.* If information regarding Labor Laws violations by a contractor's subcontractor is brought to the attention of the contractor, then the contractor

shall similarly consider whether action is necessary. *See* § 2(b)(iii).

The Order requires each contracting agency to designate a senior agency official to be an LCA to provide consistent guidance on whether contractors' actions rise to the level of a lack of integrity or business ethics. *See* § 3. As a general matter, LCAs will coordinate assistance for contractors that seek help in addressing and preventing Labor Laws violations. *See* §§ 3(b)–(c). And in consultation with the Department and other agencies responsible for enforcing the Labor Laws, LCAs will help contracting officers to: Review information regarding violations reported by contractors; assess whether reported violations are serious, repeated, willful, or pervasive; review the contractor's remediation of the violation and any other mitigating factors; and determine if the violations identified warrant remedial measures, such as a labor compliance agreement. *See* § 3(d). For purposes of this proposed guidance, a "labor compliance agreement" is an agreement entered into between an enforcement agency (defined below) and a contractor or subcontractor to address appropriate remedial measures, compliance assistance, steps to resolve issues to increase compliance with labor laws, or other related matters. *See* § 2(a)(ii).

The Order directs the FAR Council to propose such rules and regulations and issue such orders as are deemed necessary and appropriate to carry out the Order. *See* § 7. Specifically, the FAR Council will promulgate regulations for contracting agencies and contractors (with respect to their subcontractors) to apply when determining whether certain types of Labor Laws violations demonstrate a lack of integrity or business ethics. *See* § 4(a). The regulations will: Provide that, subject to the determination of the contracting agency, "in most cases a single violation of [a Labor Law] may not necessarily give rise to a determination of lack of responsibility, depending on the nature of the violation;" ensure appropriate consideration is given to any remedial measures or mitigating factors, including any agreements by contractors or other corrective action taken to address violations; and ensure that contracting officers and LCAs send information, as appropriate, to the agency suspending and debarring official, in accordance with agency procedures. *Id.* And as discussed above, the Order directs the Secretary to define certain terms used in the Order and to develop guidance to assist contracting

agencies in implementing the Order's requirements.

The Order also contains two paycheck transparency requirements. First, the Order requires contracting agencies to ensure that, for contracts subject to the Order, provisions in solicitations and clauses in contracts shall provide that, in each pay period, contractors provide all individuals performing work under the contract for whom they are required to maintain wage records under the FLSA, DBA, SCA, or equivalent State laws, with a document with information concerning that individual's hours worked, overtime hours, pay, and any additions made to or deductions made from pay (*i.e.*, a wage statement). *See* § 5(a). Contracting agencies shall also require that contractors incorporate this same requirement into covered subcontracts. *Id.* However, the Order instructs that the wage statement provided to individuals exempt from the overtime compensation requirements of the FLSA need not include a record of hours worked if the contractor or subcontractor informs the individuals of their exempt status. *Id.* The Order's wage statement requirement will be deemed satisfied for workers to whom the contractor or subcontractor provides a wage statement that complies with an applicable State or local wage statement requirement that the Secretary has determined is substantially similar to the Order's wage statement requirement. *Id.* Second, the Order provides that if a contractor or subcontractor is treating an individual performing work under a covered contract as an independent contractor, and not an employee, it must provide a document informing the individual of this status. *See* § 5(b).<sup>10</sup>

Finally, the Order requires that, in developing the guidance and proposing to amend the FAR, the Secretary and the FAR Council shall minimize, to the extent practicable, the burden of complying with the Order for federal contractors and subcontractors and in particular small entities, including small businesses, as defined in section

<sup>10</sup> The Order further requires contracting agencies to ensure that for all contracts where the estimated value of the supplies acquired and services required exceeds \$1 million, provisions in solicitations and clauses in contracts shall provide that contractors agree that the decision to arbitrate claims arising under Title VII or any tort related to or arising out of sexual assault or harassment may only be made with the voluntary consent of employees or independent contractors after such disputes arise, subject to certain exceptions. *See* § 6. Contracting agencies must require contractors to incorporate this same requirement into subcontracts where the estimated value of the supplies acquired and services required exceeds \$1 million, subject to certain exceptions. *Id.* The Order does not direct the Secretary to address this requirement.

<sup>9</sup> The Department recognizes that the FAR Council is considering allowing contractors to direct their subcontractors to report violations to the Department, which would then assess the violations.

3 of the Small Business Act (15 U.S.C. 632), and small nonprofit organizations. See § 4(e). The intent of the Order is to minimize additional compliance burdens and to increase economy and efficiency in federal contracting by helping more contractors and subcontractors come into compliance with workplace protections, not by denying them contracts. Toward that end, the Order provides that a single Web site will serve as the portal for all reporting requirements related to the Order and that LCAs and the Department will be available for consultation with contractors regarding the Order's requirements. See §§ 2(a)(vi), 3(c), 4(d). As part of the responsibility determination in FAR 9.1, Responsible Prospective Contractor, contracting officers (and contractors for their subcontractors) will take into account any remedial actions and other mitigating factors, including adherence to any agreements with enforcement agencies. The Order's goals are to provide contractors and subcontractors with additional incentives to come into compliance with Labor Laws and to help ensure that contracts are awarded to responsible entities. This will help prevent delays and waste of taxpayer money.

## II. Disclosure Requirements

For all covered procurement contracts (defined below), the Order requires contracting agencies to include provisions in their solicitations requiring that the contractor represent, to the best of its knowledge and belief, whether there have been any administrative merits determinations, civil judgments, or arbitral awards or decisions rendered against it within the preceding three years for violations of the Labor Laws. Contracting agencies shall further require contractors, at or before execution of the covered procurement contract, to represent that they will require each subcontractor performing a covered subcontract (also defined below) to report whether there have been any administrative merits determinations, civil judgments, or arbitral awards or decisions rendered against the subcontractor within the preceding three years for violations of the Labor Laws. During the performance of the covered contract, the Order requires contractors to update their disclosures semi-annually and obtain similarly updated information from their subcontractors.

The Order requires the Department to define in guidance the meaning of "administrative merits determination," "civil judgment," and "arbitral award or decision." This section of the proposed

guidance defines those terms and provides guidance on who must report Labor Laws violations under the Order, what triggers the reporting obligations, and what particular categories of information must be reported under the Order.

### A. Who Must Make Disclosures Under the Order

The FAR Council's proposed regulations would require any contractor that responds to a solicitation for a covered procurement contract to represent whether it has any Labor Laws violations reportable under the Order. The FAR Council's proposed regulations would further require prospective contractors for whom a contracting officer has initiated the responsibility determination process, and who have represented that they have Labor Laws violation(s), to disclose additional information about the violation(s). For purposes of this proposed guidance and coextensive with section 2(a)(i) of the Order, a "covered procurement contract" is a procurement contract for goods and services, including construction, where the estimated value of the supplies acquired and services required exceeds \$500,000.<sup>11</sup> Additionally, the Order requires contractors to require their subcontractors performing covered subcontracts to disclose Labor Laws violations reportable under the Order. See § 2(a)(iv). For purposes of this proposed guidance and coextensive with section 2(a)(iv) of the Order, "covered subcontract" means any contract awarded to a subcontractor that would be a covered procurement contract except for contracts for commercially available off-the-shelf items.<sup>12</sup> This proposed guidance uses "covered contracts" to include both covered procurement contracts and covered subcontracts.

The Order applies to contracting activities by executive agencies. See § 1. The term "executive agency" is defined under the FAR as "an executive department, a military department, or any independent establishment within the meaning of 5 U.S.C. 101, 102, and 104(1), respectively, and any wholly owned Government corporation within the meaning of 31 U.S.C. 9101." 48 CFR 2.101. This proposed guidance generally uses the term "contracting agencies" to refer to executive agencies, as defined in the FAR, that are engaged in contracting.

<sup>11</sup> See 48 CFR 1.108(c) (dollar thresholds under the FAR).

<sup>12</sup> The FAR, 48 CFR 2.101, defines "commercially available off-the-shelf item."

As used in this proposed guidance, the term "contract" has the same meaning as it has under the FAR, 48 CFR 2.101.<sup>13</sup> Thus, the term "contract" means a procurement contract and does not include grants and cooperative agreements (which are not subject to the Order's requirements).

In this proposed guidance, references to "contractors" and "subcontractors" include entities that hold covered contracts as well as "offerors," meaning any entity that bids for a covered contract. The term "entity" is properly understood to include both organizations and individuals that apply for and receive covered contracts.

### B. What Triggers the Disclosure Obligations

The Order creates disclosure requirements for contractors and subcontractors performing or bidding on covered contracts. Under the Order, contractors and subcontractors must report administrative merits determinations, civil judgments, and arbitral awards or decisions that have been rendered against them within the previous three years for a violation of the Labor Laws.

The relevant three-year period is the three-year period preceding the date of the offer (*i.e.*, the contract bid or proposal). Therefore, administrative merits determinations, civil judgments, and arbitral awards or decisions rendered during that three-year period must be reported even if the underlying conduct that violated the Labor Laws occurred more than three years prior to the date of the report. See §§ 2(a)(i), 2(a)(iv)(A).

The Order's reporting requirements apply to administrative merits determinations, civil judgments, and arbitral awards or decisions "rendered against the [offeror or subcontractor] within the preceding 3-year period." See §§ 2(a)(i), 2(a)(iv)(A). Therefore, it requires contractors and subcontractors to report administrative merits determinations, civil judgments, and arbitral awards or decisions that were

<sup>13</sup> 48 CFR 2.101 states: "Contract means a mutually binding legal relationship obligating the seller to furnish the supplies or services (including construction) and the buyer to pay for them. It includes all types of commitments that obligate the Government to an expenditure of appropriated funds and that, except as otherwise authorized, are in writing. In addition to bilateral instruments, contracts include (but are not limited to) awards and notices of awards; job orders or task letters issued under basic ordering agreements; letter contracts; orders, such as purchase orders, under which the contract becomes effective by written acceptance or performance; and bilateral contract modifications. Contracts do not include grants and cooperative agreements covered by 31 U.S.C. 6301, *et seq.*"

issued during the relevant three-year period even if they were not performing or bidding on a covered contract at the time. For example, if the Department's Wage and Hour Division renders an administrative merits determination finding that an employer failed to pay overtime due under the FLSA and the employer later (within three years of the determination) bids for the first time on a covered procurement contract, the employer must report the FLSA determination even though it was not a contractor or bidding on a covered contract at the time when it received the determination.

Administrative merits determinations, civil judgments, and arbitral awards or decisions that must be reported under the Order include those issued for violations of State laws equivalent to the fourteen federal Labor Laws listed in the Order. See § 2(a)(i)(O). Although the Department will identify—in a second guidance to be published in the **Federal Register** at a later date—those equivalent State laws that are Labor Laws, OSHA-approved State Plans are equivalent State laws (and thus Labor Laws) for purposes of this proposed guidance. This is because the OSH Act permits certain States to administer OSHA-approved State occupational safety and health plans in lieu of federal enforcement of the OSH Act.<sup>14</sup> Administrative merits determinations or civil judgments finding violations under an OSHA-approved State Plan are therefore subject to the Order's reporting requirements as soon as those requirements become effective, even if the Secretary has not published final guidance identifying other State laws that are equivalent to the federal Labor Laws.

#### 1. Defining “Administrative Merits Determination”

Enforcement agencies issue notices, findings, and other documents when they determine that any of the Labor Laws have been violated. For purposes of this proposed guidance, “enforcement agency” means any agency that administers the federal Labor Laws, such as the Department and its agencies, the Occupational Safety and Health Review Commission,<sup>15</sup> the

Equal Employment Opportunity Commission, and the National Labor Relations Board. Enforcement agencies do not include other federal agencies who, in their capacity as contracting agencies, undertake an investigation of a violation of the federal Labor Laws.<sup>16</sup> For purposes of this proposed guidance, “enforcement agency” also means those State agencies designated to administer an OSHA-approved State Plan, but only to the extent that the State agency is acting in its capacity as administrator of such plan. And once the Department's second guidance (to be published at a later date) identifying the State laws that are equivalent to the federal Labor Laws is finalized, “enforcement agency” will also include those State agencies that enforce those identified equivalent State laws.

For purposes of the Order, the term “administrative merits determination” means any of the following notices or findings—whether final or subject to appeal or further review—issued by an enforcement agency following an investigation that indicates that the contractor or subcontractor violated any provision of the Labor Laws:

(a) From the Department's Wage and Hour Division:

- A WH-56 “Summary of Unpaid Wages” form;
- a letter indicating that an investigation disclosed a violation of sections six or seven of the FLSA or a violation of the FMLA, SCA, DBA, or Executive Order 13658;
- a WH-103 “Employment of Minors Contrary to The Fair Labor Standards Act” notice;
- a letter, notice, or other document assessing civil monetary penalties;
- a letter that recites violations concerning the payment of special minimum wages to workers with disabilities under section 14(c) of the FLSA or revokes a certificate that authorized the payment of special minimum wages;
- a WH-561 “Citation and Notification of Penalty” for violations under the OSH Act's field sanitation or temporary labor camp standards;
- an order of reference filed with an administrative law judge.

(b) from the Department's Occupational Safety and Health Administration (OSHA) or any State agency designated to administer an OSHA-approved State Plan:

- A citation;
- an imminent danger notice;
- a notice of failure to abate; or
- any State equivalent;

(c) from the Department's Office of Federal Contract Compliance Programs:

- A show cause notice for failure to comply with the requirements of Executive

Order 11246, Section 503 of the Rehabilitation Act, the Vietnam Era Veterans' Readjustment Assistance Act of 1972, or the Vietnam Era Veterans' Readjustment Assistance Act of 1974;

(d) from the Equal Employment Opportunity Commission (the EEOC):

- A letter of determination that reasonable cause exists to believe that an unlawful employment practice has occurred or is occurring; or
- a civil action filed on behalf of the EEOC;

(e) from the National Labor Relations Board:

- A complaint issued by any Regional Director;
- (f) a complaint filed by or on behalf of an enforcement agency with a federal or State court, an administrative judge, or an administrative law judge alleging that the contractor or subcontractor violated any provision of the Labor Laws; or
- (g) any order or finding from any administrative judge, administrative law judge, the Department's Administrative Review Board, the Occupational Safety and Health Review Commission or State equivalent, or the National Labor Relations Board that the contractor or subcontractor violated any provision of the Labor Laws.

The above definition provides seven categories of documents, notices, and findings from enforcement agencies that constitute the administrative merits determinations that must be reported under the Order. The list is an exhaustive one, meaning that if a document does not fall within one of categories (a) through (g) above, the Department does not consider it to be an “administrative merits determination” for purposes of the Order.

In addition, the Department will publish at a later date a second proposed guidance that identifies an eighth category of administrative merits determinations: The documents, notices, and findings issued by State enforcement agencies when they find violations of the State laws equivalent to the federal Labor Laws.

Categories (a) through (e) in the definition list types of administrative merits determinations that are issued by specific enforcement agencies.

Categories (f) and (g) describe types of administrative merits determinations that are common to multiple enforcement agencies. Category (f) is necessary because it is possible that an enforcement agency will not have issued a notice or finding following its investigation that falls within categories (a) through (e) prior to filing a complaint in court.

The administrative merits determinations listed in the definition are issued following an investigation by the relevant enforcement agency. Administrative merits determinations are not limited to notices and findings

<sup>14</sup> Section 18 of the OSH Act encourages States to develop and operate their own job safety and health programs, and OSHA approves and monitors State Plans and provides up to 50 percent of an approved plan's operating costs. OSHA-approved State Plans are described and listed in 29 CFR part 1952, and further information about such plans can be found at <https://www.osha.gov/dcs/osp/index.html>.

<sup>15</sup> The Occupational Safety and Health Review Commission is an independent federal agency that provides administrative trial and appellate review in contests of OSH Act citations or penalties.

<sup>16</sup> For example, contracting agencies may investigate violations of the DBA relating to contracts that they administer, but that does not make them enforcement agencies for purposes of the Order.

issued following adversarial or adjudicative proceedings such as a hearing, nor are they limited to notices and findings that are final and unappealable. Thus, administrative merits determinations that must be reported under the Order include an administrative merits determination that the contractor or subcontractor is challenging, can still challenge, or is otherwise subject to further review. However, the Department understands that contractors and subcontractors may raise good-faith disputes regarding administrative merits determinations that have been issued to them. As set forth below, when contractors and subcontractors report administrative merits determinations, they may also submit any additional information that they believe may be helpful in assessing the violations at issue (including the fact that the determination has been challenged). Additionally, contractors and subcontractors will have opportunities to provide information regarding any mitigating factors.

Certain “complaints” issued by enforcement agencies are included in the definition of “administrative merits determination.” The complaints issued by enforcement agencies included in the definition are not akin to complaints filed by private parties to initiate lawsuits in Federal or state courts. Each complaint included in the definition represents a finding by an enforcement agency following a full investigation that a Labor Law was violated; in contrast, a complaint filed by a private party in a Federal or state court represents allegations made by that plaintiff and not any enforcement agency. Moreover, employee complaints made to enforcement agencies (such as a complaint for failure to pay overtime wages filed with the Department’s Wage and Hour Division or a charge of discrimination filed with the EEOC) are not administrative merits determinations.

## 2. Defining “Civil Judgment”

For purposes of the Order, the term “civil judgment” means any judgment or order entered by any federal or State court in which the court determined that the contractor or subcontractor violated any provision of the Labor Laws, or enjoined or restrained the contractor or subcontractor from violating any provision of the Labor Laws. Civil judgment includes a judgment or order that is not final or is subject to appeal.

A civil judgment could be the result of an action filed in court by or on behalf of an enforcement agency or, for those Labor Laws that establish a private

right of action, by a private party or parties. The judgment or order in which the court determined that a violation occurred may be the result of a jury trial, a bench trial, or a motion for judgment as a matter of law, such as a summary judgment motion. Even a decision granting partial summary judgment may be a civil judgment if, for example, the decision finds a violation of the Labor Laws but leaves resolution of the amount of damages for later in the proceedings. Likewise, a preliminary injunction can be a civil judgment if the order enjoins or restrains a violation of the Labor Laws. Civil judgments include consent judgments and default judgments to the extent that there is a determination in the judgment that any of the Labor Laws have been violated, or the judgment enjoins or restrains the contractor or subcontractor from violating any provision of the Labor Laws. A private settlement where the lawsuit is dismissed by the court without any judgment being entered is not a civil judgment.

Civil judgments do not include judgments or orders issued by an administrative law judge or other administrative tribunals, such as those identified in the definition of administrative merits determination. Such judgments and orders may be administrative merits determinations. If, however, a federal or State court issues a judgment or order affirming an administrative merits determination, then the court’s decision is a civil judgment.

Civil judgments include a judgment or order finding that a contractor or subcontractor violated any of the Labor Laws even if the order or decision is subject to further review in the same proceeding, is not final, can be appealed, or has been appealed. As set forth below, when contractors and subcontractors report civil judgments, they may also submit any additional information that they believe may be helpful in assessing the violations at issue (including the fact that the civil judgment has been appealed). Additionally, contractors and subcontractors will have opportunities to provide information regarding any mitigating factors.

## 3. Defining “Arbitral Award or Decision”

For purposes of the Order, the term “arbitral award or decision” means any award or order by an arbitrator or arbitral panel in which the arbitrator or arbitral panel determined that the contractor or subcontractor violated any provision of the Labor Laws, or enjoined or restrained the contractor or

subcontractor from violating any provision of the Labor Laws. Arbitral award or decision includes an award or order that is not final or is subject to being confirmed, modified, or vacated by a court.

Arbitral award or decision includes an arbitral award or decision regardless of whether it is issued by one arbitrator or a panel of arbitrators and even if the arbitral proceedings were private or confidential.

Arbitral award or decision also includes an arbitral award or decision finding that a contractor or subcontractor violated any of the Labor Laws even if the award or decision is subject to further review in the same proceeding, is not final, or is subject to being confirmed, modified, or vacated by a court. As set forth below, when contractors and subcontractors report arbitral awards or decisions, they may also submit any additional information that they believe may be helpful in assessing the violations at issue (including the fact that they have sought to have the award or decision vacated or modified). Additionally, contractors and subcontractors will have opportunities to provide information regarding any mitigating factors.

## 4. Successive Administrative Merits Determinations, Civil Judgments, and Arbitral Awards or Decisions Arising From the Same Underlying Violation

If a contractor or subcontractor appeals or challenges an administrative merits determination, civil judgment, and/or arbitral award or decision, there may be successive administrative merits determinations, civil judgments, and/or arbitral awards or decisions that arise from the same underlying violation. For example, if a contractor or subcontractor receives an OSHA citation and appeals that citation, it may receive an order from an administrative law judge (ALJ) concerning that citation. Similarly, if a contractor or subcontractor receives an adverse decision from the Department’s Administrative Review Board (ARB) and challenges the decision in federal court, it may receive a court judgment concerning that decision.

If a contractor or subcontractor receives, during the preceding three-year period, successive administrative merits determinations, civil judgments, and/or arbitral awards or decisions arising from the same underlying violation, it need not report the violation if, at the time of reporting, the determination that there was a violation of a Labor Law has been reversed or vacated in its entirety. If the determination that there was a violation of a Labor Law is later reinstated on

appeal or in further proceedings, then the subsequent administrative merits determination, civil judgment, or arbitral award or decision reinstating the finding of a violation is an administrative merits determination, civil judgment, or arbitral award or decision within the meaning of this guidance and the Order and therefore must be reported. Thus, in the above examples, if the ALJ reverses the OSHA citation, or if the federal court vacates the ARB's adverse decision, the contractor or subcontractor need not report the violation. If the OSHA violation is later reinstated by the full Occupational Health and Safety Review Commission (OSHRC), or if the federal court's decision vacating the ARB's adverse decision is reversed by a court of appeals, these subsequent decisions must be reported.

If a subsequent decision concerning the same underlying violation upholds or does not completely reverse or vacate the finding of violation, the contractor or subcontractor should report only the administrative merits determination, civil judgment, or arbitral award or decision that is the most recent at the time of reporting. Thus, in the first example above, if the ALJ affirms the OSHA citation in whole or in part, the contractor or subcontractor must report the more recent ALJ order but need not report the original citation. In the second example above, if the federal court affirms the ARB's decision, or modifies it but does not vacate it in its entirety, the contractor or subcontractor should report the more recent court order and need not report the original ARB decision.

If, however, the contractor or subcontractor appeals or challenges only part of an administrative merits determination, civil judgment, or arbitral award or decision, it must continue to report the original administrative merits determination, civil judgment, or arbitral award or decision even if a successive administrative merits determination, civil judgment, or arbitral award or decision has been issued. For example, if, within the preceding three-year period, a district court finds a contractor or subcontractor liable for Title VII and FLSA violations, and the contractor or subcontractor appeals only the Title VII judgment to the court of appeals, it must continue to report the district court decision (containing the finding of an FLSA violation) even if a subsequent court of appeals decision is rendered concerning the Title VII violation.

If the contractor or subcontractor reported an administrative merits determination, civil judgment, or

arbitral award or decision before being awarded a covered contract, and a successive administrative merits determination, civil judgment, or arbitral award or decision arising from the same underlying violation is rendered during the performance of the contract and affirms that the contractor or subcontractor committed the violation, the successive administrative merits determination, civil judgment, or arbitral award or decision is an administrative merits determination, civil judgment, or arbitral award or decision within the meaning of this guidance and the Order. Therefore, the contractor or subcontractor must report the most recent determination, judgment, award or decision when it updates its disclosures at semi-annual intervals during performance of the covered contract.

### C. What Information Must Be Disclosed

The following sections provide guidance on what information must be reported at different stages of the contracting process. When finalized, the FAR Council regulation will set forth the specific requirements for what must be reported at each stage, and how such information is to be reported.

#### 1. Initial Representation

When a contractor bids on a solicitation for a covered procurement contract, the Order requires it to report to the contracting agency issuing the solicitation whether any administrative merits determinations, civil judgments, or arbitral awards or decisions have been rendered against it within the preceding three-year period. *See* § 2(a). At this stage, the contractor will represent to the best of its knowledge and belief whether it has or has not had such violations, without providing further information.

#### 2. Pre-Award Reporting

If a contractor reaches the stage in the process at which a responsibility determination is made, and that contractor responded affirmatively at the initial representation stage, the contracting officer will require additional information about that contractor's Labor Laws violation(s). For each administrative merits determination, civil judgment, or arbitral award or decision that must be reported, the contractor will provide:

- The Labor Law that was violated;
- the case number, inspection number, charge number, docket number,

or other unique identification number;<sup>17</sup>

- the date that the determination, judgment, award, or decision was rendered; and
- the name of the court, arbitrator(s), agency, board, or commission that rendered it.<sup>18</sup>

The contractor may also provide such additional information as the contractor deems necessary to demonstrate its responsibility, such as mitigating circumstances, remedial measures (to include labor compliance agreements), and other steps taken to achieve compliance with the Labor Laws. Mitigating factors are discussed below.

#### 3. Post-Award Reporting

The Order requires contractors to update the information reported to contracting agencies semi-annually during performance of the covered procurement contract. *See* § 2(b). These periodic updates should include any new administrative merits determinations, civil judgments, and arbitral awards or decisions rendered since the last report and updates to previously reported or provided information. As noted above in section II.B.4, contractors must report new administrative merits determinations, civil judgments, and arbitral awards or decisions even if they arise from a violation of the Labor Laws that was already reported. For example, if a contractor initially reported a federal district court judgment finding that it violated the FLSA, it must still report as part of the periodic updates any federal court of appeals decision affirming that judgment. Through the ongoing post-award reporting, contractors may also submit updated information reflecting the fact that a given administrative merits determination, civil judgment, or arbitral award or decision has been vacated, reversed, or otherwise modified. And contractors may also report mitigating factors and any other information that they believe may be helpful in assessing the violations at issue.

<sup>17</sup> Specifically, the contractor should provide the inspection number for OSH Act citations, the case number for National Labor Relations Board proceedings, the charge number for EEOC proceedings, the investigation or case number if known for Wage and Hour Division investigations, the case number for investigations by the Office of Federal Contract Compliance Programs, the case number for determinations by administrative tribunals, and the case number for court proceedings.

<sup>18</sup> Pursuant to FAR 9.105-1(a), contracting officers have a duty to obtain such additional information as may be necessary to be satisfied that a prospective contractor has a satisfactory record of integrity and business ethics.

#### 4. Reporting by Subcontractors

The Order provides that contractors will require their subcontractors performing covered subcontracts to report administrative merits determinations, civil judgments, or arbitral awards or decisions rendered against them within the preceding three-year period for violations of any of the Labor Laws. *See* §§ 2(a)(iv)–(v). The Order further provides that contractors must require their subcontractors to make such reports to the contractor prior to being awarded a covered subcontract and semi-annually during performance of a covered subcontract. *Id.* The Order requires contractors to make the same assessments regarding subcontractors and their violations of the Labor Laws as contracting agencies must make of contractors. *Id.* This builds on contractors' existing obligation to determine the responsibility of their subcontractors.

To facilitate these assessments, given that contractors may have more difficulty than contracting officers and LCAs in obtaining copies of administrative merits determinations, civil judgments, and arbitral awards or decisions, the FAR Council's proposed regulations would require contractors to include provisions in subcontracts requiring that subcontractors who report violations of Labor Laws—and for which a responsibility determination has been initiated—provide a copy of the relevant administrative merits determination(s), civil judgment(s), and arbitral award(s) or decision(s), as well as any notice from the Department advising that the subcontractor either has not entered into a labor compliance agreement within a reasonable period of time or is not meeting the terms of an existing agreement. The preamble to the FAR Council's proposed regulations indicates that the subcontractor reporting requirement may be phased in through a delayed implementation to allow the contracting community to become familiar with the Order's requirements and procedures. To this end, contractors are encouraged to contact the Department for assistance in obtaining information necessary to assess any Labor Laws violations reported by their subcontractors. The Department will set up a structure within the Department to be available to consult with contractors in carrying out these responsibilities, as well as provide guidance as needed to contractors and subcontractors in compliance with the requirements of the Order. The Department will also be available to assist subcontractors directly in carrying

out their responsibilities under the Order.

The above paragraphs describe the duties of contractors and subcontractors as set forth in the text of the proposed FAR rule. However, the Department recognizes that the FAR Council is considering allowing contractors to direct their subcontractors to report violations to the Department, which would then assess the violations.

#### III. Weighing Violations of the Labor Laws

The Order directs the Department to develop guidance “to assist agencies in determining whether administrative merits determinations, arbitral awards or decisions, or civil judgments were issued for serious, repeated, willful, or pervasive violations” of the Labor Laws for purposes of implementing the final rule issued by the FAR Council. *See* § 4(b)(i). The Order specifies that the Department's guidance should “incorporate existing statutory standards for assessing whether a violation is serious, repeated, or willful” where they are available. *Id.* The Order also provides some guidelines for developing standards where none are provided by statute. *Id.*

This section of the proposed guidance defines the terms “serious,” “repeated,” “willful,” and “pervasive” and provides guidance on their meanings and how violations of the Labor Laws should be weighed. While contracting officers and LCAs can seek additional information from the Department to provide context, in utilizing this guidance to determine whether violations are serious, repeated, willful, or pervasive, contracting officers should rely on the information contained in the administrative merits determinations, arbitral awards or decisions, and civil judgments.

All violations of federal labor laws are serious, but in this context the Department has, pursuant to the Order, identified certain violations as “serious,” “willful,” “repeated,” and “pervasive.” This subset of all labor violations represents the violations that are most concerning and bear on an assessment of a contractor's or subcontractor's integrity and business ethics. The Department has purposely excluded from consideration violations that could be characterized as inadvertent or minimally impactful. In most cases, even for violations subject to disclosure and consideration under the Order, a single violation of one of the Labor Laws will not give rise to a determination of lack of responsibility. In contrast, as explained more fully below, pervasive violations and violations of particular gravity, among

others, will in most cases result in the need for a labor compliance agreement. *See* section III.E below.

Each contractor's disclosed violations of Labor Laws will be assessed on a case-by-case basis in light of the totality of the circumstances, including the severity of the violation or violations, the size of the contractor, and any mitigating factors. The extent to which a contractor has remediated violations of Labor Laws, including agreements entered into by contractors with enforcement agencies, will be given particular weight in this regard. In fact, the vast majority of administrative merits determinations (in some enforcement agencies, as much as 90 percent) result in settlement agreements between employers and enforcement agencies.

The Department will work with LCAs across contracting agencies to help ensure efficient, accurate, and consistent decisions across the government.

#### A. Serious Violations

Of the federal Labor Laws, only the OSH Act provides a statutory standard for what constitutes a “serious” violation, and this standard also applies to OSHA-approved State Plans. The other federal Labor Laws do not have statutory standards for what constitutes a serious violation. According to the Order, where no statutory standards exist, the Department's guidance for “serious” violations must take into account “the number of employees affected, the degree of risk posed or actual harm done by the violation to the health, safety, or well-being of a worker, the amount of damages incurred or fines or penalties assessed with regard to the violation, and other considerations as the Secretary finds appropriate.” *See* § 4(b)(i)(B)(1).

Accordingly, a violation is “serious” for purposes of the Order if it involves at least one of the following:

- An OSH Act or OSHA-approved State Plan citation was designated as serious, there was a notice of failure to abate an OSH Act violation, or an imminent danger notice was issued under the OSH Act or an OSHA-approved State Plan;
- The affected workers comprised 25% or more of the workforce at the worksite;
- Fines and penalties of at least \$5,000 were assessed or back wages of at least \$10,000 were due or injunctive relief was imposed by an enforcement agency or a court;
- The contractor's or subcontractor's conduct violated MSPA or the child labor provisions of the FLSA and caused or contributed to the death or serious injury of one or more workers;

- Employment of a minor who was too young to be legally employed or in violation of a Hazardous Occupations Order;

- The contractor or subcontractor engaged in an adverse employment action (including discharge, refusal to hire, suspension, demotion, or threat) or is responsible for unlawful harassment against one or more workers for exercising any right protected by any of the Labor Laws;

- The findings of the relevant enforcement agency, court, arbitrator, or arbitral panel support a conclusion that the contractor or subcontractor engaged in a pattern or practice of discrimination or systemic discrimination;

- The findings of the relevant enforcement agency, court, arbitrator, or arbitral panel support a conclusion that the contractor or subcontractor interfered with the enforcement agency's investigation; or

- The contractor or subcontractor breached the material terms of any agreement or settlement entered into with an enforcement agency, or violated any court order, any administrative order by an enforcement agency, or any arbitral award.

The definition provides an exhaustive list of the categories of Labor Laws violations that may be serious under the Order.

#### 1. OSH Act

Section 17(k) of the OSH Act, 29 U.S.C. 666(k), defines a violation as serious, in relevant part, "if there is a substantial probability that [the hazard created by the violation could result in] death or serious physical harm . . . unless the employer did not, and could not with the exercise of reasonable diligence know" of the existence of the violation. In other words, a "violation may be determined to be serious where, although the accident itself is merely possible \* \* \*, there is a substantial probability of serious injury if it does occur." *East Texas Motor Freight, Inc. v. Occupational Safety and Health Review Comm'n*, 671 F.2d 845, 849 (5th Cir. 1982) (internal quotes and citations omitted).

In light of this clear statutory definition, a violation of the OSH Act is serious if the contractor or subcontractor received a citation for a violation designated as "serious" under the OSH Act or an OSHA-approved State Plan, or an imminent danger notice under the OSH Act or an OSHA-approved State Plan. Imminent danger notices are issued only when "a danger exists which could reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through the enforcement procedures otherwise provided by [the OSH Act]." 29 U.S.C. 662(a). Because such notices are issued only for violations that imminently threaten to cause death or serious physical harm, imminent danger notices

are by definition issued only for serious violations of the OSH Act, and thus constitute serious violations under the Order.

The OSH Act separately prohibits retaliation against workers for exercising any right under the Act. 29 U.S.C. 660(c). As with retaliation under other Labor Laws, an OSH Act whistleblower violation will be a serious violation where the contractor or subcontractor engaged in an adverse employment action (including discharge, refusal to hire, suspension, demotion, or threat). Similarly, a contractor or subcontractor that has interfered with an OSHA inspection or investigation will be deemed to have committed a serious violation, as will a contractor or subcontractor that has breached the material terms of any OSHA settlement agreement, violated any court order under the OSH Act, or received a notice that it has failed to abate any cited OSHA violation.

#### 2. 25% of the Workforce Affected

Consistent with the Order's directive to consider the number of employees affected, a violation is serious when the workers affected by the violation comprised 25% or more of the workforce at the worksite. The Department believes that: using a percentage of the workforce instead of an absolute number of workers is a more useful way of considering the effects of a violation, given that employers of various sizes will have disclosure obligations under the Order; 25% represents a significant percentage of workers at a particular site, and as such, that the underlying violation is a serious one; and 25% strikes an appropriate balance by effectively excluding individualized or localized violations from this category of "serious" while capturing more widespread violations.

For purposes of this 25% threshold, "workforce" means all individuals employed by the contractor or subcontractor. It does not include workers of another entity, unless the underlying violation of the Labor Laws includes a finding that the contractor or subcontractor is a joint employer of the workers that the other entity employs at the worksite.

For purposes of this 25% threshold, "worksite" means the physical location or group of locations where the workers affected by the violations work and where the contractor or subcontractor conducts its business. For example, if the contractor or subcontractor conducts its business at a single building, or a single office within an office building, that building or office will comprise the worksite. However, if the contractor or

subcontractor conducts business activities in several offices in one building, or in several buildings in a campus or industrial park, the worksite consists of all of the offices or buildings in which the business is conducted. On the other hand, if a contractor or subcontractor has two office buildings in different parts of the same city, and a violation affects workers in one building, the worksite is the one building where the violation took place. For violations that affect workers with no fixed worksite, such as construction workers, transportation workers, and workers who perform services at various customers' locations, the worksite is the site to which they are assigned as their home base, from which their work is assigned, or to which they report.

For purposes of this 25% threshold, "affected workers" means the workers who were individually impacted by the violation. For example, affected workers include workers who were not paid wages due, were denied leave or benefits, were denied a job, a promotion, or other benefits due to discrimination, or were harmed by an unlawful policy.

The Department specifically seeks comments on this category of serious violations.

#### 3. Fines, Penalties, Back Wages, and Injunctive Relief

Consistent with the Order's directive to take into account "the amount of damages incurred or fines or penalties assessed," a violation is serious if it resulted in \$5,000 or more in fines and penalties, or \$10,000 or more in back wages. Such amounts, in the Department's view, reflect a violation of sufficient gravity to be deemed serious.

Administrative merits determinations finding violations of the laws enforced by the Department's Wage and Hour Division, for example, may be more likely to implicate these thresholds than those issued by other enforcement agencies. According to recent enforcement data from the Wage and Hour Division, these thresholds will capture only a minority of the violations of the Labor Laws enforced by Wage and Hour, and a smaller minority of the cases investigated by it under those laws. According to recent data, Wage and Hour assessed penalties in only a small minority of the cases in which it made a finding; in the small number of cases in which penalties were assessed, they amounted to \$5,000 or more only approximately one-fourth of the time. Similarly, back wages were due in less than half of the cases in which Wage and Hour made a finding, and in cases in which back wages were due, they

would have passed the proposed threshold of \$10,000 only about one-third of the time. The Department specifically seeks comments on whether the thresholds for fines and penalties and for back wages are set at the appropriate levels.

Examples of “fines and penalties” include civil monetary penalties assessed by the Department under MSPA or under the minimum wage, overtime, and child labor provisions of the FLSA. Fines and penalties do not include back wages, compensatory damages, liquidated damages under the FLSA, or statutory damages under MSPA. However, liquidated damages under the ADEA and punitive damages are included in fines and penalties for purposes of this threshold.<sup>19</sup> For purposes of determining whether the \$10,000 back wages threshold is met, compensatory damages, liquidated damages under the FLSA, and statutory damages under MSPA should be included as back wages.

The threshold amounts for fines and penalties are measured by the amount “assessed.” If an administrative merits determination, for example, assesses \$6,000 in civil monetary penalties against a contractor or subcontractor but later that amount is reduced to \$4,000 in settlement negotiations or only \$4,000 is collected, the underlying violation is serious based on the assessed amount. The Department believes that the amount assessed is a better indication of seriousness because civil monetary penalties may be reduced for reasons unrelated to the seriousness of the violation. If the amount assessed was later reduced, the contractor or subcontractor should provide that information as a possible mitigating factor.

When considering whether these thresholds are met, the total fines and penalties or the total back wages resulting from the Labor Laws violation should be considered. In cases where multiple provisions of a Labor Law have been violated, the fines and penalties assessed or the back wages due should not be parsed and separately attributed to each provision violated. For example, if the Department’s FLSA investigation discloses violations of the FLSA’s minimum wage and overtime provisions and back wages are due for both violations, the total back wages due determines whether the \$10,000 threshold is met. Likewise, if an investigation discloses three violations

of the same MSPA provision or violations of three different MSPA provisions and each violation results in assessed civil monetary penalties of \$2,000, the MSPA violation is serious because the assessed penalties total \$6,000.

A violation is also serious if injunctive relief was imposed by an enforcement agency, a court, or an arbitrator or arbitral panel. Injunctive relief is an order from an enforcement agency or court either to take a certain action or to refrain from taking a certain action. For example, an order to reinstate a wrongfully terminated worker, to modify discriminatory hiring practices, to make a location accessible to individuals with disabilities, to reinstate workers who are attempting to organize a union, or to refrain from intimidating workers during an enforcement agency’s investigation would constitute injunctive relief.

#### 4. MSPA or Child Labor Violations That Cause or Contribute to Death or Serious Injury

Violations of the health and safety provisions of MSPA and the child labor provisions of the FLSA may have serious health and safety implications. In the most serious cases, violations of these statutes may result in death or serious injury to one or more workers. Consistent with the Order’s directive to consider “the degree of risk posed or actual harm done by the violation to health, safety, or well-being of a worker,” MSPA or child labor violations that cause or contribute to the death or serious injury of one or more workers are serious under the Order. For these purposes, serious injury has the same meaning as in the FLSA’s child labor provisions as administered by the Department’s Wage and Hour Division.

#### 5. Employment of Minors Who Are Too Young To Be Legally Employed or in Violation of a Hazardous Occupations Order

Consistent with the Order’s directive to consider “the degree of risk posed or actual harm done by the violation to health, safety, or well-being of a worker,” any violation of the FLSA’s child labor provisions where the minor is too young to be legally employed or is employed in violation of any of the Secretary’s Hazardous Occupations Orders is a serious violation. Such violations do not include situations where minors are permitted to perform the work at issue but who perform the work outside the hours permitted by law. Rather, it refers to minors who, by virtue of their age, are legally prohibited from being employed or are not

permitted to be employed to perform the work at issue. Thus, for example, the employment of any minor under the age of 18 to perform a hazardous non-agricultural job, any minor under the age of 16 to perform a hazardous farm job, or any minor under the age of 14 to perform non-farm work where he or she does not meet a statutory exception otherwise permitting the work would be a serious violation. This reflects the particularly serious dangers that can result from the prohibited employment of underage minors. Conversely, the employment of, for example, a 14 or 15 year-old minor in excess of three hours outside school hours on a school day in a non-hazardous, non-agricultural job in which the child is otherwise permitted to work would not be a serious violation for purposes of the Order, even though the work violates the FLSA’s child labor provisions.

#### 6. Adverse Employment Actions or Unlawful Harassment for Exercising Rights Under Labor Laws

Consistent with the Order’s directive to consider “the degree of risk posed or actual harm done by the violation to health, safety, or well-being of a worker,” a violation involving an adverse employment action or unlawful harassment against one or more workers for exercising any right protected by the Labor Laws is a serious violation. For these purposes, adverse employment actions include discharge, refusal to hire, suspension, demotion, or threats. Examples include disciplining workers for attempting to organize a union, demoting workers for testifying in an investigation, lawsuit, or proceeding involving one of the Labor Laws, firing or demoting workers who take leave under the FMLA, and threatening workers with adverse consequences—such as termination or referral to immigration or criminal authorities—for making a complaint about potential violations of Labor Laws. These are serious violations because they both reflect a disregard by an employer for its obligations under the Labor Laws and undermine the Labor Laws by making workers reluctant to exercise their rights for fear of retaliation.

#### 7. Pattern or Practice of Discrimination or Systemic Discrimination

Consistent with the Order’s directive to consider “the degree of risk posed or actual harm done by the violation to health, safety, or well-being of a worker,” a Labor Laws violation is serious if the findings of the relevant enforcement agency, court, arbitrator, or arbitral panel support a conclusion that the contractor or subcontractor engaged

<sup>19</sup> Unlike liquidated damages under the FLSA, liquidated damages under the ADEA are punitive in nature, as they are expressly tied to willful violations. See 29 U.S.C. 626(b).

in a pattern or practice of discrimination or systemic discrimination. A pattern or practice of discrimination involves intentional discrimination against a protected group of employees, rather than discrimination that occurs in an isolated fashion. Systemic discrimination involves a pattern or practice, policy, or class case where the discrimination has a broad impact on an industry, profession, company or geographic area. Examples include policies and practices that effectuate discriminatory hiring barriers; restrictions on access to higher level jobs on the basis of race, gender, gender identity, sexual orientation, national origin, or other protected characteristics; unlawful pre-employment inquiries regarding disabilities; and discriminatory placement or assignments that are made to comply with customer preferences. Systemic discrimination also includes policies and practices that are seemingly neutral but may cause a disparate impact on protected groups. Examples include pre-employment tests used for selection purposes; height, weight or lifting requirements or restrictions; compensation practices and policies; and performance evaluation policies and practices.

#### 8. Interference With Investigations

Violations of the Labor Laws in which the findings of the relevant enforcement agency, court, arbitrator, or arbitral panel support a conclusion that the contractor or subcontractor engaged in interference with the enforcement agency's investigation also are serious under the Order. Interference can take a number of forms, such as denial of access by a contractor or subcontractor to an enforcement agency to conduct an on-site investigation, evaluation, or review; refusal to submit required documents to an enforcement agency or comply with its request for information; threats to workers who speak to enforcement agency investigators; falsification or destruction of records; lying or making misrepresentations to investigators; and threatening workers with termination or referral to immigration or criminal authorities if they do not return back wages received as part of an investigation. Like retaliation, interference with investigations is intentional conduct that frustrates the enforcement of the Labor Laws and therefore, in the Department's view, is a serious violation.

#### 9. Material Breaches and Violations of Settlements, Agreements, or Orders

Violations of the Labor Laws involving a breach of the material terms of any agreement or settlement, or a violation of a court or administrative order or arbitral award, are serious under the Order. Such violations are serious because an employer that is a government contractor or subcontractor is expected to comply with orders by a court or administrative agency and to adhere to the terms of any agreements or settlements into which it enters. A contractor's or subcontractor's failure to do so may indicate that it will similarly disregard its contractual obligations to, or agreements with, a contracting agency (or a contractor in case of a subcontractor), which could result in delays, increased costs, and other adverse consequences. A contractor or subcontractor will not, however, be found to have committed a serious violation if the agreement, settlement, award, or administrative order in question has been stayed pending an appeal or other further proceeding.

#### 10. Table of Examples

For a table containing selected examples of serious violations, see Appendix A.

##### B. Willful Violations

The Order provides that the standard for willful should "incorporate existing statutory standards" to the extent such standards exist. See § 4(b)(i)(A). The Order further provides that, where no statutory standards exist, the standard for willful should take into account "whether the entity knew of, showed reckless disregard for, or acted with plain indifference to the matter of whether its conduct was prohibited by the requirements of the [Labor Laws]." See § 4(b)(i)(B)(3). A violation is "willful" under the Order if:

- For purposes of a citation issued pursuant to the OSH Act or an OSHA-approved State Plan, the citation at issue was designated as willful or any equivalent State designation (*i.e.*, "knowing"), and the designation was not subsequently vacated;
- For purposes of the FLSA (including the Equal Pay Act), the administrative merits determination sought or assessed back wages for greater than two years or sought or assessed civil monetary penalties for a willful violation, or there was a civil judgment or arbitral award or decision finding the contractor or subcontractor liable for back wages for greater than two years or affirming the assessment of civil monetary penalties for a willful violation;
- For purposes of the ADEA, the enforcement agency, court, arbitrator, or arbitral panel assessed or awarded liquidated damages;

- For purposes of Title VII or the ADA, the enforcement agency, court, arbitrator, or arbitral panel assessed or awarded punitive damages for a violation where the contractor or subcontractor engaged in a discriminatory practice with malice or reckless indifference to the federally protected rights of an aggrieved individual; or

- For purposes of any of the other Labor Laws, the findings of the relevant enforcement agency, court, arbitrator, or arbitral panel support a conclusion that the contractor or subcontractor knew that its conduct was prohibited by any of the Labor Laws or showed reckless disregard for, or acted with plain indifference to, whether its conduct was prohibited by one or more requirements of the Labor Laws.

#### 1. The OSH Act, the FLSA, and the ADEA

The term "willful" has well-established meanings under the OSH Act, the FLSA, and the ADEA. These meanings are consistent with the standard provided in the Order. Violations of the OSH Act, the FLSA, and the ADEA are willful under the Order if they fit these well-established meanings.

Under the OSH Act, a violation is willful where an employer has demonstrated either an intentional disregard for the requirements of the OSH Act or a plain indifference to its requirements. See *A.E. Staley Mfg. Co. v. Sec'y of Labor*, 295 F.3d 1341, 1351–52 (D.C. Cir. 2002). For example, if an employer knows that specific steps must be taken to address a hazard, but substitutes its own judgment for the requirements of the legal standard, the violation is willful. Under the OSH Act or an OSHA-approved State Plan, if a violation was designated as willful and that designation has not been subsequently vacated, the violation will be willful for purposes of the Order. Some States may use a different term (*i.e.*, "knowing") that means the same thing.

Similarly, under the FLSA, a violation is willful where the employer knew that its conduct was prohibited by the FLSA or showed reckless disregard for the FLSA's requirements. See 29 CFR 578.3(c)(1); *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988). For example, an employer that requires workers to "clock out" after 40 hours in a workweek and then continue working "off the clock" or pays workers for 40 hours by check and then pays them in cash at a straight-time rate for hours worked over 40 commits a willful violation of the FLSA's overtime requirements. These actions show knowledge of the FLSA's requirements to pay time-and-a-half for hours worked over 40 and an attempt to evade that requirement by concealing records of

the workers' actual hours worked. Under the FLSA, because willful violations are grounds for assessing back wages for greater than two years or civil monetary penalties, these measures are understood to reflect a finding of willfulness and therefore will be considered indicative of willfulness under the Order.<sup>20</sup>

Likewise, under the ADEA, a violation is willful when the employer knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA. See *Trans World Airlines v. Thurston*, 469 U.S. 111, 126 (1985). Willful violations are required for liquidated damages to be assessed or awarded under the ADEA. See 29 U.S.C. 626(b). Accordingly, any violation of the ADEA in which the enforcement agency, court, arbitrator, or arbitral panel assessed or awarded liquidated damages is understood to reflect a finding of willfulness and therefore will be considered indicative of a willful violation under the Order.

## 2. Title VII and the ADA

Violations of Title VII or the ADA are "willful" under the Order if the enforcement agency, court, arbitrator, or arbitral panel assessed or awarded punitive damages for a violation where the contractor or subcontractor engaged in a discriminatory practice with malice or reckless indifference to the federally protected rights of an aggrieved individual. Punitive damages are appropriate in cases under Title VII or the ADA where the contractor or subcontractor engaged in intentional discrimination with "malice or reckless indifference to the federally protected rights of an aggrieved individual." 42 U.S.C. 1981a. This means that a managerial agent of the contractor or subcontractor, acting within the scope of employment, made a decision that was in the face of a perceived risk of violating federal law, and the contractor or subcontractor cannot prove that the manager's action was contrary to its good faith efforts to comply with federal law. See *Kolstad v. American Dental Ass'n*, 527 U.S. 526, 536, 545 (1999). For example, if a manager received a complaint of sexual harassment but failed to report it or investigate it, and the employer's anti-harassment policy was ineffective in protecting the employees' rights, or the employer did not engage in good faith efforts to educate its managerial staff about sexual harassment, then the violation would

warrant punitive damages and qualify as "willful" under the Order, See, e.g., *EEOC v. Mgmt. Hospitality of Racine, Inc.*, 666 F.3d 422, 438–39 (7th Cir. 2012).

## 3. Other Labor Laws

For violations of Labor Laws other than the OSH Act, the FLSA, the ADEA, Title VII, and the ADA, a violation is willful for purposes of the Order if the findings of the relevant enforcement agency, court, arbitrator, or arbitral panel support a conclusion that the contractor or subcontractor knew that its conduct was prohibited by the Labor Laws or showed reckless disregard for, or acted with plain indifference to, whether its conduct was prohibited by Labor Laws.<sup>21</sup> A contractor or subcontractor need not act maliciously or with a bad purpose to commit a willful violation; rather, the focus is on whether the enforcement agency, court, arbitrator, or arbitral panel's findings support a conclusion that, based on all of the facts and circumstances discussed in the findings, the contractor or subcontractor acted with knowledge or reckless disregard of its legal requirements. The administrative merits determination, civil judgment, or arbitral award or decision need not include the specific words "knowledge" or "reckless disregard"; however, the factual findings or legal conclusions contained in the determination, judgment, award or decision must support a conclusion that the violation meets one of these conditions, as described further below.

Generally, willfulness will be found in one of two circumstances. One is where the findings of the enforcement agency, court, arbitrator, or arbitral panel support a conclusion that the contractor or subcontractor knew that its conduct was prohibited by law, yet engaged in the conduct anyway. Knowledge can be inferred from the factual findings or legal conclusions contained in the administrative merits determination, civil judgment, or arbitral award or decision. For example, willfulness will typically be found where the administrative merits determination, civil judgment, or arbitral award or decision supports a conclusion that a contractor or subcontractor was previously advised by responsible government officials that its conduct was not lawful, but engaged in the conduct anyway. Repeated violations may also be willful to the extent that the original proceeding demonstrates that the contractor or

subcontractor was put on notice of its legal obligations, only to later commit the same or a substantially similar violation. If the administrative merits determination, civil judgment, or arbitral award or decision supports a conclusion that a contractor or subcontractor has a written policy or manual that describes a legal requirement, and then knowingly violates that requirement, the violation is also likely to be willful.

For example, if the administrative merits determination, civil judgment, or arbitral award or decision supports a conclusion that a contractor or subcontractor was warned by an official from the Department that the housing it was providing to migrant and seasonal agricultural workers did not comply with required safety and health standards, and that the contractor or subcontractor then failed to make the required repairs or corrections, such findings demonstrate that the contractor or subcontractor engaged in a willful violation of MSPA. Likewise, if the administrative merits determination, civil judgment, or arbitral award or decision indicates that a contractor's or subcontractor's employee handbook states that it provides unpaid leave to employees with serious health conditions as required by the FMLA, but the contractor or subcontractor refuses to grant FMLA leave or erects unnecessary hurdles to employees requesting such leave, that violation would also likely be willful. Certain acts, by their nature, are willful, such as conduct that demonstrates an attempt to evade statutory responsibilities, including the falsification of records, fraud or intentional misrepresentation in the application for a required certificate, payment of wages "off the books," or "kickbacks" of wages from workers back to the contractor or subcontractor.

The second type of willful violation is where the findings of the enforcement agency, court, arbitrator, or arbitral panel supports a conclusion that a contractor or subcontractor acted with reckless disregard or plain indifference toward the Labor Laws' requirements. These terms refer to circumstances in which the administrative merits determination, civil judgment, or arbitral award or decision supports a conclusion that a contractor or subcontractor failed to make sufficient efforts to learn or understand whether it was complying with the law. Although merely inadvertent or negligent conduct would not meet this standard, blissful ignorance of the law is not a defense to a willful violation. The adequacy of a contractor's or subcontractor's inquiry is

<sup>20</sup> Civil monetary penalties may be assessed under the FLSA for violations that are either willful or repeated. Only civil monetary penalties involving willful violations will constitute willful violations under the Order.

<sup>21</sup> Nothing in this guidance is intended to affect the terminology or operation of FAR Part 22.4.

judged in light of all of the facts and circumstances, including the nature of the violation, the complexity of the legal issue, and the sophistication of the contractor or subcontractor. Reckless disregard or plain indifference may also be shown where the administrative merits determination, civil judgment, or arbitral award or decision supports a conclusion that a contractor or subcontractor was aware of plainly obvious violations and failed to take an appropriate action. For example, an employer who employs a 13-year-old child in an obviously dangerous occupation, such as operating a forklift, is acting in reckless disregard of the law even if it cannot be shown that the employer actually knew that doing so was in violation of one of the Secretary's Hazardous Occupation Orders. Reckless disregard or plain indifference will also be found if the administrative merits determination, civil judgment, or arbitral award or decision supports a conclusion that a contractor or subcontractor acted with purposeful lack of attention to its legal requirements, such as if management-level officials are made aware of a health or safety requirement but make little or no effort to communicate that requirement to lower-level supervisors and employees.

#### 4. Table of Examples

For a table containing selected examples of willful violations, see Appendix B.

#### C. Repeated Violations

The Order provides that the standard for repeated should "incorporate existing statutory standards" to the extent such standards exist. See § 4(b)(i)(A). The Order further provides that, where no statutory standards exist, the standards for repeated should take into account "whether the entity has had one or more additional violations of the same or a substantially similar requirement in the past 3 years." See § 4(b)(i)(B)(2). Accordingly, a violation is "repeated" under the Order if it is the same as or substantially similar to one or more other violations of the Labor Laws by the contractor or subcontractor.

For a violation to be repeated, the same or substantially similar other violation(s) must be reflected in one or more civil judgments, arbitral awards or decisions, or adjudicated or uncontested administrative merits determinations issued within the last three years. Substantially similar does not mean "exactly the same." *United States v. Washam*, 312 F.3d 926, 930 (8th Cir. 2002). Rather, two things may be substantially similar where they share

"essential elements in common." *Alameda Mall, L.P. v. Shoe Show, Inc.*, 649 F.3d 389, 392 (5th Cir. 2011) (citing dictionary definition of the term). Whether a violation is "substantially similar" to a past violation turns on the nature of the violation and underlying obligation itself.

#### 1. Timeframe

The civil judgment, arbitral award or decision, or adjudicated or uncontested administrative merits determination for the prior, or predicate, violation(s) must have occurred within the three-year reporting period. This is the case even if a violation may be designated as "repeated" within the meaning of one of the Labor Laws if the prior violation took place more than three years earlier. For example, under current OSHA policy, repeated violations under the OSH Act take into account a five-year period. However, an OSH Act or OSHA-approved State Plan violation designated as a repeated violation in the citation would be repeated for purposes of the Order only if the predicate violation was issued or affirmed within the three-year reporting period.

#### 2. Separate Investigations or Proceedings

The prior violation(s) must be the subject of one or more separate investigations or proceedings. Thus, for example, if a single investigation discloses that a contractor or subcontractor violated the FLSA and the OSH Act, or committed multiple violations of any one of the Labor Laws, such violations would not be deemed "repeated."

#### 3. Type of Violation

The prior violation(s) must be reflected in one or more civil judgments, arbitral awards or decisions, or adjudicated or uncontested administrative merits determinations. To the extent that a prior civil judgment, arbitral award or decision, or administrative merits determination has been reversed or vacated in its entirety and is thus exempt from the reporting requirements, it cannot render a subsequent violation repeated.

As the definition indicates, for an administrative merits determination to serve as a predicate violation that will render a subsequent violation repeated, it must have been adjudicated or be uncontested. An adjudicated administrative merits determination for purposes of the Order is an administrative merits determination that follows a proceeding in which the contractor or subcontractor had an opportunity to present evidence or

arguments on its behalf, such as at a hearing or through written submissions, before the appropriate decision-making authority. An uncontested administrative merits determination is any non-reversed, non-vacated administrative merits determination except one in which a timely appeal of the determination has been filed or is pending before a court or other tribunal with jurisdiction to hear the appeal.

Only the predicate administrative merits determination need be adjudicated or uncontested when determining whether a violation is repeated. Thus, for example, if a contractor or subcontractor receives an OSH Act citation but timely contests it before the OSHRC, and during the pendency of that proceeding is cited for a substantially similar OSH Act violation, the second citation would not, during the pendency of the OSHRC proceeding, be a repeated violation because the first citation is neither adjudicated nor uncontested. However, if OSHRC affirms the first citation, then the second citation could be a repeated violation because the first violation is now the product of an adjudication, even though the second violation is neither adjudicated nor uncontested. This framework is intended to ensure that repeated violations will only be assessed when the contractor or subcontractor has had the opportunity to present facts or arguments in its defense concerning the predicate violation.

#### 4. Company-Wide Consideration

Repeated violations may be considered on a company-wide basis. Thus, a prior violation by any establishment of a multi-establishment company can render subsequent violations repeated, provided the other relevant criteria are satisfied. As discussed below, the relative size of the contractor or subcontractor as compared to the number of violations may be a mitigating factor.

#### 5. Substantially Similar Violations

The prior violation(s) must be the same as or substantially similar to the violation designated as repeated. Whether violations fall under the same Labor Law is not determinative of whether the requirements underlying those violations are substantially similar. Rather, this inquiry turns on the nature of the violation and underlying obligation itself.

For example, the FLSA contains provisions requiring that employers pay their covered employees the minimum wage and overtime for any hours worked over 40 in a workweek. Two or

more violations of these requirements would be deemed substantially similar because they all would involve failure to pay workers their proper wages.<sup>22</sup> However, the FLSA also includes prohibitions against forms of child labor. Although two or more violations of child labor provisions would be substantially similar to each other,<sup>23</sup> a child labor violation would not be substantially similar to a violation of the FLSA's wage provisions. The same would be true of a violation of the FLSA's provision requiring break time for nursing mothers—a violation of that provision would not be substantially similar to a violation of the wage or child labor provisions.

Similarly, for NLRA violations, any two violations of section 8(a)(3), which prohibits employers from discriminating against employees for engaging in or refusing to engage in union activities, would be substantially similar, but would not be substantially similar to violations of section 8(a)(2), which prohibits an employer from dominating or assisting a labor union through financial support or otherwise.

For violations of the OSH Act, violations are repeated if they involve the same or a substantially similar hazard. A repeated violation may be found based on a prior violation of the same standard, a different standard, or the general duty clause, but the hazards themselves must be the same or substantially similar. Thus, for example, if an employer is cited in one instance for failing to provide fall protection on a residential construction site, and a second time for failing to provide fall protection at a commercial construction site, those violations would be repeated because they involve the same or substantially similar hazards, even though the cited standards are different.

Under the FMLA, any two violations would generally be considered substantially similar to each other, with the exception of violations of the notice requirements. Thus, denial of leave, retaliation, discrimination, failure to reinstate an employee to the same or an equivalent position, and failure to maintain group health insurance would all be considered substantially similar, given that each violation involves either denying FMLA leave or penalizing an employee who takes leave. Any two instances of failure to provide notice—such as failure to provide general notice via a poster as well as failure to notify

individual employees regarding their eligibility status, rights, and responsibilities—would be substantially similar to each other, but not to other violations of the FMLA.

Under MSPA, multiple violations of the statute's requirements pertaining to wages, supplies, and working arrangements (including, for example, failure to pay wages when due, prohibitions against requiring workers to purchase goods or services solely from particular contractors, employers, or associations, and violating the terms of any working arrangements) would all be substantially similar for purposes of the Order. Likewise, violations of any of MSPA's requirements related to health and safety, including both housing and transportation health and safety, would all be substantially similar to each other. Violations of the statute's disclosure and recordkeeping requirements would also be substantially similar to each other. Finally, multiple violations related to MSPA's registration requirements would be substantially similar.

For purposes of Title VII, Section 503 of the Rehabilitation Act of 1973, the ADA, the ADEA, Section 6(d) of the FLSA (known as the Equal Pay Act, 29 U.S.C. 206(d)), Executive Order 11246 of September 24, 1965, the Vietnam Era Veterans' Readjustment Assistance Act of 1972, and the Vietnam Era Veterans' Readjustment Assistance Act of 1974, violations are substantially similar if they involve the same or an overlapping protected status—*e.g.*, race/color, national origin, sex, gender identity, sexual orientation, religion, disability, age, protected veterans' status—even if they do not involve the same employment practice—*e.g.*, hiring, firing, harassment, compensation. This is true regardless of whether the violations arise under the same statute or different statutes, *e.g.*, an ADA violation and a Section 503 violation. For example, two violations of requirements not to discriminate on the basis of sex would be substantially similar even if they involved two different employment practices—*e.g.*, hiring and promotions. Additionally, if, for example, the first violation involves discrimination on the basis of national origin and the second violation involves discrimination on the basis of national origin and race, the violations are substantially similar because they involve an overlapping protected status, namely, discrimination on the basis of national origin.

Other violations arising under two or more different statutes may also be substantially similar. For example, several of the Labor Laws have provisions prohibiting retaliation

against individuals who exercise protected rights. An employer who commits two or more violations involving retaliation will be found to have engaged in repeated violations. Similarly, failure to pay wages mandated by the FLSA, SCA, DBA, MSPA, or Executive Order 13658 would be substantially similar violations since all of these violations concern the failure to pay wages mandated by law. Likewise, violations of the OSH Act and violations of the health and safety provisions of MSPA could be substantially similar if they involve substantially similar hazards. Two or more failures to post notices required under the Labor Laws would also be deemed substantially similar, as would be two or more failures to keep records.

The Department specifically seeks comments by interested parties regarding its proposed definition of “substantially similar” for determining if a violation is repeated under the Order.

#### 6. Table of Examples

For a table containing selected examples of repeated violations, see Appendix C.

#### D. Pervasive Violations

The Order provides that, where no statutory standards exist, the standard for pervasive should take into account “the number of violations of a requirement or the aggregate number of violations of requirements in relation to the size of the entity.” See § 4(b)(i)(B)(4). No statutory standards for “pervasive” exist under the Labor Laws.

Violations are “pervasive” if they reflect a basic disregard by the contractor or subcontractor for the Labor Laws as demonstrated by a pattern of serious or willful violations, continuing violations, or numerous violations. Violations must be multiple to be pervasive, although the number of violations necessarily depends on the size of the contractor or subcontractor, because larger employers, by virtue of their size, are more likely to have multiple violations. To be pervasive, the violations need not be of the same or similar requirements of the Labor Laws. Pervasive violations may exist where the contractor or subcontractor commits multiple violations of the same Labor Law, regardless of their similarity, or violations of more than one of the Labor Laws. This category is intended to identify those contractors and subcontractors whose numerous violations of Labor Laws indicate that they may view sanctions for their violations as merely part of the “cost of doing business,” an attitude that is

<sup>22</sup> This is consistent with the treatment of such violations as “repeated” in the FLSA's regulations. See 29 CFR 578.3(b).

<sup>23</sup> 29 CFR 579.2 treats any two child labor violations as repeated.

inconsistent with the level of responsibility required by the FAR. LCAs and contractors are strongly encouraged to consult with the Department when determining whether violations are pervasive.

Pervasive violations differ from repeated violations in a number of ways. First, unlike repeated violations, pervasive violations need not be substantially similar, or even similar at all, as long as each violation involves one of the Labor Laws. Additionally, pervasive violations, unlike repeated violations, may arise in the same proceeding or investigation. For example, a small tools manufacturer with a single location may be cited multiple times for serious violations under the OSH Act—once for improper storage of hazardous materials, once for failure to provide employees with protective equipment, once for inadequate safeguards on heavy machinery, once for lack of fall protection, once for insufficient ventilation, once for unsafe noise exposure, and once for inadequate emergency exits. While these violations are sufficiently different that they would not constitute repeated violations, such a high number of workplace safety violations relative to the size of a small company with only a single location would likely demonstrate a basic disregard by the company for workers' safety and health, particularly if the company lacked a process for identifying and eliminating serious health hazards. As such, these violations would likely be considered pervasive.

In addition, violations across multiple Labor Laws—especially when they are serious, willful, or repeated—are an indication of pervasive violations that warrant careful examination by the contracting officer, in consultation with the LCA. For example, a medium-sized company that provides janitorial services at federal facilities may be found to have violated the SCA for failure to pay workers their required wages, Title VII for discrimination in hiring on the basis of national origin, the National Labor Relations Act for demoting workers who are seeking to organize a union, and the Family and Medical Leave Act for denying workers unpaid leave for serious health conditions. While these violations are substantively different from each other, a medium-sized employer that violates so many Labor Laws is demonstrating a basic disregard for its legal obligations to its workers and is likely committing pervasive violations.

Whereas a repeated violation may be found anytime a contractor or

subcontractor commits two or more substantially similar violations, there is no specific numeric threshold for pervasive violations. Rather, the number of violations necessary will depend on the size of the contractor or subcontractor, as well as the nature of the violations themselves.

A series of repeated violations may, however, become pervasive, particularly if it demonstrates that a contractor or subcontractor, despite knowledge of its violations, fails to make efforts to change its practices and continues to violate the law. For example, if the Department's Wage and Hour Division issued several administrative merits determinations over the course of three years finding that a contractor or subcontractor illegally employed underage workers, and the contractor or subcontractor, despite receiving these notices, failed to make efforts to change its child labor practices and continued to violate the FLSA's child labor provisions, the series of violations would likely be considered pervasive.

For smaller companies, a smaller number of violations may be sufficient for a finding of pervasiveness, while for large companies, pervasive violations will typically require either a greater number of violations or violations affecting a significant number or percentage of a company's workforce. For example, if the Department's Office of Federal Contract Compliance Programs finds that a large contractor that provides food services at federal agencies nationwide used pre-employment screening tests for most jobs at the company's facilities that resulted in Hispanic workers being hired at a significantly lower rate than non-Hispanic workers over a 5-year period, and in addition, the Wage and Hour Division finds that the company failed to comply with the SCA's requirements to pay its workers prevailing wages at many of its locations, such violations would likely be pervasive, notwithstanding the large size of the contractor, because the contractor's numerous serious violations spanned most of its locations and affected many of its workers. Conversely, had the company only engaged in these prohibited practices at, for example, only a few of its locations, such violations might not necessarily be considered pervasive.

Similarly, if a large company that provides laundry services to military bases in several states is cited 50 times for serious OSHA violations affecting most of its locations over the span of one year, and a number of the citations are for failure to abate dangerous conditions that OSHA had cited

previously, and as a result the company is placed on OSHA's Severe Violator Enforcement Program, such violations would likely be pervasive because the sheer number of violations over such a short period of time is evidence that the company is ignoring persistent threats to workers' safety, fails to treat safety as a serious problem, and is acting in disregard of its legal obligations. Conversely, if the violations affected only a few of the company's facilities, or if the company had acted quickly to abate any violations, the violations might not necessarily be considered pervasive.

The Department specifically seeks comments by interested parties regarding how best to assess the number of a contractor's or subcontractor's violations in light of its size.

An additional relevant factor in determining whether violations are pervasive is the involvement of higher-level management officials. When Labor Laws are violated with either the explicit or implicit approval of higher-level management, such approval signals that future violations will be tolerated or condoned, and may dissuade workers from reporting violations or raising complaints. Thus, to the extent that higher-level management officials were involved in violations themselves (such as discrimination in hiring by an executive, or a decision by an executive to cut back on required safety procedures that led to violations of the OSH Act) or knew of violations and failed to take appropriate actions (such as ignoring reports or complaints by workers), the violations are more likely to be deemed pervasive. For example, if the vice president of a construction company directs a foreman not to hire Native American workers, and as a result the company is later found to have committed numerous Title VII violations against job applicants, such violations are likely to be pervasive. Likewise, if the chief safety officer at a chemical plant fields complaints from workers about several unsafe working conditions but then fails to take action to remedy the unsafe conditions, such violations are also likely to be pervasive because the dangerous working conditions were willfully sanctioned by a high-level company official and were evident throughout the chemical plant. Such behavior indicates that the company views penalties for such violations as "the cost of doing business," rather than indicative of significant threats to its workers' health and safety that must be addressed. By the same token, managers are expected to play an active role in ensuring Labor

Law compliance in their workforce rather than abdicating their responsibility to do so. If managers actively avoid learning about labor law violations (such as by failing to exercise appropriate oversight or “passing the buck” to others), this may also indicate that the violations are pervasive.

For a table containing selected examples of pervasive violations, see Appendix D.

#### *E. Assessing Violations and Considering Mitigating Factors*

When assessing violations of the Labor Laws by a contractor or subcontractor, all the facts and circumstances of the violations, as well as any mitigating factors, should be considered.

The following types of violations raise particular concerns regarding the contractor’s or subcontractor’s compliance with the Labor Laws:

- Pervasive violations. Pervasive violations, by definition, demonstrate a basic disregard for the Labor Laws. Such disregard of legal obligations creates a heightened danger that the contractor or subcontractor may, in turn, disregard its contractual obligations as well. Additionally, such contractors and subcontractors are more likely to violate the Labor Laws in the future, and those violations—and any enforcement proceedings or litigation that may ensue—may imperil their ability to meet their obligations under a contract. Finally, that a contractor or subcontractor shows such disregard for the Labor Laws is highly probative of whether the contractor or subcontractor lacks integrity and business ethics.

- Violations that meet two or more of the categories discussed above (serious, repeated, and willful). A violation that falls into two or more of the categories is also, as a general matter, more likely to be probative of the contractor’s or subcontractor’s lack of integrity and business ethics than a violation that falls into only one of those categories.

- Violations that are reflected in final orders. To the extent that the judgment, determination, or order finding a Labor Law violation is final (because appeals and opportunities for further review have been exhausted or were not pursued), the violation should be given greater weight. Likewise, where a violation has not resulted in a final judgment, determination, or order, it should be given lesser weight.

- Violations of particular gravity. In the Department’s view, certain Labor Laws violations that are serious under the Order should be given greater weight, including violations related to the death of an employee; violations

involving a termination of employment for exercising a right protected under the Labor Laws; violations that detrimentally impact the working conditions of all or nearly all of the workforce at a worksite; and violations where the amount of back wages, penalties, and other damages awarded is greater than \$100,000.

Various factors may mitigate the existence of a Labor Law violation. The Department respects the fact that most employers endeavor to comply with the Labor Laws. The Department values highly contractors’ good-faith efforts to comply, and it encourages them to report these efforts, including workplace policies that foster compliance.

In most cases, the most important mitigating factors will be the extent to which the contractor or subcontractor has remediated the violation and taken steps to prevent its recurrence. Other mitigating factors include where the contractor or subcontractor has only had a single violation; where the number of violations is low relative to the size of the contractor or subcontractor; where the contractor or subcontractor has implemented a safety and health management program, a collectively-bargained grievance procedure, or other compliance program; where there was a recent legal or regulatory change; where the findings of the enforcement agency, court, arbitrator, or arbitral panel support a conclusion that contractor or subcontractor acted in good faith and had reasonable grounds for believing that it was not violating the law; and where the contractor or subcontractor has maintained a long period of compliance following any violations. Contractors and subcontractors should provide any information that may mitigate a Labor Law violation.

#### 1. Remediation of Violation, Including Labor Compliance Agreements

As noted above, the extent to which a contractor or subcontractor has remediated a Labor Law violation will typically be the most important factor that can mitigate the existence of a violation. Remediation is an indication that a contractor or subcontractor has assumed responsibility for a violation and has taken steps to bring itself into compliance with the law going forward. Conversely, failure to remediate a violation may demonstrate disregard for legal obligations and workers, which in turn would have bearing on whether the contractor or subcontractor lacks integrity or business ethics. In most cases, for remediation to be considered mitigating, it should involve two components. First, the remediation should correct the violation itself,

including by making any affected workers whole. For example, this could involve abating a dangerous hazard, paying workers their back wages owed, or reinstating a wrongfully discharged employee. Second, the remediation should demonstrate efforts by the contractor or subcontractor to prevent similar violations in the future. For example, if a contractor or subcontractor improperly misclassified workers as exempt from the FLSA and pays any back wages due to the workers without reviewing its classifications of the workers going forward, it will likely commit similar violations in the future. Particular consideration will be given where the contractor or subcontractor has implemented remediation on an enterprise-wide level or has entered into an enhanced settlement agreement with the relevant enforcement agency or agencies that goes beyond what is minimally required under the law to address appropriate remedial or compliance measures.

Similarly, when a contractor or subcontractor enters into a labor compliance agreement (defined above) with the enforcement agency, that agreement is an important mitigating factor. Entering into a labor compliance agreement indicates that the contractor or subcontractor recognizes the importance that the Federal Government places on compliance with the Labor Laws.

#### 2. Only One Violation

The Order provides that, in most cases, a single violation of a Labor Law may not necessarily give rise to a determination of lack of responsibility, depending on the nature of the violation. See § 4(a)(i). However, a contracting agency is not precluded from making a determination of non-responsibility based on a single violation in the rare circumstances where merited.

#### 3. Low Number of Violations Relative to Size

Larger employers, by virtue of their size, are more likely to have multiple violations than smaller ones. When assessing contractors or subcontractors with multiple violations, the size of the contractor or subcontractor will be considered.

#### 4. Safety and Health Programs or Grievance Procedures

Implementation of a safety and health management program such as OSHA’s 1989 Safety and Health Program Management guidelines or any updates

to those guidelines,<sup>24</sup> grievance procedures (including collectively-bargained ones), monitoring arrangements negotiated as part of an enhanced settlement agreement, or other compliance programs foster a corporate culture in which workers are encouraged to raise legitimate concerns about Labor Laws violations without the fear of repercussions. Such programs and procedures may prompt workers to report violations that would, under other circumstances, go unreported. Therefore, the implementation of such programs or procedures will be considered a mitigating factor, particularly as to violations that might otherwise be deemed repeated or pervasive.

#### 5. Recent Legal or Regulatory Change

To the extent that the Labor Laws violations can be traced to a recent legal or regulatory change, that may be a mitigating factor. The change must be recent, and the violations must not have been violations but for the change.

#### 6. Good Faith and Reasonable Grounds

It may be a mitigating factor if the contractor or subcontractor shows that it made efforts to ascertain its legal obligations and to follow the law, and that its actions under the circumstances were objectively reasonable. For example, if a contractor or subcontractor acts in reasonable reliance on advice from a responsible official from the relevant enforcement agency, or an administrative or authoritative judicial ruling, such reliance will typically demonstrate good faith and reasonable grounds. This factor may also apply where the contractor's or subcontractor's legal obligations are unclear, such as when a new statute, rule, or standard is first implemented.

<sup>24</sup> In addition, there are two industry consensus standards that, if implemented, should be considered as mitigating factors for violations involving workplace safety and health. The American National Standards Institute (ANSI) and American Industrial Hygiene Association (AIHA) have published a voluntary consensus standard, ANSI/AIHA Z10—2005 Occupational Safety and Health Management Systems (ANSI/AIHA, 2005), and the Occupational Health and Safety Assessment Series (OHSAS) Project Group has produced a similar document, OHSAS 18001—2007 Occupational Health and Safety Management Systems (OHSAS Project Group, 2007). These consensus-based standards have been widely accepted in the world of commerce and adopted by many businesses on a voluntary basis. They all have a similar set of elements (management leadership, worker participation, hazard identification and assessment, hazard prevention and control, education and training, and program evaluation and improvement) that focus on finding all hazards and developing a workplace plan for prevention and control of those hazards.

#### 7. Significant Period of Compliance Following Violations

If, following one or more violations within the three-year reporting period, the contractor or subcontractor maintains a steady period of compliance with the Labor Laws, such compliance may mitigate the existence of prior violations (*e.g.*, violations were reported from 2½ years ago and there have been none since).

#### IV. Paycheck Transparency Provisions

Transparency in the relationships between employers and their workers is critical to workers' understanding of their legal rights and to the resolution of workplace disputes. When workers lack information about how their pay is calculated and their status as employees or independent contractors, workers are less likely to comply with labor laws. Providing workers with information about how their pay is calculated each pay period will enable workers to raise any concerns about pay more quickly, and will encourage proactive efforts by employers to resolve such concerns. Similarly, providing workers who are classified as independent contractors with notice of their status will enable them to better understand their legal rights, evaluate their status as independent contractors, and raise any concerns during the course of the working relationship as opposed to after it ends (which will increase the likelihood that the employer and the worker will be able to resolve any concerns more quickly and effectively). Thus, the Order's paycheck transparency provisions will increase transparency in compensation information and improve working relationships.

##### A. Wage Statement

The Order requires contracting agencies to ensure that, for covered procurement contracts, provisions in solicitations and clauses in contracts require contractors to provide all workers under the contract for whom they must maintain wage records under the FLSA, the DBA, the SCA, or equivalent State laws<sup>25</sup> with a "document" each pay period with "information concerning that individual's hours worked, overtime hours, pay, and any additions made to or deductions made from pay." See § 5(a). Contracting agencies shall also ensure that contractors "incorporate this

<sup>25</sup> In a second proposed guidance to be published later in the *Federal Register*, the Department will identify those State laws that are equivalent to the FLSA, the DBA, and the SCA.

same requirement" into covered subcontracts. *Id.*

The Order requires that the wage statement be provided to "all individuals performing work" for whom the contractor or subcontractor is required to maintain wage records under the FLSA, the DBA, the SCA, or equivalent State laws. This means that a wage statement must be provided to every worker subject to the FLSA, the DBA, the SCA, or equivalent State laws regardless of the contractor's or subcontractor's classification of the worker as an employee or independent contractor.

The Order states that the wage statement provided to workers each pay period must be a "document." If the contractor or subcontractor regularly provides documents to its workers by electronic means, the wage statement may be provided electronically if the worker can access it through a computer, device, system, or network provided or made available by the contractor or subcontractor.

The Order further provides that the wage statement must be issued every pay period and contain the total number of hours worked in the pay period and the number of those hours that were overtime hours. The FAR Council's proposed regulations would require, if the wage statement is not provided weekly and is instead provided bi-weekly or semi-monthly (because the pay period is bi-weekly or semi-monthly), that the hours worked and overtime hours contained in the wage statement be broken down to correspond to the period (which will almost always be weekly) for which overtime is calculated and paid. If the hours worked and overtime hours are aggregated in the wage statement for the entire pay period as opposed to being broken down by week, the worker may not be able to understand and evaluate how the overtime hours were calculated. For example, if the pay period is bi-weekly and the worker is entitled to overtime pay for hours worked over 40 in a week, then the wage statement must provide the hours worked and any overtime hours for the first week and the hours worked and any overtime hours for the second week.

The Order states that the wage statement must also contain the worker's pay—a reference to the gross pay due the worker for the pay period—as well as all additions to and deductions from the gross pay. Additions to pay may include bonuses, awards, and shift differentials. Deductions from pay include deductions required by law (such as withholding for taxes), voluntary

deductions by the worker (such as contributions to health insurance premiums or retirement accounts), and all other deductions or reductions made from gross pay regardless of the reason. Providing a worker with gross pay and all additions to and deductions from gross pay will necessarily allow the worker to understand the net pay received and how it was calculated.

According to the Order, the wage statement provided to workers who have no entitlement to overtime compensation under the FLSA “need not include a record of hours worked if the contractor informs the individuals of their exempt status.” See § 5(a). Because such workers are exempt from the FLSA’s overtime compensation requirements, there will be no overtime hours to include on the wage statement.<sup>26</sup> To sufficiently inform a worker of exempt status so that the wage statement need not include hours worked, the contractor or subcontractor must provide written notice to the worker stating that the worker is exempt from the FLSA’s overtime compensation requirements (oral notice is not sufficient).<sup>27</sup> If the contractor or subcontractor regularly provides documents to its workers by electronic means, the document may be provided electronically if the worker can access it through a computer, device, system, or network provided or made available by the contractor or subcontractor.

The wage statement requirements “shall be deemed to be fulfilled” where a contractor or subcontractor “is complying with State or local requirements that the Secretary of Labor has determined are substantially similar to those required” by the Order. See § 5(a). This proposed guidance, when final, will therefore include a list of the State and local jurisdictions that the Secretary determines to have wage statement requirements that are “substantially similar” to the Order’s wage statement requirement (“Substantially Similar Wage Payment States”). Providing a worker in one of these States with a wage statement that complies with the requirements of that

State would satisfy the Order’s wage statement requirement.

As described above, substantially similar does not mean “exactly the same.” *Washam*, 312 F.3d at 930. Rather, two things may be substantially similar where they share “essential elements in common.” *Alameda Mall*, 649 F.3d at 392. The Secretary is considering two options for determining whether State or local requirements are substantially similar.

One option is to find a State or local requirement to be substantially similar where it requires wage statements to include the essential elements of overtime hours or overtime earnings, total hours, gross pay, and any additions or deductions. When overtime hours or earnings are disclosed in a wage statement, workers can identify from the face of the document whether they have been paid for overtime hours. The benefit of this option is that workers would be more likely to become aware of a problem with their paycheck at an earlier date, increasing the likelihood that the problem will be resolved efficiently. Applying this method, the current list of Substantially Similar Wage Payment States would be Alaska, California, Connecticut, the District of Columbia, Hawaii, New York, and Oregon.<sup>28</sup>

A second option would allow wage statements to omit overtime hours or earnings, so long as they instead include an element not listed in the Order—the “rate of pay”—in addition to the essential elements of total hours, gross pay, and any additions or deductions. The benefit of this option is that it would allow more flexibility while still requiring wage statements to provide enough information for a worker to calculate whether he or she has been paid in full. By working backwards from the information provided—dividing the gross earnings by the number of hours worked and comparing the result to the rate of pay—the worker should be able to determine whether the paycheck includes payment for overtime hours. The drawback of this option is that a failure to pay overtime would not be immediately identifiable from the face of the document as it would be in the first option. Instead, workers would need to complete a calculation in order to catch an error. Thus, if the Department were to choose this second option, workers in some of the

Substantially Similar Wage Payment States would be at greater risk of missing a problem with a paycheck than if the Department were to choose the first option. Applying this second method, the current list of Substantially Similar Wage Payment States would be Alaska, California, Connecticut, the District of Columbia, Hawaii, Massachusetts, Minnesota, New York, Oregon, Pennsylvania, Texas, Vermont, Washington, and Wisconsin.<sup>29</sup> The Department specifically seeks comments regarding the two options above. It is also open to considering other combinations of essential elements or other ways to determine whether State or local requirements are substantially similar.

After this proposed guidance is finalized, the Department will maintain on its Web site a list of the Substantially Similar Wage Payment States. The Secretary recognizes that States may change their wage statement laws, such that some States whose wage statement laws are initially designated as substantially similar may later weaken them, and other States whose laws are not initially designated as substantially similar may later strengthen them. When the Secretary determines that a State must be added to or removed from the list of Substantially Similar Wage Payment States, notice of such changes will be published on the Web site.<sup>30</sup> The Department may also issue All Agency Memoranda or similar direction to contracting agencies and the public to communicate updates to the list of the Substantially Similar Wage Payment States.

#### *B. Independent Contractor Notice*

The Order requires contractors and subcontractors, for workers under covered contracts for whom they are required to maintain wage records under the FLSA, the DBA, the SCA, or equivalent State laws, to provide those workers whom they treat as independent contractors with “a document informing the individual of this [independent contractor] status.” See § 5(a). For covered contracts, provisions in solicitations and clauses in contracts should be included requiring such notice to workers treated as independent contractors.

<sup>29</sup> Neither of these two options would satisfy the Order’s requirement that an employer inform workers of their status as exempt from overtime in order to provide a wage statement to exempt employees that does not include a record of hours worked.

<sup>30</sup> The same is true for local wage statement ordinances. The Department will list on the Web site any newly enacted local ordinances that are substantially similar.

<sup>26</sup> Workers may be entitled to overtime under the FLSA, but under terms other than time-and-a-half for hours worked over 40 in a week. See, e.g., 29 U.S.C. 207(j), (k). Such workers are not exempt from the FLSA’s overtime requirements, and wage statements provided to them under the Order must contain a record of their hours worked.

<sup>27</sup> As specified in the FAR Council’s proposed regulations, if a significant portion of the contractor’s or subcontractor’s workforce is not fluent in English, the document provided notifying the worker of exempt status must also be in the language(s) other than English in which the significant portion of the workforce is fluent.

<sup>28</sup> Oregon does not expressly require disclosure of overtime hours. However, Or. Admin. Rule 839–020–0012 requires that “[i]f multiple rates of pay are paid, the total number of hours worked at each rate of pay” must be included on the wage statement, and overtime pay is described as a “rate of pay” by Or. Admin. R. 839–020–0030.

The notice informing the worker of status as an independent contractor must be provided to each individual worker treated as an independent contractor before the worker performs any work under the contract. The notice must be a “document” (oral notice of independent contractor status is not sufficient).<sup>31</sup> The document must be separate from any contract entered into between the contractor or subcontractor and the independent contractor. If the contractor or subcontractor regularly provides documents to its workers by electronic means, the document may be provided electronically if the worker can access it through a computer, device, system, or network provided or made available by the contractor or subcontractor.

As of the effective date of the Order’s independent contractor notice requirement, contractors and subcontractors must provide the required notice to each independent contractor then engaged to perform work under a covered contract. Thereafter, contractors and subcontractors must provide the notice to an independent contractor each time that he or she is engaged to perform work under a covered contract (and certainly before he or she performs any work under the contract). The notice provided is specific to a particular covered contract regardless of whether the worker performs the same type of work on another covered contract. If a worker who has performed work under a contract and who received notice that

his or her status was as an independent contractor is engaged to perform work as an independent contractor under a different covered contract, then the contractor or subcontractor shall provide the worker with a new notice informing the worker of his or her status as an independent contractor for work performed under the different contract.

The provision of the notice to a worker informing the worker that he or she is an independent contractor does not mean that the worker is correctly classified as an independent contractor under applicable laws. The Department will not consider the notice when determining whether a worker is an independent contractor or employee. The determination of whether a worker is an independent contractor under a particular law remains governed by that law’s definition of “employee” and its standards for determining for its purposes which workers are independent contractors and not employees.

#### V. Invitation To Comment

As discussed above, the Department, in its discretion, solicits comments on this proposed initial guidance document in the manner and before the date specified herein. After the comment period has ended, the Department will publish final guidance in the **Federal Register**.

This solicitation of public feedback is intended to improve the internal management of the Executive Branch and is not intended to, and does not, create any right or benefit, substantive

or procedural, enforceable at law or in equity, against the United States, its agencies or other entities, its officers or employees, or any other person.

#### VI. Next Steps

This proposed guidance is the first step in the phased implementation of the Order.

The Order requires the FAR Council to propose to amend the Federal Acquisition Regulation to incorporate the Order’s requirements into the process by which contracting officers make pre-award responsibility determinations, among other necessary and appropriate proposed changes. See § 4(a). This proposed guidance, when finalized, will assist the FAR Council in promulgating regulations that will be binding for covered contracts. The Order further requires the GSA Administrator, in consultation with other relevant agencies, to develop a single Web site for Federal contractors to use for all Federal contract reporting requirements related to the Order to the extent practicable. See § 4(d). The final FAR rule will include the reporting Web site address for Federal contractors.

As indicated in this proposed guidance, the Department will publish in the **Federal Register** at a later date a second proposed guidance under this Order.

Signed this 19th day of May 2015.

**Mary Beth Maxwell,**

*Principal Deputy Assistant Secretary, Office of the Assistant Secretary for Policy, U.S. Department of Labor.*

### Appendix A: Examples of Serious Violations

All violations of federal labor laws are serious, but in the context of Executive Order 13673, Fair Pay and Safe Workplaces, the Department of Labor has identified certain violations as “serious,” “willful,” “repeated,” and “pervasive.” This subset of all labor violations represents the violations that are most concerning and bear on the assessment of a contractor or subcontractor’s integrity and business ethics. The Department has purposely excluded from consideration violations that could be characterized as inadvertent or minimally impactful. Ultimately, each contractor’s disclosed violations of Labor Laws will be assessed on a case-by-case basis in light of the totality of the circumstances, including the severity of the violation or violations, the size of the contractor, and any mitigating factors. In most cases, even for violations subject to disclosure and consideration under the Order, a single violation of one of the Labor Laws will not give rise to a determination of lack of responsibility.

The chart below includes a non-exhaustive list of examples of Labor Laws violations that may be found to be “serious” under the Department’s proposed guidance for Executive Order 13673. *These are examples only: They are not minimum requirements, nor are they exclusive of other violations under each Labor Law that may be serious.* The chart does not include violations of “equivalent state laws,” which are also covered by the Order, but (with the exception of OSHA State Plans, which are addressed in the current proposed guidance) will be addressed in future guidance. Where the chart indicates that a violation is serious for more than one reason, this means that *either* of the reasons listed is an *independent* ground for finding that the violation is serious, as defined in the guidance.

#### Summary of Definition of “Serious Violation”

The full definition of a “serious violation” is set forth in section III.A of the Department of Labor’s proposed guidance. When evaluating violations, Labor Compliance Advisors and contracting officers, and contractors when evaluating subcontractors, should refer to the full definition in the guidance.

In summary, the guidance provides that a violation of one of the Labor Laws is serious if it involves *at least one* of the following:

- An OSH Act or OSHA-approved State Plan citation was designated as serious, there was a notice of failure to abate an OSH Act violation, or an imminent danger notice was issued under the OSH Act or an OSHA-approved State Plan;
- The affected workers comprised 25% or more of the workforce at the worksite;

<sup>31</sup> As specified in the FAR Council’s proposed regulations, if a significant portion of the contractor’s or subcontractor’s workforce is not

fluent in English, the document notifying the worker of independent contractor status must also

be in the language(s) other than English in which the significant portion of the workforce is fluent.

- Fines and penalties of at least \$5,000 were assessed or back wages of at least \$10,000 were due or injunctive relief was imposed by an enforcement agency or a court;
- The contractor's or subcontractor's conduct violated MSPA or the child labor provisions of the FLSA and caused or contributed to the death or serious injury of one or more workers;
- Employment of a minor who was too young to be legally employed or in violation of a Hazardous Occupations Order;
- The contractor or subcontractor engaged in an adverse employment action (including discharge, refusal to hire, suspension, demotion, or threat) or is responsible for unlawful harassment against one or more workers for exercising any right protected by any of the Labor Laws;
- The findings of the relevant enforcement agency, court, arbitrator or arbitral panel support a conclusion that the contractor or subcontractor engaged in a pattern or practice of discrimination or systemic discrimination;
- The findings of the relevant enforcement agency, court, arbitrator or arbitral panel support a conclusion that the contractor or subcontractor interfered with the enforcement agency's investigation; or
- The contractor or subcontractor breached the material terms of any agreement or settlement entered into with an enforcement agency, or violated any court order, any administrative order by an enforcement agency, or any arbitral award.

When evaluating Labor Laws violations, Labor Compliance Advisors and contracting officers, and contractors when evaluating subcontractors, will review all of the above criteria to determine whether a violation is serious. The examples below are intended to illustrate how these criteria may arise in different contexts, but a violation will be serious if it meets any of the above criteria.

| Labor law   | Example of serious violation   |
|---|--|
| Fair Labor Standards Act (FLSA) .....                           | <p>The Wage and Hour Division of DOL (WHD) found that a contractor violated the minimum wage and overtime provisions of the FLSA. It issued the contractor a Form WH-56 "Summary of Unpaid Wages," and also assessed civil monetary penalties. The back wages due totaled \$75,000, and the civil monetary penalties assessed totaled \$6,000.</p> <p><i>This is a serious violation for two reasons. First, a violation of any of the Labor Laws is serious if fines and penalties of at least \$5,000 were assessed. Second, a violation of any of the Labor Laws is serious if back wages of at least \$10,000 were due. Conversely, if the back wages due totaled less than \$10,000 and the civil monetary penalties assessed had totaled less than \$5,000, the violation would not be a serious violation, assuming that none of the other criteria for seriousness listed above are met.</i></p> <p>WHD finds that a meat processor employed 10 workers under the age of 18 to operate power-driven meat processing machines, such as slicers, saws, and choppers. One of these workers died in an accident involving one of the machines.</p> <p><i>This is a serious violation for two reasons. First, a violation of FLSA's child labor provisions is serious if it involves the employment of a minor too young to be legally employed or in violation of a Hazardous Occupations Order. The employment of minors in the above-described occupation is prohibited under Hazardous Occupation Order No. 10. Second, a violation of FLSA's child labor provisions is serious if it causes or contributes to the death or serious injury of one or more workers. Conversely, the employment of, for example, a 14- or 15-year-old minor in excess of three hours outside school hours on a school day in a non-hazardous, non-agricultural job in which the child is otherwise permitted to work would not be a serious violation, assuming that none of the other criteria for seriousness listed above are met.</i></p> |
| Occupational Safety and Health (OSH) Act.                       | <p>OSHA issued a citation for failing to protect against fall hazards on a construction worksite. The citation was designated as "serious."</p> <p><i>This is a serious violation because all citations designated as serious by OSHA (or an OSHA State Plan) are serious under the Order. Conversely, if OSHA (or the equivalent state agency under an OSHA State Plan) had designated the violation as "other-than-serious," the violation would not be a serious violation under the Order.</i></p>   |
| Migrant and Seasonal Agricultural Worker Protection Act (MSPA). | <p>WHD issued a letter indicating that an investigation had disclosed a violation of MSPA that contributed to the serious injury of a worker.</p> <p><i>This is a serious violation because a violation of MSPA is serious if it caused or contributed to the death or serious injury of one or more workers. Conversely, if WHD issued a letter indicated that the investigation had disclosed that 3 of the 50 MSPA workers at a job site did not receive their wages when due, and those wages totaled \$1,000 and the civil monetary penalties totaled \$500, the violation would not be serious, assuming that none of the other criteria for seriousness listed above are met.</i></p>   |
| National Labor Relations Act (NLRA) .....                       | <p>The General Counsel of the National Labor Relations Board (NLRB) issued a complaint alleging that the contractor fired the employee who was the lead union adherent during the union's organizational campaign.</p> <p><i>This is a serious violation because a violation of any of the Labor Laws is serious where the contractor or subcontractor engaged in an adverse employment action (including discharge, refusal to hire, suspension, demotion, or threat) or is responsible for unlawful harassment against one or more workers for exercising any right protected by any of the Labor Laws. Conversely, if the NLRB's complaint had instead alleged that the contractor had, for example, denied a single employee a collectively-bargained benefit (for example, a vacation to which the employee was entitled based on her seniority), the violation would not be serious, assuming that none of the other criteria for seriousness listed above are met.</i></p>  |
| Davis-Bacon Act (DBA) .....                                     | <p>WHD issued a letter indicating that a contractor violated the DBA, and that back wages were due in the amount of \$12,000. The contractor had previously been investigated by WHD and, to resolve that investigation, had entered into a written agreement to pay the affected workers prevailing wages as required by the DBA.</p>   |

| Labor law   | Example of serious violation  |
|---|---|
| Service Contract Act (SCA) .....                            | <p><i>This is a serious violation for two reasons. First, a violation of <b>any</b> of the Labor Laws is serious if back wages of at least \$10,000 were due. Second, a violation of <b>any</b> of the Labor Laws is serious if the contractor or subcontractor breached the material terms of any agreement or settlement entered into with an enforcement agency. Conversely, if WHD issued a letter indicating that a contractor owed several workers a total of \$8,000, and the contractor's conduct did not constitute a breach of a prior agreement or meet any of the other criteria for seriousness listed above, the violation would not be serious.</i></p> <p>An ALJ issued an order finding a food service company violated the SCA by failing to provide the required amount of health and welfare benefits to 35 of its 100 workers at a particular location. The order included a finding that the contractor interfered with WHD's investigation by threatening to fire workers who spoke to WHD investigators.</p>  |
| Executive Order 11246 (Equal Employment Opportunity).       | <p><i>This is a serious violation for two reasons. First, a violation of <b>any</b> any of the Labor Laws is serious if the affected workers comprise 25% or more of the workforce at the worksite. Second, a violation of <b>any</b> of the Labor Laws is serious where the findings of the relevant enforcement agency, court, arbitrator or arbitral panel support a conclusion that the contractor or subcontractor interfered with the enforcement agency's investigation. Conversely, if the ALJ's order had indicated that the contractor owed back wages to only 10 of the 100 SCA-covered workers at the location, and did not contain a finding of interference, the violation would not be serious, assuming that none of the other criteria for seriousness listed above are met.</i></p> <p>OFCCP issued a show cause notice indicating that an investigation had disclosed that a contractor had discriminated against African-American and Hispanic job seekers in violation of EO 11246. OFCCP had determined that back wages were due to job applicants in an amount upwards of \$50,000. The contractor subsequently settled the case with OFCCP for a total of \$30,000 in back wages.</p>   |
| Section 503 of the Rehabilitation Act .....                 | <p><i>This is a serious violation for two reasons. First, a violation of <b>any</b> of the Labor Laws is serious if findings of the relevant enforcement agency, court, arbitrator or arbitral panel support a conclusion that the contractor or subcontractor engaged in a pattern or practice of discrimination or systemic discrimination. Second, a violation of <b>any</b> of the Labor Laws is serious if back wages of at least \$10,000 were due. Conversely, if OFCCP issued a show cause notice indicating that the investigation disclosed that the contractor had discriminated against only a few such job seekers, and the amount of back wages due was only \$9,000, the violation would not be serious, assuming that none of the other criteria for seriousness listed above are met.</i></p> <p>The ARB affirmed an ALJ order directing the contractor to change a practice of medical screenings that discriminated against job applicants with disabilities—and that were not job-related or consistent with business necessity—in violation of Section 503.</p> <p><i>This is a serious violation for two reasons. First, a violation of <b>any</b> of the Labor Laws is serious if injunctive relief is imposed by an enforcement agency or court. Second, a violation of <b>any</b> of the Labor Laws is serious if the findings of the relevant enforcement agency, court, arbitrator or arbitral panel support a conclusion that the contractor or subcontractor engaged in a pattern or practice of discrimination or systemic discrimination. Conversely, if the ARB had found that the contractor's practice of medical screenings was generally not discriminatory, but that the contractor had discriminated against two specific disabled job applicants in another fashion, and the ARB did not order the contractor to take any specific actions, the violation would not be serious, assuming that none of the other criteria for seriousness listed above are met.</i></p> |
| Vietnam Era Veterans' Readjustment Assistance Act (VEVRAA). | <p>OFCCP issued a show cause notice indicating that an investigation had disclosed that a contractor had discriminated against a veteran job applicant, and that back wages were due to the job applicant in an amount upwards of \$10,000.</p> <p><i>This is a serious violation because a violation of <b>any</b> of the Labor Laws is serious if back wages of at least \$10,000 were due. Conversely, if OFCCP had determined that the job applicant was due only \$5,000 in back wages, the violation would not be serious, assuming that none of the other criteria for seriousness listed above are met.</i></p>   |
| Family and Medical Leave Act (FMLA) .....                   | <p>The Secretary of Labor filed a complaint in federal court after an investigation found that a contractor fired a worker in retaliation for taking FMLA leave.</p> <p><i>This is a serious violation because a violation of <b>any</b> of the Labor Laws is serious where the contractor or subcontractor engaged in an adverse employment action (including discharge, refusal to hire, suspension, demotion, or threat) or is responsible for unlawful harassment against one or more workers for exercising any right protected by any of the Labor Laws. Conversely, had the Secretary filed a complaint in federal court alleging that a contractor improperly denied an employee two weeks of FMLA leave but did not take any adverse employment action against the employee, the violation would not be serious, assuming that none of the other criteria for seriousness listed above are met.</i></p>  |
| Title VII of the Civil Rights Act of 1964 .....             | <p>The EEOC filed a complaint in federal court after an investigation found that the contractor engaged in a pattern or practice of discrimination under Title VII.</p> <p><i>This is a serious violation because a violation of <b>any</b> of the Labor Laws is serious if the findings of the relevant enforcement agency, court, arbitrator or arbitral panel support a conclusion that the contractor or subcontractor engaged in a pattern or practice of discrimination or systemic discrimination. Conversely, had the EEOC's complaint alleged that the contractor discriminated against only a single individual, the violation would not be serious, assuming that none of the other criteria for seriousness listed above are met.</i></p>   |
| Americans with Disabilities Act of 1990 (ADA).              | <p>In a private action under the ADA brought in federal district court, the court issued injunctive relief to the plaintiff, ordering the contractor to cease violating the ADA, to rehire the plaintiff, and to provide the plaintiff a reasonable accommodation for her disability.</p>   |

| Labor law   | Example of serious violation   |
|---|--|
| Age Discrimination in Employment Act of 1967 (ADEA).  | <p><i>This is a serious violation because a violation of <b>any</b> of the Labor Laws is serious if injunctive relief is imposed by an enforcement agency or court. Conversely, had the court's relief been limited to an award of damages, the violation would not be serious, assuming that none of the other criteria for seriousness listed above are met.</i></p> <p>In a private action brought in federal district court, the factfinder found that the contractor unlawfully discriminated against the plaintiff on the basis of age when it discharged the plaintiff. The court awarded back wages of \$50,000 to the plaintiff.</p> <p><i>This is a serious violation because a violation of <b>any</b> of the Labor Laws is serious if back wages of at least \$10,000 were due. Conversely, had the court awarded only \$8,000 in back wages, the violation would not be serious, assuming that none of the other criteria for seriousness listed above are met.</i></p> |
| Executive Order 13658 (Minimum Wage for Contractors). | <p>WHD issued an investigative findings letter indicating that an investigation disclosed a violation of Executive Order 13658 and finding that a total of \$15,000 in back wages are due.</p> <p><i>This is a serious violation because a violation of <b>any</b> of the Labor Laws is serious if back wages of at least \$10,000 were due. Conversely, had WHD's investigative findings letter indicated that only \$1,500 in back wages were due, the violation would not be serious, assuming that none of the other criteria for seriousness listed above are met.</i></p>  |

**Appendix B: Examples of Willful Violations**

All violations of federal labor laws are serious, but in the context of Executive Order 13673, Fair Pay and Safe Workplaces, the Department of Labor has identified certain violations as “serious,” “willful,” “repeated,” and “pervasive.” This subset of all labor violations represents the violations that are most concerning and bear on the assessment of a contractor or subcontractor’s integrity and business ethics. The Department has purposely excluded from consideration violations that could be characterized as inadvertent or minimally impactful. Ultimately, each contractor’s disclosed violations of Labor Laws will be assessed on a case-by-case basis in light of the totality of the circumstances, including the severity of the violation or violations, the size of the contractor, and any mitigating factors. In most cases, even for violations subject to disclosure and consideration under the Order, a single violation of one of the Labor Laws will not give rise to a determination of lack of responsibility.

The chart below includes a non-exhaustive list of examples of Labor Laws violations that may be found to be “willful” under the Department’s proposed guidance for Executive Order 13673. *These are examples only: They are not minimum requirements, nor are they exclusive of other violations under each Labor Law that may be willful.* The chart does not include violations of “equivalent state laws,” which are also covered by the Order, but (with the exception of OSHA State Plans, which are addressed in the current proposed guidance) will be addressed in future guidance.

**Summary of Definition of “Willful Violation”**

The full definition of a “willful violation” is set forth in section III.B of the Department of Labor’s proposed guidance. When evaluating violations, Labor Compliance Advisors and contracting officers, and contractors when evaluating subcontractors, should refer to the full definition in the guidance.

In summary, the guidance provides that a violation of one of the Labor Laws is willful if:

- For purposes of a citation issued pursuant to the Occupational Safety and Health (OSH) Act or an OSHA-approved State Plan, the citation at issue was designated as willful or any equivalent State designation (*i.e.*, “knowing”), and the designation was not subsequently vacated;
- For purposes of the Fair Labor Standards (including the Equal Pay Act), the administrative merits determination sought or assessed back wages for greater than two years or sought or assessed civil monetary penalties for a willful violation, or there was a civil judgment or arbitral award or decision finding the contractor or subcontractor liable for back wages for greater than two years or affirming the assessment of civil monetary penalties for a willful violation;
- For purposes of the Age Discrimination in Employment Act (ADEA), the enforcement agency, court, arbitrator, or arbitral panel assessed or awarded liquidated damages;
- For purposes of Title VII or the Americans with Disabilities Act, the enforcement agency, court, arbitrator, or arbitral panel assessed or awarded punitive damages for a violation where the contractor or subcontractor engaged in a discriminatory practice with malice or reckless indifference to the federally protected rights of an aggrieved individual; or
- For purposes of any of the other Labor Laws, the findings of the relevant enforcement agency, court, arbitrator or arbitral panel support a conclusion that the contractor or subcontractor knew that its conduct was prohibited by any of the Labor Laws or showed reckless disregard for, or acted with plain indifference to, whether its conduct was prohibited by one or more requirements of the Labor Laws.

*When evaluating Labor Laws violations, Labor Compliance Advisors and contracting officers, and contractors when evaluating subcontractors, will review all of the above criteria to determine whether a violation is willful.* The examples below are intended to illustrate how these criteria may arise in different contexts, but a violation will be willful if it meets *any* of the above criteria.

| Labor law                             | Example of willful violation  |
|---------------------------------------|---|
| Fair Labor Standards Act (FLSA) ..... | <p>In a private lawsuit under the FLSA, a federal district court issued an order requiring payment of three years of back wages after finding that a contractor willfully violated the FLSA overtime regulations by paying workers for 40 hours by check and then paying them in cash at a straight-time rate for hours worked over 40.</p> <p><i>This is a willful violation because FLSA violations are willful under the Order if back wages for greater than two years are assessed. Conversely, if the court had ordered the payment of back wages for only two years, the violation would not be willful under the Order.</i></p> <p>WHD finds that a contractor employed a 13-year-old child to operate a forklift. In recognition of the contractor’s reckless disregard of its obligations under child labor laws, WHD assesses the contractor civil monetary penalties for the violation.</p> |

| Labor law   | Example of willful violation   |
|---|--|
| Occupational Safety and Health (OSH) Act.                       | <p><i>This is a willful violation because civil monetary penalties were assessed on the grounds that the violation was willful under the FLSA. Conversely, if, for example, WHD had found that a contractor had inadvertently allowed a 15-year-old, who was about to turn 16 years old, to work as a file clerk during school hours, and WHD did not assess any civil monetary penalties, the violation would not be willful under the Order.</i></p> <p>The Indiana Commissioner of Labor issued a Safety Order finding that a refinery committed a “knowing” violation of the Indiana Occupational Safety and Health Act (an OSHA State Plan) by failing to properly train truck drivers in a propane loading system, which resulted in an explosion.</p> <p><i>This is a willful violation because all citations designated as willful by OSHA—or equivalent state documents designated similarly (e.g., as “knowing”) by an OSHA State Plan—are willful under the Order. Conversely, had the Safety Order not designated the violation as willful or some other equivalent state designation, the violation would not be willful under the Order.</i></p> |
| Migrant and Seasonal Agricultural Worker Protection Act (MSPA). | <p>An ALJ issued an order finding that the contractor was warned by an official from WHD that the housing the contractor was providing to migrant and seasonal agricultural workers did not comply with required safety and health standards and that the contractor then failed to make the required repairs or corrections.</p> <p><i>This is a willful violation because the findings of the ALJ support a conclusion that the contractor knew, based on the warning of the WHD official, that its conduct was prohibited by law, yet continued to engage in the prohibited conduct. Conversely, if, for example, the ALJ’s findings indicated that the contractor did not receive any warning from WHD and, after making a reasonable inquiry into its legal obligations, believed in good faith that its housing was fully in compliance with the relevant standards, the violation would not be willful under the Order.</i></p>   |
| National Labor Relations Act (NLRA) .....                       | <p>The NLRB issued a decision finding that a unionized roofing contractor set up a non-union alter ego corporation to avoid paying its employees the wages and benefits provided in its contract with the union.</p> <p><i>This is a willful violation because the NLRB’s finding that the contractor formed the alter ego corporation supports a conclusion that the employer was aware of its requirements under the NLRA, yet engaged in the prohibited conduct anyway. Conversely, had the contractor, for example, inadvertently failed to pay its workers the benefits specified in its contract because a human resources specialist had incorrectly calculated the workers’ seniority, the violation would not be willful.</i></p>   |
| Davis-Bacon Act (DBA) .....                                     | <p>An ALJ order affirming a violation of the DBA included a finding that the contractor manipulated payroll documents to make it appear as if it had paid workers the required prevailing wages.</p> <p><i>This is a willful violation because the findings of the ALJ support a conclusion that the contractor knew that its conduct was prohibited by the DBA. The ALJ’s finding that documents were falsified indicates that the contractor knew that it was required to pay the workers prevailing wages, yet paid them less anyway. Conversely, had the contractor, for example, failed to pay certain workers prevailing wages because of a good-faith misunderstanding about the workers’ proper classification for the purpose of DBA wage determinations, the violation would not be willful.</i></p>   |
| Service Contract Act (SCA) .....                                | <p>The DOL’s Administrative Review Board (ARB) affirmed WHD’s determination that a contractor violated the SCA. The order included a finding that the contractor documented the wages as paid, but required the workers to kick back a portion of their wages to the contractor.</p> <p><i>This is a willful violation because the findings of the ARB support a conclusion that the contractor knew that its conduct was prohibited by the SCA. The finding that the contractor required the workers to kick back wages paid indicates that the contractor knew that it was required to pay the workers prevailing wages, yet paid them less anyway. Conversely, had the ARB found, for example, that employees were not paid their required SCA wages because the contractor’s payroll system, due to a systems error, failed to include the most up-to-date SCA wage determinations, the violation would not be willful.</i></p>  |
| Executive Order 11246 (Equal Employment Opportunity).           | <p>An ALJ decision found that a contractor’s vice president knew that federal law prohibits discrimination on the basis of gender, but had a policy of not promoting women to managerial positions.</p> <p><i>This is a willful violation because the findings of the ALJ support a conclusion that the contractor knew that its discrimination was prohibited by law, but engaged in the conduct anyway. Conversely, had the contractor used a neutral procedure for selecting employees for promotion and validated this procedure in accordance with OFCCP regulations, but the procedure was ultimately determined by the ALJ to be discriminatory on the basis of gender because the contractor did not fully comply with validation requirements, the violation would not be willful.</i></p>  |
| Section 503 of the Rehabilitation Act .....                     | <p>An ARB decision found that a contractor refused to hire any individuals with physical disabilities, and that in doing so, the contractor made no attempt whatsoever to determine whether any of these individuals’ disabilities would affect their abilities to do the jobs for which they applied.</p> <p><i>This is a willful violation because the findings of the ARB support a conclusion that the contractor acted in reckless disregard of its obligations under Section 503 of the Rehabilitation Act. Conversely, had the ARB found that the contractor made good-faith efforts to determine whether the applicants’ disabilities affected their abilities to do the jobs for which they applied, but submitted insufficient evidence to support its claim that accommodations would impose an undue burden, the violation would not be willful.</i></p>   |
| Vietnam Era Veterans’ Readjustment Assistance Act (VEVRAA).     | <p>An ALJ decision finding hiring discrimination in violation of VEVRAA made a factual finding that each time a veteran covered by VEVRAA’s protections applied for a job with a contractor, the reasons cited by the contractor as a basis not to hire that individual were pretextual.</p>   |

| Labor law   | Example of willful violation  |
|---|---|
| Family and Medical Leave Act (FMLA) .....             | <p><i>This is a willful violation because the findings of the ALJ support a conclusion that the contractor knew that its conduct was prohibited by VEVRAA, yet sought to hide its discriminatory practices by creating pretextual reasons for its refusal to hire covered veterans. Conversely, had the contractor used a neutral procedure for selecting employees that the contractor claimed was job-related and consistent with business necessity, but the procedure was ultimately determined by the ALJ to be discriminatory against veterans, the violation would not be willful.</i></p> <p>After suit in federal district court by a private litigant, the court issued a decision that included findings that the contractor's employee handbook provided for unpaid leave to employees with serious health conditions as required by the FMLA, but that the contractor in practice erected unnecessary hurdles to employees requesting such leave.</p>  |
| Title VII of the Civil Rights Act of 1964 .....       | <p><i>This is a willful violation because the court's findings support a conclusion that the contractor knew of its requirements under the FMLA, yet violated these requirements. Conversely, had the court's decision instead found that the contractor's actions were based on a good-faith misunderstanding of the FMLA's provisions concerning medical certification, the violation would not be willful.</i></p> <p>After a federal district court trial finding the contractor liable for sexual harassment, the factfinder assessed punitive damages after finding that the contractor engaged in a discriminatory practice with malice or reckless indifference to the federally protected rights of an aggrieved individual because the employer's anti-harassment policy was ineffective and a manager, after receiving a complaint of sexual harassment, failed to report it or investigate it.</p>  |
| Americans with Disabilities Act of 1990 (ADA).        | <p><i>This is a willful violation because Title VII violations are willful under the Order if the enforcement agency, court, arbitrator, or arbitral panel assessed or awarded punitive damages for a violation where the contractor or subcontractor engaged in a discriminatory practice with malice or reckless indifference to the federally protected rights of an aggrieved individual. Conversely, had the district court not awarded any punitive damages, the violation would not be willful.</i></p> <p>After a trial in federal court, the factfinder assessed punitive damages after finding that the contractor engaged in an ADA-prohibited discriminatory practice with malice or reckless indifference to the federally protected rights of an aggrieved individual, and the contractor could not demonstrate good faith.</p>   |
| Age Discrimination in Employment Act of 1967 (ADEA).  | <p><i>This is a willful violation because ADA violations are willful under the Order if the enforcement agency, court, arbitrator, or arbitral panel assessed or awarded punitive damages for a violation where the contractor or subcontractor engaged in a discriminatory practice with malice or reckless indifference to the federally protected rights of an aggrieved individual. Conversely, had the factfinder not assessed punitive damages, the violation would not be willful.</i></p> <p>An arbitral award included liquidated damages for a willful violation of the ADEA.</p>   |
| Executive Order 13658 (Minimum Wage for Contractors). | <p><i>This is a willful violation because ADEA violations are willful under the Order if the enforcement agency, court, arbitrator, or arbitral panel assessed or awarded liquidated damages. Conversely, had the arbitrator not awarded any liquidated damages, the violation would not be willful.</i></p> <p>An ALJ order affirming a violation of Executive Order 13658 included a finding that the employer, an experienced and sophisticated government contractor, made no effort whatsoever to determine what its minimum wage obligations were or whether its workers were employees or independent contractors, but instead chose to pay them a flat fee that fell well short of the requirements of Executive Order 13658.</p> <p><i>This is a willful violation because the ALJ order shows that the contractor made no effort whatsoever to learn or understand whether it was complying with the law, which supports a conclusion that the contractor was acting in reckless disregard or plain indifference of its requirements under Executive Order 13658. Conversely, if the employer in question was a small business and a new federal government contractor and the employer, after reading the regulations implementing Executive Order 13658, mistakenly concluded in good faith that it was not covered by these minimum wage requirements, the violation would not be willful.</i></p> |

**Appendix C: Examples of Repeated Violations**

All violations of federal labor laws are serious, but in the context of Executive Order 13673, Fair Pay and Safe Workplaces, the Department of Labor has identified certain violations as "serious," "willful," "repeated," and "pervasive." This subset of all labor violations represents the violations that are most concerning and bear on the assessment of a contractor or subcontractor's integrity and business ethics. The Department has purposely excluded from consideration violations that could be characterized as inadvertent or minimally impactful. Ultimately, each contractor's disclosed violations of Labor Laws will be assessed on a case-by-case basis in light of the totality of the circumstances, including the severity of the violation or violations, the size of the contractor, and any mitigating factors. In most cases, even for violations subject to disclosure and consideration under the Order, a single violation of one of the Labor Laws will not give rise to a determination of lack of responsibility.

The chart below includes a non-exhaustive list of examples of Labor Laws violations that may be found to be "repeated" under the Department's proposed guidance for Executive Order 13673. *These are examples only: They are not minimum requirements, nor are they exclusive of other violations under each Labor Law that may be repeated.* The chart does not include violations of "equivalent state laws," which are also covered by the Order, but (with the exception of OSHA State Plans, which are addressed in the current proposed guidance) will be addressed in future guidance.

**Summary of Definition of "Repeated Violation"**

The full definition of a "repeated violation" is set forth in section III.C of the Department of Labor's proposed guidance. When evaluating violations, Labor Compliance Advisors and contracting officers, and contractors when evaluating subcontractors, should refer to the full definition in the proposed guidance.

In summary, the guidance provides that a violation of one of the Labor Laws is repeated if it is the same as or substantially similar to one or more other violations of the Labor Laws by the contractor or subcontractor. “Substantially similar” does not mean exactly the same; rather, two things may be substantially similar where they share essential elements in common. Whether violations fall under the same Labor Law is not determinative of whether the requirements underlying those violations are substantially similar; rather, this inquiry turns on the nature of the violation and underlying obligation itself.

The same or substantially similar other violation(s) must be reflected in one or more civil judgments, arbitral awards or decisions, or adjudicated or uncontested administrative merits determinations issued within the last three years, and must be the subject of one or more separate investigations or proceedings. Repeated violations may be considered on an enterprise-wide basis; thus, a prior violation by any establishment of a multi-establishment enterprise can render subsequent violations repeated, provided the other relevant criteria are satisfied.

The guidance provides further detail on the meaning of an “adjudicated or uncontested” administrative merits determination, what constitutes a “substantially similar” violation, and other aspects of the definition.

*When evaluating Labor Laws violations, Labor Compliance Advisors and contracting officers, and contractors when evaluating subcontractors, will review the full definition to determine whether a violation is repeated.* The examples below are intended to illustrate how the definition may be applied in different contexts, but a violation can be deemed repeated as long as it meets the criteria set forth in the guidance.

| Labor law   | Example of repeated violation   |
|---|---|
| Fair Labor Standards Act (FLSA) .....                           | <p>The Wage and Hour Division (WHD) found that a software company violated overtime provisions of the FLSA after misclassifying employees at one facility as independent contractors. The company did not dispute the violation and agreed to pay back wages by signing a Form WH-56. A year later, the Secretary filed a complaint in federal court stating that an investigation of a different facility of the same company disclosed violations of the FLSA minimum wage provision.</p> <p><i>The second violation is a repeated violation because it is substantially similar to a prior violation reflected in an uncontested administrative merits determination. The first violation is “uncontested” because the company did not dispute the violation. The violations are substantially similar because even though the first violation involved overtime and the second involved minimum wage, both violations involved failure by the same company to pay workers their proper wages. Conversely, had one of the two violations instead involved, for example, the company’s failure to follow the FLSA’s requirements to provide break time for nursing mothers, the violations would not be substantially similar and the second violation therefore would not be repeated.</i></p>   |
| Occupational Safety and Health (OSH) Act.                       | <p>OSHA issued a citation to a contractor for failing to provide fall protection on a residential construction site. The citation was later affirmed by an administrative law judge (ALJ) at the Occupational Safety and Health Review Commission (OSHRC). OSHA later issued a second citation against the same contractor for failing to provide fall protection at a commercial construction site.</p> <p><i>The second violation is a repeated violation because it is substantially similar to a prior violation reflected in an adjudicated administrative merits determination. The first citation is an “adjudicated” administrative merits determination once it is affirmed by the ALJ, because the contractor had an opportunity to contest the citation and present its case before the ALJ. Had the ALJ reversed the first citation, the second violation would not be a repeated violation. (Had the employer not contested the first violation at all, it would be an “uncontested” administrative merits determination and the second violation would be “repeated” for that reason.) The second violation is substantially similar to the first because even though residential and commercial construction sites have different regulatory standards for fall protection, the hazards involved are substantially similar. Conversely, had one of the two violations instead involved, for example, the contractor’s failure to properly store hazardous materials, the violations would not be substantially similar and the second violation therefore would not be repeated.</i></p> |
| Migrant and Seasonal Agricultural Worker Protection Act (MSPA). | <p>A district court issued an order enjoining a farm labor contractor’s practice of requiring workers to purchase goods or services solely from a particular company, in violation of MSPA. Later, the Wage and Hour Division assessed civil monetary penalties after finding that the farm labor contractor failed to pay MSPA-covered workers their wages when due.</p> <p><i>The second violation is a repeated violation because it is substantially similar to a prior violation reflected in a civil judgment. Even though the violations are not identical, under MSPA, multiple violations of the statute’s requirements pertaining to wages, supplies, and working arrangements are substantially similar. (Likewise, under MSPA, any two violations of any of MSPA’s requirements related to health and safety are substantially similar to each other. The same is true for any two violations of the statute’s disclosure and recordkeeping requirements, or any two violations related to its registration requirements.) Conversely, had the contractor, for example, committed one MSPA violation for requiring workers to purchase goods or services solely from a particular company, and a second MSPA violation for failure to comply with MSPA’s transportation safety standards, the violations would not be substantially similar and the second violation therefore would not be repeated.</i></p>   |
| National Labor Relations Act (NLRA) .....                       | <p>An National Labor Relations Board (NLRB) Administrative Law Judge (ALJ) issued a decision finding that a contractor violated section 8(a)(3), which prohibits employers from discriminating against employees for engaging in or refusing to engage in union activities, by discharging employees who led a union organizational campaign. Two years later, a Regional Director issued a complaint under section 8(a)(3) against the same contractor at a different location for discharging two union representatives at a plant after they organized a one-day strike to protest low wages.</p>  |

| Labor law   | Example of repeated violation   |
|---|---|
| Davis-Bacon Act (DBA) .....                                 | <p><i>The second violation is a repeated violation because it is substantially similar to a prior violation reflected in an adjudicated administrative merits determination. The first violation is an “adjudicated” administrative merits determination because the contractor had an opportunity to contest the violation and present its case before the ALJ. The violations are substantially similar because both involved discharges under section 8(a)(3) of the NLRA. Conversely, had one of the two violations been a violation of section 8(a)(2), which prohibits an employer from dominating or interfering with the formation nor administration of a labor union through financial support or otherwise—for example, had the contractor offered assistance to one union but not to another during an organizational campaign—the two violations would not be substantially similar and the second violation would therefore not be repeated.</i></p> <p>A federal district court granted a preliminary injunction enjoining a contractor from further violations of the overtime provisions of the FLSA. Subsequently, WHD sent the contractor a letter finding that the contractor violated the DBA by failing to pay workers at a different worksite their prevailing wages.</p> <p><i>The second violation is a repeated violation because it is substantially similar to a prior violation reflected in a civil judgment. Even though the contractor violated two different statutes, the violations are substantially similar because both involve the practice of failing to pay wages required by law. Conversely, had the first violation instead involved, for example, the contractor’s failure to provide a reasonable accommodation to an employee with a disability under the ADA, the two violations would not be substantially similar and the second violation would therefore not be repeated.</i></p> |
| Service Contract Act (SCA) .....                            | <p>The Department’s Administrative Review Board (ARB) issued an order finding that a contractor failed to pay workers covered by Executive Order 13658 the minimum wage of \$10.10 per hour. Subsequently, WHD issued a letter indicating that an investigation disclosed a violation of the SCA because the contractor failed to pay service workers their required amount of fringe benefits.</p> <p><i>The second violation is a repeated violation because it is substantially similar to a prior violation reflected in an adjudicated administrative merits determination. The first violation is an “adjudicated” administrative merits determination because the contractor had an opportunity to contest the violation and present its case before the ARB. Even though the contractor violated two different Labor Laws, the violations are substantially similar because both involve the practice of failing to pay wages required by law. Conversely, if the first violation was the subject of a determination by the Department’s Wage and Hour Division that the contractor challenged before an ALJ, and the ALJ proceeding was still pending at the time of the second violation, the second violation would not be a repeated violation because the first violation would not be an adjudicated or uncontested administrative merits determination.</i></p>  |
| Executive Order 11246 (Equal Employment Opportunity).       | <p>An arbitrator found that a contractor created a hostile work environment for African-American workers in violation of Title VII. Subsequently, OFCCP issued a show cause notice finding that the same contractor failed to comply with the nondiscrimination requirements of Executive Order 11246 by failing to hire qualified Asian workers.</p> <p><i>The second violation is a repeated violation because it is substantially similar to a prior violation reflected in an arbitral award. These violations are substantially similar because violations of Title VII, Section 503, the ADA, the ADEA, the Equal Pay Act, Executive Order 11246, and VEVRAA are substantially similar when they involve the same or an overlapping protected status. In this case, both violations involved discrimination on the basis of race. Conversely, if the first violation had instead involved discrimination by the contractor on the basis of gender, the two violations would not be substantially similar and the second violation would therefore not be repeated.</i></p>  |
| Section 503 of the Rehabilitation Act .....                 | <p>A federal district court granted a private plaintiff summary judgment in a claim against a contractor under the ADA alleging constructive discharge and the failure to provide a reasonable accommodation for the plaintiff’s disability. Subsequently, the ARB affirmed an ALJ order directing the same contractor to change a practice of medical screenings that discriminated against job applicants with disabilities in violation of Section 503 of the Rehabilitation Act.</p> <p><i>The second violation is a repeated violation because it is substantially similar to a prior violation reflected in a civil judgment. These violations are substantially similar because violations of Title VII, Section 503, the ADA, the ADEA, the Equal Pay Act, Executive Order 11246, and VEVRAA are substantially similar when they involve the same or an overlapping protected status. In this case, both violations involved discrimination on the basis of a disability. Conversely, if the first violation had instead involved the contractor’s failure to provide a reasonable accommodation of an employee’s religious beliefs under Title VII, the two violations would not be substantially similar and the second violation would therefore not be repeated.</i></p>  |
| Vietnam Era Veterans’ Readjustment Assistance Act (VEVRAA). | <p>An ALJ issued an order finding that the contractor violated VEVRAA by discriminating against protected veterans during the hiring process. Subsequently, in a separate compliance evaluation, OFCCP issued a show cause notice indicating that the same contractor failed to promote employees who were protected veterans to higher-level positions.</p> <p><i>The second violation is a repeated violation because it is substantially similar to a prior violation reflected in an adjudicated administrative merits determination. The first violation is an “adjudicated” administrative merits determination because the contractor had an opportunity to contest the violation and present its case before the ALJ. These violations are substantially similar because violations of Title VII, Section 503, the ADA, the ADEA, the Equal Pay Act, Executive Order 11246, and VEVRAA are substantially similar when they involve the same or an overlapping protected status. In this case, both violations involved discrimination on the basis of protected veterans’ status. Conversely, if the first violation had instead involved discrimination on the basis of race under Executive Order 11246, the two violations would not be substantially similar and the second violation would therefore not be repeated.</i></p>  |

| Labor law   | Example of repeated violation  |
|---|--|
| Family and Medical Leave Act (FMLA) .....             | <p>A court found that a contractor had failed to reinstate an employee to the same or an equivalent position after the employee took FMLA leave. Subsequently, the Wage and Hour Division, after an investigation, filed suit against the employer challenging the employer's denial of another employee's request for FMLA leave.</p> <p><i>The second violation is repeated because it is substantially similar to a prior violation that was reflected in a civil judgment. Although the violations are not identical, under the FMLA, any two violations would generally be considered substantially similar to each other, with the exception of violations of the notice requirements. Conversely, had the first violation involved the contractor's failure to provide notice to employees of their FMLA rights and the second involved either denial of leave or failure to reinstate an employee, the two violations would not be substantially similar and the second violation would therefore not be repeated.</i></p>   |
| Title VII of the Civil Rights Act of 1964 .....       | <p>OFCCP issued a show cause notice finding that the contractor violated Executive Order 11246 by systemically paying women at one of its locations less than similarly situated men. The contractor did not contest the show cause notice and eventually settles the matter. Subsequently, the EEOC issued a letter of determination that reasonable cause existed to believe that the same contractor had engaged in unlawful harassment against women at another one of its locations.</p> <p><i>The second violation is a repeated violation because it is substantially similar to a prior violation reflected in an uncontested administrative merits determination. The first violation is "uncontested" because the company did not dispute the violation. These violations are substantially similar because violations of Title VII, Section 503, the ADA, the ADEA, the Equal Pay Act, Executive Order 11246, and VEVRAA are substantially similar when they involve the same protected status. In this case, both violations involved discrimination on the basis of gender. Conversely, if the contractor had challenged the first notice before an ALJ and if the proceeding was still pending at the time of the second violation, the second violation would not be a repeated violation because the first violation would not be an adjudicated or uncontested administrative merits determination.</i></p> |
| Americans with Disabilities Act of 1990 (ADA).        | <p>The ARB affirmed an ALJ order under Section 503 of the Rehabilitation Act directing the contractor to grant reasonable accommodations to employees with visual impairments. Subsequently, a federal district court granted a private plaintiff summary judgment in her ADA claim of constructive discharge.</p> <p><i>The second violation is a repeated violation because it is substantially similar to a prior violation reflected in an adjudicated administrative merits determination. The first violation is an "adjudicated" administrative merits determination because the contractor had an opportunity to contest the violation and present its case before the ALJ. These violations are substantially similar because violations of Title VII, Section 503, the ADA, the ADEA, the Equal Pay Act, Executive Order 11246, and VEVRAA are substantially similar when they involve the same protected status. In this case, both violations involved discrimination on the basis of a disability. Conversely, had one of the two violations involved, for example, failure to grant FMLA leave to an employee for birth of a child, the two violations would not be substantially similar and the second violation would therefore not be repeated.</i></p>  |
| Age Discrimination in Employment Act of 1967 (ADEA).  | <p>An arbitrator found that a contractor violated the ADEA by constructively discharging several employees over the age of 60. Subsequently, in an ADEA private action brought in federal district court, the court found that the contractor unlawfully discriminated against the plaintiff on the basis of age when it failed to hire him.</p> <p><i>The second violation is a repeated violation because it is substantially similar to a prior violation reflected in an arbitral award. These violations are substantially similar because violations of Title VII, Section 503, the ADA, the ADEA, the Equal Pay Act, Executive Order 11246, and VEVRAA are substantially similar when they involve the same protected status. In this case, both violations involved discrimination on the basis of age. Conversely, had one of the two violations involved, for example, discrimination on the basis of the employee's status as a protected veteran, the two violations would not be substantially similar and the second violation would therefore not be repeated.</i></p>  |
| Executive Order 13658 (Minimum Wage for Contractors). | <p>In a private action, a federal court of appeals affirmed a finding that the contractor was liable for failing to pay wages due under the FLSA. Subsequently, WHD issued an Investigative Findings Letter stating that an investigation disclosed a violation of Executive Order 13658.</p> <p><i>The second violation is a repeated violation because it is substantially similar to a prior violation reflected in a civil judgment. Even though the contractor violated two different Labor Laws, the violations are substantially similar because both involve the practice of failing to pay wages required by law. Conversely, had one of the two violations involved, for example, the contractor's violation of the OSH Act for failure to properly abate workplace hazards, the two violations would not be substantially similar and the second violation would therefore not be repeated.</i></p>   |

#### Appendix D: Examples of Pervasive Violations

All violations of federal labor laws are serious, but in the context of Executive Order 13673, Fair Pay and Safe Workplaces, the Department of Labor has identified certain violations as "serious," "willful," "repeated," and "pervasive." This subset of all labor violations represents the violations that are most concerning and bear on the assessment of a contractor or subcontractor's integrity and business ethics. The Department has purposely excluded from consideration violations that could be characterized as inadvertent or minimally impactful. Ultimately, each contractor's disclosed violations of Labor Laws will be assessed on a case-by-case basis in light of the totality of the circumstances, including the severity of the violation or violations, the size of the contractor, and any mitigating factors. In most cases, even for violations subject to disclosure and consideration under the Order, a single violation of one of the Labor Laws will not give rise to a determination of lack of responsibility.

The chart below includes a non-exhaustive list of examples of Labor Laws violations that may be found to be “pervasive” under the Department’s proposed guidance for Executive Order 13673. *These are examples only: they are not minimum requirements, nor are they exclusive of other violations under each Labor Law that may be pervasive.* The chart does not include violations of “equivalent state laws,” which are also covered by the Order, but (with the exception of OSHA State Plans, which are addressed in the current proposed guidance) will be addressed in future guidance.

#### Summary of Definition of “Pervasive Violation”

The full definition of a “pervasive violation” is set forth in section III.D of the Department of Labor’s proposed guidance. When evaluating violations, Labor Compliance Advisors and contracting officers, and contractors when evaluating subcontractors, should refer to the full definition in the proposed guidance.

In summary, the guidance provides that violations of the Labor Laws are “pervasive” if they reflect a basic disregard by the contractor or subcontractor for the Labor Laws as demonstrated by a pattern of serious or willful violations, continuing violations, or numerous violations. Violations must be multiple to be pervasive, although the number of violations necessarily depends on the size of the contractor or subcontractor, because larger employers, by virtue of their size, are more likely to have multiple violations. To be pervasive, the violations need not be of the same or similar requirements of the Labor Laws. Pervasive violations may exist where the contractor or subcontractor commits multiple violations of the same Labor Law, regardless of their similarity, or violations of more than one of the Labor Laws. This category is intended to identify those contractors and subcontractors whose numerous violations of Labor Laws indicate that they may view sanctions for their violations as merely part of the “cost of doing business,” an attitude that is inconsistent with the level of responsibility required by the FAR.

*When evaluating Labor Laws violations, Labor Compliance Advisors and contracting officers, and contractors when evaluating subcontractors, will review the full definition to determine whether a violation is pervasive. Additionally, Labor Compliance Advisors, and contractors evaluating subcontractors, are strongly encouraged to consult with the Department of Labor when determining whether violations are pervasive.* The examples below are intended to illustrate how the definition may be applied in different contexts, but a violation can be deemed pervasive as long as it meets the criteria set forth in the guidance.

#### Examples of Pervasive Violations (not specific to any particular statute)

A medium-sized company that provides janitorial services at federal facilities was found to have violated the SCA for failure to pay workers their required wages, Title VII for discrimination in hiring on the basis of national origin, the NLRA for demoting workers who are seeking to organize a union, and the FMLA for denying workers unpaid leave for serious health conditions.

*These violations are pervasive because while the violations are substantively different from each other, a medium-sized employer that violates so many Labor Laws is demonstrating a basic disregard for its legal obligations to its workers and is committing pervasive violations.*

A 100-employee IT consulting company was found to have violated EO 11246 for systematically failing to promote women to managerial positions, the FLSA for failing to pay workers overtime after misclassifying them as independent contractors, and the ADEA for constructively discharging employees who were age 60 or over.

*These violations are pervasive because while substantively different from each other, a small employer that violates Labor Laws to this degree is demonstrating a basic disregard for its legal obligations to its workers and is committing pervasive violations.*

The Wage and Hour Division issued several Form WH-103 “Employment of Minors Contrary to The Fair Labor Standards Act” notices finding that a clothing manufacturer that provides custom-made uniforms for federal employees employed numerous underage workers in violation of the child labor provisions of the FLSA. Despite receiving these notices, the contractor failed to make efforts to change its practices and continued to violate the FLSA’s child labor provisions repeatedly.

*These violations are pervasive because they are a series of repeated violations in which the contractor, despite knowledge of its violations and several repeated notices from WHD, failed to make efforts to change its practices and continued to violate the law repeatedly.*

OSHA cited a small tools manufacturer with a single location multiple times for a variety of serious violations in the same investigation—once for improper storage of hazardous materials, once for failure to provide employees with protective equipment, once for inadequate safeguards on heavy machinery, once for lack of fall protection, once for insufficient ventilation, once for unsafe noise exposure, and once for inadequate emergency exits. The manufacturer does not have a process for identifying and eliminating serious health hazards.

*These violations are pervasive because such a high number of serious workplace safety and health violations relative to the size of a small company with only a single location and the lack of an effective process to identify and eliminate serious violations (hazards) in its workplace constitute basic disregard by the contractor for worker safety and health. Even though these violations would not be “repeated” because they arose during the same investigation and because they do not involve substantially similar hazards, they would be considered pervasive.*

An ALJ at OSHRC found that although the chief safety officer at a chemical plant fielded complaints from workers about several unsafe working conditions, he failed to take action to remedy the unsafe conditions, resulting in numerous willful OSH Act violations.

*These violations are pervasive because the dangerous working conditions were willfully sanctioned by a high-level company official and were evident throughout the chemical plant. When Labor Laws are violated with either the explicit or implicit approval of higher-level management, such approval signals that future violations will be tolerated or condoned, and may dissuade workers from reporting violations or raising complaints. Such violations also indicate that the company does not voluntarily eliminate hazards, but instead views penalties for such violations as “the cost of doing business,” rather than as indicative of significant threats to its workers’ health and safety that must be addressed. Thus, to the extent that higher-level management officials were involved in violations themselves, or knew of violations and failed to have an effective process to identify and correct serious violations in their workplace, the violations are more likely to be deemed pervasive.*

A large company that provides laundry services to military bases in several states is cited 50 times for serious OSHA violations over the span of one year. The violations affect most of its locations, and a number of the citations are for high gravity serious failures to abate dangerous conditions that OSHA had cited previously. As a result, the company is placed on OSHA’s Severe Violator Enforcement Program.

*These violations are pervasive, notwithstanding the large size of the contractor, because the sheer number of high gravity serious violations over such a short period of time is evidence that the company is ignoring persistent threats to workers’ safety, fails to treat safety as a serious problem, and is acting in disregard of its legal obligations. Conversely, if the violations affected only a few of the company’s facilities, or if the company had acted quickly to abate any violations, the violations might not necessarily be considered pervasive.*

A federal district court decision in a class-action lawsuit included a finding that the vice president of a construction company directed a foreman not to hire Native American workers, and as a result, the company is found to have committed numerous Title VII violations against job applicants.

*These violations are pervasive because a high-level company official actively participated in the discriminatory conduct, resulting in numerous violations. Even though these violations would not be “repeated” because they arose during the same proceeding, they would be considered pervasive. While violations must be multiple to be pervasive, a single liability determination in a class proceeding may be considered “multiple” violations for a determination of pervasiveness.*

While a union was conducting an organizational campaign at a large manufacturer, the contractor held several captive-audience speeches for all of its workers at each of its factories for an extended period of time, threatening the workers with disciplinary measures if they voted to join the union in violation of the National Labor Relations Act (NLRA). In addition, the Wage and Hour Division finds that the company failed to pay overtime to its workers at the vast majority of its locations in violation of the Fair Labor Standards Act.

*These violations are pervasive, notwithstanding the large size of the contractor, because the contractor committed multiple serious violations affecting significant numbers of its workers. Conversely, if the contractor made its threatening remarks to only a few of its workers, or if the overtime violations only existed at a few of the contractor's locations, the violations might not necessarily be considered pervasive.*

The Department of Labor's Office of Federal Contract Compliance Programs finds, through enterprise-wide enforcement, that a large contractor that provides food services at federal agencies nationwide used pre-employment screening tests for most jobs at the company's facilities that resulted in Hispanic workers being hired at a significantly lower rate than non-Hispanic workers over a 5-year period. In addition, the Wage and Hour Division finds that the company failed to comply with the Service Contract Act's requirements to pay its workers prevailing wages at many of its locations.

*These violations are likely pervasive, notwithstanding the large size of the contractor, because the contractor's numerous serious violations spanned most of its locations and affected many of its workers. Conversely, had the company engaged in these prohibited practices at only a few of its locations, such violations might not necessarily be considered pervasive.*

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### Appendix E: Assessing Violations of the Labor Laws

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Appendices A through D provide summary definitions and examples of Labor Laws violations that are "serious," "willful," "repeated," and "pervasive" under Executive Order 13673, Fair Pay and Safe Workplaces. A Labor Compliance Advisor and contracting officer, or contractor when evaluating subcontractors, will determine whether violations reported under the Order fit into these categories, which represent the violations that are most concerning and bear on an assessment of a contractor or subcontractor's integrity and business ethics. The contracting officer with the assistance of the Labor Compliance Advisor, or the contractor when evaluating subcontractors, will then assess a contractor or subcontractor's serious, willful, repeated, and pervasive violations in determining whether the contractor or subcontractor is a responsible source with a satisfactory record of integrity and business ethics.

Each contractor or subcontractor's disclosed violations will be assessed on a case-by-case basis in light of the totality of the circumstances, including the severity of the violation or violations, the size of the contractor, and any mitigating factors. The extent to which a contractor or subcontractor has remediated violations of Labor Laws, including agreements entered into by contractors or subcontractors with enforcement agencies, will be given particular weight in this regard.

In most cases, even for violations subject to disclosure and consideration under the Order, a single violation of one of the Labor Laws will not give rise to a determination of lack of responsibility. In contrast, pervasive violations and violations of particular gravity, for example, will in most cases result in the need for a Labor Compliance Agreement.

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### Violations of Particular Concern

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The following types of violations raise particular concerns regarding the contractor's or subcontractor's compliance with the Labor Laws:

- Pervasive violations. Pervasive violations, by definition, demonstrate a basic disregard for the Labor Laws. Such disregard of legal obligations creates a heightened danger that the contractor or subcontractor may, in turn, disregard its contractual obligations as well. Additionally, such contractors and subcontractors are more likely to violate the Labor Laws in the future, and those violations—and any enforcement proceedings or litigation that may ensue—may imperil their ability to meet their obligations under a contract. The fact that a contractor or subcontractor shows such disregard for the Labor Laws is highly probative of whether the contractor or subcontractor lacks integrity and business ethics.
- Violations that are serious AND repeated, serious AND willful, or willful AND repeated. A violation that falls into two or more these categories, as a general matter, is more likely to be probative of the contractor's or subcontractor's lack of integrity and business ethics than a violation that falls into only one of those categories.
- Violations that are reflected in final orders. To the extent that the judgment, determination, or order finding a Labor Law violation is final (because appeals and opportunities for further review have been exhausted or were not pursued), the violation should be given greater weight. Likewise, where a violation has not resulted in a final judgment, determination, or order, it should be given lesser weight.
- Violations of particular gravity. Certain Labor Laws violations that are serious under the Order should be given greater weight, including:
  - Violations related to the death of an employee;
  - Violations involving a termination of employment for exercising a right protected under the Labor Laws;
  - Violations that detrimentally impact the working conditions of all or nearly all of the workforce at a worksite; and
  - Violations where the amount of back wages, penalties, and other damages awarded is greater than \$100,000.

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### Mitigating Factors

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Various factors may mitigate the existence of a contractor or subcontractor's Labor Laws violations. The Department respects the fact that most employers endeavor to comply with the Labor Laws. The Department values highly contractors' and subcontractors' good-faith efforts to comply, and it encourages them to report these efforts, including workplace policies that foster compliance. The following are the most common factors that will mitigate the existence of one or more violations in the context of a responsibility determination. This list is not exclusive, and contractors and subcontractors are encouraged to report any factors they believe may mitigate the existence of a violation:

- Remediation of the violation(s), including Labor Compliance Agreements: Typically the most important factor that can mitigate the existence of a violation, remediation is an indication that a contractor or subcontractor has assumed responsibility for a violation and has taken steps to bring itself into compliance with the law going forward. In most cases, for remediation to be considered mitigating, it should involve two components:
  - Correction of the violation: The remediation should correct the violation itself, including by making any affected workers whole. For example, this could involve abating a dangerous hazard, paying workers their back wages owed, or reinstating a wrongfully discharged employee.
  - Efforts to prevent similar violations in the future: For example, if a contractor or subcontractor improperly misclassified workers as exempt from the FLSA and pays any back wages due to the workers without reviewing its classifications of the workers going forward, it will likely commit similar violations in the future. Particular consideration will be given where the contractor or subcontractor has implemented remediation on an enterprise-wide level or has entered into an enhanced settlement agreement with the relevant enforcement agency or agencies that goes beyond what is minimally required under the law to address appropriate remedial or compliance measures.

One specific type of remediation is a Labor Compliance Agreement, which is an agreement entered into between an enforcement agency and a contractor or subcontractor to address appropriate remedial measures, compliance assistance, steps to resolve issues to increase compliance with labor laws, or other related matters. A Labor Compliance Agreement is an important mitigating factor because it indicates that the contractor or subcontractor recognizes the importance that the Federal Government places on compliance with the Labor Laws.

- Only one violation: In most cases, a single violation of a Labor Law may not necessarily give rise to a determination of lack of responsibility, depending on the nature of the violation. However, a contracting agency (or contractor evaluating subcontractors) is not precluded from making a determination of non-responsibility based on a single violation in the rare circumstances where it may be merited based on the totality of the circumstances.
  - Low number of violations relative to size: Larger employers, by virtue of their size, are more likely to have multiple violations than smaller ones. When assessing contractors or subcontractors with multiple violations, a contracting officer and Labor Compliance Advisor (or contractor evaluating subcontractors) should consider the size of the contractor or subcontractor.
  - Safety and health programs or grievance procedures: Implementation of a safety and health management program, such as OSHA's 1989 Safety and Health Program Management guidelines or any updates to those guidelines, grievance procedures (including collectively-bargained ones), monitoring arrangements negotiated as part of an enhanced settlement agreement, or other compliance programs foster a corporate culture in which workers are encouraged to raise legitimate concerns about Labor Laws violations without the fear of repercussions. Such programs and procedures may prompt workers to report violations that would, under other circumstances, go unreported. Therefore, the implementation of such programs or procedures will be considered a mitigating factor, particularly as to violations that might otherwise be deemed repeated or pervasive.
  - Recent legal or regulatory change: To the extent that the Labor Laws violations can be traced to a recent legal or regulatory change, that may be a mitigating factor. The change must be recent, and the violations must not have been violations but for the change.
  - Good faith and reasonable grounds: It may be a mitigating factor if the contractor or subcontractor shows that it made efforts to ascertain its legal obligations and to follow the law, and that its actions under the circumstances were objectively reasonable. For example, if a contractor or subcontractor acts in reasonable reliance on advice from a responsible official from the relevant enforcement agency, or an administrative or authoritative judicial ruling, such reliance will typically demonstrate good faith and reasonable grounds. This factor may also apply where the contractor's or subcontractor's legal obligations are unclear, such as when a new statute, rule, or standard is first implemented.
  - Significant period of compliance following violations: If, following one or more violations within the three-year reporting period, the contractor or subcontractor maintains a steady period of compliance with the Labor Laws, such compliance may mitigate the existence of prior violations (e.g., violations were reported from 2½ years ago and there have been none since).
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