DEPARTMENT OF LABOR

Office of the Secretary of Labor

29 CFR Parts 10 and 23

RIN 1235–AA41

Increasing the Minimum Wage for Federal Contractors

AGENCY: Wage and Hour Division, Department of Labor.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document proposes regulations to implement an Executive order titled ''Increasing the Minimum Wage for Federal Contractors,'' which was signed by President Joseph R. Biden Jr. on April 27, 2021. The Executive order states that the Federal Government's procurement interests in economy and efficiency are promoted when the Federal Government contracts with sources that adequately compensate their workers. The Executive order therefore seeks to raise the hourly minimum wage paid by those contractors to workers performing work on or in connection with covered Federal contracts to $15.00 per hour, beginning January 30, 2022; and beginning January 1, 2023, and annually thereafter, an amount determined by the Secretary of Labor (Secretary). The Executive order directs the Secretary to issue regulations by November 24, 2021, consistent with applicable law, to implement the order's requirements. This proposed rule therefore establishes standards and procedures for implementing and enforcing the minimum wage protections of the Executive order. As required by the order, the proposed rule incorporates to the extent practicable existing definitions, principles, procedures, remedies, and enforcement processes under the Fair Labor Standards Act of 1938, the Service Contract Act, the Davis-Bacon Act, and the Executive order of February 12, 2014, entitled ''Establishing a Minimum Wage for Contractors,'' as well as the regulations issued to implement that order.

DATES: Interested persons are invited to submit written comments on this notice of proposed rulemaking on or before August 23, 2021.

ADDRESSES: You may submit comments, identified by Regulatory Information Number (RIN) 1235–AA41, by either of the following methods: *Electronic Comments:* Submit comments through the Federal eRulemaking Portal at *http://www.regulations.gov.* Follow the instructions for submitting comments. *Mail:* Address written submissions to Division of Regulations, Legislation, and Interpretation, Wage and Hour Division, U.S. Department of Labor, Room S–3502, 200 Constitution Avenue NW, Washington, DC 20210. *Instructions:* Please submit only one copy of your comments by only one method. Commenters submitting file attachments on *www.regulations.gov* are advised that uploading text-recognized documents—*i.e.,* documents in a native file format or documents which have undergone optical character recognition (OCR)—enable staff at the Department to more easily search and retrieve specific content included in your comment for consideration. Anyone who submits a comment (including duplicate comments) should understand and expect that the comment will become a matter of public record and will be posted without change to *https://www.regulations.gov,* including any personal information provided. The Wage and Hour Division (WHD) posts comments gathered and submitted by a third-party organization as a group under a single document ID number on *https://www.regulations.gov.* Comments must be received by 11:59 p.m. on August 23, 2021 for consideration in this rulemaking. Commenters should transmit comments early to ensure timely receipt prior to the close of the comment period, as the Department continues to experience delays in the receipt of mail. Submit only one copy of your comments by only one method. *Docket:* For access to the docket to read background documents or comments, go to the Federal eRulemaking Portal at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Amy DeBisschop, Director of the Division of Regulations, Legislation, and Interpretation, Wage and Hour Division, U.S. Department of Labor, Room S–3502, 200 Constitution Avenue NW, Washington, DC 20210, telephone: (202) 693–0406 (this is not a toll-free number). *Accessible Format:* Copies of this notice of proposed rulemaking may be obtained in alternative formats (Rich Text Format (RTF) or text format (txt), a thumb drive, an MP3 file, large print, braille, audiotape, compact disc, or other accessible format), upon request, by calling (202) 693–0675 (this is not a toll-free number). TTY/TDD callers may dial toll-free (877) 889–5627 to obtain information or request materials in alternative formats.

Questions of interpretation or enforcement of the agency's existing regulations may be directed to the nearest WHD district office. Locate the nearest office by calling the WHD's toll-free help line at (866) 4US–WAGE ((866) 487–9243) between 8 a.m. and 5 p.m. in your local time zone, or log onto WHD's website at *https://www.dol.gov//whd/contact/local-offices* for a nationwide listing of WHD district and area offices.

SUPPLEMENTARY INFORMATION:

I. Background

On April 27, 2021, President Joseph R. Biden Jr. issued Executive Order 14026, ''Increasing the Minimum Wage for Federal Contractors.'' This Executive order explains that increasing the hourly minimum wage paid to workers performing on or in connection with covered Federal contracts to $15.00 beginning January 30, 2022 will ''bolster economy and efficiency in Federal procurement.'' 86 FR 22835. The order builds on the foundation established by Executive Order 13658, ''Establishing a Minimum Wage for Contractors,'' which was signed by President Barack Obama on February 12, 2014. *See* 79 FR 9851. Before discussing Executive Order 14026 in greater detail, the Department provides a high-level summary of the relevant history leading to the issuance of this order.

A. Prior Relevant Executive Orders

On February 12, 2014, President Barack Obama signed Executive Order 13658, ''Establishing a Minimum Wage for Contractors.'' *See* 79 FR 9851. Executive Order 13658 stated that the Federal Government's procurement interests in economy and efficiency are promoted when the Federal Government contracts with sources that adequately compensate their workers. *Id.* Executive Order 13658 therefore sought to increase efficiency and cost savings in the work performed by parties that contract with the Federal Government by raising the hourly minimum wage paid by those contractors to workers performing on or in connection with covered Federal contracts to: (i) $10.10 per hour, beginning January 1, 2015; and (ii) beginning January 1, 2016, and annually thereafter, an amount determined and announced by the Secretary, accounting for changes in inflation as measured by the Consumer Price Index. *Id.* Section 3 of Executive Order 13658 also established a minimum hourly cash wage requirement for tipped employees performing on or in connection with covered contracts, initially set at $4.90 per hour for 2015 and gradually increasing to 70 percent of the full Executive Order 13658 minimum wage over a period of years.

Section 4 of Executive Order 13658 directed the Secretary to issue regulations to implement the order's requirements. *See* 79 FR 9852. Accordingly, after engaging in notice-

and-comment rulemaking, the Department published a final rule on October 7, 2014, to implement the Executive order. *See* 79 FR 60634. The final regulations, set forth at 29 CFR part 10, established standards and procedures for implementing and enforcing the minimum wage protections of the Executive order. Pursuant to the methodology established by Executive Order 13658, the applicable minimum wage rate has increased each year since 2015. Executive Order 13658's minimum wage requirement and its minimum cash wage requirement for tipped employees were most recently increased on January 1, 2021, to $10.95 per hour and $7.65 per hour, respectively. *See* 85 FR 53850.

On May 25, 2018, President Donald J. Trump issued Executive Order 13838, titled ''Exemption from Executive Order 13658 for Recreational Services on Federal Lands.'' *See* 83 FR 25341. Section 2 of Executive Order 13838 amended Executive Order 13658 to add language providing that the provisions of Executive Order 13658 do ''not apply to [Federal] contracts or contract-like instruments'' entered into ''in connection with seasonal recreational services or seasonal recreational equipment rental.'' *Id.* Executive Order 13838 additionally stated that seasonal recreational services include ''river running, hunting, fishing, horseback riding, camping, mountaineering activities, recreational ski services, and youth camps.'' *Id.* Executive Order 13838 further specified that this exemption does not apply to ''lodging and food services associated with seasonal recreational activities.'' *Id.* Executive Order 13838 did not otherwise amend Executive Order 13658. On September 26, 2018, the Department implemented Executive Order 13838 by adding the required exclusion to the regulations for Executive Order 13658 at 29 CFR 10.4(g). *See* 83 FR 48537.

B. Executive Order 14026

On April 27, 2021, President Joseph R. Biden Jr. signed Executive Order 14026, ''Increasing the Minimum Wage for Federal Contractors.'' 86 FR 22835. Executive Order 14026 states that the Federal Government's procurement interests in economy and efficiency are promoted when the Federal Government contracts with sources that adequately compensate their workers. *Id.* Executive Order 14026 therefore seeks to promote economy and efficiency in Federal procurement by raising the hourly minimum wage paid by those contractors to workers performing work on or in connection with covered Federal contracts to (i) $15.00 per hour, beginning January 30, 2022; and (ii) beginning January 1, 2023, and annually thereafter, an amount determined by the Secretary in accordance with the Executive order. *Id.*

Section 1 of Executive Order 14026 sets forth a general position of the Federal Government that increasing the hourly minimum wage paid by Federal contractors to $15.00 will ''bolster economy and efficiency in Federal procurement.'' 86 FR 22835. The order states that raising the minimum wage ''enhances worker productivity and generates higher-quality work by boosting workers' health, morale, and effort; reducing absenteeism and turnover; and lowering supervisory and training costs.'' *Id.* The order further states that these savings and quality improvements will lead to improved economy and efficiency in Government procurement. *Id.*

Section 2 of Executive Order 14026 therefore increases the minimum wage for Federal contractors and subcontractors. 86 FR 22835. The order provides that executive departments and agencies, including independent establishments subject to the Federal Property and Administrative Services Act, 40 U.S.C. 102(4)(A), (5) (agencies), shall, to the extent permitted by law, ensure that contracts and contract-like instruments (collectively referred to as ''contracts''), as described in section 8(a) of the order and defined in this rule, include a particular clause that the contractor and any covered subcontractors shall incorporate into lower-tier subcontracts. 86 FR 22835. That contractual clause, the order states, shall specify, as a condition of payment, that the minimum wage to be paid to workers employed in the performance of the contract or any covered subcontract thereunder, including workers whose wages are calculated pursuant to special certificates issued under section 14(c) of the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 214(c),[1] shall be at least: (i) $15.00 per hour beginning January 30, 2022; and (ii) beginning January 1, 2023, and annually thereafter, an amount determined by the Secretary in accordance with the Executive order. 86 FR 22835. As required by the order, the minimum wage amount determined by the Secretary pursuant to this section shall be published by the Secretary at least 90 days before such new minimum wage is to take effect and shall be (A) not less than the amount in effect on the date of such determination; (B) increased from such amount by the annual percentage increase in the Consumer Price Index (CPI) for Urban Wage Earners and Clerical Workers (United States city average, all items, not seasonally adjusted) (CPI–W), or its successor publication, as determined by the Bureau of Labor Statistics; and (C) rounded to the nearest multiple of $0.05. *Id.*

Section 2 of the Executive order further explains that, in calculating the annual percentage increase in the CPI for purposes of that section, the Secretary shall compare such CPI for the most recent month, quarter, or year available (as selected by the Secretary prior to the first year for which a minimum wage determined by the Secretary is in effect pursuant to this section) with the CPI for the same month in the preceding year, the same quarter in the preceding year, or the preceding year, respectively. 86 FR 22835–36. Pursuant to that section, nothing in the order excuses noncompliance with any applicable Federal or state prevailing wage law or any applicable law or municipal ordinance establishing a minimum wage higher than the minimum wage established under the order. 86 FR 22836.

Section 3 of Executive Order 14026 explains the application of the order to tipped workers. 86 FR 22836. It provides that for workers covered by section 2 of the order who are tipped employees pursuant to section 3(t) of the FLSA, 29 U.S.C. 203(t), the cash wage that must be paid by an employer to such workers shall be at least: (i) $10.50 an hour, beginning on January 30, 2022; (ii) beginning January 1, 2023, 85 percent of the wage in effect under section 2 of the order, rounded to the nearest multiple of $0.05; and (iii) beginning January 1, 2024, and for each subsequent year, 100 percent of the wage in effect under section 2 of the order. 86 FR 22836. Where workers do not receive a sufficient additional amount on account of tips, when combined with the hourly cash wage paid by the employer, such that their total earnings are equal to the minimum wage under section 2 of the order, section 3 requires that the cash wage paid by the employer be increased such that the workers' total earnings equal that minimum wage . *Id.* Consistent with applicable law, if the wage required to be paid under the Service Contract Act (SCA), 41 U.S.C. 6701 *et seq.,* or any other applicable law or regulation is higher than the wage required by section 2 of the order, the employer must pay additional cash

[1] 29 U.S.C. 214(c) authorizes employers, after receiving a certificate from the WHD, to pay subminimum wages to workers whose earning or productive capacity is impaired by a physical or mental disability for the work to be performed.

wages sufficient to meet the highest wage required to be paid. 86 FR 22836.

Section 4 of Executive Order 14026 provides that the Secretary shall, consistent with applicable law, issue regulations by November 24, 2021, to implement the requirements of the order, including providing both definitions of relevant terms and exclusions from the requirements set forth in the order where appropriate. 86 FR 22836. It also requires that, to the extent permitted by law, within 60 days of the Secretary issuing such regulations, the Federal Acquisition Regulatory Council (FARC) shall amend the Federal Acquisition Regulation (FAR) to provide for inclusion of the contract clause described in section 2(a) of the order in Federal procurement solicitations and contracts subject to the order. *Id.* Additionally, section 4 states that within 60 days of the Secretary issuing regulations pursuant to the order, agencies must take steps, to the extent permitted by law, to exercise any applicable authority to ensure that certain contracts—specifically, contracts for concessions and contracts entered into with the Federal Government in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public—entered into on or after January 30, 2022, consistent with the effective date of such agency action, comply with the requirements set forth in sections 2 and 3 of the order. *Id.* The order further specifies that any regulations issued pursuant to section 4 of the order should, to the extent practicable, incorporate existing definitions, principles, procedures, remedies, and enforcement processes under the FLSA, 29 U.S.C. 201 *et seq.;* the SCA; the Davis-Bacon Act (DBA), 40 U.S.C. 3141 *et seq.;* Executive Order 13658 of February 12, 2014, ''Establishing a Minimum Wage for Contractors''; and regulations issued to implement that order. 86 FR 22836.[2]

Section 5 of Executive Order 14026 grants authority to the Secretary to investigate potential violations of and obtain compliance with the order. 86 FR 22836. It also explains that Executive Order 14026 does not create any rights under the Contract Disputes Act, 41 U.S.C. 7101 *et seq.,* and that disputes regarding whether a contractor has paid the wages prescribed by the order, as appropriate and consistent with applicable law, shall be disposed of only as provided by the Secretary in regulations issued pursuant to the order. *Id.*

Section 6 of Executive Order 14026 revokes and supersedes certain presidential actions. 86 FR 22836–37. Specifically, section 6 of Executive Order 14026 provides that Executive Order 13838 of May 25, 2018, ''Exemption From Executive Order 13658 for Recreational Services on Federal Lands'' is revoked as of January 30, 2022. *Id.* Section 6 of Executive Order 14026 also states that Executive Order 13658 of February 12, 2014, ''Establishing a Minimum Wage for Contractors'' is ''superseded, as of January 30, 2022, to the extent it is inconsistent with this order.'' *Id.*

Section 7 of Executive Order 14026 establishes that if any provision of the order, or the application of any such provision to any person or circumstance, is held to be invalid, the remainder of the order and the application shall not be affected. 86 FR 22837.

Section 8 of Executive Order 14026 establishes that the order shall apply to ''any new contract; new contract-like instrument; new solicitation; extension or renewal of an existing contract or contract-like instrument; and exercise of an option on an existing contract or contract-like instrument,'' if: (i)(A) It is a procurement contract for services or construction; (B) it is a contract for services covered by the SCA; (C) it is a contract for concessions, including any concessions contract excluded by Department of Labor (the Department) regulations at 29 CFR 4.133(b); or (D) it is a contract entered into with the Federal Government in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public; and (ii) the wages of workers under such contract are governed by the FLSA, the SCA, or the DBA. 86 FR 22837. Section 8 of the order also states that, for contracts covered by the SCA or the DBA, the order shall apply only to contracts at the thresholds specified in those statutes.[3] *Id.* Additionally, for procurement contracts where workers' wages are governed by the FLSA, the order specifies that it shall apply only to contracts that exceed the micro-purchase threshold, as defined in 41 U.S.C. 1902(a),[4] unless expressly made subject to the order pursuant to regulations or actions taken under section 4 of the order. *Id.* The order specifies that it shall not apply to grants; contracts or agreements with Indian Tribes under the Indian Self-Determination and Education Assistance Act (Public Law 93–638), as amended; or any contracts expressly excluded by the regulations issued pursuant to section 4(a) of the order. *Id.*

Section 9(a) of Executive Order 14026 provides that the order is effective immediately and shall apply to new contracts; new solicitations; extensions or renewals of existing contracts; and exercises of options on existing contracts, as described in section 8(a) of the order, where the relevant contract will be entered into, the relevant contract will be extended or renewed, or the relevant option will be exercised, on or after: (i) January 30, 2022, consistent with the effective date for the action taken by the FARC pursuant to section 4(a) of the order; or (ii) for contracts where an agency action is taken pursuant to section 4(b) of the order, January 30, 2022, consistent with the effective date for such action. 86 FR 22837.

Section 9(b) of Executive Order 14026 establishes an exception to section 9(a) where agencies have issued a solicitation before the effective date for the relevant action taken pursuant to section 4 of the order and entered into a new contract resulting from such solicitation within 60 days of such effective date. The order provides that, in such a circumstance, such agencies are strongly encouraged but not required to ensure that the minimum wages specified in sections 2 and 3 of the order are paid in the new contract. 86 FR 22837–38. The order clarifies, however, that if such contract is subsequently extended or renewed, or an option is subsequently exercised under that contract, the minimum wages specified in sections 2 and 3 of the order shall apply to that extension, renewal, or option. 86 FR 22838.

Section 9(c) also specifies that, for all existing contracts, solicitations issued between the date of the order and the effective dates set forth in that section, and contracts entered into between the date of the order and the effective dates set forth in that section, agencies are strongly encouraged, to the extent permitted by law, to ensure that the hourly wages paid under such contracts

[2] The Department recognizes that the FAR has been amended to refer to the Service Contract Act as the ''Service Contract Labor Standards'' statute and the Davis-Bacon Act as the ''Wage Rate Requirements (Construction)'' statute. *See* 79 FR 24192–02, 24193–95 (Apr. 29, 2014).

Consistent with the text of Executive Order 14026, as well as with Executive Order 13658 and its implementing regulations, the Department refers to these laws in this rule as the Service Contract Act and the Davis-Bacon Act, respectively.

[3] The prevailing wage requirements of the SCA apply to covered prime contracts in excess of $2,500. *See* 41 U.S.C. 6702(a)(2) (recodifying 41 U.S.C. 351(a)). The DBA applies to covered prime contracts that exceed $2,000. *See* 40 U.S.C. 3142(a). There is no value threshold requirement for subcontracts awarded under such prime contracts.

[4] 41 U.S.C. 1902(a) currently defines the micro-purchase threshold as $10,000.

are consistent with the minimum wage rates specified in sections 2 and 3 of the order. 86 FR 22838.

Section 10 of Executive Order 14026 provides that nothing in the order shall be construed to impair or otherwise affect the authority granted by law to an executive department or agency, or the head thereof; or the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals. 86 FR 22838. It also states that the order is to be implemented consistent with applicable law and subject to the availability of appropriations. *Id.* Finally, section 10 explains that the order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person. *Id.*

II. Discussion of Proposed Rule

A. Legal Authority

President Biden issued Executive Order 14026 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.* 86 FR 22835. 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). Executive Order 14026 delegates to the Secretary the authority to issue regulations to ''implement the requirements of this order.'' 86 FR 22836. The Secretary has delegated his authority to promulgate these regulations to the Administrator of the WHD and to the Deputy Administrator of the WHD if the Administrator position is vacant. Secretary's Order 01–2014 (Dec. 19, 2014), 79 FR 77527 (published Dec. 24, 2014); Secretary's Order 01–2017 (Jan. 12, 2017), 82 FR 6653 (published Jan. 19, 2017).

B. Overview of the Proposed Rule

This notice of proposed rulemaking (NPRM), which amends Title 29 of the Code of Federal Regulations (CFR) by revising part 10 and adding part 23, proposes standards and procedures for implementing and enforcing Executive Order 14026. Proposed subpart A of part 23 relates to general matters, including the purpose and scope of the rule, as well as the definitions, coverage, and exclusions that the rule provides pursuant to the Executive order. It also sets forth the general minimum wage requirement for contractors established by the Executive order, an antiretaliation provision, a prohibition against waiver of rights, and a severability clause. Proposed subpart B establishes requirements for contracting agencies and the Department to comply with the Executive order. Proposed subpart C establishes requirements for contractors to comply with the Executive order. Proposed subparts D and E specify standards and procedures related to complaint intake, investigations, remedies, and administrative enforcement proceedings. Proposed appendix A contains a contract clause to implement Executive Order 14026. An additional appendix, which will not publish in 29 CFR part 23, sets forth a poster regarding the Executive Order 14026 minimum wage for contractors with FLSA-covered workers performing work on or in connection with a covered contract. The Department also proposes a few conforming revisions to the existing regulations at part 10 implementing Executive Order 13658 to fully implement the requirements of Executive Order 14026 and provide additional clarity to the regulated community.

The following section-by-section discussion of this proposed rule presents the contents of each section in more detail. The Department invites comments on the issues addressed in this NPRM.

Part 23 Subpart A—General

Proposed subpart A of part 23 pertains to general matters, including the purpose and scope of the rule, as well as the definitions, coverage, and exclusions that the rule provides pursuant to the order. Proposed subpart A also includes the Executive Order 14026 minimum wage requirement for contractors, an antiretaliation provision, and a prohibition against waiver of rights.

Section 23.10 Purpose and Scope

Proposed § 23.10(a) explains that the purpose of the proposed rule is to implement Executive Order 14026, both in terms of its administration and enforcement. The paragraph emphasizes that the Executive order assigns responsibility for investigating potential violations of and obtaining compliance with the Executive order to the Department of Labor.

Proposed § 23.10(b) explains the underlying policy of Executive Order 14026. First, the paragraph repeats a statement from the Executive order that the Federal Government's procurement interests in economy and efficiency are promoted when the Federal Government contracts with sources that adequately compensate their workers. The proposed rule elaborates that raising the minimum wage enhances worker productivity and generates higher-quality work by boosting workers' health, morale, and effort; reducing absenteeism and turnover; and lowering supervisory and training costs. It is for these reasons that the Executive order concludes that raising, to $15.00 per hour, the minimum wage for work performed by parties who contract with the Federal Government will lead to improved economy and efficiency in Federal procurement. As explained more fully in section IV.C.4, the Department believes that, by increasing the quality and efficiency of services provided to the Federal Government, the Executive order will improve the value that taxpayers receive from the Federal Government's investment.

Proposed § 23.10(b) further explains the general requirement established in Executive Order 14026 that new covered solicitations and contracts with the Federal Government must include a clause, which the contractor and any covered subcontractors shall incorporate into lower-tier subcontracts, requiring, as a condition of payment, that the contractor and any subcontractors pay workers performing work on or in connection with the contract or any subcontract thereunder at least: (i) $15.00 per hour beginning January 30, 2022; and (ii) beginning January 1, 2023, and annually thereafter, an amount determined by the Secretary pursuant to the Executive order. Proposed § 23.10(b) also clarifies that nothing in Executive Order 14026 or part 23 is to be construed to excuse noncompliance with any applicable Federal or state prevailing wage law or any applicable law or municipal ordinance establishing a minimum wage higher than the minimum wage established under the Executive order.

Proposed § 23.10(c) outlines the scope of this proposed rule and provides that neither Executive Order 14026 nor part 23 creates or changes any rights under the Contract Disputes Act or any private right of action. The Department does not interpret the Executive order as limiting existing rights under the Contract Disputes Act. This provision also restates the Executive order's directive that disputes regarding whether a contractor has paid the minimum wages prescribed by the Executive order, to the extent permitted by law, shall be disposed of only as provided by the

Secretary in regulations issued under the Executive order. The provision clarifies, however, that nothing in the Executive order is intended to limit or preclude a civil action under the False Claims Act, 31 U.S.C. 3730, or criminal prosecution under 18 U.S.C. 1001. Finally, this paragraph clarifies that neither the Executive order nor the proposed rule would preclude judicial review of final decisions by the Secretary in accordance with the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*

Section 23.20 Definitions

Proposed § 23.20 defines terms for purposes of this rule implementing Executive Order 14026. Section 4(c) of the Executive order instructs that any regulations issued pursuant to the order should ''incorporate existing definitions'' under the FLSA, the SCA, the DBA, Executive Order 13658, and the regulations at 29 CFR part 10 implementing Executive Order 13658 ''to the extent practicable.'' 86 FR 22836. Most of the definitions set forth in the Department's proposed rule are therefore based on either Executive Order 14026 itself or the definitions of relevant terms set forth in the statutory text or implementing regulations of the FLSA, SCA, DBA, or Executive Order 13658. Several proposed definitions adopt or rely upon definitions published by the FARC in section 2.101 of the FAR. 48 CFR 2.101. The Department notes that, while the proposed definitions discussed in this proposed rule would govern the implementation and enforcement of Executive Order 14026, nothing in the proposed rule is intended to alter the meaning of or to be interpreted inconsistently with the definitions set forth in the FAR for purposes of that regulation.

The Department proposes to define the term *agency head* to mean the Secretary, Attorney General, Administrator, Governor, Chairperson, or other chief official of an executive agency, unless otherwise indicated, including any deputy or assistant chief official of an executive agency or any persons authorized to act on behalf of the agency head. This proposed definition is based on the definition of the term set forth in section 2.101 of the FAR, *see* 48 CFR 2.101, and is identical to the definition provided in the implementing regulations for Executive Order 13658, *see* 29 CFR 10.2.

The Department proposes to define *concessions contract* (or *contract for concessions*) to mean a contract under which the Federal Government grants a right to use Federal property, including land or facilities, for furnishing services. This proposed definition does not contain a limitation regarding the beneficiary of the services, and such contracts may be of direct or indirect benefit to the Federal Government, its property, its civilian or military personnel, or the general public. *See* 29 CFR 4.133. The proposed definition covers but is not limited to all concessions contracts excluded from the SCA by Departmental regulations at 29 CFR 4.133(b). This definition is taken from 29 CFR 10.2, which defined the same term for purposes of Executive Order 13658.

The Department proposes to define *contract* and *contract-like instrument* collectively for purposes of the Executive order as an agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law. This definition includes, but is not limited to, a mutually binding legal relationship obligating one party to furnish services (including construction) and another party to pay for them. The proposed definition of the term *contract* broadly includes all contracts and any subcontracts of any tier thereunder, whether negotiated or advertised, including any procurement actions, lease agreements, cooperative agreements, provider agreements, intergovernmental service agreements, service agreements, licenses, permits, or any other type of agreement, regardless of nomenclature, type, or particular form, and whether entered into verbally or in writing.

The proposed definition of the term *contract* is intended to be interpreted broadly to include, but not be limited to, any contract within the definition provided in the FAR or applicable Federal statutes. The proposed definition includes, but is not to be limited to, any contract that may be covered under any Federal procurement statute. The Department notes that under this definition contracts may be the result of competitive bidding or awarded to a single source under applicable authority to do so. The proposed definition also explains that, 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; exercised contract options; and bilateral contract modifications. The proposed definition also specifies that, for purposes of the minimum wage requirements of the Executive order, the term *contract* includes contracts covered by the SCA, contracts covered by the DBA, concessions contracts not otherwise subject to the SCA, and contracts in connection with Federal property or land and related to offering services for Federal employees, their dependents, or the general public, as provided in section 8(a) of the Executive order. *See* 86 FR 22837. The proposed definition of *contract* discussed herein is identical to the definition of *contract* in the regulations implementing Executive Order 13658, *see* 29 CFR 10.2, except that it includes ''exercised contract options'' as an example of a contract. The addition of this example reflects that, unlike Executive Order 13658, Executive Order 14026 expressly applies to option periods on existing contracts that are exercised on or after January 30, 2022. *See* 86 FR 22837.

As explained in the Department's final rule implementing Executive Order 13658, this definition of *contract* was originally derived from the definition of the term *contract* set forth in Black's Law Dictionary (9th ed. 2009) and section 2.101 of the FAR (48 CFR 2.101), as well as the descriptions of the term *contract* that appear in the SCA's regulations at 29 CFR 4.110 and 4.111, 4.130. *See* 79 FR 60638–41. The Department notes that the fact that a legal instrument constitutes a *contract* under this definition does not mean that the contract is covered by the Executive order. In order for a contract to be covered by the Executive order and the proposed rule, the contract must satisfy all of the following prongs: (1) It must qualify as a *contract* or *contract-like instrument* under the proposed definition set forth in part 23; (2) it must fall within one of the four specifically enumerated types of contracts set forth in section 8(a) of the order and § 23.30; and (3) it must be a ''new contract'' pursuant to the proposed definition described below. Further, in order for the minimum wage protections of the Executive order to extend to a particular worker performing work on or in connection with a covered contract, that worker's wages must also be governed by the DBA, SCA, or FLSA. For example, although an agreement between a contracting agency and a hotel located on private property pursuant to which the hotel accepts the General Services Administration (GSA) room rate for Federal Government workers would likely be regarded as a ''contract'' or ''contract-like instrument'' under the Department's proposed definition, such an agreement would not be covered by the Executive order and part 23 because it is not subject to the

DBA or SCA, is not a concessions contract, and is not entered into in connection with Federal property or lands. Similarly, a permit issued by the National Park Service (NPS) to an individual for purposes of conducting a wedding on Federal land would qualify as a ''contract'' or ''contract-like instrument'' but would not be subject to the Executive order because it would not be a contract covered by the SCA or DBA, a concessions contract, or a contract in connection with Federal property related to offering services to Federal employees, their dependents, or the general public.

The Department proposes to substantially adopt the definition of *contracting officer* in section 2.101 of the FAR, which means a person with the authority to enter into, administer, and/or terminate contracts and make related determinations and findings. The term includes certain authorized representatives of the contracting officer acting within the limits of their authority as delegated by the contracting officer. *See* 48 CFR 2.101. This definition is identical to the definition provided in 29 CFR 10.2, which implemented Executive Order 13658.

The Department proposes to define *contractor* to mean any individual or other legal entity that is awarded a Federal Government contract or subcontract under a Federal Government contract. The Department notes that the term *contractor* refers to both a prime contractor and all of its subcontractors of any tier on a contract with the Federal Government. This proposed definition is consistent with the definition set forth in 29 CFR 10.2, which incorporates relevant aspects of the definitions of the term *contractor* in section 9.403 of the FAR, *see* 48 CFR 9.403, and the SCA's regulations at 29 CFR 4.1a(f). This proposed definition includes lessors and lessees, as well as employers of workers performing on or in connection with covered Federal contracts whose wages are computed pursuant to special certificates issued under 29 U.S.C. 214(c). The Department notes that the term *employer* is used interchangeably with the terms *contractor* and *subcontractor* in part 23. The U.S. Government, its agencies, and its instrumentalities are not considered contractors, subcontractors, employers, or joint employers for purposes of compliance with the provisions of Executive Order 14026.

Importantly, the Department notes that the fact that an individual or entity is a *contractor* under the Department's definition does not mean that such an entity has legal obligations under the Executive order. A contractor only has obligations under the Executive order if it has a contract with the Federal Government that is specifically covered by the order. Thus, an entity that is awarded a contract with the Federal Government will qualify as a ''contractor'' pursuant to the Department's definition, however, that entity will only be subject to the minimum wage requirements of the Executive order if such contractor is awarded or otherwise enters into a ''new'' contract that falls within the scope of one of the four specifically enumerated categories of contracts covered by the order.

The Department proposes to define the term *Davis-Bacon Act* to mean the Davis-Bacon Act of 1931, as amended, 40 U.S.C. 3141 *et seq.,* and its implementing regulations. This proposed definition is taken from 29 CFR 10.2.

Consistent with the regulations implementing Executive Order 13658, *see* 29 CFR 10.2, the Department proposes to define *executive departments and agencies* that are subject to Executive Order 14026 by adopting the definition of *executive agency* provided in section 2.101 of the FAR. 48 CFR 2.101. The Department therefore interprets the Executive order to apply to executive departments within the meaning of 5 U.S.C. 101, military departments within the meaning of 5 U.S.C. 102, independent establishments within the meaning of 5 U.S.C. 104(1), and wholly owned Government corporations within the meaning of 31 U.S.C. 9101. The Department notes that this proposed definition includes independent agencies. Such agencies were expressly excluded from coverage of Executive Order 13658, which ''strongly encouraged'' but did not require compliance by independent agencies. *See* 79 FR 9853 (section 7(g) of Executive Order 13658); *see also* 79 FR 60643, 60646 (final rule interpreting Executive Order 13658 to exclude from coverage independent regulatory agencies within the meaning of 44 U.S.C. 3502(5)). Because Executive Order 14026 does not contain such exclusionary language, independent agencies are covered by the order and part 23. The inclusion of independent agencies is discussed in greater detail below in the explanation of contracting agency coverage set forth at § 23.30. Finally, and consistent with the regulations implementing Executive Order 13658, the Department does not interpret the definition of *executive departments and agencies* as including the District of Columbia or any Territory or possession of the United States.

The Department proposes to define *Executive Order 13658* to mean Executive Order 13658 of February 12, 2014, ''Establishing a Minimum Wage for Contractors,'' 79 FR 9851 (Feb. 20, 2014), and its implementing regulations at 29 CFR part 10.

The Department proposes to define the term *Executive Order 14026 minimum wage* as a wage that is at least: (i) $15.00 per hour beginning January 30, 2022; and (ii) beginning January 1, 2023, and annually thereafter, an amount determined by the Secretary pursuant to section 2 of Executive Order 14026. This definition is based on the language set forth in section 2 of the Executive order. 86 FR 22835.

The Department proposes to define *Fair Labor Standards Act* as the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. 201 *et seq.,* and its implementing regulations. This definition is adopted from 29 CFR 10.2.

The Department proposes to define the term *Federal Government* as an agency or instrumentality of the United States that enters into a contract pursuant to authority derived from the Constitution or the laws of the United States. This proposed definition is based on the definition set forth in the regulations implementing Executive Order 13658. *See* 29 CFR 10.2. Consistent with that definition and the SCA, the proposed definition of the term *Federal Government* includes nonappropriated fund instrumentalities under the jurisdiction of the Armed Forces or of other Federal agencies. *See* 29 CFR 4.107(a); 29 CFR 10.2. As explained above, and unlike the regulations implementing Executive Order 13658, this proposed definition also includes independent agencies because such agencies are subject to the order's requirements. For purposes of Executive Order 14026 and part 23, the Department's proposed definition does not include the District of Columbia or any Territory or possession of the United States.

The Department proposes to define the term *new contract* as a contract that is entered into on or after January 30, 2022, or a contract that is renewed or extended (pursuant to an exercised option or otherwise) on or after January 30, 2022. For purposes of Executive Order 14026, a contract that is entered into prior to January 30, 2022 will constitute a *new contract* if, on or after January 30, 2022: (1) The contract is renewed; (2) the contract is extended; or (3) an option on the contract is exercised. Under the proposed definition, a *new contract* includes contracts that result from solicitations issued prior to January 30, 2022, but

that are entered into on or after January 30, 2022, unless otherwise excluded by § 23.40; contracts that result from solicitations issued on or after January 30, 2022; contracts that are awarded outside the solicitation process on or after January 30, 2022; and contracts that were entered into prior to January 30, 2022 (an ''existing contract'') but that are subsequently renewed or extended, pursuant to an exercised option period or otherwise, on or after January 30, 2022.

This definition is based on sections 8(a) and 9(a) of Executive Order 14026. *See* 86 FR 22837. The Department notes that the plain language of Executive Order 14026 compels a more expansive definition of the term *new contract* here than was promulgated under Executive Order 13658. For example, the renewal or extension of a contract pursuant to the exercise of an option period on or after January 30, 2022, will qualify as a *new contract* for purposes of Executive Order 14026 and part 23; exercised option periods, however, generally did not qualify as ''new contracts'' under Executive Order 13658. *See* 29 CFR 10.2. The Department discusses the coverage of ''new contracts,'' and the interaction of Executive Order 14026 and Executive Order 13658 with respect to contract coverage, in more detail below in the preamble discussion accompanying proposed § 23.30.

Proposed § 23.20 defines the term *option* by adopting the definition set forth in 29 CFR 10.2 and in section 2.101 of the FAR, which provides that the term *option* means a unilateral right in a contract by which, for a specified time, the Federal Government may elect to purchase additional supplies or services called for by the contract, or may elect to extend the term of the contract. *See* 48 CFR 2.101. When used in this context, the Department notes that the additional ''services'' called for by the contract would include construction services. As discussed above, an option on an existing covered contract that is exercised on or after January 30, 2022, qualifies as a ''new contract'' subject to the Executive order and part 23.

The Department proposes to define the term *procurement contract for construction* to mean a procurement contract for the construction, alteration, or repair (including painting and decorating) of public buildings or public works and which requires or involves the employment of mechanics or laborers, and any subcontract of any tier thereunder. The proposed definition includes any contract subject to the provisions of the DBA, as amended, and its implementing regulations. This proposed definition is identical to that set forth in 29 CFR 10.2, which in turn was derived from language found at 40 U.S.C. 3142(a) and 29 CFR 5.2(h).

The Department proposes to define the term *procurement contract for services* to mean a contract the principal purpose of which is to furnish services in the United States through the use of service employees, and any subcontract of any tier thereunder. This proposed definition includes any contract subject to the provisions of the SCA, as amended, and its implementing regulations. This proposed definition is identical to that set forth in 29 CFR 10.2, which in turn was derived from language set forth in 41 U.S.C. 6702(a) and 29 CFR 4.1a(e).

The Department proposes to define the term *Service Contract Act* to mean the McNamara-O'Hara Service Contract Act of 1965, as amended, 41 U.S.C. 6701 *et seq.,* and its implementing regulations. *See* 29 CFR 4.1a(a).

The term *solicitation* is proposed to be defined to mean any request to submit offers, bids, or quotations to the Federal Government. This definition is based on the definition set forth at 29 CFR 10.2. The Department broadly interprets the term *solicitation* to apply to both traditional and nontraditional methods of solicitation, including informal requests by the Federal Government to submit offers or quotations. However, the Department notes that requests for information issued by Federal agencies and informal conversations with Federal workers are not ''solicitations'' for purposes of the Executive order.

The Department proposes to adopt the definition of *tipped employee* in section 3(t) of the FLSA, that is, any employee engaged in an occupation in which the employee customarily and regularly receives more than $30 a month in tips. *See* 29 U.S.C. 203(t). For purposes of the Executive order, a worker performing on or in connection with a contract covered by the Executive order who meets this definition is a tipped employee.

The Department proposes to define the term *United States* as the United States and all executive departments, independent establishments, administrative agencies, and instrumentalities of the United States, including corporations of which all or substantially all of the stock is owned by the United States, by the foregoing departments, establishments, agencies, instrumentalities, and including nonappropriated fund instrumentalities. This portion of the proposed definition is identical to the definition of *United States* in 29 CFR 10.2. When the term is used in a geographic sense, the Department proposes that the *United States* means the 50 States, the District of Columbia, Puerto Rico, the Virgin Islands, Outer Continental Shelf lands as defined in the Outer Continental Shelf Lands Act, American Samoa, Guam, the Commonwealth of the Northern Mariana Islands, Wake Island, and Johnston Island.

The geographic scope component of this proposed definition is derived from the definition of *United States* set forth in the regulations implementing the SCA. *See* 29 CFR 4.112(a). Although the Department only included the 50 States and the District of Columbia within the geographic scope of the regulations implementing Executive Order 13658, *see* 29 CFR 10.2, the Department notes that Executive Order 14026 directs the Department to establish ''definitions of relevant terms'' in its regulations. 86 FR 22835. As previously discussed, Executive Order 14026 also directs the Department to ''incorporate existing definitions'' under the FLSA, SCA, DBA, and Executive Order 13658 ''to the extent practicable.'' 86 FR 22836. Each of the territories listed above is covered by both the SCA, *see* 29 CFR 4.112(a), and the FLSA, *see, e.g.,* 29 U.S.C. 213(f); 29 CFR 776.7; Fair Minimum Wage Act of 2007, Pub. L. 110–28, 121 Stat. 112 (2007), but not the DBA, 40 U.S.C. 3142(a). Accordingly, it is not practicable to adopt all the cross-referenced existing definitions, and the Department must choose between them to incorporate existing definitions ''to the extent practicable.'' The Department proposes to exercise its discretion to select a definition that tracks the SCA and FLSA, for the following reasons. As reflected in the RIA, the Department has further examined the issue since its prior rulemaking in 2014 and consequently determined that the Federal Government's procurement interests in economy and efficiency would be promoted by extending the Executive Order 14026 minimum wage to workers performing on or in connection with covered contracts in Puerto Rico, the Virgin Islands, Outer Continental Shelf lands as defined in the Outer Continental Shelf Lands Act, American Samoa, Guam, the Commonwealth of the Northern Mariana Islands, Wake Island, and Johnston Island. To be clear, the Department is not proposing to extend coverage of this Executive order to contracts entered into with the governments of those territories, but rather is proposing to expand coverage to covered contracts with the Federal Government that are being performed inside the geographical limits of those territories. Because

contractors operating in those territories will generally have familiarity with many of the requirements set forth in part 23 based on their coverage by the SCA and/or the FLSA, the Department does not believe that the proposed extension of Executive Order 14026 and part 23 to such contractors will impose a significant burden.

The Department proposes to define *wage determination* as including any determination of minimum hourly wage rates or fringe benefits made by the Secretary pursuant to the provisions of the SCA or the DBA. This term includes the original determination and any subsequent determinations modifying, superseding, correcting, or otherwise changing the provisions of the original determination. The proposed definition is adopted from 29 CFR 10.2, which itself was derived from 29 CFR 4.1a(h) and 29 CFR 5.2(q).

The Department proposes to define *worker* as any person engaged in performing work on or in connection with a contract covered by the Executive order, and whose wages under such contract are governed by the FLSA, the SCA, or the DBA, regardless of the contractual relationship alleged to exist between the individual and the employer. The proposed definition also incorporates the Executive order's provision that the term *worker* includes any individual performing on or in connection with a covered contract whose wages are calculated pursuant to special certificates issued under 29 U.S.C. 214(c). *See* 86 FR 22835. The proposed definition also includes any person working on or in connection with a covered contract and individually registered in a bona fide apprenticeship or training program registered with the Department's Employment and Training Administration, Office of Apprenticeship, or with a State Apprenticeship Agency recognized by the Office of Apprenticeship. *See* 29 CFR 4.6(p) (SCA); 29 CFR 5.2(n) (DBA). The Department has included in the proposed definition of *worker* here a brief description of the meaning of working ''on or in connection with'' a covered contract. Specifically, the definition provides that a worker performs ''on'' a contract if the worker directly performs the specific services called for by the contract and that a worker performs ''in connection with'' a contract if the worker's work activities are necessary to the performance of a contract but are not the specific services called for by the contract. These concepts are discussed in greater detail below in the explanation of worker coverage set forth at § 23.30.

Consistent with the FLSA, SCA, and DBA and their implementing regulations, this proposed definition of *worker* excludes from coverage any person employed in a bona fide executive, administrative, or professional capacity, as those terms are defined in 29 CFR part 541. *See* 29 U.S.C. 213(a)(1) (FLSA); 41 U.S.C. 6701(3)(C) (SCA); 29 CFR 5.2(m) (DBA). The Department's proposed definition of *worker* is substantively identical to the definition that appears in the regulations implementing Executive Order 13658, *see* 29 CFR 10.2, but contains additional clarifying language regarding the ''on or in connection with'' standard in the proposed regulatory text itself.

Consistent with the Department's rulemaking under Executive Order 13658, as well as with the FLSA, DBA, and SCA, the Department emphasizes the well-established principle that worker coverage does not depend upon the existence or form of any contractual relationship that may be alleged to exist between the contractor or subcontractor and such persons. *See, e.g.,* 29 U.S.C. 203(d), (e)(1), (g) (FLSA); 41 U.S.C. 6701(3)(B), 29 CFR 4.155 (SCA); 29 CFR 5.5(a)(1)(i) (DBA). The Department notes that, as reflected in the proposed definition, the Executive order is intended to apply to a wide range of employment relationships. Neither an individual's subjective belief about his or her employment status nor the existence of a contractual relationship is determinative of whether a worker is covered by the Executive order.

Finally, the Department proposes to adopt the definitions of the terms *Administrative Review Board, Administrator, Office of Administrative Law Judges,* and *Wage and Hour Division* set forth in 29 CFR 10.2.

Section 23.30 Coverage

Proposed § 23.30 addresses and implements the coverage provisions of Executive Order 14026. Proposed § 23.30 explains the scope of the Executive order and its coverage of executive agencies, new contracts, types of contractual arrangements, and workers. Proposed § 23.40 implements the exclusions expressly set forth in section 8(c) of the Executive order and provides other limited exclusions to coverage as authorized by section 4(a) of the order. 86 FR 22836–37.

Executive Order 14026 provides that agencies must, to the extent permitted by law, ensure that contracts, as defined in part 23 and as described in section 8(a) of the order, include a clause specifying, as a condition of payment, that the minimum wage to be paid to workers employed in the performance of the contract shall be at least: (i) $15.00 per hour beginning January 30, 2022; and (ii) beginning January 1, 2023, and annually thereafter, an amount determined by the Secretary. 86 FR 22835. (*See* proposed § 23.50(b) for a discussion of the methodology established by the Executive order to determine the future annual minimum wage increases.) Section 8(a) of the Executive order establishes that the order's minimum wage requirement only applies to a new contract, new solicitation, extension or renewal of an existing contract, and exercise of an option on an existing contract (which are collectively referred to in this proposed rule as ''new contracts''), if: (i)(A) It is a procurement contract for services or construction; (B) it is a contract for services covered by the SCA; (C) it is a contract for concessions, including any concessions contract excluded by the Department's regulations at 29 CFR 4.133(b); or (D) it is a contract entered into with the Federal Government in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public; and (ii) the wages of workers under such contract are governed by the FLSA, the SCA, or the DBA. 86 FR 22837. Section 8(b) of the order states that, for contracts covered by the SCA or the DBA, the order applies only to contracts at the thresholds specified in those statutes. *Id.* It also specifies that, for procurement contracts where workers' wages are governed by the FLSA, the order applies only to contracts that exceed the micro-purchase threshold, as defined in 41 U.S.C. 1902(a), unless expressly made subject to the order pursuant to regulations or actions taken under section 4 of the order. *Id.* The Executive order states that it does not apply to grants; contracts or agreements with Indian Tribes under the Indian Self-Determination and Education Assistance Act (Pub. L. 93–638), as amended; or any contracts expressly excluded by the regulations issued pursuant to section 4(a) of the order. *Id.*

Proposed § 23.30(a) implements these coverage provisions by stating that Executive Order 14026 and part 23 apply to, unless excluded by § 23.40, any new contract as defined in § 23.20, provided that: (1)(i) It is a procurement contract for construction covered by the DBA; (ii) it is a contract for services covered by the SCA; (iii) it is a contract for concessions, including any concessions contract excluded by Departmental regulations at 29 CFR 4.133(b); or (iv) it is a contract in

connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public; and (2) the wages of workers under such contract are governed by the FLSA, the SCA, or the DBA. 86 FR 22837. Proposed § 23.30(b) incorporates the monetary value thresholds referred to in section 8(b) of the Executive order. *Id.* Finally, proposed § 23.30(c) states that the Executive order and part 23 only apply to contracts with the Federal Government requiring performance in whole or in part within the United States. Several issues relating to the coverage provisions of the Executive order and proposed § 23.30 are discussed below.

Coverage of Executive Agencies and Departments

Executive Order 14026 applies to all ''[e]xecutive departments and agencies, including independent establishments subject to the Federal Property and Administrative Services Act, 40 U.S.C. 102(4)(A), (5).'' 86 FR 22835. As explained above, the Department proposes to define *executive departments and agencies* by adopting the definition of *executive agency* provided in 29 CFR 10.2 and section 2.101 of the FAR. 48 CFR 2.101. The proposed rule therefore interprets the Executive order as applying to executive departments within the meaning of 5 U.S.C. 101, military departments within the meaning of 5 U.S.C. 102, independent establishments within the meaning of 5 U.S.C. 104(1), and wholly owned Government corporations within the meaning of 31 U.S.C. 9101. As discussed above, this proposed definition includes independent agencies. Accordingly, independent agencies are covered contracting agencies for purposes of Executive Order 14026 and part 23.

Additionally, Section 7(g) of Executive Order 13658 ''strongly encouraged'' but did not require independent agencies to comply with its requirements. 79 FR 9853. Therefore, in the final rule implementing Executive Order 13658, the Department interpreted such language to exclude independent regulatory agencies as defined in 44 U.S.C. 3502(5) from coverage of Executive Order 13658. *See, e.g.,* 79 FR 60643, 60646. Unlike Executive Order 13658, Executive Order 14026 does not set forth any exclusion for independent agencies. Executive Order 14026 and part 23 thus apply to a broader universe of contracting agencies than were covered by Executive Order 13658 and its implementing regulations at 29 CFR part 10.

Finally, pursuant to this proposed definition, contracts awarded by the District of Columbia or any Territory or possession of the United States would not be covered by the order.

Coverage of New Contracts With the Federal Government

Proposed § 23.30(a) provides that the requirements of the Executive order generally apply to ''contracts with the Federal Government.'' As discussed above, and consistent with the Department's regulations implementing Executive Order 13658, the Department proposes to set forth a broadly inclusive definition of the term *contract* that would include all contracts and any subcontracts of any tier thereunder, whether negotiated or advertised, including any procurement actions, lease agreements, cooperative agreements, provider agreements, intergovernmental service agreements, service agreements, licenses, permits, or any other type of agreement, regardless of nomenclature, type, or particular form, and whether entered into verbally or in writing. The Department intends that the term *contract* be interpreted broadly as to include, but not be limited to, any contract within the definition provided in the FAR or applicable Federal statutes. This definition includes, but is not limited to, any contract that may be covered under any Federal procurement statute. Contracts may be the result of competitive bidding or awarded to a single source under applicable authority to do so. 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; exercised contract options; and bilateral contract modifications. Unless otherwise noted, the use of the term *contract* throughout the Executive order and part 23 therefore includes *contract-like instruments* and subcontracts of any tier.

As reflected in proposed § 23.30(a), the minimum wage requirements of Executive Order 14026 apply only to ''new contracts'' with the Federal Government within the meaning of sections 8(a) and 9(a) of the order and as defined in part 23. 86 FR 22837. Section 9 of the Executive order states that the order shall apply to covered new contracts, new solicitations, extensions or renewals of existing contracts, and exercises of options on existing contracts, as described in section 8(a) of the order, where the relevant contract is entered into, or extended or renewed, or the relevant option will be exercised, on or after: (i) January 30, 2022, consistent with the effective date for the action taken by the FARC pursuant to section 4(a) of the order; or (ii) for contracts where an agency action is taken pursuant to section 4(b) of the order, on or after January 30, 2022, consistent with the effective date for such action. *Id.* Proposed § 23.30(a) of this rule therefore states that, unless excluded by § 23.40, part 23 applies to any new contract with the Federal Government as defined in § 23.20. As explained in the proposed definition of *new contract* above, a *new contract* means a contract that is entered into on or after January 30, 2022, or a contract that is renewed or extended (pursuant to an exercised option or otherwise) on or after January 30, 2022. For purposes of the Executive order, a contract that is entered into prior to January 30, 2022 will constitute a *new contract* if, on or after January 30, 2022: (1) The contract is renewed; (2) the contract is extended; or (3) an option on the contract is exercised. To be clear, for contracts that were entered into prior to January 30, 2022, the Executive Order 14026 minimum wage requirement applies prospectively as of the date that such contract is renewed or extended (pursuant to an exercised option or otherwise) on or after January 30, 2022; the Executive order does not apply retroactively to the date that the contract was originally entered into.

The Department notes that the plain language of Executive Order 14026 compels a more expansive definition of the term *new contract* here than under Executive Order 13658. For example, Executive Order 13658 coverage was not triggered by the unilateral exercise of a pre-negotiated option to renew an existing contract by the Federal Government, *see* 29 CFR 10.2. However, section 8(a) of this order makes clear that Executive Order 14026 applies to the ''exercise of an option on an existing contract'' where such exercise occurs on or after January 30, 2022. 86 FR 22837. The Department notes that, under the SCA and DBA, the Department and the FARC generally require the inclusion of a new or current prevailing wage determination upon the exercise of an option clause that extends the term of an existing contract. *See, e.g.,* 29 CFR 4.143(b); 48 CFR 22.404–1(a)(1); All Agency Memorandum (AAM) No. 157 (1992); *In the Matter of the United States Army,* ARB Case No. 96–133,

1997 WL 399373 (ARB July 17, 1997).[5] The SCA's regulations, for example, provide that when the term of an existing contract is extended pursuant to an option clause, the contract extension is viewed as a ''new contract'' for SCA purposes. *See* 29 CFR 4.143(b). The application of Executive Order 14026's minimum wage requirements to contracts for which an option period is exercised on or after January 30, 2022 should be easily understood by contracting agencies and contractors.

Under this proposed rule, a contract awarded under the GSA Schedules will be considered a ''new contract'' in certain situations. Of particular note, any covered contracts that are added to the GSA Schedule on or after January 30, 2022 will generally qualify as ''new contracts'' subject to the order, unless excluded by § 23.40; any covered task orders issued pursuant to those contracts would also be deemed to be ''new contracts.'' This would include contracts to add new covered services as well as contracts to replace expiring contracts. Consistent with section 9(c) of the Executive order, agencies are strongly encouraged to bilaterally modify existing contracts, as appropriate, to include the minimum wage requirements of this rule even when such contracts are not otherwise considered to be a ''new contract'' under the terms of this rule. 86 FR 22838. For example, pursuant to the order, contracting officers are encouraged to modify existing indefinite-delivery, indefinite-quantity contracts in accordance with FAR section 1.108(d)(3) to include the Executive Order 14026 minimum wage requirements.

Interaction With Contract Coverage Under Executive Order 13658

Beginning January 1, 2015, covered contracts with the Federal Government were generally subject to the minimum wage requirements of Executive Order 13658 and its implementing regulations at 29 CFR part 10. Executive Order 13658, which was issued in February 2014, required Federal contractors to pay workers working on or in connection with covered Federal contracts at least $10.10 per hour beginning January 1, 2015 and, pursuant to that order, the minimum wage rate has increased annually based on inflation. The Executive Order 13658 minimum wage is currently $10.95 per hour and the minimum hourly cash wage for tipped employees is $7.65 per hour. *See* 85 FR 53850. Executive Order 13658 applies to the same four types of Federal contracts as are covered by Executive Order 14026. *Compare* 79 FR 9853 (section 7(d) of Executive Order 13658) *with* 86 FR 22837 (section 8(a) of Executive Order 14026).

Section 6 of Executive Order 14026 states that, as of January 30, 2022, the order supersedes Executive Order 13658 to the extent that it is inconsistent with this order. 86 FR 22836–37. The Department interprets this language to mean that workers performing on or in connection with a contract that would be covered by both Executive Order 13658 and Executive Order 14026 are entitled to be paid the higher minimum wage rate under this new order. The Department therefore proposes to include language at § 23.50(d) briefly discussing the relationship between Executive Order 13658 and this order, namely to make clear that workers performing on or in connection with a covered new contract as defined in part 23 must be paid at least the higher minimum wage rate established by Executive Order 14026 rather than the lower minimum wage rate established by Executive Order 13658.

As explained above, however, Executive Order 14026 and part 23 only apply to a ''new contract'' with the Federal Government, which means a contract that is entered into on or after January 30, 2022, or a contract that is renewed or extended (pursuant to an exercised option or otherwise) on or after January 30, 2022. For some amount of time, the Department anticipates that there will be some existing contracts with the Federal Government that do not qualify as a ''new contract'' for purposes of Executive Order 14026 and thus will remain subject to the minimum wage requirements of Executive Order 13658. For example, an SCA-covered contract entered into on February 15, 2021 is currently subject to the $10.95 minimum wage rate established by Executive Order 13658. That contract will remain subject to the minimum wage rate under Executive Order 13658 until such time as it is renewed or extended, pursuant to an exercised option or otherwise, on or after January 30, 2022, at which time it will become subject to the Executive Order 14026 minimum wage rate. For example, if that contract is subsequently extended on February 15, 2022, the contract will become subject to the $15.00 minimum wage rate established by Executive Order 14026 on the date of extension, February 15, 2022. The Department anticipates that, in the relatively near future, essentially all covered contracts with the Federal Government will qualify as ''new contracts'' under part 23 and thus will be subject to the higher Executive Order 14026 minimum wage rate; until such time, however, Executive Order 13658 and its regulations at 29 CFR part 10 must remain in place.

In order to minimize potential stakeholder confusion as to whether a particular contract is subject to Executive Order 13658 or to Executive Order 14026, the Department is proposing to add clarifying language to the definition of ''new contract'' in the regulations that implemented Executive Order 13658, *see* 29 CFR 10.2, to make clear that a contract that is entered into on or after January 30, 2022, or a contract that was awarded prior to January 30, 2022, but is subsequently extended or renewed (pursuant to an option or otherwise) on or after January 30, 2022, is subject to Executive Order 14026 and part 23 instead of Executive Order 13658 and the 29 CFR part 10 regulations. The provision at 29 CFR 10.2 currently defines a ''new contract'' for purposes of Executive Order 13658 to mean ''a contract that results from a solicitation issued on or after January 1, 2015, or a contract that is awarded outside the solicitation process on or after January 1, 2015.'' That definition further provides, inter alia, that Executive Order 13658 also applies to contracts entered into prior to January 1, 2015, if, through bilateral negotiation, on or after January 1, 2015, the contract is renewed, extended, or amended pursuant to certain specified limitations explained in that regulation. *Id.* To provide clarity to stakeholders, the Department proposes to amend the definition of a ''new contract'' under Executive Order 13658 in 29 CFR 10.2 by changing the three references to ''on or after January 1, 2015'' to ''on or between January 1, 2015 and January 29, 2022.'' This clarifying edit is intended to assist stakeholders in recognizing that, beginning January 30, 2022, the higher minimum wage requirement of Executive Order 14026 applies to new contracts.

As previously mentioned, the Department also proposes to add language to part 23 at § 23.50(d) explaining that, unless otherwise excluded by § 23.40, workers performing on or in connection with a covered new contract, as defined in § 23.20, must be paid at least the higher minimum hourly wage rate established

[5] As stated in AAM 157, the Department does not assert that the exercise of an option period qualifies as a new contract in all cases for purposes of the DBA and SCA. *See* 63 FR 64542 (Nov. 20, 1998). The Department considers the specific contract requirements at issue in making this determination. For example, under those statutes, the Department does not consider that a new contract has been created where a contractor is simply given additional time to complete its original obligations under the contract. *Id.*

by Executive Order 14026 and part 23 rather than the lower hourly minimum wage rate established by Executive Order 13658 and its regulations. The Department further proposes to add substantially similar language to the Executive Order 13658 regulations at § 10.1 to ensure that the contracting community is fully aware of which Executive order and regulations apply to their particular contract. Specifically, the Department proposes to amend § 10.1 by adding paragraph (d), which explains that, as of January 30, 2022, Executive Order 13658 is superseded to the extent that it is inconsistent with Executive Order 14026 and part 23. The proposed new paragraph would further clarify that a covered contract that is entered into on or after January 30, 2022, or that is renewed or extended (pursuant to an option or otherwise) on or after January 30, 2022, is generally subject to the higher minimum wage rate established by Executive Order 14026 and part 23. The Department also proposes to add corresponding information to § 10.5(c) to ensure that stakeholders are aware of their potential obligations under Executive Order 14026 and part 23 even if they inadvertently consult the regulations that were issued under Executive Order 13658.

In sum, a Federal contract entered into on or after January 1, 2015, that falls within one of the four specified categories of contracts described in part 23 will generally be subject to the minimum wage requirements of either Executive Order 13658 or Executive Order 14026; the date upon which the relevant contract was entered into, extended, or renewed will determine whether the contract qualifies as a ''new contract'' under this Executive order and part or whether it is subject to the lower minimum wage requirement of Executive Order 13658 and the part 10 regulations.

The Department notes that contracts with independent regulatory agencies and contracts performed in the territories (*i.e.,* Puerto Rico, the Virgin Islands, Outer Continental Shelf lands as defined in the Outer Continental Shelf Lands Act, American Samoa, Guam, the Commonwealth of the Northern Mariana Islands, Wake Island, and Johnston Island) are not subject to Executive Order 13658 or part 10; this rule does not alter that determination. However, as discussed above, such contracts with the Federal Government are covered by Executive Order 14026 and part 23 to the extent that they fall within the four general types of covered contracts and are entered into, extended, or renewed on or after January 30, 2022. For example, a concessions contract with the Federal Government that is performed wholly within Puerto Rico and that was entered into on October 1, 2020, is not subject to the minimum wage requirement of Executive Order 13658 or 14026. However, if that contract is renewed on October 1, 2022, it will become subject to the minimum wage requirement of Executive Order 14026.

Coverage of Types of Contractual Arrangements

Proposed § 23.30(a)(1) sets forth the specific types of contractual arrangements with the Federal Government that are covered by Executive Order 14026. The Department notes that Executive Order 14026 and part 23 are intended to apply to a wide range of contracts with the Federal Government for services or construction. Proposed § 23.30(a)(1) implements the Executive order by generally extending coverage to procurement contracts for construction covered by the DBA; service contracts covered by the SCA; concessions contracts, including any concessions contract excluded by the Department's regulations at 29 CFR 4.133(b); and contracts in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public. Each of these categories of contractual agreements is discussed in greater detail below. The Department further notes that, as was also the case under the Executive Order 13658 rulemaking, these categories are not mutually exclusive—a concessions contract might also be covered by the SCA, as might a contract in connection with Federal property or lands, for example. A contract that falls within any one of the four categories is covered.

Procurement Contracts for Construction: Section 8(a)(i)(A) of the Executive order extends coverage to ''procurement contract[s]'' for ''construction.'' 86 FR 22837. The proposed rule at § 23.30(a)(1)(i) interprets this provision of the order as referring to any contract covered by the DBA, as amended, and its implementing regulations. The Department notes that this provision reflects that the Executive order and part 23 apply to contracts subject to the DBA itself, but do not apply to contracts subject only to the Davis-Bacon Related Acts, including those set forth at 29 CFR 5.1(a)(2)-(60). This interpretation is consistent with the discussion of procurement contracts for construction set forth in the Department's final rule implementing Executive Order 13658. *See* 79 FR 60650. For ease of reference, much of that discussion is repeated here.

The DBA applies, in relevant part, to contracts to which the Federal Government is a party, for the construction, alteration, or repair, including painting and decorating, of public buildings and public works of the Federal Government and which require or involve the employment of mechanics or laborers. 40 U.S.C. 3142(a). The DBA's regulatory definition of *construction* is expansive and includes all types of work done on a particular building or work by laborers and mechanics employed by a construction contractor or construction subcontractor. *See* 29 CFR 5.2(j). For purposes of the DBA and thereby the Executive order, a contract is ''for construction'' if ''more than an incidental amount of construction-type activity'' is involved in its performance. *See, e.g., In the Matter of Crown Point, Indiana Outpatient Clinic,* WAB Case No. 86–33, 1987 WL 247049, at *2 (June 26, 1987) (citing *In re: Military Housing, Fort Drum, New York,* WAB Case No. 85–16, 1985 WL 167239 (Aug. 23, 1985)), *aff'd sub nom., Building and Construction Trades Dep't, AFL–CIO* v. *Turnage,* 705 F. Supp. 5 (D.D.C. 1988); 18 Op. O.L.C. 109, 1994 WL 810699, at *5 (May 23, 1994). The term ''public building or public work'' includes any building or work, the construction, prosecution, completion, or repair of which is carried on directly by authority of or with funds of a Federal agency to serve the interest of the general public. *See* 29 CFR 5.2(k).

Proposed § 23.30(b) implements section 8(b) of Executive Order 14026, 86 FR 22837, which provides that the order applies only to DBA-covered prime contracts that exceed the $2,000 value threshold specified in the DBA. *See* 40 U.S.C. 3142(a). Consistent with the DBA, there is no value threshold requirement for subcontracts awarded under such prime contracts.

Contracts for Services: Proposed § 23.30(a)(1)(ii) provides that coverage of the Executive order and part 23 encompasses ''contract[s] for services covered by the Service Contract Act.'' This proposed provision implements sections 8(a)(i)(A) and (B) of the Executive order, which state that the order applies respectively to a ''procurement contract . . . for services'' and a ''contract or contract-like instrument for services covered by the Service Contract Act.'' 86 FR 22837. The Department interprets a ''procurement contract . . . for services,'' as set forth in section 8(a)(i)(A) of the Executive order, to mean a procurement contract that is

subject to the SCA, as amended, and its implementing regulations. The Department views a ''contract . . . for services covered by the Service Contract Act'' under section 8(a)(i)(B) of the order as including both procurement and non-procurement contracts for services that are covered by the SCA. The Department therefore incorporates sections 8(a)(i)(A) and (B) of the Executive order in proposed § 23.30(a)(1)(ii) by expressly stating that the requirements of the order apply to service contracts covered by the SCA. This interpretation and approach is consistent with the treatment of service contracts set forth in the Department's final rule implementing Executive Order 13658. *See* 79 FR 60650–51. For ease of reference, much of that discussion is repeated here.

The SCA generally applies to every contract entered into by the United States that ''has as its principal purpose the furnishing of services in the United States through the use of service employees.'' 41 U.S.C. 6702(a)(3). The SCA is intended to cover a wide variety of service contracts with the Federal Government, so long as the principal purpose of the contract is to provide services using service employees. *See, e.g.,* 29 CFR 4.130(a). As reflected in the SCA's regulations, where the principal purpose of the contract with the Federal Government is to provide services through the use of service employees, the contract is covered by the SCA. *See* 29 CFR 4.133(a). Such coverage exists regardless of the direct beneficiary of the services or the source of the funds from which the contractor is paid for the service and irrespective of whether the contractor performs the work in its own establishment, on a Government installation, or elsewhere. *Id.* Coverage of the SCA, however, does not extend to contracts for services to be performed exclusively by persons who are not service employees, *i.e.,* persons who qualify as bona fide executive, administrative, or professional employees as defined in the FLSA's regulations at 29 CFR part 541. Similarly, a contract for professional services performed essentially by bona fide professional employees, with the use of service employees being only a minor factor in contract performance, is not covered by the SCA and thus would not be covered by the Executive order or part 23. *See* 41 U.S.C. 6702(a)(3); 29 CFR 4.113(a), 4.156; WHD Field Operations Handbook (FOH) ¶¶ 14b05, 14c07.

Although the SCA covers contracts with the Federal Government that have the ''principal purpose'' of furnishing services in the United States through the use of service employees regardless of the value of the contract, the prevailing wage requirements of the SCA only apply to covered contracts in excess of $2,500. 41 U.S.C. 6702(a)(2) (recodifying 41 U.S.C. 351(a)). Proposed § 23.30(b) of this rule implements section 8(b) of the Executive order, which provides that for SCA-covered contracts, the Executive order applies only to those prime contracts that exceed the $2,500 threshold for prevailing wage requirements specified in the SCA. 86 FR 22837. Consistent with the SCA, there is no value threshold requirement for subcontracts awarded under such prime contracts.

The Department emphasizes that service contracts that are not subject to the SCA may still be covered by the order if such contracts qualify as concessions contracts or contracts in connection with Federal property or lands and related to offering services to Federal employees, their dependents, or the general public pursuant to sections 8(a)(i)(C) and (D) of the order. Because service contracts may be covered by the order if they fall within any of these three categories (*e.g.,* SCA-covered contracts, concessions contracts, or contracts in connection with Federal property and related to offering services), the Department anticipates that most contracts for services with the Federal Government will be covered by the Executive order and part 23.

Contracts for Concessions: Proposed § 23.30(a)(1)(iii) implements Executive Order 14026's coverage of a ''contract or contract-like instrument for concessions, including any concessions contract excluded by Department of Labor regulations at 29 CFR 4.133(b).'' 86 FR 22837. The proposed definition of *concessions contract* is addressed in the discussion of proposed § 23.20. The discussion of covered concessions contracts herein is consistent with the treatment of concessions contracts set forth in the Department's final rule implementing Executive Order 13658. *See* 79 FR 60652.

The SCA generally covers contracts for concessionaire services. *See* 29 CFR 4.130(a)(11). Pursuant to the Secretary's authority under section 4(b) of the SCA, however, the SCA's regulations specifically exempt from coverage concession contracts ''principally for the furnishing of food, lodging, automobile fuel, souvenirs, newspaper stands, and recreational equipment to the general public.'' 29 CFR 4.133(b); 48 FR 49736, 49753 (Oct. 27, 1983).[6]

Proposed § 23.30(a)(1)(iii) extends coverage of the Executive order and part 23 to all concession contracts with the Federal Government, including those exempted from SCA coverage. For example, the Executive order generally covers souvenir shops at national monuments as well as boat rental facilities and fast food restaurants at National Parks. The Department notes that Executive Order 14026 and part 23 cover contracts in connection with both seasonal recreational services and seasonal recreational equipment rental when such services and equipment are offered to the general public on Federal lands. In addition, consistent with the SCA's implementing regulations at 29 CFR 4.107(a), the Department notes that the Executive order generally applies to concessions contracts with nonappropriated fund instrumentalities under the jurisdiction of the Armed Forces or other Federal agencies.

Proposed § 23.30(b) is substantively identical to the analogous provision in the regulations implementing Executive Order 13658, *see* 29 CFR 10.3(b), and implements the value threshold requirements of section 8(b) of Executive Order 14026. 86 FR 22837. Pursuant to that section, the Executive order applies to an SCA-covered concessions contract only if it exceeds $2,500. *Id.;* 41 U.S.C. 6702(a)(2). Section 8(b) of the Executive order further provides that, for procurement contracts or contract-like instruments where workers' wages are governed by the FLSA, such as any procurement contracts for concessionaire services that are excluded from SCA coverage under 29 CFR 4.133(b), part 23 applies only to contracts that exceed the $10,000 micro-purchase threshold, as defined in 41 U.S.C. 1902(a). There is no value threshold for application of Executive Order 14026 and part 23 to subcontracts awarded under covered prime contracts or for non-procurement concessions contracts that are not covered by the SCA.

Contracts in Connection with Federal Property or Lands and Related to Offering Services: Proposed § 23.30(a)(1)(iv) implements section 8(a)(i)(D) of the Executive order, which extends coverage to contracts entered into with the Federal Government in

[6] This exemption applies to certain concessions contracts that provide services to the general public, but does not apply to concessions contracts that provide services to the Federal Government or its personnel or to concessions services provided incidentally to the principal purpose of a covered SCA contract. *See, e.g.,* 29 CFR 4.130 (providing an illustrative list of SCA-covered contracts); *In the Matter of Alcatraz Cruises, LLC,* ARB Case No. 07–024, 2009 WL 250456 (ARB Jan. 23, 2009) (holding that the SCA regulatory exemption at 29 CFR 4.133(b) does not apply to National Park Service contracts for ferry transportation services to and from Alcatraz Island).

connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public. *See* 86 FR 22837; *see also* 79 FR 60655 (Executive Order 13658 final rule preamble discussion of identical provisions in Executive Order 13658 and 29 CFR part 10). To the extent that such agreements are not otherwise covered by § 23.30(a)(1), the Department interprets this provision as generally including leases of Federal property, including space and facilities, and licenses to use such property entered into by the Federal Government for the purpose of offering services to the Federal Government, its personnel, or the general public. In other words, a private entity that leases space in a Federal building to provide services to Federal employees or the general public would be covered by the Executive order and part 23 regardless of whether the lease is subject to the SCA. Although evidence that an agency has retained some measure of control over the terms and conditions of the lease or license to provide services is not necessary for purposes of determining applicability of this section, such a circumstance strongly indicates that the agreement involved is covered by section 8(a)(i)(D) of the Executive order and proposed § 23.30(a)(1)(iv). For example, a private fast food or casual dining restaurant that rents space in a Federal building and serves food to the general public would be subject to the Executive order's minimum wage requirements even if the contract does not constitute a concessions contract for purposes of the order and part 23. Additional examples of agreements that would generally be covered by the Executive order and part 23 under this approach, regardless of whether they are subject to the SCA, include delegated leases of space in a Federal building from an agency to a contractor whereby the contractor operates a child care center, credit union, gift shop, health clinic, or fitness center in the space to serve Federal employees and/or the general public. Consistent with contract coverage under Executive Order 13658, the Department reiterates that the four categories of contracts covered by Executive Order 14026 are not mutually exclusive. A delegated lease of space on a military base from an agency to a contractor whereby the contractor operates a barber shop, for example, would likely qualify both as an SCA-covered contract for services and as a contract entered into with the Federal Government in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public.

Despite this broad definition, the Department notes some limitations to the order's coverage. Coverage under this section only extends to contracts that are in connection with Federal property or lands. The Department does not interpret section 8(a)(i)(D)'s reference to ''[F]ederal property'' to encompass money; as a result, purely financial transactions with the Federal Government, *i.e.,* contracts that are not in connection with physical property or lands, would not be covered by the Executive order or part 23. For example, if a Federal agency contracts with an outside catering company to provide and deliver coffee for a conference, such a contract will not be considered a covered contract under section 8(a)(i)(D), although it would be a covered contract under section 8(a)(i)(B) if it is covered by the SCA. In addition, section 8(a)(i)(D) coverage only extends to contracts ''related to offering services for [F]ederal employees, their dependents, or the general public.'' Therefore, if a Federal agency contracts with a company to solely supply materials in connection with Federal property or lands (such as napkins or utensils for a concession stand), the Department will not consider the contract to be covered by section 8(a)(i)(D) because it is not a contract related to offering services. Likewise, because a license or permit to conduct a wedding on Federal property or lands generally would not relate to offering services for Federal employees, their dependents, or the general public, but rather would only relate to offering services to the specific individual applicant(s), the Department would not consider such a contract covered by section 8(a)(i)(D).

Pursuant to section 8(b) of Executive Order 14026, 86 FR 22837, and an analogous provision in the regulations implementing Executive Order 13658, *see* 29 CFR 10.3(b), proposed § 23.30(b) explains that the order and part 23 apply only to SCA-covered prime contracts in connection with Federal property and related to offering services if such contracts exceed $2,500. *Id.;* 41 U.S.C. 6702(a)(2). For procurement contracts in connection with Federal property and related to offering services where employees' wages are governed by the FLSA (rather than the SCA), part 23 applies only to such contracts that exceed the $10,000 micro-purchase threshold, as defined in 41 U.S.C. 1902(a). As to subcontracts awarded under prime contracts in this category and non-procurement contracts in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public that are not SCA-covered, there is no value threshold for coverage under Executive Order 14026 and part 23.

Relation to the Walsh-Healey Public Contracts Act: Finally, the Department proposes to include as § 23.30(d) a statement that contracts for the manufacturing or furnishing of materials, supplies, articles, or equipment to the Federal Government, including those subject to the Walsh-Healey Public Contracts Act (PCA), 41 U.S.C. 6501 *et seq.,* are not covered by Executive Order 14026 or part 23. Consistent with the implementation of Executive Order 13658, *see* 79 FR 60657, the Department intends to follow the SCA's regulations at 29 CFR 4.117 in distinguishing between work that is subject to the PCA and work that is subject to the SCA (and therefore Executive Order 14026). The Department similarly proposes to follow the regulations set forth in the FAR at 48 CFR 22.402(b) in addressing whether the DBA (and thus the Executive order) applies to construction work on a PCA contract. Under that proposed approach, where a PCA-covered contract involves a substantial and segregable amount of construction work that is subject to the DBA, workers whose wages are governed by the DBA or FLSA are covered by the Executive order for the hours that they spend performing on such DBA-covered construction work.

Coverage of Subcontracts

Consistent with the rulemaking implementing Executive Order 13658, *see* 79 FR 60657–58, the Department notes that the same test for determining application of Executive Order 14026 to prime contracts applies to the determination of whether a subcontract is covered by the order, with the sole distinction that the value threshold requirements set forth in section 8(b) of the order do not apply to subcontracts. In other words, in order for the requirements of Executive Order 14026 to apply to a subcontract, the subcontract must satisfy all of the following prongs: (1) It must qualify as a *contract* or *contract-like instrument* under the definition set forth in part 23, (2) it must fall within one of the four specifically enumerated types of contracts set forth in section 8(a) of the order and § 23.30, and (3) the wages of workers under the contract must be governed by the DBA, SCA, or FLSA.

Pursuant to this approach, only covered subcontracts of covered prime contracts are subject to the requirements of the Executive order. Just as the

Executive order does not apply to prime contracts for the manufacturing or furnishing of materials, supplies, articles, or equipment, it likewise does not apply to subcontracts for the manufacturing or furnishing of materials, supplies, articles, or equipment. In other words, the Executive order does not apply to subcontracts for the manufacturing or furnishing of materials, supplies, articles, or equipment between a manufacturer or other supplier and a covered contractor for use on a covered Federal contract. For example, a subcontract to supply napkins and utensils to a covered prime contractor operating a fast food restaurant on a military base is not a covered subcontract for purposes of this order. The Executive order likewise does not apply to contracts under which a contractor orders materials from a construction materials retailer.

Coverage of Workers

Proposed § 23.30(a)(2) implements section 8(a)(ii) of Executive Order 14026, which provides that the minimum wage requirements of the order only apply to contracts covered by section 8(a)(i) of the order if the wages of workers under such contracts are subject to the FLSA, SCA, or DBA. 86 FR 22837. The Executive order thus provides that its protections only extend to workers performing on or in connection with contracts covered by the Executive order whose wages are governed by the FLSA, SCA, or DBA. *Id.* For example, the order does not extend to workers whose wages are governed by the PCA. Moreover, as discussed below, the Department proposes that, except for workers whose wages are calculated pursuant to special certificates issued under 29 U.S.C. 214(c) and workers who are otherwise covered by the SCA or DBA, employees who are exempt from the minimum wage protections of the FLSA under 29 U.S.C. 213(a) are similarly not subject to the minimum wage protections of Executive Order 14026 and part 23. The following discussion of worker coverage under Executive Order 14026 is consistent with the analysis of worker coverage that appeared in the Department's final rule implementing Executive Order 13658, *see* 79 FR 60658, but is repeated here for ease of reference.

Workers Whose Wages Are ''Governed By'' the FLSA, SCA, or DBA

In determining whether a worker's wages are ''governed by'' the FLSA for purposes of section 8(a)(ii) of the Executive order and part 23, the Department interprets this provision as referring to employees who are entitled to the minimum wage under FLSA section 6(a)(1), employees whose wages are calculated pursuant to special certificates issued under FLSA section 14(c), and tipped employees under FLSA section 3(t) who are not otherwise covered by the SCA or the DBA. *See* 29 U.S.C. 203(t), 206(a)(1), 214(c).

In evaluating whether a worker's wages are ''governed by'' the SCA for purposes of the Executive order, the Department interprets such provision as referring to service employees who are entitled to prevailing wages under the SCA. *See* 29 CFR 4.150 through 4.156. The Department notes that workers whose wages are subject to the SCA include individuals who are employed on an SCA contract and individually registered in a bona fide apprenticeship program registered with the Department's Employment and Training Administration, Office of Apprenticeship, or with a State Apprenticeship Agency recognized by the Office of Apprenticeship.

The Department also interprets the language in section 8(a)(ii) of Executive Order 14026 and proposed § 23.30(a)(2) as extending coverage to FLSA-covered employees who provide support on an SCA-covered contract but who are not entitled to prevailing wages under the SCA. 41 U.S.C. 6701(3).[7] The Department notes that such workers would be covered by the plain language of section 8(a) of the Executive order because they are performing in connection with a contract covered by the order and their wages are governed by the FLSA.

In evaluating whether a worker's wages are ''governed by'' the DBA for purposes of the order, the proposed rule interprets such language as referring to laborers and mechanics who are covered by the DBA. This includes any individual who is employed on a DBA-covered contract and individually registered in a bona fide apprenticeship program registered with the Department's Employment and Training Administration, Office of Apprenticeship, or with a State Apprenticeship Agency recognized by the Office of Apprenticeship. The Department also interprets the language in section 8(a)(ii) of Executive Order 14026 and proposed § 23.30(a)(2) as extending coverage to workers performing on or in connection with DBA-covered contracts for construction who are not laborers or mechanics but whose wages are governed by the FLSA. Although such workers are not covered by the DBA itself because they are not ''laborers and mechanics,'' 40 U.S.C. 3142(b), such individuals are workers performing on or in connection with a contract subject to the Executive order whose wages are governed by the FLSA and thus are covered by the plain language of section 8(a) of the Executive order. 86 FR 22837. The proposed rule extends this coverage to FLSA-covered employees working on or in connection with DBA-covered contracts regardless of whether such employees are physically present on the DBA-covered construction worksite.

The Department notes that where state or local government employees are performing on or in connection with covered contracts and their wages are subject to the FLSA or the SCA, such employees are entitled to the protections of the Executive order and part 23. The DBA does not apply to construction performed by state or local government employees.

Workers Performing ''On Or In Connection With'' Covered Contracts

Section 1 of Executive Order 14026 expressly states that the minimum wage requirements of the order apply to workers performing work ''on or in connection with'' covered contracts. 86 FR 22835. Consistent with the Executive Order 13658 rulemaking, *see* 79 FR 60659–62, the Department proposes to interpret these terms in a manner consistent with SCA regulations, *see, e.g.,* 29 CFR 4.150–4.155. In this proposed rule, the Department reiterates these interpretations, which are summarized below and in the proposed regulatory text pertaining to the definition of *worker* in § 23.20 for purposes of clarity.

Specifically, the Department notes that workers performing ''on'' a covered contract are those workers directly performing the specific services called for by the contract, and whether a worker is performing ''on'' a covered contract would be determined, as explained in the final rule implementing Executive Order 13658, *see* 79 FR 60660, in part by the scope of work or a similar statement set forth in the covered contract that identifies the work (*e.g.,* the services or

[7] The Department notes that, under the SCA, ''service employees'' directly engaged in providing specific services called for by the SCA-covered contract are entitled to SCA prevailing wage rates. Meanwhile, ''service employees'' who do not perform the services required by an SCA-covered contract but whose duties are necessary to the contract's performance must be paid at least the FLSA minimum wage. *See* 29 CFR 4.150 through 4.155; WHD FOH ¶ 14b05(c). For purposes of clarity, the Department refers to this latter category of workers who are entitled to receive the FLSA minimum wage as ''FLSA-covered'' workers throughout this rule even though those workers' right to the FLSA minimum wage technically derives from the SCA itself. *See* 41 U.S.C. 6704(a).

construction) to be performed under the contract. Under this approach, all laborers and mechanics engaged in the construction of a public building or public work on the site of the work will be regarded as performing ''on'' a DBA-covered contract, and all service employees performing the specific services called for by an SCA-covered contract will also be regarded as performing ''on'' a contract covered by the Executive order. In other words, any worker who is entitled to be paid prevailing wages under the DBA or SCA would necessarily be performing ''on'' a covered contract. For purposes of concessions contracts and contracts in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public that are not covered by the SCA, the Department would regard any worker performing the specific services called for by the contract as performing ''on'' the covered contract.

The Department further notes that it would consider a worker performing ''in connection with'' a covered contract to be any worker who is performing work activities that are necessary to the performance of a covered contract but who is not directly engaged in performing the specific services called for by the contract itself. For example, a payroll clerk who is not a DBA-covered laborer or mechanic directly performing the construction identified in the DBA contract, but whose services are necessary to the performance of the contract, would necessarily be performing ''in connection with'' a covered contract. This standard, also articulated in the Executive Order 13658 rulemaking, was derived from SCA regulations. *See* 79 FR 60659 (citing 29 CFR 4.150–4.155).

The Department notes that it is proposing to include, as it did in the Executive Order 13658 rulemaking, an exclusion from coverage for workers who spend less than 20 percent of their work hours in a workweek performing ''in connection with'' covered contracts. This proposed exclusion does not apply to any worker performing ''on'' a covered contract whose wages are governed by the FLSA, SCA, or DBA. The proposed exclusion, which appears in § 23.40(f), is explained in greater detail below in the discussion of the Exclusions section.

The Department noted in the final rule implementing Executive Order 13658 and reiterates here that the Executive order does not extend to workers who are not engaged in working on or in connection with a covered contract. For example, a technician who is hired to repair a DBA contractor's electronic time system or a janitor who is hired to clean the bathrooms at the DBA contractor's company headquarters are not covered by the order because they are not performing the specific duties called for by the contract or other services or work necessary to the performance of the contract. Similarly, the Executive order would not apply to a landscaper at the office of an SCA contractor because that worker is not performing the specific duties called for by the SCA contract or other services or work necessary to the performance of the contract. Similarly, the Executive order would not apply to a worker hired by a covered concessionaire to redesign the storefront sign for a snack shop in a National Park unless the redesign of the sign was called for by the concessions contract itself or otherwise necessary to the performance of the contract. The Department notes that because Executive Order 14026 and part 23 do not apply to workers of Federal contractors who do no work on or in connection with a covered contract, a contractor could be required to pay the Executive order minimum wage to some of its workers but not others. In other words, it is not the case that because a contractor has one or more Federal contracts, all of its workers or projects are covered by the order.

The Department further notes that Executive Order 14026's minimum wage requirements only extend to the hours worked by covered workers performing on or in connection with covered contracts. As the Department explained in the final rule implementing Executive Order 13658, *see* 79 FR 60672, in situations where contractors are not exclusively engaged in contract work covered by the Executive order, and there are adequate records segregating the periods in which work was performed on or in connection with covered contracts subject to the order from periods in which other work was performed, the Executive order minimum wage does not apply to hours spent on work not covered by the order. Accordingly, the proposed regulatory text at § 23.220(a) emphasizes that contractors must pay covered workers performing on or in connection with a covered contract no less than the applicable Executive order minimum wage for hours worked on or in connection with the covered contract.

FLSA Section 14(c) Workers

Executive Order 14026 expressly provides that its minimum wage protections extend to workers with disabilities whose wage rates are calculated pursuant to special certificates issued under section 14(c) of the FLSA. *See* 86 FR 22835. Consistent with the final rule implementing Executive Order 13658, *see* 79 FR 60662, the Department has proposed to include language in the contract clause set forth in appendix A explicitly stating that workers with disabilities whose wages are calculated pursuant to special certificates issued under section 14(c) of the FLSA must be paid at least the Executive Order 14026 minimum wage (or the applicable commensurate wage rate under the certificate, if such rate is higher than the Executive order minimum wage) for hours spent performing on or in connection with covered contracts. All workers performing on or in connection with covered contracts whose wages are governed by FLSA section 14(c), regardless of whether they are considered to be ''employees,'' ''clients,'' or ''consumers,'' are covered by the Executive order (unless the 20 percent of hours worked exclusion applies). Moreover, all of the Federal contractor requirements set forth in this proposed rule apply with equal force to contractors employing FLSA section 14(c) workers performing on or in connection with covered contracts.

Apprentices, Students, Interns, and Seasonal Workers

Consistent with the Department's final rule implementing Executive Order 13658, *see* 79 FR 60663, the Department's proposed rule explains that individuals who are employed on an SCA- or DBA-covered contract and individually registered in a bona fide apprenticeship program registered with the Department's Employment and Training Administration, Office of Apprenticeship, or with a State Apprenticeship Agency recognized by the Office of Apprenticeship, are entitled to the Executive order minimum wage for the hours they spend working on or in connection with covered contracts.

The Department thus proposes that DBA- and SCA-covered apprentices are subject to the Executive order but that workers whose wages are governed by special subminimum wage certificates under FLSA sections 14(a) and (b) are excluded from the order (*i.e.,* FLSA-covered learners, apprentices, messengers, and full-time students). The Department notes that the vast majority of apprentices employed by contractors on covered contracts will be individuals who are registered in a bona fide apprenticeship program registered with the Department's Employment and Training Administration, Office of Apprenticeship, or with a State

Apprenticeship Agency recognized by the Office of Apprenticeship. Such apprentices are entitled to receive the full Executive order minimum wage for all hours worked on or in connection with a covered contract. The Executive order directs that the minimum wage applies to workers performing on or in connection with a covered contract whose wages are governed by the DBA and the SCA. Moreover, the Department believes that the Federal Government's interests in economy and efficiency are best promoted by extending coverage of the order to apprentices covered by the DBA and the SCA.

However, and consistent with the Department's final rule implementing Executive Order 13658, *see* 79 FR 60663–64, the Department proposes to interpret the plain language of the Executive order as excluding workers whose wages are governed by FLSA sections 14(a) and (b) subminimum wage certificates (*i.e.,* FLSA-covered apprentices, learners, messengers, and full-time students). The order expressly states that the minimum wage must ''be paid to workers employed in the performance of the contract or any covered subcontract thereunder, including workers whose wages are calculated pursuant to special certificates issued under section 14(c).'' 86 FR 22835. The Department believes that the explicit inclusion of FLSA section 14(c) workers reflects an intent to omit from coverage workers whose wages are calculated pursuant to special certificates issued under FLSA sections 14(a) and (b).

The Department's proposed rule does not contain a general exclusion for seasonal workers or students. However, except with respect to workers who are otherwise covered by the SCA or the DBA, the proposed rule states that part 23 does not apply to employees who are not entitled to the minimum wage set forth at 29 U.S.C. 206(a)(1) of the FLSA pursuant to 29 U.S.C. 213(a) and 214(a)–(b). Pursuant to this exclusion, the Executive order does not apply to full-time students whose wages are calculated pursuant to special certificates issued under section 14(b) of the FLSA, unless they are otherwise covered by the DBA or SCA. The exclusion would also apply to employees employed by certain seasonal and recreational establishments pursuant to 29 U.S.C. 213(a)(3).

Geographic Scope

Finally, proposed § 23.30(c) provides that the Executive order and part 23 only apply to contracts with the Federal Government requiring performance in whole or in part within the United States, which is defined in proposed § 23.20 to mean, when used in a geographic sense, the 50 States, the District of Columbia, Puerto Rico, the Virgin Islands, Outer Continental Shelf lands as defined in the Outer Continental Shelf Lands Act, American Samoa, Guam, the Commonwealth of the Northern Mariana Islands, Wake Island, and Johnston Island. Under this approach, the minimum wage requirements of the Executive order and part 23 would not apply to contracts with the Federal Government to be performed in their entirety outside the geographical limits of the United States as thus defined. However, if a contract with the Federal Government is to be performed in part within and in part outside these geographical limits and is otherwise covered by the Executive order and part 23, the minimum wage requirements of the order and part 23 would apply with respect to that part of the contract that is performed within these geographical limits.

As explained above in the discussion of the proposed definition of *United States,* the geographic scope of Executive Order 14026 and part 23 is more expansive than the regulations implementing Executive Order 13658, which only applied to contracts performed in the 50 States and the District of Columbia. However, as noted above, each of the territories listed above is covered by both the SCA, *see* 29 CFR 4.112(a), and the FLSA. *See, e.g.,* 29 U.S.C. 213(f), 29 CFR 776.7; Fair Minimum Wage Act of 2007, Public Law 110–28, 121 Stat. 112 (2007). Contractors operating in those territories will therefore generally have familiarity with many of the requirements set forth in part 23 based on their coverage by the SCA and/or the FLSA.

Section 23.40 Exclusions

Proposed § 23.40 addresses and implements the exclusionary provisions expressly set forth in section 8(c) of Executive Order 14026 and provides other limited exclusions to coverage as authorized by section 4(a) of the Executive order. *See* 86 FR 22836–37. Specifically, proposed § 23.40(a) through (d) and (g) set forth the limited categories of contractual arrangements for services or construction that are excluded from the minimum wage requirements of the Executive order and part 23, while proposed § 23.40(e) and (f) establish narrow categories of workers that are excluded from coverage of the order and part 23. Each of these proposed exclusions is discussed below.

Exclusion of grants: Proposed § 23.40(a) implements section 8(c) of Executive Order 14026, which states that the order does not apply to ''grants.'' 86 FR 22837. Consistent with the regulations implementing Executive Order 13658, *see* 29 CFR 10.4(a), the Department interprets this provision to mean that the minimum wage requirements of the Executive order and part 23 do not apply to grants, as that term is used in the Federal Grant and Cooperative Agreement Act, 31 U.S.C. 6301 *et seq.* That statute defines a ''grant agreement'' as ''the legal instrument reflecting a relationship between the United States Government and a State, a local government, or other recipient'' when two conditions are satisfied. 31 U.S.C. 6304. First, ''the principal purpose of the relationship is to transfer a thing of value to the state or local government or other recipient to carry out a public purpose of support or stimulation authorized by a law of the United States instead of acquiring (by purchase, lease, or barter) property or services for the direct benefit or use of the United States Government.'' *Id.* Second, ''substantial involvement is not expected between the executive agency and the State, local government, or other recipient when carrying out the activity contemplated in the agreement.'' *Id.* Section 2.101 of the FAR similarly excludes ''grants,'' as defined in the Federal Grant and Cooperative Agreement Act, from its coverage of contracts. 48 CFR 2.101. Several appellate courts have similarly adopted this construction of ''grants'' in defining the term for purposes of other Federal statutory schemes. *See, e.g., Chem. Service, Inc.* v. *Environmental Monitoring Systems Laboratory,* 12 F.3d 1256, 1258 (3d Cir. 1993) (applying same definition of ''grants'' for purposes of 15 U.S.C. 3710a); *East Arkansas Legal Services* v. *Legal Services Corp.,* 742 F.2d 1472, 1478 (D.C. Cir. 1984) (applying same definition of ''grants'' in interpreting 42 U.S.C. 2996a). If a contract qualifies as a grant within the meaning of the Federal Grant and Cooperative Agreement Act, it would thereby be excluded from coverage of Executive Order 14026 and part 23 pursuant to the proposed rule.

Exclusion of contracts or agreements with Indian Tribes: Proposed § 23.40(b) implements the other exclusion set forth in section 8(c) of Executive Order 14026, which states that the order does not apply to ''contracts, contract-like instruments, or agreements with Indian Tribes under the Indian Self-Determination and Education Assistance Act (Pub. L. 93–638), as amended.'' 86 FR 22837.

The remaining exclusionary provisions of the proposed rule are

derived from the authority granted to the Secretary pursuant to section 4(a) of the Executive order to ''include . . . as appropriate, exclusions from the requirements of this order'' in implementing regulations. 86 FR 22836. In issuing such regulations, the Executive order instructs the Secretary to ''incorporate existing definitions'' under the FLSA, SCA, DBA, and Executive Order 13658 ''to the extent practicable.'' *Id.* Accordingly, the proposed exclusions discussed below incorporate existing applicable statutory and regulatory exclusions and exemptions set forth in the FLSA, SCA, DBA, and Executive Order 13658.

Exclusion for procurement contracts for construction that are excluded from DBA coverage: As discussed in the coverage section above, the Department proposes to interpret section 8(a)(i)(A) of the Executive order, which states that the order applies to ''procurement contract[s]'' for ''construction,'' 86 FR 22837, as referring to any contract covered by the DBA, as amended, and its implementing regulations. *See* proposed § 23.30(a)(1)(i). In order to provide further definitional clarity to the regulated community for purposes of proposed § 23.30(a)(1)(i), and consistent with the regulations implementing Executive Order 13658, the Department thus establishes in proposed § 23.40(c) that any procurement contracts for construction that are not subject to the DBA are similarly excluded from coverage of the Executive order and part 23. For example, a prime procurement contract for construction valued at less than $2,000 would not be covered by the DBA and thus is not covered by Executive Order 14026 and part 23. To assist all interested parties in understanding their rights and obligations under Executive Order 14026, the Department proposes to make coverage of construction contracts under Executive Order 14026 and part 23 consistent with coverage under the DBA and Executive Order 13658 to the greatest extent possible.

Exclusion for contracts for services that are exempted from SCA coverage: Similarly, the Department proposes to implement the coverage provisions set forth in sections 8(a)(i)(A) and (B) of the Executive order, which state that the order applies respectively to a ''procurement contract . . . for services'' and a ''contract or contract-like instrument for services covered by the Service Contract Act,'' 86 FR 22837, by providing that the requirements of the order apply to all service contracts covered by the SCA. *See* proposed § 23.30(a)(1)(ii). Proposed § 23.40(d) provides additional clarification by incorporating, where appropriate, the SCA's exclusion of certain service contracts into the exclusionary provisions of the Executive order. This proposed provision excludes from coverage of the Executive order and part 23 any contracts for services, except for those expressly covered by proposed § 23.30(a)(1)(ii)–(iv), that are exempted from coverage under the SCA. The SCA specifically exempts from coverage seven types of contracts (or work) that might otherwise be subject to its requirements. *See* 41 U.S.C. 6702(b). Pursuant to this statutory provision, the SCA expressly does not apply to (1) a contract of the Federal Government or the District of Columbia for the construction, alteration, or repair, including painting and decorating, of public buildings or public works; (2) any work required to be done in accordance with chapter 65 of title 41; (3) a contract for the carriage of freight or personnel by vessel, airplane, bus, truck, express, railway line or oil or gas pipeline where published tariff rates are in effect; (4) a contract for the furnishing of services by radio, telephone, telegraph, or cable companies, subject to the Communications Act of 1934, 47 U.S.C. 151 *et seq.;* (5) a contract for public utility services, including electric light and power, water, steam, and gas; (6) an employment contract providing for direct services to a Federal agency by an individual; or (7) a contract with the United States Postal Service, the principal purpose of which is the operation of postal contract stations. *Id.; see* 29 CFR 4.115–4.122; WHD FOH ¶ 14c00.

The SCA also authorizes the Secretary to ''provide reasonable limitations'' and to prescribe regulations allowing reasonable variation, tolerances, and exemptions with respect to the chapter but only in special circumstances where the Secretary determines that the limitation, variation, tolerance, or exemption is necessary and proper in the public interest or to avoid the serious impairment of Federal Government business, and is in accord with the remedial purpose of the chapter to protect prevailing labor standards. 41 U.S.C. 6707(b); *see* 29 CFR 4.123. Pursuant to this authority, the Secretary has exempted a specific list of contracts from SCA coverage to the extent regulatory criteria for exclusion from coverage are satisfied as provided at 29 CFR 4.123(d) and (e). To assist all interested parties in understanding their rights and obligations under Executive Order 14026, the Department proposes to make coverage of service contracts under the Executive order and part 23 consistent with coverage under the SCA to the greatest extent possible.

Therefore, the Department provides in proposed § 23.40(d) that contracts for services that are exempt from SCA coverage pursuant to its statutory language or implementing regulations are not subject to part 23 unless expressly included by proposed § 23.30(a)(1)(ii)–(iv). For example, the SCA exempts contracts for public utility services, including electric light and power, water, steam, and gas, from its coverage. *See* 41 U.S.C. 6702(b)(5); 29 CFR 4.120. Such contracts would also be excluded from coverage of the Executive order and part 23 under the proposed rule. Similarly, certain contracts principally for the maintenance, calibration, or repair of automated data processing equipment and office information/word processing systems are exempted from SCA coverage pursuant to the SCA's implementing regulations at 29 CFR 4.123(e)(1)(i)(A); such contracts would thus not be covered by the Executive order or the proposed rule. However, certain types of concessions contracts are excluded from SCA coverage pursuant to 29 CFR 4.133(b) but are explicitly covered by the Executive order and part 23 under proposed § 23.30(a)(1)(iii). 86 FR 22837. Moreover, to the extent that a contract is excluded from SCA coverage but subject to the DBA (*e.g.,* a contract with the Federal Government for the construction, alteration, or repair, including painting and decorating, of public buildings or public works that would be excluded from the SCA under 41 U.S.C. 6702(b)(1)), such a contract would be covered by the Executive order and part 23 as a ''procurement contract'' for ''construction.'' 86 FR 22837; proposed § 23.30(a)(1)(i). In sum, all of the SCA's exemptions are applicable to the Executive order, unless such SCA-exempted contracts are otherwise covered by the Executive order and this proposed rule (*e.g.,* they qualify as concessions contracts or contracts in connection with Federal land and related to offering services). The Department notes that subregulatory and other coverage determinations made by the Department for purposes of the SCA will also govern whether a contract is covered by the SCA for purposes of the Executive order. This proposed exclusion is identical to that adopted in the regulations implementing Executive Order 13658. *See* 29 CFR 10.4(d).

Exclusion for employees who are exempt from the minimum wage requirements of the FLSA under 29

U.S.C. 213(a) and 214(a)–(b): Consistent with the regulations implementing Executive Order 13658, the Department proposes to provide in § 23.40(e) that, except for workers whose wages are calculated pursuant to special certificates issued under 29 U.S.C. 214(c) and workers who are otherwise covered by the SCA or DBA, employees who are exempt from the minimum wage protections of the FLSA under 29 U.S.C. 213(a) are similarly not subject to the minimum wage protections of Executive Order 14026 and part 23. Proposed § 23.40(e)(1) through (3), which are discussed briefly below, highlighted some of the narrow categories of employees that are not entitled to the minimum wage protections of the order and part 23 pursuant to this exclusion.

Proposed § 23.40(e)(1) and (2) specifically exclude from the requirements of Executive Order 14026 and part 23 workers whose wages are calculated pursuant to special certificates issued under 29 U.S.C. 214(a) and (b). Specifically, proposed § 23.40(e)(1) excludes from coverage learners, apprentices, or messengers employed under special certificates pursuant to 29 U.S.C. 214(a). *Id.; see* 29 CFR part 520. Proposed § 23.40(e)(2) also excludes from coverage full-time students employed under special certificates issued under 29 U.S.C. 214(b). *Id.; see* 29 CFR part 519. Proposed § 23.40(e)(3) provides that the Executive order and part 23 do not apply to individuals employed in a bona fide executive, administrative, or professional capacity, as those terms are defined and delimited in 29 CFR part 541. This proposed exclusion is consistent with the regulations for Executive Order 13658, *see* 29 CFR 10.4(e), as well as with the FLSA, SCA, and DBA and their implementing regulations. *See, e.g.,* 29 U.S.C. 213(a)(1) (FLSA); 41 U.S.C. 6701(3)(C) (SCA); 29 CFR 5.2(m) (DBA).

Exclusion for FLSA-covered workers performing in connection with covered contracts for less than 20 percent of their work hours in a given workweek: As discussed earlier in the context of the ''on or in connection with'' standard for worker coverage, proposed § 23.40(f) establishes an explicit exclusion for FLSA-covered workers performing ''in connection with'' covered contracts for less than 20 percent of their hours worked in a given workweek.

This exclusion is identical to the exclusion that appears in the Department's regulations implementing Executive Order 13658. *See* 29 CFR 10.4(f). As the Department explained in the final rule for those regulations, *see* 79 FR 60660, the Department has used a 20 percent threshold for coverage determinations in a variety of SCA and DBA contexts. For example, 29 CFR 4.123(e)(2) exempts from SCA coverage contracts for seven types of commercial services, such as financial services involving the issuance and servicing of cards (including credit cards, debit cards, purchase cards, smart cards, and similar card services), contracts with hotels for conferences, transportation by common carriers of persons by air, real estate services, and relocation services. Certain criteria must be satisfied for the exemption to apply to a contract, including that each service employee spend only ''a small portion of his or her time'' servicing the contract. 29 CFR 4.123(e)(2)(ii)(D). The exemption defines ''small portion'' in relative terms and as ''less than 20 percent'' of the employee's available time. *Id.* Likewise, the Department has determined that the DBA applies to certain categories of workers (*i.e.,* air balance engineers, employees of traffic service companies, material suppliers, and repair employees) only if they spend 20 percent or more of their hours worked in a workweek performing laborer or mechanic duties on the covered site. *See* WHD FOH ¶¶ 15e06, 15e10(b), 15e16(c), and 15e19.

In light of the exclusion that was adopted in the Department's regulations implementing Executive Order 13658, as well as the above-discussed administrative practice under the SCA and the DBA of applying a 20 percent threshold to certain coverage determinations, the Department proposes an exclusion in § 23.40(f) whereby any covered worker performing only ''in connection with'' covered contracts for less than 20 percent of his or her hours worked in a given workweek will not be entitled to the Executive Order 14026 minimum wage for any hours worked.

This proposed exclusion does not apply to any worker performing ''on'' a covered contract whose wages are governed by the FLSA, SCA, or DBA. Such workers will be entitled to the Executive Order 14026 minimum wage for all hours worked performing on or in connection with covered contracts. However, for a worker solely performing ''in connection with'' a covered contract, the Executive Order 14026 minimum wage requirements will only apply if that worker spends 20 percent or more of his or her hours worked in a given workweek performing in connection with covered contracts. Thus, in order to apply this exclusion correctly, contractors must accurately distinguish between workers performing ''on'' a covered contract and those workers performing ''in connection with'' a covered contract based on the guidance provided in this section. The 20 percent of hours worked exclusion does not apply to any worker who spends any hours performing ''on'' a covered contract; rather, it applies only to workers performing ''in connection with'' a covered contract who do not spend any hours worked performing ''on'' the contract in a given workweek.

For purposes of administering the 20 percent of hours worked exclusion under the Executive order, the Department views workers performing ''on'' a covered contract as those workers directly performing the specific services called for by the contract. Whether a worker is performing ''on'' a covered contract will be determined in part by the scope of work or a similar statement set forth in the covered contract that identifies the work (*e.g.,* the services or construction) to be performed under the contract. Specifically, consistent with the SCA, *see, e.g.,* 29 CFR 4.153, a worker will be considered to be performing ''on'' a covered contract if the employee is directly engaged in the performance of specified contract services or construction. All laborers and mechanics engaged in the construction of a public building or public work on the site of the work thus will be regarded as performing ''on'' a DBA-covered contract. All service employees performing the specific services called for by an SCA-covered contract will also be regarded as performing ''on'' a contract covered by the Executive order. In other words, any worker who is entitled to be paid DBA or SCA prevailing wages is entitled to receive the Executive Order 14026 minimum wage for all hours worked on covered contracts, regardless of whether such covered work constitutes less than 20 percent of his or her overall hours worked in a particular workweek. For purposes of concessions contracts and contracts in connection with Federal property and related to offering services that are not covered by the SCA, the Department will regard any employee performing the specific services called for by the contract as performing ''on'' the covered contract in the same manner described above. Such workers will therefore be entitled to receive the Executive Order 14026 minimum wage for all hours worked on covered contracts, even if such time represents less than 20 percent of his or her overall work hours in a particular workweek.

However, for purposes of the Executive order, the Department will view any worker who performs solely

''in connection with'' covered contracts for less than 20 percent of his or her hours worked in a given workweek to be excluded from the order and part 23. In other words, such workers will not be entitled to be paid the Executive order minimum wage for any hours that they spend performing in connection with a covered contract if such time represents less than 20 percent of their hours worked in a given workweek. For purposes of this proposed exclusion, the Department regards a worker performing ''in connection with'' a covered contract as any worker who is performing work activities that are necessary to the performance of a covered contract but who are not directly engaged in performing the specific services called for by the contract itself.

Therefore, the 20 percent of hours worked exclusion may apply to any FLSA-covered employees who are not directly engaged in performing the specific construction identified in a DBA contract (*i.e.,* they are not DBA-covered laborers or mechanics) but whose services are necessary to the performance of the DBA contract. In other words, workers who may fall within the scope of this exclusion are FLSA-covered workers who do not perform the construction identified in the DBA contract either due to the nature of their non-physical duties and/or because they are not present on the site of the work, but whose duties would be regarded as essential for the performance of the contract.

In the context of DBA-covered contracts, workers who may qualify for this exclusion if they spend less than 20 percent of their hours worked performing in connection with covered contracts could include an FLSA-covered security guard patrolling or monitoring a construction worksite where DBA-covered work is being performed or an FLSA-covered clerk who processes the payroll for DBA contracts (either on or off the site of the work). However, if the security guard or clerk in these examples also performed the duties of a DBA-covered laborer or mechanic (for example, by painting or moving construction materials), the 20 percent of hours worked exclusion would not apply to any hours worked on or in connection with the contract because that worker performed ''on'' the covered contract at some point in the workweek.

The Department also reaffirms that the protections of the order do not extend to workers who are not engaged in working on or in connection with a covered contract. For example, an FLSA-covered technician who is hired to repair a DBA contractor's electronic time system or an FLSA-covered janitor who is hired to clean the bathrooms at the DBA contractor's company headquarters are not covered by the order because they are not performing the specific duties called for by the contract or other services or work necessary to the performance of the contract.

In the context of SCA-covered contracts, the 20 percent of hours worked exclusion may apply to any FLSA-covered employees performing in connection with an SCA contract who are not directly engaged in performing the specific services identified in the contract (*i.e.,* they are not ''service employees'' entitled to SCA prevailing wages) but whose services are necessary to the performance of the SCA contract. Any workers performing work in connection with an SCA contract who are not entitled to SCA prevailing wages but are entitled to at least the FLSA minimum wage pursuant to 41 U.S.C. 6704(a) would fall within the scope of this exclusion.

Examples of workers in the SCA context who may qualify for this exclusion if they perform in connection with covered contracts for less than 20 percent of their hours worked in a given workweek include an accounting clerk who processes a few invoices for SCA contracts out of thousands of other invoices for non-covered contracts during the workweek or an FLSA-covered human resources employee who assists for short periods of time in the hiring of the workers performing on the SCA-covered contract in addition to the hiring of workers on other non-covered projects. Neither the Executive order nor the exclusion would apply, however, to an FLSA-covered landscaper at the office of an SCA contractor because that worker is not performing the specific duties called for by the SCA contract or other services or work necessary to the performance of the contract.

With respect to concessions contracts and contracts in connection with Federal property or lands and related to offering services, the 20 percent of hours worked exclusion may apply to any FLSA-covered employees performing work in connection with such contracts who are not at any time directly engaged in performing the specific services identified in the contract but whose services or work duties are necessary to the performance of the covered contract. One example of a worker who may qualify for this exclusion if the worker performed work in connection with covered contracts for less than 20 percent of his or her hours in a given workweek includes an FLSA-covered clerk who handles the payroll for a fitness center that leases space in a Federal agency building as well as the center's other locations that are not covered by the Executive order. Another such example of a worker who may qualify for this exclusion if the worker performed work in connection with covered contracts for less than 20 percent of his or her hours worked in a given workweek would be a job coach whose wages are governed by the FLSA who assists FLSA section 14(c) workers in performing work at a fast food franchise located on a military base as well as that franchisee's other restaurant locations off the base. Neither the Executive order nor the exclusion would apply, however, to an FLSA-covered employee hired by a covered concessionaire to redesign the storefront sign for a snack shop in a national park unless the redesign of the sign was called for by the SCA contract itself or otherwise necessary to the performance of the contract.

As explained above, pursuant to this exclusion, if a covered worker performs work ''in connection with'' contracts covered by the Executive order as well as on other work that is not within the scope of the order during a particular workweek, the Executive Order 14026 minimum wage would not apply for any hours worked if the number of the individual's work hours spent performing in connection with the covered contract is less than 20 percent of that worker's total hours worked in that workweek. Importantly, however, this rule is only applicable if the contractor has correctly determined the hours worked and if it appears from the contractor's properly kept records or other affirmative proof that the contractor appropriately segregated the hours worked in connection with the covered contract from other work not subject to the Executive order for that worker. *See, e.g.,* 29 CFR 4.169, 4.179. As discussed in greater detail in the preamble pertaining to rate of pay and recordkeeping requirements in §§ 23.220 and 23.260, if a covered contractor during any workweek is not exclusively engaged in performing covered contracts, or if while so engaged it has workers who spend a portion but not all of their hours worked in the workweek in performing work on or in connection with such contracts, it is necessary for the contractor to identify accurately in its records, or by other means, those periods in each such workweek when the contractor and each such worker performed work on or in connection with such contracts. *See* 29 CFR 4.179.

In the absence of records adequately segregating non-covered work from the work performed on or in connection with a covered contract, all workers working in the establishment or department where such covered work is performed will be presumed to have worked on or in connection with the contract during the period of its performance, unless affirmative proof establishing the contrary is presented. Similarly, in the absence of such records, a worker performing any work on or in connection with the contract in a workweek shall be presumed to have continued to perform such work throughout the workweek, unless affirmative proof establishing the contrary is presented. *Id.*

The quantum of affirmative proof necessary to adequately segregate non-covered work from the work performed on or in connection with a covered contract—or to establish, for example, that all of a worker's time associated with a contract was spent performing ''in connection with'' rather than ''on'' the contract—will vary with the circumstances. For example, it may require considerably less affirmative proof to satisfy the 20 percent of hours worked exclusion with respect to an FLSA-covered accounting clerk who only occasionally processes an SCA-contract-related invoice than would be necessary to establish the 20 percent of hours worked exclusion with respect to a security guard who works on a DBA-covered site at least several hours each week.

Finally, the Department notes that in calculating hours worked by a particular worker in connection with covered contracts for purposes of determining whether this exclusion may apply, contractors must determine the aggregate amount of hours worked on or in connection with covered contracts in a given workweek by that worker. For example, if an FLSA-covered administrative assistant works 40 hours per week and spends two hours each week handling payroll for each of four separate SCA contracts, the eight hours that the worker spends performing in connection with the four covered contracts must be aggregated for that workweek in order to determine whether the 20 percent of hours worked exclusion applies; in this example, the worker would be entitled to the Executive order minimum wage for all eight hours worked in connection with the SCA contracts because such work constitutes 20 percent of her total hours worked for that workweek.

Exclusion for contracts that result from a solicitation issued before January 30, 2022 and that are entered into on or between January 30, 2022 and March 30, 2022: Section 9(b) of Executive Order 14026 provides that as an ''exception'' to the general coverage of new contracts, where agencies have issued a solicitation before January 30, 2022, and entered into a new contract resulting from such solicitation within 60 days of such date, such agencies are strongly encouraged but not required to ensure that the Executive Order 14026 minimum wage rates are paid under the new contract. 86 FR 22837–38. The order further provides, however, that if such contract is subsequently extended or renewed, or an option is subsequently exercised under that contract, the Executive order 14026 minimum wage requirements will apply to that extension, renewal, or option. 86 FR 22838. Accordingly, the Department proposes to insert at § 23.40(g) an exclusion providing that part 23 does not apply to contracts that result from a solicitation issued prior to January 30, 2022, and that are entered into on or between January 30, 2022 and March 30, 2022. For stakeholder clarity, and consistent with section 9(b) of the order, the proposed exclusion states that, if such a contract is subsequently extended or renewed, or an option is subsequently exercised under that contract, the Executive order and part 23 will apply to that extension, renewal, or option. The Department notes that, based on a plain reading of the language of section 9(b) of the order, this exclusion is only applicable to contracts resulting from solicitations that are issued prior to January 30, 2022, and that are entered into by March 30, 2022. Any covered contract entered into on or after March 31, 2022, will be subject to Executive Order 14026 and part 23 regardless of when such solicitation was issued. Moreover, the Department notes that this exclusion does not apply to contracts that are awarded outside the solicitation process.

Rescission of Executive Order 13838 Exemption for Contracts in Connection with Seasonal Recreational Services and Seasonal Recreational Equipment Rental Offered for Public Use on Federal Lands: As previously discussed, Executive Order 13658 was issued on February 12, 2014, and established a minimum wage rate that applied to the same four types of Federal contracts to which Executive Order 14026 applies. On May 25, 2018, Executive Order 13838 amended Executive Order 13658 to exclude from coverage contracts entered into with the Federal Government in connection with seasonal recreational services or seasonal recreational equipment rental for the general public on Federal lands. On September 26, 2018, the Department implemented Executive Order 13838 by adding the required exclusion to the regulations for Executive Order 13658 at 29 CFR 10.4(g). *See* 83 FR 48537.

Section 6 of Executive Order 14026 revokes Executive Order 13838 as of January 30, 2022. *See* 86 FR 22836. Accordingly, as of January 30, 2022, contracts entered into with the Federal Government in connection with seasonal recreational services or seasonal recreational equipment rental for the general public on Federal lands will be subject to the minimum wage requirements of either Executive Order 13658 or Executive Order 14026 depending on the date that the relevant contract was entered into, renewed, or extended. (See the preamble discussion accompanying proposed § 23.30 above for more information regarding the interaction between Executive Orders 13658 and 14026 with respect to contract coverage.) Such contracts include contracts in connection with river running, hunting, fishing, horseback riding, camping, mountaineering activities, recreational ski services, and youth camps offered for public use on Federal lands. To effectuate the rescission of Executive Order 13838, the Department is proposing to remove in its entirety the exclusion of such contracts set forth at § 10.4(g) in the regulations implementing Executive Order 13658. Consistent with such rescission, the Department also declines to exclude such contracts in part 23.

Section 23.50 Minimum Wage for Federal Contractors and Subcontractors

Proposed § 23.50 sets forth the minimum wage rate requirement for Federal contractors and subcontractors established in Executive Order 14026. *See* 86 FR 22835–36. This section generally discusses the minimum hourly wage protections provided by the Executive order for workers performing on or in connection with covered contracts with the Federal Government, as well as the methodology that the Secretary will use for determining the applicable minimum wage rate under the Executive order on an annual basis beginning at least 90 days before January 1, 2023. The Executive order provides that the minimum wage beginning January 1, 2023, and annually thereafter, will be an amount determined by the Secretary. It further provides that such rates be increased by the annual percentage increase in the CPI for the most recent month, quarter, or year available as determined by the Secretary. Consistent with the

regulations implementing Executive Order 13658, *see* 29 CFR 10.5, the Secretary proposes to base such increases on the most recent year available to minimize the impact of seasonal fluctuations on the Executive order minimum wage rate. This section also emphasizes that nothing in the Executive order or part 23 shall excuse noncompliance with any applicable Federal or state prevailing wage law or any applicable law or municipal ordinance establishing a minimum wage higher than the minimum wage established under the Executive order and part 23. *See* 86 FR 22836.

Finally, the Department proposes at § 23.50(d) to add language briefly discussing the relationship between Executive Order 13658 and this order. Consistent with section 6 of Executive Order 14026, *see* 86 FR 22836–37, the proposed provision would explain that, as of January 30, 2022, Executive Order 13658 is superseded to the extent that it is inconsistent with Executive Order 14026 and part 23. The Department proposes to explain that, unless otherwise excluded by § 23.40, workers performing on or in connection with a covered new contract, as defined in § 23.20, must be paid the minimum hourly wage rate established by Executive Order 14026 and part 23 rather than the lower hourly minimum wage rate established by Executive Order 13658 and its regulations. A more detailed discussion of the interaction between the Executive orders appears above in the discussion of contract coverage under § 23.30.

Section 23.60 Antiretaliation

Proposed § 23.60 establishes an antiretaliation provision stating that it shall be unlawful for any person to discharge or in any other manner discriminate against any worker because such worker has filed any complaint or instituted or caused to be instituted any proceeding under or related to Executive Order 14026 or part 23, or has testified or is about to testify in any such proceeding. Consistent with the Executive Order 13658 regulations, *see* 29 CFR 10.6, this language is derived from the FLSA's antiretaliation provision set forth at 29 U.S.C. 215(a)(3) and is consistent with the Executive order's direction to adopt enforcement mechanisms as consistent as practicable with the FLSA, SCA, or DBA. The Department believes that such a provision will help ensure effective enforcement of Executive Order 14026. Consistent with the Supreme Court's observation in interpreting the scope of the FLSA's antiretaliation provision, enforcement of Executive Order 14026 will depend ''upon information and complaints received from employees seeking to vindicate rights claimed to have been denied.'' *Kasten* v. *Saint-Gobain Performance Plastics Corp.,* 563 U.S. 1, 11 (2011) (internal quotation marks omitted). Accordingly, the Department proposes to include an antiretaliation provision based on the FLSA's antiretaliation provision. *See* 29 U.S.C. 215(a)(3). Importantly, and consistent with the Supreme Court's interpretation of the FLSA's antiretaliation provision, the Department's proposed rule would protect workers who file oral as well as written complaints. *See Kasten,* 563 U.S. at 17.

Moreover, as under the FLSA, the proposed antiretaliation provision under part 23 would protect workers who complain to the Department as well as those who complain internally to their employers about alleged violations of the order or part 23. *See, e.g., Greathouse* v. *JHS Sec. Inc.,* 784 F.3d 105, 111–16 (2d Cir. 2015); *Minor* v. *Bostwick Labs. Inc.,* 669 F.3d 428, 438 (4th Cir. 2012); *Hagan* v. *Echostar Satellite, LLC,* 529 F.3d 617, 626 (5th Cir. 2008); *Lambert* v. *Ackerley,* 180 F.3d 997, 1008 (9th Cir. 1999) (en banc); *Valerio* v. *Putnam Assocs. Inc.,* 173 F.3d 35, 43 (1st Cir. 1999); *EEOC* v. *Romeo Comty Sch.,* 976 F.2d 985, 989 (6th Cir. 1992). The Department also notes that the antiretaliation provision set forth in the proposed rule, like the FLSA's antiretaliation provision, would apply in situations where there is no current employment relationship between the parties; for example, it would protect a worker from retaliation by a prospective or former employer, or by a person acting directly or indirectly in the interest of an employer. *See Arias* v. *Raimondo,* 860 F.3d 1185 (9th Cir. 2017); *see also* WHD Fact Sheet #77A (''Prohibiting Retaliation Under the Fair Labor Standards Act (FLSA)''), available at *https://www.dol.gov/agencies/whd/fact-sheets/77a-flsa-prohibiting-retaliation.*

Section 23.70 Waiver of Rights

Proposed § 23.70 provides that workers cannot waive, nor may contractors induce workers to waive, their rights under Executive Order 14026 or part 23. The Supreme Court has consistently concluded that an employee's rights and remedies under the FLSA, including payment of minimum wage and back wages, cannot be waived or abridged by contract. *See, e.g., Tony & Susan Alamo Found.* v. *Sec'y of Labor,* 471 U.S. 290, 302 (1985); *Barrentine* v. *Arkansas-Best Freight Sys., Inc.,* 450 U.S. 728, 740 (1981); *D.A. Schulte, Inc.* v. *Gangi,* 328 U.S. 108, 112–16 (1946); *Brooklyn Sav. Bank* v. *O'Neil,* 324 U.S. 697, 706–07 (1945). The Supreme Court has reasoned that the FLSA was intended to establish a ''uniform national policy of guaranteeing compensation for all work'' performed by covered employees. *Jewell Ridge Coal Corp.* v. *Local No. 6167, United Mine Workers,* 325 U.S. 161, 167 (1945) (internal quotation marks omitted). Consequently, the Court has held that ''[a]ny custom or contract falling short of that basic policy, like an agreement to pay less than the minimum wage requirements, cannot be utilized to deprive employees of their statutory rights.'' *Id.* (internal quotation marks omitted). In *Barrentine,* the Supreme Court reaffirmed the ''nonwaivable nature'' of these fundamental FLSA protections and stated that ''FLSA rights cannot be abridged by contract or otherwise waived because this would 'nullify the purposes' of the statute and thwart the legislative policies it was designed to effectuate.'' 450 U.S. at 740 (quoting *Brooklyn Sav. Bank,* 324 U.S. at 707). Moreover, FLSA rights are not subject to waiver because they serve an important public interest by protecting employers against unfair methods of competition in the national economy. *See Tony & Susan Alamo Found.,* 471 U.S. at 302. Releases and waivers executed by employees for unpaid wages (and fringe benefits) due them under the SCA are similarly without legal effect. 29 CFR 4.187(d). Because the public policy interests underlying the issuance of the Executive order would be similarly thwarted by permitting workers to waive, or contractors to induce workers to waive, their rights under Executive Order 14026 or part 23, proposed § 23.70 makes clear that such waiver of rights is impermissible.

Section 23.80 Severability

Section 7 of Executive Order 14026 states that if any provision of the order, or the application of any such provision to any person or circumstance, is held to be invalid, the remainder of the order and the application shall not be affected. *See* 86 FR 22837. Consistent with this directive, the Department proposes to include a severability clause in part 23. Proposed § 23.80 explains that, if any provision of part 23 is held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, or stayed pending further agency action, the provision shall be construed so as to continue to give the maximum effect to the provision permitted by law, unless such holding shall be one of utter invalidity or

unenforceability, in which event the provision shall be severable from part 23 and shall not affect the remainder thereof.

Subpart B—Federal Government Requirements

The Department proposes subpart B of part 23 to establish the requirements for the Federal Government to implement and comply with Executive Order 14026. The Department proposes § 23.110 to address contracting agency requirements and proposes § 23.120 to address the requirements placed upon the Department.

Section 23.110 Contracting Agency Requirements

Proposed § 23.110(a) would implement section 2 of Executive Order 14026, which directs that executive departments and agencies must include a contract clause in any new contracts or solicitations for contracts covered by the Executive order. 86 FR 22835. The proposed section describes the basic function of the contract clause, which is to require that workers performing work on or in connection with covered contracts be paid the applicable Executive order minimum wage. The proposed section states that for all contracts subject to Executive Order 14026, except for procurement contracts subject to the FAR, the contracting agency must include the Executive order minimum wage contract clause set forth in appendix A of part 23 in all covered contracts and solicitations for such contracts, as described in § 23.30. It further states that the required contract clause directs, as a condition of payment, that all workers performing work on or in connection with covered contracts must be paid the applicable, currently effective minimum wage under Executive Order 14026 and § 23.50. The proposed section additionally provides that for procurement contracts subject to the FAR, contracting agencies must use the clause that will be set forth in the FAR to implement this rule. The FAR clause will accomplish the same purposes as the clause set forth in appendix A and be consistent with the requirements set forth in this rule.

As the Department noted in the rulemaking for Executive Order 13658, including the full contract clause in a covered contract is an effective and practical means of ensuring that contractors receive notice of their obligations under the Executive order. *See* 79 FR 60668. Therefore, the Department again prefers that covered contracts include the contract clause in full. At the same time, there will be instances in which a contracting agency, or a contractor, does not include the entire contract clause verbatim in a covered contract, but the facts and circumstances establish that the contracting agency, or contractor, sufficiently apprised a prime or lower-tier contractor that the Executive order and its requirements apply to the contract. It will be appropriate to find in such circumstances that the full contract clause has been properly incorporated by reference. *See Nat'l Electro-Coatings, Inc.* v. *Brock,* Case No. C86–2188, 1988 WL 125784 (N.D. Ohio 1988); *In re Progressive Design & Build, Inc.,* WAB Case No. 87–31, 1990 WL 484308 (WAB Feb. 21, 1990). The Department notes, for example, that the full contract clause will be deemed to have been incorporated by reference in a covered contract if the contract provides that ''Executive Order 14026 (Increasing the Minimum Wage for Federal Contractors), and its implementing regulations, including the applicable contract clause, are incorporated by reference into this contract as if fully set forth in this contract,'' with a citation to a web page that contains the contract clause in full, to the provision of the Code of Federal Regulations containing the contract clause set forth at appendix A, or to the provision of the FAR containing the contract clause promulgated by the FARC to implement Executive Order 14026 and this rule.

The Department's decision to include verbal agreements as part of its definition of the term ''contract'' derives from the SCA's regulations. *See* 29 CFR 4.110. Under the SCA, a contract may be embodied in a verbal agreement, *see id.,* notwithstanding the regulatory obligation to include the SCA contract clause found at 29 CFR 4.6 in the contract. The purpose of including verbal agreements in the definition of contract and contract-like instrument is to ensure that the Executive order's minimum wage protections apply in instances where the contracting parties, for whatever reason, rely on a verbal rather than written contract. This is consistent with the regulations implementing Executive Order 13658. *See* 29 CFR 10.2. As noted, such instances are likely to be exceedingly rare, but workers should not be deprived of the Executive order's minimum wage because contracting parties neglected to memorialize their understanding in a written contract.

As discussed more fully later in this preamble, the Department believes requiring non-procurement contractors potentially to become familiar with distinct Executive order contract clauses whenever they contract with more than one Federal agency, as opposed to the single, uniform clause attached as appendix A, imposes an unnecessary burden. The Department additionally believes that requiring such contractors to use multiple contract clauses could result in confusion, potentially undercutting the Department's mandate under the Executive order to adopt regulations that obtain compliance with the order.

Proposed § 23.110(a) requires the contracting agency to include the Executive order minimum wage contract clause set forth in appendix A in all covered contracts and solicitations for such contracts, as described in § 23.30, except for procurement contracts subject to the FAR. For procurement contracts subject to the FAR, contracting agencies shall use the clause set forth in the FAR developed to implement this rule; that clause must both accomplish the same purposes as the clause set forth in appendix A and be consistent with the requirements set forth in this rule.

Proposed § 23.110(b) states the consequences in the event that a contracting agency fails to include the contract clause in a covered contract. Proposed § 23.110(b) provides that if a contracting agency made an erroneous determination that Executive Order 14026 or part 23 did not apply to a particular contract or failed to include the applicable contract clause in a contract to which the Executive order applies, the contracting agency, on its own initiative or within 15 calendar days of notification by an authorized representative of the Department, must include the clause in the contract retroactive to commencement of performance under the contract through the exercise of any and all authority that may be needed. The Department notes that the Administrator possesses analogous authority under the DBA, *see* 29 CFR 1.6(f), and it believes that a similar mechanism for addressing an agency's failure to include the contract clause in a contract subject to the Executive order would enhance its ability to obtain compliance with the Executive order.

Where a contract clause should have been originally inserted by the contracting agency, a contractor is entitled to an adjustment where necessary to pay any necessary additional costs when a contracting agency initially omits and then subsequently includes the contract clause in a covered contract. This approach, which is consistent with the SCA's implementing regulations, *see* 29 CFR 4.5(c), is therefore reflected in revised § 23.440(e). The Department recognizes that the mechanics of

providing such an adjustment may differ between covered procurement contracts and the non-procurement contracts that the Department's contract clause covers. With respect to covered non-procurement contracts, the Department believes that the authority conferred on agencies that enter into such contracts under section 4(b) of the Executive order includes the authority to provide such an adjustment. The Department notes that such an adjustment is not warranted under the Executive order or part 23 when a contracting agency includes the applicable Executive order contract clause but fails to include an applicable SCA or DBA wage determination. This proposed rule would require inclusion of a contract clause, not a wage determination, in covered contracts; thus, unlike the DBA's regulations at 29 CFR 1.6(f), it is a contracting agency's failure to include the required contract clause, not a failure to include a wage determination, that would trigger the entitlement to an adjustment as described in this paragraph.

Proposed § 23.110(c) addresses the obligations of a contracting agency in the event that the contract clause has been included in a covered contract but the contractor may not have complied with its obligations under the Executive order or part 23. Specifically, proposed § 23.110(c) provides that the contracting agency must, upon its own action or upon written request of an authorized representative of the Department, withhold or cause to be withheld from the prime contractor under the contract or any other Federal contract with the same prime contractor, so much of the accrued payments or advances as may be necessary to pay workers the full amount of wages required by the Executive order. Both the SCA and DBA provide for withholding to ensure the availability of monies for the payment of back wages to covered workers when a contractor or subcontractor has failed to pay the full amount of required wages. 29 CFR 4.6(i); 29 CFR 5.5(a)(2). Withholding likewise is an appropriate remedy under the Executive order for all covered contracts because the order directs the Department to adopt SCA and DBA enforcement processes to the extent practicable and to exercise authority to obtain compliance with the order. 86 FR 22836. Consistent with withholding procedures under the SCA and DBA, proposed § 23.110(c) allows the contracting agency and the Department to withhold or cause to be withheld funds from the prime contractor not only under the contract on which covered workers were not paid the Executive order minimum wage, but also under any other contract that the prime contractor has entered into with the Federal Government. Finally, the Department notes that a withholding remedy is consistent with the requirement in section 2(a) of the Executive order that compliance with the specified obligations is an express ''condition of payment'' to a contractor or subcontractor. 86 FR 22835.

Proposed § 23.110(d) describes a contracting agency's responsibility to forward to the WHD any complaint alleging a contractor's non-compliance with Executive Order 14026, as well as any information related to the complaint. The Department recognizes that, in addition to filing complaints with WHD, some workers or other interested parties may file formal or informal complaints concerning alleged violations of the Executive order or part 23 with contracting agencies. Proposed § 23.110(d) therefore specifically requires the contracting agency to transmit the complaint-related information identified in § 23.110(d)(1)(ii)(A)–(E) to the WHD's Division of Government Contracts Enforcement within 14 calendar days of receipt of a complaint alleging a violation of the Executive order or part 23, or within 14 calendar days of being contacted by the WHD regarding any such complaint. This language is consistent with the Department's regulations implementing Executive Order 13658. *See* 29 CFR 10.11(d). The Department believes adoption of the language in proposed § 23.110(d), which includes an obligation to send such complaint-related information to WHD even absent a specific request (*e.g.,* when a complaint is filed with a contracting agency rather than with the WHD), is appropriate because prompt receipt of such information from the relevant contracting agency will allow the Department to fulfill its charge under the order to implement enforcement mechanisms for obtaining compliance with the order. 86 FR 22836.

Section 23.120 Department of Labor Requirements

Proposed § 23.120 addresses the Department's requirements under the Executive order. The order requires the Secretary to establish a minimum wage that contractors must pay to workers performing on or in connection with covered contracts. 86 FR 22835. Proposed § 23.120(a) sets forth the Secretary's obligation to establish the Executive order minimum wage on an annual basis in accordance with the order.

Proposed § 23.120(b) explains that the Secretary will determine the applicable minimum wages on an annual basis by using the method set forth in proposed § 23.50(b). The Department notes that contractors concerned about potential increases in the minimum wage provided under the Executive order may consult the CPI–W, which the Federal Government publishes monthly, to monitor the likely magnitude of the annual increase. Furthermore, the Department proposes to include language in the required contract clause (provided in appendix A) that, if appropriate, requires contractors to be compensated only for the increase in labor costs resulting from the annual inflation increases in the Executive order minimum wage beginning on January 1, 2023. This proposed provision in the contract clause should mitigate any potential contractor concerns about unanticipated financial burdens associated with annual increases in the Executive order minimum wage.

Proposed § 23.120(c) explains how the Secretary will provide notice to contractors and subcontractors of the applicable Executive order minimum wage on an annual basis. The proposed section indicates that the WHD Administrator will publish a notice in the **Federal Register** on an annual basis at least 90 days before any new minimum wage is to take effect. Additionally, the proposed provision states that the Administrator will publish and maintain on *https://alpha.sam.gov/content/wage-determinations,* or any successor website, the applicable minimum wage to be paid to workers performing on or in connection with covered contracts, including the cash wage to be paid to tipped employees. The proposed section further states that the Administrator may also publish the applicable wage to be paid to workers performing on or in connection with covered contracts, including the cash wage to be paid to tipped employees, on an annual basis at least 90 days before any such minimum wage is to take effect in any other manner the Administrator deems appropriate.

Consistent with the rulemaking implementing Executive Order 13658, *see* 29 CFR 10.12(c), the Department notes its intent to publish a prominent general notice on SCA and DBA wage determinations, stating the Executive Order 14026 minimum wage and that it applies to all DBA- and SCA-covered contracts. The Department intends to update this general notice on all DBA and SCA wage determinations annually to reflect any inflation-based

adjustments to the Executive order minimum wage. As discussed in more detail in the preamble section pertaining to proposed § 23.290 in subpart C, the Department also proposes developing a poster regarding the Executive order minimum wage for contractors with FLSA-covered workers performing on or in connection with a covered contract, as it did in response to Executive Order 13658. *See* 79 FR 60670. The Department proposes requiring that contractors provide notice of the Executive order minimum wage to FLSA-covered workers performing work on or in connection with covered contracts via posting of the poster that will be provided by the Department. This notice provision is discussed below in the preamble section pertaining to proposed § 23.290, and is also consistent with the rule implementing Executive Order 13658. *See* 29 CFR 10.29(b)

Consistent with the regulations implementing Executive Order 13658, proposed § 23.120(d) addresses the Department's obligation to notify a contractor in the event of a request for the withholding of funds. Under proposed § 23.110(c), the WHD Administrator may direct that payments due on the covered contract or any other contract between the contractor and the Federal Government may be withheld as may be considered necessary to pay unpaid wages. If the Administrator exercises his or her authority under § 23.110(c) to request withholding, proposed § 23.120(d) requires the Administrator or the contracting agency to notify the affected prime contractor of the Administrator's withholding request to the contracting agency. The Department notes that both the Administrator and the contracting agency may notify the contractor in the event of a withholding even though notice is required from only one of them.

Subpart C—Contractor Requirements

Proposed subpart C articulates the requirements that contractors must comply with under Executive Order 14026 and part 23. The subpart sets forth the general obligation to pay no less than the applicable Executive order minimum wage to workers for all hours worked on or in connection with the covered contract, and to include the Executive order minimum wage contract clause in all contracts and subcontracts of any tier thereunder. Proposed subpart C also sets forth contractor requirements pertaining to permissible deductions, frequency of pay, and recordkeeping, as well as a prohibition against taking kickbacks from wages paid on covered contracts.

Section 23.210 Contract Clause

Proposed § 23.210(a) requires the contractor, as a condition of payment, to abide by the terms of the Executive order minimum wage contract clause described in proposed § 23.110(a). The contract clause contains the obligations with which the contractor must comply on the covered contract and is reflective of the contractor's requirements as stated in the proposed regulations. Proposed § 23.210(b) articulates the obligation that contractors and subcontractors must insert the Executive order minimum wage contract clause in any covered subcontracts and must require, as a condition of payment, that subcontractors include the clause in all lower-tier subcontracts. Under the proposal, the prime contractor and upper-tier contractor would be responsible for compliance by any covered subcontractor or lower-tier subcontractor with the Executive order minimum wage contract clause. This responsibility on the part of prime and upper-tier contractors for subcontractor compliance parallels that of the SCA, DBA, and Executive Order 13658. *See* 29 CFR 4.114(b) (SCA); 29 CFR 5.5(a)(6) (DBA); 29 CFR 10.21 (Executive Order 13658).

Finally, the Department notes that, consistent with the rulemaking implementing Executive Order 13658, a contractor under part 23 is responsible for compliance by all covered lower-tier subcontractors. This obligation applies whether or not the contractor has included the Executive order contract clause, regardless of the number of covered lower-tier subcontractors, and regardless of how many levels of subcontractors separate the responsible prime or upper-tier contractor from the subcontractor that failed to comply with the Executive order.

Section 23.220 Rate of Pay

Proposed § 23.220 addresses contractors' obligations to pay the Executive order minimum wage to workers performing work on or in connection with a covered contract under Executive Order 14026. Proposed § 23.220(a) states the general obligation that contractors must pay workers the applicable minimum wage under Executive Order 14026 for all hours spent performing work on or in connection with the covered contract. The proposed section also provides that workers performing work on or in connection with contracts covered by the Executive order must receive not less than the minimum hourly wage of $15.00 beginning January 30, 2022. Under the proposal, in order to comply with the Executive order's minimum wage requirement, a contractor could compensate workers on a daily, weekly, or other time basis (no less often than semi-monthly), or by piece or task rates, so long as the measure of work and compensation used, when translated or reduced by computation to an hourly basis each workweek, will provide a rate per hour that is no lower than the applicable Executive order minimum wage. Whatever system of payment is used, however, must ensure that each hour of work in performance of the contract is compensated at not less than the required minimum rate. Failure to pay for certain hours at the required rate cannot be transformed into compliance with the Executive order or part 23 by reallocating portions of payments made for other hours that are in excess of the specified minimum.

In determining whether a worker is performing within the scope of a covered contract, the Department proposes that all workers who are engaged in working on or in connection with the contract, either in performing the specific services called for by its terms or in performing other duties necessary to the performance of the contract, are subject to the Executive order and part 23 unless a specific exemption is applicable. This standard was derived from the SCA's implementing regulations at 29 CFR 4.150, and is consistent with Executive Order 13658's implementing regulations at 29 CFR 10.22.

Because workers covered by the Executive order are entitled to its minimum wage protections for all hours spent performing work on or in connection with a covered contract, a computation of their hours worked on or in connection with the covered contract in each workweek is essential. *See* 29 CFR 4.178. The proposed rule provides that, for purposes of the Executive order, the hours worked by a worker generally include all periods in which the worker is suffered or permitted to work, whether or not required to do so, and all time during which the worker is required to be on duty or to be on the employer's premises or to be at a prescribed workplace. *Id.* The hours worked which are subject to the minimum wage requirement of the Executive order are those in which the worker is engaged in performing work on or in connection with a contract subject to the Executive order. *Id.* However, unless such hours are adequately segregated or there is affirmative proof to the contrary that such work did not continue throughout

the workweek, as discussed below, compensation in accordance with the Executive order will be required for all hours worked in any workweek in which the worker performs any work on or in connection with a contract covered by the Executive order. *Id.*

The Department further notes that, as explained in the rulemaking to implement Executive Order 13658, 79 FR 60672, in situations where contractors are not exclusively engaged in contract work covered by Executive Order 14026, and there are adequate records segregating the periods in which work was performed on or in connection with contracts subject to the order from periods in which other work was performed, the minimum wage requirement of Executive Order 14026 need not be paid for hours spent on work not covered by the order. *See* 29 CFR 4.169, 4.178, and 4.179. However, in the absence of records adequately segregating non-covered work from the work performed on or in connection with the covered contract, all workers working in the establishment or department where such covered work is performed shall be presumed to have worked on or in connection with the contract during the period of its performance, unless affirmative proof establishing the contrary is presented. *Id.* Similarly, a worker performing any work on or in connection with the covered contract in a workweek shall be presumed to have continued to perform such work throughout the workweek, unless affirmative proof establishing the contrary is presented. *Id.*

The Department notes in this proposed rule that if a contractor desires to segregate covered work from non-covered work under the Executive order for purposes of applying the minimum wage established in the order, the contractor must identify such covered work accurately in its records or by other means. The Department believes that the principles, processes, and practices that it uses in its implementing regulations under the SCA, which incorporate the principles applied under the FLSA as set forth in 29 CFR part 785, will be useful to contractors in determining and segregating hours worked on contracts with the Federal Government subject to the Executive order. *See* 29 CFR 4.169, 4.178, and 4.179; WHD FOH ¶¶ 14c07, 14g00–01.[8] In this regard, an arbitrary assignment of time on the basis of a formula, as between covered and non-covered work, is not sufficient. However, if the contractor does not wish to keep detailed hour-by-hour records for segregation purposes under the Executive order, records can be segregated on the wider basis of departments, work shifts, days, or weeks in which covered work was performed. For example, if on a given day no work covered by the Executive order was performed by a contractor, that day could be segregated and shown in the records. *See* WHD FOH ¶ 14g00.

Finally, the Department notes that the Supreme Court has held that when an employer has failed to keep adequate or accurate records of employees' hours under the FLSA, employees should not effectively be penalized by denying them recovery of back wages on the ground that the precise extent of their uncompensated work cannot be established. *See Anderson* v. *Mt. Clemens Pottery Co.,* 328 U.S. 680, 687 (1946). Specifically, the Supreme Court concluded that where an employer has not maintained adequate or accurate records of hours worked, an employee need only prove that ''he has in fact performed work for which he was improperly compensated'' and produce ''sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference.'' *Id.* Once the employee establishes the amount of uncompensated work as a matter of ''just and reasonable inference,'' the burden then shifts to the employer ''to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence.'' *Id.* at 687–88. If the employer fails to meet this burden, the court may award damages to the employee ''even though the result be only approximate.'' *Id.* at 688. These principles for determining hours worked and accompanying back wage liability apply with equal force to the Executive order.

The Department notes that the applicable minimum wage rate under Executive Order 14026 is subject to annual increases for the duration of multi-year contracts. As was the case under Executive Order 13658, nothing in Executive Order 14026 suggests that the minimum wage requirement can remain stagnant during the span of a covered multi-year contract. *See* 79 FR 60673 (discussing Executive Order 13658). Allowing the applicable minimum wage to increase throughout the duration of multi-year contracts fulfills the Executive order's intent to raise the minimum wage of workers according to annual increases in the CPI–W. It additionally ensures simultaneous application of the same minimum wage rate to all covered workers. However, as mentioned in the preamble section for § 23.110(b) and discussed in further detail in relation to § 23.440(e), the language of the contract clause contained in appendix A requires contracting agencies, if appropriate, to ensure the contractor is compensated only for the increase in labor costs resulting from the annual inflation increases in the Executive Order 14026 minimum wage beginning on January 1, 2023.

Proposed § 23.220(a) explains that the contractor's obligation to pay the applicable minimum wage to workers on or in connection with covered contracts does not excuse noncompliance with any applicable Federal or state prevailing wage law, or any applicable law or municipal ordinance establishing a minimum wage higher than the minimum wage established under Executive Order 14026. This provision implements section 2(c) of the Executive order. 86 FR 22836.

The Department notes that the minimum wage requirements of Executive Order 14026 are separate and distinct legal obligations from the prevailing wage requirements of the SCA and the DBA. If a contract is covered by the SCA or DBA and the wage rate on the applicable SCA or DBA wage determination for the classification of work the worker performs is less than the applicable Executive order minimum wage, the contractor must pay the Executive order minimum wage in order to comply with the Order and part 23. If, however, the applicable SCA or DBA prevailing wage rate exceeds the Executive order minimum wage rate, the contractor must pay that prevailing wage rate to the SCA- or DBA-covered worker in order to be in compliance with the SCA or DBA.[9]

[8] In the rulemaking implementing Executive Order 13658, the Department noted that contractors subject to the Executive order are likely already familiar with these segregation principles and should, as a matter of usual business practices, already have recordkeeping systems in place that enable the segregation of hours worked on different contracts or at different locations. 79 FR 60672, n.8. The Department further expressed its belief that such systems will enable contractors to identify and pay for hours worked subject to the Executive order without having to employ additional systems or processes. *Id.*

[9] The Department further notes that if a contract is covered by a state prevailing wage law that establishes a higher wage rate applicable to a particular worker than the Executive order minimum wage, the contractor must pay that higher prevailing wage rate to the worker. Section 2(c) of the order expressly provides that it does not excuse noncompliance with any applicable state prevailing wage law or any applicable law or municipal ordinance establishing a minimum wage higher than the Executive order minimum wage.

The Department also notes that the minimum wage requirements of Executive Order 14026 are also separate and distinct from the commensurate wage rates under 29 U.S.C. 214(c). If the commensurate wage rate paid to a worker performing on or in connection with a covered contract whose wages are calculated pursuant to a special certificate issued under 29 U.S.C. 214(c), whether hourly or piece rate, is less than the Executive Order 14026 minimum wage, the contractor must pay the Executive Order 14026 minimum wage rate to achieve compliance with the order. The Department notes that if the commensurate wage due under the certificate is greater than the Executive Order 14026 minimum wage, the contractor must pay the worker the greater commensurate wage. Paragraph (b)(5) of the contract clause states this point explicitly. A more detailed discussion of that provision is included in the preamble section for appendix A.

As in the rulemaking implementing Executive Order 13658, the Department notes that in the event that a collectively bargained wage rate is below the applicable DBA rate, a DBA-covered contractor must pay no less than the applicable DBA rate to covered workers on the project. *See* 79 FR 60673. Although a successor contractor on an SCA-covered contract is required only to pay wages and fringe benefits not less than those contained in the predecessor contractor's CBA even if an otherwise applicable area-wide SCA wage determination contains higher wage and fringe benefit rates, that requirement is derived from a specific statutory provision that expressly bases SCA obligations on the predecessor contractor's CBA wage and fringe benefit rates in particular circumstances. *See* 41 U.S.C. 6707(c); 29 CFR 4.1b. There is no similar indication in the Executive order of an intent to permit a CBA rate lower than the Executive order minimum wage rate to govern the wages of workers covered by the order. The Department accordingly proposes that the Executive order minimum wage will apply to a covered contract even if the contractor has negotiated a CBA wage rate lower than the order's minimum wage.

Proposed § 23.220(b) explains how a contractor's obligation to pay the applicable Executive order minimum wage applies to workers who receive fringe benefits. It proposes that a contractor may not discharge any part of its minimum wage obligation under the Executive order by furnishing fringe benefits or, with respect to workers whose wages are governed by the SCA, the cash equivalent thereof. Under the proposed rule, contractors must pay the Executive order minimum wage rate in monetary wages, and may not receive credit for the cost of fringe benefits furnished.

Executive Order 14026 increases, initially to $15.00, ''the hourly minimum wage'' paid by contractors with the Federal Government. 86 FR 22835. By repeatedly referencing that it is establishing a higher hourly minimum wage, without any reference to fringe benefits, the text of the Executive order makes clear that a contractor cannot discharge its minimum wage obligation by furnishing fringe benefits. This interpretation is consistent with the SCA, which does not permit a contractor to meet its minimum wage obligation through the furnishing of fringe benefits, but rather imposes distinct ''minimum wage'' and ''fringe benefit'' obligations on contractors. 41 U.S.C. 6703(1)–(2); 29 CFR 4.177(a). Similarly, the FLSA does not allow a contractor to meet its minimum wage obligation through the furnishing of fringe benefits. Although the DBA specifically includes fringe benefits within its definition of minimum wage, thereby allowing a contractor to meet its minimum wage obligation, in part, through the furnishing of fringe benefits, 40 U.S.C. 3141(2), Executive Order 14026 contains no similar provision expressly authorizing a contractor to discharge its Executive order minimum wage obligation through the furnishing of fringe benefits. Consistent with the Executive order, and the Department's regulations implementing Executive Order 13658, 29 CFR 10.22(b), proposed § 23.220(b) precludes a contractor from discharging its minimum wage obligation by furnishing fringe benefits.

Proposed § 23.220(b) also prohibits a contractor from discharging its Executive order minimum wage obligation to workers whose wages are governed by the SCA by furnishing the cash equivalent of fringe benefits. As noted, the SCA imposes distinct ''minimum wage'' and ''fringe benefit'' obligations on contractors. 41 U.S.C. 6703(1)–(2); 29 CFR 4.177(a). A contractor cannot satisfy any portion of its SCA minimum wage obligation by furnishing fringe benefits or their cash equivalent. *Id.* Consistent with the treatment of fringe benefits or their cash equivalent under the SCA, § 23.220(b) of this proposed rule does not allow contractors to discharge any portion of their minimum wage obligation under the Executive order to workers whose wages are governed by the SCA through the provision of either fringe benefits or their cash equivalent.

Proposed § 23.220(c) states that a contractor may satisfy the wage payment obligation to a tipped employee under the Executive order through a combination of an hourly cash wage and a credit based on tips received by such employee pursuant to the provisions in proposed § 23.280.

Section 23.230 Deductions

Proposed § 23.230 explains that deductions that reduce a worker's wages below the Executive order minimum wage rate may only be made under the limited circumstances set forth in this section. Proposed § 23.230(a) permits deductions required by Federal, state, or local law, including Federal or state withholding of income taxes. *See* 29 CFR 531.38 (FLSA); 29 CFR 4.168(a) (SCA); 29 CFR 3.5(a) (DBA). Proposed § 23.230(b) permits deductions for payments made to third parties pursuant to court orders. Permissible deductions made pursuant to a court order may include such deductions as those made for child support. *See* 29 CFR 531.39 (FLSA); 29 CFR 4.168(a) (SCA); 29 CFR 3.5(c) (DBA). Proposed § 23.230(b) echoes the principle established under the FLSA, SCA, and DBA that only garnishment orders made pursuant to an ''order of a court of competent and appropriate jurisdiction'' may deduct a worker's hourly wage below the minimum wage set forth under the Executive order. 29 CFR 531.39(a) (FLSA); 29 CFR 4.168(a) (SCA) (permitting garnishment deductions ''required by court order''); 29 CFR 3.5(c) (DBA) (permitting garnishment deductions ''required by court process''). For purposes of deductions made under Executive Order 14026, the phrase ''court order'' includes orders issued by Federal, state, local, and administrative courts.

Consistent with the rulemaking implementing previous Executive Order 13658, *see* 79 FR 60674, the Executive order minimum wage will not affect the formula for establishing the maximum amount of wage garnishment permitted under the Consumer Credit Protection Act (CCPA), which is derived in part from the FLSA minimum wage. *See* 15 U.S.C. 1673(a)(2).

Proposed § 23.230(c) permits deductions directed by a voluntary assignment of the worker or his or her authorized representative. *See* 29 CFR 531.40 (FLSA); 29 CFR 4.168(a) (SCA); 29 CFR 5.5(a)(1) (DBA). Deductions made for voluntary assignments include items such as, but not limited to, deductions for the purchase of U.S. savings bonds, donations to charitable organizations, and the payment of union dues. Deductions made for voluntary

assignments must be made for the worker's account and benefit pursuant to the request of the worker or his or her authorized representative. *See* 29 CFR 531.40 (FLSA); 29 CFR 4.168(a) (SCA); 29 CFR 5.5(a)(1) (DBA).

Deductions for health insurance premiums that reduce a worker's wages below the minimum wage required by the Executive order are generally impermissible under § 23.220(b). However, a contractor may make deductions for health insurance premiums that reduce a worker's wages below the Executive order minimum wage if the health insurance premiums are the type of deduction that 29 CFR 531.40(c) permits to reduce a worker's wages below the FLSA minimum wage. The regulations at 29 CFR 531.40(c) allow deductions for insurance premiums paid to independent insurance companies provided that such deductions occur as a result of a voluntary assignment from the employee or his or her authorized representative, where the employer is under no obligation to supply the insurance and derives, directly or indirectly, no benefit or profit from it. The Department reiterates, however, that in accordance with proposed § 23.220(b), a contractor may not discharge any part of its minimum wage obligation under the Executive order by furnishing fringe benefits or, with respect to workers whose wages are governed by the SCA, the cash equivalent thereof. This provision similarly does not change a contractor's obligation under the SCA to furnish fringe benefits (including health insurance) or the cash equivalent thereof ''separate from and in addition to the specified monetary wages'' under that Act. 29 CFR 4.170.

Finally, proposed § 23.230(d) permits deductions made for the reasonable cost or fair value of board, lodging, and other facilities. *See* 29 CFR part 531 (FLSA); 29 CFR 4.168(a) (SCA); 29 CFR 5.5(a)(1) (DBA). Deductions made for these items must be in compliance with the regulations in 29 CFR part 531. The Department notes that an employer may take credit for the reasonable cost or fair value of board, lodging, or other facilities against a worker's wages, rather than taking a deduction for the reasonable cost or fair value of these items. *See* 29 CFR part 531.

Section 23.240 Overtime Payments

Proposed § 23.240(a) explains that workers who are covered under the FLSA or the Contract Work Hours and Safety Standards Act (CWHSSA) must receive overtime pay of not less than one and one-half times the regular hourly rate of pay or basic rate of pay, respectively, for all hours worked over 40 hours in a workweek. *See* 29 U.S.C. 207(a); 40 U.S.C. 3702(a). These statutes, however, do not require workers to be compensated on an hourly rate basis; workers may be paid on a daily, weekly, or other time basis, or by piece rates, task rates, salary, or some other basis, so long as the measure of work and compensation used, when reduced by computation to an hourly basis each workweek, will provide a rate per hour (*i.e.,* the regular rate of pay) that will fulfill the requirements of the Executive order or applicable statute. The regular rate of pay under the FLSA is generally determined by dividing the worker's total earnings in any workweek by the total number of hours actually worked by the worker in that workweek for which such compensation was paid. *See* 29 CFR 778.5 through 778.7, 778.105, 778.107, 778.109, 778.115 (FLSA); 29 CFR 4.166, 4.180 through 4.182 (SCA); 29 CFR 5.32(a) (DBA).

Proposed § 23.240(b) addresses the payment of overtime premiums to tipped employees who are paid with a tip credit. In calculating overtime payments, the regular rate of an employee paid with a tip credit consists of both the cash wages paid and the amount of the tip credit taken by the contractor. Overtime payments are not computed based solely on the cash wage paid. For example, if on or after January 30, 2022, a contractor pays a tipped employee performing on a covered contract a cash wage of $10.50 and claims a tip credit of $4.50, the worker is entitled to $22.50 per hour for each overtime hour ($15.00 × 1.5), not $15.75 ($10.50 × 1.5). Accordingly, as of January 30, 2022, for contracts covered by the Executive order, if a contractor pays the minimum cash wage of $10.50 per hour and claims a tip credit of $4.50 per hour, then the cash wage due for each overtime hours would be $18.00 ($22.50 − $4.50). Tips received by a tipped employee in excess of the amount of the tip credit claimed are not considered to be wages under the Executive order and are not included in calculating the regular rate for overtime payments.

Section 23.250 Frequency of Pay

Proposed § 23.250 describes how frequently the contractor must pay its workers. Under the proposed rule, wages must be paid no later than one pay period following the end of the regular pay period in which such wages were earned or accrued. Proposed § 23.250 also provides that a pay period under the Executive order may not be of any duration longer than semi-monthly. (The Department notes that workers whose wages are governed by the DBA must be paid no less often than once a week and reiterates that compliance with the Executive order does not excuse noncompliance with applicable FLSA, SCA, or DBA requirements.) The Department derived proposed § 23.250 from the contract clauses applicable to contracts subject to the SCA and the DBA, *see* 29 CFR 4.6(h) (SCA); 29 CFR 5.5(a)(1) (DBA). While the FLSA does not expressly specify a minimum pay period duration, it is a violation of the FLSA not to pay a worker on his or her regular payday. *See Biggs* v. *Wilson,* 1 F.3d 1537, 1538 (9th Cir. 1993) (holding that ''under the FLSA wages are 'unpaid' unless they are paid on the employees' regular payday''). *See also* 29 CFR 778.106 (''The general rule is that overtime compensation earned in a particular workweek must be paid on the regular pay day for the period in which such workweek ends.''). As the Department's experience suggests that most covered contractors pay no less frequently than semi-monthly, the Department believes § 23.250 as proposed will not be a burden to FLSA-covered contractors.

Section 23.260 Records To Be Kept by Contractors

Proposed § 23.260 explains the recordkeeping and related requirements for contractors. The obligations set forth in proposed § 23.260 are derived from and consistent across the FLSA, SCA, DBA, and regulations implementing Executive Order 13658. *See* 29 CFR 516.2(a) (FLSA); 29 CFR 4.6(g)(1) (SCA); 29 CFR 5.5(a)(3)(i) (DBA); 29 CFR 10.26 (Executive Order 13658). Proposed § 23.260(a) states that contractors and subcontractors shall make and maintain, for three years, records containing the information enumerated in that section for each worker. The proposed section further provides that contractors performing work subject to the Executive order must make such records available for inspection and transcription by authorized representatives of the WHD.

The recordkeeping requirements enumerated in proposed § 23.260(a)(1)–(6) require that contractors maintain records reflecting each worker's (1) name, address, and social security number; (2) occupation or classification (or occupations/classifications); (3) rate or rates of wages paid; (4) number of daily and weekly hours worked; (5) any deductions made; and (6) total wages paid. Contractor obligations to maintain these records derive from and are consistent across the FLSA, SCA, and DBA, and are identical to the

recordkeeping requirements enumerated in 29 CFR 10.26(a), which implemented Executive Order 13658. These recordkeeping requirements thus imposes no new burdens on contractors.[10] The Department notes that while the concept of ''total wages paid'' is consistent in the FLSA's, SCA's, and DBA's implementing regulations, the exact wording of the requirement varies (''total wages paid each pay period,'' *see* 29 CFR 516.2(a)(11) (FLSA); ''total daily or weekly compensation of each employee,'' *see* 29 CFR 4.6(g)(1)(ii) (SCA); ''actual wages paid,'' *see* 29 CFR 5.5(a)(3)(i) (DBA)). The Department has opted to use the language ''total wages paid'' in this rule for simplicity; however, compliance with this recordkeeping requirement will be determined in relation to the applicable statute (FLSA, SCA, and/or DBA).

Proposed § 23.260(b) requires the contractor to permit authorized representatives of the WHD to conduct interviews of workers at the worksite during normal working hours. Proposed § 23.260(c) provides that nothing in part 23 limits or otherwise modifies a contractor's payroll and recordkeeping obligations, if any, under the FLSA, SCA, or DBA, or their implementing regulations, respectively.

Section 23.270 Anti-Kickback

Consistent with the regulations implementing Executive Order 13658, *see* 29 CFR 10.27, proposed § 23.270 makes clear that all wages paid to workers performing on or in connection with covered contracts must be paid free and clear and without subsequent deduction (unless set forth in proposed § 23.230), rebate, or kickback on any account. Kickbacks directly or indirectly to the contractor or to another person for the contractor's benefit for the whole or part of the wage are also prohibited. This proposal is intended to ensure full payment of the applicable Executive order minimum wage to covered workers. The Department also notes that kickbacks may be subject to civil penalties pursuant to the Anti-Kickback Act, 41 U.S.C. 8701–8707.

Section 23.280 Tipped Employees

Proposed § 23.280 explains how tipped workers must be compensated under the Executive order on covered contracts. Section 3 of the Executive order governs how the minimum wage for Federal contractors and subcontractors applies to tipped employees. Section 3 of the order provides: (a) For workers covered by section 2 of the order who are tipped employees pursuant to 29 U.S.C. 203(t), the hourly cash wage that must be paid by an employer to such workers shall be at least: (i) $10.50 an hour beginning on January 30, 2022; (ii) 85 percent of the wage in effect under section 2 of the order, rounded to the nearest multiple of $0.05, beginning January 1, 2023; and (iii) for each subsequent year, beginning January 1, 2024, 100 percent of the wage in effect under section 2 for such year; (b) Where workers do not receive a sufficient additional amount on account of tips, when combined with the hourly cash wage paid by the employer, such that their wages are equal to the minimum wage under section 2 of the order, the cash wage paid by the employer, as set forth in this section for those workers, shall be increased such that their wages equal the minimum wage under section 2 of the order. Consistent with applicable law, if the wage required to be paid under the Service Contract Act, 41 U.S.C. 6701 *et seq.,* or any other applicable law or regulation is higher than the wage required by section 2, the employer shall pay additional cash wages sufficient to meet the highest wage required to be paid.

Accordingly, as of January 30, 2022, section 3 of Executive Order 14026 requires contractors to pay tipped employees covered by the Executive order performing on covered contracts a cash wage of at least $10.50, provided the employees receive sufficient tips to equal the minimum wage under section 2 when combined with the cash wage. On January 1, 2023, the required cash wage increases to reach 85 percent of the minimum wage under section 2 of the Executive order, rounded to the nearest multiple of $0.05. For subsequent years, beginning on January 1, 2024, the cash wage for tipped employees is 100 percent of the applicable Executive Order 14026 minimum wage—*i.e.,* eliminating a contractor's ability to claim a tip credit under Executive Order 14026. When a contractor is using a tip credit to meet a portion of its wage obligations under the Executive order, the amount of tips received by the employee must equal at least the difference between the required cash wage paid and the Executive order minimum wage. If the employee does not receive sufficient tips, the contractor must increase the cash wage paid so that the cash wage in combination with the tips received equals the Executive order minimum wage.

For purposes of Executive Order 14026 and this proposal, tipped workers (or tipped employees) are defined by section 3(t) of the FLSA. 29 U.S.C. 203(t). The FLSA defines a tipped employee as ''any employee engaged in an occupation in which he customarily and regularly receives more than $30 a month in tips.'' *Id.* Section 3 of the Executive order sets forth a wage payment method for tipped employees that is similar to the tipped employee wage provision of the FLSA. 29 U.S.C. 203(m)(2)(A). As with the FLSA ''tip credit'' provision, the Executive order permits contractors to take a partial credit against their wage payment obligation to a tipped employee under the order based on tips received by the employee, until the Executive Order 14026 tip credit is phased out on January 1, 2024. The wage paid to the tipped employee to satisfy the Executive Order 14026 minimum wage comprises both the cash wage paid under section 3(a) of the Executive order and the amount of tips used for the tip credit, which is limited to the difference between the cash wage paid and the Executive order minimum wage. Because contractors with a contract subject to the Executive order may be required by the SCA or any other applicable law or regulation to pay a cash wage in excess of the Executive order minimum wage, section 3(b) of the order provides that in such circumstances contractors must pay the difference between the Executive order minimum wage and the higher required wage in cash to the tipped employees and may not make up the difference with additional tip credit.

In the proposed regulations implementing section 3 of the Executive order, the Department sets forth principles and procedures that closely follow the FLSA requirements for payment of tipped employees with which employers are already familiar. This is consistent with the directive in section 4(c) of the Executive order that regulations issued pursuant to the order should, to the extent practicable, incorporate existing principles and

[10] To alleviate any potential concerns that proposed § 23.260 might impose any new recordkeeping burdens on employers, the Department is specifically providing here the FLSA, SCA, and DBA regulatory citations from which these recordkeeping obligations are derived. The citations for all records named in the proposed rule are as follows: Name, address, and Social Security number (*see* 29 CFR 516.2(a)(1)–(2) (FLSA); 29 CFR 4.6(g)(1)(i) (SCA); 29 CFR 5.5(a)(3)(i) (DBA)); the occupation or occupations in which employed (*see* 29 CFR 516.2(a)(4) (FLSA); 29 CFR 4.6(g)(1)(ii) (SCA); 29 CFR 5.5(a)(3)(i) (DBA)); the rate or rates of wages paid to the worker (*see* 29 CFR 516.2(a)(6)(i–(ii) (FLSA); 29 CFR 4.6(g)(1)(ii) (SCA); 29 CFR 5.5(a)(3)(i) (DBA)); the number of daily and weekly hours worked by each worker (*see* 29 CFR 516.2(a)(7) (FLSA); 29 CFR 4.6(g)(1)(iii) (SCA); 29 CFR 5.5(a)(3)(i) (DBA)); any deductions made (*see* 29 CFR 516.2(a)(10) (FLSA); 29 CFR 4.6(g)(1)(iv) (SCA); 29 CFR 5.5(a)(3)(i) (DBA)).

procedures from the FLSA, SCA, and DBA. 86 FR 22836.

Proposed § 23.280(a) sets forth the provisions of section 3 of the Executive order explaining how contractors can meet their wage payment obligations under section 2 for tipped employees. Section 23.280(a)(1) and (2) makes clear that the wage paid to a tipped employee under section 2 of the Executive order consists of two components: A cash wage payment (which must be at least $10.50 as of January 30, 2022, and rises yearly thereafter) and a credit based on tips (tip credit) received by the worker equal to the difference between the cash wage paid and the Executive order minimum wage. Accordingly, on January 30, 2022, if a contractor pays a tipped employee performing on a covered contract a cash wage of $10.50 per hour, the contractor may claim a tip credit of $4.50 per hour (assuming the worker receives at least $4.50 per hour in tips) to reach the required Executive order wage payment of $15.00. Under no circumstances may a contractor claim a higher tip credit than the difference between the required cash wage and the Executive order minimum wage to meet its minimum wage obligations; contractors may, however, pay a higher cash wage than required by section 3 and claim a lower tip credit. Because the sum of the cash wage paid and the tip credit equals the Executive order minimum wage, any increase in the amount of the cash wage paid will result in a corresponding decrease in the amount of tip credit that may be claimed, except as provided in proposed § 23.280(a)(4). For example, if on January 30, 2022, a contractor on a contract subject to the Executive order paid a tipped worker a cash wage of $11.50 per hour instead of the minimum requirement of $10.50, the contractor would only be able to claim a tip credit of $3.50 per hour to reach the $15.00 Executive order minimum wage. If the tipped employee does not receive sufficient tips in the workweek to equal the amount of the tip credit claimed, the contractor must increase the cash wage paid so that the amount of cash wage paid and tips received by the employee equal the section 2 minimum wage for all hours in the workweek.

Proposed § 23.280(a)(3) of the regulations makes clear that a contractor may pay a higher cash wage than required by subsection (3)(a)(i) of the Executive order—and claim a correspondingly lower tip credit—but may not pay a lower cash wage than that required by section 3(a)(i) of the Executive order and claim a higher tip credit. In order for the contractor to claim a tip credit the employee must receive tips equal to at least the amount of the credit claimed. If the employee receives less in tips than the amount of the credit claimed, the contractor must pay the additional cash wages necessary to ensure the employee receives the Executive order minimum wage in effect under section 2 on the regular pay day.

Proposed § 23.280(a)(4) proposes the contractors' wage payment obligation when the cash wage required to be paid under the SCA or any other applicable law or regulation is higher than the Executive order minimum wage. In such circumstances, the contractor must pay the tipped employee additional cash wages equal to the difference between the Executive order minimum wage and the highest wage required to be paid by other applicable state or Federal law or regulation. This additional cash wage is on top of the cash wage paid under proposed § 23.280(a)(1) and any tip credit claimed. Unlike raising the cash wage paid under § 23.280(a)(1), additional cash wages paid under proposed § 23.280(a)(4) do not impact the calculation of the amount of tip credit the employer may claim.

Proposed § 23.280(c) provides that the same definitions and requirements set forth in 29 CFR 10.28(b)–(f) generally apply with respect to tipped employees performing on or in connection with covered contracts under this Executive order.[11] These definitions and requirements address the tip credit, the characteristics of tips, service charges, tip pooling, and notice. To the extent that § 10.28(f) requires that an employer provide notice of the ''amount of the cash wage that is to be paid by the employer, which cannot be lower than the cash wage required by paragraph (a)(1) of this section,'' the proposed regulation specifies that the minimum required cash wage shall be the minimum required cash wage described in proposed § 23.28(a)(1), rather than in § 10.28(a)(1). The definitions and requirements incorporated in § 23.28(b) generally follow definitions and requirements under the FLSA, and are familiar to employers of tipped employees generally, as well as to employers subject to § 10.28.

Section 23.290 Notice

As discussed earlier in the preamble section for § 23.120(c) in proposed subpart B, proposed § 23.290 requires that contractors notify all workers performing on or in connection with a covered contract of the applicable minimum wage rate under Executive Order 14026. The regulations implementing the FLSA, SCA, DBA, and Executive Order 13658 each contain separate notice requirements for the employers covered by those laws, so the Department believes that a similar notice requirement is necessary for effective implementation of the Executive order. *See, e.g.,* 29 CFR 516.4 (FLSA); 29 CFR 4.6(e) (SCA); 29 CFR 5.5(a)(1)(i) (DBA); 29 CFR 10.29 (Executive Order 13658). Because the Executive Order 14026 minimum wage rate will increase annually based on inflation, contractors must ensure that they are providing notice on at least an annual basis of the currently applicable rate. Moreover, the Department strongly encourages contractors to engage in regular outreach to workers performing on or in connection with covered contracts, particularly in the time period immediately before and after the annual minimum wage increase, to ensure such workers are aware of their rights and the wages to which they are entitled.

Consistent with the regulations implementing Executive Order 13658, *see* 29 CFR 10.29, contractors may satisfy this proposed notice requirement in a variety of ways. For example, with respect to service employees on contracts covered by the SCA and laborers and mechanics on contracts covered by the DBA, proposed § 23.290(a) clarifies that contractors may meet the notice requirement by posting, in a prominent and accessible place at the worksite, the applicable wage determination.[12] As stated earlier, the Department intends to publish a prominent general notice on all SCA and DBA wage determinations informing workers of the applicable Executive order minimum wage rate, to be updated on an annual basis in the event of any inflation-based increases to the rate pursuant to § 23.50(b)(2). Because contractors covered by the SCA and DBA are already required to display the applicable wage determination in a prominent and accessible place at the worksite pursuant to those statutes, *see* 29 CFR 4.6(e) (SCA), 29 CFR 5.5(a)(1)(i) (DBA), the notice requirement in

[11] On June 23, 2021, the Department issued a notice of proposed rulemaking, Tip Regulations Under the Fair Labor Standards Act (FLSA); Partial Withdrawal, proposing changes to 29 CFR 10.28(b). Comments on the changes proposed in the June 23, 2021 NPRM should be submitted to the docket for that NPRM, *see* RIN 1235–AA21.

[12] SCA contractors are required by 29 CFR 4.6(e) to notify workers of the minimum monetary wage and any fringe benefits required to be paid, or to post the wage determination for the contract. DBA contractors similarly are required by 29 CFR 5.5(a)(1)(i) to post the DBA wage determination and a poster at the site of the work in a prominent and accessible place where they can be easily seen by the workers. SCA and DBA contractors may use these same methods to notify workers of the Executive order minimum wage under proposed § 23.290.

proposed § 23.290 would not impose any additional burden on contractors with respect to those workers already covered by the SCA, DBA, or Executive Order 13658.

Proposed § 23.290(b) provides that contractors with FLSA-covered workers performing on or in connection with a covered contract may satisfy the notice requirement by displaying a poster provided by the Department of Labor in a prominent or accessible place at the worksite. This poster is appropriate for contractors with FLSA-covered workers performing work ''in connection with'' a covered SCA or DBA contract, as well as for contractors with FLSA-covered workers performing on or in connection with concessions contracts and contracts in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public. The Department will make the poster available on the WHD website and will provide the poster in a variety of languages. The Department notes that this poster will be updated annually to reflect any inflation-based increases to the Executive Order 14026 minimum wage rate that is published by the Department, and contractors must display the currently applicable poster.

Finally, proposed § 23.290(c) provides that contractors that customarily post notices to workers electronically may post the notice required by this section electronically, provided that such electronic posting is displayed prominently on any website that is maintained by the contractor, whether external or internal, and is customarily used for notices to workers about terms and conditions of employment. This kind of an electronic notice may be made in lieu of physically displaying the notice poster in a prominent or accessible place at the worksite.

As discussed earlier in the preamble section for proposed § 23.30, some FLSA-covered workers performing ''in connection with'' a covered contract may not work at the site of the work with other covered workers. These covered off-site workers nonetheless are entitled to adequate notice of the Executive order minimum wage rate under proposed § 23.290. For example, an off-site administrative assistant spending more than 20 percent of her weekly work hours processing paperwork for a DBA-covered contract would be entitled to notice under this section separate from the physical posting of the DBA wage determination at the main worksite where the DBA-covered laborers and mechanics perform ''on'' the contract. Contractors must notify these off-site workers of the Executive order minimum wage rate, either by displaying the poster for FLSA-covered workers described in proposed § 23.290(b) at the off-site worker's location, or if they customarily post notices to workers electronically, by providing an electronic notice that meets the criteria described in proposed § 23.290(c).

The Department further notes that contractors may have additional obligations under other laws, such as the Americans with Disabilities Act of 1990, to ensure that the notice required by part 23 is provided in an accessible format to workers with disabilities. The Department welcomes comments on the accessibility of any of the notice requirements or processes explained in this proposed rule.

The Department does not anticipate that this proposed notice requirement would impose a significant burden on contractors. As mentioned earlier, contractors are already required to notify workers of the required minimum wage and/or to display the applicable wage determination for workers covered by the SCA, DBA, or Executive Order 13658 in a prominent and accessible place at the worksite, which will satisfy this section's notice requirement with respect to those workers. To the extent that proposed § 23.290 imposes a new notice requirement with respect to workers whose wages are governed by the FLSA but were not covered by Executive Order 13658, such a requirement is not significantly different from the existing notice requirement for FLSA-covered workers provided at 29 CFR 516.4, which requires employers to post a notice explaining the FLSA in conspicuous places in every establishment where such employees are employed. Moreover, the Department will update and provide the Executive Order 14026 minimum wage poster. If display of the poster is necessary at more than one site in order to ensure that it is seen by all workers performing on or in connection with covered contracts, additional copies of the poster may be obtained without cost from the Department. Moreover, as discussed above, the Department will also permit contractors that customarily post notices electronically to use electronic posting of the notice. The Department's experience enforcing the FLSA, SCA, and DBA reflect that this notice provision will serve an important role in obtaining and maintaining contractor compliance with the Executive order.

Subpart D—Enforcement

Section 5 of Executive Order 14026, titled ''Enforcement,'' grants the Secretary ''authority for investigating potential violations of and obtaining compliance with th[e] order.'' 86 FR 22836. Section 4(c) of the order directs that the regulations issued by the Secretary should, to the extent practicable, incorporate existing definitions, principles, procedures, remedies, and enforcement processes under the FLSA, SCA, DBA, Executive Order 13658, and the regulations issued to implement Executive Order 13658. *Id.*

In accordance with these requirements, subpart D of part 23 is consistent with the analogous subpart of the implementing regulations for Executive Order 13658, *see* 29 CFR 10.41 through 10.44, and incorporates FLSA, SCA, and DBA remedies, procedures, and enforcement processes that the Department believes will facilitate investigations of potential violations of the order, address and remedy violations of the order, and promote compliance with the order. Most of the proposed enforcement procedures and remedies contained in part 23 accordingly are based on the implementing regulations for Executive Order 13658, which in turn were based on the statutory text or implementing regulations of the FLSA, SCA, and DBA.

Section 23.410 Complaints

The Department proposes a procedure for filing complaints in § 23.410. Section 23.410(a) outlines the procedure to file a complaint with any office of the WHD. It additionally provides that a complaint may be filed orally or in writing and that the WHD will accept a complaint in any language. Section 23.410(b) states the well-established policy of the Department with respect to confidential sources. *See* 29 CFR 4.191(a); 29 CFR 5.6(a)(5).

Section 23.420 Wage and Hour Division Conciliation

The Department proposes in § 23.420 to establish an informal complaint resolution process for complaints filed with the WHD. The provision would allow WHD, after obtaining the necessary information from the complainant regarding the alleged violations, to contact the party against whom the complaint is lodged and attempt to reach an acceptable resolution through conciliation.

Section 23.430 Wage and Hour Division Investigation

Proposed § 23.430, which outlines WHD's investigative authority, would permit the Administrator to initiate an investigation either as the result of a complaint or at any time on his or her

own initiative. As part of the investigation, the Administrator would be able to inspect the relevant records of the applicable contractors (and make copies or transcriptions thereof) as well as interview the contractors. The Administrator would additionally be able to interview any of the contractors' workers at the worksite during normal work hours, and require the production of any documentary or other evidence deemed necessary for inspection to determine whether a violation of part 23 (including conduct warranting imposition of debarment) has occurred. The section would also require Federal agencies and contractors to cooperate with authorized representatives of the Department in the inspection of records, in interviews with workers, and in all aspects of investigations.

Section 23.440 Remedies and Sanctions

The Department proposes remedies and sanctions to assist in enforcement of the Executive order in § 23.440. Proposed § 23.440(a), provides that when the Administrator determines a contractor has failed to pay the Executive order's minimum wage to workers, the Administrator will notify the contractor and the applicable contracting agency of the violation and request the contractor to remedy the violation. It additionally states that if the contractor does not remedy the violation, the Administrator shall direct the contractor to pay all unpaid wages identified in the Administrator's investigative findings letter issued pursuant to proposed § 23.510. Proposed § 23.440(a) further provides that the Administrator could additionally direct that payments due on the contract or any other contract between the contractor and the Government be withheld as necessary to pay unpaid wages, and that, upon the final order of the Secretary that unpaid wages are due, the Administrator may direct the relevant contracting agency to transfer the withheld funds to the Department for disbursement. Proposed § 23.440(b), which the Department derived from the FLSA's antiretaliation provision set forth at 29 U.S.C. 215(a)(3), states that the Administrator can provide for any relief appropriate, including employment, reinstatement, promotion and payment of lost wages, when the Administrator determines that any person had discharged or in any other manner discriminated against a worker because such worker had filed any complaint or instituted or caused to be instituted any proceeding under or related to Executive Order 14026 or part 23, or had testified or was about to testify in any such proceeding. *See* 29 U.S.C. 215(a)(3), 216(b). As described in the preamble section for subpart A, the Department believes that such a provision will help ensure effective enforcement of Executive Order 14026. Consistent with the Supreme Court's observation in interpreting the scope of the FLSA's antiretaliation provision, enforcement of Executive Order 14026 will depend ''upon information and complaints received from employees seeking to vindicate rights claimed to have been denied.'' *Kasten,* 563 U.S. at 11 (internal quotation marks omitted). The Department believes that this antiretaliation provision will promote compliance with the Executive order.

Proposed § 23.440(c) provides that if the Secretary determines a contractor has disregarded its obligations to workers under the Executive order or part 23, a standard the Department derived from the DBA implementing regulations at 29 CFR 5.12(a)(2), the Secretary would order that the contractor and its responsible officers, and any firm, corporation, partnership, or association in which the contractor or responsible officers have an interest, will be ineligible to be awarded any contract or subcontract subject to the Executive order for a period of up to three years from the date of publication of the name of the contractor or responsible officer on the ineligible list. Proposed § 23.440(c) further provides that neither an order for debarment of any contractor or responsible officer from further Government contracts nor the inclusion of a contractor or its responsible officers on a published list of noncomplying contractors under this section will be carried out without affording the contractor or responsible officers an opportunity for a hearing before an Administrative Law Judge.

As the SCA, DBA, and the regulations implementing Executive Order 13658 contain debarment provisions, inclusion of a debarment provision reflects both the Executive order's instruction that the Department incorporate remedies from the FLSA, SCA, DBA, and the regulations implementing Executive Order 13658 to the extent practicable and the Executive order's conferral of authority on the Secretary to adopt an enforcement scheme that will both remedy violations and obtain compliance with the order. Debarment is a long-established remedy for a contractor's failure to fulfill its labor standard obligations under the SCA and the DBA. 41 U.S.C. 6706(b); 40 U.S.C. 3144(b); 29 CFR 4.188(a); 29 CFR 5.5(a)(7); 29 CFR 5.12(a)(2). The possibility that a contractor will be unable to obtain Government contracts for a fixed period of time due to debarment promotes contractor compliance with the SCA and DBA, and, as similarly expressed in the rulemaking implementing Executive Order 13658, the Department expects such a remedy will enhance contractor compliance with Executive Order 14026. Since debarment to promote contractor compliance is among the remedies in the Government contract statutes that the Executive order instructs the Department to incorporate, the Department has also included debarment as a remedy for certain violations of the Executive order by covered contractors.

As the Department explained in the regulations implementing Executive Order 13658, *see* 79 FR 60680, the Department originally derived the ''disregard of obligations'' standard from the DBA's implementing regulations. The Administrative Review Board (ARB) interprets this standard to require a level of culpability beyond mere negligence in order to justify debarment. *See, e.g., Thermodyn Mech. Contractors, Inc.,* ARB Case No. 96–116, 1996 WL 697838, at *4 (ARB Oct. 25, 1996) (notingthat ''[t]o support a debarment order, the evidence must establish a level of culpability beyond mere negligence''). The Department intends for the same standard to apply under this Executive order. The requirement to show some form of culpability beyond mere negligence confirms this debarment standard is not one involving strict liability. However, for example, a showing of ''knowing or reckless'' disregard of obligations is not necessary in order to justify a debarment. Adopting a ''knowing or reckless disregard'' standard would constitute a departure from the DBA's debarment standard as well as from the SCA's debarment standard (under which debarment is warranted for SCA violations unless the Secretary of Labor recommends otherwise because of ususual circumstances), and would therefore be inconsistent with the Executive order's directive to adopt remedies and enforcement processes from the FLSA, SCA, DBA, and the regulations implementing Executive Order 13658 to the extent practicable.

Proposed § 23.440(d), which is identical to 29 CFR 10.44(d), which the Department in turn derived from the SCA, 41 U.S.C. 6705(b)(2), would allow for initiation of an action, following a final order of the Secretary, against a contractor in any court of competent jurisdiction to collect underpayments when the amounts withheld under § 23.110(c) are insufficient to reimburse workers' lost wages. Proposed

§ 23.440(d) would also authorize initiation of an action, following the final order of the Secretary, in any court of competent jurisdiction when there are no payments available to withhold. This is particularly necessary because the Executive order covers concessions and other contracts under which the contractor may not receive payments from the Federal Government and in some instances, the Administrator may be unable to direct withholding of funds because at the time the Administrator discovers that a contractor owes wages to workers, it may be that no payments remain owing under the contract or another contract between the same contractor and the Federal Government. With respect to such contractors, there will be no funds to withhold. Proposed § 23.440(d) accordingly provides that the Department may pursue an action in any court of competent jurisdiction to collect underpayments against such contractors. Proposed § 23.440(d) additionally provides that any sums the Department recovers will be paid to affected workers to the extent possible, but that sums not paid to workers because of an inability to do so within three years will be transferred into the Treasury of the United States.

In proposed § 23.440(e), the Department addresses what remedy will be available when a contracting agency fails to include the contract clause in a contract subject to the Executive order. The section provides that the contracting agency will, on its own initiative or within 15 calendar days of notification by the Department, incorporate the clause retroactive to commencement of performance under the contract through the exercise of any and all authority necessary. This incorporation will provide the Administrator authority to collect underpayments on behalf of affected workers on the applicable contract retroactive to commencement of performance under the contract. The Administrator possesses comparable authority under the DBA, 29 CFR 1.6(f), and the Department believes a similar mechanism for addressing a failure to include the contract clause in a contract subject to the Executive order will further the interest in both remedying violations and obtaining compliance with the Executive order.

Proposed § 23.440(c) also reflects that a contractor is entitled to an adjustment when a contracting agency initially omits and then subsequently includes the contract clause in a covered contract. This approach, which is consistent with the SCA's implementing regulations, *see* 29 CFR 4.5(c), is therefore reflected in proposed § 23.440(e). The Department recognizes that the mechanics of effectuating such an adjustment may differ between covered procurement contracts and the non-procurement contracts that the Department's contract clause covers. With respect to covered non-procurement contracts, the Department believes that the authority conferred on agencies that enter into such contracts under section 4(b) of the Executive order includes the authority to provide such an adjustment.

The Department believes that the remedies it proposes here will be sufficient to obtain compliance with the Executive order.

The Department intends to follow the general practice of holding contractors responsible for compliance by any covered lower-tier subcontractor(s) with the Executive order minimum wage. In other words, a contractor's responsibility for compliance flows down to all covered lower-tier subcontractors. Thus, to the extent a lower-tier subcontractor fails to pay its workers the applicable Executive order minimum wage even though its subcontract contains the required contract clause, an upper-tier contractor may still be responsible for any back wages owed to the workers. Similarly, a contractor's failure to fulfill its responsibility for compliance by covered lower-tier subcontractors may warrant debarment if the contractor's failure constituted a disregard of obligations to workers and/or subcontractors. The Department notes that its general practice under the SCA and DBA is to seek payment of back wages from the subcontractor that directly committed the violation before seeking payment from the prime contractor or any other upper-tier subcontractors.

The Department's experience under the DBA, SCA, and Executive Order 13658 has demonstrated that the ''flow-down'' model is an effective means to obtain compliance. As the Executive order charges the Department with the obligation to adopt remedies and enforcement processes from the SCA, DBA, and Executive Order 13658's implementing regulations (and/or FLSA) to obtain compliance with the order, the proposed rule reflects the flow-down approach to compliance responsibility contained in the SCA, DBA, and Executive Order 13658 regulations.

Finally, as noted in the preamble section for subpart A, the Executive order covers certain non-procurement contracts. Because the FAR does not apply to all contracts covered by Executive Order 14026, there will be instances where, pursuant to section 4(b) of the Executive order, a contracting agency must take steps to the extent permitted by law, including but not limited to insertion of the contract clause set forth in appendix A, to exercise any applicable authority to ensure that covered contracts as described in sections 8(a)(i)(C) and (D) of the Executive order comply with the requirements set forth in sections 2 and 3 of the Executive order, including payment of the Executive order minimum wage. In such instances, the enforcement provisions contained in subpart D (as well as the remainder of part 23) fully apply to the covered contract, consistent with the Secretary's authority under section 5 of the Executive order to investigate potential violations of, and obtain compliance with, the order.

Subpart E—Administrative Proceedings

Section 5 of Executive Order 14026, titled ''Enforcement,'' grants the Secretary ''authority for investigating potential violations of and obtaining compliance with th[e] order.'' 86 FR 22836. Section 4(c) of the order directs that the regulations the Secretary issues should, to the extent practicable, incorporate existing definitions, principles, procedures, remedies, and enforcement processes under the FLSA, SCA, and DBA, and regulations issued to implement Executive Order 13658. *Id.*

Accordingly, subpart E of part 23 proposes to incorporate, to the extent practicable, the DBA and SCA administrative procedures that the regulations issued to implement Executive Order 13658 also incorporated, which are necessary to remedy potential violations and ensure compliance with the Executive order. Thus, the administrative procedures in this proposed subpart are identical to the administrative procedures in the regulations issued to implement Executive Order 13658. The administrative procedures included in this subpart also closely adhere to existing procedures of the Office of Administrative Law Judges and the Administrative Review Board.

Section 23.510 Disputes Concerning Contractor Compliance

Proposed § 23.510, which the Department derived primarily from 29 CFR 5.11, addresses how the Administrator will process disputes regarding a contractor's compliance with part 23. Proposed § 23.510(a) provides that the Administrator or a contractor may initiate a proceeding covered by § 23.510. Proposed

§ 23.510(b)(1) provides that when it appears that relevant facts are at issue in a dispute covered by § 23.510(a), the Administrator will notify the affected contractor (and the prime contractor, if different) of the investigation's findings by certified mail to the last known address. If the Administrator determines there are reasonable grounds to believe the contractor should be subject to debarment, the investigative findings letter will so indicate.

Proposed § 23.510(b)(2) provides that a contractor desiring a hearing concerning the investigative findings letter is required to request a hearing by letter postmarked within 30 calendar days of the date of the Administrator's letter. It further requires the request set forth those findings which are in dispute with respect to the violation(s) and/or debarment, as appropriate, and to explain how such findings are in dispute, including by reference to any applicable affirmative defenses.

Proposed § 23.510(b)(3) provides that the Administrator, upon receipt of a timely request for hearing, will refer the matter to the Chief Administrative Law Judge (ALJ) by Order of Reference for designation of an ALJ to conduct such hearings as may be necessary to resolve the disputed matter in accordance with the procedures set forth in 29 CFR part 6. It also requires the Administrator to attach a copy of the Administrator's letter, and the response thereto, to the Order of Reference that the Administrator sends to the Chief ALJ.

Proposed § 23.510(c)(1) would apply when it appears there are no relevant facts at issue and there was not at that time reasonable cause to institute debarment proceedings. It requires the Administrator to notify the contractor, by certified mail to the last known address, of the investigative findings and to issue a ruling on any issues of law known to be in dispute. Proposed § 23.510(c)(2)(i) would apply when a contractor disagrees with the Administrator's factual findings or believes there are relevant facts in dispute. It allows the contractor to advise the Administrator of such disagreement by letter postmarked within 30 calendar days of the date of the Administrator's letter, and requires that the response explain in detail the facts alleged to be in dispute and attach any supporting documentation.

Proposed § 23.510(c)(2)(ii) requires the Administrator to examine the information timely submitted in the response alleging the existence of a factual dispute. Where the Administrator determines there is a relevant issue of fact, the Administrator will refer the case to the Chief ALJ as under § 23.510(b)(3). If the Administrator determines there is no relevant issue of fact, the Administrator will so rule and advise the contractor(s) accordingly.

Proposed § 23.510(d) provides that the Administrator's investigative findings letter becomes the final order of the Secretary if a timely response to the letter was not made or a timely petition for review was not filed. It additionally provides that if a timely response or a timely petition for review was filed, the investigative findings letter would be inoperative unless and until the decision is upheld by the ALJ or the ARB, or the letter otherwise became a final order of the Secretary.

Section 23.520 Debarment Proceedings

Proposed § 23.520, which the Department primarily derived in the Executive Order 13658 rulemaking from 29 CFR 5.12, *see* 79 FR 60683, addresses debarment proceedings. Proposed § 23.520(a)(1) provides that whenever any contractor is found by the Administrator to have disregarded its obligations to workers or subcontractors under Executive Order 14026 or part 23, such contractor and its responsible officers, and/or any firm, corporation, partnership, or association in which such contractor or responsible officers have an interest, will be ineligible for a period of up to three years to receive any contracts or subcontracts subject to the Executive order from the date of publication of the name or names of the contractor or persons on the ineligible list.

Proposed § 23.520(b)(1) provides that where the Administrator finds reasonable cause to believe a contractor has committed a violation of the Executive order or part 23 that constitutes a disregard of its obligations to its workers or subcontractors, the Administrator will notify by certified mail to the last known address the contractor and its responsible officers (and/or any firms, corporations, partnerships, or associations in which the contractor or responsible officers are known to have an interest) of the finding. Pursuant to proposed § 23.520(b)(1), the Administrator will additionally furnish those notified a summary of the investigative findings and afford them an opportunity for a hearing regarding the debarment issue. Those notified must request a hearing on the debarment issue, if desired, by letter to the Administrator postmarked within 30 calendar days of the date of the letter from the Administrator. The letter requesting a hearing must set forth any findings which are in dispute and the reasons therefore, including any affirmative defenses to be raised. Proposed § 23.520(b)(1) also requires the Administrator, upon receipt of a timely request for hearing, to refer the matter to the Chief ALJ by Order of Reference, to which will be attached a copy of the Administrator's investigative findings letter and the response thereto, for designation of an ALJ to conduct such hearings as may be necessary to determine the matters in dispute. Proposed § 23.520(b)(2) provides that hearings under § 23.520 will be conducted in accordance with 29 CFR part 6. If no timely request for hearing is received, the Administrator's findings will become the final order of the Secretary.

Section 23.530 Referral to Chief Administrative Law Judge; Amendment of Pleadings

The Department derived proposed § 23.530 from the SCA and DBA rules of practice for administrative proceedings in 29 CFR part 6. Proposed § 23.530(a) provides that upon receipt of a timely request for a hearing under § 23.510 (where the Administrator has determined that relevant facts are in dispute) or § 23.520 (debarment), the Administrator will refer the case to the Chief ALJ by Order of Reference, to which will be attached a copy of the investigative findings letter from the Administrator and the response thereto, for designation of an ALJ to conduct such hearings as may be necessary to decide the disputed matters. It further provides that a copy of the Order of Reference and attachments thereto will be served upon the respondent and the investigative findings letter and the response thereto will be given the effect of a complaint and answer, respectively, for purposes of the administrative proceeding.

Proposed § 23.530(b) states that at any time prior to the closing of the hearing record, the complaint or answer may be amended with permission of the ALJ upon such terms as he/she shall approve, and that for proceedings initiated pursuant to § 23.510, such an amendment could include a statement that debarment action was warranted under § 23.520. It further provides that such amendments will be allowed when justice and the presentation of the merits are served thereby, provided there is no prejudice to the objecting party's presentation on the merits. It additionally states that when issues not raised by the pleadings are reasonably within the scope of the original complaint and are tried by express or implied consent of the parties, they will be treated as if they had been raised in the pleadings, and such amendments

may be made as necessary to make them conform to the evidence. Proposed § 23.530(b) further provides that the presiding ALJ can, upon reasonable notice and upon such terms as are just, permit supplemental pleadings setting forth transactions, occurrences, or events which had happened since the date of the pleadings and which are relevant to any of the issues involved. It also authorizes the ALJ to grant a continuance in the hearing, or leave the record open, to enable the new allegations to be addressed.

Section 23.540 Consent Findings and Order

Proposed § 23.540, which the Department derived from 29 CFR 6.18 and 6.32, provides a process whereby parties may at any time prior to the ALJ's receipt of evidence or, at the ALJ's discretion, at any time prior to issuance of a decision, agree to dispose of the matter, or any part thereof, by entering into consent findings and an order. Proposed § 23.540(b) identifies four requirements of any agreement containing consent findings and an order. Proposed § 23.540(c) provides that within 30 calendar days of receipt of any proposed consent findings and order, the ALJ will accept the agreement by issuing a decision based on the agreed findings and order, provided the ALJ is satisfied with the proposed agreement's form and substance.

Section 23.550 Proceedings of the Administrative Law Judge

Proposed § 23.550, which the Department primarily derived from 29 CFR 6.19 and 6.33, addresses the ALJ's proceedings and decision. Proposed § 23.550(a) provides that the Office of Administrative Law Judges has jurisdiction to hear and decide appeals concerning questions of law and fact from the Administrator's determinations issued under § 23.510 or § 23.520. It further provides that any party can, when requesting an appeal or during the pendency of a proceeding on appeal, timely move an ALJ to consolidate a proceeding initiated thereunder with a proceeding initiated under the SCA or DBA. The purpose of the proposed language is to allow the Office of Administrative Law Judges and interested parties to efficiently dispose of related proceedings arising out of the same contract with the Federal Government.

Proposed § 23.550(b) provides that each party may file with the ALJ proposed findings of fact, conclusions of law, and a proposed order, together with a brief, within 20 calendar days of filing of the transcript (or a longer period if the ALJ permits). It also provides that each party would serve such proposals and brief on all other parties.

Proposed § 23.550(c)(1) requires an ALJ to issue a decision within a reasonable period of time after receipt of the proposed findings of fact, conclusions of law, and order, or within 30 calendar days after receipt of an agreement containing consent findings and an order disposing of the matter in whole. It further provides that the decision must contain appropriate findings, conclusions of law, and an order and be served upon all parties to the proceeding. Proposed § 23.550(c)(2) provides that if the Administrator requested debarment, and the ALJ concludes the contractor has violated the Executive order or part 23, the ALJ will issue an order regarding whether the contractor is subject to the ineligible list that would include any findings related to the contractor's disregard of its obligations to workers or subcontractors under the Executive order or part 23.

Proposed § 23.550(d) provides that the Equal Access to Justice Act (EAJA), as amended, 5 U.S.C. 504, does not apply to proceedings under part 23. The proceedings proposed in subpart E are not required by an underlying statute to be determined on the record after an opportunity for an agency hearing. Therefore, an ALJ has no authority to award attorney's fees and/or other litigation expenses pursuant to the provisions of the EAJA for any proceeding under part 23.

Proposed § 23.550(e) provides that if the ALJ concludes a violation occurred, the final order will require action to correct the violation, including, but not limited to, monetary relief for unpaid wages. It also requires an ALJ to determine whether an order imposing debarment is appropriate, if the Administrator has sought debarment. Proposed § 23.550(f) provides that the ALJ's decision will become the final order of the Secretary, provided a party does not timely appeal the matter to the ARB.

Section 23.560 Petition for Review

Proposed § 23.560, which the Department derived from 29 CFR 6.20 and 6.34, describes the process to apply to petitions for review to the ARB from ALJ decisions. Proposed § 23.560(a) provides that within 30 calendar days after the date of the decision of the ALJ, or such additional time as the ARB granted, any party aggrieved thereby who desires review must file a petition for review with supporting reasons in writing to the ARB with a copy thereof to the Chief ALJ. It further requires that the petition refer to the specific findings of fact, conclusions of law, and order at issue and that a petition concerning a debarment decision state the disregard of obligations to workers and subcontractors, or lack thereof, as appropriate. It additionally requires a party to serve the petition for review, and all briefs, on all parties and on the Chief ALJ. It also states a party must timely serve copies of the petition and all briefs on the Administrator and the Associate Solicitor, Division of Fair Labor Standards, Office of the Solicitor, U.S. Department of Labor.

Proposed § 23.560(b) provides that if a party files a timely petition for review, the ALJ's decision will be inoperative unless and until the ARB issues an order affirming the letter or decision, or the letter or decision otherwise becomes a final order of the Secretary. It further provides that if a petition for review concerns only the imposition of debarment, the remainder of the decision will be effective immediately. Proposed § 23.560(b) additionally states that judicial review will not be available unless a timely petition for review to the ARB is first filed. Failure of the aggrieved party to file a petition for review with the ARB within 30 calendar days of the ALJ decision will render the decision final, without further opportunity for appeal.

Section 23.570 Administrative Review Board Proceedings

Proposed § 23.570, which the Department derived primarily from 29 CFR 10.57, outlines the ARB proceedings under the Executive order. Proposed § 23.570(a)(1) states the ARB has jurisdiction to hear and decide in its discretion appeals from the Administrator's investigative findings letters issued under § 23.510(c)(1) or (2), Administrator's rulings issued under § 23.580, and from ALJ decisions issued under § 23.550. Proposed § 23.570(a)(2) identifies the limitations on the ARB's scope of review, including a restriction on passing on the validity of any provision of part 23, a general prohibition on receiving new evidence in the record (because the ARB is an appellate body and must decide cases before it based on substantial evidence in the existing record), and a bar on granting attorney's fees or other litigation expenses under the EAJA.

Proposed § 23.570(b) requires the ARB to issue a final decision within a reasonable period of time following receipt of the petition for review and to serve the decision by mail on all parties at their last known address, and on the Chief ALJ, if the case involves an appeal from an ALJ's decision. Proposed

§ 23.570(c) requires the ARB's order to mandate action to remedy the violation, including, but not limited to, providing monetary relief for unpaid wages, if the ARB concludes a violation occurred. If the Administrator has sought debarment, the ARB must determine whether a debarment remedy is appropriate. Proposed § 23.570(c) also provides that the ARB's order is subject to discretionary review by the Secretary as provided in Secretary's Order 01–2020 or any successor to that order. See Secretary of Labor's Order, 01–2020 (Feb. 21, 2020), 85 FR 13186 (Mar. 6, 2020).

Finally, proposed § 23.570(d) provides that the ARB's decision will become the Secretary's final order in the matter in accordance with Secretary's Order 01–2020 (or any successor to that order), which provides for discretionary review of such orders by the Secretary. *See id.*

Section 23.580 Administrator Ruling

Proposed § 23.580 sets forth a procedure for addressing questions regarding the application and interpretation of the rules contained in part 23. Proposed § 23.580(a), which the Department derived primarily from 29 CFR 5.13, provides that such questions should be referred to the Administrator. It further provides that the Administrator will issue an appropriate ruling or interpretation related to the question. Requests for rulings under this section should be addressed to the Administrator, Wage and Hour Division, U.S. Department of Labor, Washington, DC 20210. Any interested party may, pursuant to § 23.580(b), appeal a final ruling of the Administrator issued pursuant to § 23.580(a) to the ARB.

Appendix A to Part 23 (Contract Clause)

Section 2 of Executive Order 14026 provides that executive departments and agencies, including independent establishments subject to the Federal Property and Administrative Services Act, must, to the extent permitted by law, ensure that new contracts, contract-like instruments, and solicitations include a clause, which the contractor and any covered subcontractors must incorporate into lower-tier subcontracts, specifying, as a condition of payment, the minimum wage to be paid to workers under the order. 86 FR 22835. Section 4 of the Executive order provides that the Secretary shall issue regulations by November 24, 2021, consistent with applicable law, to implement the requirements of the order. 86 FR 22836. Section 4 of the order also requires that, to the extent permitted by law, within 60 days of the Secretary issuing such regulations, the FARC shall amend regulations in the FAR to provide for inclusion of the contract clause in Federal procurement solicitations and contracts subject to the Executive order. *Id.* The order further specifies that any regulations issued pursuant to section 4 of the order should, to the extent practicable, incorporate existing definitions, principles, procedures, remedies, and enforcement processes under the FLSA, SCA, and DBA, Executive Order 13658, and regulations issued to implement Executive Order 13658. *Id.* Section 5 of the order grants authority to the Secretary to investigate potential violations of and obtain compliance with the order. *Id.* Because a contract clause is a requirement of the order, the Department sets forth the text of a proposed contract clause as appendix A. As required by the order, the proposed contract clause specifies the minimum wage to be paid to workers under the order. The Secretary possesses the authority to obtain compliance with the order, as well as the responsibility to issue regulations implementing the requirements of the order that incorporate, to the extent practicable, existing definitions, principles, procedures, remedies, and enforcement processes under the FLSA, SCA, DBA, Executive Order 13658, and the regulations issued to implement Executive Order 13658. Consistent with that authority and responsibility, the provisions of the proposed contract clause are based on the contract clause included in the Executive Order 13658 rulemaking, which was in turn based on the statutory text or implementing regulations of the FLSA, SCA, and DBA. *See* 79 FR 60685.

The first sentence of proposed § 23.110 requires that the contracting agency include the Executive order minimum wage contract clause set forth in appendix A in all covered contracts and solicitations for such contracts, as described in § 23.30, except for procurement contracts subject to the FAR. It further states that the required contract clause directs, as a condition of payment, that all workers performing on or in connection with covered contracts must be paid the applicable, currently effective minimum wage under Executive Order 14026 and § 23.50. It additionally provides that for procurement contracts subject to the FAR, contracting agencies shall use the clause set forth in the FAR developed to implement this rule and that such clause must both accomplish the same purposes as the clause set forth in appendix A and be consistent with the requirements set forth in this rule.

Paragraph (a) of the proposed contract clause set forth in appendix A provides that the contract in which the clause is included is subject to Executive Order 14026, the regulations issued by the Secretary of Labor at 29 CFR part 23 to implement the order's requirements, and all the provisions of the contract clause.

Paragraph (b) specifies the contractor's minimum wage obligations to workers pursuant to the Executive order. Paragraph (b)(1) stipulates that each worker, as defined in 29 CFR 23.20, employed in the performance of the contract by the prime contractor or any subcontractor, regardless of any contractual relationship that may be alleged to exist between the contractor and the worker, shall be paid not less than the Executive order's applicable minimum wage. The term *worker* includes any person engaged in performing work on or in connection with a contract covered by the Executive order whose wages under such contract are governed by the FLSA, the SCA, or the DBA, regardless of the contractual relationship alleged to exist between the individual and the contractor.

Paragraph (b)(2) provides that the minimum wage required to be paid to each worker performing work on or in connection with the contract between January 30, 2022, and December 31, 2022, is $15.00 per hour. It specifies that the applicable minimum wage required to be paid to each worker performing work on or in connection with the contract should thereafter be adjusted each time the Secretary's annual determination of the applicable minimum wage under section 2(a)(ii) of the Executive order results in a higher minimum wage. Section (b)(2) further provides that adjustments to the Executive order minimum wage will be effective January 1st of the following year, and will be published in the **Federal Register** no later than 90 days before such wage is to take effect. It also provides that the applicable minimum wage will be published on *https://alpha.sam.gov/content/wage-determinations* (or any successor website) and was incorporated by reference into the contract.

The effect of paragraphs (b)(1) and (2) will be to require the contractor to adjust the minimum wage of workers performing work on or in connection with a contract subject to the Executive order each time the Secretary's annual determination of the minimum wage results in a higher minimum wage than the previous year. For example, paragraph (b)(1) will require a

contractor on a contract subject to the Executive order in 2022 (beginning on January 30, 2022) to pay covered workers at least $15.00 per hour for work performed on or in connection with the contract. If workers continue to perform work on or in connection with the covered contract in 2023 and the Secretary determines the applicable minimum wage to be effective January 1, 2023, was $15.10 per hour, paragraphs (b)(1) and (2) will require the contractor to pay covered workers $15.10 for work performed on or in connection with the contract beginning January 1, 2023, thereby raising the wages of any workers paid $15.00 per hour prior to January 1, 2023.

The proposed contract clause also includes a provision that will require contracting agencies to ensure that contractors are compensated for any increase in labor costs resulting from the annual inflation increases in the Executive Order 14026 minimum wage beginning on January 1, 2023. The Department notes, however, that such compensation is only warranted ''if appropriate.'' For example, if the contracting agency and contractor have already anticipated an increase in labor costs in pricing the applicable contract, it would not be appropriate for a contractor to receive compensation in addition to whatever consideration it has already received for any increase in labor costs in the applicable contract. The Department further notes that contractors shall be compensated ''only for'' increases in labor costs resulting from operation of the annual inflation increases. Thus, contractors are entitled to be compensated under the provision only for any increases in labor costs directly resulting from the annual inflation increase. For example, contractors are not entitled to be compensated for labor costs they allege they incurred related to raising wages for non-covered workers due to operation of the annual inflation increase for covered workers. Compensation adjustments will necessarily be made on a contract-by-contract basis, and where any annual inflation increase does not increase labor costs because, for example, of the efficiency and other benefits resulting from the increase, the contractor will not ultimately receive additional compensation as a result of the annual inflation increase.

The Department recognizes that the mechanics of providing an adjustment to the economic terms of a covered contract likely differ between covered procurement and non-procurement contracts. With respect to covered non-procurement contracts subject to the Department's proposed contract clause, the Department believes that the authority conferred on agencies that enter into such contracts under section 4(b) of the Executive order includes the authority to provide the type of adjustment contained in the Department's contract clause.

As discussed elsewhere in this preamble, the Department intends to provide notice of the Executive order minimum wage on SCA and DBA wage determinations to help inform contractors and workers of their rights and obligations under the order. As discussed in more detail in the preamble section for subpart C, the Department has also developed a poster for contractors with FLSA-covered workers performing work on or in connection with a contract covered by the Executive order.

The Department derived paragraph (b)(3) from the contract clauses applicable to contracts subject to the SCA and the DBA, *see* 29 CFR 4.6(h) (SCA), 29 CFR 5.5(a)(1) (DBA), to ensure full payment of the applicable Executive order minimum wage to covered workers. Specifically, paragraph (b)(3) requires the contractor to pay unconditionally to each covered worker all wages due free and clear and without deduction (except as otherwise provided by § 23.230), rebate or kickback on any account. Paragraph (b)(3) further requires that wages shall be paid no later than one pay period following the end of the regular pay period in which such wages were earned or accrued. Paragraph (b)(3) also requires that a pay period under the Executive order may not be of any duration longer than semi-monthly (a duration permitted under the SCA, *see* 29 CFR 4.165(b)).

Paragraph (b)(4) of the proposed contract clause provides that the prime contractor and any upper-tier subcontractor(s) will be responsible for the compliance by any subcontractor or lower-tier covered subcontractor with the Executive order minimum wage requirements. Proposed paragraph (b)(4) also states that the contractor and any subcontractor(s) responsible therefore will be liable for unpaid wages in the event of any violation of the minimum wage obligation of these clauses. As discussed earlier, the Department has found this flow-down model of responsibility to be an effective method to obtain compliance with the DBA and SCA, and to ensure that covered workers receive the wages to which they are statutorily entitled even if, for example, the subcontractor that employed them is insolvent. The Department believes the flow-down model of responsibility will likewise prove an effective model to enforce the Executive order's obligations and ensure payment of wages to covered workers.

Proposed paragraph (b)(5) of the contract clause in appendix A states that workers with disabilities whose wages are calculated pursuant to special certificates issued under section 14(c) of the FLSA must be paid at least the Executive order minimum wage (or the applicable commensurate wage rate under the certificate, if such rate is higher than the Executive order minimum wage) for time spent performing work on or in connection with covered contracts.

The Department derived proposed paragraphs (c) and (d) of the contract clause, which specify remedies in the event of a determination of a violation of Executive Order 14026 or part 23, primarily from the contract clauses applicable to contracts subject to the SCA and the DBA, *see* 29 CFR 4.6(i) (SCA); 29 CFR 5.5(a)(2), (7) (DBA). Paragraph (c) provides that the agency head shall, upon its own action or upon written request of an authorized representative of the Department, withhold or cause to be withheld from the prime contractor under the contract or any other Federal contract with the same prime contractor, so much of the accrued payments or advances as may be considered necessary to pay workers the full amount of wages required by the Executive order. Consistent with withholding procedures under the SCA and the DBA, paragraph (c) would allow the contracting agency and the Department to effect withholding of funds from the prime contractor on not only the contract covered by the Executive order but also on any other contract that the prime contractor has entered into with the Federal Government.

Proposed paragraph (d) states the circumstances under which the contracting agency and/or the Department could suspend, terminate, or debar a contractor for violations of the Executive order. It provides that in the event of a failure to comply with any term or condition of the Executive order or 29 CFR part 23, including failure to pay any worker all or part of the wages due under the Executive order, the contracting agency could on its own action, or after authorization or by direction of the Department and written notification to the contractor, take action to cause suspension of any further payment, advance, or guarantee of funds until such violations have ceased. Paragraph (d) additionally provides that any failure to comply with the contract clause may constitute

grounds for termination of the right to proceed with the contract work and, in such event, for the Federal Government to enter into other contracts or arrangements for completion of the work, charging the contractor in default with any additional cost. Paragraph (d) also provides that a breach of the contract clause may be grounds to debar the contractor as provided in 29 CFR part 23.

Proposed paragraph (e) provides that contractors may not discharge any portion of their minimum wage obligation under the Executive order by furnishing fringe benefits, or with respect to workers whose wages are governed by the SCA, the cash equivalent thereof. As noted earlier, Executive Order 14026 increases ''the hourly minimum wage'' paid by contractors with the Federal Government. 86 FR 22835. By repeatedly stating that it is increasing the hourly minimum wage, without any reference to fringe benefits, the text of the Executive order makes clear that a contractor cannot discharge its minimum wage obligation by furnishing fringe benefits. This is consistent with the Department's interpretation in the regulations issued to implement Executive Order 13658, *see* 79 FR 60688, and the SCA, which does not permit a contractor to meet its minimum wage obligation through the furnishing of fringe benefits, but rather imposes distinct ''minimum wage'' and ''fringe benefit'' obligations on contractors. 41 U.S.C. 6703(1)-(2). Similarly, the FLSA does not allow a contractor to meet its minimum wage obligation through the furnishing of fringe benefits. Although the DBA specifically includes fringe benefits within its definition of minimum wage, thereby allowing a contractor to meet its minimum wage obligation, in part, through the furnishing of fringe benefits, 40 U.S.C. 3141(2), Executive Order 14026 contains no similar provision expressly authorizing a contractor to discharge its Executive order minimum wage obligation through the furnishing of fringe benefits. Consistent with the Executive order, paragraph (e) would accordingly preclude a contractor from discharging its minimum wage obligation by furnishing fringe benefits.

Proposed paragraph (e) also prohibits a contractor from discharging its minimum wage obligation to workers whose wages are governed by the SCA by providing the cash equivalent of fringe benefits, including vacation and holidays. As discussed above, the SCA imposes distinct ''minimum wage'' and ''fringe benefit'' obligations on contractors. 41 U.S.C. 6703(1)–(2). A contractor cannot satisfy any portion of its SCA minimum wage obligation through the provision of fringe benefit payments or cash equivalents furnished or paid pursuant to 41 U.S.C. 6703(2). 29 CFR 4.177(a). Consistent with the treatment of fringe benefit payments or their cash equivalents under the SCA, proposed paragraph (e) would not allow contractors to discharge any portion of their minimum wage obligation under the Executive order to workers whose wages are governed by the SCA through the provision of either fringe benefits or their cash equivalent.

Proposed paragraph (f) provides that nothing in the contract clause would relieve the contractor from compliance with a higher wage obligation to workers under any other Federal, State, or local law, or under contract, nor shall a lower prevailing wage under any such Federal, State, or local law, or under contract, entitle a contractor to pay less than the Executive order minimum wage. This provision would implement section 2(c) of the Executive order, which provides that nothing in the order excuses noncompliance with any applicable Federal or state prevailing wage law, or any applicable law or municipal ordinance establishing a minimum wage higher than the minimum wage established under the order. 86 FR 22836. For example, if a municipal law required a contractor to pay a worker $15.75 per hour on January 30, 2022, a contractor could not rely on the $15.00 Executive order minimum wage to pay the worker less than $15.75 per hour.

Proposed paragraph (g) sets forth recordkeeping and related obligations that are consistent with the Secretary's authority under section 5 of the order to obtain compliance with the order, and that the Department views as essential to determining whether the contractor has paid the Executive order minimum wage to covered workers. The obligations in paragraph (g) are identical to the obligations that the Department derived in the Executive Order 13658 rulemaking. *See* 79 FR 60689. The Department originally derived these obligations from the FLSA, SCA, and DBA. Paragraph (g)(1) lists specific payroll records obligations of contractors performing work subject to the Executive order, providing in particular that such contractors shall make and maintain for three years, work records containing the following information for each covered worker: name, address, and social security number; the worker's occupation(s) or classification(s); the rate or rates paid to the worker; the number of daily and weekly hours worked by each worker; any deductions made; and total wages paid. The records required to be kept by contractors pursuant to proposed paragraph (g)(1) are coextensive with recordkeeping requirements that already exist under, and are consistent across, the FLSA, SCA, and DBA; as a result, compliance by a covered contractor with the proposed payroll records obligations would not impose any obligations to which the contractor is not already subject under the FLSA, SCA, or DBA.

Paragraph (g)(1) further provides that the contractor performing work subject to the Executive order shall make such records available for inspection and transcription by authorized representatives of the WHD.

Proposed paragraph (g)(2) requires the contractor to make available a copy of the contract for inspection or transcription by authorized representatives of the WHD. Proposed paragraph (g)(3) provides that failure to make and maintain, or to make available to the WHD for transcription and inspection, the records identified in paragraph (g)(1) will be a violation of the regulations implementing Executive Order 14026 and the contract. Paragraph (g)(3) additionally provides that in the case of a failure to produce such records, the contracting officer, upon direction of the Department, or under their own action, shall take action to cause suspension of any further payment or advance of funds until such violation have ceased. Proposed paragraph (g)(4) requires the contractor to permit authorized representatives of the WHD to conduct the investigation, including interviewing workers at the worksite during normal working hours. Proposed paragraph (g)(5), provides that nothing in the contract clause will limit or otherwise modify a contractor's recordkeeping obligations, if any, under the FLSA, SCA, and DBA, and their implementing regulations, respectively. Thus, for example, a contractor subject to both Executive Order 14026 and the DBA with respect to a particular project would be required to comply with all recordkeeping requirements under the DBA and its implementing regulations.

Proposed paragraph (h) requires the contractor to both insert the contract clause in all its covered subcontracts and to require its subcontractors to include the clause in any lower–tiered subcontracts. Paragraph (h) further makes the prime contractor and any upper-tier contractor responsible for the compliance by any subcontractor or lower tier subcontractor with the contract clause.

Proposed paragraph (i), which the Department derived from the SCA

contract clause, 29 CFR 4.6(n), sets forth the certifications of eligibility the contractor makes by entering into the contract. Paragraph (i)(1) stipulates that by entering into the contract, the contractor and its officials will be certifying that neither the contractor, the certifying officials, nor any person or firm with an interest in the contractor's firm is a person or firm ineligible to be awarded Federal contracts pursuant to section 5 of the SCA, section 3(a) of the DBA, or 29 CFR 5.12(a)(1). Paragraph (i)(2) constitutes a certification that no part of the contract will be subcontracted to any person or firm ineligible to receive Federal contracts. Paragraph (i)(3) contains an acknowledgement by the contractor that the penalty for making false statements is prescribed in the U.S. Criminal Code at 18 U.S.C. 1001.

The Department based proposed paragraph (j) on section 3 of the Executive order. It addressed the employer's ability to use a partial wage credit based on tips received by a tipped employee (tip credit) to satisfy the wage payment obligation under the Executive order. The provision sets the requirements an employer must meet in order to claim a tip credit.

Proposed paragraph (k) establishes a prohibition on retaliation that the Department derived from the FLSA's antiretaliation provision that is consistent with the Secretary's authority under section 5 of the order to obtain compliance with the order. It prohibits any person from discharging or discriminating against a worker because such worker has filed any complaint or instituted or caused to be instituted any proceeding under or related to Executive Order 14026 or part 23, or has testified or is about to testify in any such proceeding. The Department proposes to interpret the prohibition on retaliation in paragraph (k) in accordance with its interpretation of the analogous FLSA provision.

Proposed paragraph (l) is based on section 5(b) of the Executive order. It accordingly provides that disputes related to the application of the Executive order to the contract will not be subject to the contract's general disputes clause. Instead, such disputes will be resolved in accordance with the dispute resolution process set forth in 29 CFR part 23. Paragraph (l) also provides that disputes within the meaning of the clause includes disputes between the contractor (or any of its subcontractors) and the contracting agency, the U.S. Department of Labor, or the workers or their representatives.

Proposed paragraph (m) relates to the contractor's responsibility in providing notice to workers of the applicable Executive order minimum wage. The methods of notice contained in proposed paragraph (m) reflect those contained in proposed § 23.290. A full discussion of the methods of notice contained in proposed paragraph (m), can accordingly be found in the preamble describing the operation of proposed § 23.290.

III. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501 *et seq.,* and its attendant regulations, 5 CFR part 1320, require the Department to consider the agency's need for its information collections, their practical utility, as well as the impact of paperwork and other information collection burdens imposed on the public, and how to minimize those burdens. The PRA typically requires an agency to provide notice and seek public comments on any proposed collection of information contained in a proposed rule. *See* 44 U.S.C. 3506(c)(2)(B); 5 CFR 1320.8.

This rulemaking would affect existing information collection requirements previously approved under Office of Management and Budget (OMB) control number 1235–0018 (Records to be Kept by Employers—Fair Labor Standards Act) and OMB control number 1235–0021 (Employment Information Form), to the extent that Executive Order 14026 and its higher wage requirements will supersede Executive Order 13658 for contracts entered into, renewed, or extended (pursuant to an option or otherwise) on or after January 30, 2022 that would otherwise be covered by Executive Order 13658, and newly cover contracts in connection with seasonal recreational services or seasonal recreational equipment rental offered for public use on Federal lands, which are presently exempt from Executive 13658 under Executive Order 13838. As required by the PRA, the Department has submitted information collection revisions to OMB for review to reflect changes that will result from the implementation of Executive Order 14026.

Summary: This rulemaking proposes to enact regulations implementing Executive Order 14026, which establishes a higher minimum wage requirement for certain Federal contracts beginning January 30, 2022 than would otherwise be required by Executive Order 13658. *See* 86 FR 22835. Specifically, Executive Order 14026 establishes an initial minimum wage requirement of $15.00 per hour and an initial minimum cash wage for tipped employees of $10.50 per hour, both of which the Department expects will be higher than the corresponding rates that will be in effect on January 30, 2022 under Executive Order 13658. *See* 86 FR 22835–36. Like Executive Order 13658, Executive Order 14026 requires the Department to update the order's minimum wage requirement each subsequent year to account for inflation. *Id.* However, Executive Order 14026 gradually phases out a contractor's ability to pay a subminimum cash wage for tipped employees under Executive Order 14026, raising the minimum cash wage for tipped employees to 85 percent of the order's applicable minimum wage on January 1, 2023, and to 100 percent of the order's applicable minimum wage on January 1, 2024. *See* 86 FR 22836.

Finally, effective January 30, 2022, section 6 of Executive Order 14026 revokes Executive Order 13838. *See* 86 FR 22836. Executive Order 13838 presently exempts contracts in connection with seasonal recreational services or seasonal recreational equipment rental offered for public use on Federal lands from the minimum wage requirements established under Executive Order 13658. Consequently, these contracts will become subject to the minimum wage requirements of either Executive Order 13658 or Executive Order 14026 as of January 30, 2022, depending on the date that the relevant contract was entered into, renewed, or extended.

Purpose and use: This proposed rule, which implements Executive Order 14026, contains several provisions that could be considered to entail collections of information: (1) The requirement in proposed § 23.210 for a contractor and its subcontractors to include the Executive Order 14026 minimum wage contract clause in any covered subcontract; (2) recordkeeping requirements for covered contractors described in proposed § 23.260(a); (3) the complaint process described in proposed § 23.410; and (4) the administrative proceedings described in proposed subpart E.

Proposed subpart C states compliance requirements for contractors covered by Executive Order 14026. Proposed § 23.210 states that the contractor and any subcontractor, as a condition of payment, must abide by the Executive order minimum wage contract clause and must include in any covered subcontracts the minimum wage contract clause in any lower-tier subcontracts. Proposed § 23.260 describes recordkeeping requirements for contractors subject to Executive Order 14026. Finally, proposed § 23.290 includes a notice requirement, requiring contractors to notify all workers performing work on or in connection

with a covered contract of the applicable minimum wage rate under Executive Order 14026.

The disclosure of information originally supplied by the Federal Government for the purpose of disclosure is not included within the definition of a collection of information subject to the PRA. *See* 5 CFR 1320.3(c)(2). The Department has thus determined that proposed §§ 23.210 and 23.290 do not include an information collection subject to the PRA. The Department also notes that the proposed recordkeeping requirements in proposed § 23.260 are requirements that contractors must already comply with under the FLSA, SCA, DBA, and/or Executive Order 13658 under an OMB-approved collection of information (OMB control number 1235–0018). The Department believes that the proposed rule does not impose any additional notice or recordkeeping requirements on contractors for PRA purposes. Therefore, the burden for complying with the recordkeeping requirements in this proposed rule is subsumed under the current approval. An information collection request (ICR), however, has been submitted to the OMB that would revise the existing PRA authorization for control number 1235–0018 to incorporate the recordkeeping regulatory citations in this proposed rule.

WHD obtains PRA clearance under control number 1235–0021 for an information collection covering complaints alleging violations of various labor standards that the agency administers and enforces. An ICR has been submitted to revise the approval to incorporate the regulatory citations in this proposed rule applicable to complaints and adjust burden estimates to reflect any increase in the number of complaints filed against contractors who fail to comply with Executive Order 14026's higher minimum wage requirement.

Proposed subpart E establishes administrative proceedings to resolve investigation findings. Particularly with respect to hearings, the rule imposes information collection requirements. The Department notes that information exchanged between the target of a civil or an administrative action and the agency in order to resolve the action would be exempt from PRA requirements. *See* 44 U.S.C. 3518(c)(1)(B); 5 CFR 1320.4(a)(2). This exemption applies throughout the civil or administrative action (such as an investigation and any related administrative hearings). Therefore, the Department has determined the administrative requirements contained in subpart E of this proposed rule are exempt from needing OMB approval under the PRA.

Information and technology: There is no particular order or form of records prescribed by the proposed regulations. A contractor may meet the requirements of this proposed rule using paper or electronic means. WHD, in order to reduce burden caused by the filing of complaints that are not actionable by the agency, uses a complaint filing process in which complainants discuss their concerns with WHD professional staff. This process allows agency staff to refer complainants raising concerns that are not actionable under wage and hour laws and regulations to an agency that may be able to offer assistance.

Public comments: The Department seeks comments on its analysis that this NPRM creates a slight increase in paperwork burden associated with ICR 1235–0021 but does not create a paperwork burden on the regulated community of the information collection provisions contained in ICR 1235–0018. Commenters may send their views on the Department's PRA analysis in the same way they send comments in response to the NPRM as a whole (*e.g.,* through the *www.regulations.gov* website), including as part of a comment responding to the broader NPRM. Alternatively, commenters may submit a comment specific to this PRA analysis by sending an email to *WHDPRAComments@dol.gov.* While much of the information provided to OMB in support of the information collection request appears in the preamble, interested parties may obtain a copy of the full recordkeeping and complaint process supporting statements by sending a written request to the mail address shown in the **ADDRESSES** section at the beginning of this preamble. Alternatively, a copy of the recordkeeping ICR with applicable supporting documentation; including a description of the likely respondents, proposed frequency of response, and estimated total burden may be obtained free of charge from the *RegInfo.gov* website. Similarly, the complaint process ICR is available by visiting *http://www.reginfo.gov/public/do/PRAMain* website. As previously indicated, written comments directed to the Department may be submitted within 30 days of publication of this notification.

The OMB and the Department are particularly interested in comments that:

- Evaluate whether the proposed collections of information are necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Total burden for the recordkeeping and complaint process information collections, including the burdens that will be unaffected by this proposed rule and any changes are summarized as follows:

Type of review: Revisions to currently approved information collections.

Agency: Wage and Hour Division, Department of Labor.

Title: Employment Information Form.

OMB Control Number: 1235–0021.

Affected public: Private sector, businesses or other for-profits and Individuals or Households.

Estimated number of respondents: 38,240 (165 from this rulemaking).

Estimated number of responses: 38,240 (165 from this rulemaking).

Frequency of response: On occasion.

Estimated annual burden hours: 12,747 (55 burden hours due to this NPRM).

Estimated annual burden costs: $0 ($0 from this rulemaking).

Title: Records to be kept by Employers.

OMB Control Number: 1235–0018.

Affected public: Private sector, businesses or other for-profits and Individuals or Households.

Estimated number of respondents: 5,621,961 (0 from this rulemaking).

Estimated number of responses: 47,118,160 (0 from this rulemaking).

Frequency of response: Various.

Estimated annual burden hours: 3,626,426 (0 from this rulemaking).

Estimated annual burden costs: 0.

IV. Executive Orders 12866 and 13563

Under Executive Order 12866, OMB's Office of Information and Regulatory Affairs (OIRA) determines whether a regulatory action is significant and, therefore, subject to the requirements of the Executive order and OMB review.[13] Section 3(f) of Executive Order 12866

[13] *See* 58 FR 51735, 51741 (Oct. 4, 1993).

defines a ''significant regulatory action'' as a regulatory action that is likely to result in a rule that may: (1) Have an annual effect on the economy of $100 million or more, or adversely affect in a material way a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, or tribal governments or communities (also referred to as economically significant); (2) create serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive order. OIRA has determined that this proposed rule is economically significant under section 3(f) of Executive Order 12866.

Executive Order 13563 directs agencies to, among other things, propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs; that it is tailored to impose the least burden on society, consistent with obtaining the regulatory objectives; and that, in choosing among alternative regulatory approaches, the agency has selected those approaches that maximize net benefits. Executive Order 13563 recognizes that some costs and benefits are difficult to quantify and provides that, when appropriate and permitted by law, agencies may consider and discuss qualitatively values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts. The analysis below outlines the impacts that the Department anticipates may result from this proposed rule and was prepared pursuant to the above-mentioned Executive orders.

A. Introduction

1. Background

This proposed rulemaking implements Executive Order 14026, ''Increasing the Minimum Wage for Federal Contractors.'' This Executive order seeks to promote ''economy and efficiency'' in Federal procurement by increasing the hourly minimum wage paid by the parties that contract with the Federal Government to $15.00 for those workers working on or in connection with a covered Federal contract beginning January 30, 2022. For covered tipped workers, the minimum required cash wage will be $10.50 per hour beginning January 30, 2022, gradually rising to the full Executive Order 14026 minimum wage on January 1, 2024. The Executive order states that raising the minimum wage enhances worker productivity and generates higher-quality work by boosting workers' health, morale, and effort; reducing absenteeism and turnover; and lowering supervisory and training costs. Executive Order 14026 supersedes Executive Order 13658, which established a lower minimum wage for contractors, to the extent that the orders are inconsistent. Finally, effective January 30, 2022, Executive Order 14026 will revoke Executive Order 13838, which presently exempts contracts entered into with the Federal Government in connection with seasonal recreational services or seasonal recreational equipment rental for the general public on Federal lands from coverage of Executive Order 13658.

2. Summary of Affected Employees, Costs, Transfers, and Benefits

The Department estimated the number of employees who would, as a result of the Executive order and this proposed rule, see an increase in their hourly wage, *i.e.,* ''affected employees.'' The Department estimates there will be 327,300 affected employees in the first year of implementation (Table 1).[14] During the first 10 years the rule is in effect, average annualized direct employer costs are estimated to be $2.4 million (Table 1) assuming a 7 percent real discount rate (hereafter, unless otherwise specified, average annualized values will be presented using a 7 percent real discount rate). This estimated annualized cost includes $1.9 million for regulatory familiarization and $538,500 for implementation costs. Other potential costs are discussed qualitatively.

The direct transfer payments associated with this rule are transfers of income from employers to employees in the form of higher wage rates.[15] Estimated average annualized transfer payments are $1.5 billion per year over 10 years. This transfer estimate may be an underestimate because it does not capture workers already earning above $15.00 that may have their wages increased as well. Additionally, employers with Federal contracts may increase wages for their workers who are not working on the contract.

The Department expects that increasing the minimum wage of Federal contract workers will generate several important benefits. However, due to data limitations, these benefits are not monetized. As noted in the Executive order, this rule will ''promote economy and efficiency.'' Specifically, this proposed rule discusses benefits from improved government services, increased morale and productivity, reduced turnover, reduced absenteeism, and reduced poverty and income inequality for Federal contract workers.

Executive Order 14026 directs the Department to issue regulations to implement the order and also grants the Department exclusive enforcement authority over the order; the Department's regulations will therefore govern covered contracts. Because Executive Order 14026 also directs the FARC to amend the FAR to provide for inclusion of an implementing contract clause in covered procurement contracts and other agencies to take necessary steps to implement the order, the Department acknowledges that some impacts could be attributed to future rulemaking or other action by other agencies, such as the FARC. However, because such subsequent steps are dependent on the Department's rule and the Department's regulations will govern enforcement of this Executive order, the Department believes it is appropriate to attribute (on a shared basis, for effects associated with procurement contracts) the impacts discussed in this analysis to this NPRM.

[14] The estimate of affected employees represents the number of full-year employees working exclusively on covered contracts.

[15] These transfers may ultimately be passed on to the Federal Government and other entities, as discussed in section IV.C.2.c.ii.

Table 1: Summary of Affected Employees, Regulatory Costs, and Transfers

	Year 1	Future Years		Average Annualized Value	
		Year 2	Year 10	3% Real Rate	7% Real Rate
Affected employees (1,000s)	327.3	329.3	345.6	--	--
Direct employer costs (million)	$17.1	$0	$0	$2.0	$2.4
Regulatory familiarization	$13.4	$0	$0	$1.6	$1.9
Implementation	$3.8	$0	$0	$0.4	$0.5
Transfers (millions)	$1,466	$1,474	$1,548	$1,504	$1,501

B. Number of Affected Firms and Employees

1. Overview and Data

This section explains the Department's methodology to estimate the number of affected firms and employees. The number of firms is estimated primarily from the General Services Administration's (GSA) System for Award Management (SAM). This is supplemented with a variety of other data sources. There are no government data on the number of employees working on Federal contracts; therefore, to estimate the number of Federal contract employees, the Department employed the approach used in two previous Executive order rulemakings, the 2016 rule implementing Executive Order 13706, ''Establishing Paid Sick Leave for Federal Contractors,'' which was an updated version of the methodology used in the 2014 rulemaking implementing Executive Order 13658.[16] This approach uses data from *USASpending.gov*, a database of Government contracts from the Federal Procurement Data System–Next Generation (FPDS–NG). Although more recent data is available, the Department generally used data from 2019 to avoid any shifts in the data associated with the COVID–19 pandemic in 2020. Any long-run impacts of COVID–19 are speculative because this is an unprecedented situation, so using data from 2019 is the best approximation the Department has for future impacts. The pandemic could cause structural changes to the economy, resulting in shifts in industry employment and wages. The transfers to employees associated with this rule could be an underestimate or an overestimate, depending on how employment and wages have changed in the industries affected by this rule.

After approximating the total number of Federal contract employees, the Department estimated the share who would receive an increase in earnings (*i.e.,* affected employees). Specifically, the Department used 2019 data from the Current Population Survey (CPS) to identify the share of workers, by industry, who earned between the 2019 minimum wage for Federal contract employees, $7.40 per hour for tipped employees and $10.60 per hour for non-tipped employees, and $15 per hour.[17] This ratio was then applied to the population of Federal contract employees.

2. Number of Affected Firms

The main data source used to estimate the number of affected firms is SAM. All entities bidding on Federal procurement contracts or grants must register in SAM. Using May 2021 SAM data, the Department estimated there are 428,300 registered firms.[18] The Department excluded firms with expired registrations, firms only applying for grants,[19] government entities (such as city or county governments), foreign organizations, and companies that only sell products and do not provide services. SAM provides the primary North American Industry Classification System (NAICS) for all companies.[20]

SAM includes all prime contractors and some subcontractors (those who are also prime contractors or who have otherwise registered in SAM). However, the Department is unable to determine the number of subcontractors who are not in the SAM database. Therefore, the Department examined five years of USASpending data (2015 through 2019)[21] and found 33,500 unique subcontractors who did not hold contracts as primes in 2019 (and thus may not be included in SAM), and added these firms to the total from SAM (Table 2). Adding these 33,500 firms to the number of firms in SAM, results in 461,800 potentially affected firms that may hold Federal contracts.

In addition, some entities operating on nonprocurement contracts are covered by the E.O. Estimating the number of covered contracts involves many data sources and assumptions.[22] There are seven types of contracts included in this analysis of nonprocurement contracts (Table 3):

[16] *See* 81 FR 9591, 9636–40 (analysis of workers affected by Executive Order 13706) and 79 FR 60634, 60693–95 (analysis of workers affected by Executive Order 13658).

[17] Before doing this calculation, the Department first dropped those earning less than $10.60 (and tipped workers earning less than $7.40), so this estimate is the share of workers who are already earning at least $7.40 for tipped workers and $10.60 for non-tipped workers.

[18] Data released in monthly files. Available at: *https://www.sam.gov/SAM/pages/public/extracts/samPublicAccessData.jsf.*

[19] Entities registering in SAM are asked if they wish to bid on contracts. If the firm answers ''yes,'' then they are included as ''All Awards'' in the ''Purpose of Registration'' column in the SAM data. The Department included only firms with a value of ''Z2,'' which denotes ''All Awards.''

[20] In some instances the primary NAICS was listed as Public Administration, which is excluded from the analysis because it is not available for other data sources required (see section B.iii.). Therefore, these companies are redistributed to other NAICS based on the current distribution.

[21] The Department identified subawardees from the *USASpending.gov* data who did not perform work as a prime during 2019. The Department included subcontractors from five years of data to compensate for lower-tier subcontractors that may not be included in USASpending.gov. The Department believes this is a reasonable approximation of the number of subcontractors.

[22] Those estimates primarily capture those covered contracts for concessions and contracts in connection with Federal property or lands and relating to services for Federal employees, their dependents, or the general public that are nonprocurement in nature, such that the contracting entities are not necessarily listed in SAM. However, the estimates will additionally capture some SCA-covered contracts because SCA-covered contracts, contracts for concessions and contracts in connection with Federal property or lands are to some degree overlapping categories of contracts (*e.g.,* at least some concessions contracts and contracts in connection with Federal property or lands are covered by the SCA, *see, e.g., Cradle of Forestry in America Interpretive Association,* ARB Case No. 99–035, 2001 WL 328132 (ARB March 30, 2001)).

1. National Park Service (NPS) concessions contracts.
2. NPS Commercial Use Authorizations (CUAs).
3. Forest Service Special Use Authorizations (SUAs).
4. NPS special use permits.
5. Bureau of Land Management (BLM) special recreation permits.
6. Retail and concession leases in federally owned buildings.
7. Operations and concessions on military bases.

First, the Department estimated the number of contractors with NPS concessions contracts. The NPS website contains a list of entities operating under concessions contracts on NPS lands.[23] The Department downloaded all 441 records contained on the website, identified unique firms by name, and assigned them to industries based on the first type of ''service'' listed. This results in 401 unique entities operating under concessions contracts on NPS lands.

Second, the Department estimated the number of NPS CUAs. The Department informally consulted with the NPS and learned that the NPS had approximately 5,900 CUAs in FY2015. An NPS CUA is a written authorization to provide services to park area visitors. See 36 CFR 18.2(c). The Department has assumed, solely for purposes of the economic analysis, that all NPS CUAs are contracts covered by the Executive order. Because the number of CUAs does not take into account that one firm may hold multiple authorizations, the Department multiplied the total number of CUAs by the ratio of unique firms holding NPS concessions contracts to total NPS concessions contracts to estimate the number of contractors with CUAs (401 divided by 441 = 91 percent) for an estimated 5,340 unique firms with CUAs. The Department used the industry distribution from NPS concessions contracts to assign CUA permit holders to industries because industry information was not available.

Third, the Department estimated the number of U.S. Forest Service (FS) SUAs. The Department informally consulted the FS, which informed the Department that 77,353 SUAs were in effect in FY 2015. FY 2015 data were the latest year of data available to DOL. Based on further informal consultations with the FS, the Department estimates that approximately 36 percent of these SUAs may be covered contracts.[24] No data are available to determine whether a contractor holds more than one permit; therefore, the Department used the NPS ratio of unique concessions contract holders to total concessions contract holders to estimate the number of unique contractors with FS permits (91 percent). This leaves 25,076 unique firms that may be affected. The Department used its best professional judgement to determine the relevant industry for each type of permit because data were not available.

Fourth, the Department estimated the number of affected NPS special use permits. During informal discussions with DOL, NPS officials estimated that it issued 33,735 special use permits in FY 2015.[25] FY 2015 data were the latest year of data available to DOL. It is likely that many of these permits will not be covered by the rulemaking, but the Department has no method for directly determining the number of such permits that might be covered. Therefore, the Department assumed, solely for purposes of the economic analysis, that the E.O. would cover 36 percent of NPS special use permits (the ratio of FS SUAs that are covered) and that 91 percent of the permits are held by unique contract holders (based on NPS data for CUAs). Therefore, the Department estimates that 10,936 entities holding special use permits will be covered by the rule. These permit holders were assigned to the ''arts, entertainment, and recreation'' industry.

Fifth, BLM reports 4,737 special recreation permits in FY2019.[26] The Department again relied on the FS data to assume that 36 percent of these permits will be covered, and the NPS data to assume that 91 percent will be held by unique contractors.[27] This results in 1,536 entities holding BLM special recreation permits. The Department assumed that these are in the ''arts, entertainment, and recreation'' industry. These estimates for the NPS, FS, and BLM do not account for the possibility that the same firms may hold concessions contracts with more than one agency.

Sixth, the Department estimated the number of retail and concession leases in federally owned buildings. Data are not available on the prevalence of these contracts, but during the 2016 rulemaking implementing Executive Order 13706's paid sick leave requirements that covered a similar population, the Department estimated there were a total of 1,120 entities (1,232 entities times 91 percent assumed to be held by unique contractors). To account for blind vendors who enter into operating agreements with states who obtain contracts or permits from Federal agencies to operate vending facilities on Federal property under the Randolph-Sheppard Act, the Department has added 767 contractors to its estimate.[28] However, the Department notes that some of these vendors may already be counted in the 1,120 estimate. The Department assumes these entities are in the ''retail trade'' and ''accommodation and food services'' industries.

Seventh, to account for operations and concessions on military bases, the Department identified that the Army and Air Force, the Navy, the Marine Corps, and the Coast Guard also have bases with retail and concessions contracts. These include both the military Exchanges and private companies with concessions contracts to operate on base. The Department counted each of the branch's Exchange organizations as one firm. Based on general information about services on bases, the Department assumes these entities are in the ''retail trade'' and ''accommodation and food services'' industries. According to Exchange and Commissary News (a business magazine), the Army & Air Force Exchange Service (AAFES) has 586 concessions contracts.[29] The Department assumes each is with a unique firm and that these entities are not listed in SAM. The Department also assumes that 68 percent of these concessions contracts are domestic, resulting in an estimated 401 concessions contracts.[30]

[23] Available at: *https://www.nps.gov/subjects/concessions/concessioners-search.htm.* The Department has assumed all NPS concessions contracts are covered by the E.O., solely for purposes of this economic analysis, primarily because the E.O. itself specifically covers concessions contracts.

[24] For each Forest Service ''use code'' (*e.g.,* ''111 boat dock and wharf''), the Department determined whether the authorizations are for commercial companies.

[25] According to NPS, activities that may require a special use permit include (but are not limited to) weddings, memorial services, special assemblies, and First Amendment activities. *See https://www.nps.gov/ever/learn/management/specialuse.htm.*

[26] U.S. Department of the Interior, Bureau of Land Management. (2020). Public Land Statistics 2019. *https://www.blm.gov/sites/blm.gov/files/PublicLandStatistics2019.pdf.*

[27] The Department believes it is reasonable to apply the 36 percent coverage estimates to NPS special use permits and BLM special recreation permits because it understands that these permits are likely for sufficiently similar purposes and entered into with sufficiently similar individuals and entities as the FS SUAs.

[28] DOL communications with the Department of Education.

[29] Exchange and Commissary News. (2017). Exchange QSR Clicks with Customers. *http://www.ebmpubs.com/ECN_pdfs/ecn0517_AAFESQSRNBFF.pdf.*

[30] This is the share of AAFES net sales that occur domestically. AAFES Annual Report 2019. *https://publicaffairs-sme.com/Community/wp-content/uploads/2020/06/2019AnnualReportDigi.pdf.*

Data are not available on the number of concessions contracts for other branches of the military. However, data are available on the number of name-brand fast-food establishments at AAFES, Navy Exchange Service Command (NEXCOM), and the Marine Corps Exchange (MCX). The Department assumes the distribution of fast-food establishments across branches is similar to the distribution of total concessions contracts. The Department calculated the ratio of the number at NEXCOM or MCX fast-food establishments relative to AAFES and then multiplied that ratio by the 401 AAFES concessions contracts.[31] In total, the Department estimates 553 concessions contracts (401 for AAFES, 119 for NEXCOM, and 33 for MCX).

In total, this proposed rule estimates 507,200 potentially affected firms. Table 2 summarizes the estimated number of affected contractors by contract nexus and industry used in this rulemaking. The Department believes this is likely an upper bound on the number of affected firms because some of these firms may not have Federal contracts and even some of those with contracts may not have workers earning below $15. The Department also used USASpending.gov data to estimate the number of contractors with SCA and DBA contracts. In 2019, there were 88,800 prime contractors with potentially affected employees from USASpending. This is significantly lower than the 428,300 firms registered in SAM and used in this analysis. The Department chose to use the data from SAM to ensure the entire population of potentially affected firms is captured. Additionally, firms without active contracts may incur some regulatory familiarization costs if they plan to bid on future Federal contracting work.

BILLING CODE 4510–27–P

Table 2: Number of Potentially Affected Contractors

Industry	NAICS	Total Potentially Affected Firms	Firms From SAM	Subcon-tractors	Federal Prop. and Lands
Agriculture, forestry, fishing & hunting	11	5,895	5,808	1	86
Mining	21	1,209	1,100	44	65
Utilities	22	5,144	2,613	52	2,479
Construction	23	60,316	52,149	7,941	226
Manufacturing	31-33	55,731	47,283	8,417	31
Wholesale trade	42	20,335	19,686	649	0
Retail trade	44-45	10,683	8,292	31	1,833
Transportation and warehousing	48-49	22,194	15,897	401	5,896
Information	51	19,601	13,400	329	5,872
Finance and insurance	52	3,713	3,665	48	0
Real estate and rental and leasing	53	20,318	20,317	1	0
Professional, scientific, and technical	54	119,543	107,411	11,622	510
Management of companies & enterprises	55	551	551	0	0
Administrative and waste services	56	39,433	35,203	3,581	649
Educational services	61	17,210	16,889	250	71
Health care and social assistance	62	36,676	36,629	17	30
Arts, entertainment, and recreation	71	29,209	4,911	0	24,298
Accommodation and food services	72	16,149	12,474	7	3,141
Other services	81	24,366	24,005	94	267
Total private	**--**	**508,276**	**428,283**	**33,485**	**45,454**

[31] Exchange and Commissary News. (2014). Military Exchange Name-Brand Fast Food Portfolios. *http://www.ebmpubs.com/ECN_pdfs/ecn0714_NBFF.pdf.*

Table 3: Number of Potentially Affected Firms on Federal Properties and Lands

NAICS	NPS Concess-ions	NPS CUAs	NPS Special Use Permits	Forest Service SUAs	BLM Special Recreation Permits	Public Buildings	Federal Bases
11	0	0	0	86	0	0	0
21	0	0	0	65	0	0	0
22	0	0	0	2,479	0	0	0
23	0	0	0	226	0	0	0
31-33	0	0	0	31	0	0	0
42	0	0	0	0	0	0	0
44-45	50	666	0	35	0	944	139
48-49	142	1,891	0	3,863	0	0	0
51	1	13	0	5,858	0	0	0
52	0	0	0	0	0	0	0
53	0	0	0	0	0	0	0
54	0	0	0	510	0	0	0
55	0	0	0	0	0	0	0
56	28	373	0	248	0	0	0
61	0	0	0	71	0	0	0
62	2	27	0	2	0	0	0
71	113	1,505	10,936	10,209	1,536	0	0
72	63	839	0	1,157	0	944	139
81	2	27	0	238	0	0	0
--	**401**	**5,340**	**10,936**	**25,076**	**1,536**	**1,887**	**278**

BILLING CODE 4510–27–C

3. Number of Potentially Affected Employees

There are no Government data on the number of employees working on Federal contracts; therefore, to estimate the number of Federal contract employees, the Department employed the approach used in the 2016 rulemaking implementing Executive Order 13706's paid sick leave requirements, which was an updated version of the methodology used in the 2014 rulemaking for Executive Order 13658.[32] The Department estimated the number of employees who work on Federal contracts that will be covered by Executive Order 14026, representing the number of ''potentially affected employees.'' Additionally, the Department estimated the share of potentially affected employees who will receive wage increases as a result of the Executive order. These employees are referred to as ''affected.''

The Department estimated the number of potentially affected employees in three parts. First, the Department estimated employees and self-employed workers working on SCA and DBA procurement contracts in the 50 States and Washington, DC Second, the Department estimated the number of employees and self-employed workers working on SCA and DBA procurement contracts in the U.S. territories. Third, the Department estimated the number of potentially affected employees on nonprocurement concessions contracts and contracts on Federal property or lands (some of which would also be SCA-covered).

a. SCA and DBA Procurement Contracts in the 50 States and Washington, DC

SCA and DBA contract employees on covered procurement contracts were estimated by taking the ratio of Federal contracting expenditures (''Exp'') to total output (Y), by industry. Total output is the market value of the goods and services produced by an industry. This ratio is then applied to total private employment in that industry (''Emp'') (Table 4). This analysis was conducted at the 2-digit NAICS level.[33]

$$Potentially\ Affected\ Emp_i = \frac{Exp_i}{Y_i}\ x\ Emp_i$$

Where i = 2-digit NAICS

The Department used Federal contracting expenditures from *USASpending.gov* data, which tabulates data on Federal contracting through the

[32] *See* 81 FR 9591, 9591–9671 and 79 FR 60634–60733.

[33] The North American Industry Classification System is a method by which Federal statistical agencies classify business establishments in order to collect, analyze, and publish data about certain industries. Each industry is categorized by a sequence of codes ranging from 2 digits (most aggregated level) to 6 digits (most granular level). *https://www.census.gov/naics/*.

FPDS–NG. According to the data, the government spent $312 billion on service contracts in 2019 with a place of performance in the 50 States or Washington, DC This excludes (1) financial assistance such as direct payments, loans, and insurance; (2) contracts performed outside the U.S. because the proposed rule only covers contracts performed in the U.S.; and (3) expenditures on goods purchased by the Federal government because the proposed rule does not apply to contracts for the manufacturing and furnishing of materials and supplies.[34]

To determine the share of all output associated with Government contracts, the Department divided industry-level contracting expenditures by that industry's gross output.[35] For example, in the information industry, $10.1 billion in contracting expenditures was divided by $1.9 trillion in total output, resulting in an estimate that covered Government contracts comprise 0.52 percent of every dollar of output in the information industry.

The Department then multiplied the ratio of covered-to-gross output by private sector employment to estimate the share of employees working on covered contracts for each 2-digit NAICS industry. Private sector employment is from the May 2019 Occupational Employment and Wage Statistics (OEWS), formerly the Occupational Employment Statistics.[36] [37] All workers performing services on or in connection with a covered contract are covered by the Executive order and this proposed rule, however, unincorporated self-employed workers are excluded from the OEWS. Thus, the OEWS data are supplemented with data from the 2019 Current Population Survey Merged Outgoing Rotation Group (CPS MORG) to include unincorporated self-employed in the estimate of covered workers. To demonstrate, in the information industry, there were approximately 3.0 million private sector employees in 2019 and covered Government contracts comprise 0.52 percent of every dollar of gross output. The Department multiplied 3.0 million by 0.52 percent to estimate that the Executive order will potentially affect 15,400 employees on covered procurement contracts in the information industry.[38]

This methodology represents the number of year-round equivalent potentially affected employees who work exclusively on covered Federal contracts. Thus, when the Department refers to potentially affected employees in this analysis, the Department is referring to this illustrative number of employees who work exclusively on covered Government contracts. The number of employees who will experience wage increases will likely exceed this number since all affected workers may not work exclusively on Federal contracts. Implications of this for costs and transfers are discussed in the relevant sections.

BILLING CODE 4510–27–P

[34] For example, the government purchases pencils; however, a contract solely to purchase pencils would not be covered by the Executive order. Contracts for goods were identified in the *USASpending.gov* data if the product or service code begins with a number (services begin with a letter).

[35] Bureau of Economic Analysis. (2020). Table 8. Gross Output by Industry Group. *https://www.bea.gov/news/2020/gross-domestic-product-industry-fourth-quarter-and-year-2019.* ''Gross output of an industry is the market value of the goods and services produced by an industry, including commodity taxes. The components of gross output include sales or receipts and other operating income, commodity taxes, plus inventory change. Gross output differs from value added, which measures the contribution of the industry's labor and capital to its gross output.''

[36] Bureau of Labor Statistics. Occupational Employment and Wage Statistics. May 2019. Available at: *http://www.bls.gov/oes/.*

[37] Some adjustments were made to the OEWS employment estimates to make the population more consistent with BEA's gross output and better reflect private employment. The Department excluded Federal U.S. Postal service employees, employees of government hospitals, and employees of government educational institutions.

[38] Note that the number of employees aggregated across industries does not match the total number of employees derived using totals due to the order of operations of multiplying and summing (*i.e.,* the sum of the products is not equal to the product of the sums).

Table 4: Number of Potentially Affected Employees in the 50 States and D.C.

NAICS	Private Employees (1,000s) [a]	Total Private Output (Billions) [b]	Covered Contracting Output (Millions) [c]	Share Output from Covered Contracting	Employees on SCA and DBA Contracts (1,000s) [d]	Employees on Federal Lands and Concessions (1,000s) [e]	Total Contract Employees (1,000s)
11	1,168	$450	$408	0.09%	1	0	1.1
21	699	$577	$103	0.02%	0	0	0.2
22	547	$498	$2,399	0.48%	3	4	6.7
23	9,100	$1,662	$35,692	2.15%	195	3	197.9
31-33	12,958	$6,266	$28,603	0.46%	59	0	59.3
42	5,955	$2,098	$161	0.01%	0	0	0.5
44-45	16,488	$1,929	$327	0.02%	3	37	39.4
48-49	6,215	$1,289	$14,217	1.10%	69	119	187.2
51	2,971	$1,942	$10,076	0.52%	15.4	23	38.2
52	6,180	$3,161	$12,482	0.39%	24	0	24.4
53	2,699	$4,143	$931	0.02%	1	0	0.6
54	10,581	$2,487	$150,888	6.07%	642	9	650.6
55	2,470	$675	$0	0.00%	0	0	0.0
56	10,158	$1,141	$36,313	3.18%	323	14	337.3
61	3,271	$381	$4,250	1.11%	36	1	37.2
62	20,791	$2,648	$11,099	0.42%	87	0	87.5
71	2,949	$382	$81	0.02%	1	17	17.4
72	14,303	$1,192	$1,018	0.09%	12	33	45.6
81	5,260	$772	$2,686	0.35%	18	1	18.9
Total	**134,761**	**$33,691**	**$311,733**	**0.93%**	**1,491**	**266**	**1,750**

[a] OEWS May 2019. Excludes Federal U.S. Postal service employees, employees of government hospitals, and employees of government educational institutions. Added to the OEWS employee estimates were unincorporated self-employed workers from the 2019 CPS MORG data.

[b] Bureau of Economic Analysis, national income and product account (NIPA) Tables, Gross output. 2019.

[c] USASpending.gov. Contracting expenditures for covered contracts in 2019.

[d] Assumes share of expenditures on contracting is same as share of employment. Assumes employees work exclusively, year-round on Federal contracts. Thus, this may be an underestimate if some employees are not working entirely on Federal contracts.

[e] Calculated by multiplying the number of firms by the average employees per firm.

BILLING CODE 4510–27–C

b. SCA and DBA Procurement Contracts in the U.S. Territories

The methodology to estimate potentially affected workers in the U.S. territories is similar to the methodology above. The primary difference is that data on gross output in the territories are not available, and so the Department had to make some assumptions. Federal contracting expenditures from USASpending.gov data show that the Government spent $1.8 billion on service contracts in 2019 in Puerto Rico, Guam, and the U.S. Virgin Islands. Other territories were excluded because employment data are not available.[39] The Department approximated gross output in these three territories by calculating the ratio of the Gross Domestic Product (GDP) to total gross output for the U.S., then applying that ratio to GDP in each territory to estimate total gross output. For example, the Department estimated that Puerto Rico's gross output totaled $140.5 billion.[40]

The rest of the methodology follows the methodology for the fifty states and Washington, DC. To determine the share of all output associated with Government contracts, the Department divided contracting expenditures by gross output. The Department then multiplied the ratio of covered contract spending to gross output by private sector employment to estimate the share of employees working on covered contracts.[41] This analysis was not conducted at the industry level because the number of observations in some industries is very small, making estimates imprecise. The Department estimated 11,800 employees will be potentially affected in Puerto Rico, Guam, and the U.S. Virgin Islands.

c. Nonprocurement Concessions Contracts and Contracts on Federal Properties or Lands

The above analysis found 1.5 million potentially affected employees on SCA and DBA contracts. However, the employees of entities operating under covered nonprocurement contracts on Federal property or lands may not be included in that total. To account for these employees, the Department used a variety of sources. First, the Department estimated the number of entities operating under covered nonprocurement contracts on Federal property or lands (section V.B.ii.). Then the Department multiplied the number of contracting firms by the number of potentially affected employees per contracting firm, by industry. This ratio was calculated by dividing the potentially affected employees on direct contracts by the number of contractors (prime and subcontractors) with potentially affected employees from USASpending. For example, in the information industry, there are 15,400 potentially affected workers in 4,000 entities, for an average of 3.9 potentially affected workers per firm. This estimate of potentially affected workers per firm is multiplied by the estimated 5,872 entities in the information industry operating under covered nonprocurement contracts on Federal property or lands, resulting in 22,800 potentially affected employees in these firms.

The exception to the above methodology is for employees of military Exchanges. These 41,500 employees are directly included because Exchanges are very large employers and using the ratio method above would underestimate employment.[42] The AAFES employs 35,000 employees,[43] NEXCOM employs 13,000 associates,[44] and MSX employs 12,000 workers.[45] Data on employment for the Coast Guard Exchange (CGX) was not available and so the Department estimated there are 614 employees.[46] These numbers were then reduced by 32 percent to remove employees stationed overseas, based on the share of AAFES net sales that occur outside the continental U.S.[47] Summing these calculations over all industries results in an additional 259,300 covered employees for a total of 1.8 million potentially affected employees.

d. Additional Considerations

Because the Executive order's requirements only apply to ''new contracts'' as defined in the NPRM, some of these potentially affected workers may not be impacted in the first year after implementation. However, the Department believes the majority will be impacted in Year 1. For example, section 9(c) of the Executive order ''strongly encourage[s]'' agencies administering existing contracts ''to ensure that the hourly wages paid under such contracts or contract-like instruments are consistent with the minimum wages specified [under the order].'' Additionally, if workers are staffed on more than one contract, their hourly wage rate may increase for all contracts as soon as any one of the contracts is impacted. Lastly, rather than increasing pay for only a subset of their workers, some employers may increase wages for all potentially affected workers earning less than $15 per hour at the time their first contract is affected (rather than paying different wage rates to employees working on new contracts and employees working on existing contracts). For these reasons, the Department included all workers in the analysis of Year 1 impacts. This assumption may result in an overestimate of Year 1 impacts, but the Department believes it is preferable to overestimate transfers in Year 1 than to underestimate transfers because of uncertainty when contractors will be affected.

While some SCA contracts are for terms of more than a year (and hence may not be covered by this E.O. for several years if the contract was entered into in the last year or two), many consist of a base term of one year followed by a series of 1-year option periods. Executing a new option year under such a contract will trigger the E.O.'s provisions. It is reasonable to assume that many such contracts (whether base or option period) will be entered into during 2021.

The Department notes that at first glance the estimated number of affected firms (507,200) and potentially affected employees (1.8 million) may seem inconsistent because this is an average

[39] The other territories comprise a very small share of Federal contracting expenditure and thus the impact of their exclusion is expected to be very small (0.1 percent of all Federal contracting expenditures in 2019). This includes American Samoa and the Commonwealth of the Northern Mariana Islands. Other territories do not have any Federal expenditures in USASpending.

[40] In the U.S. the sum of personal consumption expenditures and gross private domestic investment (the relevant components of GDP) was $17.6 trillion in 2018, while gross output totaled $33.7 trillion. In Puerto Rico, personal consumption expenditures plus gross private domestic investment in 2018 (most recent data available) equaled $73.4 billion. Therefore, Puerto Rico gross output was calculated as $73.4 billion × ($33.7 trillion/$17.6 trillion).

[41] For the U.S. territories, the unincorporated self-employed are excluded because CPS data are not available on the number of unincorporated self-employed workers in U.S. territories.

[42] Many of these employees are Federal employees, but because it may include some contractors, the Department has chosen to include these workers in the analysis.

[43] AAFES. (2019). *Exchange Fact Sheet 2019. https://www.aafes.com/Images/AboutExchange/factsheet2017b.pdf.*

[44] Navy Supply Systems Command. (2020). *2019 Navy Exchange Service Command Annual Report. https://www.mynavyexchange.com/assets/Static/NEXCOMEnterpriseInfo/AR19.pdf.*

[45] Marine Corps Community Services. (n.d.). *About Us. https://usmc-mccs.org/about/.*

[46] Calculated by taking the ratio of CGX facilities to MSX facilities (5 percent) and multiplying by the number of Marine Corps employees (12,000).

[47] AAFES. (2020). *2019 Mission Report. https://publicaffairs-sme.com/Community/wp-content/uploads/2020/06/2019AnnualReportDigi.pdf*).

of only 3.5 potentially affected employees per contracting firm. This perceived inconsistency is partially due to the two separate data sources used (SAM and USAspending) and the fact that the number of affected firms is likely overestimated to ensure costs are not underestimated. For example, the number of affected firms includes firms without active contracts and potentially some firms that only supply products. If the number of firms in USASpending is used instead of SAM, the Department estimates that there are 167,800 firms (88,800 prime contractors in USASpending, 33,500 subcontractors from USASpending, and 45,500 entities with contracts on Federal property or lands) with 10.5 potentially affected employees per firm. Additionally, it is helpful to recall that the estimate of potentially affected employees represents employees working exclusively and year-round on covered contracts. This may only be a segment of a contracting firm's workforce.

4. Number of Affected Employees

a. Affected Workers in the Fifty States and Washington, DC

The Department used the 2019 Current Population Survey Merged Outgoing Rotation Groups (CPS MORG) to estimate the percentage of workers in the fifty states and Washington, DC earning between the applicable 2019 minimum wage and $15.[48] [49] In 2019, the applicable minimum wages were $10.60 for non-tipped workers covered by Executive Order 13658 and $7.40 for tipped workers covered by Executive Order 13658 in 2019. The Department used 2019 CPS MORG data due to concerns that because of effects attributable to the COVID–19 pandemic, 2020 data may not accurately reflect the affected workforce.

The Department limited its analysis to employed individuals in the private sector (with a class of worker of ''private, for profit'' or ''private, nonprofit''). Earnings for self-employed workers are not included in the CPS MORG; therefore, the Department assumed the wage distribution for self-employed workers was similar to that for employees. The Department used the hourly rate of pay variable for hourly workers [50] and calculated an hourly rate based on usual weekly earnings and usual hours worked per week for non-hourly workers.[51] [52] The Department excluded workers with unlikely wages or earnings: Those reporting usually earning less than $50 per week (including overtime, tips, and commissions) and workers with an hourly rate of pay less than $1 or more than $1,000.

Some non-hourly workers had missing hourly wage rates, primarily because they respond that usual hours per week vary.[53] The Department distributed the weights of the non-hourly workers with missing hourly rates to non-hourly workers with valid hourly wage rates, then dropped the workers with missing hourly rates.

To ensure the appropriate denominator for the percentage of workers earning an hourly rate in the affected range, the Department dropped workers earning less than the 2019 rate required by Executive Order 13658. First, the Department defined tipped workers as those in occupations of ''Waiters and waitresses'' or ''Bartenders'' and in the ''Restaurants and other food services'' or ''Drinking places, alcoholic beverages'' industries.[54] The Department dropped tipped workers earning less than $7.40 per hour and non-tipped workers earning less than $10.60 per hour. Lastly, the Department calculated the share of workers earning less than $15 per hour by 2-digit NAICS code industry (see Table 5).

This method assumes that the distribution of wages is similar between Federal Government contract employees and the broader workforce, as there is not a reputable source for data on wages paid to Federal contract employees. Therefore, the Department assumed the wage distribution mirrors that of the entire workforce. If covered workers' wages are higher, then this will result in an overestimate of transfers. The Department welcomes comments and data on the earnings of Federal Government contract employees.

The methodology to estimate potentially affected workers captures tipped workers. However, the transfer calculation assumes all affected workers will make $15 in 2022 even if they receive tips. The rule requires tipped workers to be paid a minimum cash wage of $10.50 in 2022, with incremental increases until parity with non-tipped workers is reached on January 1, 2024. Therefore, the Department may overestimate transfers for tipped workers in the first two years of this rulemaking taking effect.[55] The Department believes this is a reasonable approach because contractors on the most commonly occurring DBA- and SCA-covered contracts rarely engage tipped employees on or in connection with such contracts. Additionally, during the 2014 rulemaking implementing Executive Order 13658, the Department received no data from interested commenters indicating that a significant number of tipped employees would be covered by that Executive order. *See* 79 FR 60696.

Multiplying these shares of workers earning below $15 per hour by the estimated number of employees covered by this rule yields an estimated 320,100 affected employees in Year 1 (Table 5). Although employees on some covered contracts may not be affected in Year 1,

[48] The Department used the CPS file compiled by the National Bureau of Economic Research, available at *https://data.nber.org/morg/annual/*.

[49] Although a rate of $15 per hour will not be required for new contracts until January 30, 2022, the Department chose to use $15 in the 2019 CPS MORG data because of the uncertainty of the appropriate deflator to apply to identify workers in the affected range of wage rates. The Department used $15, which likely contributes to an overestimate of the number of affected workers.

[50] This variable excludes overtime pay, tips, and commissions. Commissions can count towards the $15 per hour minimum wage and therefore, excluding these will result in an overestimate of affected workers and consequently transfer payments. The impact of excluding tips is discussed below.

[51] For non-hourly workers who usually work more than 40 hours per week, the Department calculated an hourly rate based on these workers being paid the overtime premium for hours worked per week above 40. For example, the Department calculated an hourly rate of $20 for a non-hourly worker who reported usually earning $950 per week and usually working 45 hours per week (($20 × 40 hours) + ($20 × 1.5 × 5 hours) = $950). This assumes that none of these non-hourly workers are exempt from the overtime provision of FLSA.

[52] As explained earlier, proposed §§ 23.20 and 23.40 would exclude workers employed in a bona fide executive, administrative, or professional (EAP) capacity, as those terms are defined in 29 CFR part 541, from the requirements of Executive Order 14026. Among other requirements, these workers generally must be paid, on a salary or fee basis, a certain minimum amount, which increased from $455 per week to $684 per week on January 1, 2020. *See* 29 CFR 541.600 through 541.606; 84 FR 51230 (increasing the standard salary level generally required to exempt a worker as an EAP from $455 per week to $684 per week). However, due to uncertainties regarding whether and to what extent non-hourly workers earning at or below the equivalent of $15 per hour perform the requisite job duties to qualify as bona fide EAPs, the Department has not accounted for EAPs in its estimate of affected workers. The Department estimated that by assuming all non-hourly workers who earned at least $455 per week in 2019 are exempt, the number of affected workers would decrease by 18 percent. Using the current salary level of $684 per week as the threshold for the EAP exemption would reduce the number of affected workers by 7 percent.

[53] The other reason the imputed hourly wage rate may be missing is if usual hours worked per week is zero, but this accounts for less than one percent of workers with missing hourly rates.

[54] To the extent that there are tipped workers in other industries, the Department may have excluded some tipped workers earning between $7.40 and $10.60 per hour. However, the Department believes that there are few tipped employees working on Federal contracts who would be covered by this proposed rule.

[55] The CPS does not provide data separately for the amount of tips received, rather this is lumped into a total amount of overtime pay, tips, and commissions. Additionally, this amount is only provided for hourly workers.

the Department assumes all are affected to ensure impacts are not underestimated (see section IV.B.3. for a discussion on this assumption).

BILLING CODE 4510–27–P

Table 5: Employees with Hourly Wages in the Affected Range, by Industry

NAICS	Total Employees (1,000s)	Share Below $15	Affected Employees (1,000s)
11	1.10	48%	0.5
21	0.18	9%	0.0
22	6.67	7%	0.4
23	197.94	15%	30.0
31-33	59.29	17%	10.3
42	0.46	17%	0.1
44-45	39.38	39%	15.2
48-49	187.20	23%	42.3
51	38.18	13%	4.9
52	24.41	10%	2.4
53	0.61	18%	0.1
54	650.64	7%	48.1
55	0.00	19%	0.0
56	337.31	31%	104.5
61	37.18	16%	6.1
62	87.52	21%	18.8
71	17.38	33%	5.6
72	45.57	55%	25.1
81	18.91	29%	5.5
Sum across NAICS	**1,749.91**	**N/A**	**320.1**
Territories	11.80	61%	7.2
Total	**1,761.7**	**N/A**	**327.3**

BILLING CODE 4510–27–C

Executive Order 13838 presently exempts contracts entered into with the Federal Government in connection with seasonal recreational services and also seasonal recreational equipment rental for the general public on Federal lands from coverage of Executive Order 13658.[56] Executive Order 14026 will revoke Executive Order 13838 as of January 30, 2022. The Department believes these currently exempt workers are already captured in the number of potentially affected workers. However, the methodology to estimate affected workers may not adequately capture these workers because their wages may not be between $10.60 and $15 per hour (*i.e.,* they may earn as low as $7.25 per hour). The Department believes that the number of workers potentially missing is very small. In the final rule implementing Executive Order 13838, the Department estimated there were 1,191 affected employees (*i.e.,* exempt workers earning between $7.25 and $10.30 per hour).[57] A similar number is likely missing from the current analysis because they earn less than $10.60 per hour.

[56] Establishing a Minimum Wage for Contractors, Notice of Rate Change in Effect as of January 1, 2019. 83 FR 44906.

[57] Executive Order 13838 generally exempted from the requirements of Executive Order 13658 contracts with the Federal Government in connection with seasonal recreational services or seasonal recreational equipment rental on Federal lands.

b. Affected Workers in U.S. Territories

Because the CPS MORG does not include the U.S. territories, the Department used the May 2019 OEWS data to estimate the percentage of workers in Puerto Rico, Guam, and the U.S. Virgin Islands who earn less than $15 per hour.

The OEWS reports wage percentiles for Puerto Rico, Guam, and the U.S. Virgin Islands. The Department used these percentiles and a uniform distribution to infer the percentile associated with $15 per hour. The Department then applied this percentile to the population of potentially affected workers. For example, in Puerto Rico, the Department estimated that 71 percent of the 4,500 potentially affected employees (3,200 workers) earn less

than $15 per hour. In total, the Department estimated 7,200 workers are affected in these three U.S. territories.

c. Affected Worker Projections

To estimate the number of affected employees in later years, the Department first considered whether workers affected in Year 1 would continue to experience wage increases as a result of this NPRM in Years 2 through 10; the Department assumes they will. In the absence of this NPRM, the Department assumes affected workers' wages would increase at the rate required under Executive Order 13658. Therefore, workers affected in Year 1 would continue to experience a higher wage rate than they otherwise would in Years 2 through 10. However, if affected workers' wages are growing at a faster rate than the annual increases under Executive Order 13658, then the number of affected workers would decrease each year. The Department believes this assumption may result in a slight overestimate of the number of affected workers in future years.

In addition, the Department accounted for employment growth by using the compounded annual growth rate based on the ten-year employment projection for 2019 to 2029 from the Bureau of Labor Statistics' (BLS') Employment Projections program.[58] In Year 10, there are 345,600 affected workers. The number of affected workers in Year 1 implicitly takes into account current state minimum wages by looking at the distribution of wage rates paid. If states increase their minimum wages in the future, and the current method is applied to those future years, then affected workers could be somewhat lower than estimated. The Department requests comments on whether there are state minimum wage increases that have been announced but not yet implemented that should be factored into this analysis.

5. Demographics of Employees in the Affected Wage Rate Ranges

This section presents demographic and employment characteristics of the general population of workers in the affected wage rate ranges. The Department notes that the demographic characteristics of Federal contractors may differ from the general population in the affected hourly wage rate ranges; however, data on the demographics of only affected workers are not available.

[58] BLS, Employment Projections. (2021). Table 2.1 Employment by Major Industry Sector. *https://www.bls.gov/emp/tables.htm.*

These tables include the distribution of workers who earn in the affected wage rate range. The tables also show the distribution of the general workforce. This could be used to identify whether a certain group is more or less likely to be impacted by this proposed rule. For example, if the percentage reported in column 3 is higher than the percentage reported in column 2, then workers in that group are overrepresented.

Table 6 presents the occupation and geographic location of workers currently earning in the affected wage rate range. The Department found that workers in management, business, and financial occupations are less likely to earn in the wage range potentially impacted by this Executive order (5.1 percent of workers in the affected range are in this occupation compared to 16.1 percent of the general population), while workers in service occupations are significantly more likely to earn in the affected wage range. Workers in the Northeast and Midwest are somewhat less likely to earn in the affected wage range, and workers in the West and South are somewhat more likely to earn in the affected range, but the variation is small. Workers in non-metropolitan areas are more likely to earn in the affected range.

Table 6: Occupation and Geographic Location of Workers who Earn in the Affected Wage Rate Range

	Distribution of All Workers	Distribution of Workers with Wages in the Affected Range
By Occupation		
Management, business, & financial	16.1%	5.1%
Professional & related	13.9%	5.7%
Services	23.7%	33.9%
Sales and related	10.9%	14.3%
Office & administrative support	12.1%	15.4%
Farming, fishing, & forestry	0.8%	1.9%
Construction & extraction	5.3%	4.1%
Installation, maintenance, & repair	3.4%	2.2%
Production	6.7%	8.4%
Transportation & material moving	7.0%	9.0%
By Region / Division		
Northeast	18.1%	16.6%
New England	5.1%	4.7%
Middle Atlantic	12.9%	11.9%
Midwest	21.8%	21.2%
East North Central	15.0%	14.3%
West North Central	6.9%	7.0%
South	36.8%	37.2%
South Atlantic	19.3%	19.5%
East South Central	5.5%	5.6%
West South Central	12.0%	12.0%
West	23.3%	25.0%
Mountain	7.4%	8.1%
Pacific	15.8%	16.9%
By Metropolitan Status		
Metropolitan	88.7%	86.5%
Non-metropolitan	10.7%	12.6%
Not identified	0.6%	0.9%

Note: CPS data for 2019.

Table 7 displays the demographics of workers who currently earn in the affected wage rate range. The Department found that women, Black workers, and Hispanic workers are more likely to earn in the wage range impacted by this proposed rule. Additionally, workers 16 to 25 and workers without any college education are more likely to earn in that range.

Table 7: Demographics of Workers who Earn in the Affected Wage Rate Range

	Distribution of All Workers	Distribution of Workers with Wages in the Affected Range and Currently Covered
By Sex		
Male	53.3%	45.6%
Female	46.7%	54.4%
By Race		
White only	77.1%	74.5%
Black only	12.4%	15.7%
All others	10.5%	9.8%
By Ethnicity		
Hispanic	18.1%	25.7%
Not Hispanic	81.9%	74.3%
By Age		
16-25	16.7%	29.5%
26-35	24.5%	23.7%
36-45	20.7%	15.8%
46-55	19.2%	14.6%
56+	19.0%	16.4%
By Education		
No degree	8.9%	14.7%
High school diploma	45.2%	60.8%
Associate's degree	10.7%	10.4%
Bachelor's degree	23.7%	11.1%
Master's degree	8.5%	2.2%
Professional degree	1.3%	0.4%
PhD	1.8%	0.4%

Note: CPS data for 2019.

C. Impacts of Proposed Rule

1. Overview

This section quantifies direct employer costs and transfer payments associated with the proposed rule. These impacts were projected for 10 years. The Department estimated average annualized direct employer costs of $2.4 million and transfer payments of $1.5 billion. As these numbers demonstrate, the largest quantified impact of the proposed rule will be the transfer of income from employers to employees. The Department also discusses the many benefits of this rule qualitatively and how they will outweigh any direct employer costs.

2. Costs

The Department quantified two direct employer costs: (1) Regulatory familiarization costs and (2) implementation costs. Other employer costs are considered qualitatively.

a. Regulatory Familiarization Costs

The proposed rule will impose direct costs on covered contractors by requiring them to review the regulations. The Department believes that all Federal contracting firms that have or expect to have covered contracts will incur regulatory familiarization costs because all firms will need to determine whether they are in compliance. The Department assumed that on average, one half-hour of a human resources manager's time will be spent reviewing the rulemaking. During the 2014 rulemaking implementing Executive Order 13658's minimum wage requirements, the Department used one hour of time. The Department has used a smaller time estimate here because most of the affected firms will already be familiar with the previous

requirements and will only have to familiarize themselves with the parts that have changed (predominantly the level of the minimum wage). Additionally, this is the average amount of time spent. The Department believes that many of the potentially affected firms will have little to no regulatory familiarization costs because they are not practically affected (*e.g.,* they do not hold active government contracts or all their workers already earn at least $15 per hour.)

However, if review of regulations occurs at the establishment level, the Department's regulatory familiarization costs may be underestimated. The Department welcomes comments on the estimated time spent on regulatory familiarization and the level at which the regulatory familiarization occurs.

The cost of this time is the median loaded wage for a Compensation, Benefits, and Job Analysis Specialist of $52.65 per hour.[59] Therefore, the Department has estimated regulatory familiarization costs to be $13.4 million ($52.65 per hour × 0.5 hours × 507,200 contractors) (Table 8). The Department has included all regulatory familiarization costs in Year 1. The Department believes firms will need to familiarize themselves with the rule in Year 1 in order to identify whether any contracts will be covered in Year 1. It is possible a contractor will postpone the familiarization effort until it is poised to have a covered contract; however, since many contractors will have at least one new contract in Year 1, and the Department has no data on when contractors will first be affected, the Department has included all regulatory familiarization costs in Year 1. Average annualized regulatory familiarization costs over ten years, using a 7 percent discount rate, is $1.9 million.

Table 8: Year 1 Costs

Variable	Regulatory Familiarization Costs	Implementation Costs		
		Human Resources Time	Management Time	Total
Hours per potentially affected contractor	0.5	N/A	N/A	-
Potentially affected contractors	507,222	N/A	N/A	-
Hours per employee	N/A	0.08	0.08	-
Affected employees	N/A	327,310	327,310	-
Loaded wage rate	$52.65	$52.65	$86.02	-
Base wage	*$32.30*	*$32.30*	*$52.77*	-
Benefits and overhead adj. factor [a]	*1.63*	*1.63*	*1.63*	-
Cost ($1,000s)	$13,352	$1,436	$2,346	$3,782
Average annualized cost ($1,000s)				
3% discount rate	$1,565	$168	$275	$443
7% discount rate	$1,901	$204	$334	$538

[a] Ratio of loaded wage to unloaded wage from the 2020 ECEC (46 percent) plus 17 percent for overhead.

b. Implementation Costs

The Department believes firms will incur costs associated with implementing this rule. There will be costs to adjust the pay rate in the records and tell the affected employees, among other minimal staffing changes and considerations made by managers. The Department assumed that firms would spend ten minutes on implementation costs per newly affected employee. This estimate was chosen because for most affected workers management decisions will be negligible and the time to adjust the systems is very small.

Implementation time will be spread across both human resource workers who will implement the changes and managers who may need to assess whether to adjust their schedule. The Department splits the time between a Compensation, Benefits, and Job Analysis Specialist and a Manager. Compensation, Benefits, and Job Analysis Specialists earn a loaded hourly wage of $52.65 per hour.[60] Workers in Management Occupations earn a loaded hourly wage of $86.02 per hour.[61] The estimated number of newly affected employees in Year 1 is 327,300 (Table 8). Therefore, total Year 1 implementation costs were estimated to equal $3.8 million ([$52.65 × 5 minutes × 327,300 employees] + [$86.02 × 5 minutes × 327,300 employees]).

The Department believes implementation costs will generally be a function of the number of affected employees in Year 1. The Department believes there will be no

[59] This includes the median base wage of $32.30 from the Occupational Employment and Wage Statistics (OEWS) plus benefits paid at a rate of 46 percent of the base wage, as estimated from the BLS's Employer Costs for Employee Compensation (ECEC) data, and overhead costs of 17 percent. OEWS data available at: *http://www.bls.gov/oes/current/oes131141.htm.*

[60] OEWS May 2020 reports a median base wage of $32.30 for Compensation, Benefits, and Job Analysis Specialists. The Department supplemented this base wage with benefits paid at a rate of 46 percent of the base wage, as estimated from the BLS's ECEC data, and overhead costs of 17 percent. OEWS data available at: *http://www.bls.gov/oes/current/oes131141.htm.*

[61] OEWS May 2020 reports a median base wage of $52.77 for Management Occupations. The Department supplemented this base wage with benefits paid at a rate of 46 percent of the base wage, as estimated from the BLS's ECEC data, and overhead costs of 17 percent. OEWS data available at: *https://www.bls.gov/oes/current/oes110000.htm.*

implementation costs for new hires in later years because the cost to set wages would be similar for new hires under the baseline scenario and this proposed rule. The Department believes new hires would have a starting pay rate of at least $15 per hour, rather than starting slightly below and then receiving a raise when the contract is renewed. Assuming all costs are in Year 1, the average annualized implementation costs over ten years, using a 7 percent discount rate, is $538,500.

Finally, the actual number of affected employees may be underestimated because the analysis assumes workers are working exclusively on Federal contracts. The Department tried to take this into account when it estimated the amount of time per affected employee. If this has not been adequately reflected in the time cost estimates, then the total costs may be underestimated.

c. Other Potential Costs and Eventual Bearers of Transfers

In addition to the costs discussed above, there may be additional costs that have not been quantified. These include compliance costs, increased consumer costs, and reduced profits. The latter two hinge on the belief that employers' costs will increase by more than the associated productivity gains and cost-savings. The Department believes the benefits to firms will outweigh the costs and hence adverse impacts to prices or profits are unlikely. These are discussed here for completeness.

i. Compliance Costs

This proposed rule requires Federal executive departments and agencies to include a contract clause in any contract covered by the Executive order. The clause describes the requirement to pay all workers performing work on or in connection with covered contracts at least the Executive order minimum wage. Contractors and their subcontractors will need to incorporate the contract clause into covered lower-tier subcontracts. The Department believes that the compliance cost of incorporating the contract clause will be negligible for contractors and subcontractors. Contractors subject to the SCA and/or DBA have long had a comparable flow-down obligation for the compliance of subcontractors by operation of the SCA and DBA. Thus, upper-tier contractors' flow-down responsibility, and lower-tier subcontractors' need to comply with prevailing wage-related legal requirements so that upper-tier contractors do not incur flow-down liability, are well understood concepts to SCA and DBA contractors. *See* 29 CFR 5.5(a)(6) and 4.114(b). While the flow-down structure may be less familiar to some sub-set of contractors subject to the Executive order, this will substantially reduce the number of contractors with no familiarity with flow-down liability.

ii. Consumer Costs

In general, the relevant consumer is the Federal Government. If the rulemaking increases employers' costs (once offsetting productivity gains and cost-savings), and contractors pass along part or all of the increased cost to the government in the form of higher contract prices, then Government expenditures may rise (though, as discussed later, benefits of the Executive order are expected to accompany any such increase in expenditures). Because direct costs to employers and transfers are relatively small compared to Federal covered contract expenditures, the Department believes that any potential increase in contract prices will be negligible (less than 0.4 percent of contracting revenue, see section IV.C.vi.).

In some instances, such as concessions contracts, increased contractor costs may be passed along to the public in the form of higher prices. However, because employer costs are relatively small, any pass-through to prices will be small. The literature tends to find that minimum wages result in increased prices, but that the size of that increase can vary substantially. Ashenfelter and Jurajda (2021)[62] found that wage increases resulted in ''full or near-full price pass-through'' to the cost of a Big Mac, estimated to be about 70 percent. Basker and Khan (2016) note that, ''[e]ven with full price pass-through, the income effect of [a] price increase is likely to be very small. The average price of a burger in 2014, according to the C2ER data used in this paper, was approximately $3.77. [Thus, for example, a] 3 [percent] increase in this price amounts to only about 10 cents.''[63] Echoing the minimal anticipated price increase, Lemos (2008) found that an increase in the minimum wage of 10 percent raises food prices by no more than 4 percent, and overall prices by no more than 0.4 percent.[64]

iii. Reduced Profits

If employer costs outweigh productivity and cost-savings gains, then companies will either pass these additional costs on to consumers (discussed above) or incur smaller profits. There is very little literature showing a link between minimum wages and profits. One paper by Draca et al. (2011) did find a substantial negative link between minimum wages and profits in the United Kingdom.[65] However, because the increase in gross costs is such a small share of contracting revenue (less than 0.4 percent, see section IV.C.5.) in this case, the average impact on profits will be negligible. Impacts to profits may be larger for firms that pay lower wages, for firms with more affected workers, and for firms that cannot pass increased costs onto the government or the consumer.

3. Transfer Payments

The Department estimated transfer payments to workers in the form of higher wages. Directly, these are transfers from employers to the employees; however, ultimately these transfer costs to firms may be offset by higher productivity, cost-savings, or cost pass-throughs to the government and consumers. The Department believes negative impacts on employment or benefits will be small to negligible. Additionally, some workers currently earning at least $15 per hour may also receive pay raises due to spill-over effects. This is also discussed qualitatively.

Many papers have found increased earnings for low-wage workers associated with a minimum wage increase. The Congressional Budget Office's (CBO's) 2019 paper provides an overview of this literature.[66] Based on this research, economists have continually found that increasing the minimum wage can, under certain conditions, increase earnings and alleviate poverty. The CBO (2019) estimates a national $15 per hour minimum wage, implemented by 2025, could raise earnings for 27 million

[62] Ashenfelter, O., & Jurajda, S. (2021). Wages, Minimum Wages, and Price Pass-Through: The Case of McDonald's Restaurants. IRS Working Papers, Report No. 646. *https://dataspace.princeton.edu/bitstream/88435/dsp01sb397c318/4/646.pdf.*

[63] Basker, E., & Khan, M.T. (2016). Does the Minimum Wage Bite into Fast-Food Prices? Industrial Organization: Empirical Studies of Firms & Markets eJournal. *https://dx.doi.org/10.2139/ssrn.2326659.*

[64] Lemos, S. (2008). A Survey of the Effects of the Minimum Wage on Prices. Journal of Economic Surveys, 22(1), 187–212. *https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1467-6419.2007.00532.x.*

[65] Draca, M., Machin, S., & Van Reenen, J. (2011). Minimum Wages and Firm Profitability. American Economic Journal: Applied 3(1), 129–151. doi: 10.1257/app.3.1.129.

[66] CBO. (2019, July). The Effects on Employment and Family Income of Increasing the Federal Minimum Wage (Publication No. 55410). *https://www.cbo.gov/publication/55410.*

workers, 17 million of whom would have their rate increased to the new minimum wage and ten million of whom may receive spillover effects. Increasing the wage less, such as twelve dollars an hour or ten dollars an hour over the same time frame has commensurately smaller impacts on earnings.

a. Calculating Transfer Payments

To estimate transfers, the Department used the population of affected workers estimated in section IV.B.4 and the CPS data.

Hourly transfers are estimated as the difference between the average current hourly wage of workers with wages in the affected wage rate range and $15.[67] [68] Hourly transfers are then multiplied by average weekly hours in the industry and 52 weeks. Using wage data by industry results in Year 1 transfer payments $1.5 billion in 2020 dollars (Table 9). 2019 transfers were inflated to 2020 dollars using the GDP deflator.[69]

There are several reasons Year 1 transfers may be over- or underestimated, but the Department believes the net effect is an overestimation. First, as noted in section IV.B.3., the Department assumed all workers would be affected in Year 1, whereas in reality some will not receive transfers until later years. Second, some workers will not be impacted until partway through 2022. For example, many contracts may not be impacted until the beginning of the fiscal year on October 1, 2022. Therefore, annualizing Year 1 transfers for a full 52 weeks should result in an overestimate. Conversely, transfers may be underestimated because the Department did not account for higher overtime pay premiums due to an increase in the regular rate of pay.

[67] The Department notes that the minimum wage will be $15 in 2022, and thus could be deflated to be the comparable amount in 2019. The appropriate measure to use to deflate this wage is ambiguous; the Department used $15, which may overestimate the number of affected workers.

[68] For covered tipped workers, the $15 minimum wage will be phased-in through 2024. However, the Department uses the full $15 in Year 1. Calculating transfers based on a rate of $15 in 2022 will overestimate the transfers for tipped workers in Year 1. However, the Department believes there are few tipped workers covered by Federal contracts, so the overestimate is likely small relative to total transfers.

[69] Bureau of Economic Analysis. (2021). Table 1.1.9. Implicit Price Deflators for Gross Domestic Product. *https://www.bea.gov/data/prices-inflation/gdp-price-deflator.*

Table 9: Transfer Payment Calculation, Year 1

NAICS	Affected Employees (1,000s)	Mean Base Wage [a]	Hourly Wage Increase	Average Weekly Hours	Transfers (Millions)	Transfers in 2020$ (Millions) [c]
11	0.5	$12.53	$2.47	42	$2.8	$2.9
21	0.0	$13.16	$1.84	47	$0.1	$0.1
22	0.4	$12.98	$2.02	44	$2.0	$2.0
23	30.0	$12.85	$2.15	39	$131.0	$132.6
31-33	10.3	$12.88	$2.12	40	$45.0	$45.5
42	0.1	$12.72	$2.28	40	$0.4	$0.4
44-45	15.2	$12.49	$2.51	34	$66.7	$67.5
48-49	42.3	$12.84	$2.16	39	$187.1	$189.3
51	4.9	$12.74	$2.26	37	$21.0	$21.3
52	2.4	$12.90	$2.10	39	$10.2	$10.4
53	0.1	$12.87	$2.13	37	$0.5	$0.5
54	48.1	$12.94	$2.06	38	$193.6	$196.0
55	0.0	$12.35	$2.65	37	$0.0	$0.0
56	104.5	$12.67	$2.33	37	$473.9	$479.7
61	6.1	$12.69	$2.31	33	$23.9	$24.2
62	18.8	$12.74	$2.26	36	$79.6	$80.6
71	5.6	$12.49	$2.51	31	$23.1	$23.3
72	25.1	$11.88	$3.12	32	$131.1	$132.7
81	5.5	$12.59	$2.41	34	$23.6	$23.9
Territories [c]	7.2	$12.57	$2.43	36	$32.5	$32.9
Total	**327.3**	**N/A**	**N/A**	**N/A**	**$1,448.1**	**$1,465.7**

[a] CPS MORG 2019. Mean wage for workers earning between $10.60 ($7.40 for tipped workers) and $15 per hour.

[b] Inflated to 2020$ using GDP Deflator.

[c] Mean wage and hours among workers earning at least $15 per hour is unavailable for territories; therefore, the Department used 2019 CPS MORG data from the fifty states and Washington, D.C.

As discussed in section IV.B.4., the number of affected workers may exclude some seasonal recreation workers currently exempt under Executive Order 13838 (approximately 1,200 employees as estimated as affected by E.O. 13838). Excluding these workers may result in a slight underestimate of transfers. However, some of these currently exempt workers, those earning between $10.60 and $15 per hour, are captured in the analysis. And for these workers, transfers may be somewhat overestimated because we have applied weekly transfers to all 52 weeks. As seasonal employees, the applicable number of work weeks would be lower.

For longer-run projected transfers, the Department employed the same method used for Year 1 but used the projected number of employees. The Department applied an employment growth rate that is the compounded annual growth rate based on the ten-year projected growth. The Department assumed that wage growth will be similar to growth in the Federal contractor minimum wage (which is indexed annually based on the CPI–W).[70] Therefore, the number of affected workers in Year 1 would also apply in future years. Due to employment growth, transfers increase slightly each year, reaching $1.55 billion in Year 10 (up from $1.47 billion in Year 1). Average annualized transfers over these ten years, using both the 3 percent and 7 percent discount rates, are $1.5 billion. Year 1 transfers implicitly account for current state minimum wages through the distribution of wage rates paid.[71] If states increase their

[70] Wage growth tends to outpace the CPI–W. However, the Department assumes current wages (in the absence of this proposed minimum wage regulation) and the Federal contractor minimum wage in this proposed regulation will grow at roughly the same rate. If workers' wages grow faster than the CPI–W, then transfers could be slightly overestimated.

[71] In using the CPS MORG data to estimate the percentage of workers earning a wage rate in the affected range, the Department did not drop

Continued

minimum wages in the future, and the current method is applied to those future years, then estimated transfers might be somewhat lower.

This rule would also increase payroll taxes and workers' compensation insurance premiums in addition to the increase in wage payments because these are calculated as a percentage of the wage payment. The Department recognizes that it will be incumbent upon contractors to pay the applicable percentage increase in payroll and unemployment taxes. The Department has not factored these costs into its analysis, but requests comment that may facilitate quantification in the final regulatory impact analysis.

b. Spillover Effects

Employees earning above $15 per hour, at affected firms, may also see wage increases. Employers often increase earnings of workers earning above the minimum wage to prevent wage compression. Consider a scenario where a supervisor makes $15 per hour and now his or her supervisees receive pay increases to $15 per hour. The supervisor will likely receive a pay increase to maintain a premium over the workers reporting to them. Ashenfelter and Juraida (2012) find evidence of this spillover effect as a method to retain workers in limited-function restaurants.[72] Cengiz et al. (2019) also found modest spillover effects up to $3 over the new minimum wage, even at higher levels of minimum wages.[73] Nguyen (2018) estimates that by increasing the Federal minimum wage from $7.25 to $10.10 ''up to a third of the work force other than minimum wage earners would also see their earnings increase, such as supervisors who had earned $10.10 and now would see an increase in salary.'' [74] Dube and Lindner (2021) find spillover effects up to about the 30th percentile of the wage distributions.[75]

The Department agrees with this literature that there will likely be wage increases for some workers earning about $15 per hour. However, the Department has not quantified this change.

c. Disemployment

The Department next reviews evidence relevant to this proposed rule's potential to have disemployment effects. Disemployment of low-wage workers occurs when employers substitute capital or fewer more productive higher-wage workers to perform work previously performed by larger numbers of low-wage workers. Although economists have studied the size of this potential disemployment effect of increased minimum wages for decades, the consensus among a substantial body of research is that disemployment effects can be small or non-existent.[76] Therefore, the Department believes this proposed rule would result in negligible or no disemployment effects.

Manning (2020) found no significant impact of increased minimum wages on employment through comprehensive literature reviews.[77] Wolfson and Belman's (2019) conclusion as a result of a meta-analysis of 37 studies found a small disemployment effect, but the effect has decreased over time.[78] Some authors even found positive effects on employment as a result of minimum wage increases (Ahn, Arcidiacono and Wessels, 2011).[79]

Ashenfelter and Jurajda (2021) found that increased minimum wages does not inherently facilitate automation in low-wage, low skill jobs, though this research only studied limited-service restaurants.[80] Lordan and Neumark (2018)[81] found that low-skilled workers were more likely to lose their jobs to automation because of minimum wage increases, and workers are able and likely to shift sectors to retail or service as a result. Meanwhile, higher-skilled workers saw increased job opportunities with minimum wage increases.

The Department welcomes comment on whether there are any additional papers in the employment effects literature that could be helpful to review in a qualitative discussion of the potential for disemployment effects and whether extrapolations might vary across affected contracts (procurement and non-procurement).

d. Reduction in Benefits or Bonuses

Increased wage rates could potentially be offset by reductions in fringe benefits, bonuses, or training. The Department believes these impacts will be small. First, service employees on SCA-covered contracts generally are entitled to be paid pre-determined fringe benefit amounts. Second, the increased costs to employers are very small as a share of contracting revenues (less than 0.4 percent, see section IV.C.5.).

4. Benefits

The Department did not quantify benefits of this rulemaking due to uncertainty and data limitations. However, the Department discusses many benefits qualitatively as indicators of the efficiency and economy gained in government procurement. These include improved government services, increased morale and productivity, reduced turnover, reduced absenteeism, increased equity, and reduced poverty and income inequality for Federal contract workers. The Department notes that the literature cited in this section does not directly consider a change in the minimum wage equivalent to this proposed rulemaking (*e.g.,* for non-tipped workers from $10.60 to $15). Additionally, much of the literature is based on voluntary changes made by firms. However, the Department believes the general findings are still applicable although the impacts are likely smaller than those measured in these studies. The Department welcomes comments and data on the benefits of increasing the minimum wage specifically for Federal contract workers.

workers reporting wages that were less than the state minimum wage. However, state minimum wages are reflected in the Department's estimate of workers earning wage rates in the affected range because workers in those states generally report earning at least the state minimum wage.

[72] Ashenfelter, O., & Jurajda, S. (2021). Wages, Minimum Wages, and Price Pass-Through: The Case of McDonald's Restaurants. IRS Working Papers, Report No. 646. *https://dataspace.princeton.edu/bitstream/88435/dsp01sb397c318/4/646.pdf*.

[73] Cengiz, D., Dube, A., Lindner, A., & Zipperer, B. (2019). The Effect of Minimum Wages on Low-Wage Jobs. The Quarterly Journal of Economics, 134(3), 1405–1454. doi:10.1093/qje/qjz014.

[74] Nguyen, L. C. (2018). The Minimum Wage Increase: Will This Social Innovation Backfire? Social Work, 63(4), 367–369. doi: 10.1093/sw/swy040.

[75] Dube, A., & Lindner, A. (2021). City Limits: What Do Local-Area Minimum Wage Do? Journal of Economic Perspectives, 35(1), 27–50. doi:10.1257/jep.35.1.27.

[76] Dube, A. (2019). Impacts of Minimum Wages: Review of the International Evidence. *https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/844350/impacts_of_minimum_wages_review_of_the_international_evidence_Arindrajit_Dube_web.pdf.*

[77] Manning, A. (2020). The Elusive Employment Effect of the Minimum Wage. Journal of Economic Perspectives, 35(1), 1–26. doi:10.1257/jep.35.1.3.

[78] Wolfson, P., & Belman, D. (2019). 15 Years of Research on US Employment and the Minimum Wage. Labour Review of Labour Economics and Industrial Relations 33(4), 488–506. *https://doi.org/10.1111/labr.12162*.

[79] Ahn, T., Arcidiacono, P., & Wessels, W. (2011). The Distributional Impacts of Minimum Wage Increases When Both Labor Supply and Labor Demand Are Endogenous. Journal of Business & Economic Statistics 29(1), 12–23. *https://econpapers.repec.org/article/besjnlbes/v_3a29_3ai_3a1_3ay_3a2011_3ap_3a12-23.htm.*

[80] Ashenfelter, O., & Jurajda, S. (2021). Wages, Minimum Wages, and Price Pass-Through: The Case of McDonald's Restaurants. IRS Working Papers, Report No. 646. *https://dataspace.princeton.edu/bitstream/88435/dsp01sb397c318/4/646.pdf.*

[81] Lordan, G., & Neumark, D. (2018). People Versus Machine: The Impact of Minimum Wages on Automatable Jobs. Labour Economics 52(3), 40–53. *https://doi.org/10.1016/j.labeco.2018.03.006.*

a. Improved Government Services

The Department expects the quality of government services to improve when the minimum wage of Federal contract workers is raised. In some cases, higher-paying contractors may be able to attract higher quality workers who are able to provide higher quality services, thereby improving the experience of citizens who engage with these government contractors. For example, a study by Reich, Hall, and Jacobs (2003) found that increased wages paid to workers at the San Francisco airport increased productivity and shortened airport lines.[82] In addition, higher wages can be associated with a higher number of bidders for Government contracts, which can be expected to generate greater competition and an improved pool of contractors. Multiple studies have shown that the bidding for municipal contracts remained competitive or even improved when living wage ordinances were implemented (Thompson and Chapman, 2006).[83]

b. Increased Morale and Productivity

Increased productivity could occur through numerous channels, such as employee retention and level of effort. A strand of economic research, commonly referred to as ''efficiency wage'' theory, considers how an increase in compensation may be met with greater productivity.[84] Efficiency wages may elicit greater effort on the part of workers, making them more effective on the job.[85] Increases in the minimum wage has also been shown to increase worker morale and consequently productivity. Kim and Jang (2019) showed that wage raises increase productivity for up to two years after the wage increase.[86] They found that in both full and limited-service restaurants productivity increased due to improved worker morale after a wage increase. Potentially, higher morale leading to increased productivity can also lead to additional productivity gains. Mas and Moretti (2009) found that the presence of high-productivity grocery store cashiers was an implicit social pressure that encouraged low-productivity grocery store cashiers to perform better, especially those nearest and within line of sight of the high productivity employee.[87] Taken together, these publications provide evidence that increasing the minimum wage increases morale and productivity directly. Furthermore, as morale directly increases productivity for some workers, this may lead to increased productivity in others. The Department believes that this proposed rule could increase productivity for the Federal contracting community as well.

c. Reduced Turnover

An increase in the minimum wage has been shown to decrease both turnover rates and the rate of worker separation (Dube, Lester and Reich, 2011; Liu, Hyclak and Regmi, 2015; Jardim et al., 2018).[88] This decrease in turnover and worker separation can lead to an increase in the profits of firms, as the hiring process can be both expensive and time consuming. A review of 27 case studies found that the median cost of replacing an employee was 21 percent of the employee's annual salary.[89] One manager of a fast-food restaurant (Hirsch, Kaufman and Zelenska, 2011) [90] when interviewed, estimated that each turnover cost $300–$400. Fairris et al. (2005) [91] found the cost reduction due to lower turnover rates ranges from $137 to $638 for each worker. Managers of various traditionally low-wage firms explained that in nearly all instances, increased wages led to both a decrease in turnover and an increase in profits. Howes (2005) discovered that as San Francisco increased the city-wide minimum wage to $10 between 1997 and 2001 ($4.85 above the then Federal minimum of $5.15) the turnover rate fell 31 percent for all healthcare providers and 57 percent for new healthcare providers.[92]

Although the impacts cited here are not limited to Federal contracting, because data specific to Federal contracting and turnover are not available, the Department believes that a reduction in turnover could be observed in among workers on Federal contracts following this proposed rule. The potential reduction in turnover is a function of several variables: The current wage, hours worked, turnover rate, industry, and occupation. Therefore, the Department has not quantified the impacts of potential reduction in turnover for Federal contracts.

d. Reduced Absenteeism

Studies on absenteeism have demonstrated that there is a negative effect on firm productivity as absentee rates increase.[93] Zhang et al., in their study of linked employer-employee data in Canada, found that a 1 percent decline in the attendance rate reduces productivity by 0.44 percent.[94] Allen (1983) similarly noted that a 10-percentage point increase in the absenteeism corresponds to a decrease of 1.6 percent in productivity.[95] Fairris et al. (2005) demonstrated that as a worker's wage increases there is a reduction in unscheduled absenteeism.[96] They attribute this to workers standing to lose more if forced to look for new employment and an

[82] Reich, M., P. Hall, and K. Jacobs. (2003). ''Living Wages and Economic Performance: The San Francisco Airport Model,'' Institute of Industrial Relations, University of California, Berkeley.

[83] Thompson, J. and J. Chapman. (2006). ''The Economic Impact of Local Living Wages,'' Economic Policy Institute, Briefing Paper #170, 2006.

[84] Akerlof, G.A. (1982). Labor Contracts as Partial Gift Exchange. *The Quarterly Journal of Economics,* 97(4), 543–569.

[85] Another model of efficiency wages, which is less applicable here, is the adverse selection model in which higher wages raise the quality of the pool of applicants.

[86] Kim, H.S., & Jang, S. (2019). Minimum Wage Increase and Firm Productivity: Evidence from the Restaurant Industry. Tourism Management 71, 378–388. *https://doi.org/10.1016/j.tourman.2018.10.029.*

[87] Mas, A., & Moretti, E. (2009). Peers at Work. American Economic Review 99(1), 112–45. *https://www.aeaweb.org/articles?id=10.1257/aer.99.1.112.*

[88] Dube, A., Lester, T.W., & Reich, M. (2011). *Do Frictions Matter in the Labor Market? Accessions, Separations, and Minimum Wage Effects. (Discussion Paper No. 5811).* IZA. *https://www.iza.org/publications/dp/5811/do-frictions-matter-in-the-labor-market-accessions-separations-and-minimum-wage-effects.*

Liu, S., Hyclak, T.J., & Regmi, K. (2015). Impact of the Minimum Wage on Youth Labor Markets. *Labour 29*(4). doi: 10.1111/labr.12071.

Jardim, E., Long, M.C., Plotnick, R., van Inwegen, E., Vigdor, J., & Wething, H. (2018, October). *Minimum Wage Increases and Individual Employment Trajectories* (Working paper No. 25182). NBER. doi:10.3386/w25182.

[89] Boushey, H. and Glynn, S. (2012). There are Significant Business Costs to Replacing Employees. Center for American Progress. Available at: *http://www.americanprogress.org/wp-content/uploads/2012/11/CostofTurnover.pdf.*

[90] Hirsch, B.T., Kaufman, B.E., & Zelenska, T. (2011). *Minimum Wage Channels of Adjustment. (Discussion Paper No. 6132).* IZA. *https://www.iza.org/publications/dp/6132/minimum-wage-channels-of-adjustment.*

[91] Fairris, D., Runstein, D., Briones, C., & Goodheart, J. (2005). *Examining the Evidence: The Impact of the Los Angeles Living Wage Ordinance on Workers and Businesses.* LAANE. *https://laane.org/downloads/Examinig_the_Evidence.pdf.*

[92] Howes, C. (2005). Living Wages and Retention of Homecare Workers in San Francisco. *Industrial Relations 44*(1), 139–163. *https://onlinelibrary.wiley.com/doi/abs/10.1111/j.0019-8676.2004.00376.x.*

[93] Allen, S. G. (1983). How Much Does Absenteeism Cost? *Journal of Human Resources, 18*(3), 379–393. *https://www.jstor.org/stable/145207?seq=1.*

[94] Zhang, W., Sun, H., Woodcock, S., & Anis, A. (2013). Valuing Productivity Loss Due to Absenteeism: Firm-level Evidence from a Canadian Linked Employer-Employee Data. *Health Economics Review, 7*(3). *https://healtheconomicsreview.biomedcentral.com/articles/10.1186/s13561-016-0138-y.*

[95] Allen, S. G. (1983). How Much Does Absenteeism Cost? *Journal of Human Resources, 18*(3), 379–393. *https://www.jstor.org/stable/145207?seq=1.*

[96] Fairris, D., Runstein, D., Briones, C., & Goodheart, J. (2005). *Examining the Evidence: The Impact of the Los Angeles Living Wage Ordinance on Workers and Businesses.* LAANE. *https://laane.org/downloads/Examinig_the_Evidence.pdf.*

increase in pay paralleling an increase in access to paid time off. Pfeifer's (2010) study of German companies provides similar results, indicating a reduction in absenteeism if workers experience an overall increase in pay.[97] Conversely, Dionne and Dostie (2007) attribute a decrease in absenteeism to mechanisms of the firm other than an increase in worker pay, specifically scheduling that provides both the option to work-at-home and for fewer compressed work weeks.[98] The Department believes both the connection between minimum wages and absenteeism, and the connection between absenteeism and productivity are well enough established that this is a feasible benefit of the proposed rule.

e. Reduced Poverty and Income Inequality

Raises in the minimum wage have been shown to reduce the level of poverty among the entire population, and specifically among children, within high impact areas.[99] Himmelstein and Venkataramani (2019) estimate that nearly 5 percent of people living in poverty are healthcare workers, and that a $15 per hour minimum wage increase would lead to 215,476 workers and 163,472 children lifted above the poverty line.[100] Reducing poverty will benefit historically marginalized communities, as they have the highest poverty rates. The CBO estimates that a $15 per hour minimum wage would alleviate poverty for 1.3 million Americans.[101] Although a reduction in poverty would be smaller for Federal contract workers to the extent that they are already earning at least $10.95 in 2021, the Department nonetheless believes that this proposed rule could alleviate poverty for some Federal contract workers. If a Federal contract worker works full time (40 hours per week for 52 weeks a year) at $10.95, their annual salary would be $22,776, which is below the 2020 Census Poverty Threshold for a family of four or more.[102]

Not only does a wage increase elevate earnings for the lowest earners working for Federal contractors, studies show that minimum wage increases can also reduce the income differential between the lowest earners and the highest earners, as well as between the lowest earners and the middle wage workers (Mishel 2014).[103] Income inequality is reduced with respect to all low-wage earners, but reduced income inequality across gender and race are additionally valuable considerations. Oka and Yamada (2019) found that increases in the minimum wage increased real wages for women, less educated, and younger workers.[104] Increasing the minimum wage has the potential to drastically aid those living in poverty, and as a disproportionate number of people of color are those currently impoverished (Creamer 2020),[105] increasing the minimum wage will aid in reducing racial income inequality.

Reducing poverty for Federal contract workers could lead to increased productivity and efficiency, because it could increase worker morale and decrease absenteeism, as discussed above.

5. Impacts by Industry

This section analyzes the costs and transfers by industry relative to government contracting expenditures, revenues, and payroll. This analysis excludes territories because revenue and payroll data are not available for territories. The Department used Year 1 impacts rather than average annualized impacts to demonstrate the size of the impacts in the year where costs are largest. The Department considers total employer costs (direct costs and transfers) here because those are the relevant costs to businesses. The Department also limited the analysis to firms actively holding government contracts (*e.g.,* firms in USASpending in 2019 rather than all firms in SAM) to better approximate costs for firms with potentially affected employees. Including all firms would underestimate costs among truly affected firms.

Across all industries, total employer costs are less than 0.4 percent of government contracting revenues (Table 10). Contracting revenue represents the revenue obtained by these firms specifically for work performed on Federal contracts. This measure may be most appropriate when considering cost pass-throughs to the Federal Government in the form of higher contract prices. Since many covered contractors garner revenue from non-Federal contracts, the transfer payment estimate is almost certainly a lower percentage of their total revenues. See section IV.B.3. for details on how Federal contracting expenditures are calculated. This analysis only includes employer costs associated with firms holding active SCA or DBA contracts (121,200). It excludes firms holding nonprocurement contracts because the Department believes these firms are not included in the USASpending data on Federal contracting revenues (*i.e.,* the denominator). Using this methodology, the industry where costs and transfers are estimated to be the largest share of contracting revenue is the accommodation and food services industry, where employer costs are 3.5 percent of Federal contracting revenues.

The Department also compared employer costs to estimated revenues and payrolls using the 2017 Statistics of U.S. Businesses (SUSB). Total revenues and payroll from SUSB were adjusted to reflect the share of businesses impacted by this rulemaking and estimated to have affected employees (166,700).[106] Total employer costs were then compared to these revenues and payrolls. This analysis includes both Federal contractors and firms holding nonprocurement contracts. Using this methodology, employer costs are less than 0.2 percent of revenues and less than 0.6 percent of payroll on average. The industry where costs and transfers are estimated to be the largest share of revenue is accommodation and food services (1.2 percent) and of payroll is retail trade (4.3percent).

BILLING CODE 4510–27–C

[97] Pfeifer, C. (2010). Impact of Wages and Job Levels on Worker Absenteeism. *International Journal of Manpower 31*(1), 59–72. *https://doi.org/10.1108/01437721011031694.*

[98] Dionne, G., & Dostie, B. (2007). New Evidence on the Determinants of Absenteeism Using Linked Employer-Employee Data. *Industrial and Labor Relations Review 61*(1), 108–120. *https://journals.sagepub.com/doi/abs/10.1177/001979390706100106.*

[99] Godoey, A., & Reich, M. (2021). Are Minimum Wage Effects Greater in Low-Wage Areas? *Industrial Relations A Journal of Economy and Society, 60*(1), 36–83. *https://doi.org/10.1111/irel.12267.*

[100] Himmelstein, K. E. W., & Venkataramani, A. S. (2019). Economic Vulnerability Among US Female Health Care Workers: Potential Impact of a $15-per-Hour Minimum Wage. *American Journal of Public Health 109*(2), 198–205. doi:10.2105/AJPH.2018.304801.

[101] CBO. (2019, July). The Effects on Employment and Family Income of Increasing the Federal Minimum Wage (Publication No. 55410). *https://www.cbo.gov/publication/55410.*

[102] U.S. Census Bureau. Poverty Thresholds. *https://www.census.gov/data/tables/time-series/demo/income-poverty/historical-poverty-thresholds.html.*

[103] Mishel, L. (2014). The Tight Link Between the Minimum Wage and Wage Inequality. Economic Policy Institute. *https://www.epi.org/blog/tight-link-minimum-wage-wage-inequality/.*

[104] Oka, T., & Yamada, K. (2019, July). Heterogeneous Impact of the Minimum Wage: Implications for Changes in Between- and Within-group Inequality. arXiv. *https://arxiv.org/pdf/1903.03925.pdf.*

[105] Creamer, J. (2020). Poverty Rates for Blacks and Hispanics Reached Historic Lows in 2019. U.S. Census Bureau. *https://www.census.gov/library/stories/2020/09/poverty-rates-for-blacks-and-hispanics-reached-historic-lows-in-2019.html.*

[106] This includes 121,200 contractors from USASpending and 45,500 contractors operating on Federal properties or lands.

Table 10: Costs and Transfer Payments in Year 1, Firms with Affected Workers, as Share of Covered Contracting Revenue (2020$)

NAICS	Employer Costs and Transfers ($1,000s)	Covered Contracting Revenue (Millions) [a]	Employer Costs and Transfers as Share of Contracting Revenue
11	$2,846	$413	0.69%
21	$54	$104	0.05%
22	$850	$2,428	0.03%
23	$131,715	$36,124	0.36%
31-33	$45,884	$28,950	0.16%
42	$406	$163	0.25%
44-45	$4,811	$331	1.45%
48-49	$69,625	$14,389	0.48%
51	$8,724	$10,198	0.09%
52	$10,403	$12,633	0.08%
53	$542	$942	0.06%
54	$194,888	$152,717	0.13%
55	$1	$0	0.39%
56	$461,251	$36,754	1.25%
61	$23,856	$4,301	0.55%
62	$80,650	$11,233	0.72%
71	$868	$82	1.06%
72	$35,724	$1,030	3.47%
81	$23,391	$2,718	0.86%
--	**$1,096,487**	**$315,512**	**0.35%**

[a] USASpending.gov 2019. Contracting expenditures for covered procurement contracts. Inflated to 2020$ using the GDP deflator.

Table 11: Costs and Transfer Payments in Year 1, Firms with Affected Workers, as Share of Firm Revenue and Payroll (2020$)

NAICS	Employer Costs and Transfers ($1,000s)	Revenue (Millions) [a]	Employer Costs and Transfers as Share of Revenue	Payroll (Millions) [a]	Employer Costs and Transfers as Share of Payroll
11	$2,949	$4,167	0.071%	$809	0.365%
21	$79	$4,494	0.002%	$564	0.014%
22	$2,152	$411,211	0.001%	$48,815	0.004%
23	$133,412	$52,328	0.255%	$10,458	1.276%
31-33	$45,992	$312,190	0.015%	$38,312	0.120%
42	$406	$34,114	0.001%	$1,741	0.023%
44-45	$67,706	$17,090	0.396%	$1,556	4.350%
48-49	$190,078	$49,210	0.386%	$12,921	1.471%
51	$21,602	$206,290	0.010%	$46,393	0.047%
52	$10,403	$9,096	0.114%	$1,359	0.766%
53	$542	$6,212	0.009%	$1,073	0.050%
54	$197,526	$92,801	0.213%	$36,934	0.535%
55	$1	$23	0.005%	$58	0.002%
56	$481,297	$47,639	1.010%	$22,553	2.134%
61	$24,322	$17,564	0.138%	$5,931	0.410%
62	$81,000	$28,422	0.285%	$11,158	0.726%
71	$24,067	$54,885	0.044%	$17,194	0.140%
72	$133,183	$11,440	1.164%	$3,294	4.043%
81	$24,158	$9,186	0.263%	$2,273	1.063%
--	**$1,473,765**	**$1,368,361**	**0.108%**	**$263,395**	**0.560%**

[a] SUSB 2017. Inflated to 2020$ using the GDP deflator.

BILLING CODE 4510–27–P

6. Regulatory Alternatives

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives. Executive Order 13563 directs agencies to propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs; tailor the regulation to impose the least burden on society, consistent with achieving the regulatory objectives; and in choosing among alternative regulatory approaches, select those approaches that maximize net benefits. Executive Order 13563 further recognizes that some benefits are difficult to quantify and provides that, where appropriate and permitted by law, agencies may consider and discuss qualitatively values that are difficult or impossible to quantify.

The Department notes that due to the prescriptive nature of Executive Order 14026, the Department does not have the discretion to implement alternatives that would violate the text of the Executive order, such as the adoption of a higher or lower minimum wage rate. However, the Department considered several alternatives to discretionary proposals set forth in this NPRM.

First, as explained above, the Department has proposed to define the term *United States,* when used in a geographic sense, to mean the 50 States, the District of Columbia, Puerto Rico, the Virgin Islands, Outer Continental Shelf lands as defined in the Outer Continental Shelf Lands Act, American Samoa, Guam, the Commonwealth of the Northern Mariana Islands, Wake Island, and Johnston Island. This proposed definition would confer broader geographic scope of Executive Order 14026 than did the Department's prior rulemaking implementing Executive Order 13658, which the Department interpreted to only apply to contracts performed in the 50 States and the District of Columbia.

The Department considered defining the term *United States* to exclude contracts performed in the territories listed above, consistent with the discretionary decision made in the Department's prior rulemaking implementing Executive Order 13658. Such an alternative would result in fewer contracts covered by Executive Order 14026 and fewer workers entitled to an initial $15 hourly minimum wage for work performed on or in connection with such contracts. This would result in a smaller income transfer to workers. The Department rejected this alternative

because, as discussed more fully above in the preamble and as reflected in the RIA, the Department has further examined the issue since its prior rulemaking in 2014 and consequently determined that the Federal Government's procurement interests in economy and efficiency would be promoted by extending the Executive Order 14026 minimum wage to workers performing on or in connection with covered contracts in Puerto Rico, the Virgin Islands, Outer Continental Shelf lands as defined in the Outer Continental Shelf Lands Act, American Samoa, Guam, the Commonwealth of the Northern Mariana Islands, Wake Island, and Johnston Island.

The Department also rejected this alternative of excluding the territories from coverage of Executive Order 14026 because each of the territories listed above is covered by both the SCA, *see* 29 CFR 4.112(a), and the FLSA, *see, e.g.,* 29 U.S.C. 213(f); 29 CFR 776.7; Fair Minimum Wage Act of 2007, Public Law 110–28, 121 Stat. 112 (2007). Because contractors operating in those territories will generally have familiarity with many of the requirements set forth in part 23 based on their coverage under the SCA and/or the FLSA, the Department does not believe that the proposed extension of Executive Order 14026 and part 23 to such contractors will impose a significant burden.

Second, pursuant to the Department's authority to adopt, ''as appropriate, exclusions from the requirements of [the order],'' 86 FR 22836, the Department is proposing to include in this NPRM, as it did in the regulations implementing Executive Order 13658, an exclusion from coverage for FLSA-covered workers who spend less than 20 percent of their work hours in a workweek performing ''in connection with'' covered contracts. This proposed exclusion does not apply to any worker performing ''on'' a covered contract whose wages are governed by the FLSA, SCA, or DBA. The proposed exclusion, which appears in § 23.40(f), is explained in greater detail in the discussion of the Exclusions section of this NPRM. The Department considered alternatives related to this proposed exclusion.

As the first alternative related to this exclusion, the Department considered eliminating the exclusion for FLSA-covered workers performing in connection with covered contracts for less than 20 percent of their workhours in a given workweek. The Department considered the elimination of this exclusion as an alternative, in part because Executive Order 14026 expressly states that its minimum wage protections apply to ''workers working on or in connection with'' covered contracts. 86 FR 22835.

As the second alternative pertaining to this exclusion, the Department considered raising the 20 percent threshold for this exclusion for FLSA-covered workers performing in connection with covered contracts. The Department assessed raising the threshold but does not have the discretion to entirely exclude these workers because the Executive order itself directs that they be generally covered.

The Department lacks data on how much time FLSA-covered workers spend in connection with covered contracts and is therefore unable to identify how many FLSA-covered workers perform services in connection with covered contracts for less than 20 percent of their work hours in a workweek. As a result, the Department provides a qualitative discussion of the alternatives.

If the Department were to omit this exclusion, more workers would be covered by the rule, and contractors would be required to pay more workers the applicable minimum wage rate (initially $15 per hour) for time spent performing in connection with covered contracts. This would result in greater income transfers to workers. Conversely, if the Department were to raise the 20 percent threshold, fewer workers would be covered by the rule, resulting in a smaller income transfer to workers.

The Department rejected these regulatory alternatives because having an exclusion for FLSA-covered workers performing in connection with covered contracts based on a 20 percent of hours worked in a week standard is a reasonable interpretation. The proposed exclusion ensures the broad coverage of workers performing on or in connection with covered contracts directed by Executive Order 14026 while also acknowledging the administrative challenges imposed by such broad coverage as expressed by contractors during the Executive Order 13658 rulemaking. The Department believes that the exclusion, as proposed, will assist both contractors and workers in adjusting to the requirements of Executive Order 14026 and reduce costs while ensuring broad application of the Executive order minimum wage.

V. Initial Regulatory Flexibility Analysis (IRFA)

The Regulatory Flexibility Act of 1980 (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), hereafter jointly referred to as the RFA, requires agencies to prepare regulatory flexibility analyses when they propose regulations that will have a significant economic impact on a substantial number of small entities. *See* 5 U.S.C. 603. This rule is expected to have a significant economic impact, and thus the Department has prepared an RFA.

The RFA defines a ''small entity'' as a (1) small not-for-profit organization, (2) small governmental jurisdiction, or (3) small business. SBA establishes separate standards for each 6-digit NAICS industry code, and standard cutoffs are typically based on either the average annual number of employees or average annual receipts. For example, businesses may be defined as small if employing fewer than 100 to 1,500 employees, depending on the NAICS. In other industries, firms are small if annual receipts are less than $1 million to $41.5 million.[107]

A. Number of Affected Small Entities and Employees

The total number of potentially affected firms (507,200) is explained in section IV.B.2. This section describes how the Department determined that 385,100 of those firms are small businesses. The Department used three methods to identify small firms based on the data source:

1. For firms identified in SAM, the Department identified small contractors based on the six-digit NAICS code listed as their primary NAICS and whether SAM flagged the firm as small in that NAICS.[108] Of the 418,300 firms in SAM, 327,900 are small firms. The data in SAM is self-reported, so firms may not always indicate if they are small, or may not update their data, which may result in firms being listed as small when they no longer are. As a result, it is uncertain whether the number of small firms in SAM may be an under- or over-estimate.

2. Because some subcontractors may not be in SAM, the Department supplemented the SAM data with USAspending data (see section IV.B.2). To identify small subcontractors in the USASpending data, the Department searched for keywords ''Small'' or ''SBA'' in the business type field. Of the 33,500 subcontractors identified, 12,200 are small firms.

[107] The most recent SBA size definitions were set in August 2019. *See https://www.sba.gov/document/support--table-size-standards.* However, some exceptions do exist, for example, depository institutions (including credit unions, commercial banks, and non-commercial banks) are classified by total assets.

[108] The ''NAICS CODE STRING'' variable (column 33) and the ''PRIMARY NAICS'' variable (column 31) were the specific variables used. If the primary NAICS value contained a ''Y'' at the end when listed in the ''NAICS CODE STRING'' column, the firm was identified as small.

3. For entities operating under covered contracts on Federal properties or lands (see section IV.B.2), the Department applied the national ratio of businesses with less than 500 employees to total businesses, by industry, from the 2017 Statistics of U.S. Businesses (SUSB) data. The Department used businesses with fewer than 500 employees as a rough approximation for small businesses.[109] Of the 46,500 firms identified, 46,100 are small firms.

4. For territories, the Department used the ''Contracting Officer's Determination of Business Size'' in USASpending data. Of the 1,245 firms identified, 841 are small firms.

This estimated number of potentially affected small contractors includes some firms with no current Federal contracts covered by the Executive order. These firms may accrue regulatory familiarization costs despite not having employees affected, although their cost will be minimal. However, these firms should be removed when we consider costs per establishment with affected employees. Information was not available to eliminate these firms from the SAM database. Thus, the Department used data from USASpending to estimate a more appropriate number of small contractors with affected employees. Using the 2019 USASpending database, the Department found 64,500 private small prime contracting firms.[110] [111] Adding in the small subcontractors and the small entities operating under covered contracts on Federal properties or lands, yields an estimated 121,700 small contractors with active contracts in Year 1.[112]

The number of employees in small contracting firms is unknown. The Department estimated the share of total Federal contracting expenditures in the USASpending data associated with contractors labeled as small, by industry. The Department then applied these shares to all affected employees to estimate the share of affected employees in small entities by industry, then summed over all industries, to find that 97,900 employees of small contractors would be affected by the rule in Year 1 (Table 12).

In industries where the number of affected employees is smaller than the number of affected firms, the Department reduced the number of affected firms to the number of affected employees. This results in an estimated 67,700 small contractors with affected employees in Year 1. The calculations of direct costs and transfers per small contractor with affected employees, shown in Table 14 and Table 15, include only these 67,700 small firms.

[109] As noted above, the SBA size standard definitions vary by industry, but the Department believes businesses with less than 500 employees is a transparent method that provides a reasonable approximation of the number of firms SBA defines as small businesses. Additionally, to apply the separate definitions by NAICS codes, the most recent data available with the information needed is the 2012 SUSB.

[110] In the USASpending data, small contractors were identified based on the ''contractingofficerbusinesssizedetermination'' variable. The description of this variable in the *USASpending.gov* Data Dictionary is: ''The Contracting Officer's determination of whether the selected contractor meets the small business size standard for award to a small business for the NAICS code that is applicable to the contract.'' The Data Dictionary is available at: *https://www.usaspending.gov/data-dictionary.*

[111] This number is smaller than the number of small firms listed in SAM because it only includes firms with active covered contracts.

[112] See Table 14, footnote [b] for information about subcontractors.

Table 12: Small Federal Contracting Firms and Their Employees

NAICS	Contractors [a]		% of Expenditure in Small Contracting Firms [c]	% of Affected Employees in Small Contracting Firms	Affected Employees	
	Total	Small [b]			Total	Small
11	5,891	4,215	79.8%	79.8%	530	423
21	1,209	1,067	27.7%	27.7%	16	4
22	5,136	4,148	10.9%	10.9%	437	48
23	59,968	47,996	44.0%	44.0%	30,028	13,200
31-33	55,688	42,481	11.2%	11.2%	10,291	1,157
42	20,324	17,252	66.7%	66.7%	78	52
44-45	10,150	9,116	37.1%	37.1%	15,225	5,652
48-49	22,145	19,387	21.2%	21.2%	42,284	8,976
51	19,571	17,191	22.8%	22.8%	4,884	1,112
52	3,713	2,382	3.0%	3.0%	2,428	73
53	20,247	8,012	58.0%	58.0%	112	65
54	119,289	93,513	31.4%	31.4%	48,126	15,093
55	551	259	0.0%	0.0%	0	0
56	39,261	32,615	27.7%	27.7%	104,544	28,979
61	17,188	11,717	33.9%	33.9%	6,119	2,074
62	36,587	16,916	21.3%	21.3%	18,808	4,013
71	29,195	27,654	65.5%	65.5%	5,648	3,697
72	15,587	13,186	37.7%	37.7%	25,060	9,444
81	24,277	15,143	25.5%	25.5%	5,505	1,402
Sum	**505,977**	**384,252**	**28.3%**	**28.3%**	**320,124**	**95,465**
Territories	1,245	841	33.6%	33.6%	7,186	2,412
Total	**507,222**	**385,093**	**28.4%**	**28.4%**	**327,310**	**97,877**

[a] Source: SAM May 2021. Companies with a missing primary NAICS code or a code of 92 are distributed proportionately amongst all industries. All firms are assumed to be potentially affected. Includes 33,485 additional subcontractors identified in USASpending.gov from 2015-2019 and includes 45,454 firms with operations on Federal properties or lands. For territories, data from USASpending.gov 2019. These firms in territories are then subtracted from the SAM firm counts by NAICS to avoid double-counting.
[b] Includes 12,151 additional subcontractors identified in USASpending.gov as small and 45,016 firms with operations on Federal land or property as small.
[c] Source: USASpending.gov. Percentage of contracting expenditures for covered contracts in small businesses in 2019.

B. Small Entity Costs of the Proposed Rule

Small entities will have regulatory familiarization, implementation, and payroll costs (*i.e.,* transfers). These are discussed in detail in section IV.C.2. and summarized below. Total direct costs (*i.e.,* excluding transfers) to small contractors in Year 1 were estimated to be $11.3 million (Table 13). This is 66 percent of total direct costs, among all firms, in Year 1 (compared with 30 percent of affected employees in small contracting firms). Calculation of these costs is discussed in the following paragraphs.

Regulatory familiarization costs apply to all small firms that potentially hold covered contracts (385,100). Regulatory familiarization costs were assumed to

take one half hour of time per firm. This is an average across potentially affected contractors of all sizes and those with and without affected employees. An hour of a Compensation, Benefits, and Job Analysis Specialist's time is valued at $52.65 per hour.[113] [114]

Contractors with affected employees will experience implementation costs. For each affected employee, a worker will have to implement the changes and a manager will need to make minimal staffing changes and considerations. There will be costs to adjust the pay rate in the records and tell the affected employees, among other minimal staffing changes and considerations made by managers The Department splits a total implementation time of 10 minutes per affected employee between a Compensation, Benefits, and Job Analysis Specialist and a manager. Because of this component, costs vary with contractor size. Compensation, Benefits, and Job Analysis Specialists earn a loaded hourly wage of $52.64 per hour.[115] Workers in management occupations earn a loaded hourly wage of $86.02 per hour.[116] The estimated number of newly affected employees in Year 1 is 97,900 (Table 12). Therefore, total Year 1 implementation costs were estimated to equal $1.1 million ([$52.64 × 5 minutes × 97,900 employees] + [$86.02 × 5 minutes × 97,900 employees]).

To calculate payroll costs, the Department began with total transfers estimated in section IV.C.3. and multiplied this by the ratio of affected employees in small contracting firms to all affected employees. This yields the share of transfers occurring in small Federal contracting firms, $439.1 million in Year 1 (Table 13), which is 30 percent of total transfers for all contracting firms in Year 1.

Table 13: Costs and Transfers to Small Contractors in Year 1 (2020$)

NAICS	Direct Employer Costs ($1,000s)			Transfers in 2020$ ($1,000s)
	Regulatory Familiarization	Implementation	Total	
11	$111	$5	$116	$2,298
21	$28	$0	$28	$20
22	$109	$1	$110	$223
23	$1,263	$153	$1,416	$58,295
31-33	$1,118	$13	$1,132	$5,119
42	$454	$1	$455	$250
44-45	$240	$65	$305	$25,049
48-49	$510	$104	$614	$40,193
51	$453	$13	$465	$4,848
52	$63	$1	$64	$309
53	$211	$1	$212	$272
54	$2,462	$174	$2,636	$61,460
55	$7	$0	$7	$0
56	$859	$335	$1,193	$132,966
61	$308	$24	$332	$8,188
62	$445	$46	$492	$17,197
71	$728	$43	$771	$15,276
72	$347	$109	$456	$50,019
81	$399	$16	$415	$6,079
Sum	**$10,115**	**$1,103**	**$11,218**	**$428,062**
Territories	$22	$28	$50	$11,041
Total	**$10,137**	**$1,131**	**$11,268**	**$439,103**

[113] This includes the mean base wage of $32.30 from the OEWS plus benefits paid at a rate of 46 percent of the base wage, as estimated from the BLS's ECEC data, plus 17 percent for overhead. OEWS data available at: *https://www.bls.gov/oes/current/oes131141.htm.*

[114] Time and wage estimates for small establishments are the same as those used in the analysis for all contractors. The Department has not tailored these to small businesses due to lack of data.

[115] OEWS May 2020 reports a median base wage of $32.30 for compensation, benefits, and job analysis specialist. The Department supplemented this base wage with benefits paid at a rate of 46 percent of the base wage, as estimated from the BLS's ECEC data, and overhead costs of 17 percent. OEWS data available at: *http://www.bls.gov/oes/current/oes131141.htm.*

[116] OEWS May 2020 reports a median base wage of $52.77 for management occupations. The Department supplemented this base wage with benefits paid at a rate of 46 percent of the base wage, as estimated from the BLS's ECEC data, and overhead costs of 17 percent. OEWS data available at: *https://www.bls.gov/oes/current/oes110000.htm.*

To assess the impact on small contracting firms with affected employees, the Department assumed that affected employees would be distributed uniformly over small contracting firms within each industry. In an industry with fewer affected employees than firms, the Department assumed one affected employee would be in each firm with affected employees. For example, in NAICS 11, there are 423 affected workers and 2,199 small contractors with potentially affected workers. The Department assumed that 423 of the 2,199 firms would each have one affected worker. In industries in which the number of affected workers exceeds the number of small contractors, the Department divided the number of affected workers by the number of small contractors. For example, in NAICS 44–45, the Department assumed each of the 2,032 small firms had 2.8 affected workers per firm (5,652 affected workers divided by 2,032 small firms). Table 14 contains the average costs and transfers per small contractor with affected employees by industry. Average Year 1 costs and transfers per small contractor with affected employees range from $3,978 to $12,558 by industry.

Table 14: Average Costs and Transfers per Small Contractor with Affected Employees in Year 1 (2020$)

NAICS [a]	Small Contractors with Potentially Affected Employees [b]	Small Contractors with Affected Employees	Direct Employer Costs per Small Contractor	Transfers per Small Contractor	Total Costs and Transfers per Small Contractor
11	2,199	423	$30.71	$5,431	$5,462
21	155	4	$30.71	$4,535	$4,566
22	2,757	48	$30.71	$4,664	$4,694
23	11,923	11,923	$31.18	$4,889	$4,920
31-33	5,910	1,157	$30.71	$4,424	$4,454
42	443	52	$30.71	$4,793	$4,824
44-45	2,032	2,032	$38.53	$12,328	$12,367
48-49	7,908	7,908	$31.30	$5,082	$5,114
51	8,073	1,112	$30.71	$4,359	$4,389
52	181	73	$30.71	$4,267	$4,298
53	1,995	65	$30.71	$4,190	$4,221
54	24,733	15,093	$30.71	$4,072	$4,103
55	0	0	N/A	N/A	N/A
56	10,621	10,621	$38.30	$12,520	$12,558
61	2,275	2,074	$30.71	$3,947	$3,978
62	4,035	4,013	$30.71	$4,286	$4,316
71	24,677	3,697	$30.71	$4,132	$4,163
72	5,205	5,205	$34.28	$9,610	$9,644
81	5,710	1,402	$30.71	$4,337	$4,368
Sum	**120,834**	**66,903**	**N/A**	**N/A**	**N/A**
Territories	841	841	$38.91	$13,129	$13,168
Total	**121,675**	**67,744**	**N/A**	**N/A**	**N/A**

[a] 11=Agriculture, forestry, fishing and hunting; 21=Mining; 22=Utilities; 23=Construction; 31-33=Manufacturing; 42=Wholesale trade; 44-45=Retail trade; 48-49=Transportation and warehousing; 51=Information; 52=Finance and insurance; 53=Real estate and rental and leasing; 54=Professional, scientific, and technical services; 55=Management of companies and enterprises; 56=Administrative and waste services; 61=Educational services; 62=Health care and social assistance; 71=Arts, entertainment, and recreation; 72=Accommodation and food services; 81=Other services.
[b] Source: USASpending.gov 2019. Firms with contracting revenue, excluding contracts only for goods. Also includes 12,151 additional subcontractors identified in USASpending.gov from 2015-2019 and 45,016 firms with operations on Federal properties or lands.

To estimate whether these costs and transfers will have a substantial impact on these small entities with affected employees, they are compared to total revenues for these firms. Based on SUSB data, small Federal contractors with

affected employees had total annual revenues of $115.1 billion from all sources (Table 15).[117] Transfers from small contractors and costs to small contractors in Year 1 ($430.2 million) are less than 0.4 percent of revenues on average and exceed 1.0 percent in only the administrative and waste services industry (1.0 percent). Additionally, much of this cost will either be reimbursed by the Federal Government or offset by productivity gains and cost-savings. Therefore, the Department believes this proposed rule will not have a significant impact on small businesses.

Table 15: Costs and Transfers as Share of Revenue in Small Contracting Firms in Year 1 [a]

NAICS	Total Costs and Transfers ($1,000s)	Small Contracting Firm Revenues (Billions) [b]	Total as Share of Revenues
11	$2,311	$0.6	0.386%
21	$20	$0.0	0.072%
22	$224	$0.9	0.024%
23	$58,667	$27.1	0.217%
31-33	$5,155	$6.6	0.078%
42	$252	$0.5	0.047%
44-45	$25,127	$6.4	0.391%
48-49	$40,440	$15.2	0.266%
51	$4,883	$3.7	0.132%
52	$312	$0.2	0.149%
53	$274	$0.1	0.309%
54	$61,923	$20.0	0.310%
55	N/A	$0.0	N/A
56	$133,372	$13.1	1.015%
61	$8,252	$3.3	0.252%
62	$17,321	$5.9	0.294%
71	$15,390	$4.7	0.325%
72	$50,198	$5.5	0.912%
81	$6,122	$1.3	0.487%
--	**$430,242**	**$115.1**	**0.374%**

[a] Excludes U.S. territories because SUSB does not include territories.

[b] Source: Total revenue for firms with less than 500 employees from 2017 SUSB, inflated to 2020$ using the GDP Deflator. Revenues for small contractors calculated by multiplying total revenue by the ratio of small contracting firms to total number of small firms (approximated by those with less than 500 employees in the 2017 SUSB).

To estimate average annualized costs to small contracting firms the Department projected small business costs and transfers forward 9 years. To do this, the Department calculated the ratio of affected employees in small contracting firms to all affected employees in Year 1, then multiplied this ratio by the 10-year projections of

[117] Total revenue for small firms from 2017 SUSB; inflated to 2020$ using the GDP deflator. Revenues for small contractors calculated by multiplying total revenue by the ratio of contracting firms that are small.

national costs and transfers (*see* section IV.C.). This yields the share of projected costs and transfers attributable to small businesses (Table 16).

Table 16: Projected Costs to Small Businesses (Millions of 2020$)

Year/Discount Rate	Direct Employer Costs	Transfers	Total
Years 1 Through 10			
Year 1	$11.3	$439.1	$450.4
Year 2	$0.0	$441.7	$441.7
Year 3	$0.0	$444.4	$444.4
Year 4	$0.0	$447.1	$447.1
Year 5	$0.0	$449.8	$449.8
Year 6	$0.0	$452.5	$452.5
Year 7	$0.0	$455.3	$455.3
Year 8	$0.0	$458.0	$458.0
Year 9	$0.0	$460.8	$460.8
Year 10	$0.0	$463.6	$463.6
Average Annualized Amounts			
3% discount rate	$1.3	$450.6	$451.9
7% discount rate	$1.5	$449.7	$451.2

C. Relevant Federal Rules Duplicating, Overlapping, or Conflicting with the Rule

C. Relevant Federal Rules Duplicating, Overlapping, or Conflicting With the Rule

Section 4(a) of the Executive order requires the FARC to issue regulations to provide for inclusion of the applicable contract clause in Federal procurement solicitations and contracts subject to the order; thus, the contract clause and some requirements applicable to contracting agencies will appear in both part 23 and in the FARC regulations. The Department is not aware of any relevant Federal rules that conflict with this NPRM.

D. Alternatives to the Proposed Rule

Executive Order 14026 is prescriptive and does not authorize the Department to consider less burdensome alternatives for small businesses. However, if stakeholders can identify alternatives that would accomplish the stated objectives of Executive Order 14026 and minimize any significant economic impact of the proposed rule on small entities, the Department would welcome that feedback. Below, the Department considers the specific alternatives required by section 603(c) of the RFA.

E. Differing Compliance and Reporting Requirements for Small Entities

This NPRM provides for no differing compliance requirements and reporting requirements for small entities. The Department has strived to have this proposal implement the minimum wage requirements of Executive Order 14026 with the least possible burden for small entities. The NPRM provides a number of efficient and informal alternative dispute mechanisms to resolve concerns about contractor compliance, including having the contracting agency provide compliance assistance to the contractor about the minimum wage requirements, and allowing for the Department to attempt an informal conciliation of complaints instead of engaging in extensive investigations. These tools will provide contractors with an opportunity to resolve inadvertent errors rapidly and before significant liabilities develop.

F. Clarification, Consolidation, and Simplification of Compliance and Reporting Requirements for Small Entities

This proposed rule was drafted to clearly state the compliance requirements for all contractors subject to Executive Order 14026. The proposed rule does not contain any reporting requirements. The recordkeeping requirements imposed by this proposed rule are necessary for contractors to determine their compliance with the rule as well as for the Department and workers to determine the contractor's compliance with the law. The recordkeeping provisions apply generally to all businesses—large and small—covered by the Executive order; no rational basis exists for creating an exemption from compliance and recordkeeping requirements for small businesses. The Department makes available a variety of resources to employers for understanding their obligations and achieving compliance.

G. Use of Performance Rather Than Design Standards

This proposed rule was written to provide clear guidelines to ensure compliance with the Executive order minimum wage requirements. Under the proposed rule, contractors may achieve compliance through a variety of means. The Department makes available a variety of resources to contractors for understanding their obligations and achieving compliance.

H. Exemption From Coverage of the Rule for Small Entities

Executive Order 14026 establishes its own coverage and exemption requirements; therefore, the Department has no authority to exempt small businesses from the minimum wage requirements of the order.

VI. Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1532, requires that agencies prepare a written statement, which includes an assessment of anticipated costs and benefits, before proposing any Federal mandate that may result in excess of $100 million (adjusted annually for inflation) in expenditures in any one year by state, local, and tribal governments in the aggregate, or by the private sector. This statement must: (1) Identify the authorizing legislation; (2) present the estimated costs and benefits of the rule and, to the extent that such estimates are feasible and relevant, its estimated effects on the national economy; (3) summarize and evaluate state, local, and Tribal government input; and (4) identify reasonable alternatives and select, or explain the non-selection, of the least costly, most cost-effective, or least burdensome alternative.

A. Authorizing Legislation

This proposed rule is issued in response to section 4 of Executive Order 14026, ''Increasing the Minimum Wage for Federal Contractors,'' which instructs the Department to ''issue regulations by November 24, 2021, to implement the requirements of this order.'' 86 FR 22836.

B. Assessment of Costs and Benefits

For purposes of the UMRA, this proposed rule includes a Federal mandate that would result in increased expenditures by the private sector of more than $158 million in at least one year, and could potentially result in increased expenditures by state and local governments that hold contracts with the Federal Government.[118] It will not result in increased expenditures by Tribal govenments because they are excluded from coverage under section 8(c) of the order. In the Department's experience, state and local governments are parties to a relatively small number of SCA- and DBA-covered contracts. Additionally, because costs are a small share of revenues, impacts to governments and tribes should be small.

The Department determined that the proposed rule would result in Year 1 direct employer costs to the private sector of $17.1 million, in regulatory familiarization and implementation costs. The proposed rule will also result in transfer payments for the private sector of $1.5 billion in Year 1, with an average annualized value of $1.5 billion over ten years.

UMRA requires agencies to estimate the effect of a regulation on the national economy if such estimates are reasonably feasible and the effect is relevant and material.[119] However, OMB guidance on this requirement notes that such macroeconomic effects tend to be measurable in nationwide econometric models only if the economic effect of the regulation reaches 0.25 percent to 0.5 percent of Gross Domestic Product (GDP), or in the range of $52.3 billion to $104.7 billion (using 2020 GDP).[120] A regulation with a smaller aggregate effect is not likely to have a measurable effect in macroeconomic terms, unless it is highly focused on a particular geographic region or economic sector, which is not the case with this rule.

The Department's RIA estimates that the total costs of the final rule will be $1.5 billion. Given OMB's guidance, the Department has determined that a full macroeconomic analysis is not likely to show that these costs would have any measurable effect on the economy.

VII. Executive Order 13132, Federalism

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

VIII. Executive Order 13175, Indian Tribal Governments

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

List of Subjects in 29 CFR Parts 10 and 23

Administrative practice and procedure, Construction, Government contracts, Law enforcement, Minimum wages, Reporting and recordkeeping requirements, Wages.

Jessica Looman,

Acting Administrator, Wage and Hour Division.

For the reasons set out in the preamble, the Department of Labor proposes to amend 29 CFR subtitle A as follows:

PART 10—ESTABLISHING A MINIMUM WAGE FOR CONTRACTORS

■ 1. The authority citation for part 10 is revised to read as follows:

Authority: 5 U.S.C. 301; section 4, E.O. 13658, 79 FR 9851, 3 CFR, 2014 Comp., p. 219; section 4, E.O. 14026, 86 FR 22835; Secretary of Labor's Order No. 01–2014, 79 FR 77527.

■ 2. Amend § 10.1 by adding paragraph (d) to read as follows:

§ 10.1 Purpose and scope.

* * * * *

(d) *Relation to Executive Order 14026.* As of January 30, 2022, Executive Order 13658 is superseded to the extent that it is inconsistent with Executive Order 14026 of April 27, 2021, ''Increasing the Minimum Wage for Federal Contractors,'' and its implementing regulations at 29 CFR part 23. A covered contract that is entered into on or after January 30, 2022, or that is renewed or extended (pursuant to an option or otherwise) on or after January 30, 2022, is generally subject to the higher minimum wage rate established by Executive Order 14026 and its regulations at 29 CFR part 23.

■ 3. Amend § 10.2 by revising the definition of ''New contract'' to read as follows:

§ 10.2 Definitions.

* * * * *

New contract means a contract that results from a solicitation issued on or between January 1, 2015 and January 29, 2022, or a contract that is awarded outside the solicitation process on or between January 1, 2015 and January 29, 2022. This term includes both new contracts and replacements for expiring contracts. It does not apply to the unilateral exercise of a pre-negotiated option to renew an existing contract by the Federal Government. For purposes of the Executive Order, a contract that is entered into prior to January 1, 2015

[118] Calculated using growth in the Gross Domestic Product deflator from 1995 to 2020. Bureau of Economic Analysis. Table 1.1.9. Implicit Price Deflators for Gross Domestic Product.

[119] *See* 2 U.S.C. 1532(a)(4).

[120] According to the Bureau of Economic Analysis, 2020 GDP was $20.9 trillion. *https://www.bea.gov/sites/default/files/2021-04/gdp1q21_adv.pdf.*

will constitute a new contract if, through bilateral negotiation, on or between January 1, 2015 and January 29, 2022:

(1) The contract is renewed;

(2) The contract is extended, unless the extension is made pursuant to a term in the contract as of December 31, 2014, providing for a short-term limited extension; or

(3) The contract is amended pursuant to a modification that is outside the scope of the contract.

* * * * *

§ 10.4 [Amended]

■ 4. Amend § 10.4 by removing paragraph (g).

■ 5. Amend § 10.5 by adding a sentence at the end of paragraph (c) to read as follows:

§ 10.5 Minimum wage for Federal contractors and subcontractors.

* * * * *

(c) * * * A covered contract that is entered into on or after January 30, 2022, or that is renewed or extended (pursuant to an option or otherwise) on or after January 30, 2022, is generally subject to the higher minimum wage rate established by Executive Order 14026 of April 27, 2021, ''Increasing the Minimum Wage for Federal Contractors,'' and its regulations at 29 CFR part 23.

■ 6. Add part 23 to read as follows:

PART 23—INCREASING THE MINIMUM WAGE FOR FEDERAL CONTRACTORS

Subpart A—General

Sec.
23.10 Purpose and scope.
23.20 Definitions.
23.30 Coverage.
23.40 Exclusions.
23.50 Minimum wage for Federal contractors and subcontractors.
23.60 Antiretaliation.
23.70 Waiver of rights.
23.80 Severability.

Subpart B—Federal Government Requirements

23.110 Contracting agency requirements.
23.120 Department of Labor requirements.

Subpart C—Contractor Requirements

23.210 Contract clause.
23.220 Rate of pay.
23.230 Deductions.
23.240 Overtime payments.
23.250 Frequency of pay.
23.260 Records to be kept by contractors.
23.270 Anti-kickback.
23.280 Tipped employees.
23.290 Notice.

Subpart D—Enforcement

23.410 Complaints.
23.420 Wage and Hour Division conciliation.
23.430 Wage and Hour Division investigation.
23.440 Remedies and sanctions.

Subpart E—Administrative Proceedings

23.510 Disputes concerning contractor compliance.
23.520 Debarment proceedings.
23.530 Referral to Chief Administrative Law Judge; amendment of pleadings.
23.540 Consent findings and order.
23.550 Proceedings of the Administrative Law Judge.
23.560 Petition for review.
23.570 Administrative Review Board proceedings.
23.580 Administrator ruling.
Appendix A to Part 23—Contract Clause

Authority: 5 U.S.C. 301; section 4, E.O. 14026, 86 FR 22835; Secretary's Order 01–2014, 79 FR 77527.

Subpart A—General

§ 23.10 Purpose and scope.

(a) *Purpose.* This part contains the Department of Labor's rules relating to the administration of Executive Order 14026 (Executive Order or the Order), ''Increasing the Minimum Wage for Federal Contractors,'' and implements the enforcement provisions of the Executive Order. The Executive Order assigns responsibility for investigating potential violations of and obtaining compliance with the Executive Order to the Department of Labor.

(b) *Policy.* Executive Order 14026 states that the Federal Government's procurement interests in economy and efficiency are promoted when the Federal Government contracts with sources that adequately compensate their workers. Specifically, the Order explains that raising the minimum wage enhances worker productivity and generates higher-quality work by boosting workers' health, morale, and effort; reducing absenteeism and turnover; and lowering supervisory and training costs. Accordingly, Executive Order 14026 sets forth a general position of the Federal Government that increasing the hourly minimum wage paid by Federal contractors to $15.00 beginning January 30, 2022, (with future annual increases based on inflation) will lead to improved economy and efficiency in Federal procurement. The Order provides that executive departments and agencies, including independent establishments subject to the Federal Property and Administrative Services Act, shall, to the extent permitted by law, ensure that new covered contracts, contract-like instruments, and solicitations (collectively referred to as ''contracts'') include a clause, which the contractor and any covered subcontractors shall incorporate into lower-tier subcontracts, specifying, as a condition of payment, that the minimum wage to be paid to workers, including workers whose wages are calculated pursuant to special certificates issued under 29 U.S.C. 214(c), performing work on or in connection with the contract or any covered subcontract thereunder, shall be at least:

(1) $15.00 per hour beginning January 30, 2022; and

(2) Beginning January 1, 2023, and annually thereafter, an amount determined by the Secretary of Labor (the Secretary) pursuant to the Order. Nothing in Executive Order 14026 or this part shall excuse noncompliance with any applicable Federal or state prevailing wage law or any applicable law or municipal ordinance establishing a minimum wage higher than the minimum wage established under the Order.

(c) *Scope.* Neither Executive Order 14026 nor this part creates or changes any rights under the Contract Disputes Act, 41 U.S.C. 7101 *et seq.,* or any private right of action. The Executive Order provides that disputes regarding whether a contractor has paid the minimum wages prescribed by the Order, to the extent permitted by law, shall be disposed of only as provided by the Secretary in regulations issued under the Order. However, nothing in the Order or this part is intended to limit or preclude a civil action under the False Claims Act, 31 U.S.C. 3730, or criminal prosecution under 18 U.S.C. 1001. The Order similarly does not preclude judicial review of final decisions by the Secretary in accordance with the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*

§ 23.20 Definitions.

For purposes of this part:

Administrative Review Board (ARB or Board) means the Administrative Review Board, U.S. Department of Labor.

Administrator means the Administrator of the Wage and Hour Division and includes any official of the Wage and Hour Division authorized to perform any of the functions of the Administrator under this part.

Agency head means the Secretary, Attorney General, Administrator, Governor, Chairperson, or other chief official of an executive agency, unless otherwise indicated, including any deputy or assistant chief official of an executive agency or any persons authorized to act on behalf of the agency head.

Concessions contract or *contract for concessions* means a contract under which the Federal Government grants a

right to use Federal property, including land or facilities, for furnishing services. The term *concessions contract* includes but is not limited to a contract the principal purpose of which is to furnish food, lodging, automobile fuel, souvenirs, newspaper stands, and/or recreational equipment, regardless of whether the services are of direct benefit to the Government, its personnel, or the general public.

Contract or *contract-like instrument* means an agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law. This definition includes, but is not limited to, a mutually binding legal relationship obligating one party to furnish services (including construction) and another party to pay for them. The term *contract* includes all contracts and any subcontracts of any tier thereunder, whether negotiated or advertised, including any procurement actions, lease agreements, cooperative agreements, provider agreements, intergovernmental service agreements, service agreements, licenses, permits, or any other type of agreement, regardless of nomenclature, type, or particular form, and whether entered into verbally or in writing. The term *contract* shall be interpreted broadly as to include, but not be limited to, any contract within the definition provided in the Federal Acquisition Regulation (FAR) at 48 CFR chapter 1 or applicable Federal statutes. This definition includes, but is not limited to, any contract that may be covered under any Federal procurement statute. Contracts may be the result of competitive bidding or awarded to a single source under applicable authority to do so. 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; exercised contract options; and bilateral contract modifications. The term *contract* includes contracts covered by the Service Contract Act, contracts covered by the Davis-Bacon Act, concessions contracts not otherwise subject to the Service Contract Act, and contracts in connection with Federal property or land and related to offering services for Federal employees, their dependents, or the general public.

Contracting officer means a person with the authority to enter into, administer, and/or terminate contracts and make related determinations and findings. This term includes certain authorized representatives of the contracting officer acting within the limits of their authority as delegated by the contracting officer.

Contractor means any individual or other legal entity that is awarded a Federal Government contract or subcontract under a Federal Government contract. The term *contractor* refers to both a prime contractor and all of its subcontractors of any tier on a contract with the Federal Government. The term *contractor* includes lessors and lessees, as well as employers of workers performing on or in connection with covered Federal contracts whose wages are calculated pursuant to special certificates issued under 29 U.S.C. 214(c). The term *employer* is used interchangeably with the terms *contractor* and *subcontractor* in various sections of this part. The U.S. Government, its agencies, and instrumentalities are not contractors, subcontractors, employers, or joint employers for purposes of compliance with the provisions of the Executive Order.

Davis-Bacon Act means the Davis-Bacon Act of 1931, as amended, 40 U.S.C. 3141 *et seq.,* and the implementing regulations in this chapter.

Executive departments and agencies means executive departments, military departments, or any independent establishments 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.

Executive Order 13658 means Executive Order 13658 of February 12, 2014, ''Establishing a Minimum Wage for Contractors,'' 3 CFR, 2014 Comp., p. 219, and its implementing regulations at 29 CFR part 10.

Executive Order 14026 minimum wage means a wage that is at least:

(1) $15.00 per hour beginning January 30, 2022; and

(2) Beginning January 1, 2023, and annually thereafter, an amount determined by the Secretary pursuant to section 2 of the Executive Order.

Fair Labor Standards Act (FLSA) means the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. 201 *et seq.,* and the implementing regulations in this chapter.

Federal Government means an agency or instrumentality of the United States that enters into a contract pursuant to authority derived from the Constitution or the laws of the United States. For purposes of the Executive Order and this part, this definition does not include the District of Columbia or any Territory or possession of the United States.

New contract means a contract that is entered into on or after January 30, 2022, or a contract that is renewed or extended (pursuant to an exercised option or otherwise) on or after January 30, 2022. For purposes of the Executive Order, a contract that is entered into prior to January 30, 2022 will constitute a *new contract* if, on or after January 30, 2022:

(1) The contract is renewed;

(2) The contract is extended; or

(3) An option on the contract is exercised.

Office of Administrative Law Judges means the Office of Administrative Law Judges, U.S. Department of Labor.

Option means a unilateral right in a contract by which, for a specified time, the Government may elect to purchase additional supplies or services called for by the contract, or may elect to extend the term of the contract.

Procurement contract for construction means a procurement contract for the construction, alteration, or repair (including painting and decorating) of public buildings or public works and which requires or involves the employment of mechanics or laborers, and any subcontract of any tier thereunder. The term *procurement contract for construction* includes any contract subject to the provisions of the Davis-Bacon Act, as amended, and the implementing regulations in this chapter.

Procurement contract for services means a procurement contract the principal purpose of which is to furnish services in the United States through the use of service employees, and any subcontract of any tier thereunder. The term *procurement contract for services* includes any contract subject to the provisions of the Service Contract Act, as amended, and the implementing regulations in this chapter.

Service Contract Act means the McNamara-O'Hara Service Contract Act of 1965, as amended, 41 U.S.C. 6701 *et seq.,* and the implementing regulations in this chapter.

Solicitation means any request to submit offers, bids, or quotations to the Federal Government.

Tipped employee means any employee engaged in an occupation in which the employee customarily and regularly receives more than $30 a month in tips. For purposes of the Executive Order, a worker performing on or in connection with a contract covered by the Executive Order who meets this definition is a tipped employee.

United States means the United States and all executive departments, independent establishments, administrative agencies, and instrumentalities of the United States, including corporations of which all or substantially all of the stock is owned by the United States, by the foregoing departments, establishments, agencies, instrumentalities, and including nonappropriated fund instrumentalities. When used in a geographic sense, the *United States* means the 50 States, the District of Columbia, Puerto Rico, the Virgin Islands, Outer Continental Shelf lands as defined in the Outer Continental Shelf Lands Act, American Samoa, Guam, the Commonwealth of the Northern Mariana Islands, Wake Island, and Johnston Island.

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

Wage determination includes any determination of minimum hourly wage rates or fringe benefits made by the Secretary of Labor pursuant to the provisions of the Service Contract Act or the Davis-Bacon Act. This term includes the original determination and any subsequent determinations modifying, superseding, correcting, or otherwise changing the provisions of the original determination.

Worker means any person engaged in performing work on or in connection with a contract covered by the Executive Order, and whose wages under such contract are governed by the Fair Labor Standards Act, the Service Contract Act, or the Davis-Bacon Act, other than individuals employed in a bona fide executive, administrative, or professional capacity, as those terms are defined in 29 CFR part 541, regardless of the contractual relationship alleged to exist between the individual and the employer. The term *worker* includes workers performing on or in connection with a covered contract whose wages are calculated pursuant to special certificates issued under 29 U.S.C. 214(c), as well as any person working on or in connection with a covered contract and individually registered in a bona fide apprenticeship or training program registered with the U.S. Department of Labor's Employment and Training Administration, Office of Apprenticeship, or with a State Apprenticeship Agency recognized by the Office of Apprenticeship. A worker performs ''on'' a contract if the worker directly performs the specific services called for by the contract. A worker performs ''in connection with'' a contract if the worker's work activities are necessary to the performance of a contract but are not the specific services called for by the contract.

§ 23.30 Coverage.

(a) This part applies to any new contract, as defined in § 23.20, with the Federal Government, unless excluded by § 23.40, provided that:

(1)(i) It is a procurement contract for construction covered by the Davis-Bacon Act;

(ii) It is a contract for services covered by the Service Contract Act;

(iii) It is a contract for concessions, including any concessions contract excluded from coverage under the Service Contract Act by Department of Labor regulations at 29 CFR 4.133(b); or

(iv) It is a contract entered into with the Federal Government in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public; and

(2) The wages of workers under such contract are governed by the Fair Labor Standards Act, the Service Contract Act, or the Davis-Bacon Act.

(b) For contracts covered by the Service Contract Act or the Davis-Bacon Act, this part applies to prime contracts only at the thresholds specified in those statutes. For procurement contracts where workers' wages are governed by the Fair Labor Standards Act, this part applies when the prime contract exceeds the micro-purchase threshold, as defined in 41 U.S.C. 1902(a).

(c) This part only applies to contracts with the Federal Government requiring performance in whole or in part within the United States, which when used in a geographic sense in this part means the 50 States, the District of Columbia, Puerto Rico, the Virgin Islands, Outer Continental Shelf lands as defined in the Outer Continental Shelf Lands Act, American Samoa, Guam, the Commonwealth of the Northern Mariana Islands, Wake Island, and Johnston Island. If a contract with the Federal Government is to be performed in part within and in part outside the United States and is otherwise covered by the Executive Order and this part, the minimum wage requirements of the Order and this part would apply with respect to that part of the contract that is performed within the United States.

(d) This part does not apply to contracts for the manufacturing or furnishing of materials, supplies, articles, or equipment to the Federal Government, including those that are subject to the Walsh-Healey Public Contracts Act, 41 U.S.C. 6501 *et seq.*

§ 23.40 Exclusions.

(a) *Grants.* The requirements of this part do not apply to grants within the meaning of the Federal Grant and Cooperative Agreement Act, as amended, 31 U.S.C. 6301 *et seq.*

(b) *Contracts or agreements with Indian Tribes.* This part does not apply to contracts or agreements with Indian Tribes under the Indian Self-Determination and Education Assistance Act, as amended, 25 U.S.C. 5301 *et seq.*

(c) *Procurement contracts for construction that are excluded from coverage of the Davis-Bacon Act.* Procurement contracts for construction that are not covered by the Davis-Bacon Act are not subject to this part.

(d) *Contracts for services that are exempted from coverage under the Service Contract Act.* Service contracts, except for those expressly covered by § 23.30(a)(1)(iii) or (iv), that are exempt from coverage of the Service Contract Act pursuant to its statutory language at 41 U.S.C. 6702(b) or its implementing regulations, including those at 29 CFR 4.115 through 4.122 and 29 CFR 4.123(d) and (e), are not subject to this part.

(e) *Employees who are exempt from the minimum wage requirements of the Fair Labor Standards Act under 29 U.S.C. 213(a) and 214(a)–(b).* Except for workers who are otherwise covered by the Davis-Bacon Act or the Service Contract Act, this part does not apply to employees who are not entitled to the minimum wage set forth at 29 U.S.C. 206(a)(1) of the Fair Labor Standards Act pursuant to 29 U.S.C. 213(a) and 214(a)–(b). Pursuant to the exclusion in this paragraph (e), individuals that are not subject to the requirements of this part include but are not limited to:

(1) *Learners, apprentices, or messengers.* This part does not apply to learners, apprentices, or messengers whose wages are calculated pursuant to special certificates issued under 29 U.S.C. 214(a).

(2) *Students.* This part does not apply to student workers whose wages are calculated pursuant to special certificates issued under 29 U.S.C. 214(b).

(3) *Individuals employed in a bona fide executive, administrative, or professional capacity.* This part does not apply to workers who are employed by Federal contractors in a bona fide executive, administrative, or professional capacity, as those terms are defined and delimited in 29 CFR part 541.

(f) *FLSA-covered workers performing in connection with covered contracts for less than 20 percent of their work hours*

in a given workweek. This part does not apply to FLSA-covered workers performing in connection with covered contracts, *i.e.,* those workers who perform work duties necessary to the performance of the contract but who are not directly engaged in performing the specific work called for by the contract, that spend less than 20 percent of their hours worked in a particular workweek performing in connection with such contracts. The exclusion in this paragraph (f) is inapplicable to covered workers performing on covered contracts, *i.e.,* those workers directly engaged in performing the specific work called for by the contract.

(g) *Contracts that result from a solicitation issued before January 30, 2022, and that are entered into on or between January 30, 2022 and March 30, 2022.* This part does not apply to contracts that result from a solicitation issued prior to January 30, 2022 and that are entered into on or between January 30, 2022 and March 30, 2022. However, if such a contract is subsequently extended or renewed, or an option is subsequently exercised under that contract, the Executive Order and this part shall apply to that extension, renewal, or option.

§ 23.50 Minimum wage for Federal contractors and subcontractors.

(a) *General.* Pursuant to Executive Order 14026, the minimum hourly wage rate required to be paid to workers performing on or in connection with covered contracts with the Federal Government is at least:

(1) $15.00 per hour beginning January 30, 2022; and

(2) Beginning January 1, 2023, and annually thereafter, an amount determined by the Secretary pursuant to section 2 of Executive Order 14026. In accordance with section 2 of the Order, the Secretary will determine the applicable minimum wage rate to be paid to workers performing on or in connection with covered contracts on an annual basis beginning at least 90 days before any new minimum wage is to take effect.

(b) *Method for determining the applicable Executive Order minimum wage for workers.* The minimum wage to be paid to workers, including workers whose wages are calculated pursuant to special certificates issued under 29 U.S.C. 214(c), in the performance of a covered contract shall be at least:

(1) $15.00 per hour beginning January 30, 2022; and

(2) An amount determined by the Secretary, beginning January 1, 2023, and annually thereafter. The applicable minimum wage determined for each calendar year by the Secretary shall be:

(i) Not less than the amount in effect on the date of such determination;

(ii) Increased from such amount by the annual percentage increase in the Consumer Price Index for Urban Wage Earners and Clerical Workers (United States city average, all items, not seasonally adjusted), or its successor publication, as determined by the Bureau of Labor Statistics; and

(iii) Rounded to the nearest multiple of $0.05. In calculating the annual percentage increase in the Consumer Price Index for purposes of this section, the Secretary shall compare such Consumer Price Index for the most recent year available with the Consumer Price Index for the preceding year.

(c) *Relation to other laws.* Nothing in the Executive Order or this part shall excuse noncompliance with any applicable Federal or state prevailing wage law or any applicable law or municipal ordinance establishing a minimum wage higher than the minimum wage established under the Executive Order and this part.

(d) *Relation to Executive Order 13658.* As of January 30, 2022, Executive Order 13658 is superseded to the extent that it is inconsistent with Executive Order 14026 and this part. Unless otherwise excluded by § 23.40, workers performing on or in connection with a covered new contract, as defined in § 23.20, must be paid at least the minimum hourly wage rate established by Executive Order 14026 and this part rather than the lower hourly minimum wage rate established by Executive Order 13658 and its implementing regulations in 29 CFR part 10.

§ 23.60 Antiretaliation.

It shall be unlawful for any person to discharge or in any other manner discriminate against any worker because such worker has filed any complaint or instituted or caused to be instituted any proceeding under or related to Executive Order 14026 or this part, or has testified or is about to testify in any such proceeding.

§ 23.70 Waiver of rights.

Workers cannot waive, nor may contractors induce workers to waive, their rights under Executive Order 14026 or this part.

§ 23.80 Severability.

If any provision of this part is held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, or stayed pending further agency action, the provision shall be construed so as to continue to give the maximum effect to the provision permitted by law, unless such holding shall be one of utter invalidity or unenforceability, in which event the provision shall be severable from this part and shall not affect the remainder thereof.

Subpart B—Federal Government Requirements

§ 23.110 Contracting agency requirements.

(a) *Contract clause.* The contracting agency shall include the Executive Order minimum wage contract clause set forth in appendix A of this part in all covered contracts and solicitations for such contracts, as described in § 23.30, except for procurement contracts subject to the FAR. The required contract clause directs, as a condition of payment, that all workers performing work on or in connection with covered contracts must be paid the applicable, currently effective minimum wage under Executive Order 14026 and § 23.50. For procurement contracts subject to the FAR, contracting agencies must use the clause set forth in the FAR developed to implement this section. Such clause will accomplish the same purposes as the clause set forth in appendix A of this part and be consistent with the requirements set forth in this section.

(b) *Failure to include the contract clause.* Where the Department or the contracting agency discovers or determines, whether before or subsequent to a contract award, that a contracting agency made an erroneous determination that Executive Order 14026 or this part did not apply to a particular contract and/or failed to include the applicable contract clause in a contract to which the Executive Order applies, the contracting agency, on its own initiative or within 15 calendar days of notification by an authorized representative of the Department of Labor, shall incorporate the contract clause in the contract retroactive to commencement of performance under the contract through the exercise of any and all authority that may be needed (including, where necessary, its authority to negotiate or amend, its authority to pay any necessary additional costs, and its authority under any contract provision authorizing changes, cancellation and termination).

(c) *Withholding.* A contracting officer shall upon his or her own action or upon written request of an authorized representative of the Department of Labor withhold or cause to be withheld from the prime contractor under the covered contract or any other Federal contract with the same prime contractor,

so much of the accrued payments or advances as may be considered necessary to pay workers the full amount of wages required by the Executive Order. In the event of failure to pay any covered workers all or part of the wages due under Executive Order 14026, the agency may, after authorization or by direction of the Department of Labor and written notification to the contractor, take action to cause suspension of any further payment or advance of funds until such violations have ceased. Additionally, any failure to comply with the requirements of Executive Order 14026 may be grounds for termination of the right to proceed with the contract work. In such event, the contracting agency may enter into other contracts or arrangements for completion of the work, charging the contractor in default with any additional cost.

(d) *Actions on complaints*—(1) *Reporting*—(i) *Reporting time frame.* The contracting agency shall forward all information listed in paragraph (d)(1)(ii) of this section to the Division of Government Contracts Enforcement, Wage and Hour Division, U.S. Department of Labor, Washington, DC 20210 within 14 calendar days of receipt of a complaint alleging contractor noncompliance with the Executive Order or this part or within 14 calendar days of being contacted by the Wage and Hour Division regarding any such complaint.

(ii) *Report contents.* The contracting agency shall forward to the Division of Government Contracts Enforcement, Wage and Hour Division, U.S. Department of Labor, Washington, DC 20210 any:

(A) Complaint of contractor noncompliance with Executive Order 14026 or this part;

(B) Available statements by the worker, contractor, or any other person regarding the alleged violation;

(C) Evidence that the Executive Order minimum wage contract clause was included in the contract;

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

(E) Any other relevant facts known to the contracting agency or other information requested by the Wage and Hour Division.

(2) [Reserved]

§ 23.120 Department of Labor requirements.

(a) *In general.* The Executive Order minimum wage applicable from January 30, 2022 through December 31, 2022, is $15.00 per hour. The Secretary will determine the applicable minimum wage rate to be paid to workers performing work on or in connection with covered contracts on an annual basis, beginning January 1, 2023.

(b) *Method for determining the applicable Executive Order minimum wage.* The Secretary will determine the applicable minimum wage under the Executive Order, beginning January 1, 2023, by using the methodology set forth in § 23.50(b).

(c) *Notice*—(1) *Timing of notification.* The Administrator will notify the public of the applicable minimum wage rate to be paid to workers performing work on or in connection with covered contracts on an annual basis at least 90 days before any new minimum wage is to take effect.

(2) *Method of notification*—(i) **Federal Register**. The Administrator will publish a notice in the **Federal Register** stating the applicable minimum wage rate to be paid to workers performing work on or in connection with covered contracts on an annual basis at least 90 days before any new minimum wage is to take effect.

(ii) *Website.* The Administrator will publish and maintain on *https://alpha.sam.gov/content/wage-determinations,* or any successor site, the applicable minimum wage rate to be paid to workers performing work on or in connection with covered contracts.

(iii) *Wage determinations.* The Administrator will publish a prominent general notice on all wage determinations issued under the Davis-Bacon Act and the Service Contract Act stating the Executive Order minimum wage and that the Executive Order minimum wage applies to all workers performing on or in connection with such contracts whose wages are governed by the Fair Labor Standards Act, the Davis-Bacon Act, and the Service Contract Act. The Administrator will update this general notice on all such wage determinations annually.

(iv) *Other means as appropriate.* The Administrator may publish the applicable minimum wage rate to be paid to workers performing work on or in connection with covered contracts on an annual basis at least 90 days before any such new minimum wage is to take effect in any other media that the Administrator deems appropriate.

(d) *Notification to a contractor of the withholding of funds.* If the Administrator requests that a contracting agency withhold funds from a contractor pursuant to § 23.110(c), the Administrator and/or contracting agency shall notify the affected prime contractor of the Administrator's withholding request to the contracting agency.

Subpart C—Contractor Requirements

§ 23.210 Contract clause.

(a) *Contract clause.* The contractor, as a condition of payment, shall abide by the terms of the applicable Executive Order minimum wage contract clause referred to in § 23.110(a).

(b) *Flow-down requirement.* The contractor and any subcontractors shall include in any covered subcontracts the Executive Order minimum wage contract clause referred to in § 23.110(a) and shall require, as a condition of payment, that the subcontractor include the minimum wage contract clause in any lower-tier subcontracts. The prime contractor and any upper-tier contractor shall be responsible for the compliance by any subcontractor or lower-tier subcontractor with the Executive Order minimum wage requirements, whether or not the contract clause was included in the subcontract.

§ 23.220 Rate of pay.

(a) *General.* The contractor must pay each worker performing work on or in connection with a covered contract no less than the applicable Executive Order minimum wage for all hours worked on or in connection with the covered contract, unless such worker is exempt under § 23.40. In determining whether a worker is performing within the scope of a covered contract, all workers who are engaged in working on or in connection with the contract, either in performing the specific services called for by its terms or in performing other duties necessary to the performance of the contract, are thus subject to the Executive Order and this part unless a specific exemption is applicable. Nothing in the Executive Order or this part shall excuse noncompliance with any applicable Federal or state prevailing wage law or any applicable law or municipal ordinance establishing a minimum wage higher than the minimum wage established under Executive Order 14026.

(b) *Workers who receive fringe benefits.* The contractor may not discharge any part of its minimum wage obligation under the Executive Order by furnishing fringe benefits or, with respect to workers whose wages are governed by the Service Contract Act, the cash equivalent thereof.

(c) *Tipped employees.* The contractor may satisfy the wage payment obligation to a tipped employee under the Executive Order through a combination of an hourly cash wage and a credit based on tips received by such employee pursuant to the provisions in § 23.280.

§ 23.230 Deductions.

The contractor may make deductions that reduce a worker's wages below the Executive Order minimum wage rate only if such deduction qualifies as a:

(a) Deduction required by Federal, state, or local law, such as Federal or state withholding of income taxes;

(b) Deduction for payments made to third parties pursuant to court order;

(c) Deduction directed by a voluntary assignment of the worker or his or her authorized representative; or

(d) Deduction for the reasonable cost or fair value, as determined by the Administrator, of furnishing such worker with ''board, lodging, or other facilities,'' as defined in 29 U.S.C. 203(m)(1) and part 531 of this title.

§ 23.240 Overtime payments.

(a) *General.* The Fair Labor Standards Act and the Contract Work Hours and Safety Standards Act require overtime payment of not less than one and one-half times the regular rate of pay or basic rate of pay for all hours worked over 40 hours in a workweek to covered workers. The regular rate of pay under the Fair Labor Standards Act is generally determined by dividing the worker's total earnings in any workweek by the total number of hours actually worked by the worker in that workweek for which such compensation was paid.

(b) *Tipped employees.* When overtime is worked by tipped employees who are entitled to overtime pay under the Fair Labor Standards Act and/or the Contract Work Hours and Safety Standards Act, the employees' regular rate of pay includes both the cash wages paid by the employer (*see* §§ 23.220(a) and 23.280(a)(1)) and the amount of any tip credit taken (*see* § 23.280(a)(2)). (*See* part 778 of this title for a detailed discussion of overtime compensation under the Fair Labor Standards Act.) Any tips received by the employee in excess of the tip credit are not included in the regular rate.

§ 23.250 Frequency of pay.

Wage payments to workers shall be made no later than one pay period following the end of the regular pay period in which such wages were earned or accrued. A pay period under Executive Order 14026 may not be of any duration longer than semi-monthly.

§ 23.260 Records to be kept by contractors.

(a) *Records.* The contractor and each subcontractor performing work subject to Executive Order 14026 shall make and maintain, for three years, records containing the information specified in paragraphs (a)(1) through (6) of this section for each worker and shall make them available for inspection and transcription by authorized representatives of the Wage and Hour Division of the U.S. Department of Labor:

(1) Name, address, and social security number of each worker;

(2) The worker's occupation(s) or classification(s);

(3) The rate or rates of wages paid;

(4) The number of daily and weekly hours worked by each worker;

(5) Any deductions made; and

(6) The total wages paid.

(b) *Interviews.* The contractor shall permit authorized representatives of the Wage and Hour Division to conduct interviews with workers at the worksite during normal working hours.

(c) *Other recordkeeping obligations.* Nothing in this part limits or otherwise modifies the contractor's recordkeeping obligations, if any, under the Davis-Bacon Act, the Service Contract Act, or the Fair Labor Standards Act, or their implementing regulations in this chapter.

§ 23.270 Anti-kickback.

All wages paid to workers performing on or in connection with covered contracts must be paid free and clear and without subsequent deduction (except as set forth in § 23.230), rebate, or kickback on any account. Kickbacks directly or indirectly to the employer or to another person for the employer's benefit for the whole or part of the wage are prohibited.

§ 23.280 Tipped employees.

(a) *Payment of wages to tipped employees.* With respect to workers who are tipped employees as defined in § 23.20 and this section, the amount of wages paid to such employee by the employee's employer shall be equal to:

(1) An hourly cash wage of at least:

(i) $10.50 an hour beginning on January 30, 2022;

(ii) Beginning January 1, 2023, 85 percent of the wage in effect under section 2 of the Executive Order, rounded to the nearest multiple of $0.05;

(iii) Beginning January 1, 2024, and for each subsequent year, 100 percent of the wage in effect under section 2 of the Executive Order; and

(2) An additional amount on account of the tips received by such employee (tip credit) which amount is equal to the difference between the hourly cash wage in paragraph (a)(1) of this section and the wage in effect under section 2 of the Executive Order. Where tipped employees do not receive a sufficient amount of tips in the workweek to equal the amount of the tip credit, the employer must increase the cash wage paid for the workweek under paragraph (a)(1) of this section so that the amount of the cash wage paid and the tips received by the employee equal the minimum wage under section 2 of the Executive Order.

(3) An employer may pay a higher cash wage than required by paragraph (a)(1) of this section and take a lower tip credit but may not pay a lower cash wage than required by paragraph (a)(1) of this section and take a greater tip credit. In order for the employer to claim a tip credit, the employer must demonstrate that the worker received at least the amount of the credit claimed in actual tips. If the worker received less than the claimed tip credit amount in tips during the workweek, the employer is required to pay the balance on the regular payday so that the worker receives the wage in effect under section 2 of the Executive Order with the defined combination of wages and tips.

(4) If the cash wage required to be paid under the Service Contract Act, 41 U.S.C. 6701 *et seq.,* or any other applicable law or regulation is higher than the wage required by section 2 of the Executive Order, the employer shall pay additional cash wages equal to the difference between the wage in effect under section 2 of the Executive Order and the highest wage required to be paid.

(b) *Requirements with respect to tipped employees.* The definitions and requirements concerning tipped employees, the tip credit, the characteristics of tips, service charges, tip pooling, and notice set forth in 29 CFR 10.28(b) through (f) apply with respect to workers who are tipped employees, as defined in § 23.20, performing on or in connection with contracts covered under Executive Order 14026, except that the minimum required cash wage shall be the minimum required cash wage described in paragraph (a)(1) of this section for the purposes of Executive 14026. For the purposes of this section, where 29 CFR 10.28(b) through (f) uses the term ''Executive Order,'' that term refers to Executive Order 14026.

§ 23.290 Notice.

(a) The contractor must notify all workers performing work on or in connection with a covered contract of the applicable minimum wage rate under the Executive Order. With respect to service employees on contracts covered by the Service Contract Act and laborers and mechanics on contracts covered by the Davis-Bacon Act, the contractor may meet the requirement in

this paragraph (a) by posting, in a prominent and accessible place at the worksite, the applicable wage determination under those statutes.

(b) With respect to workers performing work on or in connection with a covered contract whose wages are governed by the FLSA, the contractor must post a notice provided by the Department of Labor in a prominent and accessible place at the worksite so it may be readily seen by workers.

(c) Contractors that customarily post notices to workers electronically may post the notice electronically, provided such electronic posting is displayed prominently on any website that is maintained by the contractor, whether external or internal, and customarily used for notices to workers about terms and conditions of employment.

Subpart D—Enforcement

§ 23.410 Complaints.

(a) *Filing a complaint.* Any worker, contractor, labor organization, trade organization, contracting agency, or other person or entity that believes a violation of the Executive Order or this part has occurred may file a complaint with any office of the Wage and Hour Division. No particular form of complaint is required. A complaint may be filed orally or in writing. The Wage and Hour Division will accept the complaint in any language.

(b) *Confidentiality.* It is the policy of the Department of Labor to protect the identity of its confidential sources and to prevent an unwarranted invasion of personal privacy. Accordingly, the identity of any individual who makes a written or oral statement as a complaint or in the course of an investigation, as well as portions of the statement which would reveal the individual's identity, shall not be disclosed in any manner to anyone other than Federal officials without the prior consent of the individual. Disclosure of such statements shall be governed by the provisions of the Freedom of Information Act (5 U.S.C. 552, *see* 29 CFR part 70) and the Privacy Act of 1974 (5 U.S.C. 552a).

§ 23.420 Wage and Hour Division conciliation.

After receipt of a complaint, the Administrator may seek to resolve the matter through conciliation.

§ 23.430 Wage and Hour Division investigation.

The Administrator may investigate possible violations of the Executive Order or this part either as the result of a complaint or at any time on his or her own initiative. As part of the investigation, the Administrator may conduct interviews with the relevant contractor, as well as the contractor's workers at the worksite during normal work hours; inspect the relevant contractor's records (including contract documents and payrolls, if applicable); make copies and transcriptions of such records; and require the production of any documentary or other evidence the Administrator deems necessary to determine whether a violation, including conduct warranting imposition of debarment, has occurred. Federal agencies and contractors shall cooperate with any authorized representative of the Department of Labor in the inspection of records, in interviews with workers, and in all aspects of investigations.

§ 23.440 Remedies and sanctions.

(a) *Unpaid wages.* When the Administrator determines a contractor has failed to pay the applicable Executive Order minimum wage to workers, the Administrator will notify the contractor and the applicable contracting agency of the unpaid wage violation and request the contractor to remedy the violation. If the contractor does not remedy the violation of the Executive Order or this part, the Administrator shall direct the contractor to pay all unpaid wages to the affected workers in the investigative findings letter it issues pursuant to § 23.510. The Administrator may additionally direct that payments due on the contract or any other contract between the contractor and the Government be withheld as necessary to pay unpaid wages. Upon the final order of the Secretary that unpaid wages are due, the Administrator may direct the relevant contracting agency to transfer the withheld funds to the Department of Labor for disbursement.

(b) *Antiretaliation.* When the Administrator determines that any person has discharged or in any other manner discriminated against any worker because such worker filed any complaint or instituted or caused to be instituted any proceeding under or related to the Executive Order or this part, or because such worker testified or is about to testify in any such proceeding, the Administrator may provide for any relief to the worker as may be appropriate, including employment, reinstatement, promotion, and the payment of lost wages.

(c) *Debarment.* Whenever a contractor is found by the Secretary of Labor to have disregarded its obligations under the Executive Order, or this part, such contractor and its responsible officers, and any firm, corporation, partnership, or association in which the contractor or responsible officers have an interest, shall be ineligible to be awarded any contract or subcontract subject to the Executive Order for a period of up to three years from the date of publication of the name of the contractor or responsible officer on the ineligible list. Neither an order for debarment of any contractor or its responsible officers from further Government contracts nor the inclusion of a contractor or its responsible officers on a published list of noncomplying contractors under this section shall be carried out without affording the contractor or responsible officers an opportunity for a hearing before an Administrative Law Judge.

(d) *Civil action to recover greater underpayments than those withheld.* If the payments withheld under § 23.110(c) are insufficient to reimburse all workers' lost wages, or if there are no payments to withhold, the Department of Labor, following a final order of the Secretary, may bring action against the contractor in any court of competent jurisdiction to recover the remaining amount of underpayments. The Department of Labor shall, to the extent possible, pay any sums it recovers in this manner directly to the underpaid workers. Any sum not paid to a worker because of inability to do so within three years shall be transferred into the Treasury of the United States as miscellaneous receipts.

(e) *Retroactive inclusion of contract clause.* If a contracting agency fails to include the applicable contract clause in a contract to which the Executive Order applies, the contracting agency, on its own initiative or within 15 calendar days of notification by an authorized representative of the Department of Labor, shall incorporate the contract clause in the contract retroactive to commencement of performance under the contract through the exercise of any and all authority that may be needed (including, where necessary, its authority to negotiate or amend, its authority to pay any necessary additional costs, and its authority under any contract provision authorizing changes, cancellation and termination).

Subpart E—Administrative Proceedings

§ 23.510 Disputes concerning contractor compliance.

(a) This section sets forth the procedure for resolution of disputes of fact or law concerning a contractor's compliance with subpart C of this part. The procedures in this section may be initiated upon the Administrator's own

motion or upon request of the contractor.

(b)(1) In the event of a dispute described in paragraph (a) of this section in which it appears that relevant facts are at issue, the Administrator will notify the affected contractor(s) and the prime contractor (if different) of the investigative findings by certified mail to the last known address.

(2) A contractor desiring a hearing concerning the Administrator's investigative findings letter shall request such a hearing by letter postmarked within 30 calendar days of the date of the Administrator's letter. The request shall set forth those findings which are in dispute with respect to the violations and/or debarment, as appropriate, and explain how the findings are in dispute, including by making reference to any affirmative defenses.

(3) Upon receipt of a timely request for a hearing, the Administrator shall refer the case to the Chief Administrative Law Judge by Order of Reference, to which shall be attached a copy of the investigative findings letter from the Administrator and response thereto, for designation to an Administrative Law Judge to conduct such hearings as may be necessary to resolve the disputed matters. The hearing shall be conducted in accordance with the procedures set forth in 29 CFR part 6.

(c)(1) In the event of a dispute described in paragraph (a) of this section in which it appears that there are no relevant facts at issue, and where there is not at that time reasonable cause to institute debarment proceedings under § 23.520, the Administrator shall notify the contractor(s) of the investigation findings by certified mail to the last known address, and shall issue a ruling in the investigative findings letter on any issues of law known to be in dispute.

(2)(i) If the contractor disagrees with the factual findings of the Administrator or believes that there are relevant facts in dispute, the contractor shall so advise the Administrator by letter postmarked within 30 calendar days of the date of the Administrator's letter. In the response, the contractor shall explain in detail the facts alleged to be in dispute and attach any supporting documentation.

(ii) Upon receipt of a timely response under paragraph (c)(2)(i) of this section alleging the existence of a factual dispute, the Administrator shall examine the information submitted. If the Administrator determines that there is a relevant issue of fact, the Administrator shall refer the case to the Chief Administrative Law Judge in accordance with paragraph (b)(3) of this section. If the Administrator determines that there is no relevant issue of fact, the Administrator shall so rule and advise the contractor accordingly.

(3) If the contractor desires review of the ruling issued by the Administrator under paragraph (c)(1) or (c)(2)(ii) of this section, the contractor shall file a petition for review thereof with the Administrative Review Board postmarked within 30 calendar days of the date of the ruling, with a copy thereof to the Administrator. The petition for review shall be filed in accordance with the procedures set forth in 29 CFR part 7.

(d) If a timely response to the Administrator's investigative findings letter is not made or a timely petition for review is not filed, the Administrator's investigative findings letter shall become the final order of the Secretary. If a timely response or petition for review is filed, the Administrator's letter shall be inoperative unless and until the decision is upheld by the Administrative Law Judge or the Administrative Review Board, or otherwise becomes a final order of the Secretary.

§ 23.520 Debarment proceedings.

(a) Whenever any contractor is found by the Secretary of Labor to have disregarded its obligations to workers or subcontractors under Executive Order 14026 or this part, such contractor and its responsible officers, and any firm, corporation, partnership, or association in which such contractor or responsible officers have an interest, shall be ineligible for a period of up to three years to receive any contracts or subcontracts subject to Executive Order 14026 from the date of publication of the name or names of the contractor or persons on the ineligible list.

(b)(1) Whenever the Administrator finds reasonable cause to believe that a contractor has committed a violation of Executive Order 14026 or this part which constitutes a disregard of its obligations to workers or subcontractors, the Administrator shall notify by certified mail to the last known address, the contractor and its responsible officers (and any firms, corporations, partnerships, or associations in which the contractor or responsible officers are known to have an interest), of the finding. The Administrator shall afford such contractor and any other parties notified an opportunity for a hearing as to whether debarment action should be taken under Executive Order 14026 or this part. The Administrator shall furnish to those notified a summary of the investigative findings. If the contractor or any other parties notified wish to request a hearing as to whether debarment action should be taken, such a request shall be made by letter to the Administrator postmarked within 30 calendar days of the date of the investigative findings letter from the Administrator, and shall set forth any findings which are in dispute and the reasons therefor, including any affirmative defenses to be raised. Upon receipt of such timely request for a hearing, the Administrator shall refer the case to the Chief Administrative Law Judge by Order of Reference, to which shall be attached a copy of the investigative findings letter from the Administrator and the response thereto, for designation of an Administrative Law Judge to conduct such hearings as may be necessary to determine the matters in dispute.

(2) Hearings under this section shall be conducted in accordance with the procedures set forth in 29 CFR part 6. If no hearing is requested within 30 calendar days of the letter from the Administrator, the Administrator's findings shall become the final order of the Secretary.

§ 23.530 Referral to Chief Administrative Law Judge; amendment of pleadings.

(a) Upon receipt of a timely request for a hearing under § 23.510 (where the Administrator has determined that relevant facts are in dispute) or § 23.520 (debarment), the Administrator shall refer the case to the Chief Administrative Law Judge by Order of Reference, to which shall be attached a copy of the investigative findings letter from the Administrator and response thereto, for designation of an Administrative Law Judge to conduct such hearings as may be necessary to decide the disputed matters. A copy of the Order of Reference and attachments thereto shall be served upon the respondent. The investigative findings letter from the Administrator and response thereto shall be given the effect of a complaint and answer, respectively, for purposes of the administrative proceedings.

(b) At any time prior to the closing of the hearing record, the complaint (investigative findings letter) or answer (response) may be amended with the permission of the Administrative Law Judge and upon such terms as he/she may approve. For proceedings pursuant to § 23.510, such an amendment may include a statement that debarment action is warranted under § 23.520. Such amendments shall be allowed when justice and the presentation of the merits are served thereby, provided there is no prejudice to the objecting

party's presentation on the merits. When issues not raised by the pleadings are reasonably within the scope of the original complaint and are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings, and such amendments may be made as necessary to make them conform to the evidence. The presiding Administrative Law Judge may, upon reasonable notice and upon such terms as are just, permit supplemental pleadings setting forth transactions, occurrences or events which have happened since the date of the pleadings and which are relevant to any of the issues involved. A continuance in the hearing may be granted or the record left open to enable the new allegations to be addressed.

§ 23.540 Consent findings and order.

(a) At any time prior to the receipt of evidence or, at the Administrative Law Judge's discretion prior to the issuance of the Administrative Law Judge's decision, the parties may enter into consent findings and an order disposing of the proceeding in whole or in part.

(b) Any agreement containing consent findings and an order disposing of a proceeding in whole or in part shall also provide:

(1) That the order shall have the same force and effect as an order made after full hearing;

(2) That the entire record on which any order may be based shall consist solely of the Administrator's findings letter and the agreement;

(3) A waiver of any further procedural steps before the Administrative Law Judge and the Administrative Review Board regarding those matters which are the subject of the agreement; and

(4) A waiver of any right to challenge or contest the validity of the findings and order entered into in accordance with the agreement.

(c) Within 30 calendar days after receipt of an agreement containing consent findings and an order disposing of the disputed matter in whole, the Administrative Law Judge shall, if satisfied with its form and substance, accept such agreement by issuing a decision based upon the agreed findings and order. If such agreement disposes of only a part of the disputed matter, a hearing shall be conducted on the matters remaining in dispute.

§ 23.550 Proceedings of the Administrative Law Judge.

(a) *General.* The Office of Administrative Law Judges has jurisdiction to hear and decide appeals concerning questions of law and fact from the Administrator's investigative findings letters issued under §§ 23.510 and 23.520. Any party may, when requesting an appeal or during the pendency of a proceeding on appeal, timely move an Administrative Law Judge to consolidate a proceeding initiated hereunder with a proceeding initiated under the Service Contract Act or the Davis-Bacon Act.

(b) *Proposed findings of fact, conclusions, and order.* Within 20 calendar days of filing of the transcript of the testimony or such additional time as the Administrative Law Judge may allow, each party may file with the Administrative Law Judge proposed findings of fact, conclusions of law, and a proposed order, together with a supporting brief expressing the reasons for such proposals. Each party shall serve such proposals and brief on all other parties.

(c) *Decision.* (1) Within a reasonable period of time after the time allowed for filing of proposed findings of fact, conclusions of law, and order, or within 30 calendar days of receipt of an agreement containing consent findings and order disposing of the disputed matter in whole, the Administrative Law Judge shall issue a decision. The decision shall contain appropriate findings, conclusions, and an order, and be served upon all parties to the proceeding.

(2) If the respondent is found to have violated Executive Order 14026 or this part, and if the Administrator requested debarment, the Administrative Law Judge shall issue an order as to whether the respondent is to be subject to the ineligible list, including findings that the contractor disregarded its obligations to workers or subcontractors under the Executive Order or this part.

(d) *Limit on scope of review.* The Equal Access to Justice Act, as amended, does not apply to proceedings under this part. Accordingly, Administrative Law Judges shall have no authority to award attorney's fees and/or other litigation expenses pursuant to the provisions of the Equal Access to Justice Act for any proceeding under this part.

(e) *Orders.* If the Administrative Law Judge concludes a violation occurred, the final order shall mandate action to remedy the violation, including, but not limited to, monetary relief for unpaid wages. Where the Administrator has sought imposition of debarment, the Administrative Law Judge shall determine whether an order imposing debarment is appropriate.

(f) *Finality.* The Administrative Law Judge's decision shall become the final order of the Secretary, unless a timely petition for review is filed with the Administrative Review Board.

§ 23.560 Petition for review.

(a) *Filing a petition for review.* Within 30 calendar days after the date of the decision of the Administrative Law Judge (or such additional time as is granted by the Administrative Review Board), any party aggrieved thereby who desires review thereof shall file a petition for review of the decision with supporting reasons. Such party shall transmit the petition in writing to the Administrative Review Board with a copy thereof to the Chief Administrative Law Judge. The petition shall refer to the specific findings of fact, conclusions of law, or order at issue. A petition concerning the decision on debarment shall also state the disregard of obligations to workers and/or subcontractors, or lack thereof, as appropriate. A party must serve the petition for review, and all briefs, on all parties and the Chief Administrative Law Judge. It must also timely serve copies of the petition and all briefs on the Administrator, Wage and Hour Division, and on the Associate Solicitor, Division of Fair Labor Standards, Office of the Solicitor, U.S. Department of Labor, Washington, DC 20210.

(b) *Effect of filing.* If a party files a timely petition for review, the Administrative Law Judge's decision shall be inoperative unless and until the Administrative Review Board issues an order affirming the letter or decision, or the letter or decision otherwise becomes a final order of the Secretary. If a petition for review concerns only the imposition of debarment, however, the remainder of the decision shall be effective immediately. No judicial review shall be available unless a timely petition for review to the Administrative Review Board is first filed.

§ 23.570 Administrative Review Board proceedings.

(a) *Authority*—(1) *General.* The Administrative Review Board has jurisdiction to hear and decide in its discretion appeals concerning questions of law and fact from investigative findings letters of the Administrator issued under § 23.510(c)(1) or (2), Administrator's rulings issued under § 23.580, and decisions of Administrative Law Judges issued under § 23.550.

(2) *Limit on scope of review.* (i) The Board shall not have jurisdiction to pass on the validity of any provision of this part. The Board is an appellate body and shall decide cases properly before it on the basis of substantial evidence contained in the entire record before it.

The Board shall not receive new evidence into the record.

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

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

(c) *Orders.* If the Board concludes a violation occurred, the final order shall mandate action to remedy the violation, including, but not limited to, monetary relief for unpaid wages. Where the Administrator has sought imposition of debarment, the Board shall determine whether an order imposing debarment is appropriate. The Board's order is subject to discretionary review by the Secretary as provided in Secretary's Order 01–2020 (or any successor to that order).

(d) *Finality.* The decision of the Administrative Review Board shall become the final order of the Secretary in accordance with Secretary's Order 01–2020 (or any successor to that order), which provides for discretionary review of such orders by the Secretary.

§ 23.580 Administrator ruling.

(a) Questions regarding the application and interpretation of the rules contained in this part may be referred to the Administrator, who shall issue an appropriate ruling. Requests for such rulings should be addressed to the Administrator, Wage and Hour Division, U.S. Department of Labor, Washington, DC 20210.

(b) Any interested party may appeal to the Administrative Review Board for review of a final ruling of the Administrator issued under paragraph (a) of this section. The petition for review shall be filed with the Administrative Review Board within 30 calendar days of the date of the ruling.

Appendix A to Part 23—Contract Clause

The following clause shall be included by the contracting agency in every contract, contract-like instrument, and solicitation to which Executive Order 14026 applies, except for procurement contracts subject to the Federal Acquisition Regulation (FAR):

(a) *Executive Order 14026.* This contract is subject to Executive Order 14026, the regulations issued by the Secretary of Labor in 29 CFR part 23 pursuant to the Executive Order, and the following provisions.

(b) *Minimum Wages.* (1) Each worker (as defined in 29 CFR 23.20) engaged in the performance of this contract by the prime contractor or any subcontractor, regardless of any contractual relationship which may be alleged to exist between the contractor and worker, shall be paid not less than the applicable minimum wage under Executive Order 14026.

(2) The minimum wage required to be paid to each worker performing work on or in connection with this contract between January 30, 2022 and December 31, 2022, shall be $15.00 per hour. The minimum wage shall be adjusted each time the Secretary of Labor's annual determination of the applicable minimum wage under section 2(a)(ii) of Executive Order 14026 results in a higher minimum wage. Adjustments to the Executive Order minimum wage under section 2(a)(ii) of Executive Order 14026 will be effective for all workers subject to the Executive Order beginning January 1 of the following year. If appropriate, the contracting officer, or other agency official overseeing this contract shall ensure the contractor is compensated only for the increase in labor costs resulting from the annual inflation increases in the Executive Order 14026 minimum wage beginning on January 1, 2023. The Secretary of Labor will publish annual determinations in the **Federal Register** no later than 90 days before such new wage is to take effect. The Secretary will also publish the applicable minimum wage on *https://alpha.sam.gov/content/wage-determinations* (or any successor website). The applicable published minimum wage is incorporated by reference into this contract.

(3) The contractor shall pay unconditionally to each worker all wages due free and clear and without subsequent deduction (except as otherwise provided by 29 CFR 23.230), rebate, or kickback on any account. Such payments shall be made no later than one pay period following the end of the regular pay period in which such wages were earned or accrued. A pay period under this Executive Order may not be of any duration longer than semi-monthly.

(4) The prime contractor and any upper-tier subcontractor shall be responsible for the compliance by any subcontractor or lower-tier subcontractor with the Executive Order minimum wage requirements. In the event of any violation of the minimum wage obligation of this clause, the contractor and any subcontractor(s) responsible therefore shall be liable for the unpaid wages.

(5) If the commensurate wage rate paid to a worker performing work on or in connection with a covered contract whose wages are calculated pursuant to a special certificate issued under 29 U.S.C. 214(c), whether hourly or piece rate, is less than the Executive Order minimum wage, the contractor must pay the Executive Order minimum wage rate to achieve compliance with the Order. If the commensurate wage due under the certificate is greater than the Executive Order minimum wage, the contractor must pay the worker the greater commensurate wage.

(c) *Withholding.* The agency head shall upon its own action or upon written request of an authorized representative of the Department of Labor withhold or cause to be withheld from the prime contractor under this or any other Federal contract with the same prime contractor, so much of the accrued payments or advances as may be considered necessary to pay workers the full amount of wages required by Executive Order 14026.

(d) *Contract Suspension/Contract Termination/Contractor Debarment.* In the event of a failure to pay any worker all or part of the wages due under Executive Order 14026 or 29 CFR part 23, or a failure to comply with any other term or condition of Executive Order 14026 or 29 CFR part 23, the contracting agency may on its own action or after authorization or by direction of the Department of Labor and written notification to the contractor, take action to cause suspension of any further payment, advance or guarantee of funds until such violations have ceased. Additionally, any failure to comply with the requirements of this clause may be grounds for termination of the right to proceed with the contract work. In such event, the Government may enter into other contracts or arrangements for completion of the work, charging the contractor in default with any additional cost. A breach of the contract clause may be grounds for debarment as a contractor and subcontractor as provided in 29 CFR 23.520.

(e) The contractor may not discharge any part of its minimum wage obligation under Executive Order 14026 by furnishing fringe benefits or, with respect to workers whose wages are governed by the Service Contract Act, the cash equivalent thereof.

(f) Nothing herein shall relieve the contractor of any other obligation under Federal, state or local law, or under contract, for the payment of a higher wage to any worker, nor shall a lower prevailing wage under any such Federal, State, or local law, or under contract, entitle a contractor to pay less than $15.00 (or the minimum wage as established each January thereafter) to any worker.

(g) *Payroll Records.* (1) The contractor shall make and maintain for three years records containing the information specified in paragraphs (g)(1)(i) through (vi) of this section for each worker and shall make the records available for inspection and transcription by authorized representatives of the Wage and Hour Division of the U.S. Department of Labor:

(i) Name, address, and social security number;

(ii) The worker's occupation(s) or classification(s);

(iii) The rate or rates of wages paid;

(iv) The number of daily and weekly hours worked by each worker;

(v) Any deductions made; and

(vi) Total wages paid.

(2) The contractor shall also make available a copy of the contract, as applicable, for inspection or transcription by authorized representatives of the Wage and Hour Division.

(3) Failure to make and maintain or to make available such records for inspection and transcription shall be a violation of 29 CFR part 23 and this contract, and in the case

of failure to produce such records, the contracting officer, upon direction of an authorized representative of the Department of Labor, or under its own action, shall take such action as may be necessary to cause suspension of any further payment or advance of funds until such time as the violations are discontinued.

(4) The contractor shall permit authorized representatives of the Wage and Hour Division to conduct investigations, including interviewing workers at the worksite during normal working hours.

(5) Nothing in this clause limits or otherwise modifies the contractor's payroll and recordkeeping obligations, if any, under the Davis-Bacon Act, as amended, and its implementing regulations; the Service Contract Act, as amended, and its implementing regulations; the Fair Labor Standards Act, as amended, and its implementing regulations; or any other applicable law.

(h) The contractor (as defined in 29 CFR 23.20) shall insert this clause in all of its covered subcontracts and shall require its subcontractors to include this clause in any covered lower-tier subcontracts. The prime contractor and any upper-tier subcontractor shall be responsible for the compliance by any subcontractor or lower-tier subcontractor with this contract clause.

(i) *Certification of Eligibility.* (1) By entering into this contract, the contractor (and officials thereof) certifies that neither it (nor he or she) nor any person or firm who has an interest in the contractor's firm is a person or firm ineligible to be awarded Government contracts by virtue of the sanctions imposed pursuant to section 5 of the Service Contract Act, section 3(a) of the Davis-Bacon Act, or 29 CFR 5.12(a)(1).

(2) No part of this contract shall be subcontracted to any person or firm whose name appears on the list of persons or firms ineligible to receive Federal contracts.

(3) The penalty for making false statements is prescribed in the U.S. Criminal Code, 18 U.S.C. 1001.

(j) *Tipped employees.* In paying wages to a tipped employee as defined in section 3(t) of the Fair Labor Standards Act, 29 U.S.C. 203(t), the contractor may take a partial credit against the wage payment obligation (tip credit) to the extent permitted under section 3(a) of Executive Order 14026. In order to take such a tip credit, the employee must receive an amount of tips at least equal to the amount of the credit taken; where the tipped employee does not receive sufficient tips to equal the amount of the tip credit the contractor must increase the cash wage paid for the workweek so that the amount of cash wage paid and the tips received by the employee equal the applicable minimum wage under Executive Order 14026. To utilize this proviso:

(1) The employer must inform the tipped employee in advance of the use of the tip credit;

(2) The employer must inform the tipped employee of the amount of cash wage that will be paid and the additional amount by which the employee's wages will be considered increased on account of the tip credit;

(3) The employees must be allowed to retain all tips (individually or through a pooling arrangement and regardless of whether the employer elects to take a credit for tips received); and

(4) The employer must be able to show by records that the tipped employee receives at least the applicable Executive Order minimum wage through the combination of direct wages and tip credit.

(k) *Antiretaliation.* It shall be unlawful for any person to discharge or in any other manner discriminate against any worker because such worker has filed any complaint or instituted or caused to be instituted any proceeding under or related to Executive Order 14026 or 29 CFR part 23, or has testified or is about to testify in any such proceeding.

(l) *Disputes concerning labor standards.* Disputes related to the application of Executive Order 14026 to this contract shall not be subject to the general disputes clause of the contract. Such disputes shall be resolved in accordance with the procedures of the Department of Labor set forth in 29 CFR part 23. Disputes within the meaning of this contract clause include disputes between the contractor (or any of its subcontractors) and the contracting agency, the U.S. Department of Labor, or the workers or their representatives.

(m) *Notice.* The contractor must notify all workers performing work on or in connection with a covered contract of the applicable minimum wage rate under the Executive Order. With respect to service employees on contracts covered by the Service Contract Act and laborers and mechanics on contracts covered by the Davis-Bacon Act, the contractor may meet this requirement by posting, in a prominent and accessible place at the worksite, the applicable wage determination under those statutes. With respect to workers performing work on or in connection with a covered contract whose wages are governed by the FLSA, the contractor must post a notice provided by the Department of Labor in a prominent and accessible place at the worksite so it may be readily seen by workers. Contractors that customarily post notices to workers electronically may post the notice electronically provided such electronic posting is displayed prominently on any website that is maintained by the contractor, whether external or internal, and customarily used for notices to workers about terms and conditions of employment.

NOTE: The following appendix will not appear in the Code of Federal Regulations.

Appendix—Increasing the Minimum Wage for Federal Contractors

BILLING CODE 4510–27–C

WORKER RIGHTS
UNDER EXECUTIVE ORDER 14026

FEDERAL MINIMUM WAGE FOR CONTRACTORS

$15.00 PER HOUR

EFFECTIVE JANUARY 30, 2022 – DECEMBER 31, 2022

The law requires certain employers to display this poster where employees can readily see it.

MINIMUM WAGE Executive Order 14026 (EO) requires that federal contractors pay workers performing work on or in connection with covered contracts at least (1) $15.00 per hour beginning January 30, 2022, and (2) beginning January 1, 2023, and every year thereafter, an inflation-adjusted amount determined by the Secretary of Labor in accordance with the EO and appropriate regulations. The EO hourly minimum wage in effect from January 30, 2022 through December 31, 2022 is $15.00.

TIPS Covered tipped employees must be paid a cash wage of at least $10.50 per hour effective January 30, 2022 through December 31, 2022. If a worker's tips combined with the required cash wage of at least $10.50 per hour paid by the contractor do not equal the EO hourly minimum wage for contractors, the contractor must increase the cash wage paid to make up the difference. Certain other conditions must also be met.

EXCLUSIONS

- Some workers who provide support "in connection with" covered contracts for less than 20 percent of their hours worked in a week may not be entitled to the EO minimum wage.
- Certain full-time students, learners, and apprentices who are employed under subminimum wage certificates are not entitled to the EO minimum wage.
- Certain other occupations and workers are also exempt from the EO.

ENFORCEMENT The U.S. Department of Labor's Wage and Hour Division (WHD) is responsible for enforcing the EO. WHD can answer questions, in person or by telephone, about your workplace rights and protections. We can investigate employers, recover wages to which workers may be entitled, and pursue appropriate sanctions against covered contractors. All services are free and confidential. The law also prohibits discriminating against or discharging workers who file a complaint or participate in any proceeding under the EO. If you are unable to file a complaint in English, WHD will accept the complaint in any language. You can find your nearest WHD office at https://www.dol.gov/whd/local/.

ADDITIONAL INFORMATION

- The EO applies only to new federal construction and service contracts, as defined by the Secretary in the regulations at 29 CFR part 23.
- Workers with disabilities whose wages are governed by special certificates issued under section 14(c) of the Fair Labor Standards Act must also receive no less than the full EO minimum wage rate.
- Some state or local laws may provide greater worker protections; employers must comply with both.
- More information about the EO is available at: www.dol.gov/agencies/whd/government-contracts/eo14026.

WAGE AND HOUR DIVISION
UNITED STATES DEPARTMENT OF LABOR

1-866-487-9243
TTY: 1-877-889-5627
www.dol.gov/agencies/whd

WH1089 REV 01/22

[FR Doc. 2021–15348 Filed 7–21–21; 8:45 am]

BILLING CODE 4510–27–P