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DEPARTMENT OF LABOR

Office of the Secretary

29 CFR Part 13

RIN 1235-AA13

Establishing Paid Sick Leave for Federal Contractors

AGENCY: Wage and Hour Division, Department of Labor

ACTION: Final Rule.

SUMMARY: This Final Rule issues regulations to implement Executive Order 13706, Establishing Paid Sick Leave for Federal Contractors, signed by President Barack Obama on September 7, 2015. Executive Order 13706 requires certain parties that contract with the Federal Government to provide their employees with up to 7 days (56 hours) of paid sick leave annually, including paid leave allowing for family care; it explains that providing access to paid sick leave will improve the health and performance of employees of Federal contractors and bring their benefits packages in line with model employers, ensuring that Federal contractors remain competitive employers and generating savings and quality improvements that will lead to improved economy and efficiency in Government procurement. The Order directs the Secretary of Labor to issue regulations to implement its requirements by September 30, 2016. This Final Rule defines terms used in the regulatory text, describes the categories of contracts and employees the Order covers and excludes from coverage, sets forth requirements and restrictions governing the accrual and use of paid sick leave, and prohibits interference with or discrimination for the exercise of rights under the Executive Order. It also describes the

obligations of contracting agencies, the Department of Labor, and contractors under the Executive Order, and it establishes the standards and procedures for complaints, investigations, remedies, and administrative enforcement proceedings related to alleged violations of the Order. As required by the Order and to the extent practicable, the Final Rule incorporates existing definitions, procedures, remedies, and enforcement processes under the Fair Labor Standards Act, the Service Contract Act, the Davis-Bacon Act, the Family and Medical Leave Act, the Violence Against Women Act, and Executive Order 13658, Establishing a Minimum Wage for Contractors.

DATES: Effective date: This Final Rule is effective on [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

Applicability date: For procurement contracts subject to the Federal Acquisition Regulation and Executive Order 13706, this Final Rule is applicable only after the effective date of regulations to be issued by the Federal Acquisition Regulatory Council. The Department of Labor will publish a document in the Federal Register to announce the applicability date for such contracts.

FOR FURTHER INFORMATION CONTACT: Robert Waterman, Compliance Specialist, Wage and Hour Division, U.S. Department of Labor, Room S-3510, 200 Constitution Avenue, N.W., Washington, D.C. 20210; telephone: (202) 693-0406 (this is not a toll-free number). Copies of this Final Rule may be obtained in alternative formats (large print, Braille, audio tape or disc), upon request, by calling (202) 693-0675 (this is not a toll-free number). TTY/TDD callers may dial toll-free 1-877-889-5627 to obtain information or request materials in alternative formats.

Questions of interpretation and/or enforcement of the agency's regulations may be directed to the nearest Wage and Hour Division (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 the WHD's website for a nationwide listing of WHD district and area offices at http://www.dol.gov/whd/america2.htm.

SUPPLEMENTARY INFORMATION:

I. Executive Order 13706 Requirements and Background

On September 7, 2015, President Barack Obama signed Executive Order 13706, Establishing Paid Sick Leave for Federal Contractors (the Executive Order or the Order). 80 FR 54697.

Section 1 of Executive Order 13706 explains that the Order seeks to increase efficiency and cost savings in the work performed by parties that contract with the Federal Government by ensuring that employees on those contracts can earn up to 7 days or more of paid sick leave annually, including paid leave allowing for family care. 80 FR 54697. The Order states that providing access to paid sick leave will improve the health and performance of employees of Federal contractors and bring benefits packages at Federal contractors in line with model employers, ensuring that they remain competitive employers in the search for dedicated and talented employees. 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 the Executive Order establishes paid sick leave for Federal contractors and subcontractors. 80 FR 54697. Section 2(a) provides that executive departments and agencies (agencies) shall, to the extent permitted by law, ensure that new contracts, contract-like instruments, and solicitations (collectively referred to as "contracts"), as described in section 6 of the Order, include a clause,

which the contractor and any subcontractors shall incorporate into lower-tier subcontracts, specifying, as a condition of payment, that all employees, in the performance of the contract or any subcontract thereunder, shall earn not less than 1 hour of paid sick leave for every 30 hours worked. Id. Section 2(b) prohibits a contractor from limiting the total accrual of paid sick leave per calendar year, or at any point, at less than 56 hours. Id.

Section 2(c) explains that paid sick leave earned under the Order may be used by an employee for an absence resulting from: (i) physical or mental illness, injury, or medical condition; (ii) obtaining diagnosis, care, or preventive care from a health care provider; (iii) caring for a child, a parent, a spouse, a domestic partner, or any other individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship who has any of the conditions or needs for diagnosis, care, or preventive care described in (i) or (ii) or is otherwise in need of care; or (iv) domestic violence, sexual assault, or stalking, if the time absent from work is for the purposes described in (i) or (ii), to obtain additional counseling, to seek relocation, to seek assistance from a victim services organization, or take related legal action, including preparation for or participation in any related civil or criminal legal proceeding, or to assist an individual related to the employee as described in (iii) in engaging in any of these activities. 80 FR 54697.

Section 2(d) provides that paid sick leave shall carry over from one year to the next and shall be reinstated for employees rehired by a covered contractor within 12 months after a job separation. Id. Under section 2(e), the use of paid sick leave cannot be made contingent on the requesting employee finding a replacement to cover any work time to be missed. 80 FR 54698. Section 2(f) provides that the paid sick leave required by the Order is in addition to a contractor's obligations under the Service Contract Act and Davis-Bacon Act, and contractors may not

receive credit toward their prevailing wage or fringe benefit obligations under those Acts for any paid sick leave provided in satisfaction of the Order's requirements. Id.

Section 2(g) provides that an employer's existing paid sick leave policy provided in addition to the fulfillment of Service Contract Act or Davis-Bacon Act obligations, if applicable, and made available to all covered employees will satisfy the requirements of the Executive Order if the amount of paid leave is sufficient to meet the requirements of section 2 and if it may be used for the same purposes and under the same conditions described in the Executive Order. Id.

Section 2(h) of the Order establishes that paid sick leave shall be provided upon the oral or written request of an employee that includes the expected duration of the leave, and is made at least 7 calendar days in advance where the need for the leave is foreseeable, and in other cases as soon as is practicable. Id.

Section 2(i) addresses when a contractor may require employees to provide certification or documentation regarding the use of leave. 80 FR 54698. It provides that a contractor may only require certification issued by a health care provider for paid sick leave used for the purposes listed in sections 2(c)(i), (c)(ii), or (c)(iii) for employee absences of 3 or more consecutive workdays, to be provided no later than 30 days from the first day of the leave. Id. It further provides that if 3 or more consecutive days of paid sick leave is used for the purposes listed in section 2(c)(iv), documentation may be required to be provided from an appropriate individual or organization with the minimum necessary information establishing a need for the employee to be absent from work. Id. The Executive Order notes that the contractor shall not disclose any verification information and shall maintain confidentiality about domestic abuse, sexual assault, or stalking, unless the employee consents or when disclosure is required by law. Id.

Section 2(j) states that nothing in the Order shall require a covered contractor to make a financial payment to an employee upon a separation from employment for unused accrued sick leave. 80 FR 54698. Section 2(j) further notes, however, that unused leave is subject to reinstatement as prescribed in section 2(d). Id.

Section 2(k) prohibits a covered contractor from interfering with or in any other manner discriminating against an employee for taking, or attempting to take, paid sick leave as provided for under the Order, or in any manner asserting, or assisting any other employee in asserting, any right or claim related to the Order. Id.

Section 2(l) states that nothing in the Order shall excuse noncompliance with or supersede any applicable Federal or State law, any applicable law or municipal ordinance, or a collective bargaining agreement requiring greater paid sick leave or leave rights than those established under the Order. Id.

Section 3(a) of the Executive Order provides that the Secretary of Labor (Secretary) shall issue such regulations by September 30, 2016, as are deemed necessary and appropriate to carry out the Order, to the extent permitted by law and consistent with the requirements of 40 U.S.C. 121, including providing exclusions from the requirements set forth in the Order where appropriate; defining terms used in the Order; and requiring contractors to make, keep, and preserve such employee records as the Secretary deems necessary and appropriate for the enforcement of the provisions of the Order or the regulations thereunder. 80 FR 54698. 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 issue regulations in the Federal Acquisition Regulation (FAR) to provide for inclusion in Federal procurement

solicitations and contracts subject to the Executive Order the contract clause described in section 2(a) of the Order. Id.

Additionally, section 3(b) states that within 60 days of the Secretary issuing regulations pursuant to the Order, agencies shall take steps, to the extent permitted by law, to exercise any applicable authority to ensure that contracts or contract-like instruments 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 after January 1, 2017, consistent with the effective date of such agency action, comply with the requirements set forth in section 2 of the Order. 80 FR 54699.

Section 3(c) specifies that any regulations issued pursuant to section 3 of the Order should, to the extent practicable and consistent with section 7 of the Order, incorporate existing definitions, procedures, remedies, and enforcement processes under the Fair Labor Standards Act, 29 U.S.C. 201 et seq. (FLSA); the McNamara-O'Hara Service Contract Act, 41 U.S.C. 6701 et seq. (SCA); the Davis-Bacon Act, 40 U.S.C. 3141 et seq. (DBA); the Family and Medical Leave Act, 29 U.S.C. 2601 et seq. (FMLA); the Violence Against Women Act of 1994, 42 U.S.C. 13925 et seq. (VAWA); and Executive Order 13658, Establishing a Minimum Wage for Contractors, 79 FR 9851 (Feb. 20, 2014) (Executive Order 13658 or Minimum Wage Executive Order). Id.

Section 4(a) of the Executive Order grants authority to the Secretary to investigate potential violations of and obtain compliance with the Order, including the prohibitions on interference and discrimination in section 2(k) of the Order. 80 FR 54699. Section 4(b) further explains that the Executive Order creates no rights under the Contract Disputes Act, and disputes regarding whether a contractor has provided employees with paid sick leave prescribed by the

Order, to the extent permitted by law, shall be disposed of only as provided by the Secretary in regulations issued pursuant to the Order. Id.

Section 5 of the Executive Order establishes that if any provision of the Order, or applying such provision to any person or circumstance, is held to be invalid, the remainder of the Order and the application of the provisions of such to any person or circumstances shall not be affected thereby. Id.

Section 6(a) of the Executive Order provides that nothing in the Order shall be construed to impair or otherwise affect (i) the authority granted by law to an executive department, agency, or the head thereof; or (ii) the functions of the Director of the Office of Management and Budget (OMB) relating to budgetary, administrative, or legislative proposals. 80 FR 54699. Section 6(b) states that the Order is to be implemented consistent with applicable law and subject to the availability of appropriations. Id. Section 6(c) 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.

Section 6(d) of the Executive Order establishes that the Order shall apply only to a new contract or contract-like instrument, as defined by the Secretary in the regulations issued pursuant to section 3(a) of the Order, if: (i) (A) it is a procurement contract for services or construction; (B) it is a contract or contract-like instrument for services covered by the Service Contract Act; (C) it is a contract or contract-like instrument 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 or contract-like instrument 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 employees under such contract or contract-like instrument are governed by the DBA, SCA, or FLSA, including employees who qualify for an exemption from the FLSA's minimum wage and overtime provisions. 80 FR 54699.

Section 6(e) states that, for contracts or contract-like instruments covered by the SCA or DBA, the Order shall apply only to contracts or contract-like instruments at the thresholds specified in those statutes. 80 FR 54699-700. Additionally, Section 6(e) provides that for procurement contracts in which employees' wages are governed by the FLSA, the Order shall apply only to contracts or contract-like instruments 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 3 of the Order. 80 FR 54700.

Section 6(f) specifies that the Order shall not apply to grants; contracts and agreements with and grants to Indian Tribes under the Indian Self-Determination and Education Assistance Act (Public Law 93–638), as amended; or any contracts or contract-like instruments expressly excluded by the regulations issued pursuant to section 3(a) of the Order. Id. Section 6(g) strongly encourages independent agencies to comply with the Order's requirements. Id.

Section 7(a) of the Executive Order provides that the Order is effective immediately and shall apply to covered contracts where the solicitation for such contract has been issued, or the contract has been awarded outside the solicitation process, on or after: (i) January 1, 2017, consistent with the effective date for the action taken by the FARC pursuant to section 3(a) of the Order; or (ii) January 1, 2017, for contracts where an agency action is taken pursuant to section 3(b) of the Order, consistent with the effective date for such action. 80 FR 54700. Section 7(b) specifies that the Order shall not apply to contracts or contract-like instruments that are awarded,

or entered into pursuant to solicitations issued, on or before the effective date for the relevant action taken pursuant to section 3 of the Order. Id.

II. Discussion of Final Rule

A. Legal Authority

The President issued Executive Order 13706 pursuant to his authority under "the Constitution and the laws of the United States of America," expressly including 40 U.S.C. 121, a provision of the Federal Property and Administrative Services Act (Procurement Act). 80 FR 54697. 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 13706 delegates to the Secretary the authority to issue regulations "deemed necessary and appropriate to carry out this order." 80 FR 54698. The Secretary has delegated his authority to promulgate these regulations to the Administrator of the WHD. Secretary's Order 01-2014 (Dec. 19, 2014), 79 FR 77527 (published Dec. 24, 2014).

B. Comments Received

On February 25, 2016, the Department published a Notice of Proposed Rulemaking (NPRM) in the Federal Register, inviting public comments on a proposal to implement the provisions of Executive Order 13706, which were to be submitted by March 28, 2016. See 81 FR 9592. On March 14, 2016, the Department extended the period for submitting written comments until April 12, 2016. See 81 FR 13306.

More than 35,000 individuals and entities commented on the Department's NPRM. Comments were received from a variety of interested stakeholders, such as labor organizations; contractors and contractor associations; worker advocates; advocacy groups focused on issues

affecting women, children, seniors, and the LGBT community; Members of Congress; local government agencies; small businesses; and workers. The vast majority of comments received came from individuals who submitted materially identical comments through interested organizations. For example, 9,025 individuals submitted essentially identical comments in support of, or joined, a comment submitted by the National Partnership for Women & Families (National Partnership) in favor of the rule, and Organizing for Action submitted a comment in support of the rule signed by 20,853 individuals.

The Department received many comments, such as those submitted by the Center for American Progress (CAP), Jobs With Justice, the Service Employees International Union (SEIU), the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), the National Women's Law Center (NWLC), A Better Balance, North America's Building Trades Unions (Building Trades), the National Employment Law Project (NELP), Pride at Work, The Leadership Conference on Civil and Human Rights, Lambda Legal, Demos, the Center for Law and Social Policy (CLASP), and 73 U.S. Senators and Representatives expressing support for establishing paid sick leave for employees of Federal contractors. For instance, the AFL-CIO agreed with the Order's policy rationale that providing access to paid sick leave improves the health and performance of Federal contractor employees, and the Leadership Conference on Civil and Human Rights wrote that providing paid sick leave means fewer employees will be forced to make difficult choices between their jobs and their health or the health of their families.

The Department also received submissions from a number of commenters, including the U.S. Chamber of Commerce and the International Franchise Association (Chamber/IFA), Associated General Contractors of America (AGC), the Professional Services Council (PSC), the Equal Employment Advisory Council (EEAC), and Associated Builders and Contractors, Inc.

(ABC), expressing opposition to the Order, many describing its requirements as burdensome for contractors. Some of these commenters also questioned the President's authority to issue the Order, which is a subject outside the purview of this rulemaking.

Many commenters expressed reactions to, offered suggestions regarding, or posed questions about specific provisions in the proposed regulations. The Department will address such comments in the section-by-section analysis of the Final Rule below.

C. Effective Date

The Department received comments requesting that the effective date of this Final Rule be delayed. AGC requested that the Final Rule apply only to contracts resulting from solicitations issued no earlier than one year after the date of the rule's publication in the Federal Register; the American Benefits Council asked for a "grace period" of 1 year before contractors were responsible for compliance with the Order; and TrueBlue, Inc. asked that the rule's effective date be 1 year after its publication. The General Contractors Association of Hawaii, Master Sheet Metal, Inc., and Alan Shintani, Inc. also requested a delay in the effective date beyond January 1, 2017. Because the Order itself specifically designates a date as of which its requirements apply to covered contracts, the Department does not believe it is appropriate to generally delay its effective date. (A specific, temporary exception from the Order's requirements for employees performing work subject to the terms of a collective bargaining agreement is discussed in the section of this preamble addressing § 13.4.) As such, this Final Rule is effective as indicated in the Dates section above, and shall apply to covered contracts where the solicitation for such contract has been issued, or the contract has been awarded outside the solicitation process, on or after January 1, 2017.

D. Discussion of the Final Rule

After considering all timely and relevant comments received in response to the February 25, 2016 NPRM, the Department is issuing this Final Rule to implement the provisions of Executive Order 13706. The Final Rule, which amends Title 29 of the Code of Federal Regulations (CFR) by adding part 13, establishes standards and procedures for implementing and enforcing Executive Order 13706. Subpart A of part 13 addresses general matters, including the purpose and scope of the rule, sets forth definitions of terms used in part 13, and describes the types of contracts and employees covered by the Order and part 13 and excluded from such coverage. It describes the paid sick leave requirements for contractors established by the Executive Order, including rules and restrictions regarding the accrual and use of such leave. It also prohibits interference with the accrual or use of paid sick leave provided pursuant to the Executive Order or part 13 and discrimination for the exercise of rights under the Executive Order or part 13, and it addresses failure to comply with the recordkeeping requirements of part 13. Finally, subpart A includes a prohibition against waiver of rights and a new provision regarding multiemployer plans and other plans, funds, or programs to provide paid sick leave.

Subpart B establishes the obligations of the Federal Government (specifically, contracting agencies and the Department) under the Order, and subpart C establishes the obligations of contractors under the Order, including recordkeeping requirements. Subparts D and E specify standards and procedures related to alleged violations of the Order and part 13, including complaint intake, investigations, remedies, and administrative enforcement proceedings. Appendix A contains a contract clause to implement Executive Order 13706.

The following section-by-section discussion of this Final Rule presents the contents of each section in more detail, summarizes and responds to comments received about specific

provisions, and describes the Final Rule as adopted, including by noting and explaining modifications from the proposed rule.

Subpart A – General

Subpart A of part 13 summarizes the purpose of the rule, defines terms used in the rule, describes the types of contracts and employees covered by and excluded from the rule, and sets forth rules and restrictions regarding the accrual and use of paid sick leave. Subpart A also prohibits interference with the accrual or use of the paid sick leave required by, and discrimination for the exercise of rights under, the Executive Order or part 13, as well as violations of the recordkeeping requirements of part 13. Additionally, subpart A includes a prohibition against waiver of rights and a new provision regarding multiemployer plans and other plans, funds, or programs to provide paid sick leave.

Section 13.1 Purpose and Scope

Proposed § 13.1(a) explained that the purpose of the rule is to implement Executive Order 13706 and reiterated statements from the Order that the Federal Government's procurement interests in economy and efficiency are promoted when the Federal Government contracts with sources that provide paid sick leave to their employees. It explained that the Order states that providing access to paid sick leave will improve the productivity of employees by improving their health and performance and will bring benefits packages offered by Federal contractors in line with model employers, ensuring they remain competitive in the search for dedicated and talented employees. Proposed § 13.1(a) stated that it is for these reasons that the Executive Order concludes that the provision of paid sick leave under the Order will generate savings and quality improvements in the work performed by parties who contract with the Federal Government, thereby leading to improved economy and efficiency in Government

procurement. 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. The Department did not receive comments regarding § 13.1(a) in particular, and, as noted above, comments questioning the President's authority to issue Executive Order 13706 are outside of the scope of this rulemaking. This provision is therefore adopted as proposed.

Proposed § 13.1(b) set forth the general position of the Federal Government that providing access to paid sick leave on Federal contracts will increase efficiency and cost savings for the Federal Government, and it explained the general requirement established in Executive Order 13706 that new contracts with the Federal Government include a clause, which the contractor and any subcontractors shall incorporate into lower-tier subcontracts, requiring, as a condition of payment, that the contractor and any subcontractors provide paid sick leave to employees in the amount of not less than 1 hour of paid sick leave for every 30 hours worked on or in connection with covered contracts. The final sentence of proposed § 13.1(b) also specified that nothing in Executive Order 13706 or part 13 would excuse noncompliance with or supersede any applicable Federal or State law, any applicable law or municipal ordinance, or a collective bargaining agreement (CBA) requiring greater paid sick leave or leave rights than those established under the Order or part 13. The Department did not receive comments regarding § 13.1(b) and adopts the provision largely as proposed, except for one change that has no substantive effect: deletion of the final sentence, because identical language appears in § 13.5(f)(1).

Proposed § 13.1(c) outlined the scope of the proposed rule and provided that neither Executive Order 13706 nor part 13 created any rights under the Contract Disputes Act or created

any private right of action. As noted in the NPRM, the Department does not interpret the Executive Order as limiting existing rights under the Contract Disputes Act. Proposed § 13.1(c) also implemented the directive in section 4(b) of the Order that disputes regarding whether a contractor has provided paid sick leave as 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. The proposed provision specified, however, that nothing in the Order or part 13 was 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 proposed paragraph specified that neither the Order nor part 13 would preclude judicial review of final decisions by the Secretary in accordance with the Administrative Procedure Act, 5 U.S.C. 701 et seq. No commenters addressed this provision, and the Department adopts it as proposed.

Section 13.2 Definitions

Proposed § 13.2 defined terms for purposes of part 13. Section 3(c) of the Executive Order instructs that any regulations issued pursuant to the Order should "incorporate existing definitions" under the FLSA, SCA, DBA, FMLA, VAWA, and Executive Order 13658 "to the extent practicable and consistent with section 7 of this order." 80 FR 54699. Because of the similarities in language, structure, and intent of the Minimum Wage Executive Order and Executive Order 13706, many of the definitions provided in the proposed rule were identical to or based on definitions promulgated in the Minimum Wage Executive Order Final Rule, which in turn were largely based on the definitions of relevant terms set forth in the statutory text or implementing regulations of the FLSA, SCA, or DBA. In addition, some definitions were based on definitions published by the FARC in section 2.101 of the FAR, 48 CFR 2.101, and others were based on definitions set forth in the Department's regulations implementing Executive

Order 13495, Nondisplacement of Qualified Workers Under Service Contracts (Executive Order 13495 or Nondisplacement Executive Order), at 29 CFR 9.2. 79 FR 60637. Definitions in the proposed rule that were relevant because of provisions of Executive Order 13706 that do not appear in Executive Order 13658 were largely based on definitions set forth in the statutory text or implementing regulations of the FMLA or the VAWA, as well as regulations issued by the U.S. Office of Personnel Management (OPM) at 5 CFR part 630, subparts B and D, which govern the accrual and use of sick leave by employees of the Federal Government.

As explained in the NPRM, the definitions discussed below will govern the implementation and enforcement of Executive Order 13706. Nothing in this Final Rule is intended to alter the meaning of or to be interpreted inconsistently with the definitions set forth in section 2.101 of the FAR for purposes of that regulation.

The Department proposed to define accrual year to mean the 12-month period during which a contractor may limit an employee's accrual of paid sick leave to no less than 56 hours. No commenters suggested revising this definition, and it is adopted as proposed.

The Department proposed to define the term Administrative Review Board as the Administrative Review Board within the U.S. Department of Labor. The Department received no comments addressing this definition, and it is adopted as proposed.

The Department proposed to define the term Administrator to mean the Administrator of the Wage and Hour Division and to include any official of the Wage and Hour Division authorized to perform any of the functions of the Administrator under part 13. The Department received no comments regarding this definition and adopts it as proposed.

The Department proposed to define as soon as is practicable to mean as soon as both possible and practical, taking into account all of the facts and circumstances of the individual

case. This definition was derived from the definition of "as soon as practicable" in the FMLA regulations. 29 CFR 825.302(b). Although the Department received comments regarding the application of this term, as described in the discussion of § 13.5(d) below, the Department did not receive comments requesting changes to this definition and therefore implements it without modification.

The Department proposed to define certification issued by a health care provider as any type of written document created or signed by a health care provider (or by a representative of the health care provider) that contains information verifying the existence of the physical or mental illness, injury, medical condition, or need for diagnosis, care, or preventive care or other need for care referred to in proposed § 13.5(c)(1)(i), (ii), or (iii). The proposed definition allowed employees to provide as certification a greater range of documents than would suffice to demonstrate the existence of a serious health condition for purposes of the FMLA. See 29 CFR 825.305, 825.306. For example, under the proposal, a note from a hospital nurse stating that an employee needed surgery and would require at least 3 days to recover before returning to work would meet the definition, as would a note from an employee's parent's doctor stating that the parent needs daily assistance with tasks such as dressing and eating. EEAC commented that employees should be required to provide as much information to certify the use of paid sick leave as is necessary to certify the use of FMLA leave; on the other hand, the Center for WorkLife Law at the University of California, Hastings College of Law (Center for WorkLife Law) commented that the Department should require no specificity in the certification beyond the fact that a medical or health condition exists, because such a statement is sufficient to prevent employee abuse of leave and would avoid inviting the contractor to inappropriately evaluate whether a particular condition justifies the use of paid sick leave. The Department declines to

adopt either suggestion. With respect to EEAC's comment, the Department notes that the reasons for which an employee may use FMLA leave are significantly more limited than the permissible uses of paid sick leave under the Order and part 13, and it is therefore logical that the information required to justify the use of FMLA leave correspondingly reflects a higher threshold than is called for in using paid sick leave. But neither does the Department agree that a simple statement that an employee (or an employee's family member) has a medical or health issue would constitute the type of certification contemplated in the Executive Order. As the examples above indicate, the Department believes that great specificity regarding the medical or health issue is not required; a health care provider's note referring to surgery need not explain what condition the surgery treated or the specifics of the procedure, and a note from a doctor regarding a physical or mental condition (such as a broken leg or dementia) that causes a need for caretaking need not provide specific details about the parent's condition or the specific tasks with which assistance is required.

In the discussion of this definition in the NPRM, the Department noted that a contractor could not require that an employee or the individual for whom the employee is caring have seen the health care provider in person in order to accept the certification. The Department did not receive comments regarding this interpretation. For purposes of clarity, it has included language in the final regulatory text making the point that the health care provider (or representative) need not have seen the employee or individual in person in order to create a valid certification.

In the NPRM, the Department proposed to define child to mean (1) a biological, adopted, step, or foster son or daughter of the employee; (2) a person who is a legal ward or was a legal ward of the employee when that individual was a minor or required a legal guardian; (3) a person for whom the employee stands in loco parentis or stood in loco parentis when that individual was

a minor or required someone to stand in loco parentis; or (4) a child, as described in paragraphs (1) through (3) of the definition, of an employee's spouse or domestic partner. The NPRM explained that this definition was adopted from the definition of "son or daughter" in the OPM regulations governing leave for Federal employees. 5 CFR 630.201(b). The Department noted that the proposed definition was deliberately broader than the definition of "son or daughter" in the FMLA, which includes only minor children or adult children "incapable of self-care because of a mental or physical disability." 29 CFR 825.102. As the Department explained in the NPRM, the terms of the Executive Order make clear that employees are to be permitted to use paid sick leave for a broader range of purposes than those for which they can use FMLA leave, and one such more expansive use is to care for an employee's child of any age.

EEAC commented that the Department should use as its definition of "child" the definition of "son or daughter" from the FMLA, asserting that an employee should not be able to use paid sick leave to care for adult children who are not incapable of self-care or the child of a spouse or domestic partner who is not also the employee's child. A comment from scholars affiliated with the Williams Institute at the UCLA School of Law, however, specifically supported the definition's inclusion of a child who is the employee's spouse or domestic partner's son or daughter but not legally recognized as the employee's child. Because the Department interprets the list of family members for whom an employee may use paid sick leave to care in section 2(c)(iii) of the Order as being deliberately broad and inclusive, see 80 FR 54697 (permitting the use of paid sick leave to care for "a child, a parent, a spouse, a domestic partner, or any other individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship")—and in particular because the list so plainly deviates from the more limited list in the FMLA, see 29 U.S.C. 2612(a)(1)(C) (permitting

the use of FMLA leave "to care for the spouse, or a son, daughter, or parent, of the employee")—the Department adopts the inclusive definition of child as proposed.

The Department proposed a definition of concessions contract or contract for concessions identical to the definition of those terms in the Minimum Wage Executive Order Final Rule. See 79 FR 60722 (codified at 29 CFR 10.2). Specifically, the Department proposed to define the term as a contract under which the Federal Government grants a right to use Federal property, including land or facilities, for furnishing services, and included as examples of such contracts those the principal purpose of which is to furnish food, lodging, automobile fuel, souvenirs, newspaper stands, and/or recreational equipment. The Department noted that the proposed definition was not limited based on the beneficiary of the services but rather that it encompassed contracts regardless of whether they are of direct benefit to the Federal Government, its property, its civilian or military personnel, or the general public. See 29 CFR 4.133; see also 79 FR 60638. The NPRM noted that the proposed definition included, but was not limited to, all concessions contracts excluded by Departmental regulations under the SCA at 29 CFR 4.133(b). See 79 FR 60638. No commenters addressed the definition of concessions contract or contract for concessions, and the Department adopts the definition as proposed.

The Department proposed to define contract and contract-like instrument collectively for purposes of the Executive Order in the same manner as it did in the Minimum Wage Executive Order implementing regulations. See 79 FR 60722 (codified at 29 CFR 10.2). Specifically, the NPRM defined a contract or contract-like instrument as an agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law. The proposed definition included, but was 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 included 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 was interpreted broadly to include, but not be limited to, any contract that may be consistent with the definition provided in the FAR or applicable Federal statutes. The proposed definition further included, but was not limited to, any contract that may be covered under any Federal procurement statute. The Department specifically noted in the proposed definition that contracts may be the result of competitive bidding or awarded to a single source under applicable authority to do so. The proposed definition also explained that, in addition to bilateral instruments, contracts included, but were not limited to, awards and notices of awards; job orders or task letters issued under basic ordering agreements; letter contracts; orders, such as purchase orders, under which the contract becomes effective by written acceptance or performance; and bilateral contract modifications. The proposed definition also specified that the term contract included contracts covered by the SCA, contracts covered by the DBA, concessions contracts not subject to the SCA, and contracts in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public. As explained in the Minimum Wage Executive Order rulemaking, the proposed definition of contract was 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 4.110-4.111 and 4.130. See 79 FR 60638-41.

The Department's proposal deliberately adopted a broad definition of this term, but noted that the mere fact that a legal instrument constitutes a contract would not mean that such contract is subject to the Executive Order. In order for a contract to be covered by the Executive Order and part 13, the contract must (1) qualify as a contract or contract-like instrument; (2) fall within one of the specifically enumerated types of contracts set forth in section 6(d)(i) of the Order and § 13.3; and (3) be a new contract. Therefore, the NPRM explained that, for example, although a cooperative agreement was a contract under the Department's proposed definition, a cooperative agreement would not be covered by the Executive Order and part 13 unless it was a new contract and was subject to the SCA or DBA, was a concessions contract, or was entered into in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public.

The Department did not receive any comments requesting a change to this proposed definition, and it therefore adopts it as proposed. One commenter, Bodman PLC, asked for clarification of whether, based on the broad definition of contract, a financial institution that holds deposits insured by the Federal Deposit Insurance Corporation or the National Credit Union Administration would be covered by the Order and part 13. A contract with the Federal Government is not covered by the Order and this rulemaking unless it is one of the types of covered contracts named in the Order and further described in § 13.3 and the accompanying explanation in this preamble. Unless the types of agreements to which the commenter referred are procurement contracts for construction covered by the DBA, contracts for services covered by the SCA, contracts for concessions, or contracts in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public, the Order does not cover them. Furthermore, as explained below, with respect to the fourth

category of covered contracts, the Department does not interpret "Federal property" to encompass money, and therefore purely financial transactions with the Federal Government are not covered by the Order or part 13.

The Department proposed to define contracting officer based on the definition used in 29 CFR 10.2, issued pursuant to the Minimum Wage Executive Order, which in turn was adopted from the definition in section 2.101 of the FAR. See 79 FR 60641 (citing 48 CFR 2.101). As proposed, the term meant a representative of an executive department or agency with the authority to enter into, administer, and/or terminate contracts and make related determinations and findings. The term also included certain authorized representatives of the contracting officer acting within the limits of their authority as delegated by the contracting officer. The Department received no comments regarding this definition and adopts it as proposed.

The Department proposed to define contractor to mean any individual or other legal entity that is awarded a Federal Government contract or a subcontract under a Federal Government contract. The proposed definition referred to both a prime contractor and all of its first- or lower-tier subcontractors on a contract with the Federal Government. It also included lessors and lessees. The Department noted that the term employer was used interchangeably with the terms contractor and subcontractor in part 13. The proposed definition also explained that 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 13706. The proposed definition, which was derived from the definition adopted in the Minimum Wage Executive Order rulemaking, see 79 FR 60722 (codified at 29 CFR 10.2), incorporated relevant aspects of the definitions of the term contractor in section 9.403 of the FAR, see 48 CFR 9.403; the SCA regulations at 29 CFR 4.1a(f); and the Department's

regulations implementing the Nondisplacement Executive Order at 29 CFR 9.2. The proposed definition differed from the Minimum Wage Executive Order only in that it did not refer to employers of employees performing work on covered Federal contracts whose wages are computed pursuant to special certificates issued under 29 U.S.C. 214(c). The Department noted in the NPRM that although such employers would be contractors for purposes of Executive Order 13706, such a reference was not called for in the proposed definition because, unlike the Minimum Wage Executive Order, this Order does not contain any explicit reference to employees whose wages are computed pursuant to section 14(c) certificates. No commenters addressed this definition, and it is adopted as proposed.

The Department proposed 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 definition is adopted as proposed.

The Department proposed to define the term domestic partner to mean an adult in a committed relationship with another adult. The proposed definition included both same-sex and opposite-sex relationships. The Department proposed to further explain that a committed relationship was one in which the employee and the domestic partner of the employee are each other's sole domestic partner (and are not married to or domestic partners with anyone else) and share responsibility for a significant measure of each other's common welfare and financial obligations. The proposed definition included, but was not limited to, any relationship between two individuals of the same or opposite sex that is granted legal recognition by a State or by the District of Columbia as a marriage or analogous relationship (including, but not limited to, a civil union). The proposed definition was adopted from the definitions of "domestic partner" and

"committed relationship" in the OPM regulations regarding the use of sick leave by Federal employees. 5 CFR 630.201(b).

The Department received a number of comments, including from Pride at Work, the Los Angeles LGBT Center, CAP, and Lambda Legal, largely supporting this proposed definition but also asking that it be clarified. Specifically, these organizations wrote that they have "a concern regarding the requirement that domestic partners share responsibility for a significant measure of each other's financial obligations" because for many couples, only one individual earns an income that supports both partners, and "the regulations should be clear that such couples are not excluded from the definition of domestic partners or committed relationship solely because only one partner earns income that they both depend upon." The Department did not intend its proposed definition to imply that only if both members of a couple earn an income would that couple be considered domestic partners. Rather, the language regarding sharing responsibility for financial obligations could refer to a variety of circumstances, such as but not limited to one member of the couple paying for the housing and other necessities of the other, the couple having joint bank accounts, the couple sharing significant expenses, and/or the couple being jointly responsible for financial obligations such as mortgage or other loan payments. In other words, rather than calling for any particular financial arrangement, the financial interdependence clause of the definition is meant to indicate that the couple's financial situation reflects that the relationship is a committed one, rather than, for example, a casual roommate situation. See Final Rule, Absence and Leave; Definitions of Family Member, Immediate Relative, and Related Terms, 75 FR 33491, 33493-94 (June 14, 2010) (OPM's discussion of the term "committed relationship," noting that its definition "would preclude casual roommates from qualifying as each other's domestic partner"). Because the Department's language is consistent with OPM's

and does not have the meaning about which the commenters were concerned, the Department adopts the definition of domestic partner as proposed.

The Department proposed to define domestic violence as (1) felony or misdemeanor crimes of violence (including threats or attempts) committed: (i) by a current or former spouse, domestic partner, or intimate partner of the victim; (ii) by a person with whom the victim shares a child in common; (iii) by a person who is cohabitating with or has cohabitated with the victim as a spouse, domestic partner, or intimate partner; (iv) by a person similarly situated to a spouse of the victim under domestic or family violence laws of the jurisdiction in which the victim resides or the events occurred; or (v) by any other adult person against a victim who is protected from that person's acts under the domestic or family violence laws of the jurisdiction in which the victim resides or the events occurred. Under the proposed definition, domestic violence also included (2) any crime of violence considered to be an act of domestic violence according to State law. This definition was derived from the VAWA, 42 U.S.C. 13925(a)(8), and its implementing regulations, 28 CFR 90.2(a). In its comment, the Women's Law Project expressed concern that this definition only refers to acts that are considered to be domestic violence for purposes of criminal laws rather than also including acts that constitute domestic violence for purposes of civil laws, in particular those allowing for civil protection orders. Because the Department did not intend for this definition to be narrow or exclude any subset of victims of acts that a State considers to constitute domestic violence, it is adopting the definition with the revisions suggested by the Women's Law Project. Specifically, in the fourth and fifth lines of the first part of the definition, the Department is inserting "civil or criminal" before "domestic and family violence laws," and in the second part of the definition, the Department is replacing "according to State law" with "under the civil or criminal domestic or family violence laws of

the jurisdiction in which the victim resides or the events occurred," the same phrase used in the first part of the definition.

The Department proposed to define employee similarly to the way the term worker was used in the Minimum Wage Executive Order rulemaking, see 79 FR 60723, but with some differences reflecting the differences in the text of that Executive Order and Executive Order 13706. As proposed, the term meant 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 SCA, DBA, or FLSA, including employees who qualify for an exemption from the FLSA's minimum wage and overtime provisions, regardless of the contractual relationship alleged to exist between the individual and the employer. Furthermore, the term employee included any person performing work 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.

Much of this proposed definition came directly from section 6(d)(ii) of the Executive Order, and much of it was identical to the definition of worker in the Minimum Wage Executive Order regulations. The most significant difference between the proposed definition of employee and the Minimum Wage Executive Order rulemaking's definition of worker was the inclusion of employees who qualify for an exemption from the FLSA's minimum wage and overtime provisions, such as employees employed in a bona fide executive, administrative, or professional capacity, as those terms are defined in 29 CFR part 541. Comments regarding the application of the Order and part 13 to such employees are addressed below, in the discussion of coverage of

employees under § 13.3; for the reasons explained there, the Department adopts the relevant portion of this definition as proposed.

The proposed definition also emphasized, as had been explained in the Minimum Wage Executive Order rulemaking, the well-established principle under the DBA, SCA, and FLSA that employee 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 79 FR 60644 (citing 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)). 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 an employee is covered by the Executive Order.

EEAC and AGC remarked on the breadth of the proposed rule's statements about coverage of independent contractors, and AGC, Master Sheet Metal, Inc., General Contractors Association of Hawaii, and TrueBlue, Inc. specifically requested clarification that the rule does not apply to independent contractor owner-operators or sole proprietors to the extent they are not subject to SCA or DBA prevailing wage requirements. Although the Department reiterates its statement that allegations of a contractual relationship or the existence of a contract are not determinative of whether a worker is an employee or an independent contractor, it clarifies its statements about the effect of a worker being properly categorized as an independent contractor here. Whether a worker is an "employee" or an "independent contractor" as those terms are often used in other contexts is not material to whether that worker is a service employee for purposes of the SCA or a laborer or mechanic for purposes of the DBA. See, e.g., 29 CFR 4.155 (SCA); 29 CFR 5.5(a)(1)(i) (DBA); In re Igwe, ARB Case No. 07-120, 2009 WL 4324725, at

*3-4 (Nov. 25, 2009) (rejecting an argument that "the individuals working on the four contracts were not entitled to SCA prevailing wages and fringe benefits because they were independent contractors, not employees" because "the relevant inquiry is whether the persons working on the contract come within the SCA definition of 'service employee'" and explaining "the irrelevance of 'contractual relationship' to that definition"). Because even workers who are independent contractors may be covered by the SCA and DBA, those workers, if so covered, are employees for purposes of the Order and part 13. A worker who is not a service employee for purposes of the SCA or a laborer or mechanic for purposes of the DBA and who is not an employee under the FLSA, however, is not covered by the Order or part 13. (The Department notes that an employee who qualifies for an exemption from the FLSA's minimum wage and overtime requirements is still an employee rather than an independent contractor; as explained elsewhere, employees who qualify for such exemptions are covered by the Order and part 13.) More specifically, owner-operators (such as owner-operator truck drivers) and sole proprietors are not covered by the Executive Order and part 13 to the extent they are not entitled to prevailing wages under the DBA or SCA and are properly classified as independent contractors whose wages are not governed by the FLSA. The Department's guidance regarding the classification of workers as independent contractors under the FLSA is available on the WHD Web site, http://www.dol.gov/whd.

The proposed definition's inclusion of any person performing work 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, was similarly in keeping with the Minimum Wage Executive Order's adoption

of those provisions from the SCA and DBA regulations. See 79 FR 60644 (citing 29 CFR 4.6(p) (SCA); 29 CFR 5.2(n) (DBA)). The Department received no comments regarding this portion of the proposed definition and has adopted it as proposed.

The Department noted in the NPRM that, because unlike the Minimum Wage Executive Order, Executive Order 13706 makes no reference to individuals performing work on or in connection with a covered contract whose wages are calculated pursuant to special certificates issued under 29 U.S.C. 214(c), that category of employees was not explicitly mentioned in the proposed definition. It further explained that such individuals would nevertheless plainly fall within the definition of employee for purposes of this rulemaking because their wages are governed by the FLSA. The AFL-CIO and SEIU supported the Department's inclusion of such workers, and the Department makes no change to this implication of the definition.

Finally, the Department has added language to this definition explaining the meaning of working "on or in connection with" a covered contract. Specifically, the definition now provides that an employee performs "on" a contract if the employee directly performs the specific services called for by the contract and that an employee performs "in connection with" a contract if the employee's work activities are necessary to the performance of a contract but are not the specific services called for by the contract. As noted in the more detailed discussion below of employee coverage as provided for in § 13.3, these concepts were explained in the NPRM but were not included in the regulatory text itself.

The Department proposed to define executive departments and agencies for purposes of this rulemaking by adopting the definition of that term used in the Minimum Wage Executive Order rulemaking, which was derived from the definition of executive agency provided in section 2.101 of the FAR, 48 CFR 2.101. 79 FR 60642, 60722 (codified at 29 CFR 10.2). The

Department therefore proposed to interpret 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 did not interpret this definition as including the District of Columbia or any Territory or possession of the United States.

Bredhoff & Kaiser, PLLC submitted a comment on behalf of the National Postal Mail Handlers Union urging the Department to ensure that the Executive Order and part 13 apply to covered contracts with the U.S. Postal Service. Although the proposed rule did not identify any particular entities that would or would not have qualified as executive departments and agencies, its definition of that term referred to, among other types of entities, independent establishments within the meaning of 5 U.S.C. 104(1). That statutory provision expressly excludes the U.S. Postal Service.

The Department agrees with the commenter that the Executive Order, which contains no indication that the U.S. Postal Service is not among the governmental entities the contracts of which may be covered, is best interpreted to apply to covered contracts with the U.S. Postal Service. The Minimum Wage Executive Order rulemaking did not address the implications of its adoption of the FAR's definition of executive departments and agencies, including its reference to independent establishments within the meaning of 5 U.S.C. 104(1) generally or coverage of the U.S. Postal Service specifically; there is no indication in the rulemaking that any commenter asked that the Department expand coverage to the U.S. Postal Service or that doing so would have had practical effect. The terms of Executive Order 13706 (as well as Executive Order 13658) indicate that contracts with the Federal Government covered by the SCA are

covered by the Order, and it is clear that under the SCA, service contracts with the Federal Government covered by that Act include contracts with the U.S. Postal Service unless they are expressly excluded. See, e.g., 41 U.S.C. 6702(b)(7) ("This chapter does not apply to … a contract with the United States Postal Service, the principal purpose of which is the operation of postal contract stations."). It is therefore appropriate to infer that the Executive Order was intended to apply to covered contracts with the U.S. Postal Service. Furthermore, the purpose of the Executive Order—ensuring that employees working on or in connection with covered contracts have access to paid sick leave—is best served by modifying the proposed definition to make clear that coverage extends to covered contracts with the U.S. Postal Service. Accordingly, the Department has expanded the definition of executive departments and agencies to refer to independent establishments not only within the meaning of 5 U.S.C. 104(1), but also within the meaning of 39 U.S.C. 201, which establishes the U.S. Postal Service "as an independent establishment of the executive branch of the Government of the United States."

The Department proposed to define Executive Order 13495 or Nondisplacement Executive Order to mean Executive Order 13495 of January 30, 2009, Nondisplacement of Qualified Workers Under Service Contracts, 74 FR 6103 (Feb. 4, 2009), and its implementing regulations at 29 CFR part 9. This definition is adopted as proposed.

The Department proposed to define Executive Order 13658 or Minimum Wage Executive Order 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. This definition is adopted as proposed.

The Department proposed 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 as proposed.

The Department proposed to define Family and Medical Leave Act as the Family and Medical Leave Act of 1993, as amended, 29 U.S.C. 2601 et seq., and its implementing regulations. This definition is adopted as proposed.

The Department proposed to define family violence, a term used in the definition of domestic violence, to mean any act or threatened act of violence, including any forceful detention of an individual that results or threatens to result in physical injury and is committed by a person against another individual (including an elderly individual) to or with whom such person is related by blood, is or was related by marriage or is or was otherwise legally related, or is or was lawfully residing. Because the VAWA does not provide a definition of the term, this definition was adopted from the definition of "family violence" in the Family Violence Prevention and Services Act, 42 U.S.C. 10401. See 42 U.S.C. 10402(4). The Department did not receive any comments regarding this definition and therefore adopts it as proposed.

Proposed § 13.2 defined 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. The proposed definition was identical to that used in the regulations implementing the Minimum Wage Executive Order. 79 FR 60722 (codified at 29 CFR 10.2). That definition was based on the definition of Federal Government set forth in 29 CFR 9.2, but eliminated the term "procurement" from that definition because Executive Order 13658 applies—as does Executive Order 13706—to both procurement and non-procurement contracts. 79 FR 60642. Consistent with the SCA, the term Federal Government under the proposal

included nonappropriated fund instrumentalities under the jurisdiction of the Armed Forces or of other Federal agencies. See 29 CFR 4.107(a). The proposed definition provided that for purposes of Executive Order 13706 and part 13, Federal Government did not include the District of Columbia or any Territory or possession of the United States. As used in the Order and part 13, the term also did not include any independent regulatory agency within the meaning of 44 U.S.C. 3502(5) because such agencies are not required to comply with the Order or part 13.

Bredhoff & Kaiser's comment, discussed above with respect to the definition of executive departments and agencies, suggested that the Department adjust the definition of Federal Government to ensure that this rulemaking applies to covered contracts with the U.S. Postal Service. The Department believes that the definition of Federal Government is sufficiently broad that the expansion of the definition of executive departments and agencies to include the U.S. Postal Service fulfills the purpose of making clear that the Department interprets the Order and part 13 to apply to covered contracts with the U.S. Postal Service. The Department therefore adopts the definition as proposed.

The Department proposed to define health care provider as any practitioner who is licensed or certified under Federal or State law to provide the health-related service in question or any practitioner recognized by an employer or the employer's group health plan. The term included, but was not limited to, doctors of medicine or osteopathy, podiatrists, dentists, psychologists, optometrists, chiropractors, nurse practitioners, nurse-midwives, clinical social workers, physician assistants, physical therapists, and Christian Science Practitioners listed with the First Church of Christ, Scientist in Boston, Massachusetts. This definition was intended to be broad and inclusive, and the Department reiterates that the list is not exhaustive. For example, not only a nurse practitioner, but also a registered nurse or a licensed practical nurse, would fall

under this definition if an employee sought a service such a practitioner was licensed or certified to provide. The definition was derived from the definitions of health care provider in the FMLA regulations, 29 CFR 825.125, and OPM regulations, 5 CFR 630.201 and 5 CFR 630.1202.

EEAC was opposed to the breadth of this term, specifically suggesting that referring to "psychologists" instead of "clinical psychologists" and failing to limit "chiropractors" with the phrase "treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by X-ray to exist" was inappropriate. Because the types of ailments and treatments for which an employee may use paid sick leave is intended to be broad, the list of practitioners is illustrative rather than restricting the types of professionals who fall within the definition, and the definition is already limited to practitioners licensed or certified under Federal or State law or recognized by an employer or the employer's group health plan, the Department does not believe the suggested changes are appropriate. Accordingly, it adopts the definition as proposed.

The Department proposed to define the term independent agencies as any independent regulatory agency within the meaning of 44 U.S.C. 3502(5). Section 6(g) of the Executive Order states that "[i]ndependent agencies are strongly encouraged to comply with the requirements of this order." The Department's proposal interpreted this provision, as it interpreted an identical provision in the Minimum Wage Executive Order, to mean that independent agencies are not required to comply with this Executive Order. See 79 FR 9853; 79 FR 60643. The proposed definition was therefore based on other Executive Orders that similarly exempt independent regulatory agencies within the meaning of 44 U.S.C. 3502(5) from the definition of agency or include language requesting that they comply. See, e.g., Executive Order 13636, 78 FR 11739 (Feb. 12, 2013) (defining agency as any executive department, military department, Government corporation, Government-controlled operation, or other establishment in the executive branch of

the Government but excluding independent regulatory agencies as defined in 44 U.S.C. 3502(5)); Executive Order 13610, 77 FR 28469 (May 10, 2012) (same); Executive Order 12861, 58 FR 48255 (September 11, 1993) ("Sec. 4 Independent Agencies. All independent regulatory commissions and agencies are requested to comply with the provisions of this order."); Executive Order 12837, 58 FR 8205 (Feb. 10, 1993) ("Sec. 4. All independent regulatory commissions and agencies are requested to comply with the provisions of this order."). The Department received no comments regarding this definition and adopts it as proposed.

The Department proposed to include in § 13.2 a definition of individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship. The Department proposed to define the term to mean any person with whom the employee has a significant personal bond that is or is like a family relationship, regardless of biological or legal relationship. The NPRM noted that although this term is used in the OPM regulations, see 5 CFR 630.201 (defining "family member," for purposes of Federal employees' use of leave, to include the term), OPM has not created a regulatory definition of it; the Department's proposed definition was, however, derived from OPM's discussion of the term in OPM's 2010 Final Rule, 75 FR 33491. In particular, OPM explained that creating an exhaustive list of the relationships that meet the definition is not possible, but that OPM has "broadly interpreted the phrase to include such relationships as grandparent and grandchild, brother- and sister-in-law, fiancé and fiancée, cousin, aunt and uncle, other relatives not specified in [the list naming a spouse, child, parent, brother, or sister], and close friend, to the extent that the connection between the employee and the individual was significant enough to be regarded as having the closeness of a family relationship even though the individuals might not be related by blood or formally in law." 75 FR 33492.

The Department explained in the NPRM that it understood the term to be inclusive of non-nuclear family structures, noting that it could include, for example, an individual who was a foster child in the same home in which the employee was a foster child for several years and with whom the employee has maintained a sibling-like relationship, a friend of the family in whose home the employee lived while she was in high school and whom the employee therefore considers to be like a mother or aunt to her, or an elderly neighbor with whom the employee has regularly shared meals and to whom the employee has provided unpaid caregiving assistance for the past 5 years and whom the employee therefore considers to be like a grandfather to her.

In the NPRM, the Department sought comments regarding its proposed definition of this term, in particular regarding whether additional specificity was necessary. Numerous organizations—including but not limited to Lambda Legal, the National LGBTQ Task Force, Pride at Work, CAP, the Children's Alliance, the Family Equality Council, Equality Maine, Basic Rights Oregon, CLASP, Demos, A Better Balance, the Working Families Organization, Caring Across Generations, the Labor Project for Working Families in partnership with Family Values @ Work, and the Movement Advancement Project—strongly supported the proposed definition of this phrase. Many of these commenters noted that many Americans live in multigenerational households and LGBTQ Americans in particular often rely on "families of choice," meaning that any specific limitations inserted into the definition could defeat the purpose of using the broad term. They also wrote that a broad definition has been successfully in place with respect to Federal employees' sick leave for years, indicating that the proposed definition would not be difficult to implement or likely to be abused. The New York City (NYC) Department of Consumer Affairs wrote about its experience enforcing a local paid sick time law and the importance of capturing, for example, an employee's fiancé or aunt in the set of people

for whom the employee can take leave to care. The Main Street Alliance, a coalition of employers, wrote that using a broad definition alleviated the burden on contractors of determining whether an employee's relationship fit into some more limited set of relationships. Other commenters noted that the example included in the NPRM of the elderly neighbor was useful.

Other commenters, however, did not support the proposed definition. The American Benefits Council, Seyfarth Shaw LLP, the Chamber/IFA, and Society for Human Resource Management and the College and University Professional Association for Human Resources (SHRM/CUPA-HR), for example, asked that the Department narrow the definition. Some of these commenters wrote that the definition applies more broadly than is necessary to achieve the goals of the Executive Order. Others noted that State and local paid sick time laws do not apply as broadly or that they believed it would be difficult for contractors to verify whether a relationship of the type described exists. A few commenters proposed specific replacement definitions: the Independent Electrical Contractors, Inc. (IEC) asked that the Department interpret the Order to allow an employee to use paid sick leave to care only for individuals with whom the employee has a biological or legal relationship; Koga Engineering and Construction, Royal Contracting Company LTD, Master Sheet Metal, Inc., and the General Contractors Association of Hawaii asked that this category extend only to family members for whom an employee can take FMLA leave; EEAC asked that it extend only to a "person with whom the employee has a significant personal bond that is or is like that of a child, parent or spouse"; and Vigilant asked that the Department interpret the word "affinity" to mean only a relationship by marriage.

The Department carefully considered the comments received and is adopting this definition as proposed. The term has been used with respect to sick leave for Federal employees since 1994, see Final Rule, Absence and Leave; Sick Leave, 59 FR 62266, 62266-67, 62270-71 (codified at 5 CFR 630.201(b)(v)), and OPM has indicated that it has had and continues to have an expansive meaning, see 75 FR 33491-92. The Department agrees with commenters that these facts suggest that the term in the Executive Order is best interpreted to have the same meaning as the term in the OPM regulations and that OPM does not consider its use of the term to have proved unworkable. Furthermore, the Department will not depart from the plain meaning of the text, which clearly extends beyond marital relationships or those referenced in the FMLA and reflects a general intent to be broad and inclusive by adopting the specific, significantly narrower definitions some commenters suggested. The Department notes that the issue of contractor verification of employees' relationships is addressed below in the discussions of requests to use paid sick leave and certification or documentation of the need to use paid sick leave; because contractor inquiries into employees' private lives are deliberately limited, the Department does not expect such verification to be intensive or complicated.

The Department proposed to define intimate partner, a term used in the definition of domestic violence, to mean a person who is or has been in a social relationship of a romantic or intimate nature with the victim, where the existence of such a relationship shall be determined based on a consideration of the length of the relationship; the type of relationship; and the frequency of interaction between the persons involved in the relationship. This definition was derived from the definition of "dating partner" in the VAWA. See 42 U.S.C. 13925(a)(9). No commenter suggested any revisions to this definition, and the Department adopts it as proposed.

In the Final Rule, the Department has added a definition of multiemployer plan, because that term is used in the final regulations for reasons explained in the discussion of § 13.8. The term is defined to mean a plan to which more than one employer is required to contribute and which is maintained pursuant to one or more CBAs between one or more employee organizations and more than one employer. This definition is derived from, but not identical to, the definition of the term under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 et seq. See 29 U.S.C. 1002(37). Because of the differences between the ERISA definition and that used here, a plan could qualify as a multiemployer plan for purposes of part 13 even though it does not so qualify for purposes of ERISA.

The Department proposed that the term new contract have the same meaning as in the Minimum Wage Executive Order Final Rule, but with dates altered to reflect the timing contemplated in section 7 of Executive Order 13706. See 79 FR 60722 (codified at 29 CFR 10.2); 80 FR 54700. Under the proposed definition, a new contract was a contract that results from a solicitation issued on or after January 1, 2017, or a contract that is awarded outside the solicitation process on or after January 1, 2017. This term included both new contracts and replacements for expiring contracts. It did not apply to the unilateral exercise of a pre-negotiated option to renew an existing contract by the Federal Government. The proposal explained that for purposes of the Executive Order, a contract that is entered into prior to January 1, 2017 would constitute a new contract if, through bilateral negotiation, on or after January 1, 2017: (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, 2016 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. The Minimum Wage Executive Order rulemaking explained that this definition was derived from

section 8 of that Executive Order, 79 FR 9853, is consistent with the convention set forth in section 1.108(d) of the FAR, 48 CFR 1.108(d), and was developed in part in response to comments on the proposed definition of new contract that appeared in the Minimum Wage Executive Order NPRM. 79 FR 60643, 60646-49. No commenter suggested altering this definition, and the Department adopts it as proposed. Additional discussion of what constitutes a new contract appears in the text addressing § 13.3 below.

For purposes of the Executive Order and part 13, which use the terms in reference to domestic violence, sexual assault, or stalking, the Department proposed to define obtain additional counseling, seek relocation, seek assistance from a victim services organization, or take related legal action to mean to spend time arranging, preparing for, or executing acts related to addressing physical injuries or mental or emotional impacts resulting from being a victim of domestic violence, sexual assault, or stalking. Under the NPRM, such acts included finding and using services of a counselor or victim services organization (a term also defined in § 13.2) intended to assist a victim to respond to or prevent future incidents of domestic violence, sexual assault, or stalking; identifying and moving to a different residence to avoid being a victim of domestic violence, sexual assault, or stalking; or a victim's pursuing any related legal action (another term defined in § 13.2). The Department stated in the proposal that counseling could, but need not be, provided by a health care provider. The Department did not receive comments addressing this definition and adopts it as proposed.

The Department proposed to define obtaining diagnosis, care, or preventive care from a health care provider to mean receiving services from a health care provider, whether to identify, treat, or otherwise address an existing condition or to prevent potential conditions from arising. The Department interpreted this term broadly and provided the following non-exhaustive list of

examples: obtaining a prescription for antibiotics at a health clinic, attending an appointment with a psychologist, having an annual physical or gynecological exam, or receiving a teeth cleaning from a dentist's assistant. The proposed definition further noted that it included time spent traveling to and from the location at which such services are provided or recovering from receiving such services. The Center for the Study of Social Policy commented that the Department should state explicitly that this definition includes seeking treatment for drug or substance abuse. Under the definition as proposed and adopted, any treatment for drug, alcohol, or another addiction received from a practitioner who is a health care provider as defined in § 13.2 would be included in this definition. The Department adopts the definition as proposed.

The Department proposed to define the term Office of Administrative Law Judges to mean the Office of Administrative Law Judges, U.S. Department of Labor. The Department adopts this definition as proposed.

Proposed § 13.2 defined the term option by adopting the definition of that term used in the Minimum Wage Executive Order rulemaking, which in turn adopted the definition set forth in section 2.101 of the FAR, 48 CFR 2.101. 79 FR 60643, 60722 (codified at 29 CFR 10.2). Under the proposal, the term option meant 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. No commenters suggested changes to this definition, and it is adopted as proposed.

The Department proposed to define paid sick leave to mean compensated absence from employment that is required by Executive Order 13706 and part 13. In the NPRM and again in this Final Rule, the Department used and uses "paid sick leave" to refer to the leave required by the Order and part 13 and "paid sick time" to refer more generally to any compensated absence

from work for time used for purposes similar (although not necessarily identical) to the purposes described in the Order, including as required by State and local laws or as provided pursuant to contractors' existing policies or under CBAs. The Department received no comments regarding this definition and adopts it as proposed.

Proposed § 13.2 defined the term parent to mean (1) a biological, adoptive, step, or foster parent of the employee, or a person who was a foster parent of the employee when the employee was a minor; (2) a person who is the legal guardian of the employee or was the legal guardian of the employee when the employee was a minor or required a legal guardian; (3) a person who stands in loco parentis to the employee or stood in loco parentis to the employee when the employee was a minor or required someone to stand in loco parentis; or (4) a parent, as described in paragraphs (1) through (3) of the definition, of an employee's spouse or domestic partner. This definition was adopted from the OPM regulations regarding leave for Federal employees. 5 CFR 630.102(b). EEAC urged the Department to use the definition of parent provided in the FMLA in order not to include the parent of an employee's spouse or domestic partner. Because, as noted above, the Department interprets the Order's deliberate inclusion of family members beyond those for whom an employee could take FMLA leave to indicate a general intent to allow the use of leave to care for a broad set of family members, it is adopting the definition as proposed.

The Department proposed to define physical or mental illness, injury, or medical condition as any disease, sickness, disorder, or impairment of, or any trauma to, the body or mind. The Department explained in the NPRM that the Executive Order intended for this term to be understood broadly, to include any illness, injury, or medical condition, regardless of whether it requires attention from a health care provider or whether it would be a "serious health

condition" that qualifies for use of leave under the FMLA. See 29 U.S.C. 2611(11); 29 CFR 825.113. In the NPRM, the Department provided the following non-exclusive list of conditions included within the proposed definition: a common cold, ear infection, upset stomach, ulcer, flu, headache, migraine, sprained ankle, broken arm, or depressive episode. The Department did not receive comments addressing this definition and adopts it as proposed.

The Department proposed to define predecessor contract to mean a contract that precedes a successor contract. Because this definition was only included in the proposed rule in connection with the provision in § 13.5(b)(4) requiring reinstatement of paid sick leave by successor contractors, which for the reasons explained below does not appear in the Final Rule, the Department has removed this definition from § 13.2.

The proposed rule defined procurement contract for construction as that term was defined for purposes of the Minimum Wage Executive Order Final Rule, that is, to mean a 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. 79 FR 60723 (codified at 29 CFR 10.2). That proposed definition, which was derived from language found at 40 U.S.C. 3142(a) and 29 CFR 5.2(h), included any contract subject to the DBA. See 79 FR 60643. No commenter addressed this definition, and it is adopted as proposed.

The Department proposed 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. The proposal also stated that the term includes any contract subject to the SCA. This proposed definition was derived, as explained in the Minimum Wage Executive Order, from language set forth in 41 U.S.C. 6702(a),

29 CFR 4.1a(e), and 29 CFR 9.2. 79 FR 60643. The Department did not receive comments specifically addressing this definition. For the reasons explained in the discussion of service contract coverage below, the Department is adopting the definition as proposed.

For purposes of the Executive Order and part 13, which use the terms in reference to domestic violence, sexual assault, or stalking, the Department proposed to define related legal action or related civil or criminal legal proceeding to mean any type of legal action, in any forum, that relates to domestic violence, sexual assault, or stalking, including, but not limited to, family, tribal, territorial, immigration, employment, administrative agency, housing matters, campus administrative or protection or stay-away order proceedings, and other similar matters; and criminal justice investigations, prosecutions, and post-trial matters (including sentencing, parole, and probation) that impact the victim's safety and privacy. This definition, which the Department intended to be broad and inclusive, was derived from the definition of "legal assistance" that appears in the VAWA. See 42 U.S.C. 13925(a)(19). The Department explained in the NPRM that this definition encompassed actions in any civil or criminal court, including a juvenile court. The definition also included administrative proceedings run by institutions of higher education (college, community college, university, or trade school), such as those related to alleged violations of Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 et seq. The Department received no comments regarding this definition and adopts it as proposed.

Under proposed § 13.2, Secretary meant the Secretary of Labor and included any official of the U.S. Department of Labor authorized to perform any of the functions of the Secretary of Labor under part 13. The Department adopts this definition as proposed.

The Department proposed 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). This provision is adopted as proposed.

The proposed definition of sexual assault in § 13.2 was any nonconsensual sexual act proscribed by Federal, tribal, or State law, including when the victim lacks capacity to consent. This definition was adopted from the VAWA. See 42 U.S.C. 13925(a)(29). No commenter suggested revising this definition, and the Department adopts it as proposed.

In the NPRM, the term solicitation was defined to have the meaning given to it in the Minimum Wage Executive Order Final Rule, i.e., any request to submit offers, bids, or quotations to the Federal Government. 79 FR 60673 (codified at 29 CFR 10.2). As explained in the Minimum Wage Executive Order rulemaking, the definition was based on language from 29 CFR 9.2, and requests for information issued by Federal agencies and informal conversations with federal workers do not fall within the definition. See 79 FR 60643-44. No comments addressed this definition, and it is adopted as proposed.

The Department proposed to define the term spouse as the other person with whom an individual entered into marriage as defined or recognized under State law for purposes of marriage in the State in which the marriage was entered into or, in the case of a marriage entered into outside of any State, if the marriage is valid in the place where entered into and could have been entered into in at least one State. This definition included an individual in a common law marriage that was entered into in a State that recognizes such marriages or, if entered into outside of any State, is valid in the place where entered into and could have been entered into in at least one State. This definition was derived from the FMLA regulations. See 29 CFR 825.122 (as updated by Definition of Spouse Under the Family and Medical Leave Act, 80 FR 9989 (Feb. 25,

2015)). As the Department noted in the NPRM, marriage and common law marriage include both same-sex and opposite-sex marriages or common law marriages. The Department did not receive comments regarding this definition and adopts it as proposed.

Under proposed § 13.2, stalking meant engaging in a course of conduct directed at a specific person that would cause a reasonable person to fear for his or her safety or the safety of others or suffer substantial emotional distress. This definition was adopted from the VAWA. See 42 U.S.C. 13925(a)(30). The Department did not receive comments regarding this definition and adopts it as proposed.

The Department proposed to define successor contract to mean a contract for the same or similar services as were provided by a different predecessor contractor at the same location. This definition does not appear in the Final Rule because, for the reasons explained in the discussion of § 13.5(b)(4), the term is no longer relevant.

In proposed § 13.2, the Department defined the term United States as it did in the Minimum Wage Executive Order rulemaking, which used the definitions of that term set forth in 29 CFR 9.2 and 48 CFR 2.101, though it did not adopt any of the exceptions to the definition of the term set forth in the FAR. See 79 FR 60645. Based on those regulations, United States meant 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, and instrumentalities, including nonappropriated fund instrumentalities. The proposed definition further noted that when used in a geographic sense, the United States meant the 50 States and the District of Columbia. The Department did not receive comments regarding this definition and adopts it as proposed.

The Department proposed to define victim services organization to mean a nonprofit, nongovernmental, or tribal organization or rape crisis center, including a State or tribal coalition, that assists or advocates for victims of domestic violence, sexual assault, or stalking, including domestic violence shelters, faith-based organizations, and other organizations, with a documented history of effective work concerning domestic violence, sexual assault, or stalking. This definition was based on the definition of "victim service provider" in the VAWA. See 42 U.S.C. 13925(a)(43). The Department intended this definition to include organizations that provide services to adult, teen, and/or child victims of domestic violence, sexual assault, or stalking. The Department did not receive comments regarding this definition and adopts it as proposed.

The Department proposed to define Violence Against Women Act as the Violence Against Women Act of 1994, 42 U.S.C. 13925 et seq., and its implementing regulations. This definition is adopted as proposed.

Finally, the Department proposed to define Wage and Hour Division to mean the Wage and Hour Division within the U.S. Department of Labor. This definition is adopted as proposed.

Section 13.3 Coverage.

Proposed § 13.3 addressed and implemented the coverage provisions of section 6 of Executive Order 13706. 80 FR 54697-700.

Proposed § 13.3(a) stated that part 13 applies to any new contract with the Federal Government, unless excluded by § 13.4, 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 from coverage under the SCA by Department of Labor 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 employees performing on or in connection with such contract are governed by the DBA, SCA, or FLSA, including employees who qualify for an exemption from the FLSA's minimum wage and overtime provisions. As explained in more detail below in the discussion of covered employees, the Department is promulgating this provision as proposed.

Proposed § 13.3(b) incorporated the monetary value thresholds referred to in section 6(e) of the Executive Order. Specifically, it provided that for contracts covered by the SCA or the DBA, part 13 applies to prime contracts only at the thresholds specified in those statutes, and for procurement contracts where employees' wages are governed by the FLSA (i.e., procurement contracts not covered by the SCA or DBA), part 13 applies when the prime contract exceeds the micro-purchase threshold, as defined in 41 U.S.C. 1902(a). Proposed § 13.3(b) further explained that for all other covered prime contracts and for all subcontracts awarded under covered prime contracts, part 13 applies regardless of the value of the contract. In this context, "all other prime contracts" covered by the Order and part 13 referred to non-procurement concessions contracts not covered by the SCA and non-procurement contracts 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 not covered by the SCA. The Department received one comment relevant to this provision, addressed in the discussion of "procurement contracts for construction" below, and adopts § 13.3(b) as proposed.

Proposed § 13.3(c), which was identical to the analogous provision in the Minimum Wage Executive Order Final Rule, 29 CFR 10.3(c), stated that part 13 only applies to contracts with the Federal Government requiring performance in whole or in part within the United States.

It further explained that 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 part 13, the requirements of the Order and part 13 would apply with respect to that part of the contract that is performed within the United States. As explained below, the Department adopts this provision as proposed.

Proposed § 13.3(d), adopted from the Minimum Wage Executive Order regulations, 29 CFR 10.3(d), explained that part 13 does not apply to contracts subject to the Walsh-Healey Public Contracts Act, 41 U.S.C. 6501 et seq. The Department is adopting this provision largely as proposed, but with one modification described below in the section discussing such contracts.

The preamble to the proposed rule addressed several issues related to the coverage provisions in some detail, and the Department repeats those points here, in addition to responding to comments relevant to them, in order to ensure that this Final Rule contains a full discussion of the scope of coverage under the Order. As noted in the NPRM, the Minimum Wage Executive Order Final Rule addressed many of the same issues, and much of the discussion here reflects interpretations described in that rulemaking.

Coverage of Executive Agencies and Departments

Executive Order 13706 applies to all "[e]xecutive departments and agencies." 80 FR 54697. Like the Minimum Wage Executive Order, it strongly encourages but does not compel "[i]ndependent agencies" to comply with its requirements. 80 FR 54700; see also 79 FR 9853. The Department explained in the NPRM that this exemption from coverage is narrow, in light of the Executive Order's broad goal of providing paid sick leave to employees on contracts with the Federal Government. The terms executive departments and agencies (modified to include the

U.S. Postal Service, as explained above) and independent agencies are defined in § 13.2. The Department received no comments regarding this interpretation.

Coverage of New Contracts with the Federal Government

Proposed § 13.3(a) provided that the requirements of the Executive Order apply to a "new contract with the Federal Government." By applying only to "new contracts," the Executive Order ensures that contracting agencies and contractors will have sufficient notice of any obligations under Executive Order 13706 and can take into account any potential impact of the Order prior to entering into "new contracts" on or after January 1, 2017. As discussed above, the proposed definition of the term contract was broadly inclusive, and the proposed definition of new contract was modeled on the definition of that term in the Minimum Wage Executive Order Final Rule, 29 CFR 10.2, and incorporated the provisions of section 7 of Executive Order 13706. Therefore, as proposed, part 13 applied to covered contracts with the Federal Government that result from solicitations issued on or after January 1, 2017, or to contracts that are awarded outside the solicitation process on or after January 1, 2017. For example, any covered contracts that are added to the GSA Schedule in response to GSA Schedule solicitations issued on or after January 1, 2017 will qualify as "new contracts" subject to the Order; any covered task orders issued pursuant to those contracts also would be deemed to be "new contracts." This included contracts to add new covered services as well as contracts to replace expiring contracts.

As explained in the discussion of § 13.2, the definition of new contract (adopted as proposed) also provides that the term includes both new contracts and replacements for expiring contracts. Consistent with the Minimum Wage Executive Order Final Rule, however, the definition does not include the unilateral exercise of a pre-negotiated option to renew an existing contract by the Federal Government. As discussed above, 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.

The proposed definition of new contract also provided that for purposes of the Executive Order, a contract that is entered into prior to January 1, 2017 constituted a new contract if, through bilateral negotiation, on or after January 1, 2017: (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, 2016 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. These statements have the same meaning in part 13 as they did in the Minimum Wage Executive Order rulemaking. See 79 FR 60646-49. The NPRM also noted the Department's understanding that contract extensions may be accomplished through options created by an agency pursuant to FAR clause 52.217-8 (which allows for an extension of time of up to 6 months for a contractor to perform services that were acquired but not provided during the contract period) or FAR clause 52.217-9 (which provides for an extension of the contract term to provide additional services for a limited term specified in the contract at previously agreed upon prices). As explained, the contracting agency's exercise of extensions under these clauses would not trigger application of the Order's paid sick leave requirements because the clauses give the contracting agency a discretionary right to unilaterally exercise the option to extend, and unilateral options are excluded from the definition of "new contract."

Specifically, and particularly in light of these clauses, a bilaterally negotiated extension of an existing contract on or after January 1, 2017 would be viewed as a "new contract" unless the extension is made pursuant to a term in the contract as of December 31, 2016 providing for a

short-term limited extension, in which case the extension would not constitute a "new contract" and would not be covered. Therefore, a short-term, bilaterally negotiated extension of contract terms (e.g., an extension of 6 months or less) that was provided for by the pre-negotiated terms of the contract prior to January 1, 2017, such as a bridge to prevent a gap in service, would not constitute a new contract. See Interim Final Rule, Federal Acquisition Regulation; Establishing a Minimum Wage for Contractors, 79 FR 74544, 74545 (Dec. 15, 2014) (providing that contracting officers "shall include" the FAR contract clause to implement the Minimum Wage Executive Order when "bilateral modifications extending the contract … are individually or cumulatively longer than six months"). In addition, when a contracting agency exercises its unilateral right to extend the term of an existing service contract and simply makes pricing adjustments based on increased labor costs that result from its obligation to include a current SCA wage determination pursuant to 29 CFR 4.4 but no bilateral negotiations occur (other than any necessary to determine and effectuate those pricing adjustments), the Department would not view the exercise of that option as a ''new contract'' covered by the Executive Order.

An extension that was bilaterally negotiated and not previously authorized by the terms of the existing contract, however, would be a "new contract" subject to the Order's paid sick leave requirements. A long-term extension of an existing contract will qualify as a "new contract" subject to the Executive Order even if such an extension was provided for by a pre-negotiated term of the contract.

With respect to the coverage of other contract modifications, the Department's approach is identical to that in the Minimum Wage Executive Order Final Rule. 79 FR 60646-49. It reflects that modifications within the scope of the contract do not in fact constitute new contracts. Long-standing contracting principles recognize that an existing contract, especially a larger one,

will often require modifications, which may include very modest changes (e.g., a small change to a delivery schedule). Therefore, regulations such as the FAR do not require agencies to create new contracts to support these actions. Accordingly, contract modifications that are within the scope of the contract within the meaning of the FAR, see 48 CFR 6.001(c) and related case law, are not "new contracts" under the proposed definition, even when undertaken after January 1, 2017. The Department's proposal nonetheless strongly encouraged agencies to bilaterally negotiate, as part of any in-scope modification, application of the Executive Order's paid sick leave requirements so that such modified contracts could take advantage of the benefits of such leave.

As also explained in the NPRM, if the parties bilaterally negotiate a modification that is outside the scope of the contract, the agency will be required to create a new contract, triggering solicitation and/or justification requirements, and thus such a modification after January 1, 2017 will constitute a "new contract" subject to the Executive Order's paid sick leave requirements. For example, if an existing SCA-covered contract for janitorial services at a Federal office building is modified by bilateral negotiation after January 1, 2017 to also provide for security services at that building, such a modification would likely be regarded as outside the scope of the contract and thus qualify as a "new contract" subject to the Executive Order. Similarly, if an existing DBA-covered contract for construction work at Site A was modified by bilateral negotiation after January 1, 2017 to also cover construction work at Site B, such a modification would generally be viewed as outside the scope of the contract and thus trigger coverage of the Executive Order. The Department cautioned, however, that whether a modification qualifies as "within the scope" or "outside the scope" of the contract is necessarily a fact-specific

determination. See, e.g., AT&T Communications, Inc. v. Wiltel, Inc., 1 F.3d 1201, 1205 (Fed. Cir. 1993).

The Department did not receive comments suggesting changes to these interpretations regarding what constitutes a "new contract." AGC asked whether new task orders under existing indefinite-delivery, indefinite-quantity (IDIQ) contracts qualify as new contracts for purposes of the Executive Order. A task order under an IDIQ contract covered by the Executive Order and part 13 would itself be covered by the Order and part 13 to the extent the task order falls within one of the four categories of contracts covered by the Order. A task order under (and within the scope of) an IDIQ contract that is not covered by the Executive Order and part 13, either because the solicitation for the IDIQ contract was issued before January 1, 2017, or the IDIQ contract was awarded outside the solicitation process before January 1, 2017, would not qualify under the Order and part 13 as a new contract even if the task order was issued after January 1, 2017. However, the Department recommended in the NPRM, and reiterates here, that the FARC should encourage, if not require, contracting officers to modify existing IDIQ contracts in accordance with FAR section 1.108(d)(3) to include the paid sick leave requirements of Executive Order 13706 and part 13, particularly if the remaining ordering period extends at least 6 months and the amount of remaining work or number of orders expected is substantial. See 79 FR 74545 (providing that contracting officers "are strongly encouraged to include" the FAR contract clause to implement the Minimum Wage Executive Order in "existing indefinite-delivery indefinite-quantity contracts, if the remaining ordering period extends at least six months and the amount of remaining work or number of orders expected is substantial").

Coverage of Types of Contractual Arrangements

Proposed § 13.3(a)(1) set forth the specific types of contractual arrangements with the Federal Government that are covered by the Executive Order. Consistent with the intent of Executive Order 13706 to apply to a wide range of contracts with the Federal Government for services or construction, proposed § 13.3(a)(1) implemented 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 notes that, as was also the case under the Minimum Wage Executive Order 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—but a contract that falls within any one of the four categories is covered.

Procurement Contracts for Construction: Section 6(d)(i)(A) of the Executive Order extends coverage to any "procurement contract for … construction." 80 FR 54699. As explained in the NPRM and the Minimum Wage Executive Order rulemaking, 79 FR 60650, this language indicates that the Executive Order and part 13 apply to contracts subject to the DBA and that they 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). The Final Rule makes no change to this interpretation.

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). The DBA's implementing regulations define the term "public building or public work" as 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 § 13.3(b) implemented section 6(e) of Executive Order 13706, 80 FR 52699-700, 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). Under this provision, which is adopted as proposed, there is no value threshold requirement for application of Executive Order 13706 and part 13 to subcontracts awarded under such prime contracts. The Mechanical Contractors Association of America (MCAA) asked in its comment why the proposal covered subcontracts that fall below the DBA threshold amount. The Department believes coverage of subcontracts without regard to their monetary value is appropriate because it is consistent with the DBA itself, which applies the threshold only to prime contracts, 40 U.S.C. 3142(a), is consistent with the coverage provisions of the Minimum Wage Executive Order, which also do not apply threshold amounts to subcontracts, 29 CFR 10.3(b), and ensures that employees who work for lower-tier contractors on projects in which the prime contract is DBA-covered are not denied access to paid sick leave.

Procurement Contracts for Services: Proposed § 13.3(a)(1)(ii) provided, in language identical to that of 29 CFR 10.3(a)(1)(ii) as promulgated by the Minimum Wage Executive Order

Final Rule, 79 FR 60723, that coverage of the Executive Order and part 13 encompasses any "contract for services covered by the Service Contract Act."

That proposed provision implemented section 6(d)(i)(B) of the Executive Order, which states that the Order applies to "a contract or contract-like instrument for services covered by the Service Contract Act." 80 FR 54699. The SCA applies (subject to the exceptions discussed below) to any 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); see also 29 CFR 4.110. 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). SCA 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. 29 CFR 4.133(a).

The NPRM noted, however, that in addition to the provision in section 6(d)(i)(B) of the Executive Order extending coverage to contracts covered by the SCA, section 6(d)(i)(A) provides that the Order applies to "a procurement contract for services." 80 FR 54699. In the Minimum Wage Executive Order rulemaking, the Department interpreted these two phrases together to mean that Executive Order 13658 applied to all procurement and non-procurement contracts covered by the SCA. As the NPRM to implement Executive Order 13706 explained, the phrase "a procurement contract for services" could instead be construed to encompass a category or categories of procurement contracts for services beyond those covered by the SCA. The SCA does not apply to all procurement contracts with the Federal Government for services. For example, the SCA itself contains a list of exemptions from its coverage: it does not apply to

"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"; "a contract for the furnishing of services by radio, telephone, telegraph, or cable companies, subject to the Communications Act of 1934"; "a contract for public utility services, including electric light and power, water, steam, and gas"; "an employment contract providing for direct services to a Federal agency by an individual"; and "a contract with the United States Postal Service, the principal purpose of which is the operation of postal contract stations." 41 U.S.C. 6702(b); see also 29 CFR 4.115-4.122. Additionally, the SCA regulations at 29 CFR 4.123(d) and (e) identify certain categories of contracts the Department has exempted from SCA coverage pursuant to authority granted by the SCA, see 41 U.S.C. 6707(b), to the extent regulatory criteria for exclusion from coverage are satisfied. For example, 29 CFR 4.123(e)(1)(i)(A) exempts from SCA coverage certain contracts principally for the maintenance, calibration, or repair of automated data processing equipment and office information/word processing systems. Furthermore, the SCA does not apply 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. 29 CFR 4.113(a)(2); see also 41 U.S.C. 6701(a)(3)(C), 6702(a)(3); WHD Field Operations Handbook (FOH) ¶ 14c07. Similarly, a contract for services "performed essentially by bona fide executive, administrative, or professional employees, with the use of service employees being only a minor factor in contract performance," is not covered by the SCA. 29 CFR 4.113(a)(3); FOH ¶ 14c07.

In the proposed rule, the Department sought comment as to whether it should include within the coverage of Executive Order 13706 a wider set of procurement contracts for services

than those contracts for services covered by the SCA. The Department's proposal noted that, for example, an interpretation treating as covered procurement contracts for services performed exclusively or essentially by employees who qualify as bona fide executive, administrative, or professional employees as defined in the FLSA's regulations at 29 CFR part 541—a type of employee covered by section 6(d)(ii) of the Order because such employees qualify for an exemption from the FLSA's minimum wage and overtime provisions, 80 FR 54700—would extend the Order's paid sick leave requirements to some such employees who would otherwise not be covered by the Order. The proposal further noted that an interpretation treating as covered other types of service contracts explicitly exempted from SCA coverage under 41 U.S.C. 6702(b) and 29 CFR 4.123(d) and (e) would also extend the Order's paid sick leave requirements to at least some employees on any such contracts; although those employees' wages would by definition not be covered by the SCA, under such an interpretation, employees performing work on or in connection with such contracts whose wages were governed by the FLSA, including employees who qualify for an exemption from its minimum wage and overtime provisions, would be entitled to paid sick leave under the Order and part 13. The Department sought comments on the potential scope and implications of such coverage, including whether employees who work on or in connection with certain categories of non-SCA-covered service contracts currently typically do not have paid sick time or do not have any type of paid time off such that the protections of Executive Order 13706 would be particularly significant to them.

Numerous commenters, including CLASP, Equal Rights Advocates, the CAP Women's Initiative, Caring Across Generations, the Working Families Organization, Women Employed, the Center for Popular Democracy (CPD), and the National Association of County and City Health Officials, urged the Department to ensure that the Executive Order covers all procurement

contracts for services in order to extend paid sick leave benefits to as many employees as possible. The AFL-CIO also encouraged the Department to expand contract coverage under the Order and part 13. Other commenters, such as PSC, the Chamber/IFA, and the American Benefits Council, however, urged the Department not to expand coverage to service contracts not covered by the SCA. In particular, PSC asserted that covering contracts for services performed exclusively or essentially by employees who qualify as bona fide executive, administrative, or professional employees would discourage technology and consulting companies from doing business with the Federal Government. It also asserted that contracts such as those involving utilities and airlines are exempted from the SCA by regulation for reasons that would also make application of paid sick leave requirements particularly difficult and therefore inappropriate.

After careful consideration of these comments, the Department is adopting § 13.3(a)(1)(ii) as proposed, that is, it is interpreting the Executive Order to cover contracts for services covered by the SCA and not (other than contracts covered by § 13.3(a)(1)(iii) and (iv)) contracts for services that, although entered into with an executive department or agency, are not covered by the SCA. Although the Department continues to believe in the importance of ensuring that employees performing work on or in connection with Federal contracts have access to paid sick leave, in this case, for reasons of consistency with the Minimum Wage Executive Order Final Rule and familiarity with the types of obligations and requirements imposed by the SCA and Minimum Wage Executive Order, the Department believes the best course is the one proposed in the NPRM.

The Department reiterates, however, that under § 13.3(a)(1)(iii) and (iv) (as well as § 13.3(d), described below), irrespective of whether a contract is covered by part 13 because it is an SCA-covered contract, the Order's paid sick leave requirements apply to service contracts that

are concessions contracts, including all concessions contracts excluded by the SCA regulations at 29 CFR 4.133(b); apply to service contracts that are in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public; and do not apply to contracts for the manufacturing or furnishing of materials, supplies, articles, or equipment to the Federal Government that are subject to the Walsh-Healey Public Contracts Act, 41 U.S.C. 6501 et seq.

Proposed § 13.3(b) implemented section 6(e) of the Executive Order, which provides that for SCA-covered contracts, the Executive Order applies only to those prime contracts that exceed the threshold for prevailing wage requirements specified in the SCA. 80 FR 54700. Although the SCA covers all non-exempted 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). Consistent with the SCA, under proposed § 13.3(b), there would be no value threshold requirement for application of Executive Order 13706 and part 13 to subcontracts awarded under such prime contracts. The Department received no comments on this portion of the proposed provision.

Contracts for Concessions: Proposed § 13.3(a)(1)(iii) implemented the Executive Order's coverage of a "contract or contract-like instrument for concessions, including any concessions contract excluded by the Department of Labor's regulations at 29 CFR 4.133(b)," 80 FR 54699, just as the Minimum Wage Executive Order Final Rule implemented identical language in that Order, see 79 FR 60638, 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).[1] Proposed § 13.3(a)(1)(iii) extended coverage of the Executive Order and part 13 to all concession contracts with the Federal Government, including those exempted from SCA coverage. The Department explained that the Executive Order generally covers, for example, souvenir shops at national monuments as well as boat rental facilities and fast food restaurants at National Parks. In addition, consistent with the SCA's implementing regulations at 29 CFR 4.107(a), the Department proposed that the Executive Order generally apply to concessions contracts with nonappropriated fund instrumentalities under the jurisdiction of the Armed Forces or other Federal agencies.

Under proposed § 13.3(b), 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 6(e) of the Executive Order further provides that, for procurement contracts where employees' 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 13 applies only to contracts that exceed the micro-purchase threshold, as defined in 41 U.S.C. 1902(a). That threshold is currently defined in the FAR as $3,500. 48 CFR 2.101. The Department proposed that there be no value threshold for

[1] 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).

application of Executive Order 13706 and part 13 to subcontracts awarded under covered prime contracts or for non-procurement concessions contracts that are not covered by the SCA.

The Chamber/IFA and the American Benefits Council commented that the Order should not apply to concessions contracts, explaining that such contractors will be disadvantaged by the requirements of the Order and part 13 because they compete against businesses that do not contract with the Federal Government and therefore do not bear the costs of providing paid sick leave. The Department declines to amend part 13's coverage provisions to exclude concessions contracts because section 6(d)(i)(C) of the Executive Order explicitly names such contracts as one of the types to which the Order applies. 80 FR 54699.

Contracts in Connection with Federal Property or Lands and Related to Offering Services: Proposed § 13.3(a)(1)(iv) implemented section 6(d)(i)(D) of the Executive Order, which extends coverage to 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. See 80 FR 54699; see also 79 FR 60655 (Minimum Wage Executive Order Final Rule preamble discussion of identical provisions in the Minimum Wage Executive Order and 29 CFR part 10). The Department's proposal interpreted 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 to the extent that such agreements are not otherwise covered by § 13.3(a)(1). In other words, under the proposal, 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 13 regardless of whether the lease is subject to the SCA. The Department noted in the NPRM that evidence that an agency has retained some

measure of control over the terms and conditions of the lease or license to provide services, though not necessary for purposes of determining applicability of this section, would strongly indicate that the agreement involved is covered by section 6(d)(i)(D) of the Executive Order and § 13.3(a)(1)(iv). Pursuant to this interpretation, 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 paid sick leave requirements even if the contract does not constitute a concessions contract for purposes of the Order and part 13. Additional examples of agreements that would generally be covered by the Executive Order and part 13 under the proposed approach (regardless of whether they would also be covered because 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, barber shop, health clinic, or fitness center in the space to serve Federal employees and/or the general public.

Although this definition is broad, the Department noted some limits to it in the NPRM that it reiterates here. First, coverage under this proposed section only extends to contracts that are in connection with Federal property or lands. 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 6(d)(i)(D), although it would be a covered contract under section 6(d)(i)(B) if it is covered by the SCA. Moreover, because the Department does not interpret section 6(d)(i)(D)'s reference to "Federal property" to encompass money, purely financial transactions with the Federal Government, i.e., contracts that are not in connection with physical property or lands, are not covered by the Order and part 13. In addition, as explained in the proposed rule, section 6(d)(i)(D) coverage only extends to contracts "related to offering services for Federal employees, their dependents, or the general public."

Therefore, if a Federal agency contracted with a company to solely supply materials in connection with Federal property or lands, the Department would not consider the contract to be covered by section 6(d)(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 6(d)(i)(D).

Proposed § 13.3(b) interpreted section 6(e) of Executive Order 13706, 80 FR 54700, to mean that the Order applies only to SCA-covered prime contracts in connection with Federal property or lands and related to offering services if such contracts exceed $2,500. 41 U.S.C. 6702(a)(2); 29 CFR 4.141(a). For procurement contracts in connection with Federal property or lands and related to offering services where employees' wages are governed by the FLSA (rather than the SCA), part 13 applies only to such contracts that exceed the $3,500 micro-purchase threshold, as defined in 41 U.S.C. 1902(a) and 48 CFR 2.101. 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, the Department proposed and is adopting no value threshold for coverage under Executive Order 13706 and part 13.

The Chamber/IFA and the American Benefits Council commented that the Order should not apply to contracts in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public for the same reasons on which they based their objections to the coverage of concessions contracts. Because section 6(d)(i)(D) of the Executive Order explicitly names contracts in connection with Federal property

or lands and related to offering services for Federal employees, their dependents, or the general public as one of the types of contracts to which the Order applies, 80 FR 54699, the Department does not believe it would be appropriate to exclude such contracts from coverage under part 13.

Contracts Subject to the Walsh-Healey Public Contracts Act: Finally, the Department proposed to include as § 13.3(d) a statement that contracts for the manufacturing or furnishing of materials, supplies, articles, or equipment to the Federal Government that are subject to the Walsh-Healey Public Contracts Act (PCA), 41 U.S.C. 6501 et seq., are not covered by Executive Order 13706 or part 13. As noted in the NPRM, however, where a PCA-covered contract involves a substantial and segregable amount of construction work that is subject to the DBA, employees whose wages are governed by the DBA or FLSA, including those who qualify for an exemption from the FLSA's minimum wage and overtime provisions, are covered by the Executive Order for the hours that they spend performing work on or in connection with such DBA-covered construction work.

No commenters asked that the Department not exempt contracts subject to the PCA. EEAC asked for clarification about the Order's application to a contract for the manufacturing or furnishing of materials, supplies, articles, or equipment to the Federal Government for an amount less than $15,000, the threshold amount for PCA coverage. See 48 CFR 22.602. Because such contracts are not one of the four types of covered contracts, the Department did not intend for the NPRM to imply that they could be covered, nor does it intend to cover them in the Final Rule. To make this point more evident, the text of § 13.3(d) has been slightly modified to indicate that PCA-covered contracts are an example of contracts for the manufacturing or furnishing of materials, supplies, articles, or equipment to the Federal Government rather than to suggest that all such contracts are PCA-covered.

Coverage of Subcontracts

As explained in the Minimum Wage Executive Order rulemaking, 79 FR 60657-58, the Department proposed that the same test for determining application of the Executive Order to prime contracts apply to the determination of whether a subcontract is covered by the Order, with the distinction that the value threshold requirements set forth in section 6(e) of the Order do not apply to subcontracts. In other words, the Department proposed that the requirements of the Order apply to a subcontract if the subcontract qualifies as a contract or contract-like instrument under the definition set forth in part 13 and it falls within one of the four specifically enumerated types of contracts set forth in section 6(d)(i) of the Order and proposed § 13.3(a)(1).

Under this approach, only covered subcontracts of covered prime contracts are subject to the requirements of the Executive Order. Therefore, just as the Executive Order does not apply to prime contracts for the manufacturing or furnishing of materials, supplies, articles, or equipment, the Order 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 contractor for use on a covered 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 supplier.

The Chamber/IFA asked in their comment that the Department include in the Final Rule "significantly more guidance" regarding the definition of "subcontract." Although the Department recognizes that the NPRM did not include a definition of "subcontract," it notes that

the SCA, DBA, and Minimum Wage Executive Order regulations all also refer to subcontracts without defining the term. The Department does not believe it is necessary or appropriate to develop a definition for the first time here. In this context as under those statutes, it is generally clear when a contract is a subcontract, such as when a contractor who enters into a covered contract to build a Federal office building also enters into a contract with a separate company to install the windows in that building. It is also generally clear when a contract is not a subcontract, such as when a contractor who enters into a covered contract with the Federal Government to build a Federal office building also enters into a contract with a separate company to repair the contractor's electronic time system or provide cleaning services at the contractor's corporate headquarters.

Coverage of Employees

Proposed § 13.3(a)(2) implemented section 6(d)(ii) of Executive Order 13706, which provides that the paid sick leave requirements of the Order only apply if the wages of employees under a covered contract are governed by the DBA, SCA, or FLSA, including employees who qualify for an exemption from the FLSA's minimum wage and overtime provisions. 80 FR 54699. This coverage provision is distinct from that in Executive Order 13658 in that the Minimum Wage Executive Order did not cover employees who qualify for an exemption from the FLSA's minimum wage and overtime provisions. See 79 FR 9853.

The NPRM explained the Department's interpretation that an employee's wages are governed by the FLSA for purposes of section 6(d)(ii) of the Executive Order and part 13 if the employee is entitled to minimum wage and/or overtime compensation under sections 6 and/or 7 of the FLSA or the employee's wages are calculated pursuant to special certificates issued under

section 14 of the FLSA. See 29 U.S.C. 206, 207, 214. No commenter addressed this interpretation, and the Department reiterates it here.

The Department further interpreted the Order's explicit coverage of employees who qualify for an exemption from the FLSA's minimum wage and overtime provisions to mean that the Order and part 13 apply to an employee who would be entitled to minimum wage and/or overtime compensation under the FLSA but for the application of an exemption from the FLSA's minimum wage and overtime requirements pursuant to section 13 of the Act. See 29 U.S.C. 213. Such employees include those employed in a bona fide executive, administrative, or professional capacity as defined in section 13(a)(1) of the FLSA, 29 U.S.C. 213(a)(1), and 29 CFR part 541.

PSC objected to the application of the Order and regulations to employees who qualify for an exemption from the FLSA's minimum wage and overtime requirements, asserting that the Department had incorrectly interpreted the Order to include such workers. The Department disagrees with the commenter's reading of the Executive Order's text. Section 6(d)(ii) of the Order explains that the paid sick leave requirements apply to covered contracts on which employees' wages are governed by the DBA, SCA, and FLSA, "including employees who qualify for an exemption from its minimum wage and overtime provisions." 80 FR 54699. Consistent with the Department's interpretation of the analogous provision in the Minimum Wage Executive Order, this language is best understood to mean that employees exempt from FLSA requirements are among the categories of employees who, if they perform work on or in connection with any covered contract, are entitled to accrue and use paid sick leave.

EEAC expressed concern that application of the requirements of the Executive Order and part 13 to employees who qualify for an exemption from the FLSA's minimum wage and overtime requirements would create a risk that the employee could no longer properly be treated

as exempt under the FLSA. Specifically, the commenter worried that if a contractor tracks such an employee's hours worked for purposes of paid sick leave accrual or use or if a contractor deducts pay, even if for less than a full day, under a bona fide plan, policy, or practice of providing compensation for loss of salary that results from an absence for which the employee uses paid sick leave, those acts would call into question whether the employee still qualifies for the FLSA exemptions described in 29 CFR part 541. The Department has explained in its guidance regarding 29 CFR part 541, however, that "[c]ertain common payroll and recordkeeping practices do not bring into question whether someone is paid on a salary basis including, e.g., taking deductions from an exempt employee's accrued leave accounts (regardless of whether to cover partial-day or full-day absences); requiring exempt employees to keep track of and/or record their hours worked; requiring exempt employees to work a specified schedule of hours; and implementing bona fide, across-the-board changes in schedules." FOH ¶ 22g02(e).

The Department also explained in the NPRM that it interpreted the Order's reference to employees whose wages are governed by the DBA to include laborers and mechanics who are covered by the DBA, including 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. AGC asked that the Department exclude laborers and mechanics—i.e., those workers who must receive prevailing wages pursuant to the DBA—from the paid sick leave requirements of the Order and part 13. Because section 6(d)(ii) of the Executive Order explicitly refers to employees whose wages are governed by the DBA, the Department does not believe it would be appropriate to accept the commenter's suggestion.

The Department also interpreted the language in section 6(d)(ii) of Executive Order 13706 and proposed § 13.3(a)(2) to extend coverage to employees performing work on or in connection with DBA-covered contracts for construction who are not laborers or mechanics but whose wages are governed by the FLSA as provided above, including those who qualify for an exemption from the FLSA's minimum wage and overtime provisions. Although such employees are not covered by the DBA itself because they are not "laborers and mechanics," 40 U.S.C. 3142(b), the NPRM noted that such individuals are employees performing work on or in connection with a contract subject to the Executive Order whose wages are governed by the FLSA, including those who qualify for an exemption from the FLSA's minimum wage and overtime provisions, and thus they are covered by section 6(d) of the Order. 80 FR 54699.

The NPRM further explained that this coverage extends to employees whose wages are governed by the FLSA, including those who qualify for an exemption from the FLSA's minimum wage and overtime provisions, who are working on or in connection with DBA-covered contracts regardless of whether such employees are physically present on the DBA-covered construction worksite. MCAA, ABC, and the National Electrical Contractors Association (NECA) all commented unfavorably on the application of coverage to employees who work away from the DBA "site of the work." These commenters are correct that DBA prevailing wages need only be paid to laborers and mechanics "employed or working upon the site of the work," 29 CFR 5.5(a)(1), a term that primarily refers to the "physical place or places where the building or work called for in the contract will remain," 29 CFR 5.2(k)(1)(1). The Executive Order applies, however, to DBA-covered contracts and to employees performing work on or in connection with such contracts, including employees whose wages are governed by the FLSA, such as employees who perform work away from the "site of the work." The Minimum

Wage Executive Order rulemaking included the same coverage of employees away from the site of the work and similarly explained that the Order's text compelled that result. 79 FR 60658-59.

The Executive Order also refers to employees whose wages are governed by the SCA. The SCA provides that "service employees" directly engaged in providing specific services called for by the SCA-covered contract are entitled to SCA prevailing wage rates. 41 U.S.C. 6701(3), 6703; 29 CFR 4.152. The Department explained in the NPRM that these employees are covered by the plain language of section 6(d) of Executive Order 13706, and that it interpreted this category to 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 received no comments regarding this interpretation.

The NPRM also noted that under the SCA, "service employees" who do not perform the services required by an SCA-covered contract but whose duties are "necessary to performance of the contract" must be paid at least the FLSA minimum wage. 29 CFR 4.153; see also 41 U.S.C. 6704(a). The Department proposed to interpret the language in section 6(d)(ii) of Executive Order 13706 and proposed § 13.3(a)(2) to extend coverage to this category of employee. It offered as an example an accounting clerk who processes invoices and work orders on an SCA-covered contract for janitorial services; such an employee would likely not qualify as performing services required by the contract (and therefore would not be entitled to SCA prevailing wages), but the clerk would be entitled to at least the FLSA minimum wage. Therefore, the clerk would be covered by the Executive Order. The Department did not receive comments regarding this interpretation.

The Department further noted in the NPRM that some employees perform work on or in connection with SCA-covered contracts but are not "service employees" for purposes of the Act because that term does not include an individual employed in a bona fide executive, administrative, or professional capacity, as those terms are defined in the FLSA regulations at 29 CFR part 541. 41 U.S.C. 6701(3)(C). The Department proposed to cover these employees under section 6(d)(ii) of the Executive Order. For example, a contractor could employ a manager who meets the test for the executive employee exemption under 29 U.S.C. 213(a)(1) and 29 CFR 541.100 to supervise janitors on an SCA-covered contract for cleaning services at a Federal building. Because that manager performs work on or in connection with a covered contract and qualifies for an exemption from the FLSA's minimum wage and overtime provisions, she would be entitled to paid sick leave as required by Executive Order 13706 and part 13. The Department did not receive comments specifically regarding this explanation, and because it is declining to adopt the suggestion of commenters who asked that part 13 not apply to employees who qualify for an exemption from the FLSA's minimum wage and overtime requirements, it also need not make any amendment to this discussion.

The NPRM included the interpretation that where State or local government employees are performing work on or in connection with covered contracts and their wages are governed by the SCA or the FLSA, including employees who qualify for an exemption from the FLSA's minimum wage and overtime provisions, such employees are entitled to the protections of the Executive Order and part 13. The Department received no comments on this issue and reiterates its position here. As noted in the NPRM, the DBA does not apply to construction performed by State or local government employees.

The Department received additional comments addressing the scope of coverage of employees. The U.S. Small Business Administration's Office of Advocacy (SBA Advocacy) asked whether employees who are part-time, seasonal, immigration visa holders, or students are covered by the Order and part 13. If those employees perform work on or in connection with covered contracts and their wages are governed by the DBA, SCA, or FLSA, including if they qualify for an exemption from the FLSA's minimum wage and overtime requirements, then they would be covered and entitled to paid sick leave as required by the Order and part 13. The ability of part-time and seasonal workers to accrue and use paid sick leave would be limited, but not eliminated, by their shorter work schedules. No special rules apply to non-citizens or students for purposes of this rulemaking. The U.S. Women's Chamber of Commerce asked that the paid sick leave requirements be extended to all private-sector employees. Although the Department appreciates that many workers do not have and would benefit from paid sick time, its authority to require employers to provide this benefit extends only to employees working on or in connection with contracts covered by the Executive Order.

On or In Connection With

As proposed, the paid sick leave requirements of Executive Order 13706 and part 13 apply to employees performing work "on or in connection with" covered contracts. As it had in the Minimum Wage Executive Order rulemaking, see 79 FR 60671-72, the Department proposed to interpret these terms in a manner consistent with SCA regulations, see, e.g., 29 CFR 4.150-4.155. In the Final Rule, the Department reiterates these interpretations, which it is including in the definition of employee in § 13.2 for purposes of clarity.

Specifically, the Department explained in the NPRM that employees performing "on" a covered contract are those employees directly performing the specific services called for by the

contract, and whether an employee is performing "on" a covered contract would be determined, as explained in the Minimum Wage Executive Order Final Rule, 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 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 employee who is entitled to be paid DBA or SCA prevailing wages 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 employee performing the specific services called for by the contract as performing "on" the covered contract.

The Department further noted in the NPRM that it would consider an employee performing "in connection with" a covered contract to be any employee 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, any employees who are not DBA-covered laborers or mechanics but whose services are necessary to the performance of the DBA contract, such as employees who do not directly 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, would necessarily be performing "in connection with" a covered contract. This standard, also articulated in the Minimum Wage

Executive Order rulemaking, was derived from SCA regulations. See 79 FR 60659 (citing 29 CFR 4.150-4.155).

Several commenters addressed this topic. The Small Business Legislative Council (SBLC) and Vigilant suggested that the Department not cover employees working "in connection with" a covered contract, instead limiting coverage to those employees working "on" covered contracts. The Department has considered these comments but is not accepting the commenters' suggestion for several reasons. First, the Executive Order's purpose is best fulfilled by extending its coverage to a broader set of employees whose work contributes to fulfillment of Federal contracts than only those who are directly engaged in performing the specific services called for by a covered contract. Furthermore, section 6(d) provides that an employee whose wages are governed by the FLSA, including an employee who qualifies for an exemption from the FLSA's minimum wage and overtime provisions, is covered regardless of which type of covered contract the employee's work is performed under—and the employees whose wages are governed by the FLSA under an SCA-covered contract are those who work "in connection with" such contracts. Finally, the coverage of employees working "in connection with" covered contracts is consistent with the Department's interpretation in the Minimum Wage Executive Order rulemaking. 79 FR 60659-60. SBLC, the American Benefits Council, Chamber/IFA, and the National Association of Manufacturers (NAM) all asked that the Department explain in greater detail which employees would be considered to work "in connection with" covered contracts. Specifically, some of these commenters wanted to know whether a human resources professional involved in the process of recruiting, interviewing, and/or hiring employees who perform on covered contracts would be included. Because finding employees to perform the work of a contract is necessary to the performance of the contract, such an employee would be working "in

connection with" the contract for which he was performing such services and, if employed by the contractor, would be entitled to paid sick leave unless the exception described below applies. Similarly, an administrative assistant to an employee who manages the work of a contract could be working "in connection with" that contract depending on his duties. For example, if the assistant orders supplies the manager determines her subordinates need to complete the project, such tasks would be "in connection with" the contract because they are necessary to the performance of the contract; on the other hand, if the assistant schedules the manager's meetings regarding private contracts or orders supplies to be used in the completion of private contracts, that work would not be "in connection with" the contract.

MCAA requested clarification of whether a construction contractor's off-site fabrication shop employees would be regarded as performing work "in connection with" a covered contract. Such employees would be performing work "in connection with" a covered contract to the extent their services are necessary to the performance of the contract. Methods of calculating or estimating the portion of such employees' hours worked in connection with covered contracts is discussed below, particularly in the discussion of § 13.5(a)(1)(i). As MCAA notes, however, employees performing under contracts for the manufacturing or furnishing of materials, supplies, articles, or equipment to the Federal Government that are subject to the Walsh-Healey Public Contracts Act, 41 U.S.C. 6501 et seq., would not be covered by the Executive Order or part 13 because such contracts are not one of the four types of covered contracts under the Executive Order.

The Department notes that it has included in this Final Rule, as it did in the Minimum Wage Executive Order rulemaking, an exception from coverage for employees who spend a minimal amount of time—less than 20 percent in a workweek—working in connection with

covered contracts. (Comments regarding that exclusion, which appears in § 13.4(e), are addressed in the discussion of it below.) In other words, the exclusion would apply to an employee who spends only minimal amounts of time performing tasks necessary to the performance of covered contracts—such as if the human resources professional described above interviews two people to work on a covered contract during a workweek in which he interviews 20 people for jobs on a private contract, or if the assistant places a single order for supplies in a workweek in which he spends the remainder of his worktime performing duties related to private contracts. In addition, this analysis occurs on a workweek-by-workweek basis, so if the human resources professional spends most of his time for 2 weeks hiring workers for a covered contract and then the contractor for which he works takes on no new covered contract for 6 months, the contractor would only have to permit him to accrue paid sick leave for those 2 weeks. If at some point during the 6 months, one employee on the covered contract quit and the human resources professional spent 2 hours of his 40-hour workweek sorting through resumes to find a potential replacement, although he performed work in connection with a covered contract, the 20 percent exclusion would apply and he would not need to be permitted to accrue paid sick leave during that workweek.

The Department noted in the NPRM and reiterates here that the Order does not extend to employees 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 home office of an SCA contractor

because that employee is not performing the specific duties called for by the SCA contract or other services or work necessary to the performance of the contract. And the Executive Order would not apply to an 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 concessions contract itself or otherwise necessary to the performance of the contract.

The Department noted in the NPRM and repeats here that because the Order and part 13 do not apply to employees of Federal contractors who do no work on or in connection with a covered contract, a contractor could be required to provide paid sick leave to some of its employees but not others; in other words, it is not the case that because a contractor has one or more Federal contracts, all of its employees or projects are covered.

Geographic Scope

Proposed § 13.3(c), which was identical to 29 CFR 10.3(c) as promulgated in the Minimum Wage Executive Order Final Rule, see 79 FR 60723, provided that Executive Order 13706 and part 13 would only apply to contracts with the Federal Government requiring performance in whole or in part within the United States. This interpretation was reflected in the Department's proposed definition of the term United States, which provided that when used in a geographic sense, the United States means the 50 States and the District of Columbia. The Department received no comments on this issue.

Accordingly, the requirements of the Order and part 13 do 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. 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 13, however, the requirements of the Order and part 13 would apply

with respect to that part of the contract that is performed within the United States, i.e., employees would accrue paid sick leave based on their hours worked on or in connection with covered contracts within the United States, and would likewise be entitled to use accrued paid sick leave while performing work on or in connection with a covered contract within the United States.

As noted in the NPRM, as with other instances described below in which employees perform some work covered by the Executive Order and part 13 and other work that is not, or if some employees working on or in connection with a covered contract do so in the United States and others do so outside the United States, a contractor wishing to comply with the Order's paid sick leave requirements as to only some employees on a contract or only some of an employee's hours worked must keep records adequately segregating non-covered work from covered work. If a contractor does not make and maintain such records, in the absence of other proof regarding the nature or location of the work, all of the employees' hours worked and/or all of the employees working on or in connection with the covered contract will be presumed to be covered by the Order and part 13.

Section 13.4 Exclusions

Proposed § 13.4 set forth exclusions from the Executive Order's requirements, including by implementing the exclusions set forth in section 6(f) of the Order and creating other limited exclusions from coverage as authorized by section 3(a) of the Executive Order. See 80 FR 54698, 54700. Specifically, proposed § 13.4(a) through (d) described the limited categories of contractual arrangements with the Federal Government for services or construction excluded from the paid sick leave requirements of the Executive Order and part 13, and proposed § 13.4(e) established a narrow category of employees that are excluded from coverage of the Order and

part 13. For the reasons explained below, the Department adopts these provisions as proposed and adds a new, temporary exclusion for a particular category of employees.

Proposed § 13.4(a) implemented the statement in section 6(f) of Executive Order 13706 that the Order does not apply to "grants." 80 FR 54700. As it did in the Minimum Wage Executive Order rulemaking, see 79 FR 60665-66, the Department interpreted this provision to mean that the paid sick leave requirements of the Executive Order and part 13 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--(1) 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; and (2) 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." 31 U.S.C. 6304. 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 also 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 (3rd 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). Under the proposed provision, if a contract qualified

as a grant within the meaning of the Federal Grant and Cooperative Agreement Act, it would be excluded from coverage of Executive Order 13706 and part 13. No commenter requested a change to this provision, and it is adopted as proposed.

Proposed § 13.4(b) implemented the other exclusion set forth in section 6(f) of Executive Order 13706, which states that the Order does not apply to "contracts and agreements with and grants to Indian Tribes under the Indian Self-Determination and Education Assistance Act (Public Law 93–638), as amended." 80 FR 54700. The proposed provision was identical to 29 CFR 10.4(b) as promulgated by the Minimum Wage Executive Order. See 79 FR 60723. Elk Valley Rancheria asked that the Department expand this provision to exclude from the Order and part 13's coverage all contracts, agreements, and grants with Indian tribes. Because this provision was based on language included in the Executive Order that excludes only a subset of contracts and agreements with Indian Tribes and because expanding the exemption would not advance the Order's goal of ensuring that employees working on or in connection with other types of covered contracts have access to paid sick leave, the Department adopts § 13.4(b) as proposed.

Proposed § 13.4(c) provided that any procurement contracts for construction that are not subject to the DBA are excluded from coverage of the Executive Order and part 13. The proposed provision was identical to 29 CFR 10.4(c) as promulgated by the Minimum Wage Executive Order Final Rule. See 79 FR 60723. The Department proposed to make coverage of construction contracts under the Executive Order and part 13 consistent with coverage under the DBA in order to assist all interested parties in understanding their rights and obligations under Executive Order 13706. The Department received no comments addressing this provision and adopts it as proposed.

Similarly, proposed § 13.4(d) incorporated the SCA's exemption of certain service contracts into the exclusionary provisions of the Executive Order. The proposed provision excluded from coverage of the Executive Order and part 13 any contracts for services, except for those expressly covered by § 13.3(a)(1)(iii) or (iv), that are exempted from coverage under the SCA, 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). The Department's proposal noted that this exemption would not apply if the relevant service contract is expressly included within the Executive Order's coverage by § 13.3(a)(1)(iii) or (iv). For example, certain types of concessions contracts are excluded from SCA coverage pursuant to 29 CFR 4.133(b) but are explicitly covered by section 6(d)(i)(C) of the Executive Order and part 13 under § 13.3(a)(1)(iii). Based on the Department's decision with regard to the Order's coverage of service contracts described above, the Department is adopting this provision as proposed.

Several commenters asked that the Department add additional exclusions for certain types of contracts or contractors. The America Outdoors Association and River Riders asked that the Department exclude businesses that receive two-thirds of their revenues over 6 months of the year (and one-third over the remaining 6 months) and/or businesses whose employees work less than 4 or 6 months per year. These commenters asserted that it would be difficult to document the hours of employees who work in wilderness settings and that the costs of compliance with the Executive Order would be particularly high for seasonal businesses. River & Trail Outfitters also asked that the Department create exemptions for seasonal recreational businesses. After considering these comments, the Department has decided not to grant these requests. No such exemption was included in the Minimum Wage Executive Order rulemaking, and the intent of Executive Order 13706 is best fulfilled by extending its coverage broadly. The

Department also notes that the burdens of the Executive Order and part 13 on these contractors will be limited because to the extent employees of these businesses must be paid according to the FLSA or SCA, these contractors are already required to keep records of the employees' hours worked, and to the extent they are exempt from the FLSA's minimum wage and overtime requirements pursuant to 29 U.S.C. 213(a)(3), 29 U.S.C. 213(b)(29), or any other FLSA provision, these contractors may avoid the burden of tracking hours worked by using the approximation permitted by § 13.5(a)(1)(iii).

Koga Engineering and Construction, Royal Contracting Company, and the General Contractors Association of Hawaii requested that the Department exempt employers with 50 or fewer employees from the requirements of the Order and part 13, asserting that smaller contractors will not be able to afford the new systems necessary to segregate time employees work on DBA-covered contracts from other contracts. Although the Department is sensitive to the concerns of small businesses, it believes it is most appropriate not to grant this request. Under this rulemaking, prime contracts that do not meet the SCA, DBA, or 41 U.S.C. 1902(a) thresholds are excluded from coverage pursuant to a provision in the Executive Order itself, and the size of the contractor is not relevant to coverage. Furthermore, although the Department understands that small employers may not be able to afford expensive systems, the Department believes employers can use less expensive means for tracking time, just as smaller contractors may use such means to comply with the SCA, DBA, and FLSA.

Delta Air Lines (Delta) urged the Department to include an express exception for contracts with air carriers, asserting that application of the Order would be complicated in the airline industry and noting that its employees already receive paid sick leave. As Airlines for America (A4A) noted in its comment, many contracts with air carriers are already outside of the

scope of the Order's coverage because they are exempted from the SCA by regulation. And to the extent some such contracts are covered, airlines' existing paid sick time policies may satisfy the requirements of the Order or airline employees may perform a sufficiently small amount of work in connection with such contracts that the exemption created by § 13.4(e) applies. For these reasons, the Department is not exempting air carriers from the Order and part 13.

The Association of American Railroads (AAR) similarly asked the Department to exempt contracts with entities that are employers for purposes of the Railroad Unemployment Insurance Act, 45 U.S.C. 351 et seq., from the Executive Order's requirements, noting that most contracts for rail services are SCA-exempt and asserting that it would be extremely difficult to segregate time railroad employees spend working on covered and non-covered contracts. For reasons analogous to those described with respect to the airline industry—many contracts are already excluded from the Order's coverage and some employees already receive paid sick time or would not be entitled to paid sick leave, and the Department is not persuaded that application of the Order is inappropriate in other circumstances—the Department has decided not to adopt this suggestion.

An individual commenter, Anthony Pannone, contended that the Department should interpret the Executive Order to apply only to contracts under which the contractor receives payment from the Federal Government, and that the Department therefore should exempt contractors that pay rent to, rather than receive appropriated funds from, the Federal Government. The Department declines to adopt this proposed exemption because it is inconsistent with section 6(d) of the Executive Order, which makes clear that the Executive Order applies to contracts that do not involve the payment of appropriated funds, including nonprocurement contracts covered by the SCA and contracts for concessions. Moreover, no

such exemption was included in the Minimum Wage Executive Order rulemaking, and the intent of Executive Order 13706 is best fulfilled by extending its coverage broadly.

Vigilant sought clarification regarding whether the Department intended to cover a contract for the sale of timber by the Federal Government, the principal purpose of which is the harvesting and purchase of timber by the contractor but which also includes such incidental activities as building roads to access the timber, gathering debris for later burning or removal, and replanting the harvested areas. Application of the paid sick leave requirements to such a contract will depend, as it does for all other contracts, upon whether they are covered contracts under the Order and part 13—that is, whether they are one of the four types of contracts described in § 13.3(a)(1). To the extent such a contract is subject to the SCA or the DBA, it would be covered under Executive Order 13706. The Department also notes, however, that "[s]o-called timber sales contracts generally are not subject to the [SCA] because normally the services provided under such contracts are incidental to the principal purpose of the contracts." 29 CFR 4.131(f) (citations omitted); see also Am. Fed'n of Labor & Cong. of Indus. Organizations v. Donovan, 757 F.2d 330, 345–56 (D.C. Cir. 1985) (citing 48 FR 49736, 49751-52 (1983)).

The NPRM also addressed exemptions for categories of employees rather than contracts. Specifically, proposed § 13.4(e) provided that the accrual requirements of part 13 do not apply to employees performing work in connection with covered contracts, i.e., those employees 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, who spend less than 20 percent of their hours worked in a particular workweek performing work in connection with such contracts. It further provided that this exclusion is inapplicable to employees performing work

on covered contracts, i.e., those employees directly engaged in performing the specific work called for by the contract, at any point during the workweek. Finally, it explained that this exclusion is also inapplicable to employees performing work in connection with covered contracts with respect to any workweek in which the employees spend 20 percent or more of their hours worked performing work in connection with a covered contract.

This proposed provision adopted language included in the Minimum Wage Executive Order Final Rule in response to comments expressing concern about new burdens on contractors associated with employees who spend an insubstantial amount of time performing work in connection with covered contracts (in particular, DBA-covered contractors that did not previously segregate hours worked by FLSA-covered employees, including those who were not present on the site of the construction work). 79 FR 60659, 60724 (codified at 29 CFR 10.4(f)). The Department explained in that rulemaking that it expected the exclusion to significantly mitigate the recordkeeping concerns identified by commenters without substantially affecting the Executive Order's economy and efficiency interests, and noted that it has used a 20 percent threshold for other purposes in the SCA and DBA contexts. 79 FR 60660 (citing 29 CFR 4.123(e)(2); FOH ¶¶ 15e06, 15e10(b), 15e16(c), and 15e19).

SBLC asked that the Department modify the § 13.4(e) exclusion to apply to employees performing work in connection with covered contracts who spend less than 50, rather than 20, percent of their hours worked in a particular workweek performing work in connection with such contracts. The Department has decided not to adopt this suggestion. This exclusion was intended to relieve contractors from potential burden without depriving employees who would otherwise be entitled to accrue and use meaningful amounts of paid sick leave—as would be the case for employees who spend a significant portion of their work time performing covered

work—of that benefit. Finally, as noted, this provision is based on an exclusion included in the Minimum Wage Executive Order Final Rule, and the Department believes it would cause confusion to have different tolerances in these otherwise identical provisions that will be applied to many of the same employees. Accordingly, the Department adopts the provision as proposed and reiterates the discussion in the NPRM regarding how the provision will operate.

As explained in the NPRM, like the exclusion created for purposes of the Minimum Wage Executive Order rulemaking, 79 FR 60659-62, this exclusion will not apply to any employee performing "on," rather than "in connection with," a covered contract at any point during the workweek. If an employee spends any time performing work on a covered contract in a workweek and that employee's wages are governed by the DBA, SCA, or FLSA, including employees who qualify for an exemption from the FLSA's minimum wage and overtime provisions, the employee will be entitled to accrue and use paid sick leave pursuant to the Executive Order as to all time performing work on or in connection with covered contracts in that workweek. For an employee solely performing "in connection with" a covered contract, however, the Executive Order's paid sick leave accrual requirements will only apply if that employee spends 20 percent or more of her hours worked in a given workweek in connection with covered contracts. Therefore, in order to apply this exclusion correctly, contractors must accurately distinguish between employees performing "on" a covered contract and those employees performing "in connection with" a covered contract. As explained above, employees directly performing the specific services called for by the contract are performing work "on" a covered contract. This category includes any employee who is entitled to be paid DBA or SCA prevailing wages, regardless of whether such covered work constitutes less than 20 percent of the employee's overall hours worked in a particular workweek.

This exclusion could apply, however, to any 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, such as employees who do not directly 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. For example, § 13.4(e) could apply to a security guard patrolling or monitoring a construction worksite where DBA-covered work is being performed or a clerk who processes the payroll for DBA contracts (either on or off the site of the work). If the security guard or clerk also performed the duties of a DBA-covered laborer or mechanic (for example, by painting or moving construction materials), however, the exclusion would not apply to any hours worked on or in connection with the contract in that workweek because that employee performed "on" the covered contract at some point in the workweek.

Similarly, any employees performing work in connection with an SCA contract who are not entitled to SCA prevailing wages but are, because they perform work "in connection with" an SCA-covered contract, entitled to at least the FLSA minimum wage could fall within the scope of the exclusion provided their work falls below the 20 percent threshold. For example, the exclusion could apply to an accounting clerk who processes a few invoices for SCA contracts out of hundreds of other invoices for non-covered contracts during the workweek or a human resources employee who assists for short periods of time in the hiring of the employees performing work on the SCA-covered contract in addition to the hiring of employees on other non-covered projects.

With respect to concessions contracts and contracts in connection with Federal property or lands and related to offering services, the § 13.4(e) exclusion could apply to any 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 an employee who could qualify for this exclusion is a clerk who handles the payroll for a child care center that leases space in a Federal building as well as the center's other locations that are not covered by the Executive Order and thus does not spend 20 percent or more of his time handling payroll for the child care center in the Federal building.

Importantly, as noted in the NPRM and the Minimum Wage Executive Order rulemaking, 79 FR 60661-62, a contractor seeking to rely on this exclusion must correctly determine the hours worked, make and maintain records (or have other affirmative proof) that the employee did not work "on" a covered contract, and appropriately segregate the hours worked by the employee in connection with the covered contract from other work not subject to the Executive Order. A contractor may apply this exception on the basis of an estimate of the employee's work time in connection with covered contracts, as discussed in more detail with respect to the final text of § 13.5(a)(1)(i), but in that case, the estimate must be reasonable and based on verifiable information. In the absence of records or other proof demonstrating that an employee did not work "on" a covered contract and adequately segregating non-covered work from the work performed in connection with a covered contract (or proof that the estimate of the employee's work time in connection with covered contracts is reasonable and based on verifiable information), the exclusion will not apply, and employees who work in connection with a

covered contract will be presumed to have spent all work time performing such work throughout the workweek.

The quantum of affirmative proof necessary to support reliance on the exclusion will vary with the circumstances. For example, it may require considerably less affirmative proof to satisfy the § 13.4(e) exclusion with respect to an accounting clerk who only occasionally processes an SCA-contract-related invoice than would be necessary to establish the exclusion with respect to a security guard who works on a DBA-covered site for at least several hours each week.

Finally, as noted in the discussion of this exclusion in the NPRM, in calculating hours worked by a particular employee 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 employee. For example, if an administrative assistant works for a single employer 40 hours per week and spends 2 hours each week handling payroll for each of four separate SCA contracts, the 8 hours that the employee spends performing work in connection with the four covered contracts must be aggregated for each workweek in order to determine whether the exclusion applies. In this case, the exclusion would not apply because the employee's hours worked in connection with the SCA contracts constitute 20 percent of her total hours worked for that workweek. As a result, the 8 hours that the employee spends performing work in connection with the four covered contracts each workweek would count toward the accrual of paid sick leave.

The Department also received several requests regarding the application of Executive Order 13706 and part 13 to employees performing work on or in connection with covered

contracts whose conditions of employment are governed by a CBA. Seyfarth Shaw suggested exempting a contract from the Executive Order's requirements if a CBA applies to the work performed under the contract; the American Benefits Council and the Chamber/IFA suggested exempting a contract from the Executive Order's requirements if a CBA that provides for at least 7 days of paid sick time applies to the work performed under the contract; the AFL-CIO as well as the Chamber/IFA suggested exempting a contract from the Executive Order's requirements if a CBA applies to the work performed under the contract until after the current CBA expires, so that negotiations taking the Executive Order into account can occur; and Seyfarth Shaw offered as an alternative exempting a contract from the Executive Order's requirements if a CBA that explicitly waives the rights in the Executive Order applies to the work performed under the contract. Other commenters, such as the Sheet Metal and Air Conditioning Contractors' National Association (SMACNA) and MCAA, also suggested exempting contracts to which CBAs apply, but only with respect to narrower sets of construction contracts.

After careful consideration of these comments, the Department has included a new, temporary exclusion from the requirements of the Order and part 13 for employees whose work is governed by certain CBAs. Specifically, the new provision, § 13.4(f), provides that if a CBA ratified before September 30, 2016 applies to an employee's work performed on or in connection with a covered contract and provides the employee with at least 56 hours (or 7 days) of paid sick time (or paid time off that may be used, among other purposes, for reasons related to sickness or health care) each year, the requirements of the Executive Order and part 13 do not apply to the employee until the earlier of the date the agreement terminates or January 1, 2020. This provision balances the importance of ensuring that the Executive Order applies to all employees entitled to its benefits promptly against the complications that could arise where an existing CBA

provides for paid sick time in a manner that is similar to, but not sufficient to meet the requirements of, the paid sick leave provisions of part 13. These complications are significant in circumstances involving CBAs because the agreement will limit a contractor's ability to unilaterally change the terms of the leave it requires to be provided. Similarly, the new § 13.4(f) provides that if a CBA ratified before September 30, 2016 applies to an employee's work performed on or in connection with a covered contract and provides the employee with paid sick time (or paid time off that may be used, among other purposes, for reasons related to sickness or health care) each year, but the amount provided under the CBA is less than 56 hours (or 7 days, if the CBA refers to days rather than hours), the contractor must provide covered employees with the difference between 56 hours (or 7 days) and the amount provided under the existing CBA. For example, if a CBA ratified before September 30, 2016 applies to an employee's work performed on or in connection with a covered contract and provides the employee with 20 hours of paid sick time each year, the contractor, in order to avail itself of the § 13.4(f) exemption, would be required under this Final Rule to allow the employee to accrue and use an additional 36 hours of paid sick time in that year, for a total of 56 hours. A contractor must provide such "top up" leave in a manner consistent with either the provisions of the Executive Order and part 13 or the terms and conditions of its CBA. If a CBA does not provide any paid sick time (or paid time off that could be used for an unlimited or broader range of reasons than paid sick time, but including reasons related to being sick or seeking health care), a contractor will be responsible for full compliance with the Order and part 13 pursuant to the effective date of this rule and the definition of a "new contract."

This temporary exclusion applies to employees rather than contracts because on any covered contract, some employees' work might be governed by a CBA while others' work is not.

For example, laborers and mechanics working on a DBA contract might be members of a union that has negotiated a CBA with the contractor, but the administrative staff performing work in connection with the contract might not be covered by the CBA. Or a CBA could apply to janitors working on an SCA contract but not their supervisor. As to employees to whom a CBA does not apply, a contractor must provide access to paid sick leave without reliance on this exception.

In addition, the temporary exclusion applies to any paid sick time policy or other paid time off policy under a CBA that allows employees to take leave for reasons related to sickness or health care. Such policies need not permit employees to be absent for all of the reasons required under § 13.5(c)(1); for example, if a paid sick time policy under a CBA allowed an employee to use leave if she is sick but not to care for family members, or if a paid sick time policy does not permit leave for reasons related to domestic violence, sexual assault, or stalking other than seeking health care, the exclusion can still apply. Adjustments to the reasons for which an employee may use paid leave are among those changes that a contractor that is party to a CBA might be unable to make unilaterally.

Finally, the Department notes it has included a date—January 1, 2020—by which all contractors taking advantage of this limited exception must come into compliance with the paid sick leave requirements regardless of whether an applicable CBA has yet terminated. The Department believes delaying the application of the Executive Order by more than 3 years after the effective date of this rulemaking, which could occur if a CBA with an extended term is in place, is inappropriate, and parties to the CBA will have 3 full years to take any actions necessary to prepare for compliance.

SHRM/CUPA-HR also asked in their comment for a different exception for certain employees. They requested that the Department exclude graduate research assistants, i.e., students who perform research under grants or contracts as part of the pursuit of an advanced degree, from the requirements of the Order and part 13, asserting that it would be problematic to cover these workers because it would be difficult to segregate their covered and non-covered hours worked. The Department does not believe a provision specific to graduate research assistants is necessary or appropriate in this context. Application of the paid sick leave requirements to such assistants will depend, as it does for all other workers, upon whether they meet the definition of employee under part 13—that is, whether their wages are governed by the SCA, DBA, or FLSA, including if they qualify for an exemption from the FLSA's minimum wage and overtime requirements—and are performing work on or in connection with a covered contract. Graduate research assistants, whether or not they qualify as employees as defined for purposes of the Order, may often perform work on or in connection with Federal grants that are excluded from the Order's coverage. To the extent such assistants' work is covered by the Order and part 13 and therefore the commenters' concern about segregating time is relevant, the Department notes that it has created additional flexibility for contractors who would have difficulty segregating the covered and non-covered hours worked of employees who perform work in connection with covered contracts, as described in the discussion of § 13.5(a)(1) below.

The Department noted in the NPRM that the Minimum Wage Executive Order rulemaking contained additional exclusions for certain categories of employees that were not replicated in the proposed rule. Specifically, under the Minimum Wage Executive Order regulations, employees whose wages are not governed by section 206(a)(1) of the FLSA because of the applicability of exemptions under section 213(a) are not entitled to the protections of

Executive Order 13658. 29 CFR 10.4(e)(3). For the reasons explained in the discussion of coverage of employees above, no such exclusion exists in this rulemaking. Additionally, the Minimum Wage Executive Order does not apply to employees whose wages are calculated pursuant to special certificates issued under 29 U.S.C. 214(a) or (b), 29 CFR 10.4(e)(1), (2), but the Department did not propose to incorporate an exclusion for any such employees in the proposed rule under this Order. The NPRM explained that because it interpreted Executive Order 13706 to be intended to apply to a broad range of employees, the Order explicitly applies to employees whose wages are governed by the FLSA, and the Order (unlike the Minimum Wage Executive Order) contains no reference to any category of employees whose wages are calculated pursuant to special certificates, it proposed to interpret Executive Order 13706 to apply to all employees whose wages are calculated pursuant to special certificates under section 14 of the FLSA. No commenter asked that the Department exclude employees whose wages are calculated pursuant to special certificates issued under 29 U.S.C. 214(a) or (b), and therefore no such provision is adopted.

Section 13.5 Paid Sick Leave for Federal Contractors and Subcontractors

Proposed § 13.5 implemented section 2 of Executive Order 13706 by setting forth rules and restrictions regarding the accrual and use of paid sick leave. It is adopted in significant part as proposed but with modifications in response to comments as described below.

Proposed § 13.5(a) addressed the accrual of paid sick leave. First, proposed § 13.5(a)(1) implemented section 2(a) of Executive Order 13706, 80 FR 54697, by providing that a contractor shall permit an employee to accrue not less than 1 hour of paid sick leave for every 30 hours worked on or in connection with a covered contract. It further provided that a contractor shall aggregate an employee's hours worked on or in connection with all covered contracts for that

contractor for purposes of paid sick leave accrual. As the NPRM explained, under this approach, if, for example, a subcontractor that installs windows in building construction projects sends a single employee to three separate DBA-covered projects, all the time the employee spends on all worksites—whether during the same or different pay periods—for the subcontractor must be added together to determine how much paid sick leave the employee has accrued. If in one pay period the employee spent 20 hours at Site A and 10 hours at Site B, she would have accrued 1 hour of paid sick leave at the end of that pay period; if in the next pay period the employee spent 30 hours at Site C, she would then have a total accrual of 2 hours of paid sick leave. As for an employee who falls within the § 13.4(e) exclusion in some workweeks but not others, only the employee's hours worked on or in connection with covered contracts during workweeks in which the exclusion does not apply would count toward accrual of paid sick leave. The Department received no comments regarding these portions of § 13.5(a)(1) and adopts them as proposed.

Proposed § 13.5(a)(1)(i) explained that for purposes of Executive Order 13706 and part 13, "hours worked" would include all time for which an employee is or should be paid, meaning time an employee spends working or in paid time off status, including time when the employee is using paid sick leave or any other paid time off provided by the contractor. The proposed definition was different from the use of the term "hours worked" in other contexts and was to apply only for purposes of the Executive Order. It included (but was broader than) all time considered "hours worked" for purposes of the SCA and the FLSA, i.e., all time an employee is suffered or permitted to work. 29 CFR 4.178; 29 CFR 785.11.

The Department explained that its proposed interpretation of "hours worked" under Executive Order 13706 to additionally include paid time off, although distinct from the FLSA

and SCA definitions of the term, was analogous to the accrual of vacation leave under the SCA, where absences from work (with or without pay) generally count toward satisfaction of length of service requirements for vacation benefits. 29 CFR 4.173(b)(1). It was also consistent with the OPM regulation regarding leave accrual by federal employees, which provides that an employee accrues leave each pay period based on time she is "in a pay status." 5 CFR 630.202(a). The Department's proposed interpretation reflected its view that basing paid sick leave accrual on all time an employee is in pay status, rather than merely on when the employee is suffered or permitted to work, would be administratively easier (or no more difficult) for contractors to implement. The Department further noted in the NPRM that this interpretation generally would have minimal impact on the rate of an employee's accrual of paid sick leave and, with respect to many employees who work at least full time (or potentially even less) each week on or in connection with covered contracts, would have no impact on the total amount of paid sick leave accrued per year because such employees will reach the maximum 56 hours within each accrual year regardless of whether paid time off is included.

Many commenters, including the National Partnership, CAP Women's Initiative, NELP, NETWORK Lobby for Catholic Social Justice (NETWORK), Women Employed, and the AFL-CIO expressed support for the NPRM's definition of hours worked. But other commenters opposed it: Koga Engineering and Construction, Royal Contracting Company, Master Sheet Metal, Inc., the General Contractors Association of Hawaii, and Vigilant wrote that it is a basic premise of accruing leave that workers earn time off by working, EEAC believed it would be appropriate for "hours worked" to have the same meaning for purposes of this rulemaking as it does in the FMLA context; the SBLC believed the proposed definition would discourage employers from having generous time off policies; and the American Benefits Council, Seyfarth

Shaw, and the Chamber/IFA commented that the proposed definition would be confusing to administer because it differs from State and local paid sick time laws.

After considering the input received from commenters, the Department has decided to change the definition of hours worked such that it does not include paid time off. Instead, the term "hours worked" will have the same meaning for purposes of Executive Order 13706 and part 13 as it does under the Fair Labor Standards Act, as described in 29 CFR part 785. The Department anticipates that this change will make administration of paid sick leave easier for those contractors who are familiar with this definition under other statutes and/or already apply it for purposes of complying with a State or local paid sick time law. Any contractor that prefers to calculate its employees' paid sick leave accrual based on hours worked and hours spent in paid time off status is permitted, though not required, to do so.

As it did in the NPRM, the Department reiterates that a contractor would only be required to count hours worked on or in connection with a covered contract, rather than hours worked on or in connection with a non-covered contract, toward paid sick leave accrual. For example, if an employee works on an SCA-covered contract for security services for 30 hours each pay period and works for the same contractor on a private contract for security services for an additional 30 hours each pay period, the contractor would only be required to allow that employee to accrue 1, rather than 2, hours of paid sick leave each pay period. Similarly, if an employee works for one contractor on a DBA-covered contract for construction for 2 months and then on a private contract for construction for 2 months, the contractor would only be required to allow the employee to accrue paid sick leave during the first 2 months. But the Department proposed to require contractors who wish to distinguish covered and non-covered hours worked for purposes of paid sick leave accrual to keep records that clearly reflect that distinction.

Specifically, proposed § 13.5(a)(1)(i) explained that to properly exclude time spent on non-covered work from an employee's hours worked that count toward the accrual of paid sick leave, a contractor must accurately identify in its records the employee's covered and non-covered hours worked. The Department's proposal explained that, in the absence of records or other proof adequately segregating the time—whether because of a contractor's inadequate recordkeeping, because the contractor preferred permitting the employee to more rapidly accrue paid sick leave rather than keeping such records, or for another reason—the employee would be presumed to have spent all paid time performing work on or in connection with a covered contract. This proposed policy was consistent with the treatment of hours worked on SCA- and non-SCA-covered contracts, see 29 CFR 4.178, 4.179, as well as the treatment of covered versus non-covered time under the Minimum Wage Executive Order rulemaking, see 79 FR 60660-61, 60672.

Several commenters expressed concern about segregating employees' covered and non-covered work time. SBA Advocacy wrote that such segregation would be difficult, in particular in the construction industry in which employees move between work on different contracts, for seasonal recreational businesses in which employees work in remote locations, and for contractors in general as to employees who do not work directly on contracts, such as accounting, delivery, and management staff. DLA Piper and the HR Policy Association asked for more information about the type of proof that would be sufficient; DLA Piper asked whether, for example, a list or copies of all invoices processed by an accounting clerk, including some that relate to covered contracts, would be required. EEAC, PSC, and DLA Piper asked if, with respect to employees working in connection with covered contracts (such as receptionists and

mail room clerks), contractors would be permitted to make estimates based on a contractor's revenue or some other basis.

The Department believes that in most circumstances it will be simple, or at least practicable, to distinguish an employee's work on a covered contract from time spent on non-covered contracts, such as when a mechanic spends some time at a site of construction on a DBA-covered contract and some time at a site of construction on a private contract. But it appreciates that segregation of time will be more complicated in circumstances in which an employee works only in connection with covered contracts, such as, as the commenters noted, when a receptionist answers phone calls, or a mail room clerk sorts mail, regarding numerous projects, or when, as MCAA and SMACNA recognized, a contractor has employees in its off-site fabrication shop prefabricate pipe assemblies or ducts for delivery and installation at projects undertaken pursuant to both covered and non-covered contracts. Therefore, the Department has added to § 13.5(a)(1)(i) a statement allowing a contractor to estimate the portion of an employee's hours worked spent in connection with (but not on) covered contracts provided the estimate is reasonable and based on verifiable information.

As suggested by the commenters, such information could include the portion of a contractor's total revenue that derives from covered contracts if it is reasonable to assume that an employee's work time is roughly evenly divided across all of the contractor's work. If, for example, a contractor derives half of its revenue from covered contracts, the contractor would likely have a reasonable basis for estimating that employees in the mail room of the contractor's corporate headquarters spend half of their hours worked in connection with covered contracts. But if that contractor has offices in two locations, and all of its work at one of those locations pertains to covered contracts, the contractor could not reasonably assume that the staff in the

mail room at that location worked in connection with covered contracts only 50 percent of the time.

An estimate of this type based on information other than a contractor's revenue could also be appropriate. For example, a contractor could estimate that a receptionist who handles incoming calls for a group of other employees who work on covered contracts during, on average, one third of their work time also spends one third of her hours worked in connection with covered contracts. Like the basis for an estimate, the period of time for which an estimate could appropriately be used would also vary depending upon the circumstances; for example, a contractor that claims the § 13.4(e) exclusion for its receptionist because at the time, only 5 percent of its revenue derived from covered contracts would not be able to continue to do so if the contractor is awarded a new covered contract that will account for 40 percent of its revenue for the next year.

Proposed § 13.5(a)(1)(ii) required a contractor to calculate an employee's accrual of paid sick leave no less frequently than at the conclusion of each workweek. The Department explained in the NPRM that it considered "workweek" to have the meaning explained in the FLSA regulations, i.e., a fixed and regularly recurring period of 168 hours—seven consecutive 24-hour periods—that need not coincide with the calendar week but must generally remain fixed for each employee. See 29 CFR 778.105. NECA, SBLC, Vigilant, and the National Defense Industrial Association (NDIA) urged the Department not to adopt this provision as proposed, asserting that contractors' systems are configured to account for time each pay period rather than as frequently as once a week. Several of these commenters requested that instead, the Department require accrual at the end of each pay period or, if contractors' pay periods occur less frequently than twice a month, then at least that often. The Department is adjusting the

regulatory text based on these comments. Rather than requiring that paid sick leave accrue no less frequently than at the end of each workweek, § 13.5(a)(1)(ii) will require that accrual occur no less frequently than at the conclusion of each pay period or each month, whichever interval is shorter. This provision has no effect on a contractor's obligation under the SCA to have semimonthly (or more frequent) pay periods, see 29 CFR 4.6(h), or under the DBA to have weekly pay periods, see 40 U.S.C. 3142(c)(1), 29 CFR 5.5(a)(3). The Department anticipates that this added flexibility will benefit those contractors who currently track hours worked less frequently than each week, although it notes that contractors may still choose to calculate paid sick leave accrual each week, and will be required to do so if they have weekly pay periods. This change is also consistent with modifications to proposed § 13.5(a)(2), described below.

Proposed § 13.5(a)(1)(ii) also provided that a contractor was not required to allow employees to accrue paid sick leave in increments smaller than 1 hour for completion of any fraction of 30 hours worked. In other words, under the proposal, an employee could accrue 1 hour of paid sick leave after working a full 30 hours, rather than accruing any fraction of an hour for any fraction of 30 hours worked. Proposed § 13.5(a)(1)(ii) further required any remaining fraction of 30 hours to be added to hours worked for the same contractor in subsequent workweeks to reach the next 30 hours worked provided that the next workweek in which the employee performs on or in connection with a covered contract occurs within the same accrual year. (The term accrual year is defined in proposed § 13.2 and addressed in the discussion of § 13.5(b)(1) below.) Vigilant expressed approval of these provisions, and the Department adopts them essentially as proposed, although the references to "workweeks" have been changed to "pay periods" for consistency with the change to the first sentence of the provision.

The NPRM included an example of how § 13.5(a)(1)(ii) would operate in practice. The Department provides a similar example here, although it has modified the specifics to reflect how accrual would occur at the end of a pay period rather than after each workweek. Assume a contractor has 2-week pay periods, and an employee works on a covered concessions contract for 80 hours in pay period 1 and 35 hours in pay period 2. At the conclusion of pay period 1, the employee will have accrued 2 hours of paid sick leave based on his first 60 hours worked and, unless the employer chooses to allow accrual in increments smaller than 1 hour, will not have accrued any more paid sick leave based on the additional 20 hours he worked in that pay period. At the conclusion of pay period 2, the employee will have accrued 1 additional hour of paid sick leave based on the remaining 20 hours from pay period 1 plus his first 10 hours worked in pay period 2. The employee need not have accrued any paid sick leave based on the remaining 25 hours worked during pay period 2 (because 25 is less than 30). If the employee spends several subsequent weeks working for the contractor on a private contract and then returns to working on the covered concessions contract, under this provision, those remaining 25 hours would be added to his subsequent hours worked on the concessions contract for purposes of reaching his next accrued hour of paid sick leave (provided his return to the covered concessions contract occurred within the same accrual year as pay period 2). As noted in the proposal, an employer might wish to permit employees to accrue paid sick leave in fractions of an hour, perhaps because it finds the related recordkeeping less burdensome than keeping track of hours worked from previous workweeks, it allows for use of paid sick leave in increments smaller than 1 hour, or for some other reason. An employer may elect to do so provided all hours worked for the contractor on or in connection with covered contracts within the accrual year are counted toward an employee's paid sick leave accrual.

Proposed § 13.5(a)(1)(iii) addressed the accrual of paid sick leave for employees as to whom contractors are not obligated by another statute to keep records of hours worked. As the Department explained in the NPRM, for most employees on covered contracts, such as service employees on SCA-covered contracts, laborers and mechanics on DBA-covered contracts, and all employees performing work on or in connection with any covered contract whose wages are governed by the FLSA, contractors are already obligated by the SCA, DBA, or FLSA to keep records of employees' hours worked. 29 CFR 4.6(g)(1)(iii), 4.185 (SCA); 29 CFR 5.5(a)(3)(i) (DBA); 29 CFR 516.2(a)(7), 516.30(a) (FLSA). Therefore, as to those employees, contractors are already collecting the information necessary to calculate the accrual of paid sick leave. But for those employees who are employed in a bona fide executive, administrative, or professional capacity, as those terms are defined in 29 CFR part 541, contractors are not currently required by the SCA, DBA, or FLSA to keep such records. See 29 CFR 4.6(g)(1)(iii), 4.156, 4.185 (requiring that records be kept for "service employees" to whom the SCA applies and excluding from that category "persons employed in an executive, administrative, or professional capacity as those terms are defined in 29 CFR part 541); 29 CFR 5.5(a)(3)(i), 5.2(m) (requiring that records be kept for "laborers and mechanics" to whom the DBA applies and excluding from those terms "[p]ersons employed in a bona fide executive, administrative, or professional capacity as defined in part 541 of this title"); 29 CFR 516.3 (excusing employers of "each employee in a bona fide executive, administrative, or professional capacity … as defined in part 541 of this chapter" from the FLSA requirement to maintain and preserve records of hours worked).

In order not to impose a new recordkeeping burden on employers of such employees, proposed § 13.5(a)(1)(iii) allowed contractors to choose to continue not to keep records of such employees' hours worked, but instead to allow the employees to accrue paid sick leave as though

the employees were working on or in connection with a covered contract for 40 hours per week. Contractors could, under the proposed provision, choose to calculate paid sick leave accrual by tracking the employee's actual hours worked provided they permitted the relevant employees to accrue paid sick leave based on their actual hours worked consistently across workweeks rather than, for example, using the 40 hours assumption in workweeks during which an employee works more than 40 hours but not those in which the employee works fewer. Under the proposed approach, the Department would apply these principles to any employees exempt from the FLSA's minimum wage and overtime provisions and not covered by the SCA or DBA. The Department explained in the NPRM that this approach is consistent with FMLA recordkeeping regulations, under which there is a general requirement that FMLA-covered employers keep records of hours worked by employees eligible for FMLA leave but an exception with respect to employees who are not covered by or are exempt from the FLSA; employers of those employees need not keep such records so long as the employer presumes that the employees have met the hours requirement for FMLA eligibility. See 29 CFR 825.500(c)(1), (f). The Department received a supportive comment from Vigilant regarding the proposal to allow contractors to use this 40 hours assumption, and it adopts it as proposed.

Proposed § 13.5(a)(1)(iii) also provided that if an employee as to whom an employer is not otherwise required to keep a record of hours worked regularly works fewer than 40 hours per week on or in connection with covered contracts, whether because the employee's time is split between covered and non-covered contracts or because the employee is part-time, the contractor could allow the employee to accrue paid sick leave based on the employee's typical number of hours worked on covered contracts per workweek. The Department further explained in the NPRM that, although the contractor need not keep records of the employee's hours worked each

week, to use a number less than 40 for this purpose, the contractor was required to have probative evidence of the employee's typical number of covered hours worked, such as payroll records showing that an employee who performs on a covered contract was paid for only 20 hours per week by the contractor.

PSC expressed concern about "intrusive second-guessing by [the Department's] auditors" regarding the determination of an employee's usual time spent on or in connection with covered contracts and suggested that the Department revise this provision to state that it would presume a contractor's estimate of the portion of time an employee exempt from the FLSA's minimum wage and overtime requirements spends working in connection with covered contracts is reasonable unless countered by a preponderance of the evidence. The Department is not adopting this suggestion because of the incentives it would create; more specifically, it would likely reward any contractor that chose not to keep records that could be the basis for a sound determination of how much time employees spend working in connection with covered contracts.

The Department has, however, modified the proposed regulatory text to alleviate the concerns of PSC and other commenters regarding the tracking of time of employees who work exclusively in connection with, rather than on, covered contracts. Specifically, § 13.5(a)(1)(iii) now provides that a contractor must have probative evidence to support using an assumed typical number of hours worked on or in connection with covered contracts that is less than 40 or, if the employee performs work in connection with rather than on covered contracts, a contractor may estimate the employee's typical number of hours worked in connection with covered contracts per workweek provided the estimate is reasonable and based on verifiable information. This language is the same as that used in § 13.5(a)(1)(i) with respect to employees as to whom

contractors are obligated to track hours worked and is intended to provide the same flexibility for contractors as to employees who qualify for an exemption from the FLSA's minimum wage and overtime requirements.

Proposed § 13.5(a)(2) required a contractor to inform an employee, in writing, of the amount of paid sick leave that the employee has accrued but not used (i) no less than monthly, (ii) at any time when the employee makes a request to use paid sick leave, (iii) upon the employee's request for such information, but no more often than once a week, (iv) upon a separation from employment, and (v) upon reinstatement of paid sick leave pursuant to § 13.5(b)(3). Some of these requirements were based on FMLA regulations regarding notification to an employee of how much leave will be or has been counted against her FMLA entitlement, see 29 CFR 825.300(d)(6), but they were modified to account for the differences between FMLA leave and paid sick leave, including in the method of accrual. The fourth and fifth requirements were meant to ensure that employees who may be and ultimately are rehired by a contractor know how much paid sick leave they should and do have available upon such rehiring. In the NPRM, the Department explained that it was important that employees be able to determine whether absences will be paid (so they can, for example, schedule their own or their family members' doctors' appointments to occur after they have accrued sufficient paid sick leave), and that these notification requirements would not create a significant burden for contractors.

CPD, NWLC, the National Council of Jewish Women, Greater New Orleans Section, the National Association of Social Workers, the State Innovation Exchange, and the Coalition on Human Needs wrote that these various requirements would ensure that employees have the information they need to effectively use paid sick leave, and the Seattle Office of Labor

Standards noted in particular that if workers cannot access information about their leave balances, they are less likely to use the benefit even when they are ill. The Chamber/IFA, the American Council of Engineering Companies (ACEC), NDIA, NECA, SBLC, Seyfarth Shaw, and the ERISA Industry Committee all asserted, however, that weekly notifications were too frequent and that responding to employee requests for accrual amounts would generate burdensome work and paperwork. Commenters offered varied alternative suggestions: IEC asked that the Department give contractors full discretion over when to inform employees how much paid sick leave they have accrued; EEAC and Vigilant requested that notifications be required quarterly; PSC believed notification in the ordinary course of payroll administration should be sufficient; and NDIA and Delta indicated that notification each pay period or at least twice a month would be preferable.

The Department has modified proposed § 13.5(a)(2) in light of these comments. Specifically, under the regulatory text as adopted, contractors will be required to inform each employee, in writing, of the amount of paid sick leave the employee has accrued but not used no less than once per pay period or per month, whichever interval is shorter, as well as upon a separation from employment and upon reinstatement of paid sick leave pursuant to paragraph (b)(4) of this section. The Department believes this revised provision appropriately balances the need to ensure that employees are informed about the paid sick leave they have available for use with the interests of contractors in administering paid sick leave in a manner that is not unnecessarily burdensome. As was true of a corresponding change to § 13.5(a)(ii), this provision has no effect on a contractor's obligation under the SCA to have at least semimonthly pay periods, see 29 CFR 4.6(h), or under the DBA to have weekly pay periods, see 40 U.S.C. 3142(c)(1), 29 CFR 5.5(a)(3). The Department also notes that contractors are free to provide

notifications to employees more frequently than is required, including in response to employee requests.

PSC, EEAC and Roffman Horvitz, PLC asked in their comments that the Department allow contractors to satisfy the requirements of § 13.5(a)(2) with a self-service portal employees can access to check their paid sick leave accrual, as long as the contractor keeps the information updated. The Department intended its proposal to be understood to accommodate such a system. Indeed, in the discussion of proposed § 13.5(a)(2) in the NPRM, the Department noted that a contractor's existing procedure for informing employees of their available paid time off, such as notification accompanying each paycheck or an online system an employee can check at any time, could be used to satisfy or partially satisfy these accrual notification requirements provided it is written and clearly indicates the amount of paid sick leave an employee has accrued separately from indicating amounts of other types of paid time off available (except where the employer's paid time off policy satisfies the requirements of § 13.5(f)(5), described below). If the contractor customarily corresponds with or makes information available to its employees by electronic means, "written" for this purpose includes electronic transmissions. The Department has inserted language to this effect into the regulatory text to eliminate any confusion.

Finally, Vigilant commented with respect to proposed § 13.5(a)(2) that verbal notifications of an employee's amount of accrued paid sick leave should be sufficient. The Department believes written notifications are more useful for employees and not particularly burdensome for contractors, particularly because the requirement is modified to coincide with pay periods, when contractors will already be providing information to employees, and because the requirement may be satisfied by electronic communication, such as by email or an appropriate self-service portal. Accordingly, it has not modified this provision as requested.

Proposed § 13.5(a)(3) permitted a contractor to choose to provide an employee with at least 56 hours of paid sick leave at the beginning of each accrual year rather than allowing the employee to accrue such leave based on hours worked over time. As proposed, it further provided that in such circumstances, the contractor need not comply with the accrual requirements described in § 13.5(a)(1). The proposed section required the contractor to allow carryover of paid sick leave as required by § 13.5(b)(2), and although the contractor could limit the amount of paid sick leave an employee may carry over to no less than 56 hours, the contractor could not limit the amount of paid sick leave an employee has available for use at any point as is otherwise permitted by § 13.5(b)(3). The NPRM provided an example to illustrate the operation of these principles: if a contractor exercises this option and an employee carries over 16 hours of paid sick leave from one accrual year to the next (as described in the discussion of § 13.5(b)(2) below), the contractor must permit the employee to have 72 hours (16 hours plus 56 hours) of paid sick leave available for use as of the beginning of the second accrual year (because the contractor is not permitted to limit an employee's paid sick leave at any point in time as described in the discussion of § 13.5(b)(3) below).

Under § 13.5(c)(4), described below, the contractor may not limit the employee's use of that paid sick leave in the second (or any) accrual year, but the employee's use can effectively be limited if the contractor sets, as permitted by this proposed provision, a limit on the amount of paid sick leave an employee can carry over from year to year; in the example, if the employee who had 72 hours of paid sick leave at the beginning of accrual year 2 did not use any leave in that year, she could be permitted to carry over only 56 hours into accrual year 3. The Department explained in the NPRM that it believed this option would be beneficial to contractors that find the tracking of hours worked and/or calculations of paid sick leave accrual to be

burdensome and would provide employees with the full amount of paid sick leave contemplated by the Executive Order at the beginning of each accrual year.

EEAC, the SBLC, Seyfarth Shaw, the HR Policy Association, the American Benefits Council, the ERISA Industry Committee, SHRM/CUPA-HR, and the Chamber/IFA all generally supported proposed § 13.5(a)(3) because they agree it is an advantage for contractors to be excused from tracking paid sick leave accrual, but these commenters strongly objected to the requirement under the proposed provision to carry over paid sick leave that was not used in one accrual year into the next. The commenters asserted that employees would unfairly benefit from having more than 56 hours of paid sick leave available at once and that under State and local paid sick time laws, the option to "frontload" leave benefits employees because they do not have to wait to accrue paid sick time before being able to use it and, in turn, benefits employers because they do not have to permit carryover. The NYC Department of Consumer Affairs and AFL-CIO also supported the proposed provision, noting that it was helpful, especially for small employers, to have the flexibility it creates, and did not suggest that it be modified.

After carefully considering these comments, the Department is not modifying the proposed provision as requested (although some of the proposed text has become § 13.5(a)(3)(i) because of other additions to the provision that constitute new subparagraphs (ii) and (iii), described below). First and most significantly, the Executive Order itself requires that paid sick leave carry over from one year to the next. 80 FR 54697. Second, the Department believes that this option, as designed, benefits contractors by permitting them to avoid the obligation to track paid sick leave accrual, which requires accounting for an employee's hours worked and performing calculations each pay period, and it would not be appropriate to also allow contractors who elect to use this option to reduce the total amount of paid sick leave an employee

could accrue and use. Specifically, if a contractor does not exercise this option and as in the example described above, an employee carries over 16 hours of paid sick leave from one accrual year to the next, if the employee uses those 16 hours, he must be permitted to accrue 56 more, meaning he could (if he has reason to use the paid sick leave and enough hours worked to accrue the maximum number of paid sick leave hours the contractor permits) have 72 total hours of paid sick leave available for use over the course of accrual year 2—just as the employee in the example above has 72 hours (that she also might or might not have reason to use during the year).

Commenters also asked for specific additions to the proposed provision. EEAC noted that the NPRM did not address circumstances in which an employee starts work for a contractor who has chosen this option in the middle of an accrual year and suggested the Department provide that the employee should begin with as much paid sick leave as she would have been able to accrue based on her typical, predicted hours worked in the remainder of the year. The Department appreciates that these circumstances could arise and that it will not always be appropriate to provide a new employee with 56 hours of paid sick leave. Accordingly, it is adding as § 13.5(a)(3)(ii) regulatory text providing that if a contractor chooses to use the option described in § 13.5(a)(3) and the contractor hires an employee or newly assigns the employee to work on or in connection with a covered contract after the beginning of the accrual year, the contractor may provide the employee with a prorated amount of paid sick leave based on the number of pay periods remaining in the accrual year. Under this new provision, if, for instance, an employee was hired by a contractor to work full-time on a covered contract after one-third of the pay periods in the current accrual year had passed, that employee would be entitled to begin her employment with at least 37 hours (two-thirds of 56 hours, rounded to the nearest hour) of

paid sick leave. The Department notes that if a contractor chooses an accrual year that begins on the date an employee begins work on or in connection with a covered contract, this issue will not arise and this new provision will not be relevant.

Vigilant asked that contractors be permitted to select this option as to only some employees, such as if they wish to track accrual for newly hired workers and switch to providing 56 hours of paid sick leave at the beginning of an employee's second year of employment. The Department agrees that contractors should have flexibility in deciding when and as to whom they choose this option. It may be, for example, that as to some employees, tracking accrual is simple, whereas for others it is more complicated, and a contractor wishes to treat those employees differently for that reason. Or a contractor might change timekeeping systems during the course of a covered contract and determine that one option has become preferable to another in later accrual years. Therefore, the Department has added § 13.5(a)(3)(iii), which provides that a contractor may use the option described in § 13.5(a)(3) as to any or all of its employees in any or all accrual years. This language is not intended to permit a contractor to change its accrual systems during an accrual year, but rather, at the beginning of a new accrual year. As with all actions a contractor takes with respect to paid sick leave, a contractor may not use the decision of whether to elect this option to avoid its obligations under the Executive Order.

Finally, the SBLC made two suggestions: first, that contractors be permitted to prorate the amount of leave employees who work less than full-time on or in connection with covered contracts receive at the beginning of an accrual year under this option, and second, that contractors be permitted to provide employees with paid sick leave each quarter, rather than each year, without tracking accrual, noting that under such a system, "rollover" of paid sick leave between quarters would be appropriate. The Department has considered these suggestions but

has decided not to adopt either of them. Prorating the amount of leave provided under this option could be administratively complicated (it would require, for example, knowing in advance how much time an employee will work on or in connection with a covered contract over the course of a full year) and is unnecessary because, as explained above, employers now explicitly have the option of tracking accrual based on hours worked on or in connection with covered contracts for part-time employees even if they use the § 13.5(a)(3) option for full-time employees. Regarding a quarterly accrual system, the Department notes that most commenters responded positively to the proposed option to provide an alternative to tracking accrual, and adding another method of calculating accrual would introduce unnecessary confusion for both contractors and for purposes of enforcement by the Wage and Hour Division.

Proposed § 13.5(b) implemented the Executive Order's provisions, in sections 2(b), (d), and (j), regarding maximum accrual, carryover, and reinstatement of paid sick leave as well as non-payment for unused paid sick leave.

Proposed § 13.5(b)(1) allowed a contractor to limit the amount of paid sick leave an employee is permitted to accrue at not less than 56 hours in each accrual year. The Department received no comments on this portion of the provision, which implements section 2(b) of the Executive Order, and adopts it as proposed.

Proposed § 13.5(b)(1) also provided detail regarding an accrual year, a term defined in § 13.2. The Department proposed to explain that an accrual year is a 12-month period beginning on the date an employee's work on or in connection with a covered contract began or any other fixed date chosen by the contractor, such as the date a covered contract began, the date the contractor's fiscal year begins, a date relevant under State law, or the date a contractor uses for determining employees' leave entitlements under the FMLA pursuant to 29 CFR 825.200.

Under the proposal, a contractor could choose its accrual year but was required to use a consistent option for all employees and could not select or change its accrual year in order to avoid the paid sick leave requirements of Executive Order 13706 and part 13. The NPRM explained that as under the FMLA, if a contractor does not select an accrual year, the option that provides the most beneficial outcome to the employee would be used. See 29 CFR 825.200(e).

EEAC commented that contractors should be permitted to choose different accrual years for groups of similarly situated employees, offering as examples employees who are covered by a CBA, those who are employed by the contractor as the result of a merger with or acquisition of a different company, or those as to whom different paid time off policies apply. Because the Department agrees that there could be circumstances in which it would be difficult for a contractor to select the same accrual year for all employees, such as if a large contractor employs some workers subject to a CBA that calls for the accrual year to begin on one date and others subject to a relevant State law that calls for a different date, it has modified the regulatory text to incorporate EEAC's suggestion. The Department notes, however, that the contractor must choose the same accrual year (or, if the contractor chooses an accrual year that begins on the date an employee begins work on or in connection with a covered contract, the same accrual year methodology) for similarly situated employees and, as noted at the proposal stage, may not select or change any employee's accrual year in order to avoid the paid sick leave requirements of the Order and part 13.

Proposed § 13.5(b)(2) provided that paid sick leave shall carry over from one accrual year to the next. The proposed language would mean that upon the date a contractor has selected as the beginning of the accrual year, an employee would continue to have available for use as much paid sick leave as the employee had accrued but not used as of the end of the previous

accrual year. This portion of § 13.5(b)(2) implements section 2(d) of the Executive Order, and no commenter opposed it, so the Department adopts it as proposed.

Proposed § 13.5(b)(2) further provided that paid sick leave carried over from the previous accrual year would not count toward any limit the contractor sets on the annual accrual of paid sick leave. The NPRM explained that under this proposal, if an employee carries over 30 unused hours of paid sick leave from accrual year 1 to accrual year 2, for example, she must still be permitted to accrue up to 56 additional hours of paid sick leave in accrual year 2 rather than only 26 (because 30 plus 26 is 56), subject to the limitations described below. NAM opposed this portion of the proposed provision, asserting that it allows employees to accrue more than 56 hours in a year. The Department believes that the Executive Order's requirement that a contractor allow an employee to accrue up to 56 hours annually only has meaningful effect if an employee can accrue up to 56 hours of new paid sick leave in each accrual year rather than merely carry over unused paid sick leave from the previous accrual year. The Department notes that an employee's ability to accrue additional paid sick leave if she has carried over unused leave from the previous year is limited by § 13.5(b)(3) (which, as described below, allows a contractor to limit the amount of paid sick leave an employee has at any point in time) and that an employee's ability to use paid sick leave, regardless of the amount she has accrued, is limited by the set of reasons that justify such use listed in § 13.5(c)(1) (which, as described below, sets forth the purposes for which an employee may use paid sick leave). As an example, as noted by EEAC, if an employee accrues 56 hours of paid sick leave in accrual year 1 and uses no paid sick leave in year 1 or year 2, she could begin accrual year 3 with only 56 hours of leave, having accrued none in accrual year 2 (pursuant to § 13.5(b)(3)); in other words, the effect of this

provision on an employee's ability to accrue paid sick leave is limited. Accordingly, this provision is adopted as proposed.

Proposed § 13.5(b)(3) allowed a contractor to limit the amount of paid sick leave an employee is permitted to have available for use at any point to not less than 56 hours and further explained that even if an employee has accrued fewer than 56 hours of paid sick leave since the beginning of the accrual year, the employee need only be permitted to accrue additional paid sick leave if the employee has fewer than 56 hours available for use. The NPRM provided as an example a circumstance in which an employee carries over 56 hours of paid sick leave into a new accrual year; in that case, a contractor need not permit that employee to accrue any additional paid sick leave until she has used some portion of that leave. If and when she does use paid sick leave, she must be permitted to accrue additional paid sick leave, up to a limit of no less than 56 hours for the accrual year, beginning with hours worked in the pay period after she has used paid sick leave such that her amount of available leave is less than 56 hours. Similarly, as explained in the NPRM, if an employee carries over 16 hours of paid sick leave into a new accrual year, she must be permitted to accrue 40 additional hours of paid sick leave even if she does not use any paid sick leave while that accrual occurs. Once she has 56 hours of paid sick leave accrued, the contractor may prohibit her from accruing any additional leave unless, and until the pay period after, she uses some portion of the 56 hours. If she uses, for example, 24 hours of paid sick leave in the same accrual year (such that she has 32 hours remaining available for use), she must be permitted to accrue up to at least 16 more hours (in addition to the 40 hours she has already accrued during the accrual year) for a total of 56 hours accrued in that accrual year. If she did so, she would then have 48 hours of paid sick leave (32 previously available

hours plus 16 newly accrued hours) available for use and could be limited to that amount until the next accrual year.

Numerous commenters, including Caring Across Generations, the American Association of University Women, the National Association of County and City Health Officials, and the National Hispanic Council on Aging, asked the Department to simplify the accrual system by limiting the amount of paid sick leave an employee can carry over from one accrual year to the next rather than the amount of paid sick leave an employee has available at any point in time. And Seyfarth Shaw noted that the Department's proposed system will be confusing for contractors because limiting the amount of paid sick leave an employee may have available for use deviates from the way many State and local paid sick time laws operate. Although the Department appreciates the commenters' interest in having paid sick leave accrual operate in the simplest manner possible, the Department declines to adopt this suggestion because it believes its proposed system to be faithful to the Executive Order, which provides in section 2(b) that "[a] contractor may not set a limit on the total accrual of paid sick leave per year, <u>or at any point in time</u>, at less than 56 hours." 80 FR 54697 (emphasis added). Accordingly, the Department adopts § 13.5(b)(3) as proposed. The Department notes, however, that consistent with the permissive language of § 13.5(b)(3), contractors would be in compliance with the Order and part 13 if they permitted employees to have available for use an amount of paid sick leave greater than 56 hours and if they allowed employees with more than 56 hours of paid sick leave available for use to carry over only 56 of those hours into the next year; in other words, a contractor may choose to use the simplified system the commenters prefer, based on ease of administration, compliance with a State or local paid sick time law, or for any other reason.

Proposed § 13.5(b)(4) implemented the second clause of section 2(d) of the Executive Order by requiring that paid sick leave be reinstated for employees rehired by the same contractor or a successor contractor within 12 months after a job separation. The proposed text specified that this reinstatement requirement applied whether the employee leaves and returns to a job on or in connection with a single covered contract or works for a single contractor on or in connection with more than one covered contract, regardless of whether the employee remains employed by the contractor to work on non-covered contracts in between periods of working on covered contracts. The NPRM offered as an example a situation in which a service employee on an SCA-covered contract accrued but did not use 12 hours of paid sick leave, moved to a different work site to perform work unrelated to a contract with the Federal Government (either with or not with the same employer), and after 6 months, returned to the original SCA-covered contract. In this example, the employee would begin back on the original job with 12 hours of paid sick leave available for use. Pursuant to §§ 13.5(a)(2) and 13.5(b)(1), if her first week back on the job is within the same accrual year during which she accrued those 12 hours, the contractor would be required to count any fraction of 30 hours worked in her previous time on the contract toward the accrual of her next hour of paid sick leave, but the contractor may limit her additional accrual in that accrual year to 44 hours such that she can only accrue 56 hours total in the accrual year.

Proposed § 13.5(b)(4) further explained that the reinstatement requirement also applied if an employee takes a job on or in connection with a covered successor contract after working for a different contractor on or in connection with the predecessor contract, including when an employee is entitled to a right of first refusal of employment from a successor contractor under Executive Order 13495. (The terms “successor contract” and “predecessor contract” were

defined in proposed § 13.2, and the requirements that a predecessor contractor submit to a contracting agency, and a contracting agency provide to a successor contractor, a certified list of relevant employees' accrued, unused paid sick leave appeared in proposed §§ 13.26 and 13.11(f), respectively.) The NPRM offered the example of an employee performing work on a contract to sell food to the public in a National Park who has accrued 16 hours of paid sick leave. If that contract ends, a different contractor takes over the food stand, and the employee is rehired by the successor contractor, he would begin his new job with 16 hours of paid sick leave. In the NPRM, the Department invited comments on its interpretation of section 2(d) of the Executive Order to mean that the reinstatement requirement applied if an employee is rehired by a different contractor on or in connection with a covered successor contract after working on or in connection with the predecessor contract. The Department described its belief that the Executive Order's requirement to carry over previously accrued paid sick leave for employees "rehired by a covered contractor" should be interpreted to include different successor contractors who rehire employees from the predecessor contract. It further noted that SCA-covered successor contractors are generally required by the Nondisplacement Executive Order to provide a right of first refusal of employment to employees on the predecessor contract in positions for which they are qualified, and as a result, many covered successor contractors effectively "rehire" these employees, making it reasonable to interpret Executive Order 13706 to provide that such employees' accrued paid sick leave balances would carry over as well. The NPRM also explained that this interpretation would ensure that the carryover of accrued, unused leave would not depend on whether the successor contract is awarded to the same contractor that performed on the predecessor contract (in which case the Executive Order clearly mandates that employees either keep their accrued, unused paid sick leave or have it reinstated).

The Department's proposal recognized that the Government must ensure that it spends money wisely and it is imperative that contract actions result in the best value for the taxpayer. It further noted that the Government understands contractors may include the costs of benefits in overhead and it therefore may not (except in cost-type contracts) pay contractors based on their actual costs. For these reasons, the Department invited comments regarding the extent to which its interpretation of the reinstatement requirement could affect pricing and cost accounting, if at all, for covered contractors and contracting agencies, including any potential for paying twice for the same benefit—once to a predecessor contractor charging the Government for predicted use of paid sick leave during its contract term, and a second time to a successor contractor who would be obligated to pay for unused sick leave later used by its employees during the successor's contract, with the Government potentially bearing the added costs through higher contract prices.

The Department's proposal noted a potential scenario in which a contractor on a covered contract may have included in its bid the full cost of providing 56 hours of paid sick leave to every employee performing work on or in connection with the contract, and the contracting agency may treat the full amount of such leave as an allowable cost. At the end of the contract term, some employees will likely have balances of accrued but unused paid sick leave which could be carried over to a successor contractor. The Department specifically sought comment on how the current contractor and any different contractors bidding for the successor contract would account for this situation in their bid pricing. Finally, the Department invited comment as to the extent to which any potential impacts on pricing or cost accounting might be mitigated, including ways to mitigate any potential impact on subcontractors, small businesses, and prime contractors with covered supply chains. In providing comments on the feasibility of mitigation steps, the Department asked commenters to consider that the requirement for paid sick leave flows down to

all subcontract tiers and that in other than cost-type contracts, the Government may not have insight into and does not pay contractors based on their actual costs.

CLASP, Demos, the Working Families Organization, NETWORK, the Diverse Elders Coalition, CAP Women's Initiative, Caring Across Generations, CPD, NELP, and Equal Rights Advocates supported the proposed provision, writing that reinstatement of leave by successor contractors could encourage employees to continue working on successor contracts, which would improve efficiency and reduce training costs for the contractor. Other commenters supported the proposal for additional reasons: the AFL-CIO noted that an employee's access to paid sick leave should not depend on which contractor wins the contract on which she works; the SEIU wrote that the retention of benefits is valuable to employees and therefore will promote continuity on covered contracts; the American Federation of State, County & Municipal Employees (AFSCME) wrote that any costs of reinstating leave could be included in contractors' bids, and the Building Trades asserted that the proposal advances the goals of the Executive Order. Other commenters, however, opposed the proposed provision: the PSC and the NAM argued that potential successor contractors would not know the costs of the paid sick leave they would have to reinstate at the time of bidding (further suggesting that if such reinstatement is required, a successor contractor should be entitled to a price adjustment after receiving the certified list of employees' paid sick leave accrual created by the predecessor contractor); the NAM also asserted that implementing this requirement would be confusing and contracting agencies would be charged twice for the same paid sick leave; and DLA Piper and the HR Policy Association believed it would be challenging to create a certified list of employees' paid sick leave accruals where tracking employees' time is difficult, that it was unclear what a successor contractor should do if it did not receive a certified list, and that there would be unfairness to successor

contractors where an employee does so little covered work for the successor contractor that she would not have been able to accrue paid sick leave on the successor contract.

After careful consideration of these comments, the Department is promulgating the Final Rule without requiring that successor contractors reinstate paid sick leave to employees who worked on the predecessor contract. Although the Department appreciates the points made by the commenters who supported the provision and had proposed including it for those reasons, the Department finds the concerns of commenters opposed to the provision compelling. Because at this time, the Department has not identified a logistically viable mechanism to address the concerns expressed about costs, including to the government, the Department has removed the proposed provision. As noted elsewhere, other definitions and requirements included in the proposed rule to implement reinstatement by successor contractors—in particular, the requirements to create and provide a certified list of employees and their paid sick leave balances, as well as a recordkeeping requirement related to that list—also do not appear in this Final Rule.

Proposed § 13.5(b)(5) implemented section 2(j) of the Executive Order by providing that nothing in the Order or part 13 required a contractor to make a financial payment to an employee for accrued paid sick leave that has not been used upon a separation from employment. Although the Executive Order does not prohibit a contractor from making such payments should the contractor so choose, under the proposed regulatory text, doing so (whether voluntarily or pursuant to a CBA) would not affect that contractor's obligation to reinstate any accrued paid sick leave upon rehiring the employee within 12 months of the separation pursuant to § 13.5(b)(4). In other words, under proposed § 13.5(b)(5), a contractor could not avoid the requirement to reinstate paid sick leave when it rehires an employee by cashing out the leave at

the time of the original separation from employment. The proposed interpretation was consistent with the Department's understanding that the Executive Order is meant to ensure that employees of Federal contractors have access to paid sick leave rather than its cash equivalent. The Department requested comments, however, regarding the impact of the proposed provision on contractors and employees, as well as the incidence of cash-out for paid time off or paid sick time under contractors' current policies or relevant CBAs.

StrategicHealthSolutions, LLC, NECA, the SBLC, the American Benefits Council, Vigilant, the Chamber/IFA, and NAM all commented that if a contractor pays an employee for accrued, unused paid sick leave, that contractor should no longer have the obligation to reinstate such leave if the employee returns to employment on a covered contract. EEAC, PSC, and Delta wrote more specifically that contractors subject to State or local laws requiring payment to employees for unused paid sick time should not have to reinstate such leave; and EEAC and DLA Piper suggested that contractors party to a CBA that requires payment to employees for unused leave should not have to reinstate such leave. The Building Trades, AFL-CIO, and A Better Balance similarly asked that employees be able to receive the cash value of unused paid sick leave upon separation from employment rather than have leave reinstated, although they suggested that the employee, rather than contractor, decide whether to exercise that option.

In light of these comments, the Department is modifying the regulatory text to provide that if a contractor makes a financial payment to an employee for accrued paid sick leave that has not been used upon a separation from employment, that contractor is no longer obligated to comply with the reinstatement of paid sick leave requirement in § 13.5(b)(4). This relief from the reinstatement obligation also applies regardless of the contractor's reason for making the payment—that is, whether it is required by State or local law, mandated by a CBA, or a

voluntary decision. It applies only if the payment is in an amount equal to or greater than the value of the pay and benefits the employee would have received pursuant to § 13.5(c)(3) had the employee used the paid sick leave. Pursuant to the Executive Order itself, the Department is not changing the portion of the provision that notes a contractor is not required by the Order or part 13 to make such a payment. The Department is neither requiring contractors to allow employees to choose whether to accept payment for unused paid sick leave nor prohibiting contractors from giving employees such a choice.

Proposed § 13.5(c) described the purposes for which an employee may use paid sick leave, thereby implementing section 2(c) of the Executive Order, and addressed the calculation of the use of paid sick leave.

Proposed § 13.5(c)(1) required, subject to the conditions described in § 13.5(d) and (e) and the amount of paid sick leave the employee has available for use, a contractor to permit an employee to use paid sick leave to be absent from work for that contractor on or in connection with a covered contract for four reasons. The Department received only positive comments regarding the four proposed provisions describing the reasons for leave—in particular, CLASP, Caring Across Generations, Demos, the Working Families Organization, NELP, the CAP Women's Initiative, Jobs With Justice, Young Invincibles, Lift Louisiana, the National Hispanic Council on Aging, the National Council of Jewish Women, and the Coalition on Human Needs, among others, supported the enumerated uses of paid sick leave—and it adopts that list as proposed.

First, § 13.5(c)(1)(i) permits an employee to use paid sick leave if she is absent because of her own physical or mental illness, injury, or medical condition. As noted in the NPRM and discussed above, these terms, defined in § 13.2, are meant to be understood broadly.

Second, § 13.5(c)(1)(ii) permits an employee to use paid sick leave if she is absent because she is obtaining diagnosis, care, or preventive care from a health care provider. The Department also interprets the terms obtaining diagnosis, care, or preventive care from a health care provider and health care provider, defined in § 13.2 and discussed above, broadly.

Third, § 13.5(c)(1)(iii) permits an employee to use paid sick leave if she is absent because she is caring for her child, parent, spouse, domestic partner, or any other individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship who has any of the conditions or needs for diagnosis, care, or preventive care referred to in § 13.5(c)(1)(i) or (ii) or is otherwise in need of care. The terms child, parent, spouse, domestic partner, and individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship are defined in § 13.2. As the Department explained in the NPRM, it understands the use of these terms in the Executive Order to be an indication that the category of individuals for whom an employee can use paid sick leave to care is expansive. As also noted in the NPRM, the individual for whom the employee is caring could have any of the broadly understood conditions or needs referred to in § 13.5(c)(1)(i) or (ii). For example, an employee may use paid sick leave to be with a child home from school with a cold or to accompany his spouse to an appointment at a fertility clinic.

This provision also refers to an individual who is "otherwise in need of care," language that appears in section 2(c) of the Executive Order. In the NPRM, the Department interpreted this phrase to refer to non-medical caregiving for an individual who has a general need for assistance related to the individual's underlying health condition, noting as an example that an employee may use paid sick leave to provide his grandfather, who has dementia, unpaid assistance with bathing, dressing, and eating if the grandfather's usual paid personal care

attendant is unable to keep her regular schedule. AARP supported the Department's inclusion of care for older adults, and the Department reiterates its interpretation here.

Fourth, § 13.5(c)(1)(iv) permits an employee to use paid sick leave if the absence is because of domestic violence, sexual assault, or stalking, if the time absent from work is for the purposes otherwise described in § 13.5(c)(1)(i) or (ii) or to obtain additional counseling, seek relocation, seek assistance from a victim services organization, take related legal action, including preparation for or participation in any related civil or criminal legal proceeding, or assist an individual related to the employee as described in § 13.5(c)(1)(iii) in engaging in any of these activities. The terms used in § 13.5(c)(1)(iv) (domestic violence, which includes the terms spouse, domestic partner, intimate partner, and family violence; sexual assault; stalking; obtain additional counseling, seek relocation, seek assistance from a victim services organization, or take related legal action; victim services organization; and related legal action or related civil or criminal legal proceeding) are defined in § 13.2 and interpreted broadly in keeping with the purpose of ensuring that victims of domestic violence, sexual assault, or stalking are able to obtain the care, safety, and legal protections they need without losing wages or their jobs and that employees can assist such victims who are family members or like family in doing so.

For example, as noted in the NPRM, an employee who is a victim of domestic violence could use a day of paid sick leave to prepare for a meeting with an attorney, travel to the attorney's office, have the meeting to discuss her legal options, and travel home; a victim could use a day of paid sick leave to go to a courthouse to determine the process for filing a petition for a civil protection order, complete any necessary paperwork, and file that paperwork with the court and use another full day to attend proceedings at the court in support of that application, including mandatory mediation. For this purpose, assisting another individual who is a victim of

domestic violence, sexual assault, or stalking includes, but is not limited to, accompanying the victim to see a health care provider, attorney, social worker, victim advocate, or other individual who provides services the victim needs as a result of the domestic violence, sexual assault, or stalking. If the individual the employee is assisting is a minor victim of domestic violence or child sexual abuse, the employee could use paid sick leave to, for example, seek legal protections for the victim (including filing a police report and/or seeking a civil protection order), medical treatment for the victim, or emergency relocation services.

As the Department explained in the discussion of proposed § 13.5(c)(1) in the NPRM, use of paid sick leave is contractor, rather than contract, specific, meaning that an employee who has accrued paid sick leave working on or in connection with one covered contract could use the leave for time she would otherwise have been working on or in connection with another covered contract for the same contractor. For example, if an employee had accrued 4 hours of paid sick leave over the course of several pay periods during which he worked for a single contractor in connection with one covered contract for 60 hours and another two covered contracts for 30 hours each, he could use his accrued paid sick leave during time he was scheduled to perform work in connection with any of the three contracts, or any other covered contract, on behalf of the same contractor. This explanation applies to the provision as adopted.

The Department also noted in the NPRM that under proposed § 13.5(c)(1), an employee need only be permitted to use paid sick leave during time the employee would otherwise have spent working on or in connection with a covered contract rather than time spent performing other work (such as on a private contract), even if that work is for the same contractor. Numerous commenters, including the National Partnership, A Better Balance, CPD, and the National Council of Jewish Women, Greater New Orleans Section, asked that the Department

amend this portion of the provision to require contractors to allow employees to use paid sick leave at any time, regardless of whether they would otherwise have been performing work on or in connection with a covered contract, asserting the Department's proposed system would be difficult to administer. Although the Department is sympathetic to the commenters' concerns, it does not believe it is appropriate given the limits of the Executive Order's scope to require that contractors permit employees to use paid sick leave at times they would not be performing work on or in connection with a covered contract. The Department notes, however, that as explained in the discussion of the anti-interference provision in § 13.6(a) below, a contractor is prohibited from scheduling an employee's covered and non-covered work for the purpose of preventing an employee from using paid sick leave.

Relatedly, the Hawaii Employers Council posed a question regarding the implications of an employee's using paid sick leave on a day when he would have worked for half the day on a covered contract and half the day on a non-covered contract. The Department clarifies that the contractor would be obligated, provided all other relevant requirements are met, to allow the employee to use paid sick leave for the portion of the day during which she would have been working on the covered contract. In the absence of another requirement (such as one imposed by a CBA, a State or local paid sick time law, or the FMLA) and if the employer has records or other proof adequately segregating the time the employee is performing the non-covered work, it is at the employer's discretion how to address the employee's need for leave during the remainder of the day.

The Department has modified the text of § 13.5(c)(1) to provide that a contractor must permit an employee to use paid sick leave to be absent from work for that contractor during time the employee would have been performing work on or in connection with a covered contract or,

if the contractor estimates the employee's hours worked in connection with such contracts for purposes of accrual, during any work time. Two aspects of this language are notable. First, as in the proposed text, this language does not prohibit an employer from permitting employees to use paid sick leave during time they would have been performing non-covered work, an approach that AGC and Roffman Horvitz suggest may be particularly suitable for covered construction contractors whose workforces may move regularly between covered and non-covered work. A contractor may choose to do so, and the Department clarifies, in response to ABC's comment, that a contractor would not be penalized for doing so; specifically, if a contractor has a more generous policy regarding when employees may use paid sick leave than is necessary under the Order and part 13 such that, for example, an employee could use all 56 hours of his accrued paid sick leave during a period when he was working exclusively on a private contract, the contractor is not obligated to provide any additional paid sick leave for use during time the employee spends performing work on or in connection with covered contracts.

Second, the revised language provides that if a contractor chooses to estimate rather than track the amount of time an employee spends performing work in connection with covered contracts as permitted by § 13.5(a)(1)(i) or (iii), that contractor must permit the employee to use her paid sick leave at any time she would have been working for the contractor. As explained in the NPRM, if a contractor wishes to distinguish an employee's covered and non-covered time for purposes of (accrual and) use of paid sick leave, it is the contractor's responsibility to keep adequate records distinguishing between an employee's covered and non-covered work, and any denial of a request to use paid sick leave because the leave would occur while an employee is performing work that is not covered by Executive Order 13706 or part 13 must be supported by records or other proof demonstrating that fact. The implication of choosing to calculate an

employee's paid sick leave based on an estimate rather than track actual covered and non-covered hours worked is that the contractor does not have proof of the actual time the employee spends performing covered work, and therefore it would not be possible for the contractor to properly restrict the employee's use of paid sick leave to that time.

Finally, the Department notes that as explained in the NPRM, if an employee falls within the 20 percent of hours worked exclusion created by § 13.4(e) for some workweeks but not others, the employee must be permitted to use paid sick leave at any time the employee would have been working on or in connection with covered contracts (or, if the contractor estimates the employee's hours worked in connection with such contracts for purposes of accrual, during any work time), regardless of whether that time falls during a workweek in which the exclusion applies with respect to accrual. As explained in the proposed rule, this approach was designed to avoid complications that would otherwise arise in responding to requests to use paid sick leave accrued by such employees. Specifically, an employee could request to use paid sick leave during a week in which it was not clear at the time of the request (because it would not be known until the end of the week) whether the employee met the 20 percent threshold; under this approach, in such circumstances, the contractor must permit the use of paid sick leave (assuming all relevant requirements for use are met) rather than deny the request or provide an uncertain response to the employee.

Proposed § 13.5(c)(2) required a contractor to account for an employee's use of paid sick leave in increments of no greater than 1 hour. In other words, under the proposal, although a contractor was permitted to choose to allow employees to use paid sick leave in increments of smaller than 1 hour (such as half an hour or 15 minutes), it was not permitted to require employees to use paid sick leave in increments of any more than 1 hour. The NPRM explained

that, for example, if an employee needs to be an hour late for work because he accompanied his sister to a chemotherapy appointment that morning, his employer must permit him to use 1 hour of paid sick leave (rather than, for instance, requiring him to take a full day off or use a full day's leave).

Several commenters asked that the Department amend this provision: EEAC asked the Department to make the minimum increment of leave 4 hours, because scheduling a replacement worker can be difficult if an employee misses only a short period of work; the SBLC suggested that contractors be permitted to require employees to use a full day of paid sick leave if they request to use more than 75 percent of their normally scheduled work hours; A4A asked that the minimum increment for airline flight crew employees be 1 day; and the American Benefits Council noted that it would be expensive for contractors that currently track attendance in greater increments to implement this requirement. The United Food and Commercial Workers International Union (UFCW), on the other hand, asked that the Department require contractors to allow employees to use paid sick leave in increments smaller than 1 hour if they already keep other time records in fractions of an hour. The Department has considered each of these suggestions but declines to adopt any of them. A contractor may limit an employee's accrual of paid sick leave to 56 hours, or seven 8-hour days, per year. If an employee were required to use 4 or 8 hours of that leave at a time even when she only needs to be absent from work for a shorter duration, she would more rapidly deplete the amount of paid sick leave she has available for use than if she were permitted to use only the smaller increments she needed. Furthermore, employees will typically accrue paid sick leave over time, meaning they will often have far less than 56 hours available for use. If, for example, an employee who has 10 hours of paid sick leave available for use needs to leave work on a covered contract just 1 hour early to take his

daughter to a doctor's appointment, but he could be required to use 4 hours of paid sick leave, he would then have only 6 hours of paid sick leave—less than a day—available if the following week his daughter is sick and needs to stay home from school. Such outcomes would not advance the purposes of the Executive Order because they would make the paid sick leave benefit less meaningful for employees and could discourage employees from obtaining preventive health care for themselves and their families. The Department recognizes, however, that the smaller the minimum increment of paid sick leave required, the greater potential exists for administrative burden on contractors; it therefore declines to require, although it continues to allow, contractors to account for paid sick leave in increments smaller than 1 hour.

Proposed § 13.5(c)(2)(i) explained that a contractor could not reduce an employee's accrued paid sick leave by more than the amount of leave the employee actually takes, and a contractor could not require an employee to take more leave than is necessary to address the circumstances that precipitated the need for the leave, provided that the leave is counted using an increment of no greater than 1 hour. This language was based on FMLA regulations regarding the use of FMLA leave. See 29 CFR 825.205(a). The Department explained in the NPRM that this provision means that if a contractor chooses to waive its increment of leave policy in order to return an employee to work—for example, if an employee arrives a half hour late to work because he was at an appointment with a psychologist and the contractor waives its normal 1-hour increment of leave and puts the employee to work immediately—the contractor would be required to treat the employee as having used no more than the amount of leave the employee actually used, half an hour. See 78 FR 8867 (discussing relevant language codified in 29 CFR 825.205(a)). Under no circumstances could a contractor treat an employee as having used paid sick leave for any time that employee was working. The Department received no comments

regarding § 13.5(c)(2)(i) and adopts it as proposed, but with minor, non-substantive edits for consistency with language used in other provisions.

Proposed § 13.5(c)(2)(ii) explained that the amount of paid sick leave used could not exceed the hours an employee would have worked if the need for leave had not arisen. For example, as explained in the NPRM, if an employee is scheduled to work from 9am to 3pm, and she is absent from work from 10:30am to 12:30pm to take her father to a doctor's appointment, a contractor could deduct no more than 2 hours of paid sick leave from her accrued paid sick leave. Similarly, if the employee is scheduled to work from 9 a.m. to 3 p.m. and she is absent from work for the entire day to care for her sick child, a contractor may deduct no more than 6 hours of paid sick leave from her accrued paid sick leave. Further, the NPRM noted, if an employee is using paid sick leave at a time when she could have worked beyond her scheduled hours but would not have been required to do so, the contractor could not treat the employee as having used paid sick leave for those optional hours. For example, if an employee scheduled to work from 9 a.m. to 3 p.m. could have chosen to stay until 7 p.m. that night to earn overtime, but she was absent for the entire day, a contractor could not deduct more than 6 hours of paid sick leave from her accrued paid sick leave. The proposed provision was consistent with the FMLA regulation at 29 CFR 825.205(c) ("Voluntary overtime hours that an employee does not work due to an FMLA-qualifying reason may not be counted against the employee's FMLA leave entitlement."). In response to comments from AAR and Delta, the Department clarifies that these examples were meant to distinguish voluntary overtime from mandatory overtime; if an employee was scheduled to work from 9am to 7pm and was absent for the entire day, he would have used (and, pursuant to § 13.5(c)(3), must receive regular pay and benefits for) 10 hours of

paid sick leave regardless of whether a portion of that time would have constituted overtime. The Department did not receive requests to amend § 13.5(c)(2)(ii) and adopts it as proposed.

In the NPRM, the Department requested comments regarding whether it should add a physical impossibility exception, as exists under the FMLA regulations at 29 CFR 825.205(a)(2), to the 1-hour minimum increment requirement. Under such a provision, in situations in which an employee is physically unable to access the worksite after the start of the shift or to depart from the workplace prior to the end of the shift, a contractor would be permitted to require the employee to continue to use paid sick leave for as long as the physical impossibility remains. Examples that arise in the FMLA context are flight attendants whose scheduled flight departs, train conductors whose scheduled train departs, and laboratory technicians who work in "clean rooms" that must remain sealed. The Department sought comment regarding the categories of covered contracts and employees entitled to paid sick leave under Executive Order 13706 and part 13 with respect to which similar circumstances could arise and the implications of a physical impossibility provision for contractors and employees who perform on or in connection with those contracts.

AAR, A4A, Delta, EEAC, and the SBLC asked that the Department include a physical impossibility exception to the minimum increment set forth in § 13.5(c)(2). Based on these requests, the Department has included such a provision, modeled on the language of the analogous FMLA provision, as § 13.5(c)(2)(iii). The new language provides that if it is physically impossible for an employee using paid sick leave to commence or end work mid-way through a shift, such as if a flight attendant or a railroad conductor is scheduled to work aboard an airplane or train, or a laboratory employee is unable to enter or leave a sealed "clean room" during a certain period of time, and no equivalent position is available, the entire period that the

employee is forced to be absent constitutes paid sick leave. The period of the physical impossibility is limited to the period during which the contractor is unable to permit the employee to work prior to the use of paid sick leave or return the employee to the same or an equivalent position due to the physical impossibility after the use of paid sick leave.

The Department notes that as under the FMLA, this provision is "intended to make a limited allowance for the practical realities of the airline, railroad, and other industries with unique workplaces in which it is physically impossible for employees to leave work early or start work late." Final Rule, The Family and Medical Leave Act,, 78 FR 8833, 8869 (Feb. 6, 2013); see also FOH ¶ 39e01(d)(3) ("The 'physical impossibility' provision is intended to be narrowly construed and applied only in instances of true physical impossibility."). Furthermore, as under the FMLA, "the physical impossibility rule is protective of employees who may be subject to disciplinary action because they need to take leave beyond that required" by the reason for which they are using paid sick leave. Id. Under this new provision, all leave taken due to physical impossibility will count as paid sick leave. Finally, the Department notes that "an equivalent position" as used in § 13.5(c)(2)(i) has the same meaning described in the FMLA regulations at 29 CFR 825.215. Therefore, "[a]n equivalent position is one that is virtually identical to the employee's former position in terms of pay, benefits and working conditions, including privileges, perquisites and status. It must involve the same or substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort, responsibility, and authority." 29 CFR 825.215(a).

Proposed § 13.5(c)(3) required a contractor to provide to an employee using paid sick leave the same pay and benefits the employee would have received had the employee not used paid sick leave. In other words, while using paid sick leave, employees paid on a salary basis

may not face any deduction in pay, and employees paid hourly must receive the same hourly rate of pay they would have earned had they been present at work. In addition, employees must receive the same benefits while using paid sick leave that they would have were they present at work; for example, contractors must continue to make contributions to any fringe benefit plan (such as a health insurance plan or retirement account) for time employees are using paid sick leave and count time toward the earning of other benefits (for example, the accrual of vacation time), although, as explained above, the time an employee is using paid sick leave does not constitute hours worked for purposes of paid sick leave accrual. As noted in the NPRM, under this provision, employees whose wages are governed by the SCA or DBA would receive the same wages required under those statutes, including health and welfare and other fringe benefits or the cash equivalent thereof, as they would have earned had they been present at work instead of using paid sick leave.

TrueBlue, Inc. posed a question in its comment regarding the proper rate of pay when an employee uses paid sick leave at a time when she is earning a different hourly amount that she was when she accrued the paid sick leave. As explained in the NPRM, an employee who receives different pay and benefits for different portions of her work (for example, an employee who works as a carpenter on one DBA-covered contract and a skilled laborer on another DBA-covered contract on which she works for the same contractor), the pay and benefits due while the employee uses paid sick leave is to be determined based on which work she would have been performing at the time she uses the leave. The employee's pay rate at the time she accrued the paid sick leave is not relevant.

Delta asked that the Department amend this provision to state that employees need not receive premium pay they would otherwise have received if using paid sick leave, and Vigilant

similarly asked the Department to state that employees receive only straight time, rather than overtime, pay while using paid sick leave. To provide clarity in response to these comments, the Department has added the word "regular" before "pay" in the regulatory text. As indicated in the regulatory text, this addition is meant to indicate that only payments that would be included in the calculation of the employee's regular rate for hours worked under the FLSA (or basic rate for purposes of the Contract Work Hours and Safety Standards Act, 40 U.S.C. 3701 et seq. (CWHSSA)) must be provided to an employee using paid sick leave to fulfill the obligation to provide the same pay to that employee. The relevant FLSA principles (adopted under CWHSSA, see 29 CFR 5.15(c)) are set forth at 29 CFR part 778.

AGC indicated that it believed this provision required that contractors provide employees with their pay and benefits in cash rather than, for example, as contributions to fringe benefit trust funds. The Department wishes to clarify it did not intend this result; employees using paid sick leave must receive the same pay and benefits they would have had they not been absent from work, and any benefits should generally be provided in the same manner as an employee receives them at other times. For example, if a contractor provides its employees with health insurance coverage by making monthly payments to a third-party insurer on behalf of each employee, the contractor must not make any reduction in such payments to account for time an employee used paid sick leave. Or if a contractor satisfies its DBA health and welfare requirements by making contributions to a benefit fund of a certain amount per hour that an employee works on DBA-covered contracts, it must continue to make the same payments when an employee is using paid sick leave. To the extent a contractor is unable to provide the same benefits during time an employee is using paid sick leave that it does when an employee is working, such as because the benefit plan to which the contractor makes contributions will not

accept them for non-work time and an amendment to the plan is not feasible, the contractor may instead provide cash or another benefit of the same or greater value as the benefit it cannot provide. The Department notes that this exception to the general requirement to provide the same benefits is limited to circumstances in which doing so is infeasible.

The Department adopts § 13.5(c)(3) essentially as proposed, but with a minor modification (the words "had the employee not used paid sick leave" are replaced with "had the employee not been absent from work") for technical accuracy.

Proposed § 13.5(c)(4) prohibited a contractor from limiting the amount of paid sick leave an employee may use per year or at once. In other words, although a contractor could limit an employee's accrual of paid sick leave to 56 hours per year, a contractor could not prohibit the employee from, for example, using 16 hours carried over from the year 1, accruing 56 additional hours, and then using all 56 hours accrued in year 2 even though her total use in year 2 would exceed 56 hours. Under the proposed text, an employer also could not limit the amount of paid sick leave an employee may use at one time. For example, an employer could not establish a policy prohibiting employees from using any particular number of hours of paid sick leave in a single workweek. Similarly, an employer could not deny an employee's request to use paid sick leave for 2 full days in a row based on the length of time requested (as long as the employee had accrued sufficient paid sick leave to cover the time). Seyfarth Shaw, the Chamber/IFA, and the American Benefits Council strongly encouraged the Department not to prohibit contractors from setting a limit on use per year, and specifically asked that the Department allow contractors to limit use of paid sick leave to 56 hours per year. Seyfarth Shaw suggested in the alternative than an 80-hour usage cap would be appropriate. The Department has considered these suggestions but has decided not to adopt them because the Executive Order does not call for a cap on the

amount of paid sick leave an employee can use in a year but does effectively create limits on use by allowing for limits on accrual, which are implemented in § 13.5(b). In light of this reasoning, the Department is amending the regulatory text to clarify that an employee's use of paid sick leave may be limited by the amount of paid sick leave an employee has available for use.

Proposed § 13.5(c)(5) prohibited a contractor from making an employee's use of paid sick leave contingent on the employee's finding a replacement worker to cover any work time to be missed or the fulfillment of the contractor's operational needs. This language implemented section 2(e) of the Executive Order and made explicit the important point that the intent of the Executive Order could only be fulfilled if employees are entitled to use paid sick leave even if the need for such leave arises at a time that is inconvenient for a contractor. PSC, AAR, and EEAC urged the Department to indicate in the regulations that employees should consult with contractors about scheduling foreseeable paid sick leave, noting that language to that effect appears in the FMLA regulations. PSC pointed to the difficulties that would arise if, for example, the four security guards a contractor sends to a Federal courthouse all request to use paid sick leave for doctor's appointments on the same morning. Although the Department is not altering the fundamental premise of this provision, it has amended the regulatory language in recognition of these commenters' concerns. Specifically, it has inserted language modeled on 29 CFR 825.302(e), the FMLA provision to which the commenters referred; the new text provides that an employee is encouraged to make a reasonable effort to schedule preventive care or another foreseeable need to use paid sick leave to suit the needs of both the contractor and employee, and a contractor may ask an employee to make a reasonable effort to schedule foreseeable absences for paid sick leave so as to not disrupt unduly the contractor's operations, but a contractor may not make an employee's use of paid sick leave contingent on the

employee's finding a replacement worker to cover any work time to be missed or on the fulfillment of the contractor's operational needs. The Department notes that because employees will have far less paid sick leave than they do FMLA leave and because paid sick leave will often involve far less serious health conditions than are involved when an employee takes FMLA leave, the risk of disruption is not as high in this context, so no greater protections for employers are necessary.

Proposed § 13.5(d) implemented section 2(h) of Executive Order 13706 by addressing an employee's request to use paid sick leave. Proposed § 13.5(d)(1) required a contractor to permit an employee to use any or all of the employee's available paid sick leave upon the oral or written request of an employee that includes information sufficient to inform the contractor that the employee is seeking to be absent from work for a purpose described in § 13.5(c)(1) and, to the extent reasonably feasible, the anticipated duration of the leave. Proposed § 13.5(d)(1) further required the request to be directed to the appropriate personnel pursuant to a contractor's policy or, in the absence of a formal policy, any personnel who typically receive requests for other types of leave or otherwise address scheduling issues on behalf of the contractor.

The NPRM explained that employees could request paid sick leave by any oral or written method, including in person, by phone, via email, or with a note reasonably calculated to provide timely notice of the employee's intent to take leave, although as explained below, in response to comments, the Department now notes that a contractor's policy may provide specific methods of communicating a request. Additionally, although the request needed to contain sufficient information for a contractor to determine whether it is a proper use of paid sick leave, and the contractor could ask questions tailored to making that determination, the request was not required to contain extensive or detailed information about the reason for the leave and a

contractor is not permitted to require such information. Specifically, under the proposed approach, the employee needed only to provide information sufficient to inform the contractor that she wished to miss work for a reason that is a permissible use of paid sick leave and was not required to specify all symptoms or details of the need for leave. The Department has inserted language to this effect into the regulatory text, included as part of § 13.5(d)(1)(i), to ensure clarity.

As also noted in the NPRM and now provided in § 13.5(d)(1)(i), an employee's request to use paid sick leave need not include a specific reference to the Executive Order or part 13 or even use the words "sick leave" or "paid sick leave"; this language is modeled on a portion of the FMLA regulations regarding the content of an employee's notice to an employer of the need to use FMLA leave. See 29 CFR 825.301(b) ("An employee giving notice of the need for FMLA leave does not need to expressly assert rights under the Act or even mention the FMLA to meet his or her obligation to provide notice, though the employee would need to state a qualifying reason for the needed leave."); see also 29 CFR 825.302(c). Under § 13.5(d)(1)(i), an employee could simply state, for example, that the employee has a cold, a dentist appointment, or an appointment with an attorney regarding a domestic violence matter. In such cases, a contractor could not ask (for purposes of approving or rejecting the request to use paid sick leave) when the cold began or how severe it is, which dentist the employee is seeing or for what purpose, or for any detail regarding the circumstances of the domestic violence.

The NPRM further explained that under the proposed provision, an employee was not required to include in her request extensive details regarding the employee's relationship with an individual for whom the employee wished to care in the time absent from work; she only needed to inform the contractor that she has a family or family-like relationship with the individual. The

Department has added this point to § 13.5(d)(1)(i) for clarity. As explained in the NPRM, simply stating, for example, that the employee's son has a stomach bug, the employee's wife was injured in a car accident, or the employee's father needs assistance going to a doctor's appointment was sufficient under this proposed approach. For a request for paid sick leave involving providing care for an individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship, the employee need only assert that a family or family-like relationship exists, such as by stating that the employee needs to care for her ill grandmother or needs to accompany a man who is like a brother to him to a doctor's appointment. As also noted in the NPRM, although a contractor may ask questions to determine if the use of paid sick leave is justified, such as inquiring of an employee who asks to take leave to care for a close friend who was in a car accident whether that friend is someone whom the employee considers to be like family, the contractor could not demand intimate details upon receiving a positive response to such an inquiry. Although the Department recognizes that paid sick leave is available for only particular uses, it interprets Executive Order 13706 as intending to provide paid sick leave in a manner that is not burdensome for employees and does not allow significant intrusion into their personal lives by their employers.

The NPRM also explained that under proposed § 13.5(d)(1), the request to use paid sick leave should provide an estimate of the timing and amount of such leave needed to the extent reasonably feasible. This requirement is satisfied by stating that the sick employee hopes only to be out for 1 day, that the child's dentist appointment is on a particular date at 10 a.m. and is not anticipated to take more than an hour, or that the appointment with the attorney related to a domestic violence matter is on a particular date at 2 p.m. and will likely continue for the remainder of the work day. The contractor may not hold an employee to the estimate provided in

the request; for example, the sick employee could return to work in the afternoon if he recovers more quickly than he expected, and an employee can use more than an hour of paid sick leave (provided he has more than 1 hour available for use) if the dentist appointment runs longer than anticipated. To ensure that this point is clear to the regulated community, the Department has included it as § 13.5(d)(1)(ii).

Finally, the Department explained in the NPRM that under proposed § 13.5(d)(1), an employee's request to use paid sick leave would be acceptable if the employee directs it to the appropriate personnel pursuant to a contractor's policy or, in the absence of a formal policy, any personnel who typically receive requests for other types of leave on behalf of the contractor, such as a supervisor or human resources department staff. A few commenters addressed the use of an employer's usual procedures for requesting time off of work. AAR asked that the Department allow contractors to use their normal procedures; EEAC asked that the Department explicitly require employees to use a contractor's policy; Vigilant asked that the Department state it is usually reasonable to comply with the contractor's call-in policy; and the UFCW asked the Department to clarify whether a contractor may deny an employee's request for paid sick leave because the employee failed to use the contractor's typical procedures.

Because not all contractor policies will comply with the requirements of the Executive Order (for example, a policy might not permit an employee to make oral or written requests for leave as described in section 2(h) of the Order), the Department has not modified the relevant proposed text, which now appears as § 13.5(d)(1)(iii), in response to these comments; because a contractor's policy may govern how an employee must make requests to use paid sick leave, however, the Department provides more detail here about the provision's meaning. Under the regulatory text as proposed and adopted, if a contractor has a policy regarding to whom an

employee should submit leave requests, it may require the employee to direct her request to use paid sick leave to particular personnel pursuant to that policy. The policy may include particular procedures to use to contact the specified personnel, such as a designated phone number or email address, as long as—pursuant to the Executive Order's requirement that contractors accept "oral or written" requests, 80 FR 54698—the employee may communicate the request by at least one oral and at least one written method. If the employee directs a request to someone who is not the individual or individuals identified in the contractor's policy, the recipient may formally reject the request or explain that she is without authority to respond to it, in either case informing the employee of the correct personnel to whom to direct a new request, or the recipient may forward the request to the correct personnel herself.

Finally, the Department noted in the NPRM that pursuant to §§ 13.5(e)(1)(ii) and 13.25(d), when an employee requests leave for the purposes described in proposed § 13.5(c)(1)(iv), i.e., for absences related to being a victim of domestic violence, sexual assault, or stalking, the contractor shall maintain confidentiality about the domestic abuse, sexual assault, or stalking, unless the employee consents or when disclosure is required by law. For completeness and clarity, the Department has added to the regulatory text, as § 13.5(d)(1)(iv), a general reference to the confidentiality requirements described in § 13.25(d), which apply to information a contractor obtains in the course of receiving requests to use paid sick leave for any purpose as well as to information an employee may provide pursuant to the certification and documentation provisions described below.

Proposed § 13.5(d)(2) provided that if the need to use paid sick leave is foreseeable, the employee's request shall be made at least 7 calendar days in advance, whereas if the employee is unable to request leave at least 7 calendar days in advance, the request shall be made as soon as

is practicable. The term as soon as is practicable is defined in § 13.2. Proposed § 13.5(d)(2) further provided that when an employee becomes aware of a need to use paid sick leave less than 7 calendar days in advance, it should typically be practicable for the employee to make a request for leave either the day the employee becomes aware of the need to use paid sick leave or the next business day, but notes that in all cases, the determination of when an employee could practicably make a request must take into account the individual facts and circumstances.

The Department explained in the NPRM that it would consider any request made on the day the employee becomes aware of the need to take paid sick leave or the following business day to have been made as soon as was practicable; although it would not presume that requests made beyond that time frame were made as soon as practicable, the facts and circumstances of the specific situation could be such that despite the longer delay, the employee did in fact notify the employer as soon as was possible and practical. As explained in the NPRM, for example, if an employee makes an appointment for his daughter to have an annual exam with her doctor 2 weeks in the future, the employee should ask to use paid sick leave to take his daughter to the appointment at least 7 calendar days before the date on which it is scheduled. If instead the nurse at the employee's daughter's school called one afternoon to say the daughter had a high fever and he needed to take her out of school right away, he could plainly not have requested leave 7 days in advance, and he should instead request leave as soon as is practicable. Depending on the circumstances, such as how much attention the daughter needed, whether the employee had access to a phone or computer, and/or whether the person to whom the request would be directed was available, in this situation, as soon as practicable could be as the employee was preparing to leave work to get his daughter, when he got home with his daughter, later that evening (perhaps after she was asleep), or the next morning (assuming the following

day was a business day). If, on the other hand, the employee himself was in a serious car accident, was taken to the hospital, and had surgery the next day, he could not practicably have requested leave the day of the accident or of the surgery (i.e., the day he became aware of the need for leave or the following day).

AAR commented that under the FMLA, foreseeable requests for leave are to be made 30 days in advance, and there is no reason to have a shorter period of 7 days in the paid sick leave context. But the 7-day time frame implements section 2(h) of the Executive Order, which specifically provides that requests be made "at least 7 calendar days in advance where the need for the leave is foreseeable," so the Department cannot accept this suggestion. In other words, an employer may not require notice more than 7 days in advance of the employee's intent to use leave for a foreseeable purpose. The Department also notes that because paid sick leave will often involve shorter periods of absence than FMLA leave, which can be up to 12 weeks in duration, it will generally not be as difficult for contractors to plan around employee absences in the paid sick leave context. The Department adopts § 13.5(d)(2) as proposed but with minor, non-substantive modifications for clarity.

The NPRM further explained, and the Department reiterates, that if an employee did not comply with the requirements of § 13.5(d)(2), a contractor could properly deny the employee's request to use paid sick leave. For example, if an employee arranges a doctor's appointment for his son 3 weeks in advance but does not submit a request to use paid sick leave until 2 days before the appointment, the contractor may properly deny that request. Denial of the request would not be proper, however, if the need for leave was not foreseeable and the employee made the request as soon as was practicable, such as if upon making the request 2 days in advance, the employee explained that his husband had planned to take their son to the appointment, but the

husband learned on the morning the employee submitted the request that the husband would be unavailable at the time of the appointment, and the couple decided that the employee would have to take the son instead.

Proposed § 13.5(d)(3) addressed a contractor's response to an employee's request to use paid sick leave. Proposed § 13.5(d)(3)(i) permitted a contractor to communicate its grant of a request to use paid sick leave either orally or in writing provided that the contractor also complied with the requirement in § 13.5(a)(2) to inform the employee in writing of the amount of paid sick leave the employee has available for use. The Department did not receive comments regarding this provision specifically but has modified it to reflect that § 13.5(a)(2) no longer requires a contractor to inform an employee of the amount of paid sick leave she has available for use upon each request to use paid sick leave and to note that a written communication may be provided electronically, if the contractor customarily corresponds with or makes information available to its employees by such means.

Proposed § 13.5(d)(3)(ii) required a contractor to communicate any denial of a request to use paid sick leave in writing, with an explanation for the denial. PSC commented that a contractor's denial of a request to use paid sick leave should not have to be in writing. The Department is not adopting this suggestion because it believes written denials are advantageous for both employees and contractors. By providing the employee with a written statement of the reason for the denial, the contractor most effectively communicates what types of requests will be denied in the future and ensures that the WHD has a written record of the contractor's rationale in the event the employee were to file an interference complaint. EEAC asked that the Department be explicit that it considers electronic communication to satisfy this requirement. The Department believes it is appropriate for a contractor to communicate denials via electronic

means, such as an email or text message, provided that the contractor customarily corresponds with or makes information available to its employees by such means; it has added language to this effect to the regulatory text.

Proposed § 13.5(d)(3)(ii) further provided that denial is appropriate if, for example, the employee did not provide sufficient information about the need for paid sick leave; the reason given is not consistent with the uses of paid sick leave described in § 13.5(c)(1); the employee did not indicate when the need would arise; the employee has not accrued, and will not have accrued by the date of leave anticipated in the request, a sufficient amount of paid sick leave to cover the request (in which case, if the employee will have any paid sick leave available for use, only a partial denial would be appropriate); or the request is to use paid sick leave during time the employee is scheduled to be performing non-covered work. The proposed text also explained that if the denial is based on insufficient information provided in the request, such as if the employee did not state the time of an appointment with a health care provider, the contractor must permit the employee to submit a new, corrected request. The Department further proposed that if the denial is based on an employee's request to use paid sick leave during time she is scheduled to be performing non-covered work, the denial must be supported by records adequately segregating the employee's time spent on covered and non-covered contracts. Seyfarth Shaw commented that this list of reasons a contractor may properly deny a request to use paid sick leave is helpful for contractors seeking to avoid accusations of interfering with employees' rights. The Department appreciates that contractors must be able to administer paid sick leave in a reasonable manner, and adopts this text as proposed.

IEC, the American Staffing Association, and TrueBlue, Inc. requested that the Department permit a contractor to prohibit an employee from using paid sick leave until the

employee has worked for the contractor for 90 days. Although the Department recognizes that such a delay may be consistent with some contractors' existing practices, the Department declines to adopt this suggestion for purposes of the Executive Order because the Order itself provides for no such delay and the Department believes the purposes of providing access to paid sick leave are best fulfilled by ensuring that employees have such access throughout their employment, including early in their tenure with a new employer.

Proposed § 13.5(d)(3)(iii) required a contractor to respond to any request to use paid sick leave as soon as is practicable after the request is made. As proposed, it further explained that, although the determination of when it is practicable for a contractor to provide a response would take into account the individual facts and circumstances, it should in many circumstances be practicable for the contractor to respond to a request immediately or within a few hours. The proposed provision further explained that in some instances, such as if it is unclear at the time of the request whether the employee will be working on or in connection with a covered or non-covered contract at the time for which paid sick leave is requested, as soon as practicable could mean within a day or no longer than within a few days. PSC, the American Benefits Council, and Vigilant objected to the Department's suggestion that a contractor could respond to a request immediately or within a few hours; in particular, Vigilant noted that in many cases, the individual who receives the request would have to check with the human resources department to determine whether the employee had paid sick leave available for use before responding to the employee. The Department does not disagree with the comments but also does not believe modification of the proposed regulatory text is necessary. In some circumstances, such as if a contractor with only a small number of employees who knows they have all accrued some paid sick leave faces a request from an employee to leave work 1 hour early because his son is sick, or

if a large contractor has an information technology system in place that allows a supervisor or human resources professional who handles leave requests to immediately check how much paid sick leave an employee has available for use, an immediate or very prompt response will be possible. As the regulatory text acknowledges, under other circumstances—such as if the human resources office with paid sick leave accrual information is unreachable at the time the request is made or the employee's schedule at the time he needs to be absent is not yet determined—there will be reasons that the response to a request will necessarily be delayed. The Department does not mean to, and did not, indicate that a very short time frame for response will always be required; its language is meant instead to indicate that employers should respond to requests to use paid sick leave as promptly as is reasonable under the circumstances.

Proposed § 13.5(e) implemented section 2(i) of the Executive Order, which addresses certification and documentation for leave of 3 or more consecutive workdays.

Under proposed § 13.5(e)(1)(i), a contractor could require certification issued by a health care provider to verify the need for paid sick leave used for the purposes listed in proposed § 13.5(c)(1)(i), (ii), or (iii) only if the employee is absent for 3 or more consecutive full workdays. Under the proposed provision, a contractor could not require certification to justify the use of paid sick leave for any amount of time shorter than 3 consecutive full workdays. For instance, if an employee is scheduled to work from 9am to 5pm on Monday, Tuesday, and Wednesday, and he is unable to come to work at all during those times because he is hospitalized due to a severe infection, his employer could require that he provide certification issued by a health care provider. On the other hand, if the employee uses 4 hours of paid sick leave on Monday because his daughter's school nurse calls in the early afternoon to say his daughter has a fever and must be taken home, all 8 hours on Tuesday because he stays home with his ill

daughter, and another 2 hours on Wednesday because his daughter is not well enough to go to school on time, his employer could not require certification because he has not used paid sick leave for all of his scheduled time on 3 consecutive full workdays. (The definition of certification issued by a health care provider appears in § 13.2.) Proposed § 13.5(e)(1)(i) further required the contractor to protect the confidentiality of any certification as required by § 13.25(d). The Department received no comments specifically regarding this provision and adopts it as proposed but with a minor correction to accurately reflect that the use of paid sick leave would be for one of the purposes described in § 13.5(c)(1)(i), (ii), or (iii), rather than all of them.

Proposed § 13.5(e)(1)(ii) addressed documentation to verify the use of paid sick leave for the purposes listed in § 13.5(c)(1)(iv), i.e., for absences related to domestic violence, sexual assault, or stalking. Specifically, it permitted a contractor to require documentation from an appropriate individual or organization to verify the need for such leave only if an employee uses paid sick leave on 3 or more consecutive full workdays for such purposes. The NPRM explained that such documentation could come from any person involved in providing or assisting with the care, counseling, relocation, assistance of a victim services organization, or related legal action, such as, but not limited to, a health care provider, counselor, employee of the victim services organization, or attorney. The Women's Law Project, NWLC, and a group of organizations "dedicated to preventing, addressing, and ending domestic violence and sexual assault" suggested that the Department move this explanatory text to the regulation itself to prevent any confusion among contractors about the broad set of possible sources of acceptable documentation. These commenters also asked that the Department add clergy members, as well as family and close friends, to the illustrative list of individuals who can provide the

documentation, and that the Department permit self-certification because there are instances in which an employee has not told anyone about the domestic violence, sexual assault, or stalking situation she faces. Because the Department agrees with these commenters that the broad scope of possible documentation for the varied and difficult circumstances related to domestic violence, sexual assault, and stalking was not fully articulated in the proposed regulatory text, and in the interest of minimizing any burden on victims who wish to limit the number of people to whom they reveal information about the situations they are facing, the Department has modified the text of § 13.5(e)(1)(ii) to incorporate each of these suggestions. The Department notes that the paid sick time laws in Massachusetts and Seattle also permit self-certification when leave is used for purposes like those described in § 13.5(c)(1)(iv). See 90 Mass. Code Regs. 33.06(2)(b)(vi); Seattle, Wash. Mun. Code § 14.16.030(F)(2)(d).

Proposed § 13.5(e)(1)(ii) also provided that a contractor may only require that such documentation contain the minimum necessary information establishing the need for the employee to be absent from work. This portion of the provision was not the subject of any comments and is adopted as proposed. As explained in the NPRM, the documentation could, for example, consist of a note from a social worker at a victim services organization stating that the employee received services from the organization related to being a victim of domestic violence and moved to a new home for reasons related to the domestic violence, as well as a receipt from a moving company or a note from a landlord that indicates the date(s) of the move; it need not name the perpetrator of the domestic violence, the nature of the acts that constitute domestic violence, the addresses of the old or new homes, or any other details beyond those sufficient to make clear that the time was used for a purpose that justifies the use of paid sick leave. As another example, documentation could consist of a letter from a legal services attorney or sexual

assault victim advocate who is assisting an employee who is a victim of sexual assault in completing the paperwork related to and filing for a civil protection order or restraining order, explaining that the employee spent time (consisting of most business hours over 3 consecutive days) with the attorney or advocate preparing for the hearing, including completing the petition for the court's order and obtaining a time for the hearing as well as attending the hearing, including waiting at the courthouse and attending the proceedings; the letter would not need to explain the circumstances of the sexual assault, name the person(s) accused of the sexual assault, or otherwise provide any details beyond those sufficient to justify the need to use paid sick leave. Similarly, if the employee used 3 or more consecutive full workdays of paid sick leave to fly across the country to be with her daughter who is a victim of sexual assault to provide support related to an administrative hearing at the university the daughter attends, documentation could consist of the boarding passes from the employee's plane flights and emails from a university official to the daughter setting the date of the hearing, without providing details about the specific subject matter of the hearing.

Proposed § 13.5(e)(1)(ii) prohibited a contractor from disclosing any verification information and reiterated that the contractor must maintain confidentiality about the domestic abuse, sexual assault, or stalking as required by § 13.25(d). This sentence is adopted as proposed.

PSC and AGC urged the Department to permit contractors to request certification for leave of less than 3 days if an employee's use of paid sick leave occurs in a pattern that the employer believes suggests abuse (such as if an employee repeatedly uses paid sick leave on Fridays or Mondays). Because the Executive Order provides that a contractor may only require certification or documentation if an employee is absent for 3 or more consecutive days, 80 FR

54698, the Department declines to adopt the suggestion that in some circumstances, contractors be permitted to require certification or documentation for shorter periods of leave. The Department further addresses suspected abuse of paid sick leave by employees, including by noting that contractors may investigate such situations, in the discussion of § 13.6 below.

Proposed § 13.5(e)(2), which was derived from the FMLA regulations at 29 CFR 825.122(k), provided that if certification or documentation is to verify the illness, injury, or condition, need for diagnosis, care, or preventive care, or activity related to domestic violence, sexual assault, or stalking of an individual related to the employee as described in § 13.5(c)(1)(iii), a contractor could also require the employee to provide reasonable documentation or a statement of the family or family-like relationship. Proposed § 13.5(e)(2) further explained that this documentation could take the form of a simple written statement from the employee or could be a legal or other document proving the relationship, such as a birth certificate or court order. EEAC noted its approval of this proposed requirement, and the Department adopts it as proposed. As noted in the NPRM, like under the FMLA, such a written statement from the employee need not be notarized. Additionally, a contractor is entitled to examine any legal or other documentation provided, but the employee is entitled to the return of any official document submitted for this purpose, such as a birth certificate. The Department also notes that if an employee has already submitted proof of a family or family-like relationship to the contractor for some other purpose, such as providing a marriage certificate in order to obtain health care benefits for the employee's spouse, such proof is sufficient to confirm the family relationship for purposes of paid sick leave, and the contractor may not require additional documentation.

Proposed § 13.5(e)(3) addressed timing with respect to certification and documentation. Proposed § 13.5(e)(3)(i) allowed a contractor to require certification or documentation only if the contractor informs an employee before the employee returns to work that certification or documentation would be required to verify the use of paid sick leave if the employee is absent for 3 or more consecutive full workdays. The Department viewed this time limit as necessary because without notice at the time the employee or individual cared for by the employee has the condition or need justifying the use of paid sick leave, it could become difficult or even impossible for the employee to obtain certification. For example, if an employee has the flu for 4 days, without knowing that the contractor wishes her to provide certification from a health care provider verifying that she was sick, she might well recover fully without contacting a doctor. The Department further explained in the NPRM but not the regulatory text that a contractor's general policy, if made clear to employees (such as in an employee handbook), requiring certification of the use of paid sick leave for absences of 3 or more consecutive full workdays would suffice to meet this requirement.

The AFL-CIO was generally supportive of this provision. Other commenters had conflicting views regarding whether notification in an employee handbook should be sufficient to meet this obligation: EEAC asked that a statement that such notice would fulfill this requirement appear in the regulatory text, whereas the Center for WorkLife Law suggested that the Department disallow such general notice but instead require actual notice to an employee at the time the employee is using leave (a requirement that would be consistent with the analogous FMLA provision, 29 CFR 825.305(a), which provides that "[a]n employer must give notice of a requirement for certification each time a certification is required").

Because the Department recognizes both the importance of employees being notified of the need to acquire certification or documentation and the potential burden on contractors that would be associated with informing each employee of its policy each time she requested to use leave, the Department is addressing these comments by adding to § 13.5(e)(3) a statement that the contractor may inform an employee of this requirement each time the employee requests to use or does use paid sick leave, or the contractor may inform employees of a general policy to require certification or documentation for absences of 3 or more consecutive full workdays if it does so in a manner reasonably calculated to provide actual notice of the requirement to employees. Whether employees have received actual notice will depend on the particular circumstances, but in general, the Department will not consider simply including an explanation of the requirement in a lengthy handbook to be sufficient to show the employer has ensured that its employees had actual notice. Explaining the policy orally when an employee is hired, reiterating the policy periodically in e-mail reminders or at human resources trainings, and including it in an employee handbook to which the employee can refer at later dates, however, would satisfy the actual notice requirement, as would prominently posting the policy on a Web page from which employees can submit electronic requests to use paid sick leave.

Under proposed § 13.5(e)(3)(ii), a contractor could require the employee to provide certification or documentation within 30 days of the first day of the 3 or more consecutive full workdays of paid sick leave but could not set a shorter deadline for its submission. This requirement is set forth in section 2(i) of the Executive Order. 80 FR 54698. No commenter addressed it, and it is adopted as proposed.

Proposed § 13.5(e)(3)(iii) addressed the period between an employee's using paid sick leave for which a contractor properly requires certification or documentation and the employee's

submission of such certification and documentation, as well as how a contractor can respond to insufficient certification or documentation. It is adopted largely as proposed, but with modifications as described. First, proposed § 13.5(e)(3)(iii) required that while a contractor is waiting for or reviewing certification or documentation, it must treat the employee's otherwise proper request for 3 or more consecutive full workdays of paid sick leave as valid. Vigilant asked that the Department change this provision such that the contractor would not treat an employee's absence as paid sick leave until after receiving sufficient certification or documentation. The Department recognizes that because it is not possible to immediately resolve the issue of whether an employee's absence of 3 or more days from work is properly treated as time using paid sick leave, either the contractor or the employee must bear the risk of an incorrect assumption while the determination is pending. Permitting an employer to wait to pay an employee for the time would create a significant deterrent to the use of paid sick leave at times when an employee's need is likely greatest (because relatively longer leave will often be for an acute or severe issue). For these reasons, and because recoupment of payments made for paid sick leave after a proper retroactive denial of that leave is permitted under the Order and part 13 in the circumstances explained below, the Department believes it is more appropriate to ensure that the employee receives the pay and benefits she would have earned had she been working than to delay such payment to the employee.

Proposed § 13.5(e)(3)(iii) also explained that if the contractor ultimately does not receive certification or documentation, or if the certification or documentation the employee provides is insufficient to verify the employee's need for paid sick leave, the contractor could, within 10 calendar days of the deadline for receiving the certification or documentation or within 10

calendar days of the receipt of the insufficient certification or documentation, whichever occurs first, retroactively deny the employee's request to use paid sick leave.

The Department explained in the NPRM that certification or documentation could be insufficient, for example, because it did not describe a need for leave consistent with the permitted reasons for using paid sick leave or because, if the leave was for a purpose other than that described in § 13.5(c)(1)(iv), it was not created or signed by a health care provider or a health care provider's representative. The Center for WorkLife Law commented that the Department should require the contractor to give an employee notice that her certification or documentation is insufficient and allow her at least 5 days to cure the deficiency. Because the Department agrees that it is appropriate to give employees, who will often be unfamiliar with the rules regarding certification and documentation, a second chance to justify their use of a substantial portion of their accrued paid sick leave, the Department has modified the regulatory text to implement this suggestion. Specifically, § 13.5(e)(3)(iii) now provides that if an employee provides certification or documentation that is insufficient to verify the employee's need for paid sick leave, the contractor shall notify the employee of the deficiency and allow the employee at least 5 days to provide new or supplemental certification or documentation. If after 30 days the employee has not provided any certification or documentation, or if after the 5 or more days allowed for resubmission the employee has either provided no new or supplemental certification or documentation or the new certification or documentation is still insufficient to verify the employee's need for paid sick leave, the contractor may, within 10 calendar days of the employee's deadline for providing sufficient certification or documentation, retroactively deny the employee's request to use paid sick leave.

Proposed § 13.5(e)(3)(iii) further provided that if the contractor retroactively rejected the employee's request, the contractor could recover the value of the pay and benefits the employee received but to which the employee was not entitled, including through deduction from any sums due to the employee (e.g., unpaid wages, vacation pay, profit sharing, etc.), provided such deductions do not otherwise violate applicable Federal or State wage payment or other laws. This language was derived from the FMLA regulations regarding the consequences of an employee's failure to return to work after an employer paid for health or non-health benefit premiums while an employee was on FMLA leave. See 29 CFR 825.213(f). If a contractor retroactively denied an employee's request to use paid sick leave, the NPRM explained, the contractor was required to reinstate the amount of paid sick leave the employee was treated as having used to the employee.

Delta commented that the NPRM did not address a contractor's options if a State law does not permit recoupment of wages paid and suggested that the contractor be permitted to treat the absence as paid sick leave but nevertheless count the absence against the employee in the contractor's time and attendance policy. The Department does not agree with this suggestion. If a contractor could properly retroactively deny an employee's request to use paid sick leave but may not recoup relevant payments made, the contractor has two options. It may treat the time as paid sick leave, in which case the contractor must comply with all of the requirements of the Order and part 13 with respect to that time, including the prohibitions on interference and discrimination (that is, it may not count the absence against the employee under its attendance policy) but the employee will have less paid sick leave available for use going forward. Or it may elect not to treat the time as paid sick leave, in which case it may count the absence against the employee under its attendance policy but it must restore the hours of paid sick leave the

employee attempted to use to the amount of paid sick leave the employee has available for use. This portion of the provision is therefore adopted as proposed, except that the reference to Federal or State wage payment laws has been corrected to refer to Federal, State, or local wage payment laws.

Proposed § 13.5(e)(4) permitted a contractor to contact the health care provider or other individual who created or signed the certification or documentation only for purposes of authenticating the document or clarifying its contents and further explained that the contractor could not request additional details about the medical or other condition referenced, seek a second opinion, or otherwise question the substance of the certification. Under the proposal, authentication meant verifying that the health care provider or other individual did in fact create or sign the certification. Clarifying meant asking what illegible handwriting or other unreadable text says or asking for an explanation of the meaning of words used or information contained in the certification. Under the proposal, which was consistent with requirements regarding certification under the FMLA, see 29 CFR 825.307, a contractor could not ask the health care provider or other individual who created or signed the certification or other documentation for more information than necessary to verify that the employee was justified in using paid sick leave. The specific information required would vary depending upon the reason for the leave. For example, as explained in the NPRM, if an employee was home sick or injured for 3 days, any certification would need to contain some information about the medical condition (such as that it was the flu or a badly sprained ankle) to verify that the condition existed and lasted 3 or more days, but if an employee was a patient in a hospital for 3 days, the certification would not need to specify the condition for which the employee was being treated, because he was clearly

receiving care from a health care provider while using paid sick leave. No commenter suggested modification of this portion of the provision, and the Department adopts it as proposed.

Proposed § 13.5(e)(4) further required the contractor to use a human resources professional, a leave administrator, or a management official if making contact with the health care provider or other individual who created or signed the certification or documentation. This requirement was derived from a regulatory provision under the FMLA. See 29 CFR 825.307(a). The proposed text went on to prohibit the employee's direct supervisor from contacting the employee's health care provider unless there is no other appropriate individual who can do so. The proposed requirement was also based on a similar provision in the FMLA regulations, 29 CFR 825.307(a), but unlike that provision, it did not contain a complete prohibition on an employee's direct supervisor contacting the health care provider. In explaining this distinction, the Department noted that although the Department sought to protect the privacy of employees (who might not wish to share personal medical or other information with a supervisor) to the extent possible, it recognized that the Executive Order applies to contractors that are not covered by the FMLA because their businesses are not of the requisite size, and so it believed the limited proposed exception was necessary. EEAC commented that it was helpful for the Department to be clear about who is permitted to seek authentication or clarification. Roffman Horvitz, on the other hand, believed the proposed provision placed too many requirements on contractors and should instead describe the necessary training for seeking authentication or clarification and allow the contractor to select the person who would complete those tasks. The Department adopts this portion of the provision as proposed, noting in response to Roffman Horvitz that the regulatory language allows contractors significant leeway in determining who may contact the

health care provider or other professional and the limits that it does create are necessary to protect employees' privacy.

Proposed § 13.5(e)(4) also addressed the Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule, Pub. L. 104-191, 110 Stat. 1936 (1996), which governs the privacy of individually identifiable health information created or held by HIPAA-covered entities and the requirements of which are set forth at 45 CFR parts 160 and 164. Specifically, it provided that the HIPAA Privacy Rule requirements must be satisfied when individually identifiable health information of an employee is shared with a contractor by a HIPAA-covered health care provider. As is true for purposes of the FMLA, if an employee's certification is unclear and the employee chooses not to provide the contractor with authorization allowing the contractor to clarify the certification with the health care provider (and does not otherwise clarify the certification), the proposed rule permitted the contractor to deny an employee's request to use paid sick leave. See 29 CFR 825.307(a). The Department received no requests to change this language and adopts it as proposed.

Proposed § 13.5(f) addressed the interaction between the paid sick leave required by Executive Order 13706 and part 13 with other laws as well as contractors' paid time off policies. Proposed § 13.5(f)(1) implemented section 2(l) of the Executive Order by providing that nothing in the Order or part 13 excused noncompliance with or superseded any applicable Federal or State law, any applicable law or municipal ordinance, or a CBA requiring greater paid sick leave or leave rights than those established under the Executive Order and part 13. The Department received no comments regarding this provision and adopts it as proposed.

Proposed § 13.5(f)(2) addressed the interaction between paid sick leave and the requirements of the SCA and DBA, thereby implementing section 2(f) of the Executive Order.

Proposed § 13.5(f)(2)(i) explained that paid sick leave required by Executive Order 13706 and part 13 was in addition to a contractor's obligations under the SCA and DBA, and a contractor would not receive credit toward its prevailing wage or fringe benefit obligations under those Acts for any paid sick leave provided in satisfaction of the requirements of Executive Order 13706 and part 13. The SCA and DBA both provide that fringe benefits furnished to employees in compliance with their requirements do not include any benefits "required by Federal, State, or local law." 41 U.S.C. 6703(2) (SCA); 40 U.S.C. 3141(2)(B) (DBA); see also 29 CFR 4.171(c) ("No benefit required by any other Federal law or by any State or local law, such as unemployment compensation, workers' compensation, or social security, is a fringe benefit for purposes of the [SCA]."); 29 CFR 5.29 ("The [DBA] excludes fringe benefits which a contractor or subcontractor is obligated to provide under other Federal, State, or local law. No credit may be taken under the [DBA] for the payments made for such benefits. For example, payment[s] for workmen's compensation insurance under either a compulsory or elective State statute are not considered payments for fringe benefits under the [DBA]."). Because paid sick leave provided in accordance with the Executive Order and part 13 is required by law, the Department reasoned, consistent with the Executive Order's express language, that such paid sick leave cannot count toward the fulfillment of SCA or DBA obligations.

Proposed § 13.5(f)(2)(ii) allowed a contractor to count the value of any paid sick time provided in excess of the requirements of Executive Order 13706 and part 13 (and any other law) toward its obligations under the SCA or DBA in keeping with the requirements of those Acts. In particular, the NPRM explained that a contractor could take credit for such paid sick time provided in compliance with the SCA requirements regarding fringe benefits as described in 29

CFR 4.170 through 4.177 or with the DBA requirements regarding fringe benefits as described in 29 CFR 5.20 through 5.32, as applicable.

Several commenters disagreed with the Department's position as expressed in § 13.5(f)(2). AGC commented that paid sick leave is a contractual, rather than legal, requirement and therefore should not be excluded from a contractor's fulfillment of its DBA fringe benefit obligations. ABC commented that not giving contractors credit toward their DBA obligations for the cost of providing paid sick leave amounts to imposing a double payment penalty on those contractors. PSC urged the Department to count a contractor's existing paid time off policy used to satisfy its obligations under the Order and part 13 (as permitted by § 13.5(f)(5)) toward its SCA obligations. The Building Trades urged the Department to conclude that if a contractor provides paid sick leave in a manner sufficient for it to qualify as a "bona fide fringe benefit" for purposes of the SCA or DBA, that contractor should be permitted to take credit for irrevocable contributions to a paid sick leave plan toward its SCA or DBA obligations. The Department does not agree with these commenters' rationales or suggestions. Paid sick leave is required by Executive Order 13706 and part 13, which are sources of law, and therefore under the SCA and DBA, as well as the Order's own terms, it cannot be used to fulfill SCA or DBA obligations. That result applies regardless of how the contractor satisfies its obligations under the Order, including by doing so with a paid time off policy or with a funded plan (which, as newly explicitly noted in § 13.8, described below, is permitted). The Department does not believe it is inappropriate that DBA (or SCA) contractors will have to comply with two legal obligations: fulfilling the requirements of the Executive Order, which provides employees access to paid sick leave, and fulfilling the requirements of the DBA (and SCA), which requires paying

employees prevailing wages and fringe benefits. Accordingly, § 13.5(f)(2) is adopted as proposed.

The Department reiterates that to the extent contractors provide leave benefits in excess of those required by the Order and part 13, the value of the excess benefit (if not required under another law) may be counted toward SCA or DBA obligations. For example, if a contractor provides paid sick leave pursuant to the Order and part 13 but also voluntarily provides its employees an additional 16 hours of paid sick time, the value of that additional 16 hours may be counted toward its SCA or DBA obligations (to the extent permitted by those statutes and their implementing regulations). Or if a contractor's paid time off policy provides more than 56 hours of leave and a contractor tracks and records the amount of paid time off employees use for the purposes described in § 13.5(c)(1), the contractor may count paid time off an employee uses for other purposes toward its SCA or DBA obligations (to the extent permitted by those statutes and their implementing regulations). For SCA-covered contracts, such obligations could include the required health and welfare benefit or required vacation time.

The Chamber/IFA asked how paid sick time that is provided for in a CBA would be treated under section 4(c) of the SCA, 29 U.S.C. 6707(c), which generally requires that a successor contractor under the SCA may not pay service employees less than the wages and fringe benefits they would have received under a predecessor contractor's CBA. The response to this question will depend on the terms and circumstances of the paid leave provided for in the CBA, but will be determined based on two primary principles. First, "a[n SCA] contractor may satisfy its fringe benefit obligations under any wage determination 'by furnishing any equivalent combinations of fringe benefits or by making equivalent or differential payments in cash' in accordance with [SCA requirements]." 29 CFR 4.163(j). In other words, that a CBA provides

for any particular benefit, such as paid time off, does not mean the successor contractor subject to a wage determination issued under section 4(c) must provide that same benefit. Second, benefits that are required by law, including paid sick leave required by the Executive Order and part 13, cannot count toward the fulfillment of SCA (or DBA) obligations.

Proposed § 13.5(f)(3) addressed the interaction of paid sick leave required by Executive Order 13706 and part 13 with the FMLA. It provided that a contractor's obligations under the Executive Order and part 13 would have no effect on its obligations to comply with, or ability to act pursuant to, the FMLA. It further provided that paid sick leave could be substituted for (that is, may run concurrently with) unpaid FMLA leave under the same conditions as other paid time off pursuant to 29 CFR 825.207. It also explained that as to time off that is designated as FMLA leave and for which an employee uses paid sick leave, all notices and certifications that satisfy the FMLA requirements set forth at 29 CFR 825.300 through 825.308 would satisfy the request for leave and certification requirements of § 13.5(d) and (e).

For example, although under the Executive Order and part 13 an employee's request to use paid sick leave need only be made at least 7 days in advance if the need for leave is foreseeable, under the FMLA, such notice must be made at least 30 days in advance pursuant to 29 CFR 825.302(a). If an employee seeks to use paid sick leave for an FMLA-qualifying reason (and thus both types of leave will run concurrently), such as if she needs major surgery, the contractor may require that she comply with the FMLA's notice requirements, which will satisfy the requirements of the Executive Order and part 13; specifically, when she notifies the contractor of the date of her surgery (that is 30 days in the future or as soon as practicable) and likely recovery period, she will have complied with the requirements of § 13.5(d) to provide oral

or written notice of a need for leave that justifies the use of paid sick leave, and the expected duration of the leave, at least 7 days in advance or as soon as practicable.

Similarly, although under the Executive Order and part 13 a contractor may not require certification of the need to use paid sick leave unless the employee uses more than 3 consecutive full workdays of paid sick leave, a contractor is permitted to require certification from an employee for a shorter period of FMLA-designated leave as provided in 29 CFR 825.305. If an employee is concurrently using paid sick leave and FMLA leave, a contractor may require certification as permitted under the FMLA even if certification for paid sick leave would not be permitted under Executive Order 13706 and part 13 (such as, for example, if the employee only needed to use 1 day of leave). If that certification supported the use of FMLA leave for an employee's serious health condition, it would be more than sufficient to serve as the certification issued by a health care provider for use of 3 consecutive full workdays of paid sick leave should such certification become necessary. Even if the certification was insufficient to demonstrate that an employee was entitled to use FMLA leave (such as because although the employee is ill, the illness did not meet the definition of a serious health condition), it could nevertheless be sufficient to meet the requirements of the Executive Order and part 13. The Department received no comments specific to the interaction of paid sick leave and FMLA leave and therefore adopts this provision as proposed.

EEAC asked the Department, presumably in response to the portion of this provision stating that paid sick leave can run concurrently with FMLA leave, to state that paid sick leave also runs concurrently with other types of paid leave. The Department has made clear in § 13.5(f)(4), discussed below, that for purposes of this rulemaking, a contractor can fulfill its obligation to provide paid sick leave under the Order and part 13 as well as satisfy the

requirements of a State or local paid sick time law with one type of paid leave that complies with both the Order and such a law. Nothing in the regulations prohibits a contractor from fulfilling other legal obligations by providing leave that also satisfies its obligations under the Executive Order and part 13. (The Department notes, however, that the converse is not necessarily true: leave that satisfies a contractor's obligations under the Executive Order and part 13 may not necessarily satisfy or be used to satisfy other legal obligations, such as those arising under the SCA and DBA.)

Proposed § 13.5(f)(4) addressed the interaction of paid sick leave required by Executive Order 13706 and part 13 with paid sick time required by State or local law. As proposed, it explained that a contractor's compliance with a State or local law requiring that employees be provided with paid sick time does not excuse the contractor from compliance with its obligations under the Executive Order 13706 or part 13. It noted, however, that a contractor is permitted to satisfy its obligations under the Order and part 13 by providing paid sick time that fulfills the requirements of a State or local law provided that the paid sick time is accrued and could be used in a manner that meets or exceeds the requirements of the Order and part 13.

The American Benefits Council, Seyfarth Shaw, the Chamber/IFA, and TrueBlue, Inc. asked that the Department provide that a contractor can fulfill its requirements under the Executive Order and part 13 by complying with any applicable State or local paid sick time law, emphasizing the burdens on contractors who would be required to comply with this Federal requirement in addition to State or local (or sometimes both) requirements. The Department declines to adopt this suggestion because it would often result in employees covered by a State or local paid sick time law having access to less paid sick time, or paid sick time that is available for fewer uses, than is required under the Executive Order. Furthermore, contractors have

experience complying with a variety of Federal, State, and local laws, so although the Department recognizes that contractors operating in States and localities with paid sick time laws may have greater obligations than those operating elsewhere, this is not a situation unique to paid sick time or that is unduly burdensome.

NWLC, the National Hispanic Council on Aging, the Maine Women's Lobby, UltraViolet Education Fund, and Innovation Ohio suggested that the Department provide more detail about the ways in which a contractor must satisfy the requirements of the Executive Order while also complying with a State or local paid sick time law, in particular by specifying that a contractor subject to both the Order and a State or local paid sick time law must provide leave that meets or exceeds the Order's accrual, use, and other requirements. The Department intended to make these points in the NPRM, and reiterates them here; it has also inserted language to this effect into the regulatory text—which is otherwise adopted as proposed—to be as clear as possible about contractors' obligations in jurisdictions in which a State or local paid sick time law applies.

Specifically, as explained in the NPRM, a contractor whose employees perform work on or in connection with covered contracts in States, counties, or municipalities that have statutes or ordinances requiring that employees be provided with paid sick time must comply with both those laws and the Executive Order. But that contractor would be permitted, at least for purposes of the Executive Order and part 13, to fulfill both obligations simultaneously. If, for example, a State law requires that employees receive up to 40 hours of paid sick time, a contractor is not necessarily required to provide employees performing work on or in connection with covered contracts in that State an additional 56 hours of paid sick leave; if the contractor provides paid sick time in compliance with both the State law and the Executive Order and part 13, the

contractor need only provide up to 56 hours total of paid sick leave. (The NYC Department of Consumer Affairs indicated in its comment that this example would apply to New York City's paid sick time ordinance.)

The Department further explained in the NPRM that because the requirements of State and local laws and the Order and part 13 will rarely be identical, to satisfy both, a contractor will likely need to comply with the requirements that are more generous to employees. For example, a contractor could satisfy both a county law that requires employees to earn at least 1 hour of paid sick time for every 40 hours worked and the Executive Order by allowing employees to earn 1 hour of paid sick leave for every 30 hours worked. Or a contractor could satisfy both a State statute that allows employers to limit employees' use of paid sick time to 40 hours per year and the Executive Order by not limiting use per year on a basis other than the amount of leave an employee has available for use. Similarly, a contractor could satisfy both a municipal ordinance that does not permit an employer to require certification of the reason for using paid sick time under any circumstances and the Executive Order and part 13 by choosing not to require certification for the use of paid sick time even if an employee uses such leave for more than 3 consecutive days.

Proposed § 13.5(f)(5) addressed the interaction between the paid sick leave requirements of Executive Order 13706 and part 13 and an employer's paid time off policies, explaining first that the Order and part 13 need not have any effect on a contractor's voluntary paid time off policy, whether provided pursuant to a CBA or otherwise. The Department's proposal noted that whether as a practical matter the requirement to provide paid sick leave under the Order and part 13 affects the amount or types of other leave a contractor provides or a union negotiates is not an issue within the Department's rulemaking authority. The Department received no comments

specifically addressing this portion of the provision and adopts it as proposed, though it now appears as § 13.5(f)(5)(i) because of adjustments to the provision described below. The timing of the Order's application to employees whose covered work is governed by a CBA is addressed in § 13.4(f).

Proposed § 13.5(f)(5) also implemented section 2(g) of the Order by providing that a contractor's existing paid time off policy (if provided in addition to the fulfillment of SCA or DBA obligations, if applicable) would satisfy the requirements of the Executive Order and part 13 if various conditions were met. First, the proposed provision explained that the paid time off was to be made available to all employees described in § 13.3(a)(2) (other than those excluded by § 13.4(e)). Second, under the proposal, employees were to be permitted to use the paid time off for at least all of the purposes described in § 13.5(c)(1). Those purposes, described in detail in the discussion of that provision, are those for which an employee must be permitted to use paid sick leave: (1) a physical or mental illness, injury, or medical condition; (2) obtaining diagnosis, care, or preventive care from a health care provider; (3) caring for the employee's child, parent, spouse, domestic partner, or any other individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship for the reasons detailed in the provision; or (4) domestic violence, sexual assault, or stalking, if the time absent from work is for the purposes detailed in the provision. Third, the paid time off was to be provided in a manner and an amount sufficient to comply with the rules and restrictions regarding the accrual of paid sick leave set forth in § 13.5(a) and regarding maximum accrual, carryover, reinstatement, and payment for unused leave set forth in § 13.5(b). Fourth, the paid time off was to be provided pursuant to policies sufficient to comply with the rules and restrictions regarding use of paid sick leave set forth in § 13.5(c), requests for leave set forth in

§ 13.5(d), and certification and documentation set forth in § 13.5(e), at least with respect to any paid time off used for the purposes described in § 13.5(c)(1). Finally, the paid time off was to be protected by the prohibitions against interference, discrimination, and recordkeeping violations described in § 13.6 and the prohibition against waiver of rights described in § 13.7, at least with respect to any paid time off used for the purposes described in § 13.5(c)(1).

EEAC, the Chamber/IFA, the American Benefits Council, and PSC wrote that requiring contractors with paid time off policies to comply with the Executive Order's requirements is too burdensome, and that any paid time off policy that allows for 56 hours or more of leave should satisfy a contractor's obligations under the Order regardless of whether it meets the other requirements for accrual and use of paid sick leave specified in part 13. Some commenters identified specific requirements they found problematic: Seyfarth Shaw wrote that being unable to limit an employee's use of leave during an accrual year would be challenging for contractors and would lead many of them to abandon their existing paid time off policies; PSC asked that the recordkeeping requirements of part 13 not apply to paid time off policies; Delta wrote that the carryover requirement conflicted with its existing paid time off policy; and EEAC interpreted the Order to mean that any paid time off policy that complies with the terms of the Order, which it distinguished from what it asserted were additional requirements set forth in part 13, would satisfy a contractor's obligations. The Chamber/IFA and SHRM/CUPA-HR suggested that the Department identify the most crucial requirements of the Order and part 13 and permit contractors with paid time off policies to comply only with those. SHRM/CUPA-HR also asked for clarification of whether if an employee uses all of her paid time off for purposes other than those the Order specifies (such as vacation), the contractor is obligated to provide additional paid sick leave to that employee.

After careful consideration of these comments, the Department declines to adopt the commenters' suggestions that contractors with paid time off policies that provide employees with less than is required by this rulemaking be excused from complying with the requirements described in the Order and part 13. The Department believes the best interpretation of section 2(g) of the Order is that it allows contractors that already provide paid time off under policies that are equivalent to or more generous than those described in the Order and part 13 to avoid an obligation to provide an additional 56 hours of paid sick leave. Thus, employers who make available to employees entitled to paid sick leave pursuant to the Executive Order 56 hours of paid time off under policies that are equivalent to or more generous than those described in the Order and part 13 have fulfilled their obligations, regardless of whether their employees use that paid leave for the purposes designated by the Order or for other purposes deemed permissible by their employers, such as vacation. The key to compliance with the Order and part 13 is that employers with paid time off policies provide access to no less than 56 hours of paid leave under the required conditions, and that any such leave used for the purposes described in § 13.5(c)(1) is covered by the relevant protections form part 13, not whether employees choose to use their paid time off for the purposes covered by the Order and part 13. In this way, the Order and part 13 maintain the flexibility and discretion that many employers and employees value in paid time off policies.

This flexibility and discretion, however, should not be understood to excuse contractors that provide paid time off that is not equally protective of employees' access to paid absences for the reasons described in § 13.5(c)(1) from fulfilling the requirements of the Order and part 13. For example, if a contractor offered a paid time off policy under which each employee had 7 days of paid leave he could use for any purpose but an employee was required to use a full day of

leave at a time even if he only needed to be absent for an hour to go to a doctor's appointment, or if the contractor could deny a request to use leave for any reason, including if the office is busy at the time an employee's child is sick, that contractor's employees would not have the meaningful access to paid sick leave the Order and part 13 are meant to confer and therefore the Department is not adopting commenters' suggestion that such a policy would fulfill the contractor's obligations under the Order.

With respect to EEAC's interpretation that the Order requires paid time off policies to comply with the Order itself but not what it considers to be additional regulatory requirements (such as recordkeeping requirements, the requirement to notify employees of the amount of paid sick leave they have accrued, the requirement to establish an accrual year, or the requirement not to make impermissible deductions from the pay and benefits an employee receives when using paid sick leave), the Department disagrees with the commenter's premise. The Order contemplates that regulations will be integral to carrying out its purposes, and accordingly directs the Secretary to issue regulations that are necessary and appropriate to implement the Order. 80 FR 54698. Part 13 constitutes the Department's interpretation of what the Order requires and how contractors will comply with it; each regulatory provision, rather than being an extraneous or additional requirement beyond what the Order demands, is a necessary and appropriate part of a complete scheme to give the Order its full intended effect. For example, the Order specifically authorizes the Secretary to include in its implementing regulations requirements regarding recordkeeping, and the records part 13 requires contractors to make and maintain will be essential to any WHD investigation of a possible violation of the Order. In addition, the Order refers to paid sick leave accrual in the course of a year without defining "year"; the definition of

and requirements regarding establishing an "accrual year" give contractors the information and instructions they need to comply with their obligations.

The Department is therefore adopting § 13.5(f)(5) with the language proposed, which now appears as § 13.5(f)(5)(ii), but it is also clarifying, as § 13.5(f)(5)(iii) and as discussed here, how its provisions apply if a contractor's paid time off policy provides more than 56 hours of leave each year. The Department recognizes that (1) employers often provide paid time off rather than separate vacation and sick leave because they and their employees value the flexibility inherent in not distinguishing types of leave and (2) the intent of the Order was to ensure that employees have access to up to 56 hours of paid leave for the purposes described in § 13.5(c)(1). Therefore, the regulatory text now explicitly provides that a contractor satisfying the requirements of the Executive Order and part 13 with a paid time off policy that provides more than 56 hours of leave per accrual year may choose to either (1) provide all paid time off as described in § 13.5(f)(5)(ii) or (2) track, and make and maintain records reflecting, the amount of paid time off an employee uses for the purposes described in § 13.5(c)(1), in which case the contractor need only provide, for each accrual year, up to 56 hours of paid time off the employee requests to use for such purposes in compliance with the Order and part 13.

In other words, to ensure that 56 hours of paid time off is protected under the Order, if a contractor chooses to track, and make and maintain records reflecting, the amount of paid time off an employee uses for the purposes described in § 13.5(c)(1), the contractor need only provide, for each accrual year, up to 56 hours that an employee requests to use for such purposes in compliance with the rules and requirements of the Executive Order and part 13. If a contractor does not choose to track, and make and maintain records reflecting, the amount of paid time off an employee uses for the purposes described in § 13.5(c)(1), all of an employee's

requests to use paid time off for such purposes must be provided in compliance with the Order and part 13. Regardless of whether a contractor distinguishes between paid time off used for the purposes described in § 13.5(c)(1) and paid time off used for other purposes, the contractor is not required to provide any additional paid sick leave or paid time off beyond the amount provided by the contractor's paid time off policy that satisfies the conditions described in § 13.5(f)(5).

For example, assume a contractor provides 120 hours of paid time off per accrual year. That contractor could decide to track and record the amount of paid time off each employee uses for the purposes described in § 13.5(c)(1), meaning that it formally distinguishes between leave used for such purposes and for other purposes and maintains documentation designed to ensure that it and each of its employees know how much paid time off an employee has used for the purposes described in § 13.5(c)(1) (and therefore how many out of at least 56 hours per accrual year the employee has remaining for use subject to the protections of the Order and part 13). If the contractor made such a choice, an employee who uses 56 hours for the purposes described in § 13.5(c)(1) early in the accrual year would not be entitled to Order's protections for her remaining 64 hours of paid time off regardless of the purposes for which she requests to use them. On the other hand, an employee who uses 64 hours of paid time off for other purposes (such as vacation) early in the year would still be entitled to use any or all of her remaining 56 hours of leave for such purposes subject to all of the protections required by the Order and part 13. Under this approach, a contractor must make up to 56 hours of paid time off per accrual year available for an employee's use for the purposes described in § 13.5(c)(1), but an employee might not choose to use any or all of her leave in that manner. For example, an employee who uses 80 hours of paid time off for vacation early in the year would only be entitled to use up to 40 remaining hours of leave for the purposes described in § 13.5(c)(1) subject to the protections

required by the Order and part 13, and if she used those 40 hours for another vacation, she would have no paid leave remaining that her contractor would be obligated to provide for the purposes described in § 13.5(c)(1).

If a contractor that provides 120 hours of paid time off chooses not to track and record the amount of paid time off employees use for the purposes described in § 13.5(c)(1), its obligations would differ because it would not have information to demonstrate that an employee had in fact used her full entitlement to up to 56 hours of paid leave for the purposes described in § 13.5(c)(1). For example, if one of the contractor's employees uses 56 hours of leave early in the accrual year for reasons that the contractor did not document (even if the contractor was informally aware of those reasons), the employee would still be entitled to use any or all of her 64 remaining hours of paid time off for the purposes described in § 13.5(c)(1) subject to the protections of the Order and part 13.

As these examples demonstrate, whether a contractor chooses to keep track of the purposes for which paid time off is used determines whether it may limit the amount of paid time off as to which it must, if the leave is used for a purpose described in § 13.5(c)(1), provide all of the protections of the Order and part 13. But whichever option the contractor selects, it need not provide more paid time off than it offers in its policy (in this example, 120 hours) per accrual year irrespective of the purposes for which an employee actually uses her leave.

Accordingly, § 13.5(f)(5) as adopted still provides that a contractor's paid time off policy must in significant measure comply with the requirements of the Order and part 13, but the Department clarifies that contractors who fulfill their obligations under the Order and part 13 with a paid time off policy have both the option to formally distinguish between uses of leave and other flexibilities as described below. The following discussion offers details regarding how

a paid time off policy used to fulfill a contractor's obligations under the Order and part 13 could operate.

As noted in the regulatory text and above, to satisfy the obligations of the Order and part 13, a contractor's paid time off policy must comply with all of the requirements of §§ 13.5(a) and 13.5(b) or, if the contractor chooses to track and record the amount of paid time off employees use for the purposes described in § 13.5(c)(1), the contractor must comply with those provisions with respect to up to 56 hours per accrual year of paid time off an employee requests to use for such purposes. The accrual-related requirements of the Executive Order and part 13 with which a contractor's paid time off policy must comply include allowing employees to accrue at least 1 hour of leave for every 30 hours worked (as hours worked are defined for purposes of the FLSA) without limiting annual accrual at any less than 56 hours and providing leave that accrues at least each pay period or each month as under § 13.5(a)(1)(ii). A contractor may assume for purposes of accrual of leave under its paid time off policy that employees whose hours it is not otherwise required by statute to track work 40 hours per week as described in § 13.5(a)(1)(iii). A contractor also has the option of providing employees with at least 56 hours of paid time off at the beginning of each accrual year as described in § 13.5(a)(3).

A contractor may choose to fulfill its obligations pursuant to § 13.5(f)(5) with a paid time off policy that provides more leave than is required, either by allowing for more rapid accrual (for example, by providing employees who work 80 hours in a pay period with 4 hours of paid time off for each pay period) or by providing more than 56 hours of paid time off at the beginning of each year. It is in these circumstances that the contractor's choice to track and record the reasons for which employees use leave becomes relevant, as noted throughout this discussion.

The requirement in § 13.5(a)(2) that a contractor notify employees of the amount of paid sick leave they have accrued also applies to paid time off policies that fulfill a contractor's obligations under the Order and part 13. In a circumstance in which a contractor does not track and record which paid time off an employee uses for the purposes described in § 13.5(c)(1), the contractor would comply with this requirement by informing an employee of an amount of paid time off generally, rather than paid sick leave specifically, available for use. In other words, because paid sick leave is typically not designated separately when an employer offers a paid time off policy, in this context, a contractor need only provide notice of the amount of paid time off an employee has available for use no less than once each pay period or each month (whichever interval is shorter) as well as upon a separation from employment and upon any reinstatement of leave if an employee is rehired within 12 months. If, however, a contractor chooses to track and record paid time off used for the purposes described in § 13.5(c)(1), the contractor would comply with this requirement by informing an employee of the amount of paid time off available for use for those purposes with the full protections required by the Order and part 13. A contractor would be free to follow its usual policy for informing employees of how much paid time off they have available overall if that amount differs (or to adopt any other practice it wished with respect to that time).

Additionally, a paid time off policy used to fulfill a contractor's obligations under the Order and part 13 must allow carryover of leave from the previous accrual year as provided in § 13.5(b)(2). But a contractor need only allow carryover of up to 56 hours of paid time off even if its policy provides more than 56 hours of leave, although this requirement applies differently depending on whether a contractor chooses to track and record the amount of paid sick leave an employee uses for the purposes described in § 13.5(c)(1). For example, assume that under a

particular contractor's paid time off policy, employees who regularly work 8-hours days, 5 days per week accrue a half day of paid time off each semi-monthly pay period, so they receive 12 days total per year, and the contractor does not track and record the reason the employee uses paid time off. If one employee used all 12 days in year 1 (for vacation, the purposes described in § 13.5(c)(1), or some combination of both), she would not carry over any paid time off into year 2. If another employee used 7 days in year 1 (for any purpose), a contractor would be required to permit her to carry over her remaining 5 days into year 2. If a third employee used no paid time off in year 1, however, the contractor would only be required to allow her to carry over 7 of her 12 days into year 2. (Consistent with § 13.5(b)(3), a contractor may choose to limit an employee's additional accrual in year 2 until she has less than 7 days of paid time off available.)

If instead a contractor had a paid time off policy with the same accrual practices but the contractor did choose to track and record which leave employees used for the purposes described in § 13.5(c)(1), application of the carryover requirement would in some circumstances depend on how much leave each employee had so used. If an employee used all 12 days in year 1 (in this case, regardless of whether she used it all for vacation or used some for vacation and some for the purposes described in § 13.5(c)(1)), she would not carry over any paid time off into year 2. If another employee used 7 days in year 1 for vacation, the contractor would be required to permit her to carry over her remaining 5 days into year 2 (and to use as much of those 40 hours, in addition to as much of 56 additional hours accrued in year 2, as she requested during year 2 for the purposes described in § 13.5(c)(1)). But if the employee used 7 days of paid time off because she was sick, the contractor would not be required to permit her to carry over any remaining paid time off into year 2. If instead the employee had used 5 days because she was sick and 2 days for vacation, the contractor would only be required to permit her to carry over 2 of her remaining

5 days of paid time off into year 2 (and to use as much of those 16 hours, in addition to as much of 56 additional hours accrued in year 2, as she requested during year 2 for the purposes described in § 13.5(c)(1)). If a third employee used no paid time off in year 1, the contractor would be required to allow her to carry over 7 of her 12 days into year 2. (Consistent with § 13.5(b)(3), the contractor would be permitted to limit an employee's additional accrual in year 2 until she had less than 7 days of paid time off available to use for the purposes described in § 13.5(c)(1).)

If a contractor's paid time off policy provides leave at the beginning of each year rather than allowing employees to accrue it over time (as is permitted under § 13.5(a)(3)), employees still need only begin the subsequent year with as much leave as would have been required under the Order and part 13. Under § 13.5(a)(3), if a contractor provides 56 hours of paid sick leave at the beginning of the accrual year, an employee must receive 56 additional hours of paid sick leave even if he has carried over some paid sick leave from the previous accrual year. In practice, these requirements mean that an employee of a contractor who has chosen the § 13.5(a)(3) option could begin accrual years after the first year with as much as 112 hours of paid sick leave. Accordingly, if a contractor provides employees with 10 days of paid time off at the beginning of each year, employees who use all of their leave (regardless of the purposes for which the leave is used or whether the contractor tracks and records such purposes) may begin subsequent years with only 10 days, but those who have not used all of their leave must be permitted either to carry over up to 4 days of unused paid time off (even if they have more) such that they begin the year with up to 14 days (that is, 112 hours) of leave or, if a contractor tracks and records leave used for the purposes described in § 13.5(c)(1), as much paid time off as is unused and required to be available for such purposes (because the employee has used less than

any amount carried over plus up to 56 newly accrued hours for such purposes). Alternatively, if an employee begins new accrual years with 112 hours or more of paid time off, whether he has carried over some of that time from the previous year or has received new leave at or above that amount, the Department would consider a contractor to have met its carryover obligation. In such circumstances, a contractor that tracks and records the amount of paid time off employees use for the purposes described in § 13.5(c)(1) must permit employees to use up to 112 hours of paid time off for such purposes in compliance with the requirements of the Order and part 13 in accrual years after the first, consistent with § 13.5(a)(3).

Paid time off policies used to satisfy the requirements of the Order and part 13 pursuant to § 13.5(f)(5) must also comply with the requirement to reinstate leave for an employee rehired by the same contractor within 12 months of a job separation. As with carryover, however, only up to 56 hours of paid time off must be reinstated even if employees have greater amounts of leave upon separation. The precise amount will depend upon how much paid time off an employee has remaining and, if a contractor tracks and records the amount of paid time off used for the purposes described in § 13.5(c)(1), how much of that time the contractor must permit an employee to use for such purposes based on the employee's prior use in that accrual year. Because the Department has modified § 13.5(b)(5) to provide that if a contractor pays separating employees for unused paid sick leave, no reinstatement of the leave is required, the same relief from the obligation could apply to paid time off policies.

Under § 13.5(f)(5), a contractor may only use its paid time off policy to satisfy its obligations under the Order and part 13 if, when an employee seeks to use or does use leave for the purposes described in § 13.5(c)(1) (all of which must be permissible uses of the paid time off), the request and use of the leave comply with all of the requirements of §§ 13.5(c), (d), (e),

§ 13.6, and § 13.7. These requirements apply to all paid time off used for the purposes described in § 13.5(c)(1) regardless of whether the contractor tracks and records such time.

The following examples illustrate how a contractor may treat paid time off used for different purposes differently and the implications of a contractor's choice to track and record the use of paid time off for the purposes described in § 13.5(c)(1).

When paid time off is used for a purpose described in § 13.5(c)(1), employees must be permitted to use leave in increments of no greater than 1 hour. A contractor may, however, require employees using paid time off for other reasons (such as vacation) to use paid time off in larger increments, such as half or full days. Therefore, if an employee asked to come to work 2 hours late one day so he could attend an event at his daughter's school, a contractor could require the employee to take the entire day off; if the employee asked to come to work 2 hours late because he needed to take his daughter to see her pediatrician, however, the contractor would have to permit the employee to use only 2 hours of paid time off.

If that contractor's paid time off policy provides 10 days of leave each year, and the employee had already used 7 (8-hour) days of paid time off that year to be absent from work because his daughter was sick, the contractor's obligation to comply with the requirements of §§ 13.5(c), (d), (e), § 13.6, and § 13.7 with respect to the employee's additional request to take his daughter to the pediatrician would depend upon how the contractor managed its paid time off policy. Specifically, if the contractor chose not to track and record the reasons for which an employee had used paid time off, it would be required to approve the employee's request to use only 2 hours of paid time off. But if the contractor had kept a record noting that the employee's previous requests to use paid time off were for a purpose described in § 13.5(c)(1) (in this case, caring for his daughter when she was ill), it would have already fulfilled its obligations under the

Order and this part and would be free to require that the employee use a full day of leave. Furthermore, if the employee had already used all 10 days of paid time off, regardless of the reason for his absences or whether the contractor tracked those reasons, the contractor would be free to deny the employee's request for 2 additional hours of paid leave. As another example of how a contractor can treat paid time off used for different purposes differently, a contractor would be obligated not to make the use of paid time off requested for a purpose described in § 13.5(c)(1) contingent on finding a replacement worker or fulfilling operational needs, although it would be free to deny requests for vacation for those reasons.

The Department noted in the discussion of § 13.5(f)(5) in the NPRM that a paid time off policy used to satisfy a contractor's obligations under the Order and part 13 may not set limits on the amount of leave that may be used per year or at once; in the Final Rule, this requirement in § 13.5(c)(4) is clarified to make explicit that use may be limited by the amount of paid sick leave an employee has available. The Department similarly clarifies here that compliance with this requirement in the context of a paid time off policy involves either not limiting use per year, at least for the purposes described in § 13.5(c)(1), to an amount of leave less than the total amount an employee has accrued under the contractor's policy, or not limiting use per year to less than 56 hours of leave (or any amount of leave carried over plus up to 56 hours of paid time off newly accrued in the accrual year) for the purposes described in § 13.5(c)(1), subject to the amount of paid time off an employee has remaining, if the contractor tracks and records such use and chooses to limit leave for such purposes.

For instance, if a contractor's policy provided employees with 120 hours of leave per year to use for any purpose and the contractor did not track the purposes for which employees used leave, a contractor could limit use per year to 120 hours. For example, the contractor could

permissibly deny an employee's request to use paid time off to care for his frail grandmother after the employee had used all 120 hours in that year (for vacation or any other purpose). By contrast, a contractor that does track and record the reasons an employee uses paid time off could, for example, deny an employee's request to use paid time off to meet with a counselor regarding domestic violence after an employee (who did not carry over any leave from the previous accrual year) had already used 56 hours of paid time off for that reason even though the employee had additional, unused hours of paid time off that year. That contractor could also deny that request if the employee had already used all of her paid time off for the year, even if she had only used 10 hours for purposes described in § 13.5(c)(1) and the rest for vacation.

As noted above, a contractor using its paid time off policy to satisfy its obligations under the Order and part 13 must comply with all of the requirements of § 13.5(d) (which addresses employee requests to use paid sick leave and contractors' responses to such requests) with respect to leave used for any purpose described in § 13.5(c)(1) (or to the amount of such leave as to which the contractor must comply with the Order and part 13, if the contractor tracks and records leave used for the purposes described in § 13.5(c)(1)). For example, consistent with that provision, a contractor may not require employees to make requests for leave (at least when used for a purpose described in § 13.5(c)(1) and if the contractor is required to comply with the Order and part 13 with respect to the leave) more than 7 days in advance of the need or as soon as is practicable if the need for leave is not foreseeable. In addition, under a paid time off policy used to fulfill a contractor's obligations under the Order and part 13 pursuant to § 13.5(f)(5), a contractor's denial of a request to take leave, at least when requested for the purposes required under § 13.5(c)(1) and if the contractor is required to comply with the Order and part 13 with

respect to the leave, must be explained in writing that is in accordance with the permissible reasons for denial under part 13.

Contractors have the option of complying with these and other provisions of § 13.5(c) and (d) (and (e), and §§ 13.6 and 13.7) as to all paid time off or distinguishing between leave used for the purposes described in § 13.5(c)(1) and other purposes (such as vacation time) even if they do not choose to track and record the amount of time used for the purposes described in § 13.5(c)(1). For example, a contractor could approve any requests to use paid time off made at least 7 days in advance if foreseeable, or as soon as practicable if not foreseeable, regardless of the reason for the absence, or a contractor could require requests to use paid time off for vacation to be made 30 days in advance but allow requests to use paid time off for illness (as well as the other uses of paid sick leave described in § 13.5(c)(1)) to be made no more than 7 days in advance if foreseeable or as soon as practicable if not foreseeable.

The rules regarding certification or documentation of the reason for an absence of 3 or more full consecutive days in § 13.5(e) are also applicable to a paid time off policy used to satisfy the requirements of the Order and part 13, at least with respect to paid time off used for the purposes required by § 13.5(c)(1). If the contractor tracks and records the amount of leave used for the purposes described in § 13.5(c)(1), however, it would be required to comply with § 13.5(e) with respect to paid time off an employee uses for the purposes described in § 13.5(c)(1) only to the extent such leave is within the amount of leave as to which the contractor must comply with the Order and part 13 (that is, up to 56 hours in the first accrual year and up to any amount carried over plus 56 hours in subsequent accrual years). If a contractor's paid time off policy allows the use of leave for a broad range of purposes, that contractor might never require such certification or documentation, in which case there would be no conflict with

§ 13.5(e). Similarly, although the recordkeeping requirements of part 13 apply to contractors who fulfill their obligations under the Order with paid time off policies, to the extent the contractor does not deny requests for leave or require certification or documentation to justify the use of leave, no such records will exist or, therefore, need to be maintained.

As noted in the NPRM, a contractor may only use its paid time off policy to satisfy its obligations under the Order and part 13 if, at least when an employee seeks to use or does use leave for the purposes described in § 13.5(c)(1) and if the contractor (that tracks and records the amount of leave used for the purposes described in § 13.5(c)(1)) is required to comply with the Order and part 13 with respect to the leave, that leave is treated as protected by the prohibitions on interference and discrimination as required by § 13.6, meaning that, for example, the request for or use of leave could not be used as a negative factor in any hiring or promotion decision and could not be the basis for discipline, including by being counted in a no fault attendance policy.

The Department notes that the option to track and record time as described in this discussion is not reflected in the recordkeeping requirements set forth in § 13.25 because making and maintaining documentation of the purposes for which employees use paid time off is a choice rather than an obligation. If, however, a contractor wishes to limit the amount of paid time off employees may use for the purposes described in § 13.5(c)(1))—and, more significantly, as to which it must comply with the Order and part 13—the burden is on the contractor to create and keep adequate documentation showing that it has in fact allowed an employee to receive the required benefits such that it is subsequently permitted to deny an employee of them. No particular form of documentation is required; a contractor may develop any system for tracking when paid time off is used for a purpose described in § 13.5(c)(1) it chooses as long as the contractor has accurate records (that could be reviewed during a WHD investigation) and

employees are properly notified of the amount of paid time off they have available for such purposes.

The Department reiterates that a contractor has a choice between amending an existing paid time off policy to operate as described here or instead providing paid sick leave that is separate from its more general leave policy. For example, if a contractor does not permit an employee to use paid time off for the purposes described in § 13.5(c)(1)(iv) related to domestic violence, sexual assault, or stalking, its paid time off policy would not satisfy its obligations under the Executive Order and part 13 as provided in § 13.5(f)(5). Accordingly, the contractor could choose to amend its paid time off policy to permit leave for these additional purposes or could provide paid sick leave pursuant to the Order and part 13 in addition to paid time off. Similarly, if a contractor's policy allowed the contractor to deny an employee's request for leave to be used for one of the purposes described in § 13.5(c)(1) based on operational needs, that policy would not satisfy the contractor's obligations under the Executive Order and part 13, and the contractor could either adjust its policy or distinguish between paid sick leave (which it would provide in keeping with the requirements of the Order and part 13) and other types of paid time off it provides (which it could provide in any manner it wishes, so long as it complies with any other applicable laws). And if a contractor with a paid time off policy that provides more than 56 hours of paid time off does not wish to comply with the requirements of the Order and part 13 as described with respect to all of the leave its policy allows or to track and record the amount of leave used for the purposes described in § 13.5(c)(1), it can instead provide paid sick leave separately from paid time off.

Finally, as noted in the NPRM, although a contractor need not treat vacation or other uses of leave under its paid time off policy identically to the way it treats paid sick leave, the

Department will consider any aspects of a paid time off policy that create significant barriers to an employee's using the time for the purposes described in § 13.5(c)(1) as interference with the employee's accrual or use under the Order or part 13 in violation of § 13.6(a) or, if appropriate, as discrimination in violation of § 13.6(b), meaning that the paid time off policy would not satisfy the contractor's obligations under the Order and part 13. For example, although a contractor need not allow vacation time to be taken in 1-hour increments, a contractor would not be in compliance with § 13.6(a) if it were to require employees to use all of the time provided in its paid time off policy at once should the employee ask to take vacation, such that any employee who took any vacation in an accrual year would automatically have no paid time off remaining for the purposes described in § 13.5(c)(1). (This example does not imply that an employee cannot choose to use all of her paid time off for vacation such that she has no paid leave remaining in the event a need to be absent from work for one of the reasons described in § 13.5(c)(1) arises; it signifies only that a contractor cannot deliberately make it difficult to make a different choice.) Similarly, a contractor's paid time off policy would not comply with § 13.6(a) if the contractor required employees to request leave for vacation 1 month in advance and would not allow an employee who had scheduled such leave and who became, or had a family member who became, unexpectedly ill to instead use paid time off for that purpose (and cancel the other upcoming leave, or take it as unpaid leave).

Section 13.6 Prohibited Acts

Proposed § 13.6 described and prohibited acts that constitute violations of the requirements of Executive Order 13706 and part 13.

Proposed § 13.6(a)(1) prohibited a contractor from interfering with an employee's accrual or use of paid sick leave as required by Executive Order 13706 or part 13. Proposed § 13.6(a)(2)

included a non-exclusive list of examples of interference. The first example was miscalculating the amount of paid sick leave an employee has accrued, such as if a contractor does not include all of an employee's hours worked in calculating accrual. A second was denying or unreasonably delaying a response to a proper request to use paid sick leave, such as if a contractor denies a request to use paid sick leave for an appointment with a clinical social worker because the contractor mistakenly believes a clinical social worker is not a health care provider, or if a contractor denies a request to use paid sick leave to accompany the employee's sister to a court proceeding regarding stalking because the contractor does not believe an employee can use paid sick leave for a family member's legal proceeding related to stalking, or if a contractor does not respond to an employee's timely request for paid sick leave until after the need for leave has passed (provided the request was made sufficiently in advance of the need).

In addition, the Department explained that as proposed, interference included discouraging an employee from using paid sick leave or reducing an employee's accrued paid sick leave by more than the amount of such leave used. Transferring the employee to work on non-covered contracts to prevent the accrual or use of paid sick leave, including scheduling an employee's non-covered work to fall at the time for which the employee has requested to use paid sick leave for the purpose of avoiding approving the request (rather than for a lawful reason, such as for a legitimate business purpose), would also constitute interference. Finally, under the NPRM, interference also included disclosing confidential information received in certification or other documentation provided to verify the need to use paid sick leave or making the use of paid sick leave contingent on the employee's finding a replacement worker or the fulfillment of the contractor's operational needs.

Proposed § 13.6(b) was an anti-discrimination provision implementing section 2(k) of Executive Order 13706. Proposed § 13.6(b)(1) prohibited a contractor from discharging or in any other manner discriminating against an employee for: (i) using, or attempting to use, paid sick leave as provided for under Executive Order 13706 and part 13; (ii) filing any complaint, initiating any proceeding, or otherwise asserting any right or claim under Executive Order 13706 and part 13; (iii) cooperating in any investigation or testifying in any proceeding under Executive Order 13706 and part 13; or (iv) informing any other person about his or her rights under Executive Order 13706 and part 13.

Proposed § 13.6(b)(2) addressed what constitutes discrimination, a term the Department intended to be understood broadly, by noting that discrimination included, but was not limited to, a contractor's considering any of the activities described in § 13.6(b)(1) as a negative factor in employment actions, such as hiring, promotions, or disciplinary actions, or a contractor's counting paid sick leave under a no fault attendance policy. See 29 CFR 825.220(c) (analogous provision under FMLA regulations). Under this proposed provision, a contractor could not, for example, reassign an employee to fewer or less preferable shifts, to a less well paid position, or to a non-covered contract because he used paid sick leave. The proposed provision also prohibited a contractor, in deciding whether to hire an employee to work on or in connection with a covered contract, to consider as a factor that the contractor would be required to reinstate the employee's unused paid sick leave from prior covered work pursuant to § 13.5(b)(4).

In the NPRM, the Department noted that this proposed provision would serve the important purpose of ensuring effective enforcement of the Executive Order, which will depend on complaints from employees, and reiterated several interpretations of the provision it had discussed in the Minimum Wage Executive Order rulemaking in connection with a comparable

anti-discrimination provision. 79 FR 60666-67. First, consistent with the Supreme Court's interpretation of the FLSA's anti-retaliation provision, § 13.6(b) would protect employees who file oral as well as written complaints. See Kasten v. Saint-Gobain Performance Plastics Corp., 131 S. Ct. 1325, 1336 (2011). Furthermore, as under the FLSA, the anti-discrimination provision under part 13 would protect employees who complain to the Department as well as those who complain internally to their employers about alleged violations of the Order or part 13. See, e.g., Minor v. Bostwick Laboratories, 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 Associates, 173 F.3d 35, 43 (1st Cir. 1999); EEOC v. Romeo Community Sch., 976 F.2d 985, 989 (6th Cir. 1992).

The Department further noted in the NPRM that the anti-discrimination provision would apply in situations where there is no current employment relationship between the parties; for example, it would protect from retaliation by a prospective or former employer that is a covered contractor. This position was consistent with the Department's interpretation of the FLSA's anti-retaliation provision, which it considers to extend to job applicants. As explained in the Minimum Wage Executive Order rulemaking, however, the Department recognizes that the U.S. Court of Appeals for the Fourth Circuit has disagreed with its interpretation with respect to the coverage of job applicants, see Dellinger v. Science Applications Int'l Corp., 649 F.3d 226 (4th Cir. 2011), and the Department therefore would not enforce its interpretation on this issue in that circuit. See 79 FR 60667. To the extent the application of the FLSA's anti-retaliation provision to job applicants or internal complaints is definitively resolved through the judicial process by the Supreme Court or otherwise, the Department would interpret the anti-retaliation provision under the Executive Order in accordance with such precedent. Id.

Commenters generally addressed the interference and discrimination provisions together. Several commenters, including Demos, NELP, the National Council of Jewish Women, NETWORK, Women Employed, and the Diverse Elders Coalition, commented that these provisions were crucial protections for workers, who would otherwise face punishment from employers for using paid sick leave or be deterred from asking to use paid sick leave in the first place. The NYC Department of Consumer Affairs similarly commented that these provisions are fundamental because without them, the paid sick leave benefit is merely illusory. The Department adopts the provisions as proposed.

AGC commented that contractors needed to be able to address employee abuse of paid sick leave without being in jeopardy of violating these provisions. The Department recognizes that there will be circumstances in which an employer becomes aware that an employee has fraudulently used paid sick leave, such as by lying about being sick or having a doctor's appointment. As in the FMLA context, an employee who engages in fraud is not entitled to the benefits or protections afforded by the Executive Order or part 13. See 29 CFR 825.216(d) ("An employee who fraudulently obtains FMLA leave from an employer is not protected by FMLA's job restoration or maintenance of health benefits provisions."). Accordingly, although a contractor may not impose requirements on an employee's use of paid sick leave specifically prohibited by the Order or part 13 (such as by requiring certification of uses of paid sick leave that are shorter than 3 full consecutive days) or otherwise discourage an employee's legitimate use of paid sick leave (such as by disciplining an employee on the basis of abuse of paid sick leave privileges that is suspected but not verified), a contractor may investigate situations in which it believes an employee has committed fraud. If a contractor determines, based on a reasonable investigation of the circumstances, that an employee has abused paid sick leave, it

may respond appropriately, such as by recouping (to the extent permitted by law) pay and benefits provided when the employee used paid sick leave based on a request premised on false information or by imposing discipline on the employee. In the absence of verification of abuse, however, a contractor must permit an employee to accrue and use paid sick leave according to the requirements of part 13.

For example, assume an employee requests to use paid sick leave to be absent every other Monday for several weeks, explaining that her wife has doctors' appointments and needs her care, and the contractor suspects she is actually taking long weekend trips to a vacation home. The contractor can tell the employee that it suspects she is making fraudulent requests for leave because it doubts her husband only needs to see the doctor on days adjacent to weekends. In response, the employee could provide additional information about her need to be absent from work, such as by explaining that her wife has cancer and receives radiation treatments every other Monday, or by voluntarily providing certification (such as a note from the wife's oncologist). In that case, the contractor would not have violated the provisions of § 13.6, and the contractor would be assured that the employee's requests to use paid sick leave merited approval. As another example, assume an employee requests to use paid sick leave because his son is sick, but when his manager goes out to lunch during the work day, she runs into the employee at a local bar without his son, and upon her confronting the employee, he admits that he was not truthful about the reason he wanted to take the day off. In that case, the contractor would not have violated the provisions of § 13.6, and the contractor would know it need not have approved the employee's request for paid sick leave. The contractor would be free to (among other possible options) rescind such approval, decline to pay the employee for that day, and count the day against the employee in its time and attendance policy.

Finally, Vigilant asked that the Department state that if an employee is absent from work despite not having enough paid sick leave to cover the time, the contractor may count the additional time against the employee pursuant to its attendance policy. The Department takes no position in this rulemaking regarding what actions a contractor may take with regard to time absent from work that is not—and should not have been—designated as paid sick leave, though it notes that part 13 does not absolve contractors from complying with any other relevant law regarding such actions and that whether a particular action constitutes interference or discrimination under § 13.6 (such as a contractor's taking action against an employee who was absent for a full day after the human resources department erroneously told him he had 8 hours of paid sick leave although he actually had only 4) will depend on the circumstances.

Proposed § 13.6(c) provided that a contractor's failure to make and maintain or to make available to the WHD records for inspection, copying, and transcription as required by § 13.25, or any other failure to comply with the requirements of that provision, constituted a violation of Executive Order 13706, part 13, and the underlying contract. This proposed provision was derived from paragraph (g)(3) of the contract clause included in the Minimum Wage Executive Order Final Rule as well as analogous provisions in the SCA and DBA. 29 CFR 4.6(g)(3) (SCA); 29 CFR 5.5(a)(3)(iii) (DBA). The Department received no comments specifically regarding this provision (though it notes that other comments regarding recordkeeping and remedies for violations of part 13 are discussed below), and adopts it as proposed.

Section 13.7 Waiver of Rights

Proposed § 13.7 provided that employees cannot waive, nor may contractors induce employees to waive, their rights under Executive Order 13706 or part 13. The Department

explained in the NPRM that it had included a provision prohibiting the waiver of rights in the regulations implementing the Minimum Wage Executive Order. 79 FR 60667.

The NPRM noted that, as the Department had explained in the Minimum Wage Executive Order rulemaking, an employee's rights and remedies under the FLSA, including payment of minimum wage and back wages, cannot be waived or abridged by contract. 79 FR 60667 (citing 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 explained 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," Barrentine, 450 U.S. at 740 (quoting Brooklyn Sav. Bank, 324 U.S. at 707), and that 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. Similarly, under the SCA regulations, releases and waivers executed by employees for unpaid SCA wages (and fringe benefits) are without legal effect. 29 CFR 4.187(d). The Department believed it was appropriate to adopt this policy in the NPRM because the interests underlying the issuance of Executive Order 13706 would be similarly thwarted by permitting workers to waive their rights under the Order or part 13.

EEAC urged the Department to limit the waiver of rights provision to prospective waivers, that is, to allow an employee to waive claims to any remedy for an employer's past violations of the paid sick leave requirements of the Order and part 13. EEAC asserted that the FLSA and FMLA permit waiver of claims based on past employer conduct, and that prohibiting

such waiver under this Order would interfere with an employee's ability to release or settle, rather than litigate, employment-related matters.

The Department disagrees with the commenter's rationale. It is correct that, although the FLSA and FMLA prohibit any prospective waiver of rights, employees have some ability to settle or release claims based on past employer conduct. See, e.g., 29 U.S.C. 218c(b)(2) ("The rights and remedies [under the FLSA] may not be waived by any agreement, policy, form, or condition of employment."); 29 U.S.C. 216(c) (providing that an employee may agree, under the supervision of the Secretary, to accept payment of compensation owed and, upon full payment, waive rights to unpaid compensation); Cheeks v. Freeport Pancake House, Inc., 796 F.3d 199 (2d Cir. 2015) (describing the history of and limitations on waiver of rights under FLSA); 29 CFR 825.220(d) ("[E]mployees … cannot 'trade off' the right to take FMLA leave against some other benefit offered by the employer. This does not prevent the settlement or release of FMLA claims by employees based on past employer conduct."). Those statutes, however, grant to an employee a private right of action, 29 U.S.C. 216(b) (FLSA); 29 CFR 825.400(a)(2) (FMLA), whereas Executive Order 13706 does not enable employees to pursue claims of violations of the Order on their own behalf, but rather vests enforcement authority in the Secretary to initiate an investigation of alleged violations, obtain compliance where violations are discovered, and participate in enforcement proceedings against a contractor where such violations are disputed. See 80 FR 54699. Therefore, as a preliminary matter, waivers of contractor liability, if they were permitted, would be limited: at most, an employee could agree not to file a complaint with the WHD or not to cooperate with an investigation or enforcement action the WHD was pursuing.

Furthermore, such an agreement would deprive the Secretary of important notice, testimony, and evidence needed to determine whether a violation has occurred and would

therefore limit the Secretary's ability to obtain specific relief for employees whose rights have been curtailed and to vindicate the general public interest in ensuring that employees who work on or in connection with covered contracts have access to paid sick leave. The SCA also does not create a private right of action, instead vesting sole enforcement authority in the Secretary, 29 CFR 4.189, 4.191, and it prohibits all releases or waivers for unpaid wages and fringe benefits due without distinguishing between prospective waiver and waiver of claims based on past employer conduct, 29 CFR 4.187(d). For these reasons as well as those explained in the Minimum Wage Executive Order rulemaking and reiterated in the NPRM, permitting any waiver of rights under the Order would be inconsistent with public policy and the Order's purposes.

Section 13.8 Multiemployer Plans or Other Funds, Plans, or Programs

Some commenters, including MCAA, AGC, and North American Dismantling Corp., noted what they perceived to be the difficulty of monitoring paid sick leave accrual and reinstatement in the construction industry, in which employees may work for a contractor on a short-term basis, sometimes more than once over the course of a year. As explained in the discussion of employee coverage, a worker's seasonal or part-time status does not affect a contractor's obligations under the Order and part 13—including to track hours worked on with a covered contract, which contractors with DBA-covered contracts will already do, and to reinstate paid sick leave upon rehiring an employee within 12 months of a separation from employment—although in practice, the employee's accrual and use of paid sick leave will be limited by his work schedule. The Department recognizes that in situations like those described by these commenters, some employers resolve the issues such transient employment can raise by providing benefits to employees by contributing to multiemployer plans negotiated pursuant to CBAs. The Building Trades specifically explained that in the construction industry,

multiemployer plans that provide benefits such as health insurance, pension benefits, or vacation time are common. They therefore asked that the Department allow contractors to create multiemployer plans to jointly provide paid sick leave to comply with the Order and part 13 as employees move between different contractors' projects. AGC similarly requested that, if the Order and part 13 must apply to laborers and mechanics, the Department permit contractors to fulfill their paid sick leave obligations by making payments into a multiemployer plan on behalf of covered workers, noting that some existing multiemployer plans already provide for paid time off.

In response to these comments, the Department has added a new provision, § 13.8(a), to the Final Rule providing that a contractor may fulfill its obligations under Executive Order 13706 and this part jointly with other contractors—that is, as though all of the contractors are a single contractor for purposes of Executive Order 13706 and part 13—through a multiemployer plan that provides paid sick leave in compliance with the rules and requirements of Executive Order 13706 and this part. (The term multiemployer plan is defined in § 13.2.) This new provision also provides that regardless of what functions the plan performs, each contractor remains responsible for any violation of the Order or part 13 that occurs during its employment of the employee.

Under § 13.8(a), if employees who work on or in connection with covered contracts receive access to paid sick leave through a multiemployer plan, the contractors that make contributions to that plan on behalf of the employees satisfy their obligations under the Order and part 13 as though they are all a single employer for purposes of Executive Order 13706 and part 13. For example, assume an employee is a member of a union that has a CBA with Contractors A and B that provides that the employers will contribute to a multiemployer plan to

provide paid sick leave that complies with the requirements of the Executive Order and part 13. If that employee works for Contractor A on a DBA contract for a single pay period and accrues 2 hours of paid sick leave, and she subsequently works for Contractor B on a different DBA contract for several pay periods, the employee would begin the job for Contractor B with 2 hours of paid sick leave available for use and would accrue additional paid sick leave that would be added to those 2 hours for purposes of the accrual cap (of no less than 56 hours) for which the CBA provides. In such a scenario, Contractor A and Contractor B are separately responsible for complying with the Order and part 13 as to the employee's accrual and use of paid sick leave while working for each respective employer; for example, if Contractor B denied an employee's valid request to use paid sick leave the employee accrued while working for Contractor A, Contractor B would have violated § 13.6, and Contractor A would not be responsible for that violation. To the extent the plan or any third party that administers the plan plays a role in administering paid sick leave—for example, by tracking accrual, notifying employees of the amounts of paid sick leave they have accrued but not used, responding to employee requests to use paid sick leave, or providing employees with the pay and benefits to which they are entitled while using paid sick leave—the contractor for which the employee is working at the time such actions are taken is responsible for ensuring that the plan performs those functions in compliance with the requirements of the Order and part 13.

AGC asked that the Department revise the proposed regulations to allow contractors to fulfill their paid sick leave obligations by contributing to a funded plan outside the multiemployer plan context, whether a contractor creates such a plan pursuant to a CBA or not. The Department did not intend any proposed regulatory provision or other interpretation in the NPRM to prohibit a contractor from providing paid sick leave by contributing to a plan, as long

as the contractor's employees have access to paid sick leave that meets all of the requirements of the Order and part 13. For purposes of clarity and completeness, the Department has added to the regulations, as § 13.8(b), a provision stating that nothing in part 13 prohibits a contractor from providing paid sick leave through a fund, plan, or program. The new provision also notes that regardless of the manner in which a contractor provides paid sick leave or what functions any fund, plan, or program performs, the contractor remains responsible for any violation of the Order or part 13 with respect to any of its employees. In other words, a contractor would be free to delegate to a fund, plan, or program—terms the Department intends to have the meaning they do for purposes of the DBA, see 29 CFR 5.27 ("The phrase 'fund, plan, or program' is merely intended to recognize the various types of arrangements commonly used to provide fringe benefits through employer contributions.")—any or all of its responsibilities under the Order and part 13. For example, the plan might simply provide pay and benefits to an employee using paid sick leave upon receiving instructions from a contractor to do so, or it could also notify employees of their amounts of accrued paid sick leave and even approve or deny requests to use the leave. The contractor would remain ultimately responsible, however, for ensuring that its obligations under the Order and part 13 are satisfied, and the contractor would be liable for any violations of the Order and part 13 regardless of whether it has made proper contributions to the plan.

Finally, the Department notes that nothing in § 13.8 (or any other provision of part 13) has any effect on any claims procedure or enforcement standards under ERISA that apply to plans that provide paid sick leave.

Subpart B–Federal Government Requirements

Subpart B of part 13, which is largely modeled on subpart B of the Minimum Wage Executive Order implementing regulations, 29 CFR 10.11-10.12, establishes the requirements for the Federal Government to implement and comply with Executive Order 13706. Section 13.11 addresses contracting agency requirements, and § 13.12 explains the requirements placed upon the Department of Labor.

Section 13.11 Contracting Agency Requirements

Proposed § 13.11(a) implemented section 2(a) of Executive Order 13706 by directing that the contracting agency include the Executive Order paid sick leave contract clause set forth in appendix A of part 13 in all covered contracts and solicitations for such contracts, as described in § 13.3, except for procurement contracts subject to the FAR. Proposed § 13.11(a) further provided that the required contract clause directs, as a condition of payment, that all employees performing work on or in connection with covered contracts be permitted to accrue and use paid sick leave as required by Executive Order 13706 and part 13. It also provided that for procurement contracts subject to the FAR, contracting agencies must use the contract clause set forth in the FAR to implement part 13, and that 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 part 13. The Department explained in the NPRM that proposed § 13.11(a) was effectively identical to 29 CFR 10.11(a), the analogous provision in the Minimum Wage Executive Order Final Rule.

PSC commented that contractors' compliance with the Order and part 13 should not be a condition of payment, arguing in part that this requirement could expose contractors to liability under the False Claims Act. As described in greater detail below in the discussion of subpart C, the Department declines to alter this provision because section 2(a) of the Order specifically

requires a contract clause that renders compliance with the Order a condition of payment. See 80 FR 54697. The Department therefore adopts § 13.11(a) in the Final Rule as proposed.

The Department reiterates that, as noted in the NPRM, inserting 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 and part 13, and the Department therefore prefers that covered contracts include the contract clause in full. As discussed in the NPRM and below in the discussion of subpart C, however, particular facts and circumstances may establish that the contracting agency or contractor sufficiently apprised the prime or lower-tier contractor that the Executive Order applied to the contract despite the failure to include the contract clause in full in the contract. See Nat'l Electro-Coatings, Inc. v. Brock, No. C86–2188, 1988 WL 125784 (N.D. Ohio July 13, 1988); In the Matter of Progressive Design & Build, Inc., WAB Case No. 87–31, 1990 WL 484308 (WAB Feb. 21, 1990). In such circumstances, the contract clause may be deemed to have been incorporated by reference in the covered contract. For example, the full contract clause will be deemed to have been incorporated by reference in a covered contract if the contract provides that "Executive Order 13706—Establishing Paid Sick Leave 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" and includes 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 to part 13, or to the provision of the FAR containing the contract clause promulgated by the FARC to implement part 13.

Proposed § 13.11(b) explained a contracting agency's obligations in the event that it fails to include the contract clause in a covered contract. Proposed § 13.11(b) first provided that

where the Department of Labor or the contracting agency discovers or determines, whether before or subsequent to a contract award, that the contracting agency made an erroneous determination that Executive Order 13706 and part 13 did not apply to a particular contract and/or failed to include the applicable contract clause in a contract to which the Executive Order and part 13 apply, the contracting agency, on its own initiative or within 15 calendar days of notification by an authorized representative of the Department of Labor, would incorporate 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 (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). The proposed language mirrored the analogous provision in the Minimum Wage Executive Order's Final Rule, see 29 CFR 10.11(b), which the Department developed based on similar authority existing under the analogous SCA, see 29 CFR 4.5(c), and DBA, see 29 CFR 1.6(f), implementing regulations.

Roffman Horvitz suggested that it would be unfair to impose a retroactive obligation when a contracting officer or the Department discovers after the contract has begun that the contract clause was omitted. AGC requested that the Department require contracting agencies to use the adjustments, or change-order, process to govern any cost increases related to retroactively incorporating the contract clause. PSC similarly requested that the Department expressly require a price or cost adjustment when a contracting agency fails to include the contract clause in a covered contract.

After carefully considering these comments, the Department adopts § 13.11(b) without change. The Order directs the Department to the extent practicable to incorporate procedures

and enforcement processes that exist under the SCA, DBA, and Minimum Wage Executive Order. The Department's approach incorporates the procedure used under the Minimum Wage Executive Order (which the Department derived from similar SCA and DBA procedures) when a contracting agency has failed to include the contract clause and does not limit a contracting agency's authority to pay any necessary additional costs. Furthermore, the Department believes, as it did with respect to the Minimum Wage Executive Order rulemaking, that this procedure will promote compliance with the Order consistent with section 4(a) of the Order.

Proposed § 13.11(c) provided that a contracting officer would, upon his or her own action or upon written request of the Administrator, 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 employees the full amount owed to compensate for any violation of Executive Order 13706 or part 13. It further provided that in the event of any such violation, the agency may, after authorization or by direction of the Administrator and written notification to the contractor, take action to cause suspension of any further payment or advance of funds until such violations have ceased. Such amounts would be based on the estimated monetary relief, including any pay and/or benefits denied or lost by reason of the violation, or other monetary losses sustained as a direct result of the violation as described in § 13.44.

The SCA, DBA, and Minimum Wage Executive Order's implementing regulations provide for withholding to ensure the availability of monies for payment to covered workers when a contractor or subcontractor has failed to comply with its obligations to pay required wages (including fringe benefits where applicable). 29 CFR 4.6(i) (SCA); 29 CFR 5.5(a)(2) (DBA); 29 CFR 10.11(c) (Executive Order 13658). The Department reasoned that withholding

likewise is an appropriate remedy under this Executive Order because the Order directs the Department to adopt enforcement processes from the SCA, DBA, and Minimum Wage Executive Order to the extent practicable and to exercise authority to obtain compliance with the Order. 80 FR 54699. Consistent with withholding procedures under the SCA and DBA, which were also adopted in the Minimum Wage Executive Order rulemaking, proposed § 13.11(c) would allow 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 violations of the paid sick leave requirements of Executive Order 13706 and part 13 occurred, but also under any other contract that the prime contractor has entered into with the Federal Government. 29 CFR 4.6(i) (SCA); 29 CFR 5.5(a)(2) (DBA); 29 CFR 10.11(c) (Executive Order 13658).

Proposed § 13.11(c) also provided that any failure to comply with the requirements of Executive Order 13706 or part 13 could be grounds for termination of the right to proceed with the contract work. Under the proposed rule, in such event, the contracting agency could enter into other contracts or arrangements for completion of the work, charging the contractor in default with any additional cost. This language was essentially identical to language included in the analogous provision in the Minimum Wage Executive Order rulemaking. See 79 FR 60724 (codified at 29 CFR 10.11(c)).

AGC requested that contracting officers not have authority to withhold payments to a prime contractor, asserting that contracting officers lack a standard upon which to determine that an alleged violation rises to the level of an actual or actionable violation and that it would accordingly be suitable to compel contracting officers to forward all allegations of noncompliance to the Department for investigation. As the Department noted above, the proposed provision, consistent with the Order's directive to incorporate procedures and

enforcement processes under the SCA, DBA and Minimum Wage Executive Order, mirrors regulations under the SCA, DBA, and Minimum Wage Executive Order that authorize contracting officers to withhold monies from accrued payments or advances as may be considered necessary to pay employees the full amount owed to compensate for any violation of the DBA, SCA, or Minimum Wage Executive Order. In addition, the Department believes that authorizing contracting officers to withhold in the circumstances contemplated by § 13.11(c) will help the Department to obtain compliance with the Order's requirements consistent with section 4(a) of the Order. Although the Department anticipates that contracting officers typically will effectuate withholding in response to written requests from the Administrator, the Department also believes that contracting officers should have the authority (as they do under the SCA, DBA and Minimum Wage Executive Order) to withhold on their own action when such withholding may be necessary to pay employees the full amount owed to compensate for any violation of Executive Order 13706 or part 13.

AGC also suggested that the Department prohibit contracting agencies from canceling or terminating a contract that fails to include the paid sick leave contract clause. The Department wishes to reaffirm that the authority of a contracting agency to cancel or terminate a contract is conditioned on a contractor's failure to comply with the Order or part 13. The Department modeled this authority on a contracting agency's authority to cancel a contract under the Minimum Wage Executive Order, see 29 CFR 10.11(c), which itself reflected a contracting agency's power under the SCA, see 29 CFR 4.6(i), and DBA, see 29 CFR 5.5(a)(7). Because the Order instructs the Department to incorporate enforcement processes under the Minimum Wage Executive Order, SCA, and DBA to the extent practicable, and because the Department believes the possibility of contract termination by a contracting agency due to a contractor's failure to

comply with the Order will advance the Department's efforts to obtain compliance with the Order, the Department declines to adopt the commenter's suggestion. For all of the reasons described, the Department adopts § 13.11(c) as proposed, except that it has corrected an inadvertent omission: the second sentence now provides that an agency may act to suspend not just a payment or advance, but also a guarantee of funds consistent with the DBA regulations at 29 CFR 5.5(a)(2) (as well as paragraph (d) of the contract clause in appendix A as proposed and adopted).

Proposed § 13.11(d) described a contracting agency's responsibility to suspend further payment or advance of funds to a contractor that fails to make available for inspection, copying, and transcription any of the records identified in § 13.25. The proposal required contracting agencies to take action to suspend payment or advance of funds under these circumstances upon their own action, or upon the direction of the Administrator and notification of the contractor. Proposed § 13.11(d) was derived from paragraph (g)(3) of the Minimum Wage Executive Order contract clause, 79 FR 60731, and was consistent with the analogous provisions of the SCA and DBA regulations, 29 CFR 4.6(g)(3) (SCA); 29 CFR 5.5(a)(3)(iii) (DBA). The Department did not receive any comments on proposed § 13.11(d) and therefore adopts the provision as proposed except that it corrects the same omission of a reference to suspending a guarantee of funds described with respect to § 13.11(c).

Proposed § 13.11(e) described a contracting agency's responsibility to forward to the WHD any complaint alleging a contractor's non-compliance with Executive Order 13706 or part 13, as well as any information related to the complaint. Although the Department proposed in § 13.41 that complaints be filed with the WHD rather than with contracting agencies, the Department recognized that some employees or other interested parties nonetheless could file

formal or informal complaints concerning alleged violations of the Executive Order or part 13 with contracting agencies. Proposed § 13.11(e)(1) therefore specifically required the contracting agency to transmit the complaint-related information identified in proposed § 13.11(e)(2) to the WHD's Office of Government Contracts Enforcement within 14 calendar days of receipt of a complaint alleging a violation of the Executive Order or part 13, or within 14 calendar days of being contacted by the WHD regarding any such complaint.

Proposed § 13.11(e)(2) described the contents of any transmission under proposed § 13.11(e)(1). Specifically, it provided that the contracting agency would forward to the Office of Government Contracts Enforcement any: (i) complaint of contractor noncompliance with Executive Order 13706 or part 13; (ii) available statements by the worker, contractor, or any other person regarding the alleged violation; (iii) evidence that the Executive Order paid sick leave contract clause was included in the contract; (iv) information concerning known settlement negotiations between the parties, if applicable; and (v) any other relevant facts known to the contracting agency or other information requested by the WHD.

Proposed § 13.11(e) was nearly identical to 29 CFR 10.11(d) as promulgated by the Minimum Wage Executive Order Final Rule, which was derived from analogous provisions in the Department's regulations implementing the Nondisplacement Executive Order. 79 FR 60669 (citing 29 CFR 9.11(d)). In the NPRM, the Department stated that proposed § 13.11(e), which included an obligation to send such complaint-related information to the WHD even absent a specific request (e.g., when a complaint was filed with a contracting agency rather than with the WHD), was appropriate because prompt receipt of such information from the relevant contracting agency would allow the Department to fulfill its charge under the Order to obtain compliance with the Order. 80 FR 54699. The proposed requirement was consistent with the

requirements in the Minimum Wage Executive Order rulemaking. The Department did not receive any comments on proposed § 13.11(e) and therefore implements the provision as proposed.

Proposed § 13.11(f) stated that a contracting officer would provide to a successor contractor any predecessor contractor's certified list, provided to the contracting officer pursuant to proposed § 13.26, of the amounts of unused paid sick leave that employees have accrued. The Department intended this requirement to facilitate compliance by successor contractors with § 13.5(b)(4), which required that paid sick leave be reinstated for employees rehired by a successor contractor within 12 months of the job separation from the predecessor contractor. Because that provision does not appear in the Final Rule, as explained above, the Department has also removed this provision from the Final Rule.

Section 13.12 Department of Labor Requirements

Proposed § 13.12 set forth the Department's obligations under the Executive Order. Proposed § 13.12(a) addressed notice-related requirements. Specifically, proposed § 13.12(a)(1) stated that the Administrator would publish and maintain on Wage Determinations OnLine (WDOL), http://www.wdol.gov, or any successor website, a notice that Executive Order 13706 creates a requirement to allow employees performing work on or in connection with contracts covered by Executive Order 13706 and part 13 to accrue and use paid sick leave, as well as an indication of where to find more complete information about that requirement. Proposed § 13.12(a)(2) provided that the Administrator would also publish a notice on all wage determinations issued under the DBA and SCA that Executive Order 13706 creates a requirement to allow employees performing work on or in connection with contracts covered by

Executive Order 13706 and part 13 to accrue and use paid sick leave, as well as an indication of where to find more complete information about that requirement.

Many commenters, including the NYC Department of Consumer Affairs and the Center for the Study of Social Policy, supported the Department's proposal to create a notice poster. The Department adopts § 13.12(a) as proposed and will publish the notice poster on the WHD Web site.

Proposed § 13.12(b), which was modeled on 29 CFR 10.12(d) as promulgated by the Minimum Wage Executive Order rulemaking, addressed the Department's obligation to notify a contractor of a request to the contracting agency for the withholding of funds or a request for the suspension of payment or advance of funds. As explained above, § 13.11(c) authorizes the Administrator to direct that payments due on the covered contract or any other contract between the contractor and the Federal Government be withheld as may be considered necessary to provide for monetary relief for violations of Executive Order 13706 or part 13, and § 13.11(d) authorizes the Administrator to direct that the contracting agency suspend payment, advance, or guarantee of funds. If the Administrator made the requests contemplated by § 13.11(c) or (d), proposed § 13.12(b) would require the Administrator and/or the contracting agency to notify the affected prime contractor of the Administrator's withholding request to the contracting agency. Although it is only necessary that one party—either the Administrator or the contracting agency—provide the notice, the other can choose in its discretion to provide notice as well. The Department did not receive any comments addressing proposed § 13.12(b) and implements the provision as proposed, although it has inserted a reference to a guarantee of funds for the reasons explained in the discussion of § 13.11(c).

Subpart C – Contractor Requirements

Subpart C of part 13 describes the requirements with which contractors must comply under Executive Order 13706 and part 13. It sets forth the obligations to include the applicable paid sick leave contract clause in subcontracts and lower-tier contracts as well as to comply with the contract clause. It also sets forth contractor requirements pertaining to deductions, kickbacks, recordkeeping, notice, and timing of pay.

Section 13.21 Contract Clause

Proposed § 13.21(a), which implemented section 2(a) of the Order and was adopted from 29 CFR 10.21 as promulgated by the Minimum Wage Executive Order Final Rule, required the contractor, as a condition of payment, to abide by the terms of the applicable paid sick leave contract clause referred to in § 13.11(a). The applicable contract clause would contain the requirements with which the contractor must comply on the covered contract. PSC requested that the Department remove the language in proposed § 13.21(a) rendering compliance with the Order and part 13 a "condition of payment." PSC asserted this language exposes contractors to potential False Claims Act liability and is unnecessary because the Department proposed sufficient remedial options in § 13.44. However, section 2(a) of the Executive Order specifically requires a contract clause that renders compliance with the Order a condition of payment. 80 FR 54697. Thus, the Department declines to accept PSC's suggestion and adopts § 13.21 in the Final Rule as proposed.

Proposed § 13.21(b) required that contractors include the applicable contract clause in any covered subcontracts and, as a condition of payment, that subcontractors include the clause in all lower-tier subcontracts. Under the proposal, the prime contractor and upper-tier contractors would be responsible for compliance by any subcontractor or lower-tier subcontractor with Executive Order 13706 and part 13, regardless of whether the contract clause

was included in the subcontract. This responsibility on the part of prime and upper-tier contractors for subcontractor compliance, which is commonly referred to as "flow-down" liability, paralleled that of the SCA, DBA, and Minimum Wage Executive Order. See 29 CFR 4.114(b) (SCA); 29 CFR 5.5(a)(6) (DBA); 29 CFR 10.21(b) (Executive Order 13658).

EEAC and Vigilant requested that covered contractors be permitted to incorporate the contract clause by reference into covered subcontracts. As the Department noted with respect to insertion of the contract clause in the discussion of § 13.11(a), the Department prefers that contractors include the contract clause in full in covered contracts, including covered subcontracts. However, there may be facts and circumstances establishing that the contractor sufficiently apprised the lower-tier subcontractor that the Order applies to the subcontract despite the contractor's failure to include the contract clause in full in the covered subcontract. The Department notes, for example, that the full contract clause will be deemed to have been incorporated by reference in a covered subcontract if the subcontract provides that "Executive Order 13706—Establishing Paid Sick Leave 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" and includes 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 to part 13, or to the provision of the FAR containing the contract clause promulgated by the FARC to implement part 13.

AGC requested that the Department delete the final sentence of proposed § 13.21(b), which imposes flow-down liability on upper-tier contractors. AGC specifically asserts that it is more difficult for upper-tier contractors to monitor lower-tier contractors' compliance with the Order's requirements than it is to monitor such contractors' compliance with DBA requirements.

ABC similarly contended it will be difficult for upper-tier contractors to monitor lower-tier contractors' compliance with the Order, noting, as did AGC, that employees working for lower-tier contractors with which upper-tier contractors subcontract may have accrued paid sick leave on other covered contracts. The Chamber/IFA requested that the Department detail the types of activities that upper-tier contractors would be expected to conduct in order to ensure compliance by subcontractors. NECA contended the cost of lower-tier compliance oversight will increase project costs and that the Department should accordingly consider alternative enforcement mechanisms. Finally, Vigilant questioned the Department's authority to impose flow-down liability, suggesting that an upper-tier contractor's sole responsibility should be to incorporate the contract clause in its subcontract.

After careful consideration of the comments received, the Department has decided to adopt § 13.21(b) as proposed. In response to the comments submitted by the Chamber/IFA and NECA, as well as comments from AGC and ABC asserting that upper-tier contractors' oversight of lower-tier contractors here may present challenges not present under the DBA and SCA, the Department notes that covered contractors are required to insert the applicable contract clause in subcontracts in order to inform covered subcontractors of the requirements with which they must comply, and that covered contractors have the latitude to implement additional measures to promote compliance by subcontractors, including emphasizing to subcontractors that the Executive Order and part 13 apply to employees performing work on or in connection with covered subcontracts and directing covered subcontractors to the portions of this Final Rule and related guidance materials that explain the rule's application to such employees. The Department further notes that upper-tier contractors can, and the Department understands often do, indemnify themselves against violations committed by lower-tier contractors. With respect

to Vigilant's comment, both the SCA and DBA, to which the Order directs the Department to look in adopting remedies and enforcement processes, have long permitted the Department to hold a prime contractor responsible for compliance by any lower-tier contractor, see 29 CFR 4.114(b) (SCA); 29 CFR 5.5(a)(6) (DBA), and the Minimum Wage Executive Order's implementing regulations make the prime and upper-tier contractors responsible for compliance by any lower-tier contractor, see 29 CFR 10.21(b). Removal of this obligation, as AGC has requested, could diminish the level of care contractors exercise in selecting subcontractors on covered contracts and reduce contractors' monitoring of the performance of subcontractors – two "vital functions" served by the flow-down responsibility. In the Matter of Bongiovanni, WAB Case No. 91-08, 1991 WL 494751 (WAB April 19, 1991). Removal of this obligation could additionally hamper the Department's enforcement efforts under section 4(a) of the Order because a contractor's responsibility for the compliance of its lower-tier subcontractors enhances the Department's ability to obtain compliance with the Executive Order. For all these reasons, the Department declines to grant the request to remove the flow-down liability obligation.

Section 13.22 Paid Sick Leave

Proposed § 13.22 required contractors to allow all employees performing work on or in connection with a covered contract to accrue and use paid sick leave as required by the Executive Order and part 13. The Department received many comments related to contractors' paid sick leave obligations, which are addressed in subpart A of the preamble, but no comments specifically addressing § 13.22. This provision is therefore adopted as proposed.

Section 13.23 Deductions

Proposed § 13.23 stated that contractors may only make deductions from the pay and benefits of an employee who is using paid sick leave under the limited circumstances set forth in

the proposed provision. The reference to "pay and benefits" in proposed § 13.23 had the same meaning as the reference to pay and benefits in § 13.5(c)(3), discussed above.

Proposed § 13.23 permitted 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 5.5(a)(1) (DBA); 29 CFR 10.23(a) (Executive Order 13658). This proposed provision also permitted deductions for payments made to third parties pursuant to court orders. See 29 CFR 531.39 (FLSA); 29 CFR 4.168(a) (SCA); 29 CFR 5.5(a)(1) (DBA); 29 CFR 10.23(b) (Executive Order 13658). Permissible deductions made pursuant to a court order could include such deductions as those made for child support. The proposed section also permitted deductions directed by a voluntary assignment of the employee 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); 29 CFR 10.23(c) (Executive Order 13658). Deductions directed by a voluntary assignment included, but were 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 were required to be made for the employee's account and benefit pursuant to the request of the employee 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). Finally, the Department proposed to permit 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); 29 CFR 10.23(d) (Executive Order 13658). Deductions made for the reasonable cost or fair value of board, lodging and other facilities were required to comply with the regulations in 29 CFR part 531. In the proposal, the Department noted that a contractor could take credit for the reasonable cost or fair value of board, lodging, or other facilities against an employee's wages, rather than taking a

deduction for the reasonable cost or fair value of these items. See 29 CFR part 531. The Department did not receive comments asking for modifications to proposed § 13.23. The Department is therefore adopting the language proposed, but it is also adding as § 13.23(e) that deductions are also permissible, to the extent permitted by law, for the purpose of recouping pay and benefits provided for paid sick leave as to which the contractor retroactively denied the employee's request pursuant to § 13.5(e)(3)(iii) or because the contractor approved the use of the paid sick leave based on a fraudulent request. This addition is consistent with the discussion of § 13.5(e)(3)(iii) and of comments regarding employee abuse of paid sick leave benefits.

Section 13.24 Anti-Kickback

Proposed § 13.24 required that all paid sick leave used by employees performing work on or in connection with covered contracts be paid free and clear and without subsequent deduction (unless as set forth in § 13.23), rebate, or kickback on any account. It further prohibited kickbacks directly or indirectly to the contractor or to another person for the benefit of the contractor for the whole or part of the paid sick leave. The proposal was derived from the Executive Order 13658 Final Rule at 29 CFR 10.27; it reflected the Department's intent to ensure that employees actually receive the full pay and benefits to which they are entitled under the Executive Order and part 13. The Department received no comments on this provision and adopts it as proposed.

Section 13.25 Records to Be Kept by Contractors

Proposed § 13.25 explained the recordkeeping and related requirements for contractors. The obligations set forth in proposed § 13.25 were derived from the FLSA, SCA, DBA, FMLA and Executive Order 13658. See 29 CFR part 516 (FLSA); 29 CFR 4.6(g) (SCA); 29 CFR 5.5(a)(3) (DBA); 29 CFR 825.500(c) (FMLA); 29 CFR 10.26 (Executive Order 13658).

Proposed § 13.25(a) required contractors and subcontractors to make and maintain during the course of the covered contract, and preserve for no less than 3 years thereafter, records containing the information enumerated in proposed § 13.25(a)(1)-(15). It also required contractors to make such records available to the WHD for inspection, copying, and transcription.

Proposed § 13.25(a)(1)-(6) required contractors to make and maintain for each employee: name, address, and Social Security number; the employee's occupation(s) or classification(s); the rate or rates of wages paid; the number of daily and weekly hours worked; any deductions made; and the total wages paid each pay period. Contractor obligations to maintain the categories of records set forth in proposed § 13.25(a)(1)-(6) were derived from and are consistent across the FLSA, SCA, and DBA (with the exception of the requirement to preserve records for no less than 3 years after the contract expires, which applies under the DBA and SCA but not the FLSA). An exception to the requirement in proposed § 13.25(a)(4) to keep records of an employee's hours worked was provided in proposed § 13.25(c), as described below. Therefore, in conjunction with § 13.25(c), these recordkeeping requirements imposed almost no new burdens on contractors.

Proposed § 13.25(a)(7) required contractors to make and maintain copies of notifications to employees of the amount of paid sick leave the employees accrued as required under § 13.5(a)(2). Proposed § 13.25(a)(8) required contractors to maintain copies of employees' requests to use paid sick leave, if in writing, or, if not in writing, any other records of employees' requests.

Proposed § 13.25(a)(9) required contractors to make and maintain records of the dates and amounts of paid sick leave used by employees and further specified that unless a contractor's

paid time off policy satisfies the requirements of Executive Order 13706 and part 13 as described in § 13.5(f)(5), contractors must designate the leave in their records as paid sick leave pursuant to Executive Order 13706. Proposed § 13.25(a)(10) required contractors to make and maintain copies of any written denials of employees' requests to use paid sick leave, including explanations for such denials, as required under § 13.5(d)(3). Proposed § 13.25(a)(11) required contractors to make and maintain records relating to the certification and documentation a contractor could require an employee to provide under § 13.5(e), including copies of any certification or documentation provided by an employee. Proposed § 13.25(a)(12) required contractors to make and maintain any other records showing any tracking of or calculations related to an employee's accrual and/or use of paid sick leave.

Proposed § 13.25(a)(13) required contractors to make and maintain copies of any certified list of employees' accrued, unused paid sick leave provided to a contracting officer in compliance with proposed § 13.26. Proposed § 13.25(a)(14) required contractors to maintain any certified list of employees' accrued, unused paid sick leave received from the contracting agency in compliance with proposed § 13.11(f). Finally, proposed § 13.25(a)(15) required contractors to maintain a copy of the relevant covered contract. The Department explained that each of the recordkeeping obligations set forth in proposed § 13.25(a)(1)-(15) were necessary and appropriate for the enforcement of Executive Order 13706 and part 13 because they require the maintenance and preservation of records necessary to investigate potential violations of and obtain compliance with the Order, consistent with sections 3(a) and 4(a) of the Order.

The Chamber/IFA, the American Benefits Council, and Seyfarth Shaw asserted that the requirement to preserve records for 3 years after contract completion was unduly burdensome. The Department has carefully reviewed the commenters' concerns; however, the Department

declines to reduce the time period required for preserving records in this Final Rule. Section 3(a) of the Executive Order specifically authorizes the Secretary to issue regulations requiring contractors to make, keep, and preserve such employee records as the Secretary deems necessary and appropriate for the enforcement of either the Order's provisions or the regulations issued by the Department. Section 4(a) of the Executive Order further authorizes the Secretary to investigate possible violations of and obtain compliance with the Order, and instructs the Department, to the extent practicable, to adopt procedures and enforcement processes consistent with the FLSA, SCA, DBA, FMLA, VAWA, and Minimum Wage Executive Order. The obligation to preserve records for 3 years after contract completion mirrors the recordkeeping requirements under the SCA and DBA, see 29 CFR 4.6(g) (SCA); 29 CFR 5.5(a)(3) (DBA), that the Department has previously determined would assist in investigating possible violations of and obtaining compliance with those statutes' provisions. Thus, the requirements in proposed § 13.25(a) are not undue; rather, consistent with sections 3(a) and 4(a) of the Order, the Secretary has determined that maintenance and preservation of the records set forth in proposed § 13.25(a) for 3 years after contract completion is necessary and appropriate to ensure the Department can effectively investigate potential violations of and obtain compliance with the Order.

PSC requested that the Department "streamline" the recordkeeping requirements contained in § 13.25(a)(7)-(12) because, although those provisions reflect FMLA requirements, they are more burdensome here because the instances of paid sick leave will outnumber those under the FMLA. The ERISA Industry Committee similarly requested that the Department remove or otherwise decrease a contractor's recordkeeping requirements related to required notifications of the amount of paid sick leave employees have accrued. Consistent with these requests and as explained in the discussion of § 13.5(a)(2), the Department has reduced the

frequency with which a contractor must notify employees of the leave they have accrued under the Order, which will reduce the required recordkeeping under § 13.25(a)(7). In addition, the Department has clarified elsewhere in this Final Rule that contractors may create and preserve documents electronically. With respect to the other recordkeeping requirements contained in § 13.25(a)(7)-(12), the Department understands that these requirements might result in a greater volume of recordkeeping than under the FMLA because there are likely to be more instances of leave under the Order than contractors experience under the FMLA. However, as mentioned above, the records the Department is requiring covered contractors to maintain under § 13.25(a)(7)-(12) are necessary to ensure the Department can fulfill its enforcement mandate under the Order.

The HR Policy Association requested that covered contractors be permitted to preserve the required records electronically. Similarly, the Chamber/IFA suggested that contractors be permitted to send required notifications to employees electronically to avoid the accumulation of paper. The ERISA Industry Committee contended that the voluminous records covered contractors would need to create to comply with the recordkeeping requirements would cause an administrative burden. In response to these comments, the Department clarifies that, as proposed, § 13.25(a) allowed a covered contractor to make and maintain the required records electronically provided that the reproductions of the electronic records were clear, identifiable, otherwise satisfy the specific requirements of § 13.25(a)(1)-(15), and were made available upon request. The Department additionally notes, however, that regardless of how a contractor maintains the required records, a contractor may only send information required by the Order and part 13 to employees electronically if the contractor customarily corresponds with or makes information available to its employees by electronic means. The Department expects that the

right of contractors to make and maintain records electronically in the manner described above, which is generally consistent with FLSA and FMLA recordkeeping requirements under 29 CFR 516.1(a) and 825.500(b), respectively, should significantly reduce contractors' asserted recordkeeping burdens under the Order and implementing regulations.

The Chamber/IFA, the ERISA Industry Committee, and the HR Policy Association also asserted that the requirement in proposed § 13.25(a)(9) to designate leave used in records as paid sick leave pursuant to the Order will cause confusion because the leave might also satisfy overlapping Federal, State, or local leave requirements. The Department agrees that there may be circumstances when leave taken by an employee under the Order also satisfies a contractor's obligations under another Federal, State, or local law. However, the Department does not agree that requiring such leave to be designated consistent with proposed § 13.25(a)(9) will cause undue confusion. First, the language in the proposed rule does not preclude covered contractors from also designating the leave in its records as compliant with another legal or regulatory obligation; therefore, contractors may additionally designate the leave as compliant with the overlapping legal requirements. Second, although the Department is not requiring contractors to disclose records made under proposed § 13.25(a)(9) to employees, it is possible that employees will receive documents, such as pay stubs, that identify leave used by employees as paid sick leave pursuant to the Order. Rather than causing confusion, however, the Department believes that such disclosures, to the extent they occur, will help employees stay apprised of how much paid sick leave they have used.

ABC contended that the proposed rule does not address the new recordkeeping requirements it is imposing with respect to exempt employees, apparently referring to the Order's coverage of employees who qualify for an exemption from the FLSA's minimum wage

and overtime provisions. Under § 13.25(c) (adopted as proposed, as explained below), however, a contractor is excused from maintaining records of employees' number of daily and weekly hours worked as otherwise required under § 13.25(a)(4) if the SCA, DBA, or FLSA do not require the contractor to keep records of the employees' hours worked and the contractor elected to use the assumption, permitted by § 13.5(a)(1)(iii), that the employee works 40 hours on or in connection with covered contracts in each workweek. Thus, the Department has not only addressed the new recordkeeping requirement with respect to exempt employees, it has also provided contractors an opportunity to significantly reduce any new recordkeeping requirement with respect to such employees.

For all of these reasons, the Department is adopting § 13.25(a) essentially as proposed, although it has made certain modifications to ensure that certain provisions expressly refer to all relevant records and removed two entries from the list that are no longer necessary. Specifically, the Department has clarified that the reference to "wages paid" under § 13.25(a)(3) and § 13.25(a)(6) includes all "pay and benefits" as those terms are used in § 13.5(c)(3), which requires covered contractors to provide to an employee using paid sick leave the same pay and benefits (that is, both wages and any other benefits, such as but not limited to contributions toward a fringe benefit plan) the employee would have received had the employee not been absent from work. The addition of new language to § 13.25(a)(3) and § 13.25(a)(6) clarifies that contractors must make and maintain records of benefits, such as any contributions they make to a fringe benefit plan on an employee's behalf. Because the clarification compels covered contractors to maintain documentation to demonstrate that they have complied with § 13.5(c)(3), it will facilitate the Department's efforts to enforce the Order and its implementing regulations. The additional language is also generally consistent with the DBA and SCA recordkeeping

requirements under 29 CFR 5.5(a)(3)(i) and 4.6(g)(1)(ii), respectively. Additionally, the Department has modified § 13.25(a)(10) to reflect that contractors must maintain records of not just written denials of requests to use paid sick leave, but all written responses, including approvals of such requests if in writing as well as denials, including explanations for such denials as required under § 13.5(d)(3). Although under § 13.5(d)(3)(i), contractors are not required to grant employees' requests to use paid sick leave in writing, if they do, maintaining such records will facilitate any investigation by the WHD that might occur. The Department removed § 13.5(a)(13) and § 13.5(a)(14) because the certified list requirement, which was necessary only to implement the requirement that successor contractors reinstate paid sick leave of employees who worked for the predecessor contractor, no longer appears. The entries that follow have been renumbered accordingly. The Department has also inserted as § 13.25(a)(14) the requirement that contractors make and maintain records of the regular pay and benefits provided to an employee for each use of paid sick leave. This provision makes explicit that records of such payments are required regardless of whether they are technically included in wages as referred to in § 13.25(a)(6). Finally, the Department inserted as § 13.25(a)(15) a requirement that a contractor make and maintain records of any financial payment made for unused paid sick leave upon a separation from employment that, pursuant to § 13.5(b)(5), relieves a contractor from the obligation to reinstate such paid sick leave as otherwise required by § 13.5(b)(4). This provision follows from the change to § 13.5(b)(5) described above; because financial payments can under the Final Rule affect a contractor's reinstatement obligation, it would be important in any investigation that a contractor have records showing that such payments were made.

Proposed § 13.25(b) related to the segregation of employees' covered and non-covered work for a single contractor. It provided that in order for a contractor to distinguish between an

employee's covered and non-covered work (such as time spent performing work on or in connection with a covered contract versus time spent performing work on or in connection with non-covered contracts or time spent performing work on or in connection with a covered contract in the United States versus time spent performing work outside the United States, or to establish that time spent performing solely in connection with covered contracts constituted less than 20 percent of an employee's hours worked during a particular workweek), the contractor would be required to keep records or other proof reflecting such distinctions. It further provided that only if the contractor adequately segregated the employee's time would time spent on non-covered work be excluded from hours worked counted toward the accrual of paid sick leave, and that similarly, only if that contractor adequately segregated the employee's time could a contractor properly deny an employee's request to take leave under § 13.5(d) on the ground that the employee was scheduled to perform non-covered work during the time he asked to use paid sick leave.

The HR Policy Association and the ERISA Industry Committee commented that it would be difficult for covered contractors to implement § 13.25(b) with respect to those employees that might be spending less than 20 percent of hours worked in a workweek in connection with covered contracts and sought a 1-year grace period for contractors to make necessary modifications to their human resource systems to enable compliance with the requirements of § 13.25(b). EEAC and Seyfarth Shaw similarly expressed that tracking the hours of individuals working in connection with a covered contract would be challenging. The language in proposed § 13.25(b) is consistent with the treatment of hours worked on SCA- and non-SCA-covered contracts, see 29 CFR 4.178, 4.179, as well as the treatment of covered versus non-covered time under the Minimum Wage Executive Order rulemaking, see 79 FR 60659, 60660-61, 60672.

Thus, many, if not most, covered contractors will have experience in segregating hours worked in the manner required by proposed § 13.25(b). In addition, requiring contractors that wish to distinguish between covered and non-covered time to keep adequate records reflecting that distinction would implement section 4(a) of the Order because it would facilitate the Department's investigation of potential violations of, and assist in obtaining compliance with, the Order. For these reasons, the Department declines to provide the grace period requested by HR Policy Association and the ERISA Industry Committee and adopts § 13.25(b) in the Final Rule as proposed. However, the Department has re-designated proposed § 13.25(b) as subparagraph (1) in the Final Rule because of the insertion of subparagraph (2), described below.

As explained above in the discussion of § 13.5(a)(i) and (iii), the Department has amended those provisions in response to comments to allow contractors to estimate an employee's covered hours worked in connection with covered contracts provided that the estimate is reasonable and based on verifiable information. New § 13.25(b)(2) reflects this change by providing that if a contractor estimates covered hours worked by an employee who performs work in connection with covered contracts pursuant to § 13.5(a)(i) or (iii), the contractor must keep records or other proof of the verifiable information on which such estimates are reasonably based. It further provides that only if the contractor relies on an estimate that is reasonable and based on verifiable information will an employee's time spent in connection with non-covered contracts be excluded from hours worked counted toward the accrual of paid sick leave. Finally, the new regulatory text notes, as explained in the discussion of § 13.5(c)(1) above, that if a contractor estimates the amount of time an employee spends performing work in connection with covered contracts, the contractor must permit the employee to use her paid sick leave during any work time for the contractor.

Proposed § 13.25(c) excused a contractor from maintaining records of the employee's number of daily and weekly hours worked as otherwise required under § 13.25(a)(4) if the SCA, DBA, or FLSA do not require the contractor to keep records of the employee's hours worked, such as because the employee is employed in a bona fide executive, administrative, or professional capacity as those terms are defined in 29 CFR part 541, and the contractor elected to use the assumption permitted by § 13.5(a)(1)(iii). The Department received no specific comments on proposed § 13.25(c) and implements the provision without modification.

Proposed § 13.25(d) addressed requirements related to the confidentiality of records. Proposed § 13.25(d)(1) required a contractor to maintain as confidential in separate files/records from the usual personnel files any records relating to medical histories or domestic violence, sexual assault, or stalking created by or provided to a contractor for purposes of Executive Order 13706, whether of an employee or an employee's child, parent, spouse, domestic partner, or other individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship. Proposed § 13.25(d)(2) required records or documents created to comply with the recordkeeping requirements in proposed part 13 that are subject to the confidentiality requirements of the Genetic Information Nondiscrimination Act of 2008 (GINA), Pub. L. 110–233, 122 Stat. 881 (2008), and/or the Americans with Disabilities Act (ADA), 42 U.S.C. 12101 et seq., to be maintained in compliance with the confidentiality requirements of those statutes as described in 29 CFR 1635.9 and 1630.14(c)(1), respectively. Proposed § 13.25(d)(3) prohibited the disclosure of any documentation used to verify the need to use 3 or more consecutive days of paid sick leave for the purposes listed in § 13.5(c)(1)(iv), and required the contractor to maintain confidentiality about any domestic violence, sexual assault, or stalking, unless the employee consents or the disclosure is required by law.

The Department has modified proposed § 13.25(d)(2) to clarify that the confidentiality requirements of the GINA and the ADA apply to medical information contained in records or documents that a contractor creates or receives in connection with compliance with part 13. This modification aims to more clearly fulfill the intent of proposed § 13.25(d)(2), which was to ensure that to the extent compliance with the Order and its implementing regulations resulted in a contractor possessing documents to which the GINA and/or the ADA confidentiality requirements apply, the contractor must maintain those documents consistent with the GINA's and/or the ADA's confidentiality requirements. The Department received no specific comments related to proposed § 13.25(d), and with the exception of this modification, the Department adopts § 13.25(d) as proposed.

Proposed § 13.25(e) required contractors to permit authorized representatives of the WHD to conduct interviews with employees at the worksite during normal working hours. This provision was derived from similar provisions under the SCA and DBA, 29 CFR 4.6(g)(4) (SCA); 29 CFR 5.5(a)(3)(iii) (DBA), and would facilitate the WHD's ability to enforce the Order and part 13. The Department received no comments related to proposed § 13.25(e) and retains the provision as proposed.

Proposed § 13.25(f) stated that nothing in part 13 limits or otherwise modifies the contractor's recordkeeping obligations, if any, under the DBA, SCA, FLSA, FMLA, Executive Order 13658, their implementing regulations, or other applicable law. The Department received no comments regarding this provision and adopts it without change.

Certified List of Employees' Accrued Paid Sick Leave

Proposed § 13.26 required a predecessor prime contractor to provide to the contracting officer, upon completion of a covered contract, a certified list of the names of all employees

entitled to paid sick leave under Executive Order 13706 and part 13 who worked on or in connection with the covered contract or any covered subcontract(s) at any point during the 12 months preceding the date of completion of the contract; the date each such employee separated from the contract or any covered subcontract(s) if prior to the date of the completion of the contract; and the amount of paid sick leave each such employee had available for use as of the date of completion of the contract or the date each such employee separated from the contract or subcontract. This requirement was intended to facilitate compliance by successor contractors with the requirement set forth in § 13.5(b)(4) that paid sick leave be reinstated for employees rehired by a successor contractor within 12 months of the job separation from the predecessor contractor. Because (for reasons explained above) that provision does not appear in the Final Rule, proposed § 13.26 is no longer necessary and also does not appear in the Final Rule.

Section 13.26 Notice

Proposed § 13.27 addressed the obligations of contractors with respect to notice to employees of their rights under Executive Order 13706 and part 13. Proposed § 13.27(a) required that contractors notify all employees performing work on or in connection with a covered contract of the paid sick leave requirements of Executive Order 13706 and part 13 by posting a notice provided by the Department of Labor in a prominent and accessible place at the worksite so it would be readily seen by employees. The Department derived this proposal from the Executive Order 13658 Final Rule at 29 CFR 10.29(b). 79 FR 60670. This proposal differed from the Minimum Wage Executive Order regulations, however, in that it required all covered contractors, including those whose contracts are DBA- or SCA-covered, to display the poster rather than allowing DBA and SCA contractors to provide notice solely on wage determinations. This difference was based on the Department's belief that, because the Order's paid sick leave

requirements require lengthier explanation than the minimum wage requirements of Executive Order 13658, and because those requirements are sufficiently detailed such that the Department did not propose to describe them in full on wage determinations, employees working on or in connection with DBA- and SCA-covered contracts would be more adequately informed about the paid sick leave requirements by a poster. The Department stated in the NPRM that it would make a poster, modeled on the Minimum Wage Executive Order poster, available on the WHD Web site.

Numerous commenters, including Voices for Vermont's Children, USAction, the NYC Department of Consumer Affairs, and NETWORK, supported the requirement that contractors prominently post notices regarding paid sick leave for employees to see. The National Partnership suggested that the Department additionally require contractors to provide employees with individual written notice of the paid sick leave requirements, either when they begin employment with the contractor or as soon as practicable if they are already employed. The Department declines to adopt this suggestion because it believes the notice poster and notification of paid sick leave accrual requirements in § 13.5(a)(2) will suffice to inform employees that they are entitled to paid sick leave. The Department therefore adopts § 13.27(a) as proposed, except that it appears in the Final Rule as § 13.26(a) because of the removal of proposed § 13.26 as explained above.

Proposed § 13.27(b), derived from the Executive Order 13658 Final Rule at 29 CFR 10.29(c), permitted contractors that customarily post notices to employees electronically to post the notice electronically, provided such electronic posting is displayed prominently on any Web site maintained by the contractor, whether external or internal, and is customarily used for notices to employees about terms and conditions of employment. The Department received no

specific comments on proposed § 13.27(b) and retains the section in its proposed form, except that it appears in the Final Rule as § 13.26(b).

Section 13.27 Timing of Pay

Proposed § 13.28 described the time by which a contractor must compensate employees for hours during which they used paid sick leave. Under the proposed provision, a contractor was required to provide such compensation no later than one pay period following the end of the regular pay period in which the paid sick leave was used. The proposed timing of the payment obligation imposed was consistent with both the SCA's and Executive Order 13658's implementing regulations. See 29 CFR 4.165(a) (SCA); 29 CFR 10.25 (Executive Order 13658). The Department received no specific comments on proposed § 13.28 and accordingly adopts the provision without change, except that it appears in the Final Rule as § 13.27 because of the removal of proposed § 13.26.

Subpart D – Enforcement

Subpart D implements section 4 of Executive Order 13706, which grants the Secretary "authority for investigating potential violations of and obtaining compliance with the order," 80 FR 54699, by setting forth remedies, procedures, and enforcement processes. Subpart D is largely based on subpart D of the Minimum Wage Executive Order regulations in 29 CFR part 10, which incorporated relevant regulatory provisions under the FLSA, SCA, and DBA, as well as certain enforcement procedures set forth in the Department's regulations implementing the Nondisplacement Executive Order. Subpart D differs in some respects from the analogous provisions in the Minimum Wage Executive Order regulations because of the differences between minimum wage and paid sick leave requirements and because Executive Order 13706

contemplates that the Department would also incorporate FMLA provisions to the extent practicable.

Subpart D establishes a procedure for filing complaints with the WHD, creates an informal complaint resolution process between the WHD and parties alleged to be in violation of the Order, details the WHD's investigation procedures under the Order, and provides remedies and sanctions for violations of the Order, including monetary relief, liquidated damages, and debarment, as well as processes for collection of underpayments. As noted in the NPRM, the Department believes subpart D will facilitate investigations of potential violations of the Order, allow for violations of the Order to be addressed and remedied, and promote compliance with the Order. The Department received numerous comments generally supporting the proposed enforcement provisions as reasonable, strong, and critical to protecting workers' rights and discouraging violation of the law; as explained in more detail below, the Department is adopting subpart D as proposed.

Section 13.41 Complaints

The Department proposed a procedure for filing complaints in § 13.41 identical to that which appears in 29 CFR 10.41, the analogous section of the Minimum Wage Executive Order Final Rule. Proposed § 13.41(a) provided that any employee, contractor, labor organization, trade organization, contracting agency, or other person or entity that believes a violation of the Executive Order or part 13 has occurred could file a complaint with any office of the WHD. It also provided that no particular form of complaint is required; a complaint could be filed orally or in writing, and WHD would accept a complaint in any language if the complainant was unable to file it in English. Proposed § 13.41(b) stated the well-established policy of the Department with respect to confidential sources. See 29 CFR 4.191(a); 29 CFR 5.6(a)(5). Specifically, it

provided that it is the Department's policy to protect the identity of its confidential sources and to prevent an unwarranted invasion of personal privacy. Accordingly, the provision stated that 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, would not be disclosed in any manner to anyone other than Federal officials without the prior consent of the individual. The proposed provision further provided that disclosure of such statements would be governed by the provisions of the Freedom of Information Act, 5 U.S.C. 552, 29 CFR part 70, and the Privacy Act of 1974, 5 U.S.C. 552. Many commenters, including Jobs With Justice, Demos, Women Employed, the National Hispanic Council on Aging, and the National Employment Lawyers Association (NELA), generally supported allowing employees to file complaints with the WHD. No commenter suggested any change to this provision, and the Department adopts it as proposed.

Section 13.42 Wage and Hour Division Conciliation

Proposed § 13.42, which was identical to 29 CFR 10.42, established an informal complaint resolution process for complaints filed with the WHD. The provision allowed the WHD, after obtaining the necessary information from the complainant regarding the alleged violations, to contact the party against whom the complaint was lodged and attempt to reach an acceptable resolution through conciliation. The Department received no comments regarding this provision and adopts § 13.42 without modification.

Section 13.43 Wage and Hour Division Investigation

Proposed § 13.43, which outlined the WHD's investigative authority, was identical to 29 CFR 10.43. That section of the Minimum Wage Executive Order Final Rule was derived primarily from regulations implementing the SCA and DBA. See 79 FR 60679 (citing 29 CFR

4.6(g)(4), 29 CFR 5.6(b)). Proposed § 13.43 permitted the Administrator to initiate an investigation either as the result of a complaint or at any time on his or her own initiative. Under the proposal, as part of the investigation, the Administrator was entitled to conduct interviews with the contractor, as well as the contractor's employees 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. The proposed section also required Federal agencies and contractors to cooperate with authorized representatives of the Department in the inspection of records, in interviews with employees, and in all aspects of investigations. The Department received no comments requesting any change to this provision and therefore implements it as proposed.

Section 13.44 Remedies and Sanctions

In proposed § 13.44, the Department set forth remedies and sanctions for violations of the Order and part 13. Proposed § 13.44(a) provided for remedies for violations of the prohibition on interference with the accrual or use of paid sick leave described in § 13.6(a). Proposed § 13.44(a) provided that when the Administrator determines that a contractor has interfered with an employee's accrual or use of the paid sick leave in violation of § 13.6(a), the Administrator would notify the contractor and the relevant contracting agency of the interference and request the contractor to remedy the violation. It additionally proposed that if the contractor does not remedy the violation, the Administrator would direct the contractor to provide any appropriate relief to the affected employee(s) in the Administrator's investigation findings letter issued pursuant to § 13.51. The Department further proposed that such relief may include any pay

and/or benefits denied or lost by reason of the violation; other actual monetary losses sustained as a direct result of the violation; or appropriate equitable or other relief. Proposed relief also included an amount equaling any monetary relief as liquidated damages unless such amount was reduced by the Administrator because the violation was in good faith and the contractor had reasonable grounds for believing it had not violated the Order or part 13. The types of relief available under proposed § 13.44(a) were derived from the FMLA, 29 U.S.C. 2617(a)(1), 2617(b)(2), and its implementing regulations, 29 CFR 825.400(c). Important aspects of these FMLA remedies, such as the inclusion of liquidated damages, are also part of the FLSA scheme. See 29 U.S.C. 216(b), 260. As noted in the NPRM, under the FLSA and FMLA—and by extension, under Executive Order 13706 and part 13—liquidated damages serve the purpose of compensating employees for the delay in receiving wages owed rather than punishing the employer who violated the statute. See, e.g., Herman v. RSR Sec. Servs. Ltd., 172 F.3d 132, 142 (2d Cir. 1999) (FLSA); Jordan v. U.S. Postal Serv., 379 F.3d 1196, 1202 (10th Cir. 2004) (FMLA).

As the Department explained in the NPRM, under the regulatory text, an example of a possible remedy includes payment for time for which a contractor improperly denied a request to use paid sick leave such that the employee took unpaid leave that should have been treated as paid sick leave. In that case, the damages would be the pay and benefits the employee would have received for that time pursuant to § 13.5(c)(3), and the award would include an equal amount of liquidated damages unless the violation was made in good faith and the contractor had reasonable grounds for believing it had not violated the Order or part 13. As another example, if a contractor improperly denied a request to use paid sick leave such that an employee came to work and hired a babysitter to care for a sick child with whom the employee wished to stay

home, the remedy would be the amount the employee spent on the child care, and the award would include an equal amount of liquidated damages unless the violation was made in good faith and the contractor had reasonable grounds for believing it had not violated the Order or part 13. In this example, relief would not include lost pay or benefits because the employee did not lose pay or benefits due to the violation. The Department stated in the NPRM that equitable relief could include, but was not limited to, requiring the contractor to allow for accrual and use of paid sick leave by an employee it erroneously treated as not covered by the Executive Order or requiring the contractor to restore paid sick leave it improperly deducted from an employee's accrued paid sick leave.

Many commenters, including the NYC Department of Consumer Affairs, the Seattle Office of Labor Standards, NELP, the Coalition on Human Needs, and CLASP, supported including liquidated damages as a remedy for violations of the Order. EEAC, however, opposed the Department's proposal to allow for liquidated damages, noting that the Order directs that its implementing regulations should incorporate remedies from the Minimum Wage Executive Order rulemaking, which does not provide for liquidated damages.

After careful consideration, the Department will not follow EEAC's suggestion to remove liquidated damages as an available remedy for violations of the Order and part 13. The Executive Order requires the Department to incorporate procedures and remedies not solely from the Minimum Wage Executive Order rulemaking, but also the FLSA and, notably, the FMLA, and as explained above, those statutes provide for liquidated damages. Furthermore, monetary relief for violations of the Order and part 13 will often be limited because the monetary value of paid sick leave is limited. Liquidated damages in the amount of any monetary relief is therefore

an important mechanism for ensuring that employees who suffer violations are adequately compensated.

Proposed § 13.44(a) also provided that the Administrator could direct that payments due on the contract or any other contract between the contractor and the Federal Government be withheld as may be necessary to provide any appropriate monetary relief, and that, upon the final order of the Secretary that monetary relief is due, the Administrator could direct the relevant contracting agency to transfer the withheld funds to the Department for disbursement. These portions of the proposed provision were identical to language in the Minimum Wage Executive Order Final Rule. See 29 CFR 10.44(a). The Department received no comments regarding this portion of the proposed provision. For the reasons explained, the Department adopts § 13.44(a) as proposed.

Proposed § 13.44(b) set out remedies for violations of the prohibition on discrimination in § 13.6(b). It provided that when the Administrator determines that a contractor has discriminated against an employee in violation of § 13.6(b), the Administrator would notify the contractor and the relevant contracting agency of the discrimination and request that the contractor remedy the violation. It further provided that if the contractor does not remedy the violation, the Administrator would direct the contractor to provide any appropriate relief, including but not limited to employment, reinstatement, promotion, restoration of leave, or lost pay and/or benefits, in the Administrator's investigation findings letter issued pursuant to § 13.51. As proposed, § 13.44(b) also provided that an amount equaling any monetary relief could be awarded as liquidated damages unless such amount is reduced by the Administrator because the violation was in good faith and the contractor had reasonable grounds for believing the contractor had not violated the Order or part 13. This language was derived from the FMLA

remedies set forth in 29 U.S.C. 2617(a)(1) and 29 CFR 825.400(c); see also 29 U.S.C. 2617(b)(2). It was similar to the analogous provision in the Minimum Wage Executive Order rulemaking, 79 FR 60728 (codified at 29 CFR 10.44(b)), which was derived from the remedies provided for under the FLSA's anti-retaliation provision, see 29 U.S.C. 216(b), except that the proposed provision allowed for liquidated damages, a remedy available under the FMLA, 29 U.S.C. 2617(a)(1), and the FLSA, 29 U.S.C. 216(b), 260. Proposed § 13.44(b) further noted that the Administrator could additionally direct that payments due on the contract or any other contract between the contractor and the Federal Government be withheld as may be necessary to provide any appropriate monetary relief and that upon the final order of the Secretary that monetary relief is due, the Administrator could direct the relevant contracting agency to transfer the withheld funds to the Department of Labor for disbursement. Comments supporting and opposing the inclusion of liquidated damages in § 13.44(a) also apply to § 13.44(b), and for the reasons described above, the Department is continuing to allow for that remedy. Accordingly, this provision is implemented as proposed.

Proposed § 13.44(c) addressed the remedies for violations of the recordkeeping requirements in subpart C. It provided that when a contractor fails to comply with the requirements of § 13.25 in violation of § 13.6(c), the Administrator would request that the contractor remedy the violation. Proposed § 13.44(c) further provided that if a contractor fails to produce required records upon request, the contracting officer, upon direction of an authorized representative of the Department of Labor, or under its own action, would take such action as necessary to cause suspension of any further payment or advance of funds on the contract until such time as the violations are discontinued. PSC asserted that it would be unreasonable to suspend contract payments simply because a contractor failed to produce records upon request.

The Department declines to modify proposed § 13.44(c) because any such suspension would end when the recordkeeping violations are discontinued, and because the section is consistent with and was derived from paragraph (g)(3) of the Minimum Wage Executive Order contract clause, 79 FR 60731, the analogous provision of the SCA regulations, 29 CFR 4.6(g)(3), and the analogous provision of the DBA regulations, 29 CFR 5.5(a)(3)(iii). The Department therefore adopts this provision without change other than the insertion of a reference to a guarantee of funds for the reasons explained in the discussion of § 13.11(c).

Proposed § 13.44(d), which was effectively identical to the corresponding provision in the Minimum Wage Executive Order rulemaking, 29 CFR 10.44(c), allowed for the remedy of debarment. Specifically, it provided that whenever a contractor is found by the Secretary to have disregarded its obligations under Executive Order 13706 or part 13, such contractor and its responsible officers, and any firm, corporation, partnership, or association in which the contractor or responsible officers have an interest, would be ineligible to be awarded any contract or subcontract subject to the Executive Order for a period of up to 3 years from the date of publication of the name of the contractor or responsible officer on the excluded parties list currently maintained on the System for Award Management website, http://www.SAM.gov. The "disregarded its obligations" standard, which is also used in the Minimum Wage Executive Order rulemaking, was derived from the DBA implementing regulations at 29 CFR 5.12(a)(2). See 79 FR 60680. Proposed § 10.44(d) further provided that neither an order of 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 would be carried out without affording the contractor or responsible officers an opportunity for a hearing before an Administrative Law Judge (ALJ).

Debarment is a long-established remedy for a contractor's failure to fulfill its labor standards obligations under the SCA and the DBA, see 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), and one that, as noted, was adopted in the Minimum Wage Executive Order rulemaking, see 79 FR 60728 (codified at 29 CFR 10.44(c)). In the NPRM, the Department explained that 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, DBA, and Minimum Wage Executive Order, and the Department intended inclusion of the remedy in the NPRM to incentivize compliance with Executive Order 13706 as well.

A Better Balance, Innovation Ohio, the National Partnership, Equal Rights Advocates, CPD, and numerous other commenters endorsed the debarment of contractors found to have violated the Order and part 13 as an appropriate remedy. The Department therefore implements § 13.44(d) as proposed.

Proposed § 13.44(e) allowed 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 § 13.11(c) are insufficient to reimburse all monetary relief due. Proposed § 13.44(e) also authorized 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. Such circumstances could arise, for example, if at the time the Administrator discovers a contractor owes monetary relief to employees, no payments remain owing under the contract or another contract between the same contractor and the Federal Government, or if the covered contract is a concessions contract under which the contractor does not receive payments from the Federal Government. Proposed § 13.44(e) additionally provided that any sums the

Department recovers would be paid to affected employees to the extent possible, but that sums not paid to employees because of an inability to do so within 3 years would be transferred into the Treasury of the United States. Proposed § 13.44(e) was derived from the analogous provision of the Minimum Wage Executive Order rulemaking, 29 CFR 10.44(d), which in turn was derived from the SCA, 41 U.S.C. 6705(b)(2). No comments addressed this provision specifically and the Department adopts it as proposed.

In proposed § 13.44(f), the Department addressed what remedy would be available when a contracting agency fails to include the contract clause in a contract subject to the Executive Order. It provided that the contracting agency, on its own initiative or within 15 calendar days of notification by the Department, would incorporate 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 (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). This provision was identical to 29 CFR 10.44(e); in promulgating that provision during the Minimum Wage Executive Order rulemaking, the Department explained that this clause would provide the Administrator authority to collect underpayments on behalf of affected employees on the applicable contract retroactive to commencement of performance under the contract. 79 FR 60681. The Department also noted in that rulemaking that the Administrator possesses comparable authority under the DBA. Id. (citing 29 CFR 1.6(f)). The Department explained in the NPRM that a mechanism for addressing a failure to include the contract clause in a contract subject to Executive Order 13706 would further the interest in both remedying violations and obtaining compliance with the Order, as it did with respect to the Minimum Wage Executive Order. Furthermore, as also noted in the

Minimum Wage Executive Order rulemaking, the proposed provision included language reflecting the Department's belief that 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. Id. (citing 29 CFR 4.5(c), the SCA regulation with which this position is consistent). As noted above, PSC requested that the Department expressly require a price or cost adjustment when a contracting agency fails to include the contract clause in a covered contract. For the reasons explained in the discussion of § 13.11(b), § 13.44(f) is implemented without change.

Subpart E – Administrative Proceedings

Pursuant to section 4 of Executive Order 13706, subpart E establishes and describes the administrative proceedings to be conducted under the Order. In compliance with section 3(c) of the Order, proposed subpart E incorporates, to the extent practicable, the DBA, SCA, and Executive Order 13658 administrative procedures the Department believes are necessary to remedy potential violations and ensure compliance with the Executive Order. Indeed, the Department substantially modeled subpart E on subpart E of the Minimum Wage Executive Order Final Rule, which was primarily derived from the rules governing administrative proceedings conducted under the DBA and SCA. 79 FR 60682. The administrative procedures included in subpart E also closely adhere to existing procedures of the Department's Office of Administrative Law Judges and Administrative Review Board (ARB).

Section 13.51 Disputes Concerning Contractor Compliance

Proposed § 13.51, which the Department derived primarily from the DBA's implementing regulations at 29 CFR 5.11, addressed how the Administrator would process disputes regarding a contractor's compliance with part 13. Specifically, proposed § 13.51(a)

provided that the Administrator or a contractor could initiate a proceeding. The Department received no comments regarding this provision, and it is adopted as proposed.

Proposed § 13.51(b)(1) provided that when it appears that relevant facts are at issue in a dispute covered by § 13.51(a), the Administrator would notify the affected contractor(s) and the prime contractor, if different, of the investigative findings by certified mail to the last known address. The preamble to the proposal further stated that if the Administrator determines that there are reasonable grounds to believe the contractor(s) should be subject to debarment, the investigative findings letter would so indicate. Proposed § 13.51(b)(2) required a contractor desiring a hearing concerning the investigative findings letter to request a hearing by letter postmarked within 30 calendar days of the date of the Administrator's letter. It further required the request to set forth those findings 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 § 13.51(b)(3) required the Administrator, upon receipt of a timely request for hearing, to refer the matter to the Chief Administrative Law Judge 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 required the Administrator to attach a copy of the Administrator's letter, and the response thereto, to the Order of Reference that the Administrator sent to the Chief Administrative Law Judge.

The Department did not receive any requests to alter § 13.51(b) and implements it as proposed.

Proposed § 13.51(c)(1) applied in circumstances when it appears there are no relevant facts at issue and there is not at that time reasonable cause to institute debarment proceedings. It

required the Administrator to notify the contractor, by certified mail to the contractor's last known address, of the investigative findings and to issue a ruling on any issues of law known to be in dispute.

Proposed § 13.51(c)(2)(i) applied when a contractor disagrees with the Administrator's factual findings or believes there are relevant facts in dispute. It required the contractor to advise the Administrator of such disagreement by letter postmarked within 30 calendar days of the date of the Administrator's letter. Under the NPRM, the contractor was also required to explain in detail the facts alleged to be in dispute and attach any supporting documentation with its response.

Proposed § 13.51(c)(2)(ii) required that the information submitted in the response alleging the existence of a factual dispute must be timely in order for the Administrator to examine such information. Under the NPRM, where the Administrator determined there was a relevant issue of fact, the Administrator would refer the case to the Chief Administrative Law Judge. If the Administrator determined there was no relevant issue of fact, the Administrator would so rule and advise the contractor accordingly.

Proposed § 13.51(c)(3) applied where a contractor desires review of a ruling issued by the Administrator under proposed § 13.51(c)(1) or the final sentence of proposed § 13.51(c)(2)(ii). It required a contractor to file any petition for review with the ARB postmarked within 30 calendar days of the Administrator's ruling, with a copy thereof to the Administrator. It further required the petitioner to file its petition in accordance with the procedures set forth in 29 CFR part 7.

The Department received no comments addressing § 13.51(c) and adopts it without modification.

Proposed § 13.51(d) provided that the Administrator's investigative findings letter would become the final order of the Secretary if a timely response to the letter is not made or a timely petition for review is not filed. It additionally provided that if a timely response or a timely petition for review is filed, the investigative findings letter would be inoperative unless and until the decision is upheld by an ALJ or the ARB, or the letter otherwise becomes a final order of the Secretary. No comments addressed § 13.51(d), and the Department implements it as proposed.

Section 13.52 Debarment Proceedings

Proposed § 13.52 addressed debarment proceedings and was identical to the analogous provision in the Minimum Wage Executive Order regulations, 29 CFR 10.52, which the Department primarily derived from the DBA implementing regulations at 29 CFR 5.12. 79 FR 60683. Proposed § 13.52(a) provided that whenever any contractor is found by the Secretary of Labor to have disregarded its obligations to employees or subcontractors under Executive Order or part 13, such contractor and its responsible officers, and any firm, corporation, partnership, or association in which such contractor or responsible officers have an interest, would be ineligible for a period of up to 3 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 excluded parties list currently maintained on the System for Award Management website, http://www.SAM.gov. The Department received no comments addressing this provision and adopts it as proposed.

Proposed § 13.52(b)(1) provided that where the Administrator finds reasonable cause to believe a contractor has committed a violation of the Executive Order or part 13 that constitutes a disregard of its obligations to its employees or subcontractors, the Administrator would 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. Under proposed § 13.52(b)(1), the Administrator would additionally furnish those notified a summary of the investigative findings and afford them an opportunity for a hearing regarding the debarment issue. Those notified would have to 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 would need to set forth any findings that were in dispute and the reasons therefore, including any affirmative defenses to be raised.

Proposed § 13.52(b)(1) also required the Administrator, upon receipt of a timely request for hearing, to refer the matter to the Chief Administrative Law Judge by Order of Reference, to which would be attached a copy of the Administrator's investigative findings letter and the response thereto, for designation to an ALJ to conduct such hearings as may be necessary to determine the matters in dispute. Proposed § 13.52(b)(2) provided that hearings under § 13.52 would be conducted in accordance with 29 CFR part 6. Under the proposal, if no timely request for hearing was received, the Administrator's findings would become the final order of the Secretary.

The Department did not receive any comments regarding § 13.52(b) and implements the provision as proposed.

Section 13.53 Referral to Chief Administrative Law Judge; Amendment of Pleadings

Proposed § 13.53, as well as proposed §§ 13.54-13.57, were largely identical to the corresponding provisions in the Minimum Wage Executive Order rulemaking, 29 CFR 10.53-10.57, and were derived from the SCA and DBA rules of practice for administrative proceedings contained in 29 CFR part 6. Proposed § 13.53(a) provided that upon receipt of a timely request

for a hearing under proposed § 13.51 (where the Administrator has determined that relevant facts are in dispute) or proposed § 13.52 (debarment), the Administrator would refer the case to the Chief Administrative Law Judge by Order of Reference, to which would 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 provided that a copy of the Order of Reference and attachments thereto would be served upon the respondent and that the investigative findings letter and the response thereto would be given the effect of a complaint and answer, respectively, for purposes of the administrative proceeding.

Proposed § 13.53(b) stated that at any time prior to the closing of the hearing record, the complaint or answer could be amended with permission of the ALJ upon such terms as the ALJ approves, and that for proceedings initiated pursuant to proposed § 13.51, such an amendment could include a statement that debarment action is warranted under proposed § 13.52. It further provided that such amendments would be allowed when justice and the presentation of the merits are served thereby, provided no prejudice to the objecting party's presentation on the merits would result. It additionally stated that when issues not raised by the pleadings were reasonably within the scope of the original complaint and were tried by express or implied consent of the parties, they would be treated as if they had been raised in the pleadings, and such amendments could be made as necessary to make them conform to the evidence. Proposed § 13.53(b) further provided that the presiding ALJ could, upon reasonable notice and upon such terms as are just, permit supplemental pleadings setting forth transactions, occurrences, or events that have happened since the date of the pleadings and that are relevant to any of the issues involved. It also authorized the ALJ to grant a continuance in the hearing, or leave the record open, to enable

the new allegations to be addressed. The Department received no comments addressing this provision and implements it as proposed.

Section 13.54 Consent Findings and Order

Proposed § 13.54(a) provided that parties could 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 disposing of the proceeding. Proposed § 13.54(b) provided that any agreement containing consent findings and an order disposing of a proceeding in whole or in part would also provide: (1) that the order would 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 must consist solely of the Administrator's findings letter and the agreement; (3) a waiver of any further procedural steps before the ALJ and the ARB 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. Proposed § 13.54(c) provided that within 30 calendar days of receipt of any proposed consent findings and order, the ALJ would 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. It further provided that if the agreement disposes of only a part of the disputed matter, a hearing would be conducted on the matters remaining in dispute. The Department received no comments addressing this provision, and it adopts § 13.54 as proposed.

Section 13.55 Proceedings of the Administrative Law Judge

Proposed § 13.55 addressed the ALJ's proceedings and decision. Proposed § 13.55(a) provided that 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 § 13.51 and/or § 13.52. The Department received no comments related to proposed § 13.55(a) and accordingly adopts the section in its proposed form.

Proposed § 13.55(b) provided that each party could file with the ALJ proposed findings of fact, conclusions of law, and a proposed order, together with a supporting brief expressing the reasons for such proposals, within 20 calendar days of filing of the transcript (or a longer period if the ALJ permits). It also provided that each party would serve such documents on all other parties. No comments addressed § 13.55(b), and the Department adopts it as proposed.

Proposed § 13.55(c)(1) required 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 provided that the decision would contain appropriate findings, conclusions of law, and an order and be served upon all parties to the proceeding. Proposed § 13.55(c)(2) provided that if the Administrator requests debarment, and the ALJ concludes the contractor has violated the Executive Order or part 13, the ALJ would issue an order regarding whether the contractor is subject to the excluded parties list that would include any findings related to the contractor's disregard of its obligations to employees or subcontractors under the Executive Order or part 13. The Department received no comments related to proposed § 13.55(c) and adopts it without modification.

Proposed § 13.55(d) provided that the Equal Access to Justice Act (EAJA), as amended, 5 U.S.C. 504, does not apply to proceedings under part 13 because such proceedings were not required by an underlying statute to be determined on the record after an opportunity for an agency hearing. Therefore, the Department reasoned that an ALJ had no authority to award

attorney's fees and/or other litigation expenses pursuant to the provisions of the EAJA for any proceeding under part 13.

NELA commented that the rule would be strengthened by adding language to allow prevailing employees represented by private counsel to recover attorney's fees and costs in administrative proceedings brought to enforce and remedy violations of the Order. NELA expressed the view that the financial loss to a full-time employee who has not been permitted to accrue or use up to 56 hours per year of paid sick leave as required under the Order is likely to be minimal, and that without the ability to recover attorney's fees and costs, it would not be financially feasible for an employee to retain private counsel, or economically viable for a private attorney to represent an employee in this type of complaint.

After careful consideration of this comment, the Department has decided to retain § 13.55(d) as proposed. Although the Department agrees that promoting legal representation for employees is a worthy objective, the Department declines to adopt the recommendation to add language to permit the recovery of attorney's fees and costs by prevailing employees in administrative proceedings brought pursuant to these regulations. The American Rule governing the recovery of attorney's fees ordinarily requires litigants in court to bear their own fees and costs, regardless whether they win or lose. See Buckhannon Bd. & Care Home, Inc. v. West Va. Dep't of Health & Human Res., 532 U.S. 598, 602 (2001). A prevailing party may be entitled to collect fees from the losing party only pursuant to explicit statutory authority. See Key Tronic Corp. v. United States, 511 U.S. 809, 819 (1994); In the Matter of Ann P. Harris v. Tennessee Valley Authority, ARB Case No. 99-004, 2000 WL 2804643, at *3-7 (DOL Adm. Rev. Bd. Nov. 29, 2000) (same, in administrative proceedings before Department of Labor ALJs or the ARB). Not only does the Order not contain any such explicit authority, it also specifies that it does not

create, and is not intended to create, any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the government or any other person. 80 FR 54699. Rather, pursuant to subpart E, where the Administrator finds that a violation of the Order or part 13 has occurred, the WHD shall initiate an enforcement proceeding, and an employee may participate in, but cannot be a party to, such a proceeding under the Order, and therefore would not be a "prevailing party" for purposes of fee-shifting even if monetary or other relief were awarded.

Lastly, § 13.44 sets forth remedies and sanctions for violations of the Order. Relief may include any pay and/or benefits denied or lost by reason of the violation, other monetary losses sustained as a direct result of the violation, or appropriate equitable or other relief, as well as, in certain circumstances, payment of liquidated damages in an amount equaling any monetary relief. The Department believes these remedies provide adequate restitution to employees for violations of the Order, and that the inability of affected employees to recover attorney's fees and costs does not represent an impediment to enforcement of Executive Order 13706.

Proposed § 13.55(e) provided that if an ALJ concludes that a violation of the Executive Order or part 13 occurred, the final order would mandate action to remedy the violation, including any monetary or equitable relief described in § 13.44. It also required an ALJ to determine whether an order imposing debarment is appropriate, if the Administrator has sought debarment. The Department received no comments related to proposed § 13.55(e) and accordingly retains the section as proposed.

Proposed § 13.55(f) provided that the ALJ's decision would become the final order of the Secretary, provided a party does not timely appeal the matter to the ARB. The Department received no comments regarding this provision and adopts it as proposed.

Section 13.56 Petition for Review

The Department proposed § 13.56 as the process to apply to petitions for review to the ARB from ALJ decisions. Proposed § 13.56(a) provided that within 30 calendar days after the date of the decision of the ALJ, or such additional time as the ARB grants, 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 Administrative Law Judge. It further required the petition to 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 employees and subcontractors, or lack thereof, as appropriate. It additionally required a party to serve the petition for review, and all supporting briefs, on all parties and on the Chief Administrative Law Judge. It also stated that a party must timely serve copies of the petition and all supporting briefs on the Administrator and the Associate Solicitor, Division of Fair Labor Standards, Office of the Solicitor, U.S. Department of Labor. The Department received no comments related to proposed § 13.56(a) and accordingly retains the section in its proposed form.

Proposed § 13.56(b) provided that if a party files a timely petition for review, the ALJ's decision would be inoperative unless and until the ARB issues an order affirming the decision, or the decision otherwise becomes a final order of the Secretary. It further provided that if a petition for review concerns only the imposition of debarment, the remainder of the ALJ's decision would be effective immediately. It additionally stated that judicial review would 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 would render the decision final, without further opportunity for appeal. No commenter addressed proposed § 13.56(b), and the Department implements it without change.

Section 13.57 Administrative Review Board Proceedings

Proposed § 13.57 outlined the ARB proceedings under the Executive Order. Proposed § 13.57(a)(1) stated the ARB has jurisdiction to hear and decide in its discretion appeals from the Administrator's investigative findings letters issued under § 13.51(c)(1) or the final sentence of § 13.51(c)(2)(ii), Administrator's rulings issued under § 13.58, and from ALJ decisions issued under § 13.55. It further provided that in considering the matters within its jurisdiction, the ARB would be the Secretary's authorized representative and would act fully and finally on behalf of the Secretary. Proposed § 13.57(a)(2)(i) identified the limitations on the ARB's scope of review, including a restriction on passing on the validity of any provision of part 13 and 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. Proposed § 13.57(a)(2)(ii) prohibited the ARB from granting attorney's fees or other litigation expenses under the EAJA.

With respect to attorney's fees and costs under the EAJA, the Department explained in the discussion of § 13.55(d) above why it is declining to adopt NELA's recommendation to add language to permit the recovery of attorney's fees and costs by prevailing employees in administrative proceedings brought pursuant to these regulations. The Department received no other comments related to proposed § 13.57(a) and is adopting it as proposed.

Proposed § 13.57(b) required 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 involved an appeal from an ALJ's decision. Proposed § 13.57(c) directed the ARB's order to mandate action to remedy a violation, including any monetary or equitable relief described in § 13.44, if the ARB concludes

a violation occurred. Under the proposed rule, if the Administrator sought debarment, the ARB would determine whether a debarment remedy is appropriate.

Finally, proposed § 13.57(d) provided that the ARB's decision would become the Secretary's final order in the matter. The Department received no comments related to proposed § 13.57 (b), (c), and (d) and accordingly adopts them as proposed.

Section 13.58 Administrator Ruling

Proposed § 13.58 set forth a procedure for addressing questions regarding the application and interpretation of the rules contained in part 13. Proposed § 13.58(a), which the Department derived primarily from the DBA's implementing regulations at 29 CFR 5.13, provided that such questions could be referred to the Administrator. It further provided that the Administrator would issue an appropriate ruling or interpretation related to the question. Additionally, under proposed § 13.58(a), requests for rulings under this section must be addressed to the Administrator, Wage and Hour Division, U.S. Department of Labor, Washington, D.C. 20210.

Any interested party could, pursuant to proposed § 13.58(b), appeal a final ruling of the Administrator issued pursuant to proposed § 13.58(a) to the ARB within 30 calendar days of the date of the ruling.

The Department received no comments related to proposed § 13.58 and accordingly retains the section as proposed.

Appendix A (Contract Clause)

Because Executive Order 13706 requires inclusion of a contract clause in covered contracts, the Department proposed the text of a contract clause in appendix A to part 13. The Department is finalizing the contract clause as appendix A to part 13 essentially as proposed. Certain provisions of the proposed contract clause have been modified, however, to reflect

changes to relevant portions of part 13 as promulgated by the Final Rule; these modifications are explained below. As required by the Order, the contract clause specifies employees must earn not less than 1 hour of paid sick leave for every 30 hours worked. Consistent with the Secretary's authority to obtain compliance with the Order, as well as the Secretary's responsibility to issue regulations implementing the requirements of the Order that incorporate, to the extent practicable, existing procedures, remedies, and enforcement processes under the FLSA, SCA, DBA, FMLA, VAWA and Executive Order 13658, the additional provisions of the contract clause are based on the statutory text or implementing regulations of these five statutes and Executive Order 13658 and are intended to obtain compliance with the Order.

The introduction to the contract clause provides that the clause must be included by the contracting agency in all contracts, contract-like instruments, and solicitations to which Executive Order 13706 applies, except for procurement contracts subject to the Federal Acquisition Regulation (FAR). For procurement contracts subject to the FAR, contracting agencies shall use the clause set forth in the FAR developed to implement part 13. Such clause shall accomplish the same purposes as the clause set forth in appendix A and shall be consistent with the requirements set forth in the Secretary's regulations.

Paragraph (a) of the contract clause set forth in appendix A provides that the contract in which the clause is included is subject to Executive Order 13706, the regulations issued in part 13 to implement the Order's requirements, and all the provisions of the contract clause.

Paragraph (b) identifies the contractor's general paid sick leave obligations. Paragraph (b)(1) stipulates that contractors must permit each employee engaged 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 employee, to earn not less than 1 hour

of paid sick leave for every 30 hours worked. It further provides that the contractor must allow accrual and use of paid sick leave as required by the Executive Order and part 13, particularly the accrual, use, and other requirements set forth in §§ 13.5 and 13.6, which are incorporated by reference in the contract.

The first sentence of paragraph (b)(2), which reflects requirements in proposed §§ 13.23 and 13.24 and was derived from the contract clauses applicable to contracts subject to the SCA, DBA and Executive Order 13658, see 29 CFR 4.6(h) (SCA); 29 CFR 5.5(a)(1) (DBA); 79 CFR 60731 (Executive Order 13658), aims to ensure that employees actually receive the full pay and benefits to which they are entitled under the Executive Order and part 13 when they use paid sick leave. It requires a contractor to provide paid sick leave to all employees when due free and clear and without subsequent deduction (except as otherwise provided by § 13.24), rebate, or kickback on any account. Paragraph (b)(2)'s second sentence clarifies that employees who have used paid sick leave must receive the full pay and benefits to which they are entitled for the period of leave used no later than one pay period following the end of the regular pay period in which the employee used the sick leave. This requirement appears in § 13.27.

Paragraph (b)(3) provides that the prime contractor and any upper-tier subcontractor shall be responsible for the compliance by any subcontractor or lower-tier subcontractor with the requirements of Executive Order 13706, part 13, and the 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(b) (Executive Order 13658). It also appears in § 13.21(b).

Paragraphs (c) and (d) of the contract clause are derived primarily from the contract clauses applicable to contracts subject to the SCA, DBA, and Executive Order 13658. See 29

CFR 4.6(i) (SCA); 29 CFR 5.5(a)(2), (7) (DBA); 79 FR 60731 (Executive Order 13658). Paragraph (c) provides that the contracting officer 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 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 employees the full amount owed to compensate for any violation of the requirements of Executive Order 13706, part 13, or the contract clause, including any pay and/or benefits denied or lost by reason of its violation; other actual monetary losses sustained as a direct result of the violation; and liquidated damages. Consistent with withholding procedures under the SCA, DBA, and Executive Order 13658, paragraph (c) allows 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.

Paragraph (d) states the circumstances under which the contracting agency and/or the Department may suspend or terminate a contract, 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, part 13, or the contract clause in appendix A, the contracting agency may 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; this requirement operates as provided in § 13.11(c). Paragraph (d) also provides that a breach of the contract clauses may be grounds to debar the contractor as provided in § 13.52.

Paragraph (e), which implements section 2(f) of the Executive Order, provides that the paid sick leave required by the Executive Order, part 13, and the contract clause is in addition to a contractor's obligations under the SCA and DBA, and that a contractor may not receive credit toward its prevailing wage or fringe benefit obligations under those Acts for any paid sick leave provided in satisfaction of the requirements of the Executive Order and part 13.

Paragraph (f), which implements section 2(l) of the Executive Order, provides that nothing in Executive Order 13706 or part 13 shall excuse noncompliance with or supersede any applicable Federal or State law, any applicable law or municipal ordinance, or a CBA requiring greater paid sick leave or leave rights than those established under Executive Order 13706 and part 13. Sections 13.5(f)(2)(i) and § 13.5(f)(1) also implement sections 2(f) and 2(l) of the Executive Order, respectively, and the preamble discussions related to §§ 13.5(f)(2)(i) and 13.5(f)(1) accordingly describe the operation of paragraphs (e) and (f) in greater detail.

Paragraph (g) sets forth recordkeeping and related obligations that are consistent with the Secretary's authority under section 4 of the Order to obtain compliance with the Order, and that the Department views as essential to determining whether the contractor has satisfied its obligations under the Executive Order. The Department derived the obligations set forth in paragraph (g) from the FLSA, SCA, DBA, FMLA and Executive Order 13658. The recordkeeping obligations in paragraph (g) duplicate those in § 13.25, and paragraph (g) has accordingly been modified to reflect any changes to § 13.25. Specifically, paragraphs (xvi) and (xvii) have been added to section (1) to reflect the addition of § 13.25(16) and (17); paragraph

(ii) has been added to section (2) to reflect the addition of § 13.25(b)(2); and paragraphs (iii), (vi), (vii), and (x) have been edited to reflect minor revisions made to the corresponding paragraphs of § 13.25. A full description of those obligations and changes appears in the preamble related to § 13.25.

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 covered lower–tier subcontracts.

Paragraph (i), which is derived from the SCA contract clause, 29 CFR 4.6(n), and the Executive Order 13658 contract clause, 79 FR 60731, 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 certify that neither the contractor nor any person or firm with 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 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 shall be subcontracted to any person or firm on the list of persons or firms ineligible to receive Federal contracts currently maintained on the System for Award Management website, http://www.SAM.gov. 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.

Paragraph (j) implements section 2(k) of the Executive Order. The text of paragraph (j) mirrors the regulatory text at §§ 13.6(a) and 13.6(b); accordingly, paragraph (j) has been modified to reflect an additional example of interference included in the regulatory text. A full description of the operation of the proposed contractor obligations not to interfere with or

discriminate against employees with respect to the accrual or use of paid sick leave accordingly appears in the preamble related to §§ 13.6(a) and 13.6(b).

Paragraph (k) provides that employees cannot waive, nor may contractors induce employees to waive, their rights under Executive Order 13706, part 13, or the contract clause. As discussed in greater detail in the preamble related to § 13.7, the Department included a provision prohibiting the waiver of rights in the regulations implementing the Minimum Wage Executive Order and believes it is appropriate to adopt the same policy here.

Paragraph (l) requires that contractors notify all employees performing work on or in connection with a covered contract of the paid sick leave requirements of Executive Order 13706, part 13, and the contract clause by posting a notice provided by the Department of Labor in a prominent and accessible place at the worksite so it may be readily seen by employees. It additionally permits contractors that customarily post notices to employees electronically to post the notice electronically, provided such electronic posting is displayed prominently on any Web site that is maintained by the contractor, whether external or internal, and is customarily used for notices to employees about terms and conditions of employment. The notice obligations contained in paragraph (l) mirror those contained in § 13.26(a)-(b), which the Department derived from the Minimum Wage Executive Order Final Rule at 29 CFR 10.29(b)-(c). The preamble related to those sections contains a discussion of the Department's rationale for including the particular notice obligation it has adopted.

Paragraph (m) is based on section 5(b) of the Executive Order and provides that disputes related to the application of the Executive Order to the contract shall not be subject to the contract's general disputes clause. Instead, such disputes shall be resolved in accordance with the dispute resolution process set forth in part 13. Paragraph (m) also provides that disputes

within the meaning of the contract clause include disputes between the contractor (or any of its subcontractors) and the contracting agency, the U.S. Department of Labor, or the employees or their representatives.

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, requires that the Department consider the impact of paperwork and other information collections burdens imposed on the public. Under the PRA, an agency may not collect or sponsor the collection of information, nor may it impose an information collection requirement unless it displays a currently valid Office of Management and Budget (OMB) control number. See 5 CFR 1320.8(b)(3)(vi). The OMB has assigned control number 1235-0018 to the general recordkeeping provisions of various labor standards that the WHD administers and enforces and control number 1235-0021 to the information collection which gathers information from complainants alleging violations of such labor standards. The OMB has assigned control number 1235-0029 to the new information collection request (ICR) that the Department has created to address any recordkeeping requirements related to paid sick leave that may be new.

In accordance with the PRA, the Department solicited public comments on the proposed changes to the existing information collections and the new information collection in the NPRM, as discussed below. See 81 FR 9592. The Department also submitted a contemporaneous request for OMB review of the proposed revisions to the information collections in accordance with 44 U.S.C. 3507(d). The Department extended the period for filing comments on the PRA and information collections only, to provide interested parties additional time to submit comments. See 81 FR 19997. On April 28, 2016, the OMB issued a notice that continued the

previous approval of the information collections under the existing terms of clearance and asked the Department to resubmit the information collection requests upon promulgation of the Final Rule and after consideration of public comments received.

Circumstances Necessitating Collection: The Final Rule contains provisions that are considered collections of information under the PRA. Pursuant to § 13.21, the contractor and any subcontractors shall include in any covered subcontracts the applicable Executive Order paid sick leave contract clause referred to in § 13.11(a) and shall require, as a condition of payment, that the subcontractor include the contract clause in any lower-tier subcontracts. Pursuant to § 13.25, contractors and each subcontractor performing work subject to Executive Order 13706 and these regulations shall make and maintain during the course of the covered contract, and preserve for no less than three years thereafter, records containing the information specified in paragraphs (a)(1) through (17) of § 13.25 for each employee and shall make them available for inspection, copying, and transcription by authorized representatives of the Wage and Hour Division. These include: (1) Name, address, and Social Security number of each employee; (2) The employee's occupation(s) or classification(s); (3) The rate or rates of wages paid (including all pay and benefits provided); (4) The number of daily and weekly hours worked; (5) Any deductions made; (6) The total wages paid (including all pay and benefits provided) each pay period; (7) A copy of notifications to employees of the amount of paid sick leave the employees have accrued as required under § 13.5(a)(2); (8) A copy of employees' requests to use paid sick leave, if in writing, or, if not in writing, any other records reflecting such employee requests; (9) Dates and amounts of paid sick leave used by employees; (10) A copy of any written denials of employees' requests to use paid sick leave, including explanations for such denials, as required under § 13.5(d)(3); (11) Any records reflecting the certification and documentation a contractor

may require an employee to provide under § 13.5(e), including copies of any certification or documentation provided by an employee; (12) Any other records showing any tracking of or calculations related to an employee's accrual and/or use of paid sick leave; (13) The relevant covered contract; (14) The regular pay and benefits provided to an employee for each use of paid sick leave; and (15) Any financial payment made for unused paid sick leave upon a separation from employment intended, pursuant to § 13.5(b)(5), to relieve a contractor from the obligation to reinstate such paid sick leave as otherwise required by § 13.5(b)(4).

Additionally, under § 13.25, if a contractor wishes to distinguish between an employee's covered and non-covered work, the contractor must keep records reflecting such distinctions.

The Department notes that some of the recordkeeping requirements related to paid sick leave may be new requirements for some contractors. As a result, the Department created a new information collection, 1235-0NEW, titled "Government Contractor Paid Sick Leave" and submitted it to OMB for approval. On April 28, 2016, the OMB filed a notice of action, assigning OMB control number 1235-0029 to the new package, and asked that prior to publication of the Final Rule, the Department provide OMB a summary of all comments received and identify any changes made in the Final Rule in response to those comments. A new information collection request (ICR) was submitted to the OMB that would provide PRA authorization for control number 1235-0029 to incorporate the recordkeeping provisions in this Final Rule and to incorporate burdens associated with the new recordkeeping requirements.

Additionally, on, April 28, 2016, the OMB filed a notice of action instructing the Department to continue the information collections under the existing terms of clearance for ICR 1235-0018 and ICR 1235-0021, and asked the Department to resubmit the information collection requests upon promulgation of the Final Rule and after consideration of public comments

received. The Department will submit to OMB for approval a revision to ICR 1235-0018 incorporating certain recordkeeping provisions in this rule even though the Final Rule does not increase a paperwork burden on the regulated community of the information collection provisions contained in ICR 1235-0018. The ICR under OMB control number 1235-0018 contains the general FLSA recordkeeping requirements and burdens. The Final Rule does restate recordkeeping requirements that are already required for other purposes. The restated recordkeeping requirements are located in § 13.25(a)(1) – (6) (including an exemption located in § 13.25(c)). Such burden is already captured in the ICR for all employers; however, the Department believes restating the requirements in one place will help employers, particularly small entities, comply with this Final Rule by removing the need to cross check other regulations.

The 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 provisions in the Final 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 the paid sick leave requirements of Executive Order 13706 and 29 CFR part 13.

Subpart E establishes administrative proceedings to resolve investigation findings and imposes information collection requirements, particularly with respect to hearings. However, the PRA's requirements do not apply to a civil action in which a U.S. agency is a party, or to an administrative action or investigation involving a U.S. agency. See 44 U.S.C. 3518(c)(1)(B); 5 CFR 1320.4(a)(2). Therefore, the Department determined the collections of information required by subpart E of this Final Rule are exempt from the PRA's requirements.

Information and technology: There is no particular order or form of records prescribed by the Final Rule. A contractor may meet the requirements of this Final Rule using paper or electronic means. The WHD, in order to reduce burden caused by the filing of complaints that are not actionable by the agency, uses a complaint filing process that has 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 sought public comments on its analysis that the NPRM created a slight paperwork burden associated with ICR 1235-0021 but did not add to the paperwork burden on the regulated community for the information collection provisions otherwise previously approved in ICR 1235-0018. Additionally, the Department sought comments on its analysis that the proposed rule created a new paperwork burden on the regulated community as described in the new information collection provisions contained in ICR 1235-0029. The Department received some comments with respect to the paperwork. The SEIU submitted a comment, with approximately 4,000 employee signatures, voicing general support for the new reporting requirements established by the NPRM and stating that Section 13.21 (which requires federal contractors to include the Executive Order contract clause in all of their federal contracts) "guarantees that federal contractors and subcontractors are familiar with the paid sick leave requirements and that they will comply with these requirements 'as a condition of payment'," and that Section 13.25's recordkeeping requirements "assist the agency with both preventing and detecting possible instances of contractor fraud and inaccuracies."

The Chamber commented that the Department's Paperwork Reduction Act burden estimates provided in the NPRM were too low. They contended that the Department's assertion

that 322,067 workers will gain paid sick leave rights during the first three years of implementation of the proposed rule was an underestimate for the number of affected employees. They suggested that a more reasonable estimate of the number of affected workers would include the number of workers working for concessionaires and lessees of space on Federal property, independent contractors who are covered under the EO, subcontractor employees, and employees who spend time working on non-Federal projects. As described in more detail in the relevant sections, to address commenters' concerns with respect to the number of affected employees, the Department reviewed its methodology and revised its estimates by adding concessioners and other contractors on Federal lands, lessees of space on Federal property, and firms with operations on Federal bases to the analysis of this Final Rule, which contributed to an increase in the estimated number of affected employees. Also, using more recent data to estimate the number of subcontractors led to the inclusion of 3,763 more subcontractors than in the NPRM. The Department notes that the OES includes incorporated independent contractors, and thus those workers are included in the analysis. Unincorporated independent contractors continue to be excluded in this Final Rule as they are unlikely to be covered by this Rule because, assuming they are bona fide independent contractors, they are not covered by the FLSA and are unlikely to be performing work on or in connection with SCA-covered, or DBA-covered contracts. As further described below, the methodology represents workers who are working exclusively and year-round on covered Federal contracts, thus the number of workers who will gain benefits will likely exceed this number. However, data are not available to estimate the number of workers gaining benefits. Implications of this for costs and transfers are discussed in the relevant sections.

The Chamber also expressed the view that the new recordkeeping burden should be higher because the Department underestimated its estimates of patterns of leave use; time values associated with recordkeeping, creating a certified list, and providing leave balances; and failed to account for the burden created for employers as a part of regulatory familiarization. The Department agrees that the Executive Order and the regulations will usually require employers subject to the Order to track accrued leave and leave usage and to provide notice to employees of the amount of accrued paid leave, and will allow employers subject to the Order to obtain a certification under certain circumstances. The Department has accordingly created a new information collection requirement for employers subject to these new requirements. The Department's estimates of time values related to these requirements are based on its enforcement experience. The Department has added a new section on regulatory familiarization to this ICR to address the Chamber's concern.

An agency may not conduct an information collection unless it has a currently valid OMB approval, and the Department submitted the identified information collections contained in the proposed rule to OMB for review in accordance with the PRA under Control numbers 1235-0018, and 1235-0021. The Department submitted a new information collection request in the proposed rule as 1235-0NEW, to which OMB subsequently assigned control number 1235-0029. See 44 U.S.C. 3507(d); 5 CFR 1320.11. The Department has resubmitted the revised information collections to OMB for approval, and the Department intends to publish a notice announcing OMB's decision regarding this information collection request. A copy of the information collection request can be obtained at http://www.Reginfo.gov or by contacting the Wage and Hour Division as shown in the FOR FURTHER INFORMATION CONTACT section of this preamble.

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

Type of Review: Revision to currently approved information collections.

Agency: Wage and Hour Division, Department of Labor.

Title: Records to be Kept by Employers -- Fair Labor Standards Act.

OMB Control Number: 1235-0018.

Affected Public: Private sector businesses or other for-profits, farms, not-for-profit institutions, state, local and tribal governments, and individuals or households.

Estimated Number of Respondents: 5,511,960 (unaffected by this rulemaking)

Estimated Number of Responses: 46,057,855 (unaffected by this rulemaking)

Estimated Burden Hours: 3,489,585 (unaffected by this rulemaking)

Estimated Time per Response: Various (unaffected by this rulemaking)

Frequency: Various (unaffected by this rulemaking)

Other Burden Cost: 0

Title: Employment Information Form.

OMB Control Number: 1235-0021.

Affected Public: Businesses or other for-profit, not-for-profit institutions, state and local governments, and individuals or households.

Total Respondents: 37,594 (227 from this rulemaking)

Estimated Number of Responses: 37,594 (227 from this rulemaking)

Estimated Burden Hours: 12,532 (76 from this rulemaking)

Estimated Time per Response: 20 minutes (unaffected by this rulemaking)

Frequency: once

Other Burden Cost: 0

Type of Review: Approval of New Information Collection

Agency: Wage and Hour Division, Department of Labor.

Title: Government Contractor Paid Sick Leave.

OMB Control Number: 1235-0029.

Affected Public: Businesses or other for-profit, farms, not-for-profit institutions, state, local and tribal governments, and individuals or households.

Total Respondents: 617,200

Estimated Number of Responses: 13,577,407

Estimated Burden Hours: 590,478

Estimated Time per Response: various

Frequency: on occasion

Other Burden Cost: $347, 784 (maintenance and operations)

IV. Executive Orders 12866 and 13563

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of an intended regulation and to propose or adopt a regulation only upon a reasoned determination that the intended regulation's net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity) justify its costs. Executive Order 13563 emphasizes the importance of quantifying both costs and benefits where possible, reducing costs, harmonizing rules, and promoting flexibility.

Under Executive Order 12866, it must be identified whether a regulatory action is significant and therefore subject to the requirements of the Executive Order and to review by OMB. 58 FR 51735. Section 3(f) of Executive Order 12866 defines a "significant regulatory action" as an action that is likely to result in a rule that: (1) has an annual effect on the economy of $100 million or more, or adversely affects 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) creates serious inconsistency or otherwise interferes with an action taken or planned by another agency; (3) materially alters the budgetary impacts of entitlement grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or (4) raises novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in Executive Order 12866. Id.

The Office of Management and Budget has determined that this Final Rule is a "significant regulatory action" under section 3(f) of Executive Order 12866 because it is economically significant based on the analysis set forth below. As a result, the Department has

prepared a Final Regulatory Impact Analysis (FRIA) as required under section 6(a)(3) of Executive Order 12866, and OMB has reviewed the Final Rule.

A. Introduction

i. Background and Need for Rulemaking

Executive Order 13706 (EO) provides that employees can earn up to seven days of paid sick leave annually on specified categories of contracts with the Federal Government where either the solicitation has been issued, or the contract has been awarded outside the solicitation process, on or after January 1, 2017. 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 allow their employees to earn paid sick leave.[2] This rulemaking implements the Executive Order, consistent with the authorization in section 3 of the Order.

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

The Department estimated the number of employees who would, as a result of the Executive Order and this Final Rule, receive some additional amount of paid sick leave, i.e., "affected employees." There are two categories of affected employees: those covered employees who currently receive no paid sick leave, and those covered employees who currently receive paid sick leave in an amount less than they would be entitled to receive under the Executive Order (up to 7 days annually). As discussed in detail below, because the Final Rule only applies to "new contracts," and the Department has assumed it will take five years for the universe of possibly covered contracts to become "new," the full impact of the rulemaking will not likely occur before Year 5. In Year 5, the Department estimates there will be 1.2 million affected

[2] The phrase "economy and efficiency" is used here only in the sense implied by the Federal Property and Administrative Services Act.

employees (Table 1).[3,4] This includes approximately 593,800 employees who currently receive no paid sick leave and 556,800 employees who receive some paid sick leave but would be entitled to receive additional paid sick leave under the Final Rule (Table 8).

The Department also estimated costs and transfer payments associated with this rulemaking. During the first 10 years the rule is in effect, average annualized direct employer costs are estimated to be $27.3 million (Table 1). (This estimation assumes 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 $10.7 million for regulatory familiarization, $4.9 million for initial implementation costs, $3.7 million for recurring implementation costs, and $8.0 million for administrative costs. For a discussion of how the Department estimated these numbers, please see section V.C.ii.

Transfer payments are transfers of income from employers to employees. Estimated average annualized transfer payments are $349.6 million per year over 10 years. Some of these payments may be in terms of increased time away from work rather than increased income if workers take more days of sick leave after the Rulemaking. We refer to all such gains as transfers.

Lastly, the Department estimated deadweight loss (DWL). DWL occurs when a market operates at less than optimal equilibrium output, which happens anytime the conditions for a perfectly competitive market are not met, including but not limited to a labor market intervention. The Department estimated that average annualized DWL will be $734,000 per year

[3] This includes projected net job growth and so is somewhat larger than five times the number of affected employees in Year 1. Net job growth takes into account both workers entering and leaving Federal government contracting.

[4] The estimates of affected employees represent the number of full-year employees working exclusively on covered contracts.

during the first ten years of the rule. This will be primarily due to a possible small decrease in employment that may be a consequence of the Final Rule. This DWL analysis assumes the market is currently in equilibrium.

There will be many benefits associated with this rule. However, due to data limitations, these benefits are not monetized. The following benefits are a subset of those discussed qualitatively: improved employee health, improved health of dependents, increased productivity, reduced hiring costs, decreased healthcare expenditures, and job growth.

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

	Year 1 (1,000s)	Future Years (1,000s)			Average Annualized Value (1,000s)	
		Year 2	Year 5	Year 10	3% Real Rate	7% Real Rate
Affected employees	222.1	454.0	1,150.6	1,203.7	--	--
Direct employer costs (2015$)	$125,044	$10,541	$16,936	$11,034	$25,027	$27,255
Regulatory familiarization	$80,427	$0	$0	$0	$9,154	$10,702
Initial implementation	$36,475	$0	$0	$0	$4,151	$4,853
Recurring implementation	$6,107	$6,379	$6,389	$0	$3,396	$3,690
Administrative	$2,036	$4,162	$10,548	$11,034	$8,326	$8,010
Transfers (2015$)	$85,508	$176,226	$456,686	$496,765	$364,112	$349,629
DWL (2015$)	$183	$376	$963	$1,028	$764	$734

iii. Terminology and Abbreviations

The following terminology and abbreviations will be used throughout this Regulatory Impact Analysis (RIA).

ATUS: American Time Use Survey.

BLM: Bureau of Land Management.

BLS: Bureau of Labor Statistics.

CPI-U: Consumer Price Index for all urban consumers.

CPS: Current Population Survey.

CUA: Commercial Use Authorization.

DBA: Davis-Bacon Act.

DWL: Deadweight loss. This is the loss of economic efficiency that can occur when the market equilibrium for a good or service is not achieved.

ECEC: Employer Costs for Employee Compensation.

FPDS-NG: Federal Procurement Data System–Next Generation.

FS: U. S. Forest Service.

FY: Fiscal year. The Federal fiscal year, used in this analysis, is from October 1 through September 30.

GSA: General Services Administration.

NCS: National Compensation Survey.

NHIS: National Health Interview Survey.

NPS: National Park Service.

OES: Occupational Employment Statistics.

PTO: Paid time-off.

Price elasticity of labor demand (with respect to wage): The percentage change in labor hours demanded in response to a one percent increase in wages.

Price elasticity of labor supply (with respect to wage): The percentage change in labor hours supplied in response to a one percent increase in wages.

Real dollars (2015$): Dollars adjusted using the CPI-U to reflect their purchasing power in 2015.

RIA: Regulatory Impact Analysis. This will be used to reference the analysis conducted to assess the impact of this regulation.

SAM: System for Award Management.

SBA Advocacy: Office of Advocacy of the U.S. Small Business Administration.

SUSB: Survey of United States Businesses.

Walsh-Healey PCA: The Walsh-Healey Public Contracts Act.

B. Methodology to Determine the Number of Affected Employees and Firms

i. Overview and Data

This section explains the Department's methodology to estimate the number of affected employees and firms. 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 sources including data from the NPS, the BLM, the FS and SBA Advocacy. There are no data on the number of employees working on Federal contracts ("Federal contract employees"); therefore, to estimate the number of Federal contract employees, the Department employed the approach used in the Minimum Wage Executive Order Final Rule.[5] This approach uses data from USASpending.gov, a database of government contracts from the Federal Procurement Data System–Next Generation (FPDS-NG).

After determining the total number of Federal contract employees, the Department estimated the share who will receive additional days of paid sick leave due to the rulemaking. The 2015 National Compensation Survey (NCS) provides data on the percentage of employees with paid sick leave and categorical ranges of the annual number of days of leave that employees receive. This distribution allowed the Department to estimate the number of employees who receive less than the amount of paid sick leave required under the Final Rule. The 2015 NCS does not provide data for the agriculture industry. Therefore, the Department supplemented the 2015 NCS data on paid sick leave with data from the 2011 ATUS Leave Module.

[5] See 79 FR 60634, 60692-60720.

ii. Number of Affected Firms

Commenters asserted that the Department underestimated the number of firms affected by the rulemaking for several reasons. In response to these comments, the Department reviewed its methodology for estimating the number of affected firms and revised its estimates by excluding firms that are only applying for grants, and adding entities likely operating under covered nonprocurement contracts, specifically nonprocurement contracts on Federal lands, firms with leases in Federally owned properties, and firms with operations on Federal bases to the analysis. These revisions are described below with a discussion of commenters' concerns.

The main data source used to estimate the number of affected firms is SAM. SAM reports all entities registered in the database, which is a requirement to bid for Federal procurement contracts or grants. Firms report a 6-digit primary NAICS code as part of their SAM registration. NAICS codes were not reported by 20 companies; for these firms NAICS codes are assigned based on the proportion of firms in each industry.

In the NPRM we used SAM data to estimate that 543,851 firms might be affected by the rulemaking. See 81 FR 9641. However, this estimate included firms whose sole contractual arrangement with the Federal Government was that they were applying for grants. These firms will not be affected by the rulemaking, and therefore, we have eliminated them from the analysis. The Department updated its estimate by downloading August 2015 SAM data and removing from the analysis firms only receiving grants. After this adjustment we found 415,310 registered firms.[6,7] This is a reduction of 128,541 firms relative to the NPRM.

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[6] Data released in monthly files. Available at: https://www.sam.gov/portal/SAM/#1.

[7] Entities registering in SAM are asked if they wish to bid on contracts. If a non-Federal entity answers "Yes" to this question, SAM marks the registration as being "All Awards." This is the "Purpose of Registration" column in the SAM data. The Department included only firms with a value of "Z2," which denotes "All Awards." See Section 3.2: Determining your Purpose of

SAM includes all prime contractors and some subcontractors (those who are also prime contractors or who have otherwise registered in SAM). However, we are unable to determine the number of subcontractors who are not in the SAM database. Therefore, for the NPRM the Department examined five years of USASpending data[8] and found 20,589 subcontractors who did not hold contracts as primes (and thus may not be included in SAM), and added these firms to the total from SAM. The Department used the number of unique subcontractors over five years to adjust for USASpending not including lower tiers of subcontractors. No commenters provided data or suggestions for methodological improvements, so we continue to use this methodology in this Final Rule. Applying this method to the most recent five years of data, FY2011 through FY2015, the Department found 24,352 subcontractors who do not hold contracts as primes and added these firms to the 415,310 firms not registered in SAM solely for the purpose of receiving grants in this Final Rule (Table 2).

Commenters such as the Chamber/IFA and the SBA Advocacy noted the Department did not account for nonprocurement concessions contracts and nonprocurement 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. In response to these comments, the Department has included 49,757 additional firms in the Final Rule.

Registration in the System for Award Management User Guide available at: https://test.sam.gov/sam/SAM_Guide/SAM_User_Gude.htm#_Toc330768975.

[8] The Department identified subawardees from the USASpending.gov data who did not perform work as a prime during those years. 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, and received no comments providing a better method. The USASpending data are discussed in more detail in the section on "Number of Potentially Affected Employees."

Estimating the number of entities operating under covered nonprocurement contracts on Federal property or lands involved many data sources and assumptions as described below.[9]

First, the Department estimated the number of contractors with National Park Service (NPS) concessions contracts. The NPS website contains a list of entities operating under concessions contracts on NPS lands.[10] The Department downloaded all 473 records contained on the website, identified unique firms by name, and assigned them to industries based on the first service provided listed. This results in 418 entities operating under concessions contracts on NPS lands. Second, the Department estimated the number of NPS Commercial Use Authorizations (CUAs). The Department informally consulted with the NPS and learned that the NPS has approximately 5,900 FY2015 CUAs. The Department understands that a NPS CUA is a written authorization to provide services to park area visitors. See 36 CFR 18.2(c). Because this definition may render NPS CUAs contracts with the Federal Government in connection with Federal property or lands and related to offering services to the general public and/or SCA-covered contracts, 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, we multiplied the total

[9] 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)).

[10] Available at: http://www.concessions.nps.gov/authorized_concessions.htm. The Department has assumed all NPS concessions contracts are covered by the EO, solely for purposes of this economic analysis, primarily because the EO itself specifically covers concessions contracts.

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 (418 divided by 473 = 88 percent) for an estimated 5,190 unique firms with CUAs from NPS. We also used the industry distribution from NPS concessions contracts to assign CUA permit holders to industries because industry information was not directly available.

Next, we estimated the number of U.S. Forest Service special use authorizations. The Department informally consulted the FS, which informed the Department that 77,353 special use authorizations (SUAs) were in effect in fiscal year 2015. Based on further informal consultations with the FS, the Department estimates that approximately 36 percent of these SUAs may be covered contracts. No data are available to determine whether a contractor holds more than one permit; therefore, we used the NPS ratio of unique concessions contract holders to total concessions contract holders to estimate the number of unique contractors with FS permits (88 percent). This leaves 24,370 unique firms that may be affected. The Department combined its own assumptions with information from the U.S. Census Bureau on the NAICS classification when determining the relevant industry for each type of permit because data were not available.

We also estimated the number of affected NPS special use permits. During informal discussions with DOL, NPS officials estimated it issued 33,700 special use permits in FY 2015.[11] It is likely that many, if not most, 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 EO would cover 36 percent of NPS special use permits using the FS data for SUAs, and that

[11] According to the NPS, activities that may require a special use permit "include (but are not limited to) weddings, [F]irst [A]mendment demonstration activities, a bike race, fishing tournament, group activities (groups of 20 or more participants). See https://www.nps.gov/ever/learn/management/specialuse.htm.

88 percent of the permits are held by unique contract holders based on NPS data for CUAs. Therefore, the Department estimates that 10,600 entities holding special use permits will be covered by the rule. We assigned these permit holders to the "arts, entertainment, and recreation" industry.

Next, we estimated the number of U.S. Bureau of Land Management (BLM) special recreation permits. BLM reports 4,004 of these permits in FY2014.[12] The Department again relied on the FS data to assume that 36 percent of these permits will be covered, and that 88 percent will be held by unique contractors.[13] This results in 1,261 entities holding BLM special recreation permits. We 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 group.

SBA Advocacy provided estimates of retail and concession leases in federally-owned buildings. SBA Advocacy cites the GSA as the source for 732 retail leases and "hundreds of other businesses that have concessions contracts" in Federally-owned buildings. We were unable to confirm these numbers. We interpreted "hundreds" to be 500 and thus included a total of 1,232 entities. SBA also suggested that the NPRM's estimate of affected firms did not include visually-impaired contractors that lease space at federal building to operate vending facilities under the Randolph-Sheppard Act. The Department understands that approximately 2,108 such

[12] U.S. Department of the Interior, Bureau of Land Management. (2015). Public Land Statistics 2014. Available at: http://www.blm.gov/public_land_statistics/pls14/pls2014.pdf.

[13] The Department believes it is reasonable to apply the 36% 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.

leases may have existed in fiscal year 2014.[14] The Department has accordingly added 2,108 firms to its estimate, but notes that some of these firms may already be counted in the GSA estimate. We assume these entities are in the "retail trade" and "accommodation and food services" industries.

SBA Advocacy also provided estimates of operations and concessions on military bases. SBA Advocacy cites a phone call between Advocacy and the Army and Air Force Exchange Service to report 1,200 direct operations and 462 concessions operating on federal bases. The Department was unable to independently confirm these numbers.[15] The Navy, the Marine Corps, and the Coast Guard also have bases with retail and concessions contracts. The Department determined there are 523 Navy Exchanges,[16] 2,250 Marine Corps Exchanges,[17] and 114[18] Coast Guard Exchanges. Based on general information about services on bases, we assume these entities are in the "retail trade" and "accommodation and food services" industries. We further assume that these entities, which appear to be providing nonprocurement services, are not listed in SAM.

In conclusion, the Department added some firms to the pool of affected business entities, but eliminated others. The Department added 49,757 firms operating under contracts on federal lands or with leases in federal buildings or bases, based on our assumption that these were

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[14] http://www2.ed.gov/programs/rsarsp/index.html.

[15] The Department did identify one source of data. Available at: http://www.aafes.com/Images/AboutExchange/factsheet.pdf.

[16] Navy Exchange data from Navy Exchange's Annual Report 2014. Available at: https://www.mynavyexchange.com/assets/Static/NEXCOMEnterpriseInfo/AR14.pdf.

[17] Marine Corps Exchanges Community Services. Available at: http://www.usmcmccs.org/about/.

[18] Coast Guard's Community Services Command. Available at: http://www.uscg.mil/csc/.

nonprocurement contractors not registered in SAM that might be covered by the Executive Order. Using more recent data to estimate the number of subcontractors led to the inclusion of 3,763 more subcontractors than in the NPRM. We also eliminated 128,541 firms that only receive federal grants mentioned above. In total, these revisions and updates reduced the number of firms by 75,021 (49,757+3,763-128,541). This Final Rule accordingly estimates 489,419 potentially affected firms. Table 2 summarizes the estimated number of affected contractors by contract nexus and industry used in this rulemaking.

Table 2: Number of Potentially Affected Contractors

Industry	Total Potentially Affected Firms	Firms From SAM [a]	Subcon-tractors [b]	NPS Conce-ssions	NPS CUAs [c]	NPS Special Use Permits [d]	Forest Service SUAs [e]	BLM Special Recreation Permits	Public Buildings [f]	Federal Bases [g]
Agriculture, forestry, fishing…	8,525	8,428	13	0	0	0	84	0	0	0
Mining	1,668	1,594	11	0	0	0	63	0	0	0
Utilities	5,641	3,171	61	0	0	0	2,409	0	0	0
Construction	61,399	52,410	8,770	0	0	0	219	0	0	0
Manufacturing	69,513	65,119	4,364	0	0	0	30	0	0	0
Wholesale trade	28,626	28,157	469	0	0	0	0	0	0	0
Retail trade	17,682	12,446	52	73	906	0	34	0	1,670	2,501
Transportation and warehousing	17,780	11,881	93	153	1,900	0	3,754	0	0	0
Information	19,511	13,583	235	0	0	0	5,693	0	0	0
Finance and insurance	2,712	2,682	30	0	0	0	0	0	0	0
Real estate and rental and leasing	20,705	20,699	6	0	0	0	0	0	0	0
Professional, scientific, and…	101,538	93,481	7,562	0	0	0	496	0	0	0
Management of companies…	264	264	0	0	0	0	0	0	0	0
Administrative and waste services	33,374	30,375	2,086	50	621	0	241	0	0	0
Educational services	13,645	13,130	446	0	0	0	69	0	0	0
Health care and social assistance	27,314	27,246	39	2	25	0	2	0	0	0
Arts, entertainment, and recreation	26,922	4,063	1	78	968	10,628	9,922	1,261	0	0
Accommodation and food services	14,524	8,902	1	58	720	0	1,124	0	1,670	2,048
Other services	18,077	17,679	113	4	50	0	232	0	0	0
Total private	**489,419**	**415,310**	**24,352**	**418**	**5,190**	**10,628**	**24,370**	**1,261**	**3,340**	**4,549**

[a] GSA's System for Award Management (SAM) for August 2015.
[b] USASpending.gov FY2011-FY2015.
[c] Total CUAs from NPS, adjusted for firms holding more than one permit using the ratio from NPS concessions.
[d] Total SUAs from NPS. Assumed same proportion as the FS SUAs are covered and the same proportion as NPS concessions are unique.
[e] Forest Service provided a count of permits at the end of FY2015. Use ratio of unique firms to all firms from NPS concessions.
[f] Retail and concession leases in public buildings. Provided by SBA Advocacy and U.S. Department of Education.
[g] Direct operations and concessions on federal bases. Army and Air Force Exchange Service (AAFES) firms provided by SBA Advocacy. Navy Exchange data from Navy Exchange's Annual Report 2014. Marine Corps Exchange data from Marine Corp Community Services. Coast Guard

Exchange data from Coast Guard's Community Services Command.

The Chamber/IFA also argued that the Department's analysis in the NPRM is internally inconsistent because we estimated 1.2 million potentially affected employees and 543,900 potentially affected contractors, which results in an average of 2.1 potentially affected employees per contracting firm. The Department believes this perceived inconsistency is the result of inappropriately dividing the number of potentially affected employees by 543,900. There are three primary reasons why the 543,900 figure is not the appropriate denominator when calculating the average number of employees per contracting firm.

First, as explained in the NPRM, 81 FR 9641, the estimated number of potentially affected contractors includes those that only work on Walsh-Healey Public Contracts Act (PCA) contracts, which will not be affected by the rulemaking, and whose employees thus have been excluded from the estimate of affected employees. These contractors remain in the estimate of affected contractors in the Final Rule because the Department believes they may accrue some limited regulatory familiarization costs to determine that they are not impacted by the Final Rule. However, these contractors will not have affected employees.

Second, as also explained in the NPRM, 81 FR 9641, some firms listed in the SAM database may not currently hold government contracts but are enrolled in SAM because they have held government contracts in the past or are interested in applying for contracts. These firms were kept in the analysis because some may bid on and be awarded future contracts. However, since others will not, affected workers should not be distributed to those firms (i.e., some of these firms will not have affected employees). Third, the NPRM analysis included firms listed in the SAM database that only hold, or wish to hold, government grants. Firms applying only for grants were eliminated from the estimated number of affected firms in this Final Rule because they will not accrue any costs.

When preparing the analysis of the proposed rule, the Department had not identified an appropriate method to eliminate contracting firms with contracts only on Walsh-Healey PCA contracts or without Federal contracts to estimate the number of contracting firms with affected employees. For this Final Rule, the Department has identified a methodology to estimate the number of contractors with potentially affected employees.[19] This methodology counts only contractors with service (including construction) contracts in USASpending in FY2015 because these are the procurement contractors with potentially affected employees, and adds entities operating under covered nonprocurement contracts on Federal property or lands. We estimate there are 165,987 such contractors (91,878 prime contractors in USASpending, 24,352 subcontractors, and 49,757 entities with contracts on Federal property or lands). If this is used as the denominator, which we think would be reasonable, then we estimate an average of 10.4 full-year employees working exclusively on covered contracts per contracting firm. It is important to note, however, that this is not an estimate of the average number of total employees at these potentially affected contracting firms since only a segment of a contracting firm's workforce may work on covered Federal contracts.

iii. Number of Potentially Affected Employees

There are no 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 Minimum Wage Executive Order Final Rule.[20] The Department estimated the number of employees who work on federal contracts that will be covered by the Executive Order,

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[19] This methodology plus one additional step is used in the FRFA to estimate the number of small contractors with affected employees because these contractors are a subset of the contractors with potentially affected employees.

[20] See 79 FR 60634, 60692-60720.

representing the number of "potentially affected employees." Additionally, the Department estimated the share of potentially affected employees who will receive new or additional paid sick leave as a result of the Executive Order. These employees are referred to as "affected."[21]

The Department estimated the number of potentially affected employees in two parts. First, we estimated employees working on SCA and DBA procurement contracts. Second, we 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). 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 3). This analysis was conducted at the 2-digit NAICS level.[22]

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

Where i= 2-digit NAICS

The Department used total Federal contracting expenditures from USASpending.gov data, which tabulates data on Federal contracting through the Federal Procurement Data System–Next Generation (FPDS-NG). The Congressional Budget Office (CBO) has stated that this is the

[21] Some workers with seven days of paid sick leave may still be affected if the Executive Order entitles them to use paid sick leave for additional purposes. However, data are not available to estimate these workers.

[22] 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). United States Census Bureau. "North American Industry Classification System: Introduction to NAICS." U.S. Department of Commerce. Available at: http://www.census.gov/eos/www/naics/.

"only comprehensive source of information about federal spending on contracts."[23] According to data from USASpending.gov, the government spent $555 billion on procurement contracts in FY2015. The Department excluded expenditures to state and local governments because government employees generally receive at least seven days of paid sick leave and because the DBA does not apply to construction performed by state or local government employees. The Department also excluded contracts performed outside the U.S. because the Final Rule only covers contracts to the extent they are performed in the U.S. These two adjustments reduce the relevant Federal government's expenditures to $508 billion. Next, the Department excluded expenditures on goods purchased by the Federal government because the Final Rule does not apply to contracts subject to the Walsh-Healey PCA and hence would not apply to contracts for the manufacturing and furnishing of materials and supplies.[24] 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). Subtracting Federal expenditures on goods purchased, the Department found that the Federal government spent $286.4 billion on services (including construction) provided by government contractors in FY2015.

To determine the share of all output associated with government contracts the Department divided industry-level contracting expenditures by that industry's gross output.[25]

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[23] Congressional Budget Office. (2015). Federal Contracts and the Contracted Workforce. p. 3. Available at: https://www.cbo.gov/publication/49931.

[24] For example, the government purchases pencils; however, a contract solely to purchase pencils (whether covered by the Walsh-Healey PCA or not) would not be covered by the Executive Order.

[25] Bureau of Economic Analysis, National Income and Product Accounts (NIPA) Tables, Gross Output. 2015. "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

For example, in the information industry, $8.1 billion in contracting expenditures was divided by $1.6 trillion in total output, resulting in an estimate that covered government contracts comprise 0.52 percent of every dollar of total 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 2015 Occupational Employment Statistics (OES).[26] To demonstrate, in the information industry, there were approximately 2.7 million private sector employees in May 2015 and covered government contracts comprise 0.52 percent of every dollar of total output. The Department multiplied 2.7 million by 0.52 percent to estimate that 14,000 employees on covered procurement contracts in the information industry will be potentially affected by the Executive Order.[27]

Commenters claimed that independent contractors are not represented in these data. For example, the Chamber/IFA wrote "the Department's analysis fails to account for independent contractors who will be treated as equivalent employees under the proposal." The Department notes that the OES includes incorporated independent contractors, and thus such independent contractors are included in the analysis. Unincorporated independent contractors are unlikely to be covered by this rule because, assuming they are bona fide independent contractors, they are not covered by the FLSA, and are unlikely to be performing work on or in connection with SCA- or DBA-covered contracts. Thus, they continue to be excluded in the Final Rule.

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output differs from value added, which measures the contribution of the industry's labor and capital to its gross output."

[26] Bureau of Labor Statistics. Occupational Employment Statistics. May 2015. Available at: http://www.bls.gov/oes/.

[27] Note that number of employees aggregated across industry analysis does not match the total number of employees derived using totals due to the order of multiplying and summing.

This Final Rule makes clear that contract workers with the U.S. Postal Service are covered by this rulemaking. These workers are included in the OES employment data for the transportation and warehousing industry and these contracts are included in USASpending.gov data.[28] Therefore, workers covered by these contracts are captured in the methodology above.

This methodology represents the number of year-round potentially affected employees who work exclusively on covered Federal contracts. Thus, when we refer to potentially affected employees in this analysis we are referring to this illustrative number of year-round potentially affected employees who work exclusively on covered government contracts. The number of employees who will gain benefits will likely exceed this number since all workers may not work exclusively on Federal contracts. However, data are not available to estimate the number of employees gaining benefits. Implications of this for costs and transfers are discussed in the relevant sections.

[28] The Department excludes from the OES data the 615,100 workers in NAICS 491110 who are Federal postal service employees but includes workers in NAICS 492000: Couriers and Messengers.

Table 3: Number of Potentially Affected Employees

Industry	NAICS	Private Employees (1,000s) [a]	Total Output (Billions) [b]	Covered Contracting Output (Millions) [c]	Share Output from Covered Contracting	Employees on Direct Contracts (1,000s) [d]	Employees on Federal Lands and Concessions (1,000s)	Total Contract Employees (1,000s)
Agriculture, forestry…	11	412	$454	$339	0.07%	0	0	0
Mining	21	811	$426	$105	0.02%	0	0	0
Utilities	22	554	$391	$3,043	0.78%	4	7	12
Construction	23	6,393	$1,320	$24,194	1.83%	117	1	119
Manufacturing	31-33	12,303	$5,940	$20,703	0.35%	43	0	43
Wholesale trade	42	5,838	$1,574	$254	0.02%	1	0	1
Retail trade	44-45	15,751	$1,610	$1,263	0.08%	12	107	120
Transportation & warehousing	48-49	4,789	$1,071	$11,005	1.03%	49	98	147
Information	51	2,749	$1,571	$8,146	0.52%	14	19	34
Finance and insurance	52	5,666	$2,275	$18,734	0.82%	47	0	47
Real estate and rental and…	53	2,066	$3,264	$1,174	0.04%	1	0	1
Professional, scientific, and…	54	8,483	$1,979	$136,870	6.92%	587	9	596
Management of companies…	55	2,260	$629	$0	0.00%	0	0	0
Administrative and waste…	56	8,882	$891	$29,781	3.34%	297	18	315
Educational services	61	2,814	$332	$4,290	1.29%	36	1	37
Health care and social assist.	62	17,754	$2,234	$22,845	1.02%	182	1	182
Arts, entertainment, and rec.	71	2,243	$311	$103	0.03%	1	14	15
Accommodation and food...	72	12,923	$961	$1,161	0.12%	16	28	44
Other services	81	4,010	$672	$2,387	0.36%	14	1	15
Total private	**--**	**116,702**	**$27,907**	**$286,396**	**1.03%**	**1,421**	**306**	**1,727**

[a] OES May 2015.
[b] Bureau of Economic Analysis, NIPA Tables, Gross output. 2015.
[c] USASpending.gov. Contracting expenditures for covered contracts in FY2015.
[d] Assume share of expenditures on contracting is same as share of employment. Assumes all employees work exclusively on Federal contracts. Thus this may be an underestimate if some employees are not working entirely on Federal contracts.

The above analysis, which largely follows the NPRM, found 1.4 million potentially affected employees associated with contracting expenditures by the Federal government. However, as pointed out by SBA Advocacy and the Chamber/IFA, the rulemaking also covers entities operating under covered nonprocurement contracts on Federal property or lands and these workers may not be represented above. 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. Conceptually, this ratio was calculated by dividing the potentially affected employees on direct contracts identified above (1.4 million across all industries) by the 116,200 estimated number of prime contractors and subcontractors with potentially affected employees from USASpending (91,900 prime contractors in and 24,400 subcontractors) (V.B.ii.). However, this calculation was conducted at the industry level and summed over industries. For example, in retail trade, we estimate 12,000 potentially affected workers in 597 entities (545 prime plus 52 subcontractors), for an average of 20.7 potentially affected workers per firm. This estimate of potentially affected workers per firm is multiplied by the estimated 5,184 entities operating under covered nonprocurement contracts on Federal property or lands in the retail trade industry, resulting in 107,000 potentially affected employees in these firms. Summing these calculations over all industries results in an additional 306,000 covered employees for a total of 1.7 million potentially affected employees.

Because the Executive Order only applies to "new contracts," coverage of the estimated total number of potentially affected employees (1.7 million) will occur on a staggered year-by-year basis. The Department accordingly needed to devise a method to estimate at what rate the

staggered coverage would occur. The Executive Order defines a new contract to be either one for which a solicitation has been issued, or for which the contract has been awarded outside the solicitation process, on or after January 1, 2017. Consistent with the Department's approach in the rulemaking implementing Executive Order 13658, see 79 FR 34568, 34596, 60693, the Department estimated that twenty percent of contracts will qualify as "new" in Year 1. If approximately twenty percent of contracts are new each year, then almost all contracts should qualify as new for purposes of the Executive Order by Year 5.[29] The Department assumed employee coverage would also occur on a uniform twenty percent year-by-year basis. The Department accordingly multiplied the 1.7 million total potentially affected employees by 0.2 to estimate that 345,000 employees may be impacted in Year 1. In Years 2 through 5 a slightly larger number of workers will be impacted due to projected employment growth.[30]

The Chamber/IFA questioned the Department's estimate of affected employees in the NPRM on multiple grounds. As discussed below, the Department disagrees with the commenters. First, the Chamber/IFA believes the Department may have underestimated the number of affected employees because the "estimate is based only on consideration of numbers of employees who may currently lack access to 7 days of paid leave, and it ignores the impact on thousands more employees and their employers because current programs offering 7 or more days of leave fail to match other prescriptive details of the proposed rule." Employers that offer seven days of paid sick leave but with more restrictive usage will be required to broaden the use of their paid sick leave policies in response to the rulemaking. For instance, to the extent the

[29] If some contracts last longer than 5 years, then not all contracts will be covered by Year 5. For example, U.S. Forest Service contracts for ski resorts can last 20 years or more.
[30] The Department applied the geometric annual growth rate based on the ten-year employment projection for 2014 to 2024 from BLS' Employment Projections program by industry. Available at http://www.bls.gov/news.release/ecopro.t02.htm.

employer's policy does not allow employees to use paid sick leave for absences related to domestic violence, the policy would need to be revised to comply with the Order and part 13. Therefore, the Department agrees these workers may be beneficiaries of this Final Rule. Although, as discussed below, the Department was able to calculate imprecise estimates of the number of additional affected employees, it has not included the costs or transfers associated with these employees for two main reasons. First, the Department found no applicable evidence to estimate the number of employees with paid sick leave that have a more restrictive scope of use than required in this Final Rule. Second, no strong evidence is available to estimate the impact on the number of days of paid sick leave taken for these employees who currently have a more restrictive scope of use in their current paid sick leave access. Therefore, they are not included in the analysis.

However, the Department identified some data appropriate for illustrative estimates. According to the 2010 National Paid Sick Days Study (NPSDS), 64 percent of workers have paid sick days but only 47 percent have paid sick days they are allowed to use to care for sick family members.[31] If we assume workers with paid sick leave that can only be used for their own health are uniformly distributed across days of paid leave then we can estimate the number of affected employees due to expanded usage eligibility. We estimate 123,300 workers (115,700 full-time + 7,600 part-time) receive 7 days or more of paid sick leave and thus will not receive additional days of paid leave.[32] If 27 percent ((64 percent - 47 percent)/64 percent) of these employees have greater access to their paid sick leave due to expanded eligibility, then an

[31] Smith, T.W. and Kim, J. (2010). Paid Sick Days: Attitude and Experiences. Public Welfare Foundation.

[32] Based on estimates from 2015 NCS, 2011 ATUS, and 2015 CPS. See section V.B.iv. for details.

additional 32,800 employees may be considered "affected" in Year 1 (an increase of 15 percent in Year 1). However, according to the data from the American Time Use Survey, analyzed by the Council of Economic Advisors,[33] 53 percent of workers have paid sick days that can be used for their own illness and 48 percent have paid sick days that can be used to care for family members. As noted above, the Department estimated that 123,300 potentially affected employees receive 7 days or more of paid sick leave. If 9.4 percent ((53 percent - 48 percent)/53 percent) of these employees have usage extended then an additional 11,600 employees may be considered "affected" in Year 1, (a 5.2 percent increase in the number of affected employees).[34] Therefore, depending on the source, the estimate of the incremental number of affected employees due to expanded usage varies between 11,600 and 32,800 employees.[35]

The second Chamber/IFA concern is that the Department is underestimating affected employees because "if government contract work is more labor intensive per dollar expended than non-governmental activity, then the number of affected employees will be…commensurately greater than the numbers estimated by the Department in its analysis." The Department calculated the number of employees based on the share of government expenditures to all expenditures by industry. Overall, the Department believes that services provided for the government will not be any more or less labor intensive than services provided for the private sector However, within industries, government contract work could be more or less labor

[33] The Council of Economic Advisers. (2014). The Economics of Paid and Unpaid Leave.

[34] This assumes all workers who have paid leave to care for family members can use this leave to care for themselves.

[35] This is potentially an underestimate since it does not include any impacts due to additional uses allowed under this Final Rule, such as domestic violence. The Department found no data on current coverage for any additional uses to include in the estimate of additional "affected" employees.

intensive than private contract work. For example, because federal contracts for construction services are more likely to be heavy or highway construction, government contract work could involve different levels of labor intensity than private contract work in the construction industry. The Department believes that the differences in labor intensity between contracted and non-contracted sectors across 2-digit NAICS tend to balance each other out.

Third, the Chamber/IFA believes affected employees may be underestimated because the Department assumed that employees were working exclusively on Federal contracts. To the extent that employees spend only a portion of their time working on federal contracts, the number of affected employees will be higher than the number of year-round exclusively federal contract employees estimated above. As discussed above, data are not available on the share of an employee's time that is spent on Federal contracting. The impact of this on transfers was discussed in the NPRM and in this Final Rule in the section on transfers (V.C.iii.). For this Final Rule we have added a discussion regarding the impact on costs (V.C.ii.).

Fourth, the Chamber/IFA repeatedly stated that the Department should have conducted a baseline survey of contracting firms to obtain information about the prevalence of the "15 plus specific elements" required by the Rule. The commenters claim that the Department could have conducted a survey "following the issuance of Executive Order 13706 in September 2015" and "still be on schedule to complete the contemplated rulemaking by September 30, 2016." The Department believes that conducting such a survey is unnecessary because existing data provides the information necessary to calculate reasonable estimates of the total costs and transfers of this Final Rule.

iv. Number of Affected Employees

The Department used the 2015 National Compensation Survey (NCS) to determine the proportion of potentially affected employees who already receive paid sick leave. The NCS

estimates that nationally 61 percent of all private sector employees currently receive some paid sick leave.[36,37] However, this average can vary substantially by industry and hours worked. To account for these differences the Department performed its analysis by industry and full-time/part-time status.[38] The BLS reports the share of employees who receive paid leave disaggregated by industry and separately by full-time status (Table 4). However, the NCS does not publish data cross-tabulated by industry and full-time status. For this Final Rule the BLS provided this breakdown using the NCS microdata for categories with sufficient observations to meet their publication criteria. For industries not available from the NCS by part-time status, the Department estimated the rates.[39] The NCS does not include employees in the agriculture, forestry, fishing and hunting industries; therefore, the Department estimated the share of

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[36] National Compensation Survey, March 2015, Table 32. Leave benefits: Access, private industry employees.

[37] Data on paid sick leave are not available specifically for Federal contractors. The Department assumes rates of paid sick leave for Federal contractors are similar to all private sector workers.

[38] The Department's analysis categorizes as full-time those individuals who work 32 hours or more per workweek (rounded to the nearest integer). 32 hours represents the line of demarcation between workers who would and would not accrue 56 hours of paid sick leave a year if they work a full year. The Department's designation herein of certain individuals as "full-time" and other individuals as "part-time" based on their usual hours worked is solely for purposes of facilitating the economic analysis in this rulemaking.

[39] The Department used the share of employees with sick leave, for all employees and full-time employees, and the ratio of full-time to part-time employees in each industry to estimate the shares for part-time employees in those industries without part-time employees' shares. The Department used data from the CPS to calculate the ratio of full- to part-time employees. For example, the NCS does not provide an estimate of the percentage of part-time workers in the manufacturing industry with paid sick leave. NCS provides estimates of 65 percent and 67 percent of all and full-time workers, respectively, have some paid sick leave in the manufacturing industry. Based on the 2015 CPS data, the Department estimated that about 96% of workers in the manufacturing industry work full-time. Since the 65 percent total is a weighted average of full-time and part-time workers with paid sick leave, we estimated the percentage of part-time workers in the manufacturing industry with paid sick leave by solving for "PT%" in: 0.65 = (0.67*0.959) + (PT%*0.041).

employees with access to paid sick leave in those industries based on the 2011 ATUS Leave Module.[40]

Table 4: Share of Employees with Paid Sick Leave by Industry and Full-Time Status

Industry	NAICS	% With Some Paid Sick Leave		
		Total [a]	Full-Time [b]	Part-Time [b]
Agriculture, forestry, fishing and hunting [c]	11	18%	21%	7%
Mining	21	64%	65%	27% [d]
Utilities	22	89%	89%	89% [d]
Construction	23	41%	42%	25%
Manufacturing	31-33	65%	67%	18% [d]
Wholesale trade	42	77%	80%	41% [d]
Retail trade	44-45	50%	73%	27%
Transportation and warehousing	48-49	74%	75%	73%
Information	51	92%	95%	51%
Finance and insurance	52	90%	93%	57%
Real estate and rental and leasing	53	72%	80%	36% [d]
Professional, scientific, and technical services	54	78%	85%	26% [d]
Management of companies and enterprises	55	90%	91%	81% [d]
Administrative and waste services	56	44%	53%	15%
Educational services	61	73%	90%	24%
Health care and social assistance	62	72%	85%	36%
Arts, entertainment, and recreation	71	48%	71%	29%
Accommodation and food services	72	25%	46%	11%
Other services	81	57%	73%	24%
Total private	--	**61%**	**73%**	**25%**

[a] National Compensation Survey, March 2015, Table 32. Leave benefits: Access, private industry workers (unless otherwise noted). Assumes distribution of paid leave is similar for Federal contractors and other private employees.
[b] The NCS does not publish data by industry and full-time status; however, for this Final Rule the BLS provided this breakdown using the NCS microdata for industries with sufficient observations to meet their publication criteria. Full-time is defined as 32 or more hours per week.

[40] The 2011 ATUS Leave Module is a special supplement to the annual ATUS survey sponsored by the BLS and conducted by the U.S. Census Bureau. It surveys employees nationally on use of leave. The Department estimated the share of workers in the agriculture, forestry, fishing and hunting industries that receive paid sick leave. The ratio of leave benefits for full-time and part-time workers from the NCS was applied to this total to estimate separate rates for these two subgroups.

[c] NCS does not include information for this industry. Used 2011 ATUS Leave Module to estimate share of employees in this industry with paid sick leave. Assumes distribution of paid leave is similar for Federal contractors and other private sector employees.
[d] NCS does not include information for this industry and part-time status. The Department estimated these rates.

The Department estimated that of the 345,000 employees potentially impacted in Year 1, approximately 294,000 are full-time employees and 51,400 are part-time employees.[41] For full-time employees, across all industries, 73 percent receive some paid sick leave and 27 percent currently receive no paid sick leave. For part-time employees, 25 percent receive some paid sick leave and 75 percent receive no paid leave. All employees with no paid sick leave will be affected regardless of how many hours per week they work (assuming they work a sufficient number of hours to accrue paid sick leave).

Additionally, some employees who currently receive paid sick leave will also be affected by the Final Rule if they receive fewer than the mandated number of days based on the required accrual rate. To determine how many of these employees are affected, the Department used NCS data on the distribution of days of leave. The 2015 NCS provides the share of employees with a range of days of paid sick leave (e.g., 5 to 9 days per year).[42] The NCS publishes these data aggregated across all industries. However, since this analysis is conducted by industry, the BLS provided the Department with these ranges of days disaggregated by industry based on the NCS (see Appendix A). The Department then used the categorical distribution of days for all workers in an industry and full-time workers across industries to approximate these values for

[41] Based on the share of workers who are full-time in the 2015 CPS data. This assumes the share of government contractors that are full-time is similar to private industry overall. As noted, full-time is defined for purposes of this analysis as 32 or more hours per week.

[42] Table 35. Paid sick leave: Number of annual days by service requirement, private industry workers, National Compensation Survey, March 2015. Available at: http://www.bls.gov/ncs/ebs/benefits/2015/ownership/private/table35a.htm.

both full-time and part-time workers by industry.[43] This results in a distribution by categories of days of sick leave by industry and full-time status.

The Department distributed the share of employees within each NCS category (e.g., 5 to 9 days per year) of paid sick leave days across the individual number of days in that category (e.g., 5, 6, 7, 8, 9) using a Poisson distribution that approximates the distribution of days of paid sick leave provided to workers with this benefit.[44] For example, using the NCS data the Department estimates that 53 percent of full-time employees with paid sick leave receive 5 to 9 days of leave. Applying the Poisson distribution, the Department estimated 10 percent of employees with paid sick leave currently receive 5 sick days, 13 percent currently receive 6 sick days, etc.[45] The percent distributions of days of paid sick leave are presented in Appendix A.

The Executive Order generally measures paid sick leave in hours, restricting a contractor from limiting total accrual of paid sick leave per year, or any point in time, at less than 56 hours. Because the NCS tabulates paid sick leave in days, the Department converted sick leave hours to days to use the NCS. The Department assumed a standard 8 hours worked per day, so the

[43] The distribution is available for all workers and full-time workers but not part-time workers. Combining these data with the share of workers who are full-time allowed the Department to approximate the distribution for part-time workers.

[44] The Poisson distribution is frequently used for discrete count data. The data were consistent with a Poisson distribution. The distribution of days of sick leave is continuous but was approximated using integers to allow use of the Poisson distribution and to simplify the analysis. Aggregate findings would be highly comparable if a continuous distribution had been used instead.

[45] Some additional manipulations were made to the data in cases where the Poisson distribution resulted in numbers contradictory to the reported medians (see Appendix A).

Executive Order provides a maximum accrual of 7 days of paid sick leave annually. Therefore, this analysis assumes employees receiving at least 7 days of paid sick leave are not affected.[46]

To estimate the number of affected employees in Year 1 the Department summed the number of potentially affected employees with less than 7 days of paid sick leave. The Department estimates 114,600 contract employees have no paid sick leave and will be affected. The Department also estimates 107,500 contract employees have access to paid sick leave but receive fewer than 7 days of paid sick leave (47 percent of workers with some paid sick leave) and are thus classified as affected employees. The Department accordingly estimates that there will be approximately 222,100 affected employees in Year 1 (Table 5).

v. Number of Additional Days of Paid Sick Leave Accrued by Affected Employees

The Department estimated the number of additional paid sick leave days the approximately 222,100 affected employees would need to receive for contractors to comply with the Executive Order. This was done somewhat differently for full-time and part-time employees. For full-time employees with no paid sick leave the Department estimated they will receive 7 additional days of paid sick leave. For full-time employees with between 1 and 6 days of leave the Department estimated the number of additional days they would need to receive to reach 7 days of paid sick leave (e.g., if they currently receive 1 day then they will receive an additional 6 days).

[46] The number of days of leave for workers with paid time off policies is unknown. The NCS estimates the distribution of days of paid sick leave for workers with a set number of days of paid sick leave. We assume this distribution of days of leave is the same for workers with paid time off policies (and those with "as needed" paid sick leave provisions). This may result in an underestimate of the number of days currently received by workers with a paid-time off program because the SHRM (2008) estimates that workers with paid time off policies receive an average of 15 days the first year of service.

To estimate the additional number of paid sick days per year that would accrue to part-time employees as a result of the rule, the Department first had to estimate hours of paid sick leave per year currently available to these workers. To estimate paid sick leave hours currently available to part-time employees required additional calculations because the NCS reports days of paid sick leave per year, not hours. Therefore, the Department adjusted part-time employees' days of paid sick leave by assuming that the hours of paid sick leave associated with "one day" of leave is equivalent to average hours worked in a day. For example, if a part-time worker averages 6 hours of work per work day, then one day of paid sick leave will also be equal to 6 hours. To do this, the Department divided part-time workers' average hours worked per week by 5 to calculate their average hours worked per day by industry. The Department then multiplied average work hours per day by NCS reported paid days of sick leave per year to estimate part-time employees' hours of paid sick leave currently available per year.

Next, the Department calculated the total hours of paid sick leave per year that might accrue to a part-time worker as a result of this EO. Because paid sick leave is accrued at a rate of 1 hour per every 30 hours worked, the Department divided mean annual hours worked for part-time workers in an industry by 30 to estimate the number of hours of paid sick leave required under the Executive Order. The difference between hours of paid sick leave currently available per year and hours of paid sick leave per year required under the Executive Order is the additional hours that accrue to part-time workers. This was then divided by 8 to express the additional paid sick hours in terms of standardized 8-hour days. Table 7 presents the adjusted numbers for part-time employees.

As stated above, the Department is estimating a total of 222,100 affected employees in Year 1 (Table 5). The total number of additional days of paid sick leave is then calculated by

multiplying the number of employees affected by the average number of additional days of paid sick leave provided by the Final Rule (Table 6 and Table 7). The Department estimated that the Final Rule will result in a total of 968,000 additional days of paid sick leave provided (792,000 days for full-time workers and 176,000 days for part-time workers).[47]

Table 5: Number of Affected Employees in Year 1

Industry	Affected Employees				
	Total	Full-Time [a]	Part-Time [a]	With No Paid Sick Leave	With Some Paid Sick Leave
Agriculture, forestry, fishing and hunting	58	47	12	52	6
Mining	39	37	1	20	18
Utilities	294	287	8	256	39
Construction	20,280	18,504	1,776	14,086	6,195
Manufacturing	6,372	6,045	327	3,009	3,363
Wholesale trade	133	121	12	43	90
Retail trade	16,709	11,021	5,688	9,487	7,223
Transportation and warehousing	15,609	13,857	1,752	7,427	8,182
Information	2,587	2,042	545	701	1,886
Finance and insurance	2,484	2,194	290	842	1,642
Real estate and rental and leasing	95	73	22	42	54
Professional, scientific, and technical serv.	72,713	60,405	12,308	26,224	46,489
Management of companies and enterprises	0	0	0	0	0
Administrative and waste services	50,648	40,768	9,881	33,656	16,993
Educational services	2,456	1,275	1,181	1,716	739
Health care and social assistance	19,587	14,554	5,033	8,601	10,985
Arts, entertainment, and recreation	2,184	1,276	908	1,328	856

[47] This estimate is based on the marginal number of paid sick days employers would have to provide due to this regulation. To the extent employers that currently provide paid sick leave do not modify their existing paid sick leave policies in accordance with section 2(g) of the Executive Order and section 13.5(f), and to the extent there are SCA- or DBA-covered employers who provide paid sick leave as an SCA or DBA fringe benefit, this estimate may not entirely reflect the total marginal number of days employers would have to provide. However, the Department assumes firms will be able to and will choose to apply the currently provided days of paid sick leave toward the requirements of the Executive Order and this rule, and the Department similarly understands that contractors generally do not provide paid sick leave as an SCA or DBA fringe benefit.

Accommodation and food services	7,718	4,451	3,267	5,895	1,823
Other services	2,092	1,365	727	1,208	884
Total private	**222,059**	**178,320**	**43,739**	**114,593**	**107,465**

[a] Part-time is defined as working less than 32 hours per week.

Table 6: Current Distribution of Days of Paid Leave, Additional Days of Leave, and Affected Employees in Year 1, Full-Time Employees

Industry	Number of Full-Time Potentially Affected Employees Accruing Annually the Following Number of Days of Sick Leave								Affected Employees	Days Add. Sick Leave Available
	0	1	2	3	4	5	6	7+		
Agriculture, forestry, fishing…	41	0	0	1	2	1	1	5	47	302
Mining	19	0	0	0	0	3	15	18	37	157
Utilities	250	0	0	0	0	8	29	1,982	287	1,792
Construction	12,626	154	475	980	1,515	1,448	1,307	3,265	18,504	104,346
Manufacturing	2,721	55	228	626	1,291	562	562	2,200	6,045	28,580
Wholesale trade	35	1	5	15	30	18	16	53	121	480
Retail trade	4,686	115	356	734	1,135	1,967	2,028	6,335	11,021	47,574
Transportation and warehousing	6,567	77	358	1,107	2,568	1,249	1,931	12,411	13,857	64,780
Information	295	8	38	116	270	516	799	3,865	2,042	5,409
Finance and insurance	617	7	41	171	528	271	559	6,614	2,194	7,933
Real estate and rental and leasing	24	1	3	7	11	13	13	49	73	294
Professional, scientific, and…	15,758	394	1,625	4,467	9,214	12,188	16,759	44,647	60,405	207,437
Management of companies…	0	0	0	0	0	0	0	0	0	0
Administrative and waste services	24,702	301	1,241	3,414	7,042	1,930	2,138	11,789	40,768	221,703
Educational services	590	4	24	90	255	108	204	4,623	1,275	5,818
Health care and social assistance	4,505	152	628	1,726	3,561	1,676	2,305	15,482	14,554	58,835
Arts, entertainment, and recreation	574	19	58	119	185	158	163	702	1,276	5,929
Accommodation and food services	2,872	43	133	275	425	346	356	867	4,451	24,452
Other services	580	11	47	129	265	140	192	784	1,365	6,146
Total private	**77,462**	**1,342**	**5,260**	**13,977**	**28,298**	**22,603**	**29,378**	**115,693**	**178,320**	**791,969**

Note: Numbers do not always add to total due to rounding.

Table 7: Current Distribution of Days of Paid Leave, Additional Days of Leave, and Affected Employees in Year 1, Part-Time Employees

Industry	Number of Part-Time Potentially Affected Employees Accruing Annually the Following Number of Days of Sick Leave								Affected Employees	Days Additional Sick Leave Available [a]
	0	1	2	3	4	5	6	7+		
Agriculture, forestry, fishing & hunting	11	0	0	0	0	0	0	0	12	46
Mining	1	0	0	0	0	0	0	0	1	5
Utilities	6	0	0	0	0	0	1	49	8	31
Construction	1,459	11	29	53	72	79	73	170	1,776	7,503
Manufacturing	288	1	3	7	13	7	7	24	327	1,381
Wholesale trade	9	0	0	1	1	1	1	2	12	45
Retail trade	4,801	22	59	107	145	292	264	888	5,688	23,165
Transportation and warehousing	860	13	51	140	285	171	232	1,433	1,752	5,730
Information	406	1	3	9	19	45	61	283	545	1,822
Finance and insurance	225	0	2	7	19	13	23	234	290	1,196
Real estate and rental and leasing	17	0	0	1	1	1	1	5	22	81
Professional, scientific, and technical…	10,467	22	78	189	343	548	662	1,842	12,308	47,125
Management of companies and…	0	0	0	0	0	0	0	0	0	0
Administrative and waste services	8,954	23	83	200	363	120	137	653	9,881	42,049
Educational services	1,127	0	2	7	18	10	16	301	1,181	4,671
Health care and social assistance	4,096	19	69	167	302	172	208	1,367	5,033	20,469
Arts, entertainment, and recreation	754	5	15	27	37	37	33	154	908	3,302
Accommodation and food services	3,023	9	23	42	58	55	57	130	3,267	14,564
Other services	628	2	7	17	31	19	23	99	727	2,861
Total private	**37,132**	**127**	**426**	**975**	**1,708**	**1,570**	**1,802**	**7,635**	**43,739**	**176,048**

Note: Numbers do not always add to total due to rounding.
[a] This is expressed in terms of standardized 8-hour days, as described in the text.

To estimate the number of affected employees in later years, the Department calculated the average annual geometric growth rate in employment based on the ten-year employment projection for 2014 to 2024 from BLS' Employment Projections program. Table 8 shows the number of affected employees in Years 1 through 10, along with the number of employees with no paid sick leave currently, with some paid sick leave, and by full-time/part-time status. The share of employees working full-time in 2015 and the share of employees with no paid sick leave were applied to projected years.

Table 8: Affected Employees in Years 1 through 10

Year	Affected Employees (1,000s)				
	Total	Full-Time	Part-Time	With No Paid Sick Leave	With Some Paid Sick Leave
Year 1	222.1	178.3	43.7	114.6	107.5
Year 2	454.0	364.6	89.4	234.3	219.7
Year 3	686.1	551.0	135.1	354.1	332.0
Year 4	918.3	737.4	180.9	473.9	444.4
Year 5	1,150.6	924.0	226.6	593.8	556.8
Year 6	1,161.0	932.3	228.7	599.1	561.9
Year 7	1,171.5	940.7	230.7	604.5	566.9
Year 8	1,182.1	949.3	232.8	610.0	572.1
Year 9	1,192.8	957.9	235.0	615.6	577.3
Year 10	1,203.7	966.6	237.1	621.2	582.5

The Department estimates that once all covered contracts have been renewed (in Year 5), the equivalent of 1.2 million year-round exclusively federal contract employees will be affected by this Final Rule. The Economic Policy Institute developed a range of estimates that are comparable; they found that "between 694,000 and 1,053,000 employees of Federal contractors may directly benefit with additional paid sick leave." Their estimates use data from the General Services Administration's (GSA's) Federal Procurement Data System, the BLS' Employment Requirements Matrix, and the BLS' NCS. EPI's estimated number is consistent with the

Department's estimate in the NPRM because both estimates included only employees working on contracts in USASpending.gov. As noted previously, the Department added employees working on contracts on Federal property or lands in the analysis of this Final Rule, which increased the estimated number of affected employees.

C. Impacts of Final Rule

i. Overview

This section presents direct employer costs, transfer payments and DWL associated with the Final Rule. These impacts were projected for 10 years. The Department estimated average annualized direct employer costs of $27.3 million, transfer payments of $349.6 million and DWL of $734,000. As these numbers demonstrate, the largest quantified impact of the Final Rule will be the transfer of income from employers to employees. The Department also discusses the many benefits of this rule qualitatively.

ii. Costs

The Department quantified three direct employer costs: (1) regulatory familiarization costs; (2) implementation costs; and (3) recurring administrative costs. Other employer costs are considered qualitatively. This section explains the methodology and responds to commenters. Some commenters believe our costs estimates are too low; where appropriate, estimates were adjusted. Other commenters provided evidence from state and municipal laws demonstrating that costs will be low. For instance, the Seattle Office of Labor Standards cited a study that found the costs of the Seattle paid leave law have been modest, stating: "[T]here is no evidence that the Ordinance caused employers to go out of business, and 70% of employers were either

"somewhat" or "very" supportive of the Ordinance."[48] They also cite a study by the Main Street Alliance of Washington that found "no evidence of widespread negative economic impacts."[49] Similarly, many commenters submitted a form letter that cites the Vice President of the San Francisco Chamber of Commerce saying that the San Francisco law's impact on employers was "minimal" (due to responses by employers that allow them to lower costs, such as having current employees cover for others using paid sick leave instead of hiring replacement labor).[50] These commenters also cited research finding that the Connecticut paid sick leave "law had a minimal impact on costs"[51] for employers. The Leadership Conference on Civil and Human Rights cited research showing that "CEOs support paid sick time 73 percent to 16 percent, and support 'more time off to take care of sick children or other relatives' 83 percent to 5 percent."[52]

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[48] Romich, J., Bignell, W., Brazg, T, Johnson, C., Mar, C., and et al. (2014). Implementation and Early Outcomes of the City of Seattle Paid Sick and Safe Time Ordinance. University of Washington. Available at: http://www.seattle.gov/Documents/Departments/CityAuditor/auditreports/PSSTOUWReportwAppendices.pdf.

[49] Main Street Alliance of Washington. (2013). Paid Sick Days and the Seattle Economy: Job Growth and Business Formation at the 1-year Anniversary of Seattle's Paid Sick and Safe Leave Law. Available at: http://www.seattle.gov/Documents/Departments/CivilRights/psst-report-main_street_alliance.pdf.

[50] Swarns, R. (2014). Despite Business Fears, Sick-Day Laws Like New York's Work Well Elsewhere. New York Times. Available at: http://www.nytimes.com/2014/01/27/nyregion/despite-business-fears-sick-day-laws-like-new-yorks-work-well-elsewhere.html.

[51] Appelbaum, E., Milkman, R., Elliott, L., and Kroeger, T. (2014). Good for Business? Connecticut's Paid Sick Leave Law. Center for Economic and Policy Research and The Murphy Institute at the City University of New York Publication. Available at: http://cepr.net/documents/good-for-buisness-2014-02-21.pdf.

[52] Bottari, M. (2016). Highlights of Luntz Poll of American CEOs Shows Broad Support for Progressive Policies, PRWatch, Center for Media and Democracy.

1. Regulatory Familiarization Costs

The Final Rule will impose direct costs on covered contractors by requiring them to review the regulation. The Department believes that all Federal contracting firms that have or expect to have covered contracts will incur regulatory familiarization costs because all establishments will need to determine whether they are in compliance. As explained above, in response to comments the Department revised the number of potentially affected contracting firms to include entities operating on Federal lands and property. See section V.B.ii. for a description of the number of these potentially affected contracting firms. The Department estimated in the NPRM, based on the GSA's SAM data in August 2015, that there were 543,900 Federal contracting firms.

In the NPRM the Department included contracting firms strictly providing materials and supplies to the government and other firms with no Federal contracts covered by the Executive Order because they may incur some regulatory familiarization costs.[53] However, the Department also noted that these firms may not incur regulatory familiarization costs, resulting in an overestimate of the number of potentially affected contractors. The Chamber/IFA wrote that the Department's estimate of regulatory familiarization costs is based on the assumption that "only successful contract bidders will incur familiarization cost." To clarify, our estimate includes firms that are registered in SAM but that do not have covered contracts. Thus, it includes most firms serious about bidding. The Chamber/IFA also wrote: "Even contractors exempt from the proposed rule for some reason will, first, have to review the regulation and their own book of

[53] In addition, at the time the NPRM was prepared, the Department had not developed a method to estimate and exclude firms strictly providing materials and supplies to the government and firms without Federal contracts. The Department has since devised a method to identify and exclude such firms which is done when estimating the number of contractors with affected employees.

contracts (and prospective bids) to make such a determination." The Department acknowledges these firms may still incur some minimal regulatory familiarization costs and has therefore included them in the estimate of potentially affected contactors.

In the NPRM the Department assumed one hour of a human resources manager's time will be spent reviewing the rulemaking. Some commenters believe this is an underestimate. The Chamber/IFA wrote "experience based on other recent regulations….shows that the initial familiarization process entails many hours of involvement by a variety of company executives, attorneys and consultants." TrueBlue, Inc. wrote: "We have already spent well more than [one hour] trying to decipher this rule." In response to these comments, the Department has increased this estimate to two hours per firm. The Department also notes that the time estimate is an average over all firms the Department has identified as potentially affected. As stated in the previous paragraph, the estimate includes firms expected to have very minimal or no regulatory familiarization costs such as contractors only holding or bidding on contracts for products. Thus, while some firms presumably will spend more than two hours on regulatory familiarization, the Department believes that the average amount of time potentially affected contractors will spend on regulatory familiarization is two hours.

The Chamber/IFA also wrote that "[t]here may be circumstances under which a familiarization effort may require repetition. For example, a large firm with decentralized contract teams, may find that multiple familiarization activities occur as different teams within the company make independent bid decisions on different contract opportunities." However, the commenters provided neither evidence of the prevalence of these circumstances nor an average number of teams per firm with these circumstances. The Department accordingly cannot

confirm how commonly, if at all, this scenario will occur. Even assuming it does, the Department lacks the data to make an estimate related to additional familiarization costs.

The cost of this time is the mean wage for a human resource manager of $82.17 per hour.[54] In the NPRM, based on 2014 data, this wage rate was $79.96. The Chamber/IFA believes this is too low because it does not include the "full economic opportunity cost." It suggests that a "practical approximation may be provided by the indirect overhead and profit mark-ups relative to direct labor cost that government contracts permit." Thus, the Chamber/IFA believes direct wages should be multiplied by 3.25 instead of the 1.46 used in the proposed rule.

The Department disagrees with the mark-up rate suggested by the Chamber/IFA because it is not appropriate to apply a load factor used on direct labor costs to indirect labor. That is, the markup rate suggested by the commenters includes indirect overhead labor (i.e., time for human resource workers), and it is inappropriate to mark-up that indirect cost (i.e., HR workers' wages) for indirect costs (e.g., additional HR time). The Department also disagrees with the mark-up rate suggested by the commenters because the relatively small costs of this rulemaking (relative to payroll or revenue, see section V.C.vii.) are likely to have little to no effect on the cost of overhead and support services in addition to the overhead costs estimated in this cost section. Most overhead costs are largely fixed and will be unaffected. For example, building rent, heat and electricity are unlikely to change. For these reasons, the Department has continued to use the NPRM mark-up rate in the Final Rule.[55]

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[54] This includes the mean base wage of $56.29 from the Occupational Employment Statistics (OES) 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. OES data available at: http://www.bls.gov/oes/current/oes113121.htm.

[55] The Department acknowledges that there might be overhead costs and thus conducted a sensitivity analysis using an additional overhead rate of 17 percent. This rate is based on a Chemical Manufacturers Association Study and has been used in the Environmental Protection

Therefore, for this Final Rule, the Department has estimated regulatory familiarization costs to be $80.4 million ($82.17 per hour x 2 hours x 489,400 contractors) (Table 9). The Department has included all regulatory familiarization costs in Year 1. We believe 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 (i.e., a new contract within one of the 4 covered categories). 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.

Table 9: Year 1 Costs

Variable	Regulatory Famil-iarization Costs	Initial Implemen-tation Costs (No Current Policy)	Initial Implemen-tation Costs (Current Policy)	Recurring Implemen-tation Costs	Recurring Admin-istrative Costs
Hours per potentially affected contractor	2	10	1	N/A	N/A
Hours per employee	N/A	N/A	N/A	1	0.33
Potentially affected contractors [a]	489,419	92,990	396,430	N/A	N/A
Newly affected employees	N/A	N/A	N/A	222,059	N/A
Total affected employees	N/A	N/A	N/A	N/A	222,059
Loaded wage rate	$82.17	$27.50	$27.50	$27.50	$27.50
Base wage [b]	*$56.29*	*$18.84*	*$18.84*	*$18.84*	*$18.84*

Agency's Final Rules (see for example, EPA Electronic Reporting under the Toxic Substances Control Act Final Rule, Supporting & Related Material). However, an overhead rate based on the chemical manufacturing industry may not be appropriate for all industries, and thus we present this estimate as an illustrative example. Adding an additional overhead rate of 17 percent would increase total costs (regulatory familiarization costs, implementation costs, and administrative costs) by $14.6 million in Year 1, an increase of 11.6 percent. As previously noted, the Department believes this overestimates the overhead costs attributable to this rulemaking, but recognizes that there is not a definitive approach to estimating the marginal cost of labor.

Benefits adj. factor [c]	*1.46*	*1.46*	*1.46*	*1.46*	*1.46*
Cost ($1,000s)	$80,427	$25,573	$10,902	$6,107	$2,036

[a] Total number of prime contractors from the GSA's SAM from August 2015 and subcontractors from USASpending.gov. Number of entities operating under covered contracts on Federal property from various sources. Total is split between firms with and without a sick leave policy based on results from a SHRM survey.
[b] Regulatory familiarization uses OES mean wage for human resource managers in 2015. Available at: http://www.bls.gov/oes/current/oes113121.htm. Other costs use OES mean wage for human resources assistants, except payroll and timekeeping in 2015. Available at: http://www.bls.gov/oes/current/oes434161.htm.
[c] Ratio of loaded wage to unloaded wage from the 2015 ECEC.

2. Implementation Costs

Firms will incur implementation costs. The Department believes some of these costs will be incurred in Year 1 and will occur regardless of the number of employees affected but other implementation costs will be incurred as employees become covered and be a function of the number of affected employees. Therefore, the Department modeled this in two parts. First, firms will incur upfront implementation costs (e.g., fixed time costs associated with making baseline adjustments to accounting and payroll software that are not dependent on the size of the firm). Second, because we believe overall implementation costs will generally vary with the size of the firm, we have included a cost per affected employee. Because this Final Rule will only apply to employees on new contracts, the Department estimates it will take approximately five years to phase in the coverage over nearly all affected employees. Therefore, recurring implementation costs will generally be spread over the first five years that the regulation is in effect, with some fixed costs upfront. As each contract becomes affected, the covered contractors will need to spend some time updating the accounting systems used to track paid sick leave and training managers responsible for implementing the requirements of the Executive Order and this rule.

Fixed costs that do not vary by number of employees are assumed to be a small share of total implementation costs but they provide an opportunity to vary costs across firms with and without sick leave programs in place. The Department assumed firms that need to create a sick leave policy will each spend 10 hours of time developing this policy, regardless of the number of employees, and firms with a program in place will spend one hour, regardless of the number of employees.[56] According to a survey conducted by the Society for Human Resource Management (SHRM), 81 percent of companies provided some form of paid sick leave.[57] As noted above, the Department estimated there are 489,400 Federal contracting firms. Therefore, the Department estimated 93,000 firms will need to create a sick leave policy (19 percent of 489,400 firms). The remaining 396,400 firms would have lower implementation costs. The share of firms with a system in place is consistent with findings from one study of the San Francisco paid sick leave ordinance that found "only one-sixth needed to introduce an entirely new paid sick days policy because of the law."[58] This is 16.7 percent, which is comparable to the SHRM estimate (19 percent) the Department used above.

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[56] When developing the NPRM the Department identified little applicable data from which to estimate the amount of time required to make these adjustments. One source, based on a small sample, finds the average one-time implementation costs ranged from zero to $125,000 with an average of 0.125 percent of revenue. See Romich, J., et al. (2014). Implementation and Early Outcomes of the City of Seattle Paid Sick and Safe Time Ordinance. However, the authors note: "These respondents are self-selected and too few to provide statistically representative data. However, their responses offer a qualitative sense of the range of possible costs."

[57] Society for Human Resource Management. (2008). Examining Paid Leave in the Workplace: Helping Your Organization Attract and Retain Talented Employees. SHRM reports are available based on more recent surveys, which indicate a greater proportion of firms have a paid sick leave program than the 81 percent figure used here. However, the newer estimates seem inconsistent with data from other sources concerning the prevalence of paid sick leave programs; because of this uncertainty, and to avoid a possible underestimate of implementation costs, the Department has relied here on the earlier SHRM report.

[58] Drago, R. and Lovell, V. (2011). San Francisco's Paid Sick Leave Ordinance: Outcomes for Employees and Employers. Institute for Women's Policy Research.

In addition to these fixed costs, all firms with affected employees will have additional implementation costs that vary based on the number of affected employees. The Department also assumed, as it did in the NPRM, that firms will spend one hour on implementation costs per newly affected employee. Total implementation costs are therefore a function of whether the firm has a system in place and the number of affected employees.

For this Final Rule, the Department has included a table demonstrating average implementation hours by contractor size. For a contractor with a current paid sick leave policy and 50 affected employees, we estimated they will spend 51 hours over five years implementing the program. We estimated that a contractor without a current paid sick leave policy and 50 affected employees will spend a total of 60 hours over five years implementing the program. Contractors with no affected employees are estimated to accrue just the fixed implementation costs. This includes covered contractors whose paid sick leave policies already provide for at least one hour of paid sick leave per 30 hours worked; contracting firms strictly providing materials and supplies to the government; and other firms registered in SAM with no Federal contracts covered by the Executive Order. This is an overestimate of the number of firms incurring fixed implementation costs; contracting firms only providing materials and supplies will incur no fixed implementation costs because they have no employees working on covered contracts and will not have to make any changes to their current systems. Thus, while some firms may spend more than one hour (or 10 hours depending on whether they currently have a system in place), other firms will spend less time; one hour (or 10 hours for a firm with no system) is used to approximate the average time spent for all of the potentially affected contracting firms.

Table 10: Implementation Hours by Employer Size Over 5 Years

Number of Affected Employees	Per Firm Hours for Implementation Over 5 Years	
	No Current Policy	Current Policy
1-5	11-15	2-6
6-10	16-20	7-11
11-20	21-30	12-21
21-50	31-60	22-51
51-100	61-110	52-101
101-500	111-510	102-501
501-1,000	511-1,010	502-1,001
1,001-2,000	1,011-2,010	1,002-2,001

The Department values this time using human resources worker's mean wage of $27.50 per hour.[59] Initial implementation costs in Year 1 were estimated to be $36.5 million ($27.50 per hour x 10 hours x 93,000 contractors plus $27.50 per hour x 1 hour x 396,400 contractors) (Table 9). The Department assumes recurring implementation costs will use one hour of a human resource worker's time per newly affected employee. As stated above, the Department found that the average wage with benefits for a human resources worker is $27.50 per hour. The estimated number of newly affected employees in Year 1 is 222,100 (Table 9). Therefore, total Year 1 recurring implementation costs were estimated to equal $6.1 million ($27.50 x 1 hour x 222,100 employees). The Chamber/IFA asserted that implementation will require the time of multiple employees at various levels within a company and thus a blended wage rate should be used. However, the Department believes a human resources worker is capable of performing the tasks necessary for a contractor to implement the Order and this part, and the Chamber provided no specific basis for computing a blended wage rate.

[59] This includes the mean base wage of $18.84 from the OES plus benefits paid at a rate of 46 percent of the base wage, as estimated from the BLS's ECEC data. OES data available at: http://www.bls.gov/oes/current/oes113121.htm.

The Chamber/IFA contended that affected employees were underestimated in the NPRM (as mentioned previously) and that this may cause costs to be underestimated. It expressed concern that the Department's "estimate is based only on consideration of numbers of employees who may currently lack access to 7 days of paid leave, and it ignores the impact on thousands more employees and their employers because current programs offering 7 or more days of leave fail to match other prescriptive details of the proposed rule." The Department's estimate of implementation costs in this Final Rule includes an hour of implementation time for contractors that currently offer 7 or more days of sick leave, i.e., the initial implementation cost. The Department believes the costs associated with changing a paid sick leave policy solely to meet the prescriptive details of the Order and implementing regulations will be minimal, particularly because some contractors likely provide an opportunity to take 7 or more days of paid sick leave in programs for which leave is already permitted for any reason, and that its one-hour estimate is accordingly appropriate.

As noted earlier, the Chamber/IFA also believes affected employees may be underestimated because the analysis assumes workers are working only on Federal contracts. This modeling method was retained in the Final Rule because the number of truly affected employees is unknown. The number of employees sharing work on Federal contracts will impact recurring costs; therefore the Department tried to take into account that this work may be spread over several employees when it estimated the amount of time per affected employee – i.e. per affected full-year-on-federal-contract equivalents -- necessary for implementation and administrative activities. If this has not been adequately reflected in the time cost estimates, and the costs used instead better represent costs per one worker working exclusively on Federal

contracts, then the total costs may be underestimated. Unfortunately, data are not available to determine whether this is true and if so, how much higher costs may be.

Various commenters, including AGC, the Chamber/IFA, TrueBlue, Inc., the American Benefits Council, PSC and Integrated Facility Services, also expressed a general concern that the Department's time estimates were low. For example, TrueBlue, Inc. asserted the time estimates are inaccurate because "[m]aking the necessary procedural, IT infrastructure, and administrative changes needed to accommodate and comply with the proposed rules is complicated, daunting, time-consuming, and leaves any employer open to making potentially costly mistakes." Additionally, the Chamber/IFA expressed a concern that the Department's estimate of the time allotted for implementation is insufficient for the amount of training required in a company to implement this regulation. However, the Department believes that the total hours estimated for implementation by companies, as demonstrated in Table 10 above, adequately covers any training, IT, and administrative time that might be necessary to implement any changes. Indeed, other commenters provided evidence from state and municipality laws that supports the Department's assessment concerning the size of implementation costs. For example, many commenters submitted a form letter that cites research finding that 70 percent of employers in the city of Seattle had experienced no administrative difficulties with implementation.[60] Another report found that in Connecticut almost half of employers reported that the new state law had

[60] Romich, Romich, J., Bignell, W., Brazg, T., Johnson, C., Mar, C., Morton, J., & Song, C. (2014). Implementation and Early Outcomes of the City of Seattle Paid Sick and Safe Time Ordinance. University of Washington Publication. Available at http://www.seattle.gov/Documents/Departments/CityAuditor/auditreports/PSSTOUWReportwAppendices.pdf.

caused no change in their overall costs.[61,62] Evidence from state and local laws is discussed in additional detail in the section on "Other Potential Costs."

The Department has carefully reviewed the comments suggesting its implementation costs estimate in the NPRM was too low as well as the comments suggesting that the Department's estimate in the NPRM was appropriate. For the reasons described above, the Department has not adjusted the implementation time estimates for this Final Rule.

3. Recurring Administrative Costs

Contractors may incur recurring administrative costs associated with maintaining records of paid sick leave, approving leave, and adjusting scheduling. In the NPRM the Department assumed an HR worker will spend on average an additional fifteen minutes per affected employee annually on administrative costs. We believe these costs will be relatively small because employers already have systems in place and already incur many of these costs for employees who take sick leave. For example, managers may need to adjust scheduling when workers take time off due to illness regardless of whether that sick leave is paid or unpaid. These costs should therefore reflect only the costs associated with the marginal number of days of leave taken due to the implementation of this Final Rule. The additional number of days of leave taken is unknown but estimates tend to be in the 1-to-2 day range. For example, Ahn and

[61] Appelbaum, E., et al. (2014). Good for Business? Connecticut's Paid Sick Leave Law. Center for Economic and Policy Research and The Murphy Institute at the City University of New York Publication. Available at: http://cepr.net/documents/good-for-buisness-2014-02-21.pdf.

[62] However, it should be noted that the Connecticut law may be easier to implement since it applies to all workers at a firm. Therefore, it does not necessitate tracking hours on different contracts.

Yelowitz (2016) found that paid sick leave results in workers staying home 1.2 more days a year.[63,64]

Many commenters, including the Chamber/IFA, PSC, American Outdoors Association and the National Roofing Contractors Association asserted the rule would be administratively burdensome and/or that the proposed cost is too low. For example, the Chamber/IFA believes the 15-minute estimate is too low because it does not include time for workers to enter their hours, and the National Roofing Contractors Association asserts that its members are concerned the paid sick leave mandate will disrupt their daily operations.

Other commenters discussed the high cost of tracking hours worked on Federal contracts. For example, SBA Advocacy contended construction industry representatives have represented that segregating covered federal work from non-federal work for the accrual of paid sick leave will be challenging because their employees often work at multiple locations for multiple clients. However, the Department believes that for billing and/or other purposes most businesses already track hours spent on work for different clients on different contracts. For example, hours worked by laborers and mechanics on DBA contracts must already be monitored and reported. SBA Advocacy believes this may be a concern for seasonal recreation businesses which it asserts "often have large numbers of part time workers and operate in remote locations, shifting from covered and non-covered work for multiple days."

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[63] Ahn, T. and Yelowitz, A. (2016). Paid Sick Leave and Absenteeism: The First Evidence from the U.S. Available at: http://ssrn.com/abstract=2740366.

[64] Using the ATUS 2011 Leave Module, the Department estimated workers with paid sick leave take on average an additional 2.3 hours of sick leave compared to workers with no paid sick leave annually. Using the National Health Interview Survey (NHIS) the Department found workers with paid sick leave took on average 0.77 more days of sick leave than did workers without paid sick leave.

Conversely, some commenters provided evidence from state and municipality laws demonstrating that administrative costs will be low. For example, many commenters cited a study of Connecticut's paid sick leave law that found employers "typically found that the administrative burden was minimal."[65,66] The study authors wrote: "In our fieldwork, some managers noted that it took time and effort to establish mechanisms to track employee hours for those receiving paid sick day coverage for the first time. However, once those mechanisms were in place, the staff required to administer the law was modest." Evidence from state and local laws is discussed in additional detail in the section on "Other Potential Costs." Additionally, some commenters drew upon their own experience as evidence that providing paid sick leave is not overly burdensome to implement. Hawthorne Auto Clinic has 33 years of experience providing sick leave to employees and wrote "[b]ased on our experience, I am confident that other businesses will find it simple to implement paid sick days policies."

The Department believes most employers already track employees' time and thus these costs would be negligible. The Department has also reduced both the frequency with which contractors must calculate covered employees' accrued paid sick leave, and the frequency with which contractors must inform covered employees of the paid sick leave they have accrued, as explained in the discussion of subpart A above. Therefore, the recurring administrative costs of this Final Rule will be lower than the proposed rule. However, despite that, the Department agrees with commenters that these administrative costs may be underestimated and has increased

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[65] Appelbaum, E., et al. (2014). Good for Business? Connecticut's Paid Sick Leave Law. Center for Economic and Policy Research and The Murphy Institute at the City University of New York Publication. Available at: http://cepr.net/documents/good-for-buisness-2014-02-21.pdf.

[66] However, it should be noted that the Connecticut law may be easier to implement since it applies to all workers at a firm. Therefore, it does not necessitate tracking hours on different contracts.

the time estimate from 15 minutes per affected employee to 20 minutes in order to be responsive to comments. The Department would like to emphasize this is the average amount of time per affected employee. Some employees may require more time; for example, employees whose requests are denied might require more administrative effort. However, many employees do not take any sick leave and their costs would be negligible. Based on tabulations of the 2014 National Health Interview Survey (NHIS) data, the Department estimated that 46.9 percent of workers with paid sick leave do not take any sick leave in a year.[67]

The cost of this time is estimated as the mean wage for a human resource worker of $27.50 per hour.[68] The Department estimates in Year 1 there will be 222,100 affected employees. Under these assumptions, administrative costs in Year 1 will total $2.0 million ($27.50 x (20 minutes/60 minutes) x 222,100 employees). Although these costs are relatively small in Year 1, they will occur annually and thus be a significant share of costs in the long run.

Some commenters, including the Chamber/IFA, argued this wage is inappropriate. However, the Chamber did not provide any evidence for what a more appropriate wage rate would be. Additionally, as noted earlier, the Chamber/IFA believes affected employees may be underestimated because we assume employees are working exclusively on Federal contracts. As noted in the section on implementation costs, because the number of truly affected employees is unknown, the Department considered costs related to the equivalent of one employee working exclusively on Federal contracts.

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[67] However, due to the additional uses allowed under this rulemaking and the provisions to prevent retaliation, use may be expanded due to this Final Rule.

[68] This includes the mean base wage of $18.84 from the 2015 OES plus benefits paid at a rate of 46 percent of the base wage, as estimated from the BLS's ECEC data. OES data available at: http://www.bls.gov/oes/current/oes113121.htm.

4. Projected Costs

Table 11 shows estimated costs for each of the first 10 years as well as average annualized costs over the same period. Regulatory familiarization and initial implementation costs will only accrue in Year 1. Recurring implementation costs are incurred over the first 5 years since the Department has estimated it will take five years for the universe of covered contracts to become "new." Recurring administrative costs accrue in all years. The annual administrative cost increases until Year 5 because the number of affected employees increases during this period. After Year 5, recurring administrative costs level off, with only a small increase over time to reflect employment growth.

When estimating projected costs the Department employed the same method used for Year 1 but used projected numbers of affected employees. The employment growth rate was calculated as the geometric annual growth rate based on the ten-year employment projection for 2014 to 2024 from BLS' Employment Projections program. Real wages for human resource managers and human resources assistants (except payroll and timekeeping) were assumed to remain constant over this ten-year period.

Table 11: Direct Employer Costs in Years 1 through 10 (Millions of 2015$)

Year/Discount Rate	Regulatory Famil. Costs	Initial Implementation Costs	Recurring Implementation Costs [a]	Recurring Administra-tive Costs	Total
Years 1 through 10					
Year 1	$80.4	$36.5	$6.1	$2.0	$125.0
Year 2	$0.0	$0.0	$6.4	$4.2	$10.5
Year 3	$0.0	$0.0	$6.4	$6.3	$12.7
Year 4	$0.0	$0.0	$6.4	$8.4	$14.8
Year 5	$0.0	$0.0	$6.4	$10.5	$16.9
Year 6	$0.0	$0.0	$0.0	$10.6	$10.6
Year 7	$0.0	$0.0	$0.0	$10.7	$10.7
Year 8	$0.0	$0.0	$0.0	$10.8	$10.8
Year 9	$0.0	$0.0	$0.0	$10.9	$10.9

Year 10	$0.0	$0.0	$0.0	$11.0	$11.0
Average Annualized Amounts					
3% discount rate	$9.2	$4.2	$3.4	$8.3	$25.0
7% discount rate	$10.7	$4.9	$3.7	$8.0	$27.3

[a] Recurring implementation costs are incurred for the first 5 years as since the Department has estimated it will take five years for the universe of possibly covered contracts to become "new."

5. Other Potential Costs

In addition to the costs discussed above, there may be additional costs that have not been quantified. These include the following potential costs included in the NPRM: costs to consumers, reduced production, and replacement costs. Based on similar rules in states and municipalities, the Department expects these costs to be small.[69] After discussing these costs we then discuss additional costs mentioned by commenters, including: costs to seasonal businesses, reduced profits, reduced benefits, bonuses, or wages, reduced employment, absenteeism, and competitive disadvantage.

Consumer costs

The relevant consumer is the Federal government. If the rulemaking increases employers' costs, 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. In FY2015, Federal expenditures for covered contracting service firms were $286.4 billion (Table 3). Employer costs and transfers (estimated below) in Year 5 (the year when all employees are affected) are estimated to be $473.6 million. Therefore,

[69] See: http://www.dol.gov/featured/PaidLeave/get-the-facts-sicktime.pdf.

employer costs are 0.17 percent of contracting revenue (assuming no growth in contracting expenditures and without accounting for the benefits of the Final Rule).

Concerning prices, the National Roofing Contractors Association wrote that paid sick leave costs "must be factored into the bids submitted for any federal contract and will add further to the already high degree of uncertainty to the bidding process." MCAA believes firms will "have to add high price contingencies to their bids or proposals to cover these new contingent risks." However, a study of Connecticut's paid sick leave law, cited by many commenters, found only 15.5 percent of employers reported increased prices.[70] Similarly, in San Francisco 10.9 percent of firms raised prices in response to paid sick leave.[71] Therefore, there is some evidence that increased costs will be passed on to the government in higher contract prices. However, the Department expects this price increase to be low because evidence shows a minority of firms raised prices and the cost of the rulemaking is a very small share of these firms' revenues.

Some commenters believe this rulemaking will reduce the efficiency of government contracting by increasing government contract prices or stifling competition. Roffman Horvitz PLC wrote "[t]he proposed regulation creates additional overhead contract costs that new government contractors simply cannot bear to absorb, creating further barriers to entry in the market." The National Roofing Contractors Association spoke with members who reported "they would consider not bidding at all on federal contracts" due to this rulemaking. Conversely, the Washington Center for Equitable Growth cited research evaluating Washington, D.C.'s

[70] Appelbaum, E., et al. (2014). Good for Business? Connecticut's Paid Sick Leave Law. Center for Economic and Policy Research and The Murphy Institute at the City University of New York Publication. Available at: http://cepr.net/documents/good-for-buisness-2014-02-21.pdf.

[71] Drago, R. and Lovell, V. (2011). San Francisco's Paid Sick Leave Ordinance: Outcomes for Employers and Employees. Institute for Women's Policy Research.

Accrued Sick and Safe Leave Act of 2008 that found that "[i]n 2013, the Office of the District of Columbia Auditor looked at the effects of the requirement and found no evidence that businesses opted to leave Washington or that it prevented new business formation in the District."[72,73] In order for competition to be stifled, costs would have to increase (and outweigh benefits) and not be passed along to the government. As noted above, we believe costs will be small on average and will be accompanied by benefits, and some costs will be passed along to the government, leaving little reason to restrain the vast majority of bidders.

Production costs

If the number of days of sick leave taken remains unchanged by the Final Rule, then production should not be affected by the rule. However, employees may take more sick days if the number of compensated sick days available increases or the scope of eligible reasons to take sick leave broadens; it is via this path that the Final Rule might result in production costs to employers. There is evidence that workers may take additional days of leave under this rulemaking.[74]

If these additional hours are not covered by a replacement worker, then the employer incurs costs associated with this lost production and the employee receives benefits associated

[72] Branche, Y. (2013). Audit of the Accrued Sick and Safe Leave Act of 2008. Washington, DC: Office of the District of Colombia Auditor. Available at: http://dcauditor.org/sites/default/files/DCA092013.pdf.

[73] Impacts of this rule may differ from D.C. because this law may result in employers having to distinguish between covered and non-covered workers. Additionally, the D.C. law required less paid sick leave, one hour for every 37 to 87 hours, depending on the size of the firm.

[74] Data suggest that workers may take more sick leave when it is paid. Using the ATUS 2011 Leave Module, the Department estimated workers with paid sick leave take on average an additional 2.3 hours of sick leave annually. Using the NHIS the Department found workers with paid sick leave took on average 0.77 more days of sick leave. Workers who already have paid sick leave may also expand their usage because of the additional uses allowed under this rulemaking and the provisions to prevent retaliation.

with the paid sick leave (expressed as a transfer from employer to employee in this rule). Payroll remains the same but the worker's production is lost. If a worker's productivity is equal to his or her wage, then the cost is equivalent to income paid to the worker in wages while on sick leave.

If employers bring in workers to cover these lost hours of production, then the additional cost (i.e., the replacement worker's wages) is offset because the employer does not lose the production attributed to the sick worker. In both cases, the employer incurs net costs equivalent to one worker's wage or productivity; either the employer pays the sick worker, but loses the sick worker's productivity, or the employer pays both the sick worker and the replacement worker, but does not lose the sick worker's productivity. In both cases, costs and benefits should offset each other, to the extent that workers are paid according to their marginal productivity, and the productivity of the replacement worker matches that of the original worker. Although these assumptions are not likely to be exactly met, conceptually small deviations from the assumptions should result in only small deviations of net costs or benefits. In addition, there are no data available on which to estimate these net costs or benefits.

Replacement costs

As demonstrated above, if the worker who takes sick leave is temporarily replaced by another worker, the marginal payroll cost of the additional worker is offset by the productivity of the replacement worker. Therefore, the Department estimates there will be very few additional costs associated with bringing in workers to cover work normally performed by workers on sick leave (in addition to the cost of paying the sick worker). However, there are four channels through which additional costs may be incurred if firms bring in replacement workers. These all stem from the assumption that workers take more leave when paid sick leave is provided. These costs will depend on whether firms hire new workers or reschedule current workers.

First, there are managerial costs associated with rescheduling; these are included in administrative costs. Second, if replacement workers are hired, then there may be associated hiring costs. The Department expects this cost to be small. A 2010 survey of employers providing paid sick days in San Francisco found 8.4 percent reported "always" or "frequently" hiring a replacement for a sick worker and 23.6 percent saying they "rarely" hire replacement workers.[75] Third, if other workers are scheduled at their overtime wage rate, then there may be some additional cost associated with the overtime premium. Once again, the Department expects this cost to be small. Many commenters cited a study of Connecticut's paid sick leave law that found 13.7 percent of employers had other workers work overtime to cover absences as the primary method of covering absences.[76] Fourth, if the replacement worker is paid the same amount as the absent worker but is less productive, then there may be some production costs.

Some commenters disagreed with the Department's analysis in the previous paragraph as it was depicted in the NPRM. For example, the National Roofing Contractors Association asserted that the Department's assumption means that a replacement worker would have to do the job of two people for this rationale to make sense. This was not an assumption made by the Department. The point of the discussion in the NPRM and above is that if an employer pays another worker to replace the sick worker, that employer does not incur any costs in addition to the transfers accounted for elsewhere in the Regulatory Impact Analysis section.

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[75] Drago, R. and Lovell, V. (2011). San Francisco's Paid Sick Leave Ordinance: Outcomes for Employers and Employees. Institute for Women's Policy Research.

[76] Appelbaum, E., et al. (2014). Good for Business? Connecticut's Paid Sick Leave Law. Center for Economic and Policy Research and The Murphy Institute at the City University of New York Publication. Page 11. Available at: http://cepr.net/documents/good-for-buisness-2014-02-21.pdf.

Reduced profits

Some commenters argued profits will be hurt. However, after the Seattle law took effect a majority of employers reported profitability was unchanged.[77] The Institute for Women's Policy Research cited the 2011 IWPR report on San Francisco's Paid Sick Leave Ordinance, which found that "Six of seven employers reported no negative effect on profitability after the law's implementation."[78] In part, this may be because costs were passed through to consumers or wages or other benefits to workers were reduced. However, the same survey found that only 10.9 percent of firms raised prices (as discussed above) and "[s]ix out of seven workers reported that their employer did not reduce raises, bonuses, or other benefits to implement" (benefits, bonuses, and wages are discussed below).[79] Therefore, it seems employers make adjustments through multiple channels to account for any increased costs.

Reduction in benefits, bonuses, and wages

Some commenters believe this benefit would be offset by reductions in other benefits, bonuses, or pay. A commenter from New Jersey wrote that requiring paid sick leave will "force them to look at alternatives to reduce other costs -- reduce vacation eligibility or other types of benefits OR reducing staff or hours worked." We believe these impacts will be negligible. A study of Connecticut's paid sick leave law found only one percent of establishments reduced

[77] Romich, J., et al. (2014). Implementation and Early Outcomes of the City of Seattle Paid Sick and Safe Time Ordinance. University of Washington. Available at: http://www.seattle.gov/Documents/Departments/CityAuditor/auditreports/PSSTOUWReportwAppendices.pdf.

[78] Drago, R. and Lovell, V. (2011). San Francisco's Paid Sick Leave Ordinance: Outcomes for Employers and Employees. Institute for Women's Policy Research.

[79] Drago, R. and Lovell, V. (2011). San Francisco's Paid Sick Leave Ordinance: Outcomes for Employers and Employees. Institute for Women's Policy Research.

wages within the time period of the analysis.[80] And as noted in the survey discussed above, according to workers, employers generally did not reduce benefits, raises, or bonuses as a result of the San Francisco Ordinance.

Reduction in employment

Some commenters believe this benefit will hurt employment or hours. One small business owner believes this rule will cause lay-offs. A manager of a seasonal recreational business believes the increased costs will result in employment cuts, in particular for youth. The Department believes any impact on employment will be small due to case studies of paid sick leave and the small size of costs relative to these contractors' payroll and revenue. For example, a study of Connecticut's paid sick leave law found that approximately 90 percent of employers did not reduce employee hours.[81] Furthermore, in Seattle, job growth was stronger in 2013 after the Ordinance went into effect than it was in the first part of 2012. The Department does, however, account for some decreased hours in the model in the DWL calculation (section V.C.iv.).[82]

Work absences

Some commenters expressed concern that the rulemaking will increase workers' absences. This is especially a concern to employers when the absences are considered abuse of

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[80] Appelbaum, E., et al. (2014). Good for Business? Connecticut's Paid Sick Leave Law. Center for Economic and Policy Research and The Murphy Institute at the City University of New York Publication. Page 13. Available at: http://cepr.net/documents/good-for-buisness-2014-02-21.pdf.

[81] Appelbaum, E., et al. (2014). Good for Business? Connecticut's Paid Sick Leave Law. Center for Economic and Policy Research and The Murphy Institute at the City University of New York Publication. Page 13. Available at: http://cepr.net/documents/good-for-buisness-2014-02-21.pdf.

[82] Main Street Alliance of Washington. (2013). Paid Sick Days and the Seattle Economy: Job Growth and Business Formation at the 1-year Anniversary of Seattle's Paid Sick and Safe Leave Law. Available at: http://www.seattle.gov/Documents/Departments/CivilRights/psst-report-main_street_alliance.pdf.

the policy. AGC asserted its member contractors working in Massachusetts have noticed questionable uses of paid sick leave since the state adopted a paid leave mandate. They also cited research by Ahn and Yelowitz (2016)[83] showing that paid sick leave increases absenteeism by 1.2 days a year.[84] They also noted that absenteeism in the construction industry causes unique challenges because cost and schedule concerns are highly dependent on labor productivity. This issue is discussed in more detail in section V.C.vii.

The Department agrees the rulemaking will likely increase days away from the office because workers may stay home more often when sick or to care for sick family members. This is an intended result of the rulemaking, and the Department expects the benefits from increased access to paid sick leave to partially offset increased costs . Moreover, there is little evidence of employees abusing paid sick leave.

According to a study of Connecticut's paid sick leave law, managers commented that "the level of abuse was not only low, but [had] not changed at all after the state law's implementation."[85] The Department also believes abuse is uncommon because most workers with paid sick leave do not take all of their paid sick days and a significant portion of workers do not take any paid sick leave.[86]

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[83] Ahn, T. and Yelowitz, A. (2016). Paid Sick Leave and Absenteeism: The First Evidence from the U.S. Available at: http://ssrn.com/abstract=2740366.

[84] The authors measure "absenteeism" as the amount of sick leave taken from one's job, regardless of the reason. The Department chose to not use this result to calculate quantitative estimates of impacts for various reasons, including that the estimate is based on administrative workers and thus may not be applicable to all workers.

[85] Appelbaum, E., et al. (2014). Good for Business? Connecticut's Paid Sick Leave Law. Center for Economic and Policy Research and The Murphy Institute at the City University of New York Publication. Available at: http://cepr.net/documents/good-for-buisness-2014-02-21.pdf.

[86] Based on tabulations of the 2014 NHIS, the Department estimated that 46.9 percent of workers with paid sick leave do not take any sick leave in a year.

Competitive disadvantage

According to the American Benefits Council:

> Providing mandatory paid leave will increase costs of doing business, but the requirements – and increased costs – apply only to those businesses providing services to the federal government. A business operating in a federal building must provide the paid leave; its competitor down the street need not. This puts the business in the federal building at a financial disadvantage. It cannot simply request that the government pay for the increased costs. In these types of contracts, the contractor remits a portion of its proceeds to the government. The federal building business can increase its prices (although some contracts with the government limit the business's ability to do so) and hope that the price increase does not drive customers away. The federal building business can cut costs in other ways – decreasing staffing levels or reducing service options. Or, the federal building business can decide to cease operating in a federal building.

The Department reiterates that the costs of this Final Rule are expected to be small relative to payroll and revenue. Therefore, even if the contractor incurs additional costs they should be incorporated by small adjustments to prices, profits, wages, or hours (as discussed above). Additionally, because the Final Rule only applies to new contracts, the bidder can potentially restructure its contractual relationship in order to be able to incur the potentially higher costs without making these adjustments. The Department believes contractors will find the most efficient combination of adjustments.

The Chamber/IFA considered competitive disadvantage from a different angle: "The proposed rule may raise costs for contractors who need to create new or modify existing paid sick leave programs and put them at a contract bidding disadvantage compared to firms that already have such plans in place." However, it is the contractor who may presently avoid the costs of providing sick leave to employees that has a competitive advantage; requiring contractors to provide paid sick leave removes that advantage. Indeed, as the U.S. Women's Chamber of Commerce commented: "Requiring more businesses to provide paid sick leave will

help level the playing field for those business owners who are doing the right thing for their workers."

DLA Piper asked whether the Department considered the impact of the proposed rule on commercial item contractors and barriers to participation. As an initial matter, the Department recognizes that some commercial items contracts may be covered by the Executive Order and part 13 because they cover contracts covered by the SCA, which may apply in certain circumstances to contracts for commercial services. See, e.g., 48 CFR 52.212-5(c). However, a significant portion of commercial items contracts will not be covered by the Order and part 13. First, the paid sick leave requirements do not apply to commercial supply contracts subject to the Walsh-Healey Public Contracts Act. Second, unless covered under one of the other contract categories in the Order (such as concession contracts), the Final Rule will not apply to contracts for services that are specifically exempted from coverage under the SCA, including those commercial services listed in 29 CFR 4.123(e). For the reasons discussed above, the Department's conclusions regarding the benefits and costs associated with other contractors implementing the Order are similarly applicable to any commercial items contracts subject to the Order and this Final Rule.

iii. Transfer Payments

1. Calculating Transfer Payments

To calculate transfer payments, the Department has assumed solely for purposes of discussion and ease of presentation that no offsetting cost- and productivity-related benefits will be realized as a result of the Executive Order and this Final Rule. As discussed in section V.C.v., however, numerous benefits of providing paid sick leave under the Executive Order can be expected to accompany the transfer payments and other costs discussed above.

The most important factor in determining transfer payments is the number of additional days of paid sick leave for which employees will be compensated. In order to estimate transfer payments the Department needed to:

- Assign a monetary value to these days of paid sick leave taken; and
- Determine what share of the additional 968,000 days of paid sick leave accrued (calculated above in section V.B.iv.) will be taken.

The Final Rule requires contractors to provide an employee the same pay and benefits for hours of paid sick leave used that the employee would have received had he been working. Thus, the Department needed to estimate both a base hourly wage for affected employees and a base hourly benefit rate. The Department assumed an 8-hour work day to place a monetary value on the transfer payment associated with a day of paid sick leave used. The Department used data from the 2015 CPS to estimate base hourly wage rates by industry and full-time status. The SCA nationwide fringe benefit rate, which applies to most contracts covered by the SCA, currently is $4.27 per hour. Because many of the contracts covered by the Executive Order will be subject to the SCA, and many employees performing on or in connection with contracts covered by the Executive Order but not covered by the SCA will nonetheless be performing service-related work similar in character to work performed by SCA-covered service employees, the Department estimated that most affected employees will average a base hourly benefit rate of $4.27. The exception is the construction industry, for which the Department used the benefits to wage ratio from the ECEC for the construction industry (1.45) because employees in the

construction industry will be performing on or in connection with DBA contracts rather than SCA contracts.[87]

Although the Executive Order will allow employees to accrue up to 56 hours of paid sick leave annually, many employees will not use all paid sick leave that they accrue (and many others will not work a sufficient number of hours on covered contracts to accrue 56 hours of paid sick leave in an accrual year). If employees take less than the full amount of paid sick leave accrued, then transfer payments should include only some of the additional days accrued. The Department expects employees on average to use fewer days than allocated. To estimate the share of accrued days employees will use, the Department used data from the 2015 NCS and ECEC by industry (provided by the BLS and reported in Table 12). While the numbers vary by industry, over all industries employees with paid sick leave take an average of 4 days of sick leave annually.[88] Employees with access to a fixed number of paid sick leave days per year accrued an average of 8 days annually. Dividing the average days of paid sick leave taken by the average days of paid sick leave accrued annually, the Department estimated that employees use on average 50 percent of days allotted. This may be an overestimate in Year 1 when employees may have fewer days available since they will not start to accrue paid sick leave until they commence work on a covered contract, nor will they carry over any days from the previous year.[89] This could also be an underestimate because the additional uses allowed under this

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[87] For full-time construction workers benefits are estimated to be $10.06 per hour (45 percent of $22.47). For part-time construction workers benefits are estimated to be $7.94 per hour (45 percent of $17.74).

[88] BLS calculated this using the ECEC data based on workers in paid sick leave plans where a cost was incurred by the employer in the reference period.

[89] This assumes employees with sick leave in the NCS are allowed to carry over sick days. The larger the share of these employees without carryover privileges, the more appropriate the number is for Year 1 and the less appropriate it is for future years.

rulemaking and the provisions to prevent retaliation, may result in expanded use for employees who already have paid sick leave.

Case studies demonstrate that not all paid sick days will be taken. In a comment by the Institute for Women's Policy Research, the organization cited the 2011 IWPR report on San Francisco's Paid Sick Leave Ordinance that found that the average worker used only three paid sick days per year and 25 percent used no paid sick days at all.[90]

Table 12: Ratio of Days of Sick Leave Available That Are Taken

Industry	Average Number of Days [a]		Ratio of Days Available Taken	Total Additional Days of Paid Sick Leave	
	Available	Taken		Available	Taken
Agriculture, forestry, fishing… [b]	--	--	0.50	349	174
Mining	27	2	0.07	162	12
Utilities	21	6	0.29	1,823	521
Construction	6	2	0.33	111,849	37,283
Manufacturing	8	3	0.38	29,961	11,235
Wholesale trade	8	3	0.38	526	197
Retail trade	6	2	0.33	70,740	23,580
Transportation and warehousing	9	4	0.44	70,509	31,337
Information	9	4	0.44	7,231	3,214
Finance and insurance	12	5	0.42	9,130	3,804
Real estate and rental and leasing	6	4	0.67	376	251
Professional, scientific, and…	8	4	0.50	254,562	127,281
Management of companies and…	12	4	0.33	0	0
Administrative and waste services	8	2	0.25	263,752	65,938
Educational services	11	5	0.45	10,488	4,767
Health care and social assistance	8	4	0.50	79,304	39,652
Arts, entertainment, and recreation	6	3	0.50	9,231	4,616
Accommodation and food services	6	2	0.33	39,016	13,005
Other services	8	3	0.38	9,007	3,378
Total private [c]	**8**	**4**	**0.50**	**968,017**	**370,246**

[90] Drago, R. and Lovell, V. (2011). San Francisco's Paid Sick Leave Ordinance: Outcomes for Employers and Employees. Institute for Women's Policy Research.

[a] For this Final Rule the BLS provided this breakdown using NCS and ECEC data for industries with sufficient observations to meet their publication criteria.
[b] NCS does not include information for this industry. Used average across all private employees.
[c] Total additional days of paid sick leave taken is not equal to the number of paid sick leave days available multiplied by the share of 50 percent. This is because the analysis was conducted at the industry level and days were aggregated to estimate the total. Due to rounding by the BLS of the number of days, the aggregated total number of days taken and the total using aggregated number of days available and taken differ.

Therefore, of the 968,000 days of additional paid sick leave accrued, 370,200 days are estimated to be taken and result in transfer payments (see Table 12). Using wage data by industry results in Year 1 transfer payments of $85.5 million (Table 13). This is 0.03 percent of revenue from Federal contracts for these contractors (since many covered contractors garner revenue from private work, the transfer payment estimate is almost certainly a lower percentage of their total revenues). If all days of paid sick leave were used, transfers would be $214.4 million in Year 1 or 0.07 percent of Federal contracting revenues.

Table 13: Transfer Payments in Year 1

Industry	NAICS	Transfer ($1,000s)	Covered Contracting Revenue (Millions) [a]	Transfer as Share of Contracting Revenue
Agriculture, forestry, fishing and…	11	$28	$339	0.01%
Mining	21	$3	$105	0.00%
Utilities	22	$142	$3,043	0.00%
Construction	23	$9,565	$24,194	0.04%
Manufacturing	31-33	$2,558	$20,703	0.01%
Wholesale trade	42	$44	$254	0.02%
Retail trade	44-45	$3,869	$1,263	0.31%
Transportation and warehousing	48-49	$6,501	$11,005	0.06%
Information	51	$793	$8,146	0.01%
Finance and insurance	52	$981	$18,734	0.01%
Real estate and rental and leasing	53	$55	$1,174	0.00%
Professional, scientific, and…	54	$36,531	$136,870	0.03%
Management of companies and…	55	$0	$0	0.01%

Administrative and waste services	56	$11,660	$29,781	0.04%
Educational services	61	$1,040	$4,290	0.02%
Health care and social assistance	62	$8,438	$22,845	0.04%
Arts, entertainment, and recreation	71	$816	$103	0.79%
Accommodation and food services	72	$1,870	$1,161	0.16%
Other services	81	$615	$2,387	0.03%
Total private	--	**$85,508**	**$286,396**	**0.03%**

[a] Source: USASpending.gov. Contracting expenditures for covered contracts.

To estimate transfers beyond year 1, the Department projected employment and wage growth. The employment growth rate was calculated as the geometric annual growth rate based on the ten-year employment projection for 2014 to 2024 from BLS' (as discussed in section V.B.iv.). The Department calculated the average annual geometric growth rate in median nominal wages from CPS data between 2005 and 2015. The geometric growth rate is the constant annual growth rate that when compounded yields the last historical year's wage. The CPI-U was then used to convert this nominal growth rate to a real growth rate.

The real growth rate for benefit payments was calculated using the geometric growth rate in nominal SCA benefit rates between 2006 and 2015 and converted to a real rate using the CPI-U.[91] For projected transfers the Department employed the same method used for Year 1 but used the projected number of employees and wages. Table 14 shows projected transfers through Year 10. It also contains average annualized transfers using both 3 percent and 7 percent discount rates.

If some contracts last longer than 5 years, then not all contracts will be covered by Year 5 and transfers will accrue more slowly. In general, the Department believes most contracts will

[91] The Department calculated how estimates would change if we used the GDP deflator instead of the CPI-U to adjust wages and benefits. The differences are small. Average annualized transfers would increase by 0.89% from $349.6 million to $352.7 (costs would not change).

renew within five years but notes that some contracts, such as contracts for concessions and operations on federal lands may last longer than five years.

Table 14: Transfers in Years 1 through 10

Year/Discount Rate	Transfers (Millions of 2015$)
Years 1 through 10	
Year 1	$85.5
Year 2	$176.2
Year 3	$268.3
Year 4	$361.8
Year 5	$456.7
Year 6	$464.4
Year 7	$472.2
Year 8	$480.2
Year 9	$488.4
Year 10	$496.8
Average Annualized Amounts	
3% discount rate	$364.1
7% discount rate	$349.6

2. Additional Considerations

The Department based its method of calculating transfers on the number of employees working exclusively on Federal contracts. To the extent that Federal contract work is split between employees, these transfer estimates may be over- or underestimates. The current method attributes all hours worked on a Federal contract to one employee. For example, if that employee currently receives five paid sick leave days per year, he or she would receive a transfer of two additional days of paid sick leave. If instead half this work was completed by one employee and half by another employee, the Executive Order would require that each receive 3.5 sick days per year; however, since each employee already receives 5 days of paid sick leave, there would be no incremental transfer. The Department estimated that the maximum size of the

overestimate due to the assumption of employees working exclusively on Federal contracts is $27.0 million in Year 1 (31.6 percent of the $85.5 million in total transfers).[92] Conversely, if this work is spread across multiple employees, and these employees currently do not receive any paid sick leave, and the propensity to take the paid sick leave diminishes with the number of days, then this methodology could result in an underestimate of transfers.

Another consideration is that some of the transfers may be reduced by employer responses to the rule. Employers may reduce vacation time, reduce wages, or increase health insurance premiums in order to diminish some of their increased costs. (These outcomes may be unlikely in the short run due to stickiness of compensation.) Employers may also reallocate days of leave to keep total benefits the same. For example, an employer that used to provide 5 sick days and 5 vacation days could now provide 5 sick days, 3 vacation days, and 2 days that can be used for any purpose. This would leave exactly zero employer-employee transfer because an employee could take 7 days paid sick leave if necessary but could still only take a maximum of 5 days of vacation. (Provided the policy met the requirements of section 2 of the Order and this Final Rule and employees could use accrued paid sick leave and the 2 "any-purpose" days for the same purposes and under the same conditions as described in the Order and this Final Rule, the employer would be in compliance and transfers would be zero).

Some commenters expressed concern that because monitoring hours worked on Federal contracts will be very burdensome employers may provide paid sick leave to all workers for all hours worked in order to reduce the monitoring costs. For example, the ERISA Industry Committee asserted that many large employers are likely to apply the Executive Order's requirements to a larger group than what is mandated by the Executive Order to reduce the risk

[92] The maximum possible overestimate was calculated by eliminating transfers associated with employees who currently receive any paid sick leave.

of excluding covered employees. However, benefits potentially provided to workers on non-covered contracts are not quantified.

Transfer payments were calculated assuming paid sick leave is accrued for all 52 weeks of the year. If workers take paid sick leave or other leave, and do not accrue hours while on leave, then transfers may be slightly lower. The impact for full-time employees will be negligible. An employee who works 40 hours per week will reach the 56 hour cap after 42 weeks of work. Therefore, they will reach the cap regardless of whether paid sick leave is accrued while on leave. For part-time employees, hours of accrual are slightly overestimated. For example, an employee who works 25 hours per week will accrue 43.3 hours of paid sick leave annually (assuming no leave). If this worker takes a week of sick leave, and paid sick leave is not accrued during this week, then they will accrue 0.8 fewer hours of paid sick leave (25/30). If this worker also took two weeks of vacation, they would accrue 1.7 fewer hours of paid sick leave ((25x2)/30).

iv. Deadweight Loss

Deadweight loss (DWL) occurs when a market operates at less than optimal equilibrium output. This typically results from an intervention that sets, in the case of a labor market, compensation above the equilibrium level.[93] The higher cost of labor leads to a decrease in the total number of labor hours that are purchased on the market. DWL is a function of the difference between the compensation the employers were willing to pay for the hours lost and the compensation employees were willing to take for those hours. In other words, DWL represents the total loss in economic surplus resulting from a "wedge" between the employer's

[93] The estimate of DWL assumes the market meets the theoretical conditions for an efficient market in the absence of this intervention (e.g., all conditions of a perfectly competitive market hold: full information, no barriers to entry, etc.). Since labor markets are generally not perfectly competitive, this estimate is necessarily imprecise.

willingness to pay and the employee's willingness to accept work arising from the Final Rule. DWL may vary in magnitude depending on market parameters, but it is typically small when wage changes are small or when labor supply and labor demand are relatively inelastic with respect to compensation.

The DWL resulting from this Final Rule was estimated based on the average decrease in hours worked and increase in average hourly compensation (again, without accounting for offsetting benefits of the Executive Order and the Final Rule). As the cost of labor rises due to the requirement to pay sick leave, the quantity of labor demanded decreases, which results in fewer hours worked. To calculate the DWL, the annual increase in compensation (i.e., transfers per worker) was divided by the total number of hours worked to estimate the average hourly increase in compensation.[94] Using the estimated percent change in compensation and the elasticity of labor demand with respect to wage (as a proxy for compensation), the Department estimated the percent decrease in average hours per employee.[95] To estimate the percent decrease in average hourly wages associated with labor supply, the Department used the decrease

[94] For the purposes of the DWL calculation, we treat the increase in employee benefits resulting from the paid leave requirement as if it were equivalent to an increase in employees' hourly wage. This is necessary because the parameters needed to evaluate the DWL (i.e., the wage elasticities) are expressed strictly in terms of wages. However, to the extent that employers may replace ("crowd out") some of their employees' wages with the required paid sick benefit, this will result in an overestimate of DWL. (It may also change the nature of the DWL in ways not captured by this numerical analysis.)

[95] An elasticity of -0.2 was used based on the Department's analysis of Lichter, A., Peichl, A., and Siegloch, A. (2014). The Own-Wage Elasticity of Labor Demand: A Meta-Regression Analysis. IZA DP No. 7958.

in average hours per employee and the elasticity of labor supply with respect to wage (again, as a proxy for compensation).[96]

Using these values the Department calculated DWL per affected employee (Table 15). This was multiplied by the number of affected employees to estimate total DWL; $182,900 in Year 1. Projected DWL is shown in Table 16. Average annualized DWL during the first ten years the rule is in effect is estimated to be $734,500.

[96] An elasticity of 0.15 was used based on a literature review and specifically results from Bargain, O., Orsini, K., and Peichl, A. (2011). Labor Supply Elasticities in Europe and the US. IZA DP No. 5820.

Table 15: Deadweight Loss Calculation

Industry	Average Base Hourly Wage	Percent Change in Wage from Base [a]		Average Annual Hours per Employee	Percent Change in Hours	DWL per Affected Employee	Affected Employees	Total DWL
		Change in Ld Wage	Change in Ls Wage					
Ag., forestry, fish. and hunting	$15.96	1.48%	-1.98%	2,182	-0.30%	$1.79	58	$104
Mining	$28.79	0.12%	-0.16%	2,473	-0.02%	$0.02	39	$1
Utilities	$29.67	0.75%	-1.00%	2,172	-0.15%	$0.84	294	$247
Construction	$22.06	1.01%	-1.35%	2,126	-0.20%	$1.12	20,280	$22,728
Manufacturing	$24.16	0.78%	-1.04%	2,157	-0.16%	$0.74	6,372	$4,718
Wholesale trade	$23.59	0.67%	-0.89%	2,151	-0.13%	$0.53	133	$71
Retail trade	$16.14	0.82%	-1.10%	1,804	-0.16%	$0.46	16,709	$7,690
Transportation and warehousing	$21.56	0.90%	-1.20%	2,165	-0.18%	$0.89	15,609	$13,826
Information	$27.13	0.61%	-0.82%	1,971	-0.12%	$0.47	2,587	$1,218
Finance and insurance	$28.10	0.69%	-0.93%	2,083	-0.14%	$0.66	2,484	$1,636
Real estate and rental and leasing	$23.17	1.38%	-1.85%	1,949	-0.28%	$2.02	95	$192
Prof., sci., and tech. services	$31.73	0.83%	-1.11%	2,044	-0.17%	$1.05	72,713	$76,026
Management of companies…	$27.40	0.47%	-0.62%	2,104	-0.09%	$0.29	0	$0
Administrative and waste services	$17.67	0.68%	-0.91%	1,957	-0.14%	$0.37	50,648	$18,913
Educational services	$22.78	1.26%	-1.68%	1,601	-0.25%	$1.36	2,456	$3,329
Health care and social assistance	$22.33	1.10%	-1.47%	1,877	-0.22%	$1.19	19,587	$23,260
Arts, entertainment, and recreation	$17.40	1.33%	-1.77%	1,680	-0.27%	$1.21	2,184	$2,634
Accommodation and food services	$13.52	1.08%	-1.44%	1,721	-0.22%	$0.63	7,718	$4,889
Other services	$18.33	0.95%	-1.26%	1,803	-0.19%	$0.69	2,092	$1,451
Total private							**222,059**	**$182,934**

[a] This is the change in the wage rate associated with the labor supply (Ls) or labor demand (Ld) curve and the new level of hours.

Table 16: DWL in Years 1 through 10

Year/Discount Rate	DWL (Millions of 2015$)
Years 1 through 10	
Year 1	$0.18
Year 2	$0.38
Year 3	$0.57
Year 4	$0.77
Year 5	$0.96
Year 6	$0.98
Year 7	$0.99
Year 8	$1.00
Year 9	$1.01
Year 10	$1.03
Average Annualized Amounts	
3% discount rate	$0.76
7% discount rate	$0.73

v. Benefits

There are a variety of benefits associated with this rule; however, due to data limitations these are not monetized. The following benefits were discussed qualitatively in the NPRM: improved employee health, improved health of dependents, increased productivity, reduced hiring costs, decreased healthcare expenditures, improved firm profits and decreased government expenditures relative to what would be expected if the rule's costs and transfer impacts were considered in isolation, and job growth. The first part of this section considers these benefits and related comments. The second part of this section considers benefits discussed by commenters that were not included in the benefits section of the NPRM RIA.

1. Benefits Discussed Qualitatively in the NPRM

<u>Improved employee health</u>

Multiple studies have shown that paid sick leave greatly reduces the chance of employee injury and/or exposure to illness. When sick employees attend their jobs, they engage in a practice known as "presenteeism." Presenteeism is detrimental to productivity, and increases the probability of workplace injury and illness, resulting in greater employer and employee costs. In one study from the American Journal of Public Health, which many commenters cited, researchers used data from multiple industries (construction, retail, manufacturing, health care, etc.) to show that employees with access to paid sick leave were 28 percent less likely to incur a non-fatal work injury than their counterparts without paid sick leave.[97]

In a similar study, data from the outbreak of the 2009 H1N1 pandemic showed that individuals who were not paid for absences had a 4.4 percentage point greater change of contracting an influenza-type illness than those with sick leave pay (9.2 percent versus 13.6 percent; only the rate for workers without paid leave is statistically significant at the 10 percent level).[98] A study of Connecticut's paid sick leave law, cited by many commenters, found 18.8 percent of employers reported reduced presenteeism and 14.8 percent reported a reduction in spread of illness.[99]

Diminishing presenteeism by providing paid sick leave can be expected to have positive impacts on employee health, as it would reduce the possibility that sick employees could potentially expose their colleagues to infection or disease. Studies have linked the incidence of

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[97] Asfaw, A, Pana-Cryan, R., and Rosa, R. (2012). Paid Sick Leave and Nonfatal Occupational Injuries. American Journal of Public Health, 102(9), e59-e64.

[98] Kumar, S., Quinn, S.C., Kim, K.H., Daniel, L.H., and Freimuth, V.S. (2011) The Impact of Workplace Policies and Other Social Factors on Self-Reported Influenza-like Illness Incidence During the 2009 H1N1 Pandemic. American Journal of Public Health, 102(1), 134-140.

[99] Appelbaum, E., et al. (2014). Good for Business? Connecticut's Paid Sick Leave Law. Center for Economic and Policy Research and The Murphy Institute at the City University of New York Publication. Available at: http://cepr.net/documents/good-for-buisness-2014-02-21.pdf.

presenteeism to a lack of paid sick leave. For instance, a 2010 survey found that 37 percent of the working respondents who had paid sick leave, had attended work with a contagious illness.[100] Meanwhile, 55 percent of employees with no paid sick leave had attended work with a contagious illness.[101]

Many commenters discussed the health benefits of paid leave. In particular, commenters stressed the reduction in the spreading of contagious illnesses. The Iowa Main Street Alliance wrote: "Our businesses know that when employees stay home rather than reporting to work sick, their co-workers and customers stay healthy. Preventing the spread of illness in the workplace saves money." Many form letter submissions cited studies demonstrating how paid sick leave reduces the prevalence of presenteeism and prevents spreading illnesses. The first is a national survey that found "87 percent of employers reported that employees had come to work with short-term, easily spread illnesses such as a cold or the flu."[102] The second reported that "people without paid sick time are 1.5 times more likely than people with paid sick time to go to work with a contagious illness like the flu."[103] The third examined Google flu data from 2003 to 2015 and found "that when workers gained access to paid sick days, the number of workers going to

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[100] Smith, T.W. and Kim, J. (2010). Paid Sick Days: Attitude and Experiences. Public Welfare Foundation.

[101] These proportions are suggestive of a difference between employees with and without paid sick leave, but no standard errors or sample sizes were provided to determine if these are statistically significantly different proportions.

[102] Wolters Kluwer Law & Business. (2008). On the Job, But Out of It? CCH Survey Looks At Ill Effects of Sick Employees At Work. Available at: http://www.cch.com/press/news/2008/20080110h.asp.

[103] Smith, T. W. and Kim, J. (2010). Paid Sick Days: Attitudes and Experiences. National Opinion Research Center at the University of Chicago Publication.

work with contagious illnesses decreased, causing infection rates to decrease by up to 20 percent."[104]

Contagious illnesses in industries where employees interact with the public may be especially problematic. One commenter in particular mentioned the Chipotle Mexican Grill case.[105] According to NELP, "[t]he poultry industry receives hundreds of millions of dollars in federal contracts…The lack of paid sick leave [in the industry], and the widespread use of putative sick leave policies, often means workers are required to choose between their health and their employment. This has serious implications not only for workers, but may also impact the safety of our food."[106] NELP and the Nebraska Appleseed Center for Law in the Public Interest cited a survey that found 62 percent of workers reported they have gone to work while sick. When asked why they had gone to work sick, 77 percent responded they did not have paid sick leave and needed the money.[107]

Improved health of dependents

Another potential positive impact of the Final Rule is its indirect effect on the health of an employee's dependents (particularly children). Paid leave has a substantial impact on parents'

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[104] Pichler, S., and Ziebarth, N. R. (2015). The Pros and Cons of Sick Pay Schemes: Testing for Contagious Presenteeism and Shirking Behavior. Deutsches Institut für Wirtschaftsforschung Publication. Available at: http://www.diw.de/documents/publikationen/73/diw_01.c.514633.de/dp1509.pdf.

[105] The commenter did not elaborate but for context, this refers to sick employees attending work which led to two norovirus outbreaks. For more information see: http://www.cnbc.com/2016/02/08/chipotle-blames-norovirus-outbreaks-on-sick-employees.html.

[106] However, the Department notes that poultry industry contracts with the Federal government may not be covered by this rulemaking because it does not cover contracts for commercial items subject to the Walsh-Healey Public Contracts Act.

[107] Northwest Arkansas Workers' Justice Center. (2016). Wages and Working Conditions in Arkansas Poultry Plants. Available at: http://nwawjc.org/poultry-report/.

ability to care for sick children. One study, using the Baltimore Parenthood Study and multivariate analysis, found parents with paid sick leave or vacation leave were 5.2 times more likely to remain home to care for their sick child.[108] According to a study in San Francisco by the Institute for Women's Policy Research, parents that did not have paid sick leave were more than 20 percentage points more likely to send their children to school while sick (75.9 compared with 53.8).[109] This "child presenteeism" is problematic because these pupils have the potential to expose other students and teachers to the illness, decreasing others' health.

Commenters agreed. Legal Aid Society wrote: "Parents' access to paid sick days can positively impact their children's health and academic success… Parents without access to paid sick days are 71% more likely to send an ill child to school or child-care than those parents with access to paid sick days."[110] Legal Aid Society also pointed out that: "Sick children can have a significant effect on spreading contagious illness. A study analyzing the spread of pandemic influenza found that children and teenagers make up nearly 65% of those responsible for

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[108] Heymann, S.J., Toomey, S., and Furstenberg, F. (1999) Working Parents: What Factors are involved in Their Ability to Take Time off from Work When Their Children Are Sick? Archives of Pediatrics and Adolescent Medicine, 153(8): 870-874.

[109] Drago, R. and Lovell, V. (2011). San Francisco's Paid Sick Leave Ordinance: Outcomes for Employees and Employers. Institute for Women's Policy Research.

[110] Kim, J. and Smith, T.W. (2010). Paid Sick Days: Attitudes and Experiences, National Opinion Research Center At The University Of Chicago. Available at: http://news.uchicago.edu/static/newsengine/pdf/100621.paid.sick.leave.pdf.

infectious flu contacts."[111] They also cited research demonstrating that children recover better from illnesses and injuries when their parents care for them.[112]

The ability to take sick leave to care for individuals equivalent to a family relationship may be especially helpful in the LGBT community. The Williams Institute at the UCLA School of Law noted the rule "would also allow employees to use paid sick leave to care for a partner's children, even when the employee has no legally recognized relationship to the children. This policy is particularly important for LGBT people, who continue to experience unique barriers to establishing parental status or legal custody of a partner's children."

Increased productivity

As noted earlier, the Department expects the costs of providing paid sick leave under the Executive Order will be accompanied by its benefits. The Department particularly anticipates that contractor costs to provide paid leave will be accompanied by increased employee productivity. This increased productivity will occur through numerous channels, such as improved health, employee retention, and level of effort. When workers attend work while sick they tend to have diminished productivity. Goetzel et al. (2004) found that on-the-job

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[111] Beyeler, W.E., Glass, L.M., and Glass, R.J. (2005). National Infrastructure Simulation and Analysis Center, Sandia National Laboratories, Local Mitigation Strategies for Pandemic Influenza. Available at: http://www.sandia.gov/CasosEngineering/docs/FluMitigationPaperWithFullSOMTables.pdf.

[112] Chung, P.J. and Schuster, M.A. (2014). Time Off to Care for a Sick Child—Why Family-Leave Policies Matter. New England Journal of Medicine, 37(493).
Earle, A. and Heymann, J. (2010). Raising The Global Floor: Dismantling The Myth That We Can't Afford Good Working Conditions For Everyone.

productivity loss due to sickness represented 18 percent to 60 percent of employer costs associated with 10 health conditions.[113]

A strand of economic research, commonly referred to as "efficiency wage" theory, considers how an increase in compensation may be met with greater productivity.[114] To the degree that the Final Rule increases employee compensation it could yield some of the benefits associated with efficiency wages.[115] Efficiency wages may reduce employer costs by reducing turnover, allowing workers to gain more firm-specific human capital that enhances their productivity and reducing the cost of replacing workers. Efficiency wages may also elicit greater effort on the part of workers, making them more effective on the job.[116] A higher wage implies a larger cost of losing one's job; employees will put in more effort in order to reduce the risk of losing the job. This is commonly referred to as the shirking model.[117] Third, efficiency wages may attract higher-quality applicants.

Providing paid sick leave to employees has been associated with decreased job separations. In one 2013 study, the author showed that paid sick leave is associated with a

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[113] Goetzel, R.Z., et al. (2004). Health, Absence, Disability, and Presenteeism Cost Estimates of Certain Physical and Mental Health Conditions Affecting U.S. Employers. JOEM, 46(4), 398-412.

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

[115] As we note elsewhere in this analysis, increased compensation is not guaranteed for all affected workers because some employers may respond to the paid sick leave requirement by reducing other fringe benefits, such as paid vacation, or by decreasing base wages.

[116] 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.

[117] Shapiro, C. and Stiglitz, J. E. (1984). Equilibrium Unemployment as a Worker Discipline Device. The American Economic Review, 74(3), 433-444.

decrease in the probability of job separation of 25 percent.[118] Such a reduction in job separation would increase marginal productivity because new employees have less firm-specific capital (i.e., skills and knowledge that have productive value in their particular company) and thus would require additional supervision and training to match the productivity of former workers.[119] Other research supports the hypothesis that paid leave encourages employees to remain at their respective companies. In a survey of two hundred human resource managers, two-thirds cited family-supportive policies as the single most important factor in attracting and retaining employees.[120] By providing paid sick leave, companies may be able to reduce the firm's turnover rate and increase productivity (and therefore reduce hiring costs, see the section on reduced hiring costs below).

Commenters agreed that the rule will increase productivity. Many form letter submissions cited studies demonstrating how paid sick leave improves productivity. The first uses results from the American Productivity Audit to estimate that presenteeism cost the economy $206.6 billion in 2005 (after adjusting for inflation).[121] The second is a survey of

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[118] Hill, H. (2013). Paid Sick Leave and Job Stability. Work and Occupations, 40(2), 10.

[119] Argote, L., Insko, C. A., Yovetich, N., and Romero, A. A. (1995). Group Learning Curves: The Effects of Turnover and Task Complexity on Group Performance. Journal of Applied Social Psychology, 25(6), 512–529.

Shaw, J. D. (2011). Turnover Rates and Organizational Performance: Review, Critique, and Research Agenda. Organizational Psychology Review, 1(3), 187-213.

Dube, A., Lester,T.W., and Reich, M.. (2013). Minimum Wage Shocks, Employment Flows and Labor Market Frictions. IRLE Working Paper #149-13.

[120] Williams, J. (2001). Unbending Gender: Why Work and Family Conflict and What to Do About It. Oxford University Press.

[121] Stewart, W. F., Ricci, J. A., Chee, E., and Morganstein, D. (2003). Lost Productive Work Time Costs from Health Conditions in the United States: Results From the American Productivity Audit. Journal of Occupational and Environmental Medicine, 45(12), 1234-1246.

human resources executives that found "38 percent reported presenteeism being a problem in their organizations, and 69 percent reported having paid sick time or other paid time off policies in place as measures to prevent this problem."[122] The third is a survey showing that "26 percent of workers without paid time off to see a doctor reported having six or more days in which they were unable to concentrate at work, compared to 17 percent of workers who had such paid time off."[123] The fourth demonstrates that paid sick days "help workers recover and return to work more quickly: nationally, workers without paid sick days spent more days bedridden due to illness than workers with paid sick days."[124] The last showed that in Jersey City, "businesses that changed their policies to comply with the law reported significant benefits, including a reduction in the number of sick employees coming to work, [and] an increase in productivity."[125]

Finally, productivity may increase due to the ability to attract more productive employees. Many commenters cited the same Jersey City study, which found that benefits to

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(Unpublished calculation based on $226 billion annually in lost productivity, 71 percent due to presenteeism.)

[122] Wolters Kluwer Law & Business. (2008). On the Job, But Out of It? CCH Survey Looks At Ill Effects of Sick Employees At Work. Available at: http://www.cch.com/press/news/2008/20080110h.asp.

[123] Davis, K., Collins, S. R., Doty, M. M., Ho, A., and Holmgren, A. L. (2005). Issue Brief: Health and Productivity among U.S. Workers. The Commonwealth Fund Publication. The Department notes that this study does not provide information to determine whether the point estimate of 26 percent is statistically significantly higher than the 17 percentage point estimate.

[124] Human Impact Partners. (2009). A Health Impact Assessment of the Healthy Families Act of 2009. Available at: http://www.humanimpact.org/downloads/national-paid-sick-days-hia-report/.

[125] Lindemann, D. and Britton, D. (2015). Earned Sick Days in Jersey City: A Study of Employers and Employees at Year One. Center for Women and Work at Rutgers, the State University of New Jersey Publication. Available at: http://cww.rutgers.edu/sites/cww.rutgers.edu/files/documents/working_families/Jersey_City_ESD_Issue_Brief.pdf.

businesses that changed their policy to adhere to the city's paid sick leave law experienced "an improvement in the quality of job applicants."

Reduced hiring costs

By providing paid sick leave, employers may experience lower job turnover, resulting in higher productivity and lower hiring costs, both of which would positively impact profits (the benefit of increased productivity was discussed above and profits are discussed below). Multiple studies demonstrate an inverse relationship between sick leave pay and employee turnover. One 2003 study from the University of Michigan found that when employers in upstate New York implemented a paid sick leave policy, they experienced modest reductions in employee turnover.[126] Lowering employee turnover reduces hiring costs, boosting profitability. Various research shows that firms incur a substantial cost for hiring new employees. A review of 27 case studies found that the median cost of replacing an employee was 21 percent of the employee's annual salary.[127] These costs might be diminished by incorporating paid sick leave into family friendly policies. Even though marginal labor costs may rise when employers provide paid sick leave, the Department expects the new, higher wages will be partially offset by increased productivity, and reduced hiring and training costs.

The potential reduction in turnover is a function of several variables: the current wage, hours worked, turnover rate, industry, and occupation. Additionally, the estimated cost of replacing a separated employee, and providing paid sick leave to an employee, varies

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[126] Baughman, R., Holtz-Eakin, D. and DiNaridi, D. (2002). Productivity and Wage Effects of "Family-Friendly" Fringe Benefits. International Journal of Manpower, 24(3), 247-259.

[127] 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.

significantly based on factors such as industry and geographic region.[128] Therefore, quantifying the potential benefits associated with a decrease in turnover attributed to this Final Rule would require many sources of data and assumptions.

Many commenters agreed that the rule will increase retention and diminish hiring costs. One commenter wrote: "An employer is much more likely to lose their employee when a mother is forced to choose between a job and [her] child, or to have an employee who is struggling to balance the needs of work and childcare." The Main Street Alliance wrote: "The costs of turnover can be high, and many business owners do not fully realize how providing paid sick time can reduce this cost. Employers who begin providing paid sick time often report that employee turnover is reduced, saving them the cost of hiring and training replacements, as well as that of lost productivity while the positions are unfilled." Many commenters submitting a form letter noted that in Jersey City, "businesses that changed their policies to comply with the law reported significant benefits, including … a reduction in employee turnover."[129] Many of these same commenters also cited research, noted above, that "shows that an employee is at least 25 percent less likely to voluntarily leave a job when the employee has access to paid sick days."[130] A study of Connecticut's paid sick leave law, cited by many commenters, found 3.3

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[128] One 2008 study conducted by professors at San Francisco State University showed that in California providing sick leave to employees in the construction, retail, restaurant, and hotel industries could increase employer's payroll costs by between $299 and $862 per employee annually. Potepan, M.J. (2008). Paid Sick Leave: Access, Costs and Feasibility of Implementation at the State Level. Sacramento State: Center for California Studies.

[129] Lindemann, D. and Britton, D. (2015). Earned Sick Days in Jersey City: A Study of Employers and Employees at Year One. Center for Women and Work at Rutgers, the State University of New Jersey Publication. Available at: http://cww.rutgers.edu/sites/cww.rutgers.edu/files/documents/working_families/Jersey_City_ESD_Issue_Brief.pdf.

[130] Hill, H. D. (2013). Paid Sick Leave and Job Stability. Work and Occupations, 40(2), 143-173.

percent of employers reported reduced employee turnover.[131] However, 10.6 percent reported increased loyalty which may result in additional long-term reductions in turnover.

Some commenters noted the high cost of turnover. The Main Street Alliance wrote: "In middle- and low-wage jobs, turnover costs are estimated to be 16 to 20 percent of workers' annual wages."[132] Commenters submitting a form letter noted, as we did above, that "[a]cross all occupations, median turnover costs are estimated to be 21 percent of workers' annual wages."[133] Additionally, one of the two authors of this study wrote in support of this rulemaking and confirmed the high cost of turnover.

Firm profits/ earnings

To the extent that productivity increases and turnover and hiring costs are reduced, offering paid sick leave will increase profits relative to what would be expected if the rule's costs and transfers were considered in isolation. Some studies have suggested there may be a positive relationship between paid sick leave and profits. In one such study from 2001, researchers discovered that having a paid sick leave policy had a positive effect on firms' profits.[134] The authors note, however, that efficiency wage theory underpins their empirical result and thus requires compensation to increase, which is not guaranteed to result from this rule because

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[131] Appelbaum, E., et al. (2014). Good for Business? Connecticut's Paid Sick Leave Law. Center for Economic and Policy Research and The Murphy Institute at the City University of New York Publication. Available at: http://cepr.net/documents/good-for-buisness-2014-02-21.pdf.

[132] Ibid.

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

[134] Meyer, C.S., Mukerjee, S., and Sestero, A. (2001). Work-family Benefits: Which Ones Maximize Profits? Journal of Managerial Issues, 13(1), 28–44.

employers may respond to the paid sick leave requirement, where permitted by law, by reducing other fringe benefits, such as paid vacation, or by decreasing base wages. Additionally, even if compensation increases, efficiency wage theory may not apply if the main reason for the improved productivity is a response to the goodwill created by a voluntary increase in compensation offered by an employer.[135] Therefore, it may not be valid to assume that Meyer et al.'s results would be comparable.[136]

Few commenters discussed increased profits or earnings. The Legal Aid Society reported: "A study published three years after [San Francisco's] ordinance's implementation found that over 70 percent of employers did not report any impact on profitability."[137] Conversely, the HR Policy Association noted that "the studies [cited in the NPRM] on productivity and firm profits are based on general efficiency wage theory and presented without a quantitative cost-benefit analysis of the specific leave mandate for current and future beneficiaries of Executive Order 13706." The Department did not quantify the value of these benefits since none of the studies provided estimates that were directly applicable to employees covered by this Final Rule.

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[135] Although efficiency wage literature tends to focus on firms voluntarily paying higher wages and thus distinguishing themselves from other firms, the literature provides no evidence that voluntarily paying higher wages is a necessary condition for efficiency wages. Efficiency wage theory may hold because employers paying higher wages attract more productive workers.

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

[137] Drago, R. and Lovell, V. (2011). San Francisco's Paid Sick Leave Ordinance: Outcomes for Employees and Employers. Institute for Women's Policy Research.

Government expenditures

As noted in the section on costs (V.C.ii.), contractors may pass along part or all of the potentially increased costs to the government in the form of higher contract prices. However, to the extent that benefits from increased productivity and reduced turnover offset these higher costs which the Department expects, this will reduce government contract spending relative to what would be expected if the rule's costs and transfers were considered in isolation.

Some commenters believe the rule may reduce government contracting costs. Others noted that we did not adequately justify the assertion that the rulemaking will provide cost savings. The National Association of Manufacturers wrote the following: "Simply stated, there is no concrete evidence that requiring federal contractors to increase the benefits they provide to their workers will result in cost savings or efficiency." As previously noted, the Department discussed benefits qualitatively because quantitative research findings related to benefits were not directly applicable to the population of employees and contracting firms impacted by this Final Rule.

Regardless of the direct impact on contract costs, there are other important channels through which the Final Rule might affect government expenditures. The transfer of income resulting from this Final Rule may result in reduced social assistance payments, and thus decrease government expenditures. For example, providing access to paid sick leave may help workers retain their jobs, reducing eligibility for government social assistance programs and lowering government expenditures. Studies have shown that the more paid family leave an employee receives, the less likely he/she is to utilize various social assistance programs. For instance, a 2012 study by Rutgers University's Center for Women and Work showed that women who received paid maternity leave reported receiving $413 less in public assistance in the year

after their child was born than women who took no leave after childbirth.[138] The National Partnership for Women & Families also cited research showing that "allowing all workers to earn paid sick time would result in … more than $500 million in savings to publicly funded health insurance programs such as Medicare, Medicaid and the State Children's Health Insurance Program."[139]

Decreased healthcare expenditures

One positive impact of mandating paid sick leave benefits would be that employees could mitigate future health costs by more frequently investing in preventive care. For example, employees would likely use paid sick leave to visit a physician, who could diagnose illnesses and other ailments before they become more serious and costlier to patients. A study analyzing data from the 2008 NHIS shows that employees with paid sick leave were 12 percent more likely to have visited a doctor in the past year.[140] Additionally, employees with paid sick leave were more likely to have received preventive procedures such as an endoscopy (9.6 percent) or mammogram (7.8 percent).[141] Researchers at the Institute for Women's Policy Research used data from the NHIS on emergency room visits by workers with and without paid sick leave to project that requiring employers to provide paid sick leave would prevent roughly 1.3 million hospital emergency department visits nationally each year, resulting in $1.1 billion in medical

[138] Houser, L. and Vartanian, T. (2012). Pay Matters: The Positive Economic Impacts of Paid Family Leave for Families, Businesses, and the Public. Rutgers University, Center for Women and Work.

[139] Miller, K., Williams, C., and Youngmin Yi. (2011). Paid Sick Days and Health: Cost Savings from Reduced Emergency Department Visits. Institute for Women's Policy Research.

[140] Peipins, L., Soman, A., Berkowitz, Z., and White, M.C. (2012). The Lack of Paid Sick Leave as a Barrier to Cancer Screening and Medical Care Seeking. BMC Public Health, 12(250), 1-9.

[141] Ibid.

savings annually (this includes the $500 million in savings to publicly funded health insurance programs mentioned previously).[142]

Commenters agreed that the rule could reduce health care costs through preventative care and reduced use of emergency rooms. Several commenters wrote: "A day or more to recover can prevent routine illnesses from turning into something much more serious. Those who earn paid time for a doctor's visit are more likely to get annual check-ups and critical screenings like mammograms, to identify any health problems and seek timely treatment. They're less likely to be injured on the job, and less likely to use an emergency room because the doctor's office is closed after hours or an untreated condition worsened." According to the National Partnership for Women & Families, individuals without paid sick time are "almost three times as likely to report taking their child or a family member to a hospital emergency room because they were unable to take time off work during their regular work hours.[143] The National Women's Law Center cited research finding "one-third of workers with annual family incomes below $35,000 who lacked paid sick days delayed seeking medical care, or did not seek care, for an ill family member."[144]

Job growth and labor force retention

One critique of the proposal to mandate paid sick leave has been that the transfer of income from employers to employees might reduce employment. However, various studies have argued the opposite, claiming that paid sick leave are associated with greater job growth.

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[142] Miller, K., Williams, C., and Youngmin Yi. (2011). Paid Sick Days and Health: Cost Savings from Reduced Emergency Department Visits. Institute for Women's Policy Research.
[143] Smith, T. W. and Kim, J. (2010). Paid Sick Days: Attitudes and Experiences. National Opinion Research Center at the University of Chicago Publication. Available at: http://news.uchicago.edu/static/newsengine/pdf/100621.paid.sick.leave.pdf.

[144] Human Impact Partners. (2009). A Health Impact Assessment of the Healthy Families Act of 2009. Available at: http://www.humanimpact.org/downloads/national-paid-sick-days-hia-report/.

Recently, it has been shown that counties in which a city has implemented paid sick leave have experienced greater job growth than neighboring counties with no cities with paid leave laws. San Francisco County, for example, saw a 3.5 percent increase in employment between the years of 2006 (when a paid sick leave law was implemented) and 2010, while the five counties surrounding it experienced an employment decrease of 3.4 percent on average (the analysis did not control for other characteristics that may affect employment or assess statistical significance).[145] Additionally, King County, the county in which Seattle (which instituted a similar paid sick leave policy to San Francisco in 2011) is located, found that the rate of annual job growth in the food and retail industries increased much faster than within the state of Washington as a whole between 2011 and 2013.[146] We note, however, that these results might also be associated with other economic factors, such as labor migration as a result of the Great Recession, and historically greater employment trends in the urban areas of San Francisco and Seattle in comparison to neighboring regions.

Job growth was not mentioned by many commenters. However, Legal Aid Society cited a study that found "the sectors most affected by the ordinance, including the food service and accommodation [industries], experienced higher rates of job and business growth than neighboring counties following the [San Francisco] ordinance's passage."[147]

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[145] Petro, J. (2010). Paid Sick Leave Does Not Harm Business Growth or Job Growth. Drum Major Institute for Public Policy.

[146] The Main Street Alliance of Washington. (2013). Paid Sick Days and the Seattle Economy: Job Growth and Business Formation at the 1-year Anniversary of Seattle's Paid Sick and Safe Leave Law.

[147] Miller, K. and Towne, S. (2011). San Francisco Employment Growth Remains Stronger With Paid Sick Days Law Than Surrounding Counties. Institute for Women's Policy Research.

A related topic discussed by some commenters is that paid sick leave can prevent workers from leaving the labor force. The New Hampshire Campaign for a Family Friendly Economy noted, "[w]hen families are able to provide for their basic needs and know that their loved ones are well cared for they are more likely to stay in the workforce." Sarah Damaske, a researcher from Pennsylvania State University, wrote: "Access to paid sick leave is an important feature of the types of jobs that college educated women find and that helps workers maintain their employment." She explained how research she and Adrianne Frech conducted suggests that maintaining full-time employment has long-term physical and mental health benefits.

2. Benefits Mentioned by Commenters Not Previously Addressed In This Section

Expanded covered reasons for use

Commenters discussed the benefits associated with expanding applicable uses of leave. In this rulemaking, the Department estimates transfers by comparing current days of paid sick leave and newly mandated days of sick leave. Benefits are then associated with additional sick days provided and expected to be taken. The Department notes that workers who currently have access to paid sick leave may take more sick days to the extent the permitted uses under the Executive Order and this Final Rule are broader than under their existing paid sick leave or paid time off program. This impact is not quantified in benefits or transfers due to a lack of applicable quantitative evidence. The Williams Institute at the UCLA School of Law wrote "[t]he Propose[d] Rule could protect many more LGBT employees who may not currently be able to use their paid sick leave to care for their families." They also wrote that the rule "would also allow employees to care for the children of a same-sex spouse or partner, even when the employee has not been able to form a legal relationship with the child, for example, because of

obstacles to adoption, parental status, or custody." Legal Aid Society wrote that the rule "will increase job security for workers and families who have fewer workplace protections, such as LGBT workers, and for workers who need paid sick time to ensure their safety, such as survivors of domestic violence."

Allowing paid sick leave to be used by victims of domestic violence, sexual assault, and stalking also provides benefits. According to surveys from the Bureau of Justice Statistics, reported by the National Partnership for Women & Families, "36 percent of rape and sexual assault victims lost more than 10 days of work following victimization, and more than half of stalking victims lost five or more days of work."[148]

Disadvantaged groups

As discussed above, the rulemaking may be especially helpful to the LGBT community by allowing paid sick leave to be used to care for certain individuals not related by blood or marriage. Additionally, some minority groups, women, and low-wage earners, who have lower prevalence of paid sick leave, will be helped by this rule. The Center for the Study of Social Policy wrote: "[P]aid sick time can be an effective tool for advancing equity by providing crucial economic stability to families and reducing familial stress during illnesses and times of hardship," and observed that ensuring the ability to accrue and use paid sick leave is particularly important for part-time, low-income and single head of household workers who are disproportionately women and people of color. The National Hispanic Council on Aging wrote: "According to a report released by the Congressional Joint Economic Committee in March, 2010, about 49% of Hispanics working for firms hiring over 15 employees did not have paid sick

[148] Bureau of Justice Statistics, U.S. Department of Justice. (2013). Stalking. Available at: http://www.bjs.gov/index.cfm?ty=tp&tid=973; Bureau of Justice Statistics, U.S. Department of Justice. (2002). National Crime Victimization Survey: Personal and Property Crimes, 2000.

leave, while about 60% of White workers overall reported receiving paid sick leave."[149] According to the AFL-CIO: "Those with lower incomes are especially vulnerable to the lack of paid sick days. Sixty-two percent of low-wage private sector workers do not have employer-paid sick leave."[150]

The National Organization for Women noted that "[t]he burden of inadequate paid sick leave and paid sick family leave falls heaviest on mothers. Given current norms of caregiving, women are more likely to need to stay home with a sick family member than fathers, yet mothers are less likely than fathers to have any paid time off, and those who do have some paid leave have fewer weeks of paid time off than dads."[151] They also noted that "[s]ingle parent families, mostly headed by women, are disproportionately affected by the inability to access paid sick leave."

Fair competition

One business owner wrote: "this rule will help level the playing field so that businesses, like mine, that provide earned paid leave, are more cost competitive. Right now we compete against other companies that do not provide these benefits to their employees, therefore these

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[149] Congressional Joint Economic Committee. (2010). Expanding Access to Paid Sick Leave: The Impact of the Healthy Families Act on America's Workers. Available at: http://www.jec.senate.gov/public/_cache/files/abf8aca7-6b94-4152-b720-2d8d04b81ed6/sickleavereportfinal.pdf.

[150] Institute for Women's Policy Research. (2015). Workers' Access to Paid Sick Days in the States; DeRigne, L., Stoddard-Dare, P., and Quinn, L. (2016). Workers Without Paid Sick Leave Less Likely To Take Time Off For Illness Or Injury Compared To Those With Paid Sick Leave. Health Affairs, 35(3), 520-527. (The AFL-CIO compared the nearly 65 percent of families with incomes below $35,000 who had no paid sick leave to the 25 percent of families who earned more than $100,000 a year).

[151] Phillips, K.R. (2004). Getting Time Off: Access to Leave among Working Parents. The Urban Institute. Available at: http://www.urban.org/sites/default/files/alfresco/publication-pdfs/310977-Getting-Time-Off.PDF.

competitors have lower overhead and lower hourly rates." The public policy organization Demos cited their report that quantified "how the federal contracting system fuels inequality by funding low-wage jobs that lack critical benefits such as leave."[152] The U.S. Women's Chamber of Commerce wrote: "Requiring more businesses to provide paid sick leave will help level the playing field for those business owners who are doing the right thing for their workers." Bredhoff & Kaiser cited a 2015 study by the Department that found lack of paid sick leave results in competitive disadvantages against those employers who do provide such paid leave.[153]

Morale, stress, financial stability, and job retention

Commenters noted that the rule could help morale. Many commenters cited a study of Connecticut's paid sick leave law that found "employers identified several positive effects of paid sick days, including improved employee productivity and morale."[154] This study found 29.6 percent of employers reported an increase in morale and 12.5 reported an increase in motivation. According to the Americans United for Change: "In jurisdictions where paid sick leave has been implemented, research has shown that businesses reported positive benefits such as improved morale."[155]

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[152] Hiltonsmith, R. and Daly, L. (2014). Underwriting Good Jobs: How to Place over 20 Million Americans on a Pathway to the Middle Class Using Federal Purchasing Power. Available at: http://www.demos.org/publication/underwriting-good-jobs-how-place-over-20-million-americans-pathway-middle-class-using-fe.

[153] U.S. Department of Labor. (2015). The Cost of Doing Nothing - The Price We All Pay Without Paid Leave Policies to Support America's 21st Century Working Families.

[154] Appelbaum, E., et al. (2014). Good for Business? Connecticut's Paid Sick Leave Law. Center for Economic and Policy Research and The Murphy Institute at the City University of New York Publication. Available at: http://cepr.net/documents/good-for-buisness-2014-02-21.pdf.

[155] Ibid.

Commenters believe the rule will reduce stress and improve financial and job stability. NLWC noted that "a lack of paid time off can be a major stressor in parents' lives, which can impair their interactions with their children and affect their development."[156] Bredhoff & Kaiser wrote: "As one 2011 report observed, missing just three and a half days of work due to illness can cause a worker to forfeit wages equivalent to the average monthly grocery bill for an American family."[157] NWLC cited research finding "almost one in five low-wage working mothers reported losing a job due to her own illness or caring for a family member." [158] Job stability benefits may accrue to both workers with and without current paid sick leave. According to the AFL-CIO, "49 percent of private sector workers who have paid sick leave report that their employers have dismissal policies for missed time that, in practice, penalize their use of paid sick time, and 34 percent fear penalties for using paid sick leave."[159] This Final Rule may reduce employees' fear of retribution because the rule proscribes interference and discrimination.

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[156] Vogtman, J. and Schulman, K. (2016). Set Up To Fail: When Low-Wage Work Jeopardizes Parents' And Children's Success. National Women's Law Center. Available at: http://nwlc.org/wp-content/uploads/2016/01/FINAL-Set-Up-To-Fail-When-Low-Wage-Work-Jeopardizes-Parents%E2%80%99-and-Children%E2%80%99s-Success.pdf.

[157] Green, A., Filion, K., and Gould, E. (2011). The Need for Paid Sick Days. Economic Policy Institute. Available at: http://www.epi.org/publication/the_need_for_paid_sick_days/.

[158] Vogtman, J. and Schulman, K. (2016). Set Up To Fail: When Low-Wage Work Jeopardizes Parents' And Children's Success. National Women's Law Center. Available at: http://nwlc.org/wp-content/uploads/2016/01/FINAL-Set-Up-To-Fail-When-Low-Wage-Work-Jeopardizes-Parents%E2%80%99-and-Children%E2%80%99s-Success.pdf.

[159] Miller, K., Drago, R., and Williams, C. (2011). Paid Sick Days and Employer Penalties for Absence. Institute for Women's Policy Research.

vi. Regulatory Alternatives

The Department notes that Executive Order 13706 delegates to the Secretary the authority only to issue regulations to "implement the requirements of this order." Because the Executive Order itself establishes the basic paid sick leave requirements that the Department is responsible for implementing, many potential regulatory alternatives are beyond the scope of the Department's authority in issuing this Final Rule. However, the Chamber/IFA expressed concern that the Department did not present alternatives and wrote "it is a well-established principle of regulatory impact analysis under Executive Order 12866 to present comparative costs and benefits for various alternatives, including those the underlying law or Executive Order may seem to exclude." In response, the Department has discussed some alternatives posed by commenters in this section.

1. Alternative with Unlimited Accrual

As was done in the NPRM, for illustrative purposes only, this section presents an alternative to the provisions set forth in this Final Rule. The Department notes, however, that it considers this alternative to be beyond the scope of the Department's authority under the Executive Order. This alternative considers how transfer payments would be affected if employees could accrue an unlimited number of hours of paid sick leave, as long as they kept a maximum balance of 56 hours. For example, if paid sick leave is used periodically throughout the year, an employee who works 80 hours per week could accrue and use 138.7 hours of paid sick leave (80 hours x 52 weeks x accrual rate of one hour per 30 hours worked (1/30)). To calculate transfers associated with this alternative, the modeling allows employees to accrue more than 7 days of paid sick leave annually. The number of days of leave accrued is based on the mean number of hours worked among full-time employees in an industry. For example, in

administrative and waste services full-time employees work on average 41.7 hours per week. With no cap on paid leave accrual, this would result in 9.0 days of leave accrued annually for employees in this industry. Using this alternative across all industries, the Department estimated 1.2 million additional days of paid sick leave would be accrued by full-time employees in Year 1. If only a fraction of these additional sick days are actually taken (as assumed earlier in the analysis and shown in Table 12) then 488,200 days will be taken by full-time employees and total transfer payments would be $132.0 million. This is 54 percent higher than the current transfer estimate of $85.5 million. However, this might be an overestimate because employees are not required to accrue paid sick leave while on vacation or leave.

2. Alternatives Suggested by Commenters

Some commenters made suggestions that could help reduce costs while maintaining the intent of the rulemaking and continuing to provide the intended benefits. Some of these have been incorporated in the Final Rule. The impact of these alternatives on costs was generally not quantifiable.

The American Benefits Council believes the requirement that employers allow paid leave in increments of only 1 hour could cost tens of thousands of dollars in adjustment costs which is "an excessive burden on such employers, and serves only to preserve an extra 3 hours of paid leave for the employee." The Department believes that changing a firm's tracking system to allow paid sick leave to be taken in increments of one hour is not excessively burdensome, and the American Benefits Council provided no basis for its estimate. The Department also did not have the necessary data to estimate the impact on regulatory costs of allowing a larger minimum hour requirement.

Commenters believe the requirement to allow accrual of paid sick leave while on leave (e.g., sick leave, vacation) will be costly to firms. The Equal Employment Advisory Council (EEAC) believes because this definition of "hours worked" differs from the FLSA and FMLA this requirement will "be extremely confusing for federal contractors" and "changing the established rules and procedures for one particular set of regulations will be significantly more difficult, requiring an additional set of records that must be kept." They also noted that "counting hours not actually 'worked' as 'hours worked' artificially inflates the employee's entitlement under the Executive Order, which likely used that term of art in accord with its traditional meaning." The Department adjusted this requirement such that paid sick leave is only required to be earned on time suffered or permitted to work and not paid time off. The transfer estimates presented in this analysis continue to include accrual while on leave because of the difficulty in adjusting them due to lack of reliable data; furthermore, these adjustments are likely to be small since hours on vacation and paid sick leave are a fraction of work hours and the paid sick leave time that might be accrued in those periods will only be one-thirtieth of the hours spent on vacation and sick leave (see V.C.iii.2.).

The Department notes that this change may reduce employer costs by creating consistency across regulations. However, the Department believes this change will have a small impact on the amount of leave full-time employees accrue because annual accrual is limited to 56 hours. A worker who works 40 hours per week will reach this cap after 42 weeks of work. Therefore, even if they are on vacation/leave for the other 10 weeks and technically accruing leave, this will not increase their accrued hours. For part-time workers accruing while on vacation or leave, this change will impact total hours accrued. The Department made some calculations to demonstrate how transfers may change for the 19 percent of affected workers who

work part-time now that accrual is not required while on leave. We quantified the additional hours accrued due to accruing while on paid sick leave and found it to be small. For example, a worker who works 25 hours per week will accrue 43.3 hours of paid sick leave annually (assuming no leave). If this worker takes a week of sick leave, and paid sick leave is not accrued during this week, then he will accrue 0.8 hours less of paid sick leave (25/30). If this worker also took two weeks of vacation, he would accrue 1.7 fewer hours of paid sick leave ((25x2)/30).

vii. Average Annualized Impacts By Industry

Commenters expressed concern that the Department did not adequately consider costs for specific industries. For example, the MCAA wrote that OMB Circular A-4 requires a more specific examination of the impact of the rule on Federal construction projects. A recreation permit holder on public lands wrote that the Department "should demonstrate how the costs associated with the rule make sense given the…volume and gross revenues of small permit holders." In response, the Department has added this section analyzing average annualized costs and transfers by industry relative to payroll and revenue.

Table 17 shows 10-year average annualized costs and transfers by industry using both a 3 percent and a 7 percent interest rate. These annualized costs are then compared to estimated Federal contractors' payroll and revenue. Across all industries, these average annualized costs are less than 0.07 percent of payroll and less than 0.01 percent of revenue. The industry where costs and transfers are the largest share of both payroll and revenue is the professional, scientific, and technical services industry. This industry is followed by the construction industry (when looking at payroll) and the administrative and waste services industry (when considering revenue).

Table 17: Average Annualized Costs and Transfers (1,000s of 2015$)

Industry	NAICS	Average Annualized Costs and Transfers (1,000s)		Relative to Payroll [a]		Relative to Revenue [a]	
		3% Discount Rate	7% Discount Rate	3% Discount Rate	7% Discount Rate	3% Discount Rate	7% Discount Rate
Agriculture, forestry, fishing and hunting	11	$349	$384	0.015%	0.016%	0.003%	0.003%
Mining	21	$61	$68	0.001%	0.001%	0.000%	0.000%
Utilities	22	$715	$721	0.001%	0.001%	0.000%	0.000%
Construction	23	$44,397	$42,986	0.168%	0.163%	0.034%	0.033%
Manufacturing	31-33	$12,189	$12,143	0.008%	0.007%	0.001%	0.001%
Wholesale trade	42	$966	$1,090	0.003%	0.003%	0.000%	0.000%
Retail trade	44-45	$17,126	$16,605	0.167%	0.162%	0.015%	0.014%
Transportation and warehousing	48-49	$27,132	$26,257	0.139%	0.134%	0.034%	0.032%
Information	51	$3,900	$3,866	0.006%	0.006%	0.001%	0.001%
Finance and insurance	52	$4,298	$4,150	0.071%	0.069%	0.010%	0.010%
Real estate and rental and leasing	53	$795	$882	0.012%	0.013%	0.002%	0.002%
Professional, scientific, and technical…	54	$162,894	$157,110	0.208%	0.201%	0.081%	0.078%
Management of companies and enterprises	55	$7	$9	0.000%	0.000%	0.000%	0.000%
Administrative and waste services	56	$53,427	$51,586	0.149%	0.144%	0.073%	0.071%
Educational services	61	$4,903	$4,792	0.025%	0.025%	0.008%	0.008%
Health care and social assistance	62	$39,867	$38,397	0.115%	0.111%	0.045%	0.044%
Arts, entertainment, and recreation	71	$4,234	$4,226	0.027%	0.027%	0.009%	0.009%
Accommodation and food services	72	$8,712	$8,464	0.146%	0.142%	0.042%	0.041%
Other services	81	$3,167	$3,149	0.078%	0.078%	0.020%	0.020%
Total private	--	**$389,139**	**$376,884**	**0.065%**	**0.063%**	**0.010%**	**0.009%**

[a] Source: Total payroll and revenue from 2012 SUSB; inflated to 2015$ using the CPI-U. Payroll and revenue for contractors estimated by taking ratio of potentially affected contractors relative to all firms, within an industry, and multiplying by total payroll or revenue. If contractors tend to be larger or smaller than other firms in the industry then revenue and payroll may be under or over estimated. These calculations assume no growth in real value of revenue or payroll over these ten years.

Many commenters expressed concern that the rule would be especially costly in the construction industry. However, as modeled, costs in the construction industry are small compared with payroll and revenues (less than 0.2 percent of payroll and less than 0.04 percent of revenue). Moreover, the Department does not believe that one of the primary concerns for the construction industry - the segregating of time between Federal contracts and non-covered contracts (e.g., SBA Advocacy, Sheet Metal and Air Conditioning National Association) - will result in substantial costs because hours worked by laborers and mechanics on DBA contracts must already be monitored. 29 CFR 5.5(a)(3). Thus, in nearly all instances, if a construction contractor complies with its existing DBA recordkeeping obligation, it will have effectively segregated these employees' time. Therefore, there should be minimal, or no, additional costs associated with tracking hours for these employees. In addition, for employees working "in connection with" covered contracts the Department has reduced the costs associated with monitoring hours by permitting contractors to make estimates consistent with § 13.5(a)(1)(i). For these reasons, we believe the estimated costs to the construction industry are appropriate.

Another concern expressed by members of the construction industry is the higher costs associated with absenteeism in this industry. The AGC noted that "absenteeism is particularly problematic in the construction industry, where cost and schedule concerns are critical and highly dependent on labor productivity." They also cite research demonstrating these costs: "Nicholson et al. (2006)[160] have used economic models to estimate that when a carpenter in construction is absent, the cost of the absence is 50% greater than his/her daily wage, and when a laborer in construction is absent, the cost is 9% greater than his/her daily wage." The

[160] Nicholson, S., Pauly, M. V., Polsky, D., Sharda, C., Szrek, H., and Berger, M. L. (2006). Measuring the effects of work loss on productivity with team production. Health Economics, 15(2), 111-123.

Department notes that even if costs and transfers are 50 percent larger than estimated, they would still be less than 0.3 percent of payroll and less than 0.06 percent of revenues in the construction industry.

Appendix A

Table 18: Percent of Workers with Fixed Number of Paid Sick Leave Plans, by Number of Days Offered, Private Industry Workers, March 2015

Industry	<5 Days	5 to 9 Days	10 to 14 Days	15 to 29 Days	>29 Days	Mean Days	Med-ian Days
Agriculture, forestry, fishing and hunting	-	-	-	-	-	-	-
Mining and logging	-	42	15	-	-	27	6
Utilities	-	34	38	-	-	21	10
Construction	31	57	11	-	-	6	5
Manufacturing	30	53	12	-	-	8	5
Wholesale trade	26	61	8	-	-	8	5
Retail trade	21	70	7	-	-	6	6
Transportation and warehousing	16	44	34	-	-	9	7
Information	6	65	26	-	-	9	7
Finance and insurance	7	49	39	-	-	12	8
Real estate and rental and leasing	-	65	-	-	-	6	6
Professional, scientific, and…	11	59	22	-	-	8	6
Management of companies and…	14	66	-	-	-	12	6
Administrative and waste services	36	40	22	-	-	8	5
Educational services	8	35	52	-	-	11	10
Health care and social assistance	22	42	34	-	-	8	7
Arts, entertainment, and recreation	-	47	-	-	-	6	6
Accommodation and food services	37	58	-	-	-	6	5
Other services	22	47	21	-	-	8	6
Total private	21	53	21	3	2	8	6

Source: Bureau of Labor Statistics, National Compensation Survey; Unpublished data
Note: Dashes indicate data not available or do not meet publication criteria.

Table 19: DOL Calculated Percent of Full-Time Workers with Fixed Number of Paid Sick Leave Plans, by Number of Days Offered

Industry	Number of Days [a]									
	1	2	3	4	5	6	7	8	9	10
Agriculture, forestry, fishing and hunting	1%	3%	8%	16%	10%	13%	12%	12%	11%	8%
Mining and logging	0%	0%	0%	0%	9%	41%	3%	9%	29%	0%
Utilities	0%	0%	0%	0%	0%	1%	4%	12%	29%	3%
Construction	2%	5%	11%	17%	16%	14%	13%	10%	7%	6%
Manufacturing	1%	4%	11%	23%	10%	10%	12%	12%	11%	5%
Wholesale trade	1%	4%	11%	22%	13%	12%	14%	14%	13%	3%
Retail trade	1%	3%	6%	9%	16%	16%	16%	12%	8%	4%
Transportation and warehousing	0%	2%	6%	13%	6%	10%	13%	11%	12%	11%
Information	0%	1%	2%	5%	9%	14%	19%	16%	17%	8%
Finance and insurance	0%	1%	2%	6%	3%	7%	12%	19%	19%	8%
Real estate and rental and leasing	1%	4%	7%	11%	13%	14%	14%	11%	8%	3%
Professional, scientific, and technical services	0%	2%	5%	10%	14%	19%	13%	14%	13%	8%
Management of companies and enterprises	0%	2%	7%	20%	7%	14%	12%	19%	26%	0%
Administrative and waste services	1%	4%	12%	25%	7%	8%	9%	9%	9%	8%
Educational services	0%	0%	2%	5%	2%	4%	6%	9%	11%	11%
Health care and social assistance	1%	2%	7%	14%	7%	9%	11%	10%	9%	13%
Arts, entertainment, and recreation	1%	4%	9%	13%	11%	12%	10%	8%	6%	12%
Accommodation and food services	2%	5%	11%	17%	14%	15%	13%	10%	7%	2%
Other services	1%	3%	8%	17%	9%	12%	11%	11%	10%	8%
Total private	1%	3%	8%	16%	10%	13%	12%	12%	11%	8%

[a] Workers may receive more than 10 days of sick leave but since these data are not used in the analysis the Department does not present shares above 10 days.

Table 20: DOL Calculated Percent of Part-Time Workers with Fixed Number of Paid Sick Leave Plans, by Number of Days Offered

Industry	Number of Days [a]									
	1	2	3	4	5	6	7	8	9	10
Agriculture, forestry, fishing and hunting	1%	3%	8%	14%	11%	13%	12%	11%	9%	8%
Mining and logging	0%	0%	0%	0%	10%	40%	3%	10%	27%	0%
Utilities	0%	0%	0%	0%	1%	2%	5%	13%	27%	3%
Construction	2%	6%	11%	15%	16%	15%	12%	8%	5%	5%
Manufacturing	1%	5%	12%	21%	11%	11%	12%	11%	9%	4%
Wholesale trade	1%	4%	11%	20%	14%	13%	14%	12%	10%	3%
Retail trade	1%	3%	6%	8%	16%	15%	14%	10%	6%	3%
Transportation and warehousing	1%	2%	6%	12%	7%	10%	12%	10%	9%	11%
Information	0%	1%	2%	5%	11%	15%	17%	15%	13%	8%
Finance and insurance	0%	1%	2%	6%	4%	8%	12%	16%	16%	8%
Real estate and rental and leasing	2%	4%	7%	10%	14%	13%	13%	9%	5%	3%
Professional, scientific, and technical services	1%	2%	5%	9%	15%	18%	13%	12%	10%	8%
Management of companies and enterprises	0%	2%	7%	18%	8%	15%	13%	18%	21%	0%
Administrative and waste services	1%	5%	13%	23%	8%	9%	9%	8%	7%	8%
Educational services	0%	1%	2%	5%	3%	5%	7%	8%	9%	11%
Health care and social assistance	1%	3%	7%	13%	7%	9%	9%	9%	7%	12%
Arts, entertainment, and recreation	2%	5%	9%	12%	12%	11%	10%	7%	4%	11%
Accommodation and food services	2%	6%	11%	15%	15%	15%	12%	8%	5%	2%
Other services	1%	4%	8%	15%	10%	12%	11%	10%	8%	8%
Total private	1%	3%	8%	14%	11%	13%	12%	11%	9%	8%

[a] Workers may receive more than 10 days of sick leave but since these data are not used in the analysis the Department does not present shares above 10 days.

V. Final Regulatory Flexibility Analysis (FRFA)

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 a FRFA.

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, small businesses are generally defined as having fewer than 500, 1,000, or 1,250 employees in manufacturing industries and less than $7.5 million in average annual receipts for many nonmanufacturing industries.[161] SBA revised its size standards February 26, 2016.[162] In this analysis, the Department used the indicator in the SAM data to identify small contractors based on the six-digit NAICS code listed as their primary NAICS.[163] However, because most firms would have registered on SAM prior

[161] However, some exceptions do exist, the most notable being that depository institutions (including credit unions, commercial banks, and non-commercial banks) are classified by total assets. Small governmental jurisdictions are another noteworthy exception. They are defined as the governments of cities, counties, towns, townships, villages, school districts, or special districts with populations of less than 50,000 people. See http://www.sba.gov/advocacy/regulatory-flexibility-act.

[162] See https://www.sba.gov/sites/default/files/files/Size_Standards_Table.pdf

[163] 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.

to SBA's update of its size standards, the Department expected more firms would have been listed as small had they registered after the update. To account for this, the Department used SBA's estimates of the increase in the number of small business in each industry,[164] converted it to a percentage increase in the number of small businesses in that industry, and applied it to the number of entities listed as small in the SAM database. For example, SBA estimated the revised standards would result in an additional 1,250 manufacturers classified as small, about 0.5 percent of small manufacturing firms. We therefore increased the number of small affected manufacturers by 0.5 percent. The subcontracting firms identified were all assumed to be small. The Department applied the national ratio of small businesses to total business by industry (determined by applying the updated SBA standards to the 2012 Statistics of U.S. Businesses (SUSB) data) to estimate the number of small entities operating under covered contracts on Federal property.

A. Commenters' Response

The Department specifically asked for comments on the impacts of the proposed rule on small businesses, particularly whether alternatives exist that will reduce burdens on small entities and still meet the rule's objectives. Most small businesses that commented expressed concern the rulemaking will increase their costs in general. Some noted the costs will be more burdensome for small businesses. The National Federation of Independent Business wrote:

> At the majority of these [small] businesses, the task of compliance will fall on the small business owner. This individual is unlikely to be an expert in the complex details of paid sick leave program management. Accordingly, it will take additional time to comprehend the requirement and may also require the covered small business to hire a consultant or other expert to assist with implementation.

[164] See https://www.sba.gov/contracting/getting-started-contractor/make-sure-you-meet-sba-size-standards/whats-new-size-standards

Women Impacting Public Policy wrote that "[l]arger contractors with higher revenues and large administrative staffs are more capable of handling this compliance burden and are more likely to already have the necessary systems in place. Women-owned businesses, which are by-and-large small businesses, will encounter costs and burdens that are not experienced by other firms."

Other small businesses supported the rulemaking. For example, the U.S. Women's Chamber of Commerce wrote: "These women business owners nationwide already provide paid sick leave to their employees because many of them have been previously in workforces that did not offer these critical benefits…Requiring more businesses to provide paid sick leave will help level the playing field for those business owners who are doing the right thing for their workers."

Commenters questioned the Department's estimated implementation and regulatory familiarization cost estimates. Other commenters argued that the administrative costs are more burdensome for small businesses. The National Electrical Contractors Association wrote that "smaller companies usually only have a single person – at the most two employees – that handle time keeping and record keeping of items such as this requirement." A small business owner commented that he offers paid time off, and that "[g]oing backwards to a mandatory 'sick time' including tracking with all of the required documentation would add more complications." Other commenters stated that the definition of family in the NPRM lowers the administrative costs compared to more restrictive definitions. A small business owner stated that administrative efficiency was improved and wrote: "As a small business owner, the administrative hassle of having to dig into employee's personal life to determine their eligibility is not worth the effort. Any specific limitations on the proposed definition of family would only increase the

administrative burden." As noted in Section V.C.ii. the Department has increased the estimated time required for regulatory familiarization and recurring administrative costs for this Final Rule.

Last, in terms of specific costs, commenters expressed skepticism about the average payroll increase estimates for small businesses. SBA Advocacy stated that "a small recreation company with 20 full-time staff and 220 seasonal workers estimated costs of $25,000 to comply with this regulation. Multiple small restaurant franchisees located in military bases reported costs from $5,000 to $35,000." However, these estimates are difficult to evaluate because we do not know what assumptions were made in developing them and furthermore what "costs" are included in these estimates

Some commenters believe the Executive Order and implementing regulations will hurt small businesses' ability to compete in bidding. SBA Advocacy noted that "[s]mall recreation companies have stated that they will be reluctant to sign a new contract to provide services such as food or equipment rentals on federal lands, as they may not be able to increase the price of their products to offset these costs." The National Federation of Independent Business wrote that "[m]ost small companies will have to increase the price of their bids to maintain the same return on the contract. Higher prices will make their bids less competitive than a larger federal contractor that may already have a compliant paid sick leave program in place."

Some commenters suggested alternatives that would reduce the burden on small entities, including an exemption for small businesses. Several commenters, such as the General Contractors Association of Hawaii and the Hawaiian Dredging Construction Company, stated that small businesses should be exempt from the requirement of providing paid sick leave, although they varied on the size of contracting firms that should be excluded. Independent Electrical Contractors commented that "the Department should take into account processes and

procedures already in place in most small businesses," and further recommended that the Department should allow companies to "apply a 90 day probationary period to new employees before they are able to take paid sick leave." SBA Advocacy stated that DOL should consider alternatives suggested by commenters "such as exemptions for certain part-time and seasonal work." The Department has addressed requests for exclusions, like those described above, in the subpart A preamble.

The Chief Counsel for Advocacy of the Small Business Administration (SBA) was notified of this rule upon its submission to OMB under EO 12866. Advocacy noted several concerns; in addition to those described in the preceding paragraphs, it stated that the Department underestimated the number of small businesses affected by this Final Rule by only including contracting companies registered in SAM. SBA Advocacy wrote: "Advocacy believes that there may be hundreds or thousands of small businesses such as restaurants, retail, and outdoor recreation companies operating on federal lands, in federal buildings and on military bases that DOL has not adequately counted in determining the numbers of small businesses affected or in estimating the costs of this rule." SBA Advocacy provided additional information about the number of concessions contracts, commercial use authorizations, and permits issued by the National Park Service, the U.S. Forest Service, GSA, and the Army and Air Force Exchange Service. As described in section V.B.ii., the Department included estimates of these potentially affected contractors in this Final Rule.

The Department describes responses to some of these comments in the appropriate part of the FRFA. Responses to comments that also apply to the overall analysis were generally included in the appropriate section of the RIA.

B. Number of Small Entities and Employees to Which the Final Rule Will Apply

The number of prime contracting entities was estimated based on the GSA's System for Award Management (SAM) for August 2015 (415,300).[165] This number is lower than in the proposed rulemaking because firms enrolled on SAM strictly for grants have now been excluded (see V.B.ii).[166] The Department understands that many entities that are prime contractors listed in SAM are also subcontractors, and therefore SAM includes both. However, we were unable to determine the number of subcontractors who are not in the SAM database. Therefore, the Department examined five years of USASpending data[167] and found 24,400 subcontractors who do not hold contracts as primes (and thus may not be included in SAM), and added these subcontractors to the total from SAM to obtain a total estimate of 439,700 firms that may be holding procurement contracts. In response to comments from SBA Advocacy and others, the Department has also included an estimated 49,800 entities operating under covered contracts on Federal property or lands. Estimating the number of entities operating under covered contracts on Federal property or lands involved many data sources and assumptions as described in section V.B.ii. These calculations result in 489,400 potentially affected contractors. Of these, an estimated 320,000 are considered small contracting firms.[168]

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[165] Data are released in monthly files.

[166] Entities registering in SAM are asked if they wish to bid on contracts. If a non-Federal entity answers "Yes" to this question, SAM marks the registration as being "All Awards." This is the "Purpose of Registration" column in the SAM data. The Department included only firms with a value of "Z2," which denotes "All Awards." See section "3.2 Determining your Purpose of Registration" in the System for Award Management User Guide available at: https://test.sam.gov/sam/SAM_Guide/SAM_User_Guide.htm#_Toc330768975.

[167] The Department identified subawardees from the USASpending.gov data between FY2011 and FY2015 who did not perform work as a prime during those years.

[168] SAM data for August 2015 provides information on which contractors are small. All subcontractors (identified with USASpending data for FY2011-FY2015) are considered small

This estimated number of potentially affected small contractors includes those that strictly provide materials and supplies to the government and other firms with no 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.[169] However, these firms should be eliminated when we consider costs per establishment with affected employees. Information was not available to eliminate these firms from the SAM database.[170]

Thus, the Department used data from USASpending to estimate a more appropriate number of small contractors with affected employees. Using the FY2015 USASpending database, the Department found 70,600 unique private small prime contracting firms.[171] Adding in the small subcontractors and the small entities operating under covered contracts on Federal property yields an estimated 143,400 small contractors with active contracts in Year 1. Because this Final Rule only applies to new contracts, the Department divided the number of contractors by 5 to represent the number of contractors with new contracts in Year 1 (28,700 firms). Lastly,

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due to lack of data. The proportion of entities operating under covered contracts on Federal property or lands that are small were assumed to be the same as the national proportions in 2012 SUSB data. These proportions were calculated and applied by industry.

[169] In the proposed rule the Department said these firms may not incur familiarization costs. Commenters contended that these firms will still accrue regulatory familiarization costs because, as the U.S. Chamber of Commerce wrote: "[e]ven contractors exempt from the proposed rule for some reason will, first, have to review the regulation and their own book of contracts (and prospective bids) to make such a determination."

[170] This may also be an overestimate since some firms in the SAM database do not currently have contracts with the Federal government.

[171] 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/DownloadCenter/Documents/USAspending.govDownloadsDataDictionary.pdf.

the Department adjusted this estimate to exclude a share of potentially affected contractors who have potentially affected employees but no affected employees because they already provide the required number of days of paid sick leave.[172] The ratio of affected employees to potentially affected employees in small businesses was calculated and multiplied by the number of small contractors with potentially affected employees by industry to make this adjustment. These calculations result in an estimated 21,400 small contractors with affected employees in Year 1. The calculations of direct costs and transfers per small contractor with affected employees shown in Table 23 include only these 21,400 small contractors.

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. However, based on 2015 NCS data, smaller firms are less likely to offer sick leave pay, and therefore employees in small contracting firms are more likely to be affected. The Department adjusted for this using data from the 2015 NCS on the distribution of employees with paid sick leave by employer size. For these purposes, small businesses were approximated as those having less than 500 employees. The Department found that employees in firms with less than 500 employees were 1.1 times more likely to not have paid sick leave than employees in all firms. Therefore, the Department multiplied the previously estimated share of affected employees

[172] As discussed in the RIA, some potentially affected employees considered not affected in the Department's analysis may actually be affected due to a broader scope of uses allowed for taking paid sick leave. However, data are not sufficient to estimate the number of additional employees that will be affected due to this, how many additional days of paid sick leave will be taken by these employees, or the transfers associated with any additional affected employees. Thus, for the purpose of calculating average costs and transfers per contractor with affected employees, any possible additional employees affected are excluded from both the numerator and denominator for consistency.

working for small contractors (e.g., 22.3 percent in the information industry) by 1.1 to better estimate the percent of affected employees in small businesses in each industry (e.g., 24.9 percent in the information industry). The Department then multiplied the percent affected that are in small businesses by the total number of affected employees by industry, then summed over all industries, to find that 66,800 employees employed by small contractors in Year 1 would be affected by the rule.

Table 21: Small Federal Contracting Firms and Their Employees

Industry	NAICS	Contractors [a]		% of Expenditure in Small Contracting Firms [c]	% of Affected Employees in Small Contracting Firms [d]	Affected Employees in Year 1	
		Total	Small [b]			Total	Small
Agriculture, forestry, fishing and hunting	11	8,525	4,200	82.4%	92.3%	58	54
Mining	21	1,668	1,384	56.4%	63.1%	39	24
Utilities	22	5,641	4,569	11.9%	13.3%	294	39
Construction	23	61,399	52,251	55.2%	61.8%	20,280	12,526
Manufacturing	31-33	69,513	8,332	13.2%	14.8%	6,372	942
Wholesale trade	42	28,626	24,009	51.5%	57.6%	133	77
Retail trade	44-45	17,682	11,421	29.4%	32.9%	16,709	5,497
Transportation and warehousing	48-49	17,780	13,158	19.0%	21.3%	15,609	3,321
Information	51	19,511	16,443	22.3%	24.9%	2,587	645
Finance and insurance	52	2,712	1,631	2.6%	2.9%	2,484	72
Real estate and rental and leasing	53	20,705	15,326	28.1%	31.4%	95	30
Professional, scientific, and technical serv.	54	101,538	69,335	26.1%	29.2%	72,713	21,254
Management of companies and enterprises	55	264	157	9.3%	10.4%	0	0
Administrative and waste services	56	33,374	27,598	25.4%	28.4%	50,648	14,377
Educational services	61	13,645	9,074	14.7%	16.4%	2,456	403
Health care and social assistance	62	27,314	12,099	16.2%	18.1%	19,587	3,548
Arts, entertainment, and recreation	71	26,922	25,336	54.4%	60.8%	2,184	1,329
Accommodation and food services	72	14,524	12,376	22.2%	24.8%	7,718	1,915
Other services	81	18,077	11,262	30.7%	34.4%	2,092	719
Total private	**--**	**489,419**	**319,962**	**24.7%**	**27.7%**	**222,059**	**66,772**

[a] Source: GSA's System for Award Management (SAM) for August 2015. Companies without a primary NAICS code are distributed proportionately amongst all industries. All firms are assumed to be potentially affected. Includes 24,352 additional subcontractors identified in USASpending.gov from FY2011-FY2015 and includes 49,757 firms with operations on Federal land or property.
[b] SAM for August 2015. Companies without a primary NAICS code are distributed proportionately amongst all industries. All small firms are assumed to be potentially affected. Assume all 24,352 additional subcontractors identified in USASpending.gov are small.
[c] Source: USASpending.gov. Percentage of contracting expenditures for covered contracts in small businesses in FY2013-FY2015.
[d] Employees in firms with less than 500 employees were 1.1 times more likely to have no paid sick leave than employees in all firms. The Department adjusted upward the number of affected employees by 1.1.

C. Small Entity Costs of the Final Rule

Employers will need to keep additional records for affected employees. This will result in an increase in employer burden, which was estimated in the PRA portion (section V.I.). Note that the burdens reported for the PRA section of this Final Rule include the entire information collection and not merely the additional burden estimated as a result of this Final Rule.

Small entities will also have regulatory familiarization, implementation, administrative, and payroll costs (i.e., transfers). These are discussed in section V.C. Total direct costs (i.e., excluding transfers) to small contractors in Year 1 were estimated to be $78.9 million (Table 22). This is 63 percent of total direct costs in Year 1 (compared with 30 percent of affected employees in small contracting firms). Calculation of these costs is discussed in the following paragraphs.

Estimated regulatory familiarization costs and initial implementation costs in Year 1 apply to all small firms that potentially hold covered contracts (320,000). Regulatory familiarization costs were assumed to take two hours of time in Year 1, on average across these potentially affected contractors of all sizes. In the NPRM, the Department estimated one hour of time was necessary for this purpose, but due to comments the Department has increased this time estimate to two hours in the Final Rule. An hour of a human resource manager's time is valued at $82.17 per hour.[173,174] Initial implementation costs, the upfront cost that is thought to be comparable across contractors of all sizes, and thus is a fraction of the total implementation costs, were estimated as taking either 1 or 10 hours of a human resource worker's time,

[173] This includes the mean base wage of $56.29 from the OES plus benefits paid at a rate of 46 percent of the base wage, as estimated from the BLS's ECEC data. OES data available at: http://www.bls.gov/oes/current/oes113121.htm.

[174] Time and wage estimates for small establishments are the same as used in the analysis for all contractors. We have not tailored these to small businesses due to lack of data.

(depending on whether the contractor has a paid leave system in place), valued at $27.50 per hour.[175]

In addition to upfront implementation costs, contractors with affected employees will experience recurring implementation costs as employees gradually become covered. As each employee is affected, the contractor will need to spend some time updating the accounting systems used to track paid sick leave. Therefore, implementation costs are modeled as a function of newly affected employees for the first five years.[176] Because of this component, costs vary with contractor size. The Department estimated one hour of time per newly affected employee will be spent by a human resources worker on implementation costs. Contractors may also incur recurring administrative costs associated with maintaining records of paid sick leave and adjusting scheduling. In the NPRM, the Department assumed a human resource worker will spend an additional fifteen minutes per affected employee annually on ongoing administrative costs. Due to comments the Department has increased this time estimate to twenty minutes in the Final Rule.

To calculate payroll costs, the Department began with total transfers estimated in section V.C.iii., 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, $26.1 million in Year 1 (Table 22), which is 31 percent of total transfers for all contracting firms in Year 1. As noted in V.C.iii., total transfers may be an overestimate if contractors tend to

[175] This includes the mean base wage of $18.84 from the OES plus benefits paid at a rate of 46 percent of the base wage, as estimated from the BLS's ECEC data. OES data available at: http://www.bls.gov/oes/current/oes113121.htm.

[176] The Final Rule will only apply to employees on new contracts. The Department estimates it will take five years for all employees to be affected. Therefore, adjustment costs will accrue over the first five years.

perform work for multiple clients, rather than working exclusively on Federal contracts. This may be especially pertinent for small business since according to a report by American Express Open, Federal contracting comprises 19 percent of revenues for small contracting firms.[177] Table 23 contains the average costs and transfers per small contractor with affected employees by industry (see VI.B. for explanation). Average Year 1 costs and transfers per small contractor with affected employees range from $174 to $3,391.

To estimate whether these costs and transfers will have a substantial impact on small entities they are compared to total revenues for these firms. Based on Statistics of U.S. Businesses (SUSB) data, small Federal contractors had total annual revenues of $566.6 billion in 2015 from all sources (Table 24).[178] Transfers from small contractors and costs to small contractors in Year 1 ($105.0 million) are less than 0.02 percent of revenues on average and are no more than 0.17 percent in any industry. Therefore, the Department believes this Final Rule will not have a significant impact on small businesses.

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 national costs and transfers (see section V.C.). This yields the share of projected costs and transfers attributable to small businesses (Table 25).

[177] American Express OPEN. (2013). Trends in Federal Contracting for Small Businesses: A Research Summary for the American Express OPEN for Government Contracts Program.
[178] Total revenue for small firms from 2012 SUSB; inflated to 2015$ using the CPI-U. Revenues for small contractors calculated by multiplying total revenue by the ratio of number of small contracting firms to total number of small firms.

Table 22: Costs and Transfers to Small Contractors in Year 1

Industry	NAICS	Direct Employer Costs ($1,000s)					Transfers ($1,000s)
		Regulatory Famil-iarization	Initial Imple-mentation	Recurring Imple-mentation	Recurring Admin-istrative	Total	
Agriculture, forestry, fishing and…	11	$690	$313	$1	$0	$1,005	$26
Mining	21	$227	$103	$1	$0	$331	$2
Utilities	22	$751	$341	$1	$0	$1,093	$19
Construction	23	$8,587	$3,894	$344	$115	$12,940	$5,908
Manufacturing	31-33	$1,369	$621	$26	$9	$2,025	$378
Wholesale trade	42	$3,945	$1,789	$2	$1	$5,738	$25
Retail trade	44-45	$1,877	$851	$151	$50	$2,930	$1,273
Transportation and warehousing	48-49	$2,162	$981	$91	$30	$3,265	$1,383
Information	51	$2,702	$1,225	$18	$6	$3,951	$198
Finance and insurance	52	$268	$122	$2	$1	$392	$28
Real estate and rental and leasing	53	$2,519	$1,142	$1	$0	$3,662	$17
Professional, scientific, and…	54	$11,394	$5,167	$585	$195	$17,341	$10,678
Management of companies and…	55	$26	$12	$0	$0	$38	$0
Administrative and waste services	56	$4,535	$2,057	$395	$132	$7,119	$3,310
Educational services	61	$1,491	$676	$11	$4	$2,182	$171
Health care and social assistance	62	$1,988	$902	$98	$33	$3,020	$1,529
Arts, entertainment, and recreation	71	$4,164	$1,888	$37	$12	$6,100	$496
Accommodation and food services	72	$2,034	$922	$53	$18	$3,026	$464
Other services	81	$1,851	$839	$20	$7	$2,716	$211
Total private	**--**	**$52,580**	**$23,846**	**$1,836**	**$612**	**$78,874**	**$26,116**

Table 23: Average Costs and Transfers per Small Contractor with Affected Employees in Year 1

Industry	NAICS	Total Small Contractors with Potentially Affected Employees [a]	Small Contractors with Potentially Affected Employees in Year 1 [b]	Small Contractors with Affected Employees in Year 1 [c]	Direct Employer Costs per Small Contractor	Transfers per Small Contractor	Total Costs and Transfers per Small Contractor
Agriculture, forestry, fishing and hunting	11	1,957	391	391	$161.73	$66.08	$227.81
Mining	21	184	37	28	$189.18	$72.85	$262.03
Utilities	22	2,661	532	74	$176.12	$254.88	$431.00
Construction	23	17,899	3,580	3,368	$293.08	$1,754.34	$2,047.42
Manufacturing	31-33	10,941	2,188	1,784	$176.05	$211.87	$387.91
Wholesale trade	42	1,484	297	230	$168.89	$109.97	$278.85
Retail trade	44-45	5,578	1,116	857	$391.94	$1,485.43	$1,877.37
Transportation and warehousing	48-49	7,931	1,586	925	$288.37	$1,495.84	$1,784.21
Information	51	8,293	1,659	701	$190.45	$282.19	$472.64
Finance and insurance	52	198	40	12	$383.26	$2,440.85	$2,824.12
Real estate and rental and leasing	53	2,326	465	328	$160.04	$52.86	$212.91
Professional, scientific, and technical services	54	26,396	5,279	3,542	$376.70	$3,014.52	$3,391.22
Management of companies and enterprises	55	2	0	0	$158.77	$15.31	$174.08
Administrative and waste services	56	13,533	2,707	2,390	$377.26	$1,384.81	$1,762.07
Educational services	61	3,140	628	230	$220.97	$742.28	$963.25
Health care and social assistance	62	4,916	983	581	$380.47	$2,629.11	$3,009.58
Arts, entertainment, and recreation	71	23,191	4,638	3,665	$169.99	$135.36	$305.34
Accommodation and food services	72	7,715	1,543	1,503	$203.41	$308.64	$512.06
Other services	81	5,007	1,001	774	$190.72	$272.77	$463.49
Total private	**--**	**143,352**	**28,670**	**21,383**	**$271.19**	**$1,221.33**	**$1,492.52**

[a] Source: USASpending.gov FY2015. Firms with contracting revenue, excluding contracts only for goods. Also includes 24,352 additional subcontractors identified in USASpending.gov from FY2011-FY2015 and 48,400 firms with operations on Federal land or property.
[b] Estimated as 20 percent of contractors with revenue from service contracts in FY2015. If affected employees in Year 1 are spread over more than 20 percent of these contractors, average costs and transfers per small contractor in Year 1 would be lower.
[c] Calculated by multiplying the number of small contractors with potentially affected employees in Year 1 by percentage of potentially affected

workers who are affected, by industry. This may be an underestimate of the number of small contractors with affected employees if contractors have some potentially affected employees who are affected and others who are not affected.

Table 24: Costs and Transfers as Share of Revenue in Small Contracting Firms in Year 1

Industry	NAICS	Total Transfers & Costs ($1,000s)	Small Contracting Firm Revenues (Billions) [a]	Total as Share of Revenues
Agriculture, forestry, fishing and hunting	11	$1,031	$4.2	0.025%
Mining	21	$333	$7.7	0.004%
Utilities	22	$1,112	$80.6	0.001%
Construction	23	$18,848	$58.1	0.032%
Manufacturing	31-33	$2,403	$40.7	0.006%
Wholesale trade	42	$5,763	$159.6	0.004%
Retail trade	44-45	$4,202	$22.6	0.019%
Transportation and warehousing	48-49	$4,648	$17.6	0.026%
Information	51	$4,149	$41.8	0.010%
Finance and insurance	52	$421	$1.8	0.024%
Real estate and rental and leasing	53	$3,679	$10.6	0.035%
Professional, scientific, and technical services	54	$28,019	$53.5	0.052%
Management of companies and enterprises	55	$38	$0.0	0.162%
Administrative and waste services	56	$10,429	$20.9	0.050%
Educational services	61	$2,353	$8.2	0.029%
Health care and social assistance	62	$4,549	$11.2	0.041%
Arts, entertainment, and recreation	71	$6,597	$19.5	0.034%
Accommodation and food services	72	$3,490	$2.2	0.161%
Other services	81	$2,928	$5.9	0.050%
Total private	**--**	**$104,990**	**$566.6**	**0.019%**

[a] Source: Total revenue for small firms from 2012 SUSB; inflated to 2015$ using the CPI-U. Adjusted with ratio of small contracting firms to all small firms.

Table 25: Projected Costs to Small Businesses (Millions of 2015$)

Year/Discount Rate	Direct Employer Costs	Transfers	Total
Years 1 Through 10			
Year 1	$78.9	$26.1	$105.0
Year 2	$3.2	$53.8	$57.0
Year 3	$3.8	$81.9	$85.8
Year 4	$4.5	$110.5	$114.9
Year 5	$5.1	$139.5	$144.6
Year 6	$3.2	$141.8	$145.0

Year 7	$3.2	$144.2	$147.5
Year 8	$3.3	$146.7	$149.9
Year 9	$3.3	$149.2	$152.5
Year 10	$3.3	$151.7	$155.0
Average Annualized Amounts			
3% discount rate	$12.2	$111.2	$123.4
7% discount rate	$13.7	$106.8	$120.5

D. Differing Compliance and Reporting Requirements for Small Entities

This Final Rule provides no differing compliance and reporting requirements for small entities.

E. Least Burdensome Option or Explanation Required

The Department believes it has chosen the most effective option that implements the Executive Order, and limits burdens to the extent reasonably possible given the requirements of the Executive Order. Taking no regulatory action does not address the Department's concerns discussed above (see Need for Regulation section) and would contravene the Executive Order. The Department also found the option to allow unlimited accrual (section V.C.vi.) to be overly burdensome on business as well as beyond the scope of the Executive Order.

Pursuant to section 603(c) of the RFA, the following alternatives are to be addressed:

i. Differing compliance or reporting requirements for small entities. To establish differing compliance or reporting requirements for small businesses would undermine the impact of the rule. The Department makes available a variety of resources to employers for understanding their obligations and achieving compliance. Therefore, the Department is not implementing differing compliance or reporting requirements for small businesses.

ii. The clarification, consolidation, or simplification of compliance and reporting requirements for small entities. The Department makes available a variety of resources to employers for

understanding their obligations and achieving compliance. As such, the Department has not clarified, consolidated, or simplified the rule.

iii. The use of performance rather than design standards. The Department makes available a variety of resources to employers for understanding their obligations and achieving compliance. Therefore, the Department is not relying upon performance to determine compliancy.

iv. An exemption from coverage of the rule, or any part thereof, for such small entities.

To exempt small businesses from the Final Rule would undermine the impact of the rule. The Department makes available a variety of resources to employers for understanding their obligations and achieving compliance. Therefore, the Department is not implementing a "small business" exemption.

F. Identification, to the Extent Practicable, of all Relevant Federal Rules That May Duplicate, Overlap, or Conflict with the Final Rule

The Department is not aware of any Federal rules that duplicate, overlap, or conflict with this Final Rule.

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. However, this rulemaking applies almost entirely to private employees on Federal contracts and is not expected to affect state, local, or tribal governments. Please see section V.C. for an assessment of anticipated costs and benefits to the private sector.

A few commenters discussed the cost of the proposed rule to tribes. Elk Valley Rancheria wrote that they have "limited staff available to perform both direct and indirect services for federal contracts…The recordkeeping requirements, ambiguity in covered contracts, limited budgets of federal agencies, and potential penalties that could be imposed upon the Tribe as a federal contractor could result in the Tribe having to forego important federal contracting opportunities to the detriment of both the Tribe and federal agencies such as the Federal Highway Administration and the National Park Service." The Chamber/IFA believes some costs may be passed on to state, local and tribal governments and believes "the Department neglected to identify the various parties or types of contracts that would be implicated. The Department has therefore not addressed these important issues in its Unfunded Mandates Reform Act analysis." The Department believes that because costs are a small share of revenues, impacts to governments and tribes should be small.

VII. Executive Order 13132, Federalism

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

VIII. Executive Order 13175, Indian Tribal Governments

This Final Rule will not have tribal implications under Executive Order 13175 that would require a tribal summary impact statement. The rule will not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal government and

Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes.

IX. Effects on Families

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

X. Executive Order 13045, Protection of Children

This Final Rule will have no environmental health risk or safety risk that may disproportionately affect children.

XI. Environmental Impact Assessment

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

XII. Executive Order 13211, Energy Supply

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

XIII. Executive Order 12630, Constitutionally Protected Property Rights

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

XIV. Executive Order 12988, Civil Justice Reform Analysis

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

List of Subjects in 29 CFR Part 13

Administrative practice and procedure, Construction, Government contracts, Law enforcement, Paid sick leave, Reporting and recordkeeping requirements.

David Weil,

Administrator, Wage and Hour Division

For the reasons set out in the preamble, the Department of Labor amends Title 29 of the Code of Federal Regulations by adding part 13 to read as follows:

PART 13 —ESTABLISHING PAID SICK LEAVE FOR FEDERAL CONTRACTORS

Subpart A – General

Sec.

13.1 Purpose and scope.
13.2 Definitions.
13.3 Coverage.
13.4 Exclusions.
13.5 Paid sick leave for Federal contractors and subcontractors.
13.6 Prohibited acts.
13.7 Waiver of rights.
13.8 Multiemployer plans or other funds, plans, or programs.

Subpart B – Federal Government Requirements

13.11 Contracting agency requirements.
13.12 Department of Labor requirements.

Subpart C – Contractor Requirements

13.21 Contract clause.
13.22 Paid sick leave.
13.23 Deductions.
13.24 Anti-kickback.
13.25 Records to be kept by contractors.
13.26 Notice.
13.27 Timing of pay.

Subpart D – Enforcement

13.41 Complaints.
13.42 Wage and Hour Division conciliation.
13.43 Wage and Hour Division investigation.
13.44 Remedies and sanctions.

Subpart E – Administrative Proceedings

13.51 Disputes concerning contractor compliance.
13.52 Debarment proceedings.
13.53 Referral to Chief Administrative Law Judge; amendment of pleadings.
13.54 Consent findings and order.
13.55 Administrative Law Judge proceedings.
13.56 Petition for review.
13.57 Administrative Review Board proceedings.
13.58 Administrator ruling.
Appendix A to Part 13— Contract Clause

AUTHORITY: 5 U.S.C. 301; E.O. 13706, 80 FR 54697, 3 CFR, 2016 Comp., p. 367;

Secretary's Order 01-2014, 79 FR 77527.

Subpart A—General

§ 13.1 Purpose and scope.

(a) Purpose. This part contains the Department of Labor's rules relating to the administration and enforcement of Executive Order 13706 (Executive Order or the Order), "Establishing Paid Sick Leave for Federal Contractors." The Order states that providing paid sick leave to

employees will improve the health and performance of employees of Federal contractors and will bring benefits packages offered by Federal contractors in line with model employers, ensuring they remain competitive in the search for dedicated and talented employees. The Executive Order concludes that providing paid sick leave will result in savings and quality improvements in the work performed by parties who contract with the Federal Government that will in turn lead to improved economy and efficiency in Government procurement.

(b) Policy. Executive Order 13706 sets forth the general position of the Federal Government that providing access to paid sick leave on Federal contracts will increase efficiency and cost savings for the Federal Government. The Order therefore provides that executive departments and agencies 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 subcontractors shall incorporate into lower-tier subcontracts, specifying, as a condition of payment, that employees will earn not less than 1 hour of paid sick leave for every 30 hours worked on or in connection with covered contracts.

(c) Scope. Neither Executive Order 13706 nor this part creates or changes any rights under the Contract Disputes Act or creates any private right of action. The Executive Order provides that disputes regarding whether a contractor has provided paid sick leave as prescribed by the Order, to the extent permitted by law, shall be disposed of only as provided in this part. 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 and this part similarly do not preclude judicial review of final decisions by the Secretary of Labor in accordance with the Administrative Procedure Act, 5 U.S.C. 701 et seq.

§ 13.2 Definitions.

For purposes of this part:

Accrual year means the 12-month period during which a contractor may limit an employee's accrual of paid sick leave to no less than 56 hours.

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.

As soon as is practicable means as soon as both possible and practical, taking into account all of the facts and circumstances of the individual case.

Certification issued by a health care provider means any type of written document created or signed by a health care provider (or by a representative of the health care provider) that contains information verifying that the physical or mental illness, injury, medical condition, or need for diagnosis, care, or preventive care or other need for care referred to in § 13.5(c)(1)(i), (ii), or (iii) exists. The health care provider (or representative) need not have seen the employee or the individual for whom the employee is caring in person to create a valid certification.

Child means:

(1) A biological, adopted, step, or foster son or daughter of the employee;

(2) A person who is a legal ward or was a legal ward of the employee when that individual was a minor or required a legal guardian;

(3) A person for whom the employee stands in loco parentis or stood in loco parentis when that individual was a minor or required someone to stand in loco parentis; or

(4) A child, as described in paragraphs (1) through (3) of this definition, of an employee's spouse or domestic partner.

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 to include, but not be limited to, any contract that may be consistent with the definition provided in the Federal Acquisition Regulation (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; 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 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 representative of an executive department or agency 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. 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 (DBA) means the Davis-Bacon Act of 1931, as amended, 40 U.S.C. 3141 et seq., and its implementing regulations.

Domestic partner means an adult in a committed relationship with another adult. A committed relationship is one in which the employee and the domestic partner of the employee are each other's sole domestic partner (and are not married to or domestic partners with anyone

else) and share responsibility for a significant measure of each other's common welfare and financial obligations. This includes, but is not limited to, any relationship between two individuals of the same or opposite sex that is granted legal recognition by a State or by the District of Columbia as a marriage or analogous relationship (including, but not limited to, a civil union).

Domestic violence means:

(1) Felony or misdemeanor crimes of violence (including threats or attempts) committed:

(i) By a current or former spouse, domestic partner, or intimate partner of the victim;

(ii) By a person with whom the victim shares a child in common;

(iii) By a person who is cohabitating with or has cohabitated with the victim as a spouse, domestic partner, or intimate partner;

(iv) By a person similarly situated to a spouse of the victim under civil or criminal domestic or family violence laws of the jurisdiction in which the victim resides or the events occurred; or

(v) By any other adult person against a victim who is protected from that person's acts under the civil or criminal domestic or family violence laws of the jurisdiction in which the victim resides or the events occurred.

(2) Domestic violence also includes any crime of violence considered to be an act of domestic violence under the civil or criminal domestic or family violence laws of the jurisdiction in which the victim resides or the events occurred.

Employee 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 Service Contract Act, the Davis-Bacon Act, or the Fair Labor Standards Act, including

employees who qualify for an exemption from the Fair Labor Standards Act's minimum wage and overtime provisions, regardless of the contractual relationship alleged to exist between the individual and the employer. The term employee includes any person performing work 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. An employee performs "on" a contract if the employee directly performs the specific services called for by the contract. An employee performs "in connection with" a contract if the employee's work activities are necessary to the performance of a contract but are not the specific services called for by the contract.

Executive departments and agencies means executive departments within the meaning of 5 U.S.C. 101, military departments within the meaning of 5 U.S.C. 102, or any independent establishments within the meaning of 5 U.S.C. 104(1) or 39 U.S.C. 201, and any wholly owned Government corporation within the meaning of 31 U.S.C. 9101.

Executive Order 13495 or Nondisplacement Executive Order means Executive Order 13495 of January 30, 2009, Nondisplacement of Qualified Workers Under Service Contracts, 74 FR 6103 (Feb. 4, 2009), and its implementing regulations at 29 CFR part 9.

Executive Order 13658 or Minimum Wage Executive Order means 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.

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

Family and Medical Leave Act (FMLA) means the Family and Medical Leave Act of 1993, as amended, 29 U.S.C. 2601 et seq., and its implementing regulations.

Family violence means any act or threatened act of violence, including any forceful detention of an individual that results or threatens to result in physical injury and is committed by a person against another individual (including an elderly individual) to or with whom such person is related by blood, is or was related by marriage or is or was otherwise legally related, or is or was lawfully residing.

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, any Territory or possession of the United States, or any independent regulatory agency within the meaning of 44 U.S.C. 3502(5).

Health care provider means any practitioner who is licensed or certified under Federal or State law to provide the health-related service in question or any practitioner recognized by an employer or the employer's group health plan. The term includes, but is not limited to, doctors of medicine or osteopathy, podiatrists, dentists, psychologists, optometrists, chiropractors, nurse practitioners, nurse-midwives, clinical social workers, physician assistants, physical therapists, and Christian Science Practitioners listed with the First Church of Christ, Scientist in Boston, Massachusetts.

Independent agencies means independent regulatory agencies within the meaning of 44 U.S.C. 3502(5).

Individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship means any person with whom the employee has a significant personal bond that is or is like a family relationship, regardless of biological or legal relationship.

Intimate partner means a person who is or has been in a social relationship of a romantic or intimate nature with the victim, where the existence of such a relationship shall be determined based on a consideration of the length of the relationship; the type of relationship; and the frequency of interaction between the persons involved in the relationship.

Multiemployer plan means a plan to which more than one employer is required to contribute and which is maintained pursuant to one or more collective bargaining agreements between one or more employee organizations and more than one employer.

New contract means a contract that results from a solicitation issued on or after January 1, 2017, or a contract that is awarded outside the solicitation process on or after January 1, 2017. 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, 2017 will constitute a new contract if, through bilateral negotiation, on or after January 1, 2017:

(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, 2016 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.

Obtain additional counseling, seek relocation, seek assistance from a victim services organization, or take related legal action, used in reference to domestic violence, sexual assault, or stalking, means to spend time arranging, preparing for, or executing acts related to addressing physical injuries or mental or emotional impacts resulting from being a victim of domestic violence, sexual assault, or stalking. Such acts include finding and using services of a counselor or victim services organization intended to assist a victim to respond to or prevent future incidents of domestic violence, sexual assault, or stalking; identifying and moving to a different residence to avoid being a victim of domestic violence, sexual assault, or stalking; or a victim's pursuing any related legal action.

Obtaining diagnosis, care, or preventive care from a health care provider means receiving services from a health care provider, whether to identify, treat, or otherwise address an existing condition or to prevent potential conditions from arising. The term includes time spent traveling to and from the location at which such services are provided or recovering from receiving such services.

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.

Paid sick leave means compensated absence from employment that is required by Executive Order 13706 and this part.

Parent means:

(1) A biological, adoptive, step, or foster parent of the employee, or a person who was a foster parent of the employee when the employee was a minor;

(2) A person who is the legal guardian of the employee or was the legal guardian of the employee when the employee was a minor or required a legal guardian;

(3) A person who stands in loco parentis to the employee or stood in loco parentis to the employee when the employee was a minor or required someone to stand in loco parentis; or

(4) A parent, as described in paragraphs (1) through (3) of this definition, of an employee's spouse or domestic partner.

Physical or mental illness, injury, or medical condition means any disease, sickness, disorder, or impairment of, or any trauma to, the body or mind.

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 Davis-Bacon Act.

Procurement contract for services means 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. The term procurement contract for services includes any contract subject to the Service Contract Act.

Related legal action or related civil or criminal legal proceeding, used in reference to domestic violence, sexual assault, or stalking, means any type of legal action, in any forum, that relates to the domestic violence, sexual assault, or stalking, including, but not limited to, family, tribal, territorial, immigration, employment, administrative agency, housing matters, campus

administrative or protection or stay-away order proceedings, and other similar matters; and criminal justice investigations, prosecutions, and post-trial matters (including sentencing, parole, and probation) that impact the victim's safety and privacy.

Secretary means the Secretary of Labor and includes any official of the U.S. Department of Labor authorized to perform any of the functions of the Secretary of Labor under this part.

Service Contract Act (SCA) means the McNamara-O'Hara Service Contract Act of 1965, as amended, 41 U.S.C. 6701 et seq., and its implementing regulations.

Sexual assault means any nonconsensual sexual act proscribed by Federal, tribal, or State law, including when the victim lacks capacity to consent.

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

Spouse means the other person with whom an individual entered into marriage as defined or recognized under State law for purposes of marriage in the State in which the marriage was entered into or, in the case of a marriage entered into outside of any State, if the marriage is valid in the place where entered into and could have been entered into in at least one State. This definition includes an individual in a common law marriage that was entered into in a State that recognizes such marriages or, if entered into outside of any State, is valid in the place where entered into and could have been entered into in at least one State.

Stalking means engaging in a course of conduct directed at a specific person that would cause a reasonable person to fear for his or her safety or the safety of others or suffer substantial emotional distress.

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, and instrumentalities, including nonappropriated fund instrumentalities. When used in a geographic sense, the United States means the 50 States and the District of Columbia.

Victim services organization means a nonprofit, nongovernmental, or tribal organization or rape crisis center, including a State or tribal coalition, that assists or advocates for victims of domestic violence, sexual assault, or stalking, including domestic violence shelters, faith-based organizations, and other organizations, with a documented history of effective work concerning domestic violence, sexual assault, or stalking.

Violence Against Women Act (VAWA) means the Violence Against Women Act of 1994, 42 U.S.C. 13925 et seq., and its implementing regulations.

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

§ 13.3 Coverage.

(a) This part applies to any new contract with the Federal Government, unless excluded by § 13.4, 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 § 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 employees performing on or in connection with such contract are governed by the Davis-Bacon Act, the Service Contract Act, or the Fair Labor Standards Act, including

employees who qualify for an exemption from the Fair Labor Standards Act's minimum wage and overtime provisions.

(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 employees' 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). For all other prime contracts covered by Executive Order 13706 and this part and for all subcontracts awarded under prime contracts covered by Executive Order 13706 and this part, this part applies regardless of the value of the contract.

(c) This part only applies to contracts with the Federal Government requiring performance in whole or in part within the United States. 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 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.

§ 13.4 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 and agreements with and grants to Indian Tribes. This part does not apply to contracts and agreements with and grants to Indian Tribes under the Indian Self-Determination and Education Assistance Act, as amended, 25 U.S.C. 450 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 § 13.3(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 § 4.115 through 4.122 and § 4.123(d) and (e), are not subject to this part.

(e) Employees performing in connection with covered contracts for less than 20 percent of their work hours in a given workweek. The accrual requirements of this part do not apply to employees performing in connection with covered contracts, i.e., those employees 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, who spend less than 20 percent of their hours worked in a particular workweek performing in connection with such contracts. This exclusion is inapplicable to employees performing on covered contracts, i.e., those employees directly engaged in performing the specific work called for by the contract, at any point during the workweek. This exclusion is also inapplicable to employees performing in connection with covered contracts with respect to any workweek in which the employees spend 20 percent or more of their hours worked performing in connection with a covered contract.

(f) Employees whose covered work is governed by a collective bargaining agreement that already provides 56 hours of paid sick time. If a collective bargaining agreement ratified before September 30, 2016 applies to an employee's work performed on or in connection with a covered contract and provides the employee with at least 56 hours (or 7 days, if the agreement

refers to days rather than hours) of paid sick time (or paid time off that may be used for reasons related to sickness or health care) each year, the requirements of the Executive Order and this part do not apply to the employee until the earlier of the date the agreement terminates or January 1, 2020. If a collective bargaining agreement ratified before September 30, 2016 applies to an employee's work performed on or in connection with a covered contract and provides the employee with paid sick time (or paid time off that may be used for reasons related to sickness or health care) each year, but the amount of such leave provided under the agreement is less than 56 hours (or 7 days, if the agreement refers to days rather than hours), the requirements of the Executive Order and this part do not apply to the employee until the earlier of the date the agreement terminates or January 1, 2020, provided that each year the contractor provides covered employees with the difference between 56 hours (or 7 days) and the amount provided under the existing agreement in a manner consistent with either the Executive Order and this part or the terms and conditions of the collective bargaining agreement.

§ 13.5 Paid sick leave for Federal contractors and subcontractors.

(a) Accrual. (1) A contractor shall permit an employee to accrue not less than 1 hour of paid sick leave for every 30 hours worked on or in connection with a covered contract. A contractor shall aggregate an employee's hours worked on or in connection with all covered contracts for that contractor for purposes of paid sick leave accrual.

(i) Hours worked has the same meaning for purposes of Executive Order 13706 and this part as it does under the Fair Labor Standards Act, as set forth in 29 CFR part 785. To properly exclude time spent on non-covered work from an employee's hours worked that count toward the accrual of paid sick leave, a contractor must accurately identify in its records the employee's covered and non-covered hours worked, or, if the employee performs work in connection with rather than

on covered contracts, a contractor may estimate the portion of an employee's hours worked spent in connection with covered contracts provided the estimate is reasonable and based on verifiable information.

(ii) A contractor shall calculate an employee's accrual of paid sick leave no less frequently than at the conclusion of each pay period or each month, whichever interval is shorter. A contractor need not allow an employee to accrue paid sick leave in increments smaller than 1 hour for completion of any fraction of 30 hours worked. Any such fraction of hours worked shall be added to hours worked for the same contractor in subsequent pay periods to reach the next 30 hours worked provided that the next pay period in which the employee performs on or in connection with a covered contract occurs within the same accrual year.

(iii) If a contractor is not obligated by the Service Contract Act, Davis-Bacon Act, or Fair Labor Standards Act to keep records of an employee's hours worked, such as because the employee is employed in a bona fide executive, administrative, or professional capacity as those terms are defined in 29 CFR part 541, the contractor may, as to that employee, calculate paid sick leave accrual by tracking the employee's actual hours worked or by using the assumption that the employee works 40 hours on or in connection with a covered contract in each workweek. If such an employee regularly works fewer than 40 hours per week on or in connection with covered contracts, whether because the employee's time is split between covered and non-covered contracts or because the employee has a part-time schedule, the contractor may allow the employee to accrue paid sick leave based on the employee's typical number of hours worked on or in connection with covered contracts per workweek provided the contractor has probative evidence to support the number it uses or, if the employee performs work in connection with rather than on covered contracts, a contractor may estimate the employee's typical number of

hours worked in connection with covered contracts per workweek provided the estimate is reasonable and based on verifiable information.

(2) A contractor shall inform an employee, in writing, of the amount of paid sick leave that the employee has accrued but not used no less than once each pay period or each month, whichever interval is shorter, as well as upon a separation from employment and upon reinstatement of paid sick leave pursuant to paragraph (b)(4) of this section. A contractor's existing procedure for informing employees of their available leave, such as notification accompanying each paycheck or an online system an employee can check at any time, may be used to satisfy or partially satisfy these requirements provided it is written (including electronically, if the contractor customarily corresponds with or makes information available to its employees by electronic means).

(3) A contractor may choose to provide an employee with at least 56 hours of paid sick leave at the beginning of each accrual year rather than allowing the employee to accrue such leave based on hours worked over time.

(i) If a contractor chooses to use the option described in this paragraph, the contractor need not comply with the accrual requirements described in paragraph (a)(1) of this section. The contractor must, however, allow carryover of paid sick leave as required by paragraph (b)(2) of this section, and although the contractor may limit the amount of paid sick leave an employee may carry over to no less than 56 hours, the contractor may not limit the amount of paid sick leave an employee has available for use at any point as is otherwise permitted by paragraph (b)(3) of this section.

(ii) If a contractor chooses to use the option described in this paragraph and the contractor hires an employee or newly assigns the employee to work on or in connection with a covered contract

after the beginning of the accrual year, the contractor may provide the employee with a prorated amount of paid sick leave based on the number of pay periods remaining in the accrual year.

(iii) A contractor may use the option described in this paragraph as to any or all of its employees in any or all accrual years.

(b) Maximum accrual, carryover, reinstatement, and payment for unused leave. (1) A contractor may limit the amount of paid sick leave an employee is permitted to accrue to not less than 56 hours in each accrual year. An accrual year is a 12-month period beginning on the date an employee's work on or in connection with a covered contract began or any other fixed date chosen by the contractor, such as the date a covered contract began, the date the contractor's fiscal year begins, a date relevant under State law, or the date a contractor uses for determining employees' leave entitlements under the FMLA pursuant to § 825.200 of this title. A contractor may choose its accrual year but must use a consistent option for all, or across similarly situated groups of, employees and may not select or change any employee's accrual year in order to avoid the paid sick leave requirements of Executive Order 13706 and this part.

(2) Paid sick leave shall carry over from one accrual year to the next. Paid sick leave carried over from the previous accrual year shall not count toward any limit the contractor sets on annual accrual.

(3) A contractor may limit the amount of paid sick leave an employee is permitted to have available for use at any point to not less than 56 hours. Accordingly, even if an employee has accrued fewer than 56 hours of paid sick leave since the beginning of the accrual year, the employee need only be permitted to accrue additional paid sick leave if the employee has fewer than 56 hours available for use.

(4) Paid sick leave shall be reinstated for employees rehired by the same contractor within 12 months after a job separation. This reinstatement requirement applies whether the employee leaves and returns to a job on or in connection with a single covered contract or works for a single contractor on or in connection with more than one covered contract, regardless of whether the employee remains employed by the contractor in between periods of working on covered contracts.

(5) Nothing in Executive Order 13706 or this part shall require a contractor to make a financial payment to an employee for accrued paid sick leave that has not been used upon a separation from employment. If a contractor nevertheless makes such a payment in an amount equal to or greater than the value of the pay and benefits the employee would have received pursuant to paragraph (c)(3) of this section had the employee used the paid sick leave, the contractor is relieved of the obligation to reinstate an employee's accrued paid sick leave upon rehiring the employee within 12 months of the separation pursuant to paragraph (b)(4) of this section.

(c) Use. (1) Subject to the conditions described in paragraphs (d) and (e) of this section and the amount of paid sick leave the employee has available for use, a contractor must permit an employee to use paid sick leave to be absent from work for that contractor during time the employee would have been performing work on or in connection with a covered contract or, if the contractor estimates the employee's hours worked in connection with such contracts for purposes of accrual, during any work time because of:

(i) A physical or mental illness, injury, or medical condition of the employee;

(ii) Obtaining diagnosis, care, or preventive care from a health care provider by the employee;

(iii) Caring for the employee's child, parent, spouse, domestic partner, or any other individual related by blood or affinity whose close association with the employee is the equivalent of a

family relationship who has any of the conditions or needs for diagnosis, care, or preventive care referred to in paragraphs (c)(1)(i) or (ii) of this section or is otherwise in need of care; or

(iv) Domestic violence, sexual assault, or stalking, if the time absent from work is for the purposes otherwise described in paragraphs (c)(1)(i) or (ii) of this section or to obtain additional counseling, seek relocation, seek assistance from a victim services organization, take related legal action, including preparation for or participation in any related civil or criminal legal proceeding, or assist an individual related to the employee as described in paragraph (c)(1)(iii) of this section in engaging in any of these activities.

(2) A contractor shall account for an employee's use of paid sick leave in increments of no greater than 1 hour.

(i) A contractor may not reduce an employee's accrued paid sick leave by more than the amount of time the employee is actually absent from work, and a contractor may not require an employee to use more leave than is necessary to address the circumstances that precipitated the need for the leave, provided that the leave is counted using an increment of no greater than 1 hour.

(ii) The amount of paid sick leave used may not exceed the hours an employee would have worked if the need for leave had not arisen.

(iii) If it is physically impossible for an employee using paid sick leave to commence or end work mid-way through a shift, such as if a flight attendant or a railroad conductor is scheduled to work aboard an airplane or train, or a laboratory employee is unable to enter or leave a sealed "clean room" during a certain period of time, and no equivalent position is available, the entire period that the employee is forced to be absent constitutes paid sick leave. The period of the physical impossibility is limited to the period during which the contractor is unable to permit the

employee to work prior to the use of paid sick leave or return the employee to the same or an equivalent position due to the physical impossibility after the use of paid sick leave.

(3) A contractor shall provide to an employee using paid sick leave the same regular pay and benefits the employee would have received had the employee not been absent from work. Regular pay means payments that would be included in the calculation of the employee's regular rate for hours worked under the Fair Labor Standards Act as set forth in 29 CFR part 778.

(4) A contractor may not limit the amount of paid sick leave an employee may use per year or at once on any basis other than the amount of paid sick leave an employee has available.

(5) An employee is encouraged to make a reasonable effort to schedule preventive care or another foreseeable need to use paid sick leave to suit the needs of both the contractor and employee, and a contractor may ask an employee to make a reasonable effort to schedule foreseeable paid sick leave so as to not disrupt unduly the contractor's operations, but a contractor may not make an employee's use of paid sick leave contingent on the employee's finding a replacement worker to cover any work time to be missed or on the fulfillment of the contractor's operational needs.

(d) Request for leave. (1) A contractor shall permit an employee to use any or all of the employee's available paid sick leave upon the oral or written request of an employee that includes information sufficient to inform the contractor that the employee is seeking to be absent from work for a purpose described in paragraph (c)(1) of this section and, to the extent reasonably feasible, the anticipated duration of the leave.

(i) An employee's request to use paid sick leave need not include a specific reference to the Executive Order or this part or even use the words "sick leave" or "paid sick leave," and a contractor may not require an employee to provide extensive or detailed information about the

need to be absent from work or the employee's family or family-like relationship with an individual for whom the employee is requesting to care.

(ii) Although an employee shall make a good faith effort to provide a reasonable estimate of the length of the requested absence from work, a contractor shall permit the employee to return to work earlier, or continue to use available paid sick leave for longer, than anticipated.

(iii) The employee's request shall be directed to the appropriate personnel pursuant to a contractor's policy or, in the absence of a formal policy, any personnel who typically receive requests for other types of leave or otherwise address scheduling issues on behalf of the contractor.

(iv) The contractor shall maintain the confidentiality of any medical or other personal information contained in an employee's request to use paid sick leave as required by § 13.25(d).

(2) If the need for leave is foreseeable, the employee's request shall be made at least 7 calendar days in advance. If the employee is unable to request paid sick leave at least 7 calendar days in advance, the request shall be made as soon as is practicable. When an employee becomes aware of a need to use paid sick leave less than 7 calendar days in advance, it should typically be practicable for the employee to make a request for leave either the day the employee becomes aware of the need to use paid sick leave or the next business day. In all cases, however, the determination of when an employee could practicably make a request must take into account the individual facts and circumstances.

(3)(i) A contractor may communicate its grant of a request to use paid sick leave either orally or in writing (including electronically, if the contractor customarily corresponds with or makes information available to its employees by such means).

(ii) A contractor shall communicate any denial of a request to use paid sick leave in writing (including electronically, if the contractor customarily corresponds with or makes information available to its employees by such means), with an explanation for the denial. Denial is appropriate if, for example, the employee did not provide sufficient information about the need for paid sick leave; the reason given is not consistent with the uses of paid sick leave described in paragraph (c)(1) of this section; the employee did not indicate when the need would arise; the employee has not accrued, and will not have accrued by the date of leave anticipated in the request, a sufficient amount of paid sick leave to cover the request (in which case, if the employee will have any paid sick leave available for use, only a partial denial is appropriate); or the request is to use paid sick leave during time the employee is scheduled to be performing non-covered work. If the denial is based on insufficient information provided in the request, such as if the employee did not state the time of an appointment with a health care provider, the contractor must permit the employee to submit a new, corrected request. If the denial is based on an employee's request to use paid sick leave during time she is scheduled to be performing non-covered work, the denial must be supported by records adequately segregating the employee's time spent on covered and non-covered contracts.

(iii) A contractor shall respond to any request to use paid sick leave as soon as is practicable after the request is made. Although the determination of when it is practicable for a contractor to provide a response will take into account the individual facts and circumstances, it should in many circumstances be practicable for the contractor to respond to a request immediately or within a few hours. In some instances, however, such as if it is unclear at the time of the request whether the employee will be working on or in connection with a covered or non-covered

contract at the time for which paid sick leave is requested, as soon as practicable could mean within a day or no longer than within a few days.

(e) Certification or documentation for leave of 3 or more consecutive full workdays. (1)(i) A contractor may require certification issued by a health care provider to verify the need for paid sick leave used for a purpose described in paragraphs (c)(1)(i), (ii), or (iii) of this section only if the employee is absent for 3 or more consecutive full workdays. The contractor shall protect the confidentiality of any certification as required by § 13.25(d).

(ii) A contractor may only require documentation from an appropriate individual or organization to verify the need for paid sick leave used for a purpose described in paragraph (c)(1)(iv) of this section only if the employee is absent for 3 or more consecutive full workdays. The source of such documentation may be any person involved in providing or assisting with the care, counseling, relocation, assistance of a victim services organization, or related legal action, such as, but not limited to, a health care provider, counselor, representative of a victim services organization, attorney, clergy member, family member, or close friend. Self-certification is also permitted. The contractor may only require that such documentation contain the minimum necessary information establishing a need for the employee to be absent from work. The contractor shall not disclose any verification information and shall maintain confidentiality about the domestic abuse, sexual assault, or stalking, as required by § 13.25(d).

(2) If certification or documentation is to verify the illness, injury, or condition, need for diagnosis, care, or preventive care, or activity related to domestic violence, sexual assault, or stalking of an individual related to the employee as described in paragraph (c)(1)(iii) of this section, a contractor may also require the employee to provide reasonable documentation or a statement of the family or family-like relationship. This documentation may take the form of a

simple written statement from the employee or could be a legal or other document proving the relationship, such as a birth certificate or court order.

(3)(i) A contractor may only require certification or documentation if the contractor informs an employee before the employee returns to work that certification or documentation will be required to verify the use of paid sick leave if the employee is absent for 3 or more consecutive full workdays. The contractor may inform an employee of this requirement each time the employee requests to use or does use paid sick leave, or the contractor may inform employees of a general policy to require certification or documentation for absences of 3 or more consecutive full workdays if it does so in a manner reasonably calculated to provide actual notice of the requirement to employees.

(ii) A contractor may require the employee to provide certification or documentation within 30 days of the first day of the 3 or more consecutive full workdays of paid sick leave but may not set a shorter deadline for its submission.

(iii) While a contractor is waiting for or reviewing certification or documentation, it must treat the employee's otherwise proper request for 3 or more consecutive full workdays of paid sick leave as valid. If the employee provides certification or documentation that is insufficient to verify the employee's need for paid sick leave, the contractor shall notify the employee of the deficiency and allow the employee at least 5 days to provide new or supplemental certification or documentation. If after 30 days the employee has not provided any certification or documentation, or if after the 5 or more days allowed for resubmission the employee has either provided no new or supplemental certification or documentation or the new certification or documentation is still insufficient to verify the employee's need for paid sick leave, the contractor may, within 10 calendar days of the employee's deadline for providing sufficient

certification or documentation, retroactively deny the employee's request to use paid sick leave. In such circumstances, the contractor may recover the value of the pay and benefits the employee received but to which the employee was not entitled, including through deduction from any sums due to the employee (e.g., unpaid wages, vacation pay, profit sharing, etc.), provided such deductions do not otherwise violate applicable Federal, State, or local wage payment or other laws.

(4) A contractor may contact the health care provider or other individual who created or signed the certification or documentation only for purposes of authenticating the document or clarifying its contents. The contractor may not request additional details about the medical or other condition referenced, seek a second opinion, or otherwise question the substance of the certification. To make such contact, the contractor must use a human resources professional, a leave administrator, or a management official. The employee's direct supervisor may not contact the employee's health care provider unless there is no other appropriate individual who can do so. The requirements of the Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule, set forth at 45 CFR parts 160 and 164, must be satisfied when individually identifiable health information of an employee is shared with a contractor by a HIPAA-covered health care provider.

(f) Interaction with other laws and paid time off policies. (1) General. Nothing in Executive Order 13706 or this part shall excuse noncompliance with or supersede any applicable Federal or State law, any applicable law or municipal ordinance, or a collective bargaining agreement requiring greater paid sick leave or leave rights than those established under the Executive Order and this part.

(2) SCA and DBA requirements. (i) Paid sick leave required by Executive Order 13706 and this part is in addition to a contractor's obligations under the Service Contract Act and Davis-Bacon Act. A contractor may not receive credit toward its prevailing wage or fringe benefit obligations under those Acts for any paid sick leave provided in satisfaction of the requirements of Executive Order 13706 and this part.

(ii) A contractor may count the value of any paid sick time provided in excess of the requirements of Executive Order 13706 and this part (and any other law) toward its obligations under the Service Contract Act or Davis-Bacon Act in keeping with the requirements of those Acts.

(3) FMLA. A contractor's obligations under the Executive Order and this part have no effect on its obligations to comply with, or ability to act pursuant to, the Family and Medical Leave Act. Paid sick leave may be substituted for (that is, may run concurrently with) unpaid FMLA leave under the same conditions as other paid time off pursuant to § 825.207 of this title. As to time off that is designated as FMLA leave and for which an employee uses paid sick leave, all notices and certifications that satisfy the FMLA requirements set forth at § 825.300 through 300.308 of this title will satisfy the request for leave and certification requirements of paragraphs (d) and (e) of this section.

(4) State and local paid sick time laws. A contractor's compliance with a State or local law requiring that employees be provided with paid sick time does not excuse the contractor from compliance with any of its obligations under the Executive Order 13706 or this part. A contractor may, however, satisfy its obligations under the Order and this part by providing paid sick time that fulfills the requirements of a State or local law provided that the paid sick time is accrued and may be used in a manner that meets or exceeds all of the requirements of the Order

and this part including but not limited to the accrual and use requirements in this section and the prohibitions on interference and discrimination in § 13.6. Where the requirements of an applicable State or local law and the Order and this part differ, satisfying both will require a contractor to comply with the requirement that is more generous to employees.

(5) Paid time off policies. (i) The paid sick leave requirements of Executive Order 13706 and this part need not have any effect on a contractor's voluntary paid time off policy, whether provided pursuant to a collective bargaining agreement or otherwise.

(ii) A contractor's existing paid time off policy (if provided in addition to the fulfillment of Service Contract Act or Davis-Bacon Act obligations, if applicable) will satisfy the requirements of the Executive Order and this part if the paid time off is made available to all employees described in § 13.3(a)(2) (other than those excluded by § 13.4(e)); may be used for at least all of the purposes described in paragraph (c)(1) of this section; is provided in a manner and an amount sufficient to comply with the rules and restrictions regarding the accrual of paid sick leave set forth in paragraph (a) of this section and regarding maximum accrual, carryover, reinstatement, and payment for unused leave set forth in paragraph (b) of this section; is provided pursuant to policies sufficient to comply with the rules and restrictions regarding use of paid sick leave set forth in paragraph (c) of this section, regarding requests for leave set forth in paragraph (d) of this section, and regarding certification and documentation set forth in paragraph (e) of this section, at least with respect to any paid time off used for the purposes described in paragraph (c)(1) of this section; and is protected by the prohibitions against interference, discrimination, and recordkeeping violations described in § 13.6 and the prohibition against waiver of rights described in § 13.7, at least with respect to any paid time off used for the purposes described in paragraph (c)(1) of this section.

(iii) A contractor satisfying the requirements of the Executive Order and this part with a paid time off policy that provides more than 56 hours of leave per accrual year may choose to either provide all paid time off as described in paragraph (f)(5)(ii) of this section or track, and make and maintain records reflecting, the amount of paid time off an employee uses for the purposes described in paragraph (c)(1) of this section, in which case the contractor need only provide, for each accrual year, up to 56 hours of paid time off the employee requests to use for such purposes in compliance with the Order and this part.

§ 13.6 Prohibited acts.

(a) Interference. (1) A contractor may not in any manner interfere with an employee's accrual or use of paid sick leave as required by Executive Order 13706 or this part.

(2) Interference includes, but is not limited to, miscalculating the amount of paid sick leave an employee has accrued, denying or unreasonably delaying a response to a proper request to use paid sick leave, discouraging an employee from using paid sick leave, reducing an employee's accrued paid sick leave by more than the amount of such leave used, transferring the employee to work on non-covered contracts to prevent the accrual or use of paid sick leave, disclosing confidential information contained in certification or other documentation provided to verify the need to use paid sick leave, or making the use of paid sick leave contingent on the employee's finding a replacement worker or the fulfillment of the contractor's operational needs.

(b) Discrimination. (1) A contractor may not discharge or in any other manner discriminate against any employee for:

(i) Using, or attempting to use, paid sick leave as provided for under Executive Order 13706 and this part;

(ii) Filing any complaint, initiating any proceeding, or otherwise asserting any right or claim under Executive Order 13706 or this part;

(iii) Cooperating in any investigation or testifying in any proceeding under Executive Order 13706 or this part; or

(iv) Informing any other person about his or her rights under Executive Order 13706 or this part.

(2) Discrimination includes, but is not limited to, a contractor's considering any of the activities described in paragraph (b)(1) of this section as a negative factor in employment actions, such as hiring, promotions, or disciplinary actions, or a contractor's counting paid sick leave under a no fault attendance policy.

(c) Recordkeeping. A contractor's failure to make and maintain or to make available to authorized representatives of the Wage and Hour Division records for inspection, copying, and transcription as required by § 13.25, or any other failure to comply with the requirements of § 13.25, constitutes a violation of Executive Order 13706, this part, and the underlying contract.

§ 13.7 Waiver of rights.

Employees cannot waive, nor may contractors induce employees to waive, their rights under Executive Order 13706 or this part.

§ 13.8 Multiemployer plans or other funds, plans, or programs.

(a) A contractor may fulfill its obligations under Executive Order 13706 and this part jointly with other contractors—that is, as though all of the contractors are a single contractor—through a multiemployer plan that provides paid sick leave in compliance with the rules and requirements of Executive Order 13706 and this part. Regardless of what functions the plan performs, each

contractor remains responsible for any violation of the Order or this part that occurs during its employment of the employee.

(b) Nothing in this part prohibits a contractor from providing paid sick leave through a fund, plan, or program. Regardless of the manner in which a contractor provides paid sick leave or what functions any fund, plan, or program performs, the contractor remains responsible for any violation of the Order or this part with respect to any of its employees.

Subpart B – Federal Government Requirements

§ 13.11 Contracting agency requirements.

(a) Contract clause. The contracting agency shall include the Executive Order paid sick leave contract clause set forth in Appendix A of this part in all covered contracts and solicitations for such contracts, as described in § 13.3, except for procurement contracts subject to the FAR. The required contract clause directs, as a condition of payment, that all employees performing work on or in connection with covered contracts shall be provided paid sick leave as required by Executive Order 13706 and this part. For procurement contracts subject to the FAR, contracting agencies must use the clause set forth in the FAR developed to implement this rule. Such 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.

(b) Failure to include the contract clause. Where the Department of Labor 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 13706 and 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 and this part apply, 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 the Administrator, 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 employees the full amount owed to compensate for any violation of Executive Order 13706 or this part. In the event of any such violation, the agency may, after authorization or by direction of the Administrator 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 Executive Order 13706 or this part 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) Suspending payment. A contracting officer shall, upon his or her own action or upon the direction of the Administrator and notification of the contractor, take action to cause suspension of any further payment, advance, or guarantee of funds to a contractor that has failed to make available for inspection, copying, and transcription any of the records identified in § 13.25.

(e) Actions on complaints—(1) Reporting time frame. The contracting agency shall forward all information listed in paragraph (e)(2) of this section to the Office of Government Contracts Enforcement, Wage and Hour Division, U.S. Department of Labor, 200 Constitution Avenue, NW, Washington, D.C. 20210 within 14 calendar days of receipt of a complaint alleging contractor noncompliance with Executive Order 13706 or this part or within 14 calendar days of being contacted by the Wage and Hour Division regarding any such complaint.

(2) Report contents. The contracting agency shall forward to the Office of Government Contracts Enforcement, Wage and Hour Division, U.S. Department of Labor, 200 Constitution Avenue, NW, Washington, D.C. 20210 any:

(i) Complaint of contractor noncompliance with Executive Order 13706 or this part;

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

(iii) Evidence that the Executive Order paid sick leave contract clause was included in the contract;

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

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

§ 13.12 Department of Labor requirements.

(a) Notice —(1) Wage Determinations OnLine website. The Administrator will publish and maintain on Wage Determinations OnLine (WDOL), http://www.wdol.gov, or any successor site, a notice that Executive Order 13706 creates a requirement to allow employees performing work on or in connection with contracts covered by Executive Order 13706 and this part to

accrue and use paid sick leave, as well as an indication of where to find more complete information about that requirement.

(2) Wage determinations. The Administrator will publish on all wage determinations issued under the Davis-Bacon Act and the Service Contract Act a notice that Executive Order 13706 creates a requirement to allow employees performing work on or in connection with contracts covered by Executive Order 13706 and this part to accrue and use paid sick leave, as well as an indication of where to find more complete information about that requirement.

(b) Notification to a contractor of the withholding of funds. If the Administrator requests that a contracting agency withhold funds from a contractor pursuant to § 13.11(c), or suspend payment, advance, or guarantee of funds pursuant to § 13.11(d), the Administrator and/or contracting agency shall notify the affected prime contractor of the Administrator's request to the contracting agency.

Subpart C—Contractor Requirements

§ 13.21 Contract clause.

(a) The contractor, as a condition of payment, shall abide by the terms of the applicable Executive Order paid sick leave contract clause referred to in § 13.11(a).

(b) The contractor shall include in any covered subcontracts the applicable Executive Order paid sick leave contract clause referred to in § 13.11(a) and shall require, as a condition of payment, that the subcontractor include the 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 requirements of Executive Order 13706 and this part, whether or not the contract clause was included in the subcontract.

§ 13.22 Paid sick leave.

The contractor shall allow all employees performing work on or in connection with a covered contract to accrue and use paid sick leave as required by Executive Order 13706 and this part.

§ 13.23 Deductions.

The contractor may make deductions from the pay and benefits of an employee who is using paid sick leave 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 employee or his or her authorized representative;

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

(e) Deduction, to the extent permitted by law, for the purpose of recouping pay and benefits provided for paid sick leave as to which the contractor retroactively denied the employee's request pursuant to § 13.5(e)(3)(iii) or because the contractor approved the use of the paid sick leave based on a fraudulent request.

§ 13.24 Anti-kickback.

All paid sick leave used by employees performing on or in connection with covered contracts must be paid free and clear and without subsequent deduction (except as set forth in § 13.23), 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 paid sick leave are prohibited.

§ 13.25 Records to be kept by contractors.

(a) The contractor and each subcontractor performing work subject to Executive Order 13706 and this part shall make and maintain during the course of the covered contract, and preserve for no less than 3 years thereafter, records containing the information specified in paragraphs (a)(1) through (15) of this section for each employee and shall make them available for inspection, copying, 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 employee;

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

(3) The rate or rates of wages paid (including all pay and benefits provided);

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

(5) Any deductions made;

(6) The total wages paid (including all pay and benefits provided) each pay period;

(7) A copy of notifications to employees of the amount of paid sick leave the employees have accrued as required under § 13.5(a)(2);

(8) A copy of employees' requests to use paid sick leave, if in writing, or, if not in writing, any other records reflecting such employee requests;

(9) Dates and amounts of paid sick leave used by employees (unless a contractor's paid time off policy satisfies the requirements of Executive Order 13706 and this part as described in § 13.5(f)(5), leave must be designated in records as paid sick leave pursuant to Executive Order 13706);

(10) A copy of any written responses to employees' requests to use paid sick leave, including explanations for any denials of such requests, as required under § 13.5(d)(3);

(11) Any records relating to the certification and documentation a contractor may require an employee to provide under § 13.5(e), including copies of any certification or documentation provided by an employee;

(12) Any other records showing any tracking of or calculations related to an employee's accrual and/or use of paid sick leave;

(13) The relevant covered contract;

(14) The regular pay and benefits provided to an employee for each use of paid sick leave; and

(15) Any financial payment made for unused paid sick leave upon a separation from employment intended, pursuant to § 13.5(b)(5), to relieve a contractor from the obligation to reinstate such paid sick leave as otherwise required by § 13.5(b)(4).

(b) Segregation of time. (1) If a contractor wishes to distinguish between an employee's covered and non-covered work (such as time spent performing work on or in connection with a covered contract versus time spent performing work on or in connection with non-covered contracts or time spent performing work on or in connection with a covered contract in the United States versus time spent performing work outside the United States, or to establish that time spent performing solely in connection with covered contracts constituted less than 20 percent of an employee's hours worked during a particular workweek), the contractor must keep records or other proof reflecting such distinctions. Only if the contractor adequately segregates the employee's time will time spent on non-covered work be excluded from hours worked counted toward the accrual of paid sick leave. Similarly, only if that contractor adequately segregates the employee's time may a contractor properly deny an employee's request to take leave under § 13.5(d) on the ground that the employee was scheduled to perform non-covered work during the time she asked to use paid sick leave.

(2) If a contractor estimates covered hours worked by an employee who performs work in connection with covered contracts pursuant to § 13.5(a)(1)(i) or (iii), the contractor must keep records or other proof of the verifiable information on which such estimates are reasonably based. Only if the contractor relies on an estimate that is reasonable and based on verifiable information will an employee's time spent in connection with non-covered contracts be excluded from hours worked counted toward the accrual of paid sick leave. If a contractor estimates the amount of time an employee spends performing in connection with covered contracts, the contractor must permit the employee to use her paid sick leave during any work time for the contractor.

(c) If a contractor is not obligated by the Service Contract Act, Davis-Bacon Act, or Fair Labor Standards Act to keep records of an employee's hours worked, such as because the employee is employed in a bona fide executive, administrative, or professional capacity as those terms are defined in 29 CFR part 541, and the contractor chooses to use the assumption permitted by § 13.5(a)(1)(iii), the contractor is excused from the requirement in paragraph (a)(4) of this section to keep records of the employee's number of daily and weekly hours worked.

(d)(1) Records relating to medical histories or domestic violence, sexual assault, or stalking, created by or provided to a contractor for purposes of Executive Order 13706, whether of an employee or an employee's child, parent, spouse, domestic partner, or other individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship, shall be maintained as confidential records in separate files/records from the usual personnel files.

(2) If the confidentiality requirements of the Genetic Information Nondiscrimination Act of 2008 (GINA), section 503 of the Rehabilitation Act of 1973, and/or the Americans with

Disabilities Act (ADA) apply to medical information contained in records or documents that the contractor created or received in connection with compliance with the recordkeeping or other requirements of this part, the records and documents must also be maintained in compliance with the confidentiality requirements of the GINA, section 503 of the Rehabilitation Act of 1973, and/or ADA as described in § 1635.9 of this title, 41 CFR 60-741.23(d), and § 1630.14(c)(1) of this title, respectively.

(3) The contractor shall not disclose any documentation used to verify the need to use 3 or more consecutive days of paid sick leave for the purposes listed in § 13.5(c)(1)(iv) (as described in § 13.5(d)(2)) and shall maintain confidentiality about any domestic abuse, sexual assault, or stalking, unless the employee consents or when disclosure is required by law.

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

(f) Nothing in this part limits or otherwise modifies the contractor's recordkeeping obligations, if any, under the Davis-Bacon Act, the Service Contract Act, the Fair Labor Standards Act, the Family and Medical Leave Act, Executive Order 13658, their implementing regulations, or other applicable law.

§ 13.26 Notice.

(a) The contractor must notify all employees performing work on or in connection with a covered contract of the paid sick leave requirements of Executive Order 13706 and this part by posting a notice provided by the Department of Labor in a prominent and accessible place at the worksite so it may be readily seen by employees.

(b) Contractors that customarily post notices to employees electronically may post the notice electronically, provided such electronic posting is displayed prominently on any Web site that is

maintained by the contractor, whether external or internal, and customarily used for notices to employees about terms and conditions of employment.

§ 13.27 Timing of pay.

The contractor shall compensate an employee for time during which the employee used paid sick leave no later than one pay period following the end of the regular pay period in which the paid sick leave was used.

Subpart D—Enforcement

§ 13.41 Complaints.

(a) Any employee, 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. If the complainant is unable to file the complaint in English, the Wage and Hour Division will accept the complaint in any language.

(b) 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, 29 CFR part 70, and the Privacy Act of 1974, 5 U.S.C. 552a.

§ 13.42 Wage and Hour Division conciliation.

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

§ 13.43 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 employees 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 employees, and in all aspects of investigations.

§ 13.44 Remedies and sanctions.

(a) Interference. When the Administrator determines that a contractor has interfered with an employee's accrual or use of paid sick leave in violation of § 13.6(a), the Administrator will notify the contractor and the relevant contracting agency of the interference and request that the contractor remedy the violation. If the contractor does not remedy the violation, the Administrator shall direct the contractor to provide any appropriate relief to the affected employee(s) in the investigative findings letter issued pursuant to § 13.51. Such relief may include any pay and/or benefits denied or lost by reason of the violation; other actual monetary losses sustained as a direct result of the violation; or appropriate equitable or other relief. Payment of liquidated damages in an amount equaling any monetary relief may also be directed

unless such amount is reduced by the Administrator because the violation was in good faith and the contractor had reasonable grounds for believing it had not violated the Order or this part. The Administrator may additionally direct that payments due on the contract or any other contract between the contractor and the Federal Government be withheld as may be necessary to provide any appropriate monetary relief. Upon the final order of the Secretary that monetary relief is due, the Administrator may direct the relevant contracting agency to transfer the withheld funds to the Department of Labor for disbursement.

(b) Discrimination. When the Administrator determines that a contractor has discriminated against an employee in violation of § 13.6(b), the Administrator will notify the contractor and the relevant contracting agency of the discrimination and request that the contractor remedy the violation. If the contractor does not remedy the violation, the Administrator shall direct the contractor to provide appropriate relief to the affected employee(s) in the investigative findings letter issued pursuant to § 13.51. Such relief may include, but is not limited to, employment, reinstatement, promotion, restoration of leave, or lost pay and/or benefits. Payment of liquidated damages in an amount equaling any monetary relief may also be directed unless such amount is reduced by the Administrator because the violation was in good faith and the contractor had reasonable grounds for believing the contractor had not violated the Order or this part. The Administrator may additionally direct that payments due on the contract or any other contract between the contractor and the Federal Government be withheld as may be necessary to provide any appropriate monetary relief. Upon the final order of the Secretary that monetary relief is due, the Administrator may direct the relevant contracting agency to transfer the withheld funds to the Department of Labor for disbursement.

(c) Recordkeeping. When a contractor fails to comply with the requirements of § 13.25 in violation of § 13.6(c), the Administrator will request that the contractor remedy the violation. If the contractor fails to produce required records upon request, 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, advance, or guarantee of funds on the contract until such time as the violations are discontinued.

(d) Debarment. Whenever a contractor is found by the Secretary 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 3 years from the date of publication of the name of the contractor or responsible officer on the excluded parties list currently maintained on the System for Award Management website, http://www.SAM.gov. Neither an order of 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.

(e) Civil actions to recover greater underpayments than those withheld. If the payments withheld under § 13.11(c) are insufficient to reimburse all monetary relief due, or if there are no payments to withhold, the Department of Labor, following a final order of the Secretary, may bring an action against the contractor in any court of competent jurisdiction to recover the remaining amount. The Department of Labor shall, to the extent possible, pay any sums it recovers in this manner directly to the employees who suffered the violation(s) of § 13.6(a) or

(b). Any sum not paid to an employee because of inability to do so within 3 years shall be transferred into the Treasury of the United States as miscellaneous receipts.

(f) 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

§ 13.51 Disputes concerning contractor compliance.

(a) This section sets forth the procedures for resolution of disputes of fact or law concerning a contractor's compliance with 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 that are in dispute with respect

to the violations and/or debarment, as appropriate, 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 § 13.52, the Administrator shall notify the contractor(s) of the investigative 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 the final sentence of (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 an Administrative Law Judge or the Administrative Review Board or otherwise becomes a final order of the Secretary.

§ 13.52 Debarment proceedings.

(a) Whenever any contractor is found by the Secretary of Labor to have disregarded its obligations to employees or subcontractors under Executive Order 13706 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 up to 3 years to receive any contracts or subcontracts subject to Executive Order 13706 from the date of publication of the name or names of the contractor or persons on the excluded parties list currently maintained on the System for Award Management website, http://www.SAM.gov.

(b)(1) Whenever the Administrator finds reasonable cause to believe that a contractor has committed a violation of Executive Order 13706 or this part which constitutes a disregard of its

obligations to employees or subcontractors, the Administrator shall notify by certified mail to the last known address or by personal delivery, 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 13706 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.

§ 13.53 Referral to Chief Administrative Law Judge; amendment of pleadings.

(a) Upon receipt of a timely request for a hearing under § 13.51 (where the Administrator has determined that relevant facts are in dispute) or § 13.52 (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 the Administrative Law Judge may approve. For proceedings pursuant to § 13.51, such an amendment may include a statement that debarment action is warranted under § 13.52. 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 that have happened since the date of the pleadings and that 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.

§ 13.54 <u>Consent findings and order.</u>

(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.

§ 13.55 Administrative Law Judge proceedings.

(a) Jurisdiction. 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 §§ 13.51 and 13.52.

(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 13706 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 excluded parties list, including findings that the contractor disregarded its obligations to employees 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 any monetary or equitable relief described in § 13.44. 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.

§ 13.56 Petition for review.

(a) Filing. 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 employees 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 decision, or the 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.

§ 13.57 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 § 13.51(c)(1) or the final sentence of § 13.51(c)(2)(ii), Administrator's rulings issued under § 13.58, and decisions of Administrative Law Judges issued under § 13.55. In considering the matters within the scope of its jurisdiction, the Administrative Review Board shall act as the authorized representative of the Secretary and shall act fully and finally on behalf of the Secretary concerning such matters.

(2) Limit on scope of review. (i) The Administrative Review Board shall not have jurisdiction to pass on the validity of any provision of this part. The Administrative Review 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 Administrative Review 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 Administrative Review 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 Administrative Review Board concludes a violation occurred, the final order shall mandate action to remedy the violation, including, but not limited to, any monetary or equitable relief described in § 13.44. Where the Administrator has sought imposition of

debarment, the Administrative Review Board shall determine whether an order imposing debarment is appropriate.

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

§ 13.58 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, D.C. 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 13—Contract Clause

The following clause shall be included by the contracting agency in every contract, contract-like instrument, and solicitation to which Executive Order 13706 applies, except for procurement contracts subject to the Federal Acquisition Regulation (FAR):

(a) Executive Order 13706. This contract is subject to Executive Order 13706, the regulations issued by the Secretary of Labor in 29 CFR part 13 pursuant to the Executive Order, and the following provisions.

(b) Paid Sick Leave. (1) The contractor shall permit each employee (as defined in 29 CFR 13.2) engaged in the performance of this contract by the prime contractor or any subcontractor, regardless of any contractual relationship that may be alleged to exist between the contractor and

employee, to earn not less than 1 hour of paid sick leave for every 30 hours worked. The contractor shall additionally allow accrual and use of paid sick leave as required by Executive Order 13706 and 29 CFR part 13. The contractor shall in particular comply with the accrual, use, and other requirements set forth in 29 CFR 13.5 and 13.6, which are incorporated by reference in this contract.

(2) The contractor shall provide paid sick leave to all employees when due free and clear and without subsequent deduction (except as otherwise provided by 29 CFR 13.24), rebate, or kickback on any account. The contractor shall provide pay and benefits for paid sick leave used no later than one pay period following the end of the regular pay period in which the paid sick leave was taken.

(3) The prime contractor and any upper-tier subcontractor shall be responsible for the compliance by any subcontractor or lower-tier subcontractor with the requirements of Executive Order 13706, 29 CFR part 13, and this clause.

(c) Withholding. The contracting officer 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 employees the full amount owed to compensate for any violation of the requirements of Executive Order 13706, 29 CFR part 13, or this clause, including any pay and/or benefits denied or lost by reason of the violation; other actual monetary losses sustained as a direct result of the violation, and liquidated damages.

(d) Contract Suspension/Contract Termination/Contractor Debarment. In the event of a failure to comply with Executive Order 13706, 29 CFR part 13, or this clause, 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 13.52.

(e) The paid sick leave required by Executive Order 13706, 29 CFR part 13, and this clause is in addition to a contractor's obligations under the Service Contract Act and Davis-Bacon Act, and a contractor may not receive credit toward its prevailing wage or fringe benefit obligations under those Acts for any paid sick leave provided in satisfaction of the requirements of Executive Order 13706 and 29 CFR part 13.

(f) Nothing in Executive Order 13706 or 29 CFR part 13 shall excuse noncompliance with or supersede any applicable Federal or State law, any applicable law or municipal ordinance, or a collective bargaining agreement requiring greater paid sick leave or leave rights than those established under Executive Order 13706 and 29 CFR part 13.

(g) Recordkeeping. (1) Any contractor performing work subject to Executive Order 13706 and 29 CFR part 13 must make and maintain, for no less than three (3) years from the completion of the work on the contract, records containing the information specified in paragraphs (i) through (xv) of this section for each employee and shall make them available for inspection, copying, 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 of each employee;

(ii) The employee's occupation(s) or classification(s);

(iii) The rate or rates of wages paid (including all pay and benefits provided);

(iv) The number of daily and weekly hours worked;

(v) Any deductions made;

(vi) The total wages paid (including all pay and benefits provided) each pay period;

(vii) A copy of notifications to employees of the amount of paid sick leave the employee has accrued, as required under 29 CFR 13.5(a)(2);

(viii) A copy of employees' requests to use paid sick leave, if in writing, or, if not in writing, any other records reflecting such employee requests;

(ix) Dates and amounts of paid sick leave taken by employees (unless a contractor's paid time off policy satisfies the requirements of Executive Order 13706 and 29 CFR part 13 as described in § 13.5(f)(5), leave must be designated in records as paid sick leave pursuant to Executive Order 13706);

(x) A copy of any written responses to employees' requests to use paid sick leave, including explanations for any denials of such requests, as required under 29 CFR 13.5(d)(3);

(xi) Any records reflecting the certification and documentation a contractor may require an employee to provide under 29 CFR 13.5(e), including copies of any certification or documentation provided by an employee;

(xii) Any other records showing any tracking of or calculations related to an employee's accrual or use of paid sick leave;

(xiii) The relevant covered contract;

(xiv) The regular pay and benefits provided to an employee for each use of paid sick leave; and

(xv) Any financial payment made for unused paid sick leave upon a separation from employment intended, pursuant to 29 CFR 13.5(b)(5), to relieve a contractor from the obligation to reinstate such paid sick leave as otherwise required by 29 CFR 13.5(b)(4).

(2)(i) If a contractor wishes to distinguish between an employee's covered and non-covered work, the contractor must keep records or other proof reflecting such distinctions. Only if the contractor adequately segregates the employee's time will time spent on non-covered work be excluded from hours worked counted toward the accrual of paid sick leave. Similarly, only if that contractor adequately segregates the employee's time may a contractor properly refuse an employee's request to use paid sick leave on the ground that the employee was scheduled to perform non-covered work during the time she asked to use paid sick leave.

(ii) If a contractor estimates covered hours worked by an employee who performs work in connection with covered contracts pursuant to 29 CFR 13.5(a)(i) or (iii), the contractor must keep records or other proof of the verifiable information on which such estimates are reasonably based. Only if the contractor relies on an estimate that is reasonable and based on verifiable information will an employee's time spent in connection with non-covered work be excluded from hours worked counted toward the accrual of paid sick leave. If a contractor estimates the amount of time an employee spends performing in connection with covered contracts, the contractor must permit the employee to use her paid sick leave during any work time for the contractor.

(3) In the event a contractor is not obligated by the Service Contract Act, the Davis-Bacon Act, or the Fair Labor Standards Act to keep records of an employee's hours worked, such as because the employee is exempt from the FLSA's minimum wage and overtime requirements, and the contractor chooses to use the assumption permitted by 29 CFR 13.5(a)(1)(iii), the contractor is

excused from the requirement in paragraph (1)(d) of this section to keep records of the employee's number of daily and weekly hours worked.

(4)(i) Records relating to medical histories or domestic violence, sexual assault, or stalking, created for purposes of Executive Order 13706, whether of an employee or an employee's child, parent, spouse, domestic partner, or other individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship, shall be maintained as confidential records in separate files/records from the usual personnel files.

(ii) If the confidentiality requirements of the Genetic Information Nondiscrimination Act of 2008 (GINA), section 503 of the Rehabilitation Act of 1973, and/or the Americans with Disabilities Act (ADA) apply to records or documents created to comply with the recordkeeping requirements in this contract clause, the records and documents must also be maintained in compliance with the confidentiality requirements of the GINA, section 503 of the Rehabilitation Act of 1973, and/or ADA as described in 29 CFR 1635.9, 41 CFR 60-741.23(d), and 29 CFR 1630.14(c)(1), respectively.

(iii) The contractor shall not disclose any documentation used to verify the need to use 3 or more consecutive days of paid sick leave for the purposes listed in 29 CFR 13.5(c)(1)(iv) (as described in 29 CFR 13.5(e)(1)(ii)) and shall maintain confidentiality about any domestic abuse, sexual assault, or stalking, unless the employee consents or when disclosure is required by law.

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

(6) Nothing in this contract clause limits or otherwise modifies the contractor's recordkeeping obligations, if any, under the Davis-Bacon Act, the Service Contract Act, the Fair Labor

Standards Act, the Family and Medical Leave Act, Executive Order 13658, their respective implementing regulations, or any other applicable law.

(h) The contractor (as defined in 29 CFR 13.2) 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.

(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 currently maintained on the System for Award Management website, http://www.SAM.gov.

(3) The penalty for making false statements is prescribed in the U.S. Criminal Code, 18 U.S.C. 1001.

(j) Interference/Discrimination. (1) A contractor may not in any manner interfere with an employee's accrual or use of paid sick leave as required by Executive Order 13706 or 29 CFR part 13. Interference includes, but is not limited to, miscalculating the amount of paid sick leave an employee has accrued, denying or unreasonably delaying a response to a proper request to use paid sick leave, discouraging an employee from using paid sick leave, reducing an employee's accrued paid sick leave by more than the amount of such leave used, transferring an employee to work on non-covered contracts to prevent the accrual or use of paid sick leave, disclosing confidential information contained in certification or other documentation provided to verify the

need to use paid sick leave, or making the use of paid sick leave contingent on the employee's finding a replacement worker or the fulfillment of the contractor's operational needs.

(2) A contractor may not discharge or in any other manner discriminate against any employee for:

(i) Using, or attempting to use, paid sick leave as provided for under Executive Order 13706 and 29 CFR part 13;

(ii) Filing any complaint, initiating any proceeding, or otherwise asserting any right or claim under Executive Order 13706 and 29 CFR part 13;

(iii) Cooperating in any investigation or testifying in any proceeding under Executive Order 13706 and 29 CFR part 13; or

(iv) Informing any other person about his or her rights under Executive Order 13706 and 29 CFR part 13.

(k) Waiver. Employees cannot waive, nor may contractors induce employees to waive, their rights under Executive Order 13706, 29 CFR part 13, or this clause.

(l) Notice. The contractor must notify all employees performing work on or in connection with a covered contract of the paid sick leave requirements of Executive Order 13706, 29 CFR part 13, and this clause by posting a notice provided by the Department of Labor in a prominent and accessible place at the worksite so it may be readily seen by employees. Contractors that customarily post notices to employees electronically may post the notice electronically, provided such electronic posting is displayed prominently on any Web site that is maintained by the contractor, whether external or internal, and customarily used for notices to employees about terms and conditions of employment.

(m) Disputes concerning labor standards. Disputes related to the application of Executive Order 13706 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 13. 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 employees or their representatives.

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