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DEPARTMENT OF LABOR

Office of the Secretary of Labor

29 CFR Parts 10 and 23

RIN 1235-AA41

Increasing the Minimum Wage for Federal Contractors

AGENCY: Wage and Hour Division, Department of Labor.

ACTION: Final rule.

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

DATES: *Effective date:* This final rule is effective on January 30, 2022.

Applicability date: For procurement contracts subject to the Federal Acquisition Regulation and Executive Order 14026, this final rule is applicable beginning on the effective date of regulations issued by the Federal Acquisition Regulatory Council. For nonprocurement contracts subject to Executive Order 14026, this final rule is applicable beginning on the effective date of relevant agency action to implement the Executive order and this final rule.

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

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

SUPPLEMENTARY INFORMATION:

I. Background

On April 27, 2021, President Joseph R. Biden, Jr. issued Executive Order 14026, "Increasing the Minimum Wage for Federal Contractors." This Executive order explains that increasing the hourly minimum wage paid to workers performing on or in connection with covered Federal contracts to $15.00 beginning January 30, 2022 will "bolster economy and efficiency in Federal procurement." 86 FR 22835. The order builds on the foundation established by Executive Order 13658, "Establishing a Minimum Wage for Contractors," signed by

President Barack Obama on February 12, 2014. *See* 79 FR 9851.

A. Prior Relevant Executive Orders

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

Section 4 of Executive Order 13658 directed the Secretary to issue regulations to implement the order's requirements. *See* 79 FR 9852. Accordingly, after engaging in notice-and-comment rulemaking, the Department published a final rule on October 7, 2014, to implement the Executive order. *See* 79 FR 60634. The final regulations, set forth at 29 CFR part 10, established standards and procedures for implementing and enforcing the minimum wage protections of the Executive order. Pursuant to the methodology established by Executive Order 13658, the applicable minimum wage rate has increased each year since 2015. Executive Order 13658's minimum wage requirement is presently $10.95 per hour and its minimum cash wage requirement for tipped employees is presently $7.65 per hour. *See* 85 FR 53850. These rates will

increase to $11.25 per hour and $7.90 per hour, respectively, on January 1, 2022. *See* 86 FR 51683.

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

B. Executive Order 14026

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

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

Section 2 of Executive Order 14026 therefore increases the minimum wage for Federal contractors and subcontractors. 86 FR 22835. The order provides that executive departments and agencies, including independent establishments subject to the Federal Property and Administrative Services Act, 40 U.S.C. 102(4)(A), (5) (agencies), shall, to the extent permitted by law, ensure that contracts and contract-like instruments (collectively referred to as "contracts"), as described in section 8(a) of the order and defined in this rule, include a particular clause that the contractor and any covered subcontractors shall incorporate into lower-tier subcontracts. 86 FR 22835. That contractual clause, the order states, shall specify, as a condition of payment, that the minimum wage to be paid to workers employed in the performance of the contract or any covered subcontract thereunder, including workers whose wages are calculated pursuant to special certificates issued under section 14(c) of the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 214(c),[1] shall be at least: (i) $15.00 per hour beginning January 30, 2022; and (ii) beginning January 1, 2023, and annually thereafter, an amount determined by the Secretary in accordance with the Executive order. 86 FR 22835. As required by the order, the minimum wage amount determined by the Secretary pursuant to this section shall be published by the Secretary at least 90 days before such new minimum wage is to take effect and shall be

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

(A) not less than the amount in effect on the date of such determination; (B) increased from such amount by the annual percentage increase in the Consumer Price Index (CPI) for Urban Wage Earners and Clerical Workers (United States city average, all items, not seasonally adjusted) (CPI-W), or its successor publication, as determined by the Bureau of Labor Statistics; and (C) rounded to the nearest multiple of $0.05. *Id*.

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

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

(SCA), 41 U.S.C. 6701 *et seq*., or any other applicable law or regulation is higher than the wage required by section 2 of the order, the employer must pay additional cash wages sufficient to meet the highest wage required to be paid. 86 FR 22836.

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

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[2] The Department recognizes that the FAR has been amended to refer to the Service Contract Act as the "Service Contract Labor Standards" statute and the Davis-Bacon Act as the "Wage Rate Requirements (Construction)" statute. *See* 79 FR 24192-02, 24193-95 (Apr. 29, 2014). Consistent with the text of Executive Order 14026, as well as with Executive Order 13658 and

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

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

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

Section 8 of Executive Order 14026 establishes that the order shall apply to "any new contract; new contract-like instrument; new solicitation; extension or renewal of an existing contract or contract-like instrument; and exercise of an option on an existing contract or contract-like instrument," if: (i)(A) it is a procurement contract for services or construction; (B) it is a contract for services covered by the SCA; (C) it is a contract for concessions, including any concessions contract excluded by Department of Labor (the Department) regulations at 29 CFR 4.133(b); or (D) it is a contract entered into with the Federal Government in connection with Federal property or lands and related to offering services for Federal employees, their

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its implementing regulations, the Department refers to these laws in this rule as the Service Contract Act and the Davis-Bacon Act, respectively.

dependents, or the general public; and (ii) the wages of workers under such contract are governed by the FLSA, the SCA, or the DBA. 86 FR 22837. Section 8 of the order also states that, for contracts covered by the SCA or the DBA, the order shall apply only to contracts at the thresholds specified in those statutes.[3] *Id*. Additionally, for procurement contracts where workers' wages are governed by the FLSA, the order specifies that it shall apply only to contracts that exceed the micro-purchase threshold, as defined in 41 U.S.C. 1902(a),[4] unless expressly made subject to the order pursuant to regulations or actions taken under section 4 of the order. *Id*. The order specifies that it shall not apply to grants; contracts or agreements with Indian Tribes under the Indian Self-Determination and Education Assistance Act (Public Law 93–638), as amended; or any contracts expressly excluded by the regulations issued pursuant to section 4(a) of the order. *Id*.

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

Section 9(b) of Executive Order 14026 establishes an exception to section 9(a) where agencies have issued a solicitation before the effective date for the relevant action taken pursuant to section 4 of the order and entered into a new contract resulting from such solicitation within

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

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

60 days of such effective date. The order provides that, in such a circumstance, such agencies are strongly encouraged, but not required, to ensure that the minimum wages specified in sections 2 and 3 of the order are paid in the new contract. 86 FR 22837-38. The order clarifies, however, that if such contract is subsequently extended or renewed, or an option is subsequently exercised under that contract, the minimum wages specified in sections 2 and 3 of the order shall apply to that extension, renewal, or option. 86 FR 22838.

Section 9(c) also specifies that, for all existing contracts, solicitations issued between the date of the order and the effective dates set forth in that section, and contracts entered into between the date of the order and the effective dates set forth in that section, agencies are strongly encouraged, to the extent permitted by law, to ensure that the hourly wages paid under such contracts are consistent with the minimum wage rates specified in sections 2 and 3 of the order. 86 FR 22838.

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

C. Notice of Proposed Rulemaking

On July 22, 2021, the Department published a Notice of Proposed Rulemaking (NPRM) in the Federal Register inviting comments for a period of 30 days on a proposal to implement the provisions of Executive Order 14026. *See* 86 FR 38816. On August 4, 2021, the Department extended the comment period until August 27, 2021. *See* 86 FR 41907. The Department received

approximately 275 comments in response to its NPRM implementing Executive Order 14026. Comments were received from a variety of interested stakeholders, such as labor organizations; contractors and contractor associations; worker advocates; contracting agencies; small businesses; and workers.

II. Discussion of the Final Rule

A. Purpose and Legal Authority

President Biden issued Executive Order 14026 pursuant to his authority under "the Constitution and the laws of the United States," expressly including the Federal Property and Administrative Services Act (Procurement Act), 40 U.S.C. 101 *et seq*. 86 FR 22835. The Procurement Act authorizes the President to "prescribe policies and directives that the President considers necessary to carry out" the statutory purposes of ensuring "economical and efficient" government procurement and administration of government property. 40 U.S.C. 101, 121(a). Executive Order 14026 delegates to the Secretary the authority to issue regulations to "implement the requirements of this order." 86 FR 22836. The Secretary has delegated his authority to promulgate these regulations to the Administrator of the Wage and Hour Division (WHD) and to the Deputy Administrator of the WHD if the Administrator position is vacant. Secretary's Order 01-2014 (Dec. 19, 2014), 79 FR 77527 (published Dec. 24, 2014); Secretary's Order 01-2017 (Jan. 12, 2017), 82 FR 6653 (published Jan. 19, 2017).

The Department received many comments, such as those submitted by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) and Communications Workers of America, AFL-CIO (CWA), the National Women's Law Center, the National Employment Law Project (NELP), Restaurant Opportunities Centers (ROC) United, and the Shriver Center on Poverty Law, expressing strong support for Executive Order 14026 and for raising the minimum wage paid to workers performing on or in connection with federal contracts. Many of these commenters, such as the Center for American Progress and the Center for Law and Social Policy, commended the Department's NPRM as a "thorough" and

appropriate implementation of Executive Order 14026. Although the Associated General Contractors of America (AGC) recommended some substantive changes to the interpretations set forth in the Department's NPRM, it also expressed its appreciation to the Department "for generally following the provisions of the previous rulemaking increasing the minimum wage for federal contractors" and expressed its support for "the retention of the existing guidelines and definitions," where appropriate.

However, the Department also received submissions from several commenters, including Associated Builders and Contractors (ABC), the Home Care Association of America, the Pacific Legal Foundation, the U.S. Chamber of Commerce (Chamber), and U.S. House of Representatives Members Virginia Foxx and Fred Keller, expressing strong opposition to Executive Order 14026 and/or questioning its legality and stated purpose. The purpose of this rulemaking is to implement Executive Order 14026, and therefore comments questioning the legal authority and rationale underlying the President's issuance of the Executive order are not within the scope of this rulemaking action.

A few commenters, such as ABC and the Chamber, argued that the Department lacks the authority to issue or enforce this rule because it impermissibly conflicts with congressional enactments by establishing a minimum wage that overrides or conflicts with the statutory wage requirements and methodologies set forth in the DBA, FLSA, and SCA. For example, the Chamber asserted that "the new minimum wage, and the future wages increased through indexing, will likely override the already established, and statutorily driven, method for calculating wages under the [DBA] and [SCA]. These two laws specifically require a locally prevailing wage be paid for the different employee job descriptions on work covered by them." ABC made a similar argument, contending that the Department has "all the discretion necessary to decline to enforce the EO in a manner that is inconsistent with congressional authority (i.e., by declining to set a new minimum wage for any employee covered by the DBA, SCA or FLSA that differs from the congressionally mandated minimum wages under the foregoing statutes)."

To the extent the comments above are addressing the scope of the Department's rulemaking authority, the Department strongly disagrees with them. While it is true that section 4 of Executive Order 14026 states that the Department's regulations "should, to the extent practicable, incorporate existing definitions, principles, procedures, remedies, and enforcement processes" under the DBA, FLSA, SCA, and Executive Order 13658, that section of the order must be read in harmony with the entire order, particularly with sections 1 and 8. When read holistically, Executive Order 14026 clearly does not authorize the Department to essentially nullify the policy, premise, and essential coverage protections of the order, as suggested by ABC, by declining to extend the Executive order minimum wage to any worker covered by the DBA, FLSA, or SCA where such rate differs from the applicable minimum wages established under those laws. Indeed, in order to effectuate the purposes of Executive Order 14026, it must apply to workers who would otherwise be subject to lower minimum wage requirements under the DBA, FLSA, and/or SCA. As ABC itself recognizes, the DBA, FLSA, and SCA establish "minimum" wage rates; it is therefore not inconsistent with these wage floors to establish a higher minimum wage rate.

As the Department explained in the NPRM, and consistent with the relevant discussion in the rulemaking implementing Executive Order 13658, the minimum wage requirements of Executive Order 14026 are separate and distinct legal obligations from the prevailing wage requirements of the DBA and SCA. If a contract is covered by the DBA or SCA and the wage rate on the applicable DBA or SCA wage determination for the classification of work the worker performs is less than the applicable Executive order minimum wage, the contractor must pay the Executive order minimum wage in order to comply with the order and this part. If, however, the applicable DBA or SCA prevailing wage rate exceeds the Executive order minimum wage rate,

the contractor must pay that prevailing wage rate to the DBA- or SCA-covered worker in order to be in compliance with the DBA or SCA.[5]

The minimum wage requirements of the DBA and SCA do not preclude the Department from implementing or enforcing the minimum wage requirement of Executive Order 14026. The DBA itself expressly states that it "does not supersede or impair any authority otherwise granted by federal law to provide for the establishment of specific wage rates." 40 U.S.C. 3146. The DBA thus sets a wage floor for covered construction contracts and explicitly contemplates laws that exceed the floor. Likewise, the legislative history of the SCA reflects that the SCA prevailing wage requirement can co-exist with other applicable laws requiring the payment of higher minimum wages. The reports accompanying the 1965 enactment of the SCA, for example, make clear that contractors must pay "no less" than the prevailing wage determined by the Secretary under the SCA. *See* H.R. Rep. No. 89-948, at 3 (1965); S. Rep. No. 89-798 (1965), *reprinted in* 1965 U.S.C.C.A.N. 3737. Congressional reports accompanying subsequent amendments to the SCA reflect that contractors must pay "at least" the prevailing wage. S. Rep. No. 92-1131 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3534; H.R. Rep. No. 92-1251, at 3 (1972); H.R. Rep. No. 94-1571, at 1 (1976). These statements demonstrate that the SCA's prevailing wage rates were not intended to preclude higher wage rates required by other laws. The DBA, SCA, and Executive Order 14026 can and should thus be viewed as complementary and co-existing rather than in conflict because it is possible for contractors to comply with all of the laws; neither the DBA nor SCA reflects an intent to preclude application of a higher wage requirement under other laws, including this Executive order.

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[5] Moreover, if a contract is covered by a state prevailing wage law that establishes a higher wage rate applicable to a particular worker than the Executive order minimum wage, the contractor must pay that higher prevailing wage rate to the worker. Section 2(c) of the order expressly provides that it does not excuse noncompliance with any applicable State prevailing wage law or any applicable law or municipal ordinance establishing a minimum wage higher than the Executive order minimum wage. *See* 86 FR 22836.

Similarly, the Department strongly disagrees with the Chamber's argument that the Executive order and the Department's NPRM conflict with the FLSA. As a threshold matter, the Department notes that the FLSA itself expressly states that "[n]o provision of this chapter or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this chapter." 29 U.S.C. 218(a). Just as the FLSA's minimum wage requirement does not preclude application of a higher prevailing wage rate requirement under the DBA or SCA when both laws apply to a particular worker, neither does the higher minimum wage requirement of Executive Order 14026 conflict with the FLSA's minimum wage floor. Nonetheless, the Chamber asserts that such a conflict exists because Executive Order 14026, for example, "would eliminate the credit employers are allowed to take in compensating tipped employees. . . . and would eliminate the exemption for employees with disabilities to be paid a wage less than the minimum wage." The FLSA permits, but does not require, employers satisfying relevant requirements to take a credit against tips; an employer can comply with the requirements of both the FLSA and Executive Order 14026 by paying the full Executive order minimum wage for covered federal contract work. An FLSA-covered employer that performs work on a covered contract must abide by the higher cash wage floor for such contract work to comply with Executive Order 14026 and this part; however, neither the order nor this rule affect how the employer complies with the FLSA for work not covered by the order. Similarly, the FLSA permits, but does not require, employers satisfying relevant requirements to pay subminimum wages pursuant to an FLSA section 14(c) certificate; an employer can comply with the requirements of both the FLSA and Executive Order 14026 by paying the full Executive order minimum wage for covered federal contract work.[6] Moreover, employers whose workers are performing on or in connection with a

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[6] The Department notes that some states and localities have enacted laws that eliminate the tip credit and/or that prohibit the payment of subminimum wages to workers with disabilities. The FLSA does not preclude such laws establishing higher wage requirements and does not excuse noncompliance with such laws. The FLSA likewise does not prohibit application of a higher

contract covered by Executive Order 14026 may continue to pay subminimum commensurate wages to workers with disabilities where authorized by an FLSA section 14(c) certificate to the extent that the commensurate wage rates are not lower than the applicable Executive order minimum wage. Executive Order 14026 applies to federal contractors, not the entire universe of employers covered by the FLSA who employ tipped workers or workers with disabilities under FLSA section 14(c) certificates, and the Executive order only applies to workers performing work on or in connection with a covered contract.

The Department is the federal agency charged with administering and enforcing the DBA, FLSA, and SCA; after careful consideration of the comments, the Department has determined that the minimum wages provided for under those statutes do not operate to preclude the Department from issuing this final rule to implement the requirements of Executive Order 14026.[7]

Other commenters, such as the Colorado River Outfitters Association, Colorado Ski Country USA, Conduent Federal Solutions, LLC (Conduent), and the National Federation of Independent Business (NFIB), request that the Department either decline to implement Executive Order 14026, modify the amount of the Executive Order 14026 minimum wage rate, change the

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minimum wage requirement for federal contractors under Executive Order 14026. Indeed, the FLSA itself explicitly contemplates that other applicable laws may require greater wage payments. *See* 29 U.S.C. 218(a).

[7] A Department of the Army attorney-advisor similarly commented that application of Executive Order 14026 to intergovernmental support agreements (IGSAs) governed by 10 U.S.C. 2679 would be unlawful because that statute authorizes the use of wage grade rates normally paid by the state or local government. For the reasons explained above, the Department does not perceive any conflict between that statute and Executive Order 14026. Notably, 10 U.S.C. 2679 expressly permits, but does not require, the use of such wage grade rates. *See* 10 U.S.C. 2679(a)(2) (stating that an IGSA "may use" state or local government wage grades). To the extent that an IGSA qualifies as a covered contract under Executive Order 14026, the contractor would be required to pay at least the applicable Executive order rate to workers performing on or in connection with the covered contract in order to comply with the order and this part. Where the wage grade rates normally paid by the state or local government exceed the wage floor established by Executive Order 14026, the order would have no applicability and the workers should be paid the higher rate. *See* § 23.50(c). Because the Department concludes that application of the Executive order to such IGSAs is not inconsistent with 10 U.S.C. 2679, the Department declines to create a special exemption for IGSAs.

effective date for the wage rate, or phase in the wage rate over a number of years, for at least certain subsets of covered contracts. Executive Order 14026 clearly directs the Department to issue regulations implementing its requirements. *See* 86 FR 22836. The Executive order expressly requires that, as of January 30, 2022, workers performing on or in connection with covered contracts must be paid $15 per hour unless exempt. *See* 86 FR 22835-38. There is no indication in the Executive order that the Department has authority to modify the amount or timing of the minimum wage requirement, except where the Department is expressly required to implement the future annual inflation-based adjustments to the wage rate pursuant to the methodology set forth in the order.

The Department also received several comments, including from the International Brotherhood of Teamsters (Teamsters), requesting that the President take other executive actions or the Department pursue other initiatives to protect federal contract workers. While the Department appreciates and will consider such recommendations, comments requesting further executive actions or other Departmental actions are beyond the scope of this rulemaking.

All other comments, including comments raising specific concerns or questions regarding interpretations of the Executive order set forth in the Department's NPRM, will be addressed in the following section-by-section analysis of the final rule. After considering all timely and relevant comments received in response to the July 22, 2021 NPRM, the Department is issuing this final rule to implement the provisions of Executive Order 14026.

B. Discussion of Final Rule Provisions

The Department's final rule, which amends Title 29 of the Code of Federal Regulations (CFR) by adding part 23 and modifying part 10, establishes standards and procedures for implementing and enforcing Executive Order 14026. Subpart A of part 23 relates to general matters, including the purpose and scope of the rule, as well as the definitions, coverage, and exclusions that the rule provides pursuant to the Executive order. It also sets forth the general minimum wage requirement for contractors established by the Executive order, an antiretaliation

provision, a prohibition against waiver of rights, and a severability clause. Subpart B establishes requirements for contracting agencies and the Department to comply with the Executive order. Subpart C establishes requirements for contractors to comply with the Executive order. Subparts D and E specify standards and procedures related to complaint intake, investigations, remedies, and administrative enforcement proceedings. Appendix A contains a contract clause to implement Executive Order 14026. An additional appendix, which will not publish in 29 CFR part 23, sets forth a poster regarding the Executive Order 14026 minimum wage for contractors with FLSA-covered workers performing work on or in connection with a covered contract. The Department also finalizes a few conforming revisions to the existing regulations at part 10 implementing Executive Order 13658 to fully implement the requirements of Executive Order 14026 and provide additional clarity to the regulated community.

The following section-by-section discussion of this final rule summarizes the provisions proposed in the NPRM, addresses the comments received on each section, and sets forth the Department's response to such comments for each section.

Part 23 Subpart A – General

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

Section 23.10 Purpose and Scope

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

Proposed § 23.10(b) explained the underlying policy of Executive Order 14026. First, the paragraph repeated a statement from the Executive order that the Federal Government's

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

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

The Department received some comments addressing the purpose and scope provisions of the rule set forth at proposed § 23.10(a) and (b). Several commenters, including ABC, the Chamber, and the Pacific Legal Foundation, contended that Executive Order 14026 does not promote economy and efficiency in Federal Government procurement and challenged the

evidentiary and legal basis for the determinations set forth in the Executive order that are reflected in proposed § 23.10. As noted above, comments questioning the President's legal authority to issue the Executive order under the Procurement Act are not within the scope of this rulemaking action. To the extent that such comments object to or challenge specific conclusions made by the Department in its regulatory impact analysis and regulatory flexibility analysis set forth in the NPRM, those comments are addressed in sections IV and V of the preamble to this final rule.

The AFL-CIO and CWA, among other commenters, urged the Department to amend proposed § 23.10(b) to clarify that nothing in Executive Order 14026 excuses noncompliance with higher wages required under a collective bargaining agreement (CBA) and that a CBA or wage law requiring a minimum wage lower than the order's requirement does not excuse noncompliance with the order. The Center for American Progress requested similar clarification. The Chamber, on the other hand, asserted that the "[a]bsence of any allowance for collective bargaining agreements (CBAs) with a wage rate lower than $15 per hour and the inflation adjusted wage in future years is another problem" that existed under Executive Order 13658 and its regulations and will be "exacerbate[d]" under Executive Order 14026 and this part. The Chamber argued that, by requiring a higher wage rate "than what they could achieve through the bargaining process, unions will be getting something without having to give anything up," thereby disrupting the "delicate balance of competing interests" and wage certainty reflected in a CBA.

Executive Order 14026 does not reflect any intent to permit a CBA rate lower than the Executive order minimum wage rate to govern the wages of workers while performing on or in connection with contracts covered by the order. The Department notes that this interpretation is consistent with the regulations interpreting Executive Order 13658. Moreover, in the event that a collectively bargained wage rate is below the applicable DBA rate, a DBA-covered contractor must pay no less than the applicable DBA rate to covered workers on the project. Although a

successor contractor on an SCA-covered contract is required under the SCA only to pay wages and fringe benefits not less than those contained in the predecessor contractor's CBA even if an otherwise applicable area-wide SCA wage determination contains higher wage and fringe benefit rates, that requirement is derived from a specific statutory provision that expressly bases SCA obligations on the predecessor contractor's CBA wage and fringe benefit rates in specific circumstances. *See* 41 U.S.C. 6707(c); 29 CFR 4.1b. Moreover, where an SCA-covered contractor's CBA rate is not the applicable SCA rate pursuant to that statutory provision and is below that applicable SCA rate, the contractor must pay no less than the applicable SCA rate to covered workers on the project.

Accordingly, the Department concludes that permitting payment of CBA wage rates below the Executive Order 14026 minimum wage is inconsistent with the order; the Department thus declines to suspend application of the Executive order minimum wage for contractors that have negotiated a CBA wage rate lower than the order's minimum wage. This conclusion, as well as the Department's related determination that nothing in the Executive order excuses noncompliance with higher wages required under a CBA, is reflected in the contract clause set forth in Appendix A. Specifically, paragraph (f) of the Department's contract clause expressly provides: "Nothing herein shall relieve the contractor of any other obligation under Federal, state or local law, or under contract, for the payment of a higher wage to any worker, nor shall a lower prevailing wage under any such Federal, State, or local law, or under contract, entitle a contractor to pay less than $15.00 (or the minimum wage as established each January thereafter) to any worker." After careful consideration of the comments, however, the Department has determined to also add a corresponding clarification to § 23.50(c), which is the regulatory provision discussing Executive Order 14026's minimum wage rate and its relation to other laws. To ensure full consistency between the regulatory text and the contract clause on this point, the Department therefore amends § 23.50(c) by adding "or any applicable contract" to the provision, such that it reads as follows: "Nothing in the Executive Order or this part shall excuse

noncompliance with any applicable Federal or state prevailing wage law or any applicable law or municipal ordinance, or any applicable contract, establishing a minimum wage higher than the minimum wage established under the Executive Order and this part."

In its comment, Maximus recommended that the Department expand the purpose and scope discussion set forth in § 23.10 to address procedures dealing with wage compression that may result from the Executive order minimum wage increase; establish prevailing wage determination processes for remote workers based on the worker's locality rather than the location of the work; outline wage determination processes to eliminate monopsony impacts in localities where the contractor's wages are the locality-based prevailing wage; and define procedural changes to better align the Wage and Hour Division, contracting officers, and contractors' responsibilities and actions. Maximum's recommendations largely pertain to the wage determination processes and enforcement schemes under the DBA and SCA. This rulemaking is solely dedicated to implementing Executive Order 14026 and thus does not alter the Department's statutory or regulatory obligations, including its responsibility and protocols for determining prevailing wage rates, under the DBA and SCA. The Department appreciates such proposals and will carefully consider the suggestions provided by Maximus as part of the Department's continual evaluation of its wage determination and enforcement programs under the DBA and SCA,[8] but declines to make such modifications in this final rule. The Department specifically notes that Executive Order 14026 does not empower the Department to change prevailing wage rates established under the DBA and SCA or to establish an Executive order minimum wage rate that is higher than the rate set forth in the order, except where authorized to do so based on annual inflation increases pursuant to the order's methodology.

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[8] The Department notes that it plans to engage in a rulemaking to update and modernize the regulations implementing the DBA in the near future. *See* https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202104&RIN=1235-AA40. The Department described a similar initiative to update the SCA regulations as a "long term action" in WHD's Spring 2021 regulary agenda. *See* https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202104&RIN=1235-AA38.

After consideration of these comments, and based on the clarifications made elsewhere in the regulatory text and contract clause, the Department adopts § 23.10(a) and (b) as proposed.

Proposed § 23.10(c) outlined the scope of the rule and provided that neither Executive Order 14026 nor part 23 creates or changes any rights under the Contract Disputes Act or any private right of action. The Department explained that it does not interpret the Executive order as limiting existing rights under the Contract Disputes Act. This provision also restated the Executive order's directive that disputes regarding whether a contractor has paid the minimum wages prescribed by the Executive order, to the extent permitted by law, shall be disposed of only as provided by the Secretary in regulations issued under the Executive order. The provision clarified, however, that nothing in the Executive order is intended to limit or preclude a civil action under the False Claims Act, 31 U.S.C. 3730, or criminal prosecution under 18 U.S.C. 1001. Finally, this paragraph clarified that neither the Executive order nor the proposed rule would preclude judicial review of final decisions by the Secretary in accordance with the Administrative Procedure Act, 5 U.S.C. 701 *et seq*.

The Department received some comments from stakeholders such as the AFL-CIO and CWA, National Employment Lawyers Association (NELA), NELP, the Service Employees International Union (SEIU), and the Teamsters, requesting that the Department amend proposed § 23.10(c) by adding a statement that the Department does not intend for these regulations to displace any state or local law meant to enforce federal minimum wage or prevailing wage rates, including the minimum rates set forth in Executive Order 14026. The Department appreciates this feedback and confirms that neither the Executive order nor this part are intended to modify any existing private rights of action that workers may possess under other laws. The Department believes that this interpretation is already reflected in the first sentence of the proposed regulatory text at § 23.10(c), which states that "[n]either Executive Order 14026 nor this part creates or changes any rights under the Contract Disputes Act, 41 U.S.C. 7101 *et seq.*, or any private right of action." However, to further improve clarity, the Department is modifying this

provision of the regulatory text to add "that may exist under other applicable laws" at the end of the sentence. Other than this clarifying edit, the Department adopts this provision as proposed.

Section 23.20 Definitions

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

As a general matter, some commenters, such as the SEIU, stated that the Department appropriately and reasonably defined the terms of Executive Order 14026. The AFL-CIO and CWA, for example, noted that they "especially endorse the NPRM's broad definitions," particularly the Department's proposed definitions of the terms *contract or contract-like instrument* and *new contract*. AGC expressed appreciation to the Department "for generally following the provisions of the previous rulemaking increasing the minimum wage for federal contractors" and expressed its support for "the retention of the existing guidelines and definitions," noting that "[c]larity and consistency are necessary for contractors to easily come into compliance with the rulemaking, plan for the future of their businesses, and deliver quality[,] fiscally accurate, and timely projects for federal owners." Other individuals and

organizations submitted comments supporting, opposing, or questioning specific proposed definitions that are addressed below.

The Department proposed to define the term *agency head* to mean the Secretary, Attorney General, Administrator, Governor, Chairperson, or other chief official of an executive agency, unless otherwise indicated, including any deputy or assistant chief official of an executive agency or any persons authorized to act on behalf of the agency head. The proposed definition was based on the definition of the term set forth in section 2.101 of the FAR, *see* 48 CFR 2.101, and was identical to the definition provided in the implementing regulations for Executive Order 13658, *see* 29 CFR 10.2. The Department did not receive any comments addressing the term *agency head* and thus the Department adopts the definition of that term as it was originally proposed.

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

Some commenters expressed concern or requested clarification regarding application of this definition to specific factual circumstances; such comments are addressed below in the preamble discussion of the coverage of concessions contracts. The Department did not receive any comments suggesting revisions to the proposed definition of this term and thus adopts the definition set forth in the NPRM.

The Department proposed to define *contract* and *contract-like instrument* collectively for purposes of the Executive order as an agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law. 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 Department indicated in the NPRM that the proposed definition of the term *contract* was intended to be interpreted broadly to include, but not be limited to, any contract within the definition provided in the FAR or applicable Federal statutes. The proposed definition would also include, but was not to be limited to, any contract that may be covered under any Federal procurement statute. The Department noted that under this definition contracts may be the result of competitive bidding or awarded to a single source under applicable authority to do so. The proposed definition also 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; exercised contract options; and bilateral contract modifications. The proposed definition also specified that, for purposes of the minimum wage requirements of the Executive order, the term *contract* included contracts covered by the SCA, contracts covered by the DBA, concessions contracts not otherwise subject to the SCA, and contracts in connection with Federal property or land and related to offering services for Federal employees, their dependents, or the general public, as provided in section 8(a) of the Executive order. *See* 86 FR 22837. The proposed definition of *contract* included in

the NPRM was identical to the definition of *contract* in the regulations implementing Executive Order 13658, *see* 29 CFR 10.2, except that it included "exercised contract options" as an example of a contract. The addition of this example reflected that, unlike Executive Order 13658, Executive Order 14026 expressly applies to option periods on existing contracts that are exercised on or after January 30, 2022. *See* 86 FR 22837.

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

qualify as a "contract" or "contract-like instrument" but would not be subject to the Executive order because it would not be a contract covered by the SCA or DBA, a concessions contract, or a contract in connection with Federal property related to offering services to Federal employees, their dependents, or the general public.

Numerous commenters, such as the Strategic Organizing Center and the Teamsters, expressed their support for the Department's proposed definition of the terms *contract* and *contract-like instrument*. NELP, for example, noted that the definition "mirrors that of the SCA and DBA" and is consistent with "the definition established by the existing minimum wage policy for contracted workers." In supporting the inclusion of contract-like instruments within the scope of coverage of Executive Order 14026, NELP agreed "that it is best for the efficiency of federal agencies and for the strongest return on public revenues to expand the types of formal relationships under which contracted work is performed." The Teamsters similarly endorsed the proposed definition as "consistent both with the Order and the definitions contained in the SCA and DBA" and noted that the proposal "appropriately seeks to include the full range of contracts and other government procurement arrangements to effectuate the purposes of" Executive Order 14026.

A few commenters, such as the SEIU and the Teamsters, requested that the proposed definition of *contract or contract-like instrument* be amended to specifically include task orders placed under multiple-award contracts (MACs), such as GSA Schedules, Government Wide Acquisition Contracts (GWACs), and other indefinite-delivery, indefinite-quantity (IDIQ) contracts. SourceAmerica requested that the Department clarify the proposed definition of *contract or contract-like instrument* to expressly include contracts between the Federal Government and state and local governments entered into through intergovernmental support agreements (IGSAs).

Other commenters, including the Chamber, acknowledged that the proposed definition is consistent with the regulations implementing Executive Order 13658 but expressed concern that

the term "contract-like instrument" will nevertheless cause confusion because there will be more contractors and workers affected by Executive Order 14026 who are unfamiliar with the term. Numerous commenters, particularly in the outdoor recreational industries, similarly opposed the breadth of the proposed definition of *contract* set forth in the NPRM because it would include non-procurement contracts, such as permits and licenses and other types of legal arrangements in which a contractor pays money to the Federal Government in order to operate.

With respect to all comments regarding the broad scope of the proposed collective definition of the terms *contract* and *contract-like instrument*, the Department agrees that its proposed definition is intended to encompass a wide variety of contractual agreements, even though the Department recognizes that not all such agreements will actually be subject to the Executive order, as explained more fully below. The proposed definition of these terms could be applied to an expansive range of different types of legal arrangements, including licenses, permits, task orders, and contracts entered into through IGSAs. (To maintain consistency with the definition of "contract" as it appears in the regulations implementing Executive Order 13658, the Department declines commenters' requests to modify the regulatory text here to explicitly reference task orders and contracts entered into pursuant to IGSAs as examples of legal instruments that may fall within the scope of the definition. However, as in the Department's 2014 rulemaking to implement Executive Order 13658, the Department agrees that this definition could indeed be applied to such legal instruments and affirms that the list of examples of legal arrangements qualifying as "contracts" provided in the definition is illustrative and non-exhaustive.) Indeed, and consistent with its use in Executive Order 13658, the use of the term *contract-like instrument* in Executive Order 14026 underscores that the Order was intended to be of potential applicability to virtually any type of agreement with the Federal Government that is contractual in nature.

With respect to commenter concerns regarding use of the purportedly unfamiliar term "contract-like instrument," the Department acknowledges that the term "contract-like

instrument" is not used in the FLSA, SCA, DBA, or FAR. For this reason, the Department has defined the term collectively with the well-known term "contract" in a manner that should be generally known and understood by the contracting community. The Department notes that the term "contract-like instrument" was expressly used in both Executive Order 13658 and Executive Order 14026 and is defined, collectively with the term *contract*, in the Department's regulations implementing Executive Order 13658, *see* 29 CFR 10.2. That definition has been codified in the regulations since 2015, and the Department expects that most contracting agencies and contractors affected by this rulemaking are familiar with the definition. The use of the term "contract-like instrument" in Executive Order 14026 reflects that the order is intended to cover all arrangements of a contractual nature, including those arrangements that may not be universally regarded as a "contract" in other contexts, such as special use permits issued by the Forest Service, Commercial Use Authorizations issued by the National Park Service, and outfitter and guide permits issued by the Bureau of Land Management and the U.S. Fish and Wildlife Service.

The Department acknowledges that the term *contract* does not apply to an arrangement or an agreement that is truly not contractual. However, Executive Order 14026 is intended to sweep broadly to apply to traditional procurement construction and service contracts as well as a broad range of concessions agreements and agreements in connection with Federal property or lands and related to offering services, regardless of whether the parties involved typically consider such arrangements to be "contracts" and regardless of whether such arrangements are characterized as "contracts" for purposes of the specific programs under which they are administered.

Moreover, and consistent with the relevant discussion in the Executive Order 13658 rulemaking, the Department believes that the use of the term "contract-like instrument" in Executive Order 14026 is intended to prevent disputes or extended discussions between contracting agencies and contractors regarding whether a particular legal arrangement qualifies

as a "contract" for purposes of coverage by the order and this part. The broad definition set forth in this rule will help facilitate more efficient determinations by contractors, contracting officers, and the Department as to whether a particular legal instrument is covered. The Department thus affirms that the term "contract-like instrument" is best understood contextually in conjunction with the well-known term "contract" and thus defines the terms collectively.

The Department has carefully considered all of the comments received on the proposed collective definition of the terms *contract* and *contract-like instrument,* and adopts the definition as proposed.

Importantly, however, and as explained in the NPRM, the fact that a legal instrument qualifies as a *contract or contract-like instrument* under this definition does not necessarily mean that such contract is subject to Executive Order 14026. *See* 86 FR 38828. In addition to qualifying as a *contract or contract-like instrument*, such contract must also fall within one of the four specifically enumerated types of contracts set forth in section 8(a) of the order and § 23.30, and must qualify as a *new contract* pursuant to the definition explained below. (Moreover, in order for the minimum wage protections of the Executive order to extend to a particular worker performing work on or in connection with a covered contract, that worker's wages must also be governed by the DBA, SCA, or FLSA.) The Department believes that the NPRM implementing Executive Order 14026 clearly explained the proposed definition and this basic test for contract coverage, but as requested by commenters, the Department has endeavored to provide additional clarification and examples of covered contracts in its preamble discussion of the coverage provisions set forth at § 23.30 in this final rule.

The Department also recognizes that a few commenters, including the Affiliated Outfitter Associations (AOA), suggested that the Department should include separate definitions of the terms "subcontract" and "subcontractor" in the final rule. In the proposed rule, the Department stated that the proposed definition of the term *contract* broadly included all contracts and any subcontracts of any tier thereunder and also provided that the term *contractor* referred to both a

prime contractor and all of its subcontractors of any tier on a contract with the Federal Government. The applicability of Executive Order 14026 to subcontracts is discussed in greater detail in the discussion of the rule's coverage provisions below, but with respect to these commenters' specific proposal to separately define the terms "subcontract" and "subcontractor," the Department declines to define those terms in the final rule because it could generate significant confusion for contracting agencies, contractors, and workers. The Department notes that many commenters strongly urged the Department to align its definitions and coverage provisions with those set forth in the SCA, the DBA, Executive Order 13658, and the FAR to ensure compliance and to minimize confusion. Neither Executive Order 13658 nor the FAR nor the regulations implementing the DBA or SCA provide independent definitions of the terms "subcontract" and "subcontractor." The SCA's regulations, for example, simply provide that the definition of the term "contractor" includes a subcontractor whose subcontract is subject to provisions of the SCA. *See* 29 CFR 4.1a(f).

As with the DBA, SCA, and Executive Order 13658, all of the provisions of Executive Order 14026 that are applicable to covered prime contracts and contractors apply with equal force to covered subcontracts and subcontractors, except for the value threshold requirements set forth in section 8(b) of the order that only pertain to prime contracts. For these reasons, and to avoid using unnecessary and duplicative terms throughout this part, the Department therefore will continue to use the term *contract* to refer to all contracts and any subcontracts thereunder, unless otherwise noted.

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

The Department did not receive any comments on its proposed definition of this term; the final rule therefore adopts the definition as proposed.

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

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

The Department received a few comments, such as from the AOA, asserting that the definition of *contractor* should not apply to particular individuals and entities, generally

involving concessionaires and other licensees and permitees; such comments overlap with concerns expressed about the coverage of such legal instruments that are discussed below regarding contract coverage under § 23.30. As recognized by many commenters, Executive Order 14026 and this part apply to both procurement and non-procurement contracts, including contracts that are not subject to the FAR. In order to effectuate the stated intent and coverage provisions of the Executive order, the Department's definitions of both *contract* and *contractor* are thus broadly written to encompass a wide range of arrangements with the Federal Government entered into by a wide range of entities and individuals. As noted above, however, the mere fact that an individual or entity qualifies as a *contractor* under this definition does not necessarily render that individual or entity subject to Executive Order 14026; that entity must comply with the minimum wage requirements of the Executive order only if such contractor is awarded or otherwise enters into a "new" contract that falls within the scope of one of the four specifically enumerated categories of contracts covered by the order.

The Department also received comments from stakeholders, such as Colorado Ski Country USA and the National Ski Areas Association (NSAA), requesting clarification that the Department's determination that a particular individual or entity qualifies as a *contractor* under Executive Order 14026 and this part does not necessarily mean that such individual or entity is subject to other laws pertaining to federal contractors. The Department confirms that its determination that certain individuals or entities qualify as *contractors* for purposes of Executive Order 14026 and this part does not render such individuals or entities or their agreements "federal contractors" or "contracts" under other laws. The Department's proposed definitions and coverage principles discussed in this rule pertain to Executive Order 14026 and are not determinative of rights and responsibilities under other laws and regulations enforced by other federal agencies. (As recognized by NSAA, however, due to the nearly identical definitions of *contract* and *contractor* under Executive Order 14026 and Executive Order 13658, the

determination in this rule that an entity qualifies as a contractor also means that such entity would be a contractor for purposes of Executive Order 13658.)

The Department did not receive any specific comments requesting changes to its proposed definition of the term *contractor*; the final rule therefore adopts the definition 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 proposed definition was taken from 29 CFR 10.2. The Department did not receive any comments on its proposed definition of this term and thus finalizes the definition as proposed.

Consistent with the regulations implementing Executive Order 13658, *see* 29 CFR 10.2, the Department proposed to define *executive departments and agencies* that are subject to Executive Order 14026 by adopting the definition of *executive agency* provided in section 2.101 of the FAR. 48 CFR 2.101. Specifically, the Department 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 noted that this proposed definition included independent agencies. Such agencies were expressly excluded from coverage of Executive Order 13658, which "strongly encouraged" but did not require compliance by independent agencies. *See* 79 FR 9853 (section 7(g) of Executive Order 13658); *see also* 79 FR 60643, 60646 (final rule interpreting Executive Order 13658 to exclude from coverage independent regulatory agencies within the meaning of 44 U.S.C. 3502(5)). Because Executive Order 14026 does not contain such exclusionary language, independent agencies are covered by the order and part 23. The inclusion of independent agencies was discussed in greater detail in the NPRM in the explanation of contracting agency coverage set forth at § 23.30. Finally, and consistent with the regulations implementing Executive Order 13658, the Department did not interpret the definition of

executive departments and agencies as including the District of Columbia or any Territory or possession of the United States.

The Department received a few comments on this proposed definition, such as those submitted by the AFL-CIO and CWA and the SEIU, generally expressing support for this proposed definition and its inclusion of independent agencies but requesting that the Department expressly state that the U.S. Postal Service and other agencies and establishments within the meaning of 40 U.S.C. 102(4)(A) and (5) are covered by the definition of *executive departments and agencies*. The SEIU also expressed that the Department's final rule should include a list of independent establishments, government-owned corporations, and other entities covered by Executive Order 14026 to assist stakeholders in understanding their rights and responsibilities.

As a threshold matter, the Department notes that Executive Order 14026 expressly states that it applies to "[e]xecutive departments and agencies, including independent establishments subject to the Federal Property and Administrative Services Act, 40 U.S.C. 102(4)(A), (5)." 86 FR 22835. The plain text of Executive Order 14026 thus reflects that the Order applies to independent establishments but only to the extent that such establishments are subject to the Procurement Act. As explained in the comment submitted by the American Postal Workers Union, AFL-CIO, the U.S. Postal Service may qualify as an independent establishment, but it is not subject to the Procurement Act, 40 U.S.C. 121 *et seq*. The Department understands that the Postal Reorganization Act includes an exclusive list of laws Congress applies to the Postal Service and that list does not include the Procurement Act. *See* 39 U.S.C. 410(b). Thus, while commenters such as the American Postal Workers Union and the Teamsters request coverage of U.S. Postal Service contracts under Executive Order 14026, the Department does not have authority to expand coverage to such contracts because the U.S. Postal Service is not subject to the Procurement Act.

With respect to commenter requests for inclusion of a list of independent establishments, government-owned corporations, and other entities covered by Executive Order 14026, the

Department greatly appreciates such feedback and agrees that transparency for the regulated community as to the scope of coverage is helpful in achieving compliance under the Executive order. After careful consideration, however, the Department declines to provide such a list in this final rule because various agencies and entities may be added or removed from the underlying statutory classifications of covered agencies (i.e., executive departments, military departments, or any independent establishments within the meaning of 5 U.S.C. 101, 102, and 104(1), respectively, and any wholly owned Government corporation within the meaning of 31 U.S.C. 9101) by congressional or judicial determinations beyond the purview of the Department. Because these designations are not static, the Department believes it would be inadvisable to codify such lists in the regulations themselves. The Department will endeavor, however, to work with contracting agencies to ensure awareness of their potential obligations under Executive Order 14026 and to provide compliance assistance to the general public as needed. The Department therefore adopts its definition of *executive departments and agencies* as proposed, without modification.

The Department proposed to define *Executive Order 13658* to mean Executive Order 13658 of February 12, 2014, "Establishing a Minimum Wage for Contractors," 79 FR 9851 (Feb. 20, 2014), and its implementing regulations at 29 CFR part 10. The Department did not receive any comments about this proposed definition and therefore adopts it as proposed.

The Department proposed to define the term *Executive Order 14026 minimum wage* as a wage that is at least: (i) $15.00 per hour beginning January 30, 2022; and (ii) beginning January 1, 2023, and annually thereafter, an amount determined by the Secretary pursuant to section 2 of Executive Order 14026. This definition was based on the language set forth in section 2 of the Executive order. 86 FR 22835. No comments were received on this proposed definition; accordingly, this definition is adopted in the final rule.

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 was adopted from 29 CFR 10.2. The Department did not receive any comments regarding this proposed definition and therefore adopts it as proposed, with one technical edit to change reference from the implementing regulations "in this chapter" to "in this title."

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

The Department proposed to define the term *new contract* as a contract that is entered into on or after January 30, 2022, or a contract that is renewed or extended (pursuant to an exercised option or otherwise) on or after January 30, 2022. For purposes of Executive Order 14026, a contract that is entered into prior to January 30, 2022 will constitute a *new contract* if, on or after January 30, 2022: (1) the contract is renewed; (2) the contract is extended; or (3) an option on the contract is exercised. Under the proposed definition, a *new contract* includes contracts that result from solicitations issued prior to January 30, 2022, but that are entered into on or after January 30, 2022, unless otherwise excluded by § 23.40; contracts that result from solicitations issued on or after January 30, 2022; contracts that are awarded outside the solicitation process on or after January 30, 2022; and contracts that were entered into prior to

January 30, 2022 (an "existing contract") but that are subsequently renewed or extended, pursuant to an exercised option period or otherwise, on or after January 30, 2022.

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

Numerous commenters, including the AFL-CIO and CWA, NELP, the SEIU, the Strategic Organizing Center, and the Teamsters, expressed their strong support for the proposed definition of *new contract*, particularly for its inclusion of exercised option periods. For example, the AFL-CIO and CWA stated that "[b]roadening the definition of 'new contract' to include renewals, options, and extensions more closely aligns with the SCA and DBA" and that "DOL's inclusion of the exercise of options within the definition of 'new contract' provides a more congruent position that will not only allow agencies and contractors to predict the changes in contractual obligations due to the exercise of an option but will also ensure that a larger class of workers more quickly receive the benefit of the new minimum wage requirements." NELP similarly commended the proposed definition of *new contract*, stating that "adhering to the announced implementation date of January 30, 2022, and attaching the wage increase to any renewals, extensions, or options on contracts signed before that date is critical to realizing the benefits of the executive order and to establishing consistency and equity in a system in which more than 500,000 contract actions were implemented in low-paying service industries just

between the inauguration of President Biden and the date of the NPRM publication." Other commenters, such as Colorado Ski Country USA, Maximus, and River Riders, Inc., expressed concern or confusion regarding the application of Executive Order 14026 to contracts that were entered into prior to January 30, 2022 but that are subsequently renewed or extended, pursuant to an exercised option period or otherwise, on or after January 30, 2022.

A few commenters, such as the AFL-CIO and CWA and the Teamsters, requested that the Department expand the definition of *new contract* to include covered task orders placed on or after January 30, 2022, under existing multiple-award contracts. Other commenters, such as River Riders, Inc., requested clarification as to how the definition of *new contract* applies to particular factual situations, such as whether an extension to an existing permit, where the permit is presently exempt under Executive Order 13838, qualifies as a *new contract*.

Because the Department's proposed definition of *new contract* accurately and appropriately implements the coverage principles explicitly required by sections 8(a) and 9(a) of Executive Order 14026, *see* 86 FR 22837, the Department adopts the definition of *new contract* as proposed. The Department addresses commenters' specific questions regarding application of the definition to various factual situations, and provides additional clarification and examples of new contracts, in its preamble discussion of the coverage provisions set forth at § 23.30 in this final rule below.

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

Department did not receive comments regarding this proposed definition and thus adopts the definition as set forth in the NPRM.

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

The Center for Workplace Compliance expressed support for this proposed definition of a "key term" because it is consistent with the definition set forth in the regulations implementing Executive Order 13658, *see* 29 CFR 10.2. The Center for Workplace Compliance noted that it supports such consistency because "compliance with the new E.O. will be simplified to the extent that the compliance obligations are similar to those under E.O. 13658." The Department received no other specific comments about the proposed definition of *procurement contract for construction* and therefore adopts the definition as proposed in the NPRM.

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. This proposed definition included any contract subject to the provisions of the SCA, as amended, and its implementing regulations. This proposed definition was identical to that set forth in 29 CFR 10.2, which in turn was derived from language set forth in 41 U.S.C. 6702(a) and 29 CFR 4.1a(e). As with the definition of *procurement contract for construction* above, the Center for Workplace Compliance commended this definition for its consistency with 29 CFR 10.2. The Department received no other specific comments about the proposed definition and thus adopts it without modification.

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). The Department did not receive comments about this proposed definition and thus finalizes it as set forth in the NPRM.

The Department proposed to define the term *solicitation* to mean any request to submit offers, bids, or quotations to the Federal Government. This definition was based on the definition set forth at 29 CFR 10.2. The Department broadly interpreted the term *solicitation* to apply to both traditional and nontraditional methods of solicitation, including informal requests by the Federal Government to submit offers or quotations. However, the Department noted that requests for information issued by Federal agencies and informal conversations with Federal workers would not be "solicitations" for purposes of the Executive order. No comments were received on this proposed definition and it is therefore adopted as proposed.

The Department proposed to adopt the definition of *tipped employee* in section 3(t) of the FLSA, that is, any employee engaged in an occupation in which the employee customarily and regularly receives more than $30 a month in tips. *See* 29 U.S.C. 203(t). For purposes of the Executive order, a worker performing on or in connection with a contract covered by the Executive order who meets this definition is a tipped employee. The Department did not receive comments regarding this proposed definition; it is therefore adopted as set forth in the NPRM.

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

as defined in the Outer Continental Shelf Lands Act, American Samoa, Guam, the Commonwealth of the Northern Mariana Islands, Wake Island, and Johnston Island.

The geographic scope component of this proposed definition was derived from the definition of *United States* set forth in the regulations implementing the SCA. *See* 29 CFR 4.112(a). Although the Department only included the 50 States and the District of Columbia within the geographic scope of the regulations implementing Executive Order 13658, *see* 29 CFR 10.2, the Department noted in the NPRM that Executive Order 14026 directs the Department to establish "definitions of relevant terms" in its regulations. 86 FR 22835. As previously discussed, Executive Order 14026 also directs the Department to "incorporate existing definitions" under the FLSA, SCA, DBA, and Executive Order 13658 "to the extent practicable." 86 FR 22836. Each of the territories listed above is covered by both the SCA, *see* 29 CFR 4.112(a), and the FLSA, *see, e.g.*, 29 U.S.C. 213(f); 29 CFR 776.7; Fair Minimum Wage Act of 2007, Pub. L. 110-28, 121 Stat. 112 (2007), but not the DBA, 40 U.S.C. 3142(a). Accordingly, it was not practicable to adopt all the cross-referenced existing definitions, and the Department had to choose between them to incorporate existing definitions "to the extent practicable." The Department proposed to exercise its discretion to select a definition that tracks the SCA and FLSA, for the following reasons. As explained in the NPRM and reflected in the preliminary regulatory impact analysis, the Department further examined the issue since its prior rulemaking in 2014 and consequently determined that the Federal Government's procurement interests in economy and efficiency would be promoted by expanding the geographic scope of Executive Order 14026. To be clear, the Department was not proposing to extend coverage of this Executive order to contracts entered into with the governments of the specified territories, but rather proposed to expand coverage to covered contracts with the Federal Government that are being performed inside the geographical limits of those territories. Because contractors operating in those territories will generally have familiarity with many of the requirements set forth in part 23 based on their coverage by the SCA and/or the FLSA, the Department did not

believe that the proposed extension of Executive Order 14026 and part 23 to such contractors would impose a significant burden.

The Department received a number of comments on this proposed definition and interpretation that workers performing on or in connection with covered contracts in the specified U.S. territories are covered by Executive Order 14026. The vast majority of the comments received on this proposed definition expressed strong support for the proposed interpretation that Executive Order 14026 apply to covered contracts being performed in Puerto Rico, the Virgin Islands, Outer Continental Shelf lands as defined in the Outer Continental Shelf Lands Act, American Samoa, Guam, the Commonwealth of the Northern Mariana Islands, Wake Island, and Johnston Island. A wide variety of stakeholders expressed their agreement with this proposed coverage interpretation, including numerous elected officials, such as the Governor of Guam and several legislators from Puerto Rico and Guam; labor organizations, such as the Labor Council for Latin American Advancement, AFL-CIO, the American Federation of State, County, and Municipal Employees (AFSCME), the Union de Profesionales de la Seguridad Privada de Puerto Rico, and the Teamsters; and other interested organizations, including the Economic Policy Institute (EPI), One Fair Wage, Oxfam, ROC United, and the Leadership Conference on Civil and Human Rights. Several of these commenters voiced their concurrence that expansion of coverage to the enumerated U.S. territories will promote economy and efficiency in Federal Government procurement. For example, the Governor of Guam, the Hon. Lourdes A. Leon Guerrero, affirmed "that extending the E.O. 14026 minimum wage to workers performing contracts in Guam would promote the federal government's procurement interests in economy and efficiency" and "E.O. 14026's application to Guam will improve the morale and quality of life of 11,800 employees in Guam, Puerto Rico, and the U.S. Virgin Islands, who are laborers, nursing assistants, and foodservice and maintenance workers." Several legislators in Puerto Rico expressed similar support for the expansion of coverage to workers in Puerto Rico. NELP also commended the Department's proposed definition of *United States* as including the specified

U.S. territories, commenting that "[j]ust as higher wages will result in lower turnover and higher productivity in the 50 US States, so too will economy and efficiency improve for contracts performed in these areas with the $15 minimum wage."

A few commenters, such as Conduent and the Center for Workplace Compliance, expressed concern with the Department's proposed interpretation that Executive Order 14026 applies to workers performing on or in connection with covered contracts in the enumerated U.S. territories. Such commenters generally asserted that the proposed coverage of the territories is not compelled by the text of Executive Order 14026 itself and could cause financial disruptions, including by adversely affecting private industry, in the territories unless the Executive order minimum wage rate is phased in over a number of years. Due to its concern that the NPRM's "expanded geographic scope may have unintended consequences given the fact that E.O. 13658 did not apply in these jurisdictions and the increase in minimum wage may be significant," the Center for Workplace Compliance encouraged the Department "to carefully monitor implementation of the E.O. as it applies to jurisdictions outside of the fifty states and the District of Columbia and take a flexible approach with covered contractors through the exercise of enforcement discretion should significant unintended consequences occur."

The Department appreciates and has carefully considered all of the comments submitted regarding the proposed definition of *United States* and geographic scope of the rule. After thorough review, the Department adopts the definition and interpretation as proposed. Although it is true that the text of Executive Order 14026 does not compel the determination that the order applies to covered contracts in the specified U.S. territories, the Department exercised its delegated discretion to select a definition of *United States* that aligns with the FLSA and SCA, as explained in the NPRM. As outlined in the NPRM and reflected in the final regulatory impact analysis in this final rule, the Department has further analyzed this issue since its Executive Order 13658 rulemaking in 2014 and consequently determined that the Federal Government's procurement interests in economy and efficiency would be promoted by extending the Executive

Order 14026 minimum wage to workers performing on or in connection with covered contracts in the enumerated U.S. territories. The vast majority of public comments received on this issue concur with this determination, including perhaps most notably a wide variety of stakeholders located in the U.S. territories themselves. With respect to the comments voicing concern with potential unintended consequences of such coverage in the U.S. territories, the Department appreciates such feedback and certainly intends to monitor the effects of this rule. However, such comments did not provide compelling qualitative or quantitive evidence for the assertions that application of the order to the U.S. territories will result in economic or other disruptions. The Department further views requests for a gradual phase-in of the Executive Order 14026 minimum wage rate as beyond the purview of the Department in this rulemaking.[9] The Department therefore adopts the proposed definition of *United States*, and the related interpretation that Executive Order 14026 applies to covered contracts performed in the specified U.S. territories, as set forth in the NPRM.

The Department proposed to define *wage determination* as including any determination of minimum hourly wage rates or fringe benefits made by the Secretary pursuant to the provisions of the SCA or the DBA. This term included the original determination and any subsequent determinations modifying, superseding, correcting, or otherwise changing the provisions of the original determination. The proposed definition was adopted from 29 CFR 10.2, which itself was derived from 29 CFR 4.1a(h) and 29 CFR 5.2(q). The Department did not receive comments on this proposed definition and therefore adopts it without modification.

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[9] Section 3 of Executive Order 14026 explicitly establishes a gradual phase-in of the full Executive Order minimum cash wage rate for tipped employees. With that lone exception, the order clearly requires that, as of January 30, 2022, workers performing on or in connection with covered contracts must be paid $15 per hour unless exempt. There is no indication in the Executive order that the Department has authority to modify the amount or timing of the minimum wage requirement, except where the Department is expressly required to implement the future annual inflation-based adjustments to the wage rate pursuant to the methodology set forth in the order.

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

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

additional clarifying language regarding the "on or in connection with" standard in the proposed regulatory text itself.

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

Several commenters expressed support for the Department's proposed definition of *worker*. NELP, for example, noted that this "broad definition recognizes that many work activities—not just those specifically mentioned in the contract—are integral to the performance of that contract, and that all individuals performing these work activities should be covered by the EO." NELP further commended the definition because it "makes clear that the federal government takes misidentifying employment status seriously and will look beyond an employer's labeling of workers as 'independent contractors' and make its own determination of whether such workers are covered." The AFL-CIO and CWA similarly agreed with the proposed definition of *worker*, commending it as a "broad and comprehensive" definition that comports with the DBA, FLSA, and SCA, and that is "necessary to ensure that contractors and subcontractors that conduct business with the federal government do not evade the Executive Order's requirements and thereby undercut the wage floor it is intended to establish."

Other commenters expressed concern with the proposed definition and interpretation of the term *worker,* particularly with respect to the Department's proposed general coverage of workers performing in connection with covered contracts. For example, the Chamber

acknowledged that the proposed definition mirrors the definition of *worker* in 29 CFR 10.2 but noted that the "only activities associated with the federal contract are subject to the new minimum wage. In most businesses, employees are not allocated exclusively to such a narrow range of duties and customers, meaning that employers will have to isolate the time spent on work associated with the federal contract from time spent doing other duties. This will be a tremendous administrative burden." ABC and Maximus, among others, similarly expressed concern regarding the proposed definition and interpretation that workers performing in connection with a covered contract are generally entitled to the Executive Order 14026 minimum wage, noting that such an interpretation may cause confusion and increase administrative burden. Several other commenters requested clarification as to whether workers in particular factual scenarios, including apprentices, would qualify as covered workers under the proposed definition.

The Department has carefully considered all relevant comments received regarding its proposed definition of *worker* and has determined to adopt the definition as set forth in the NPRM. With respect to the concerns expressed regarding the breadth of the proposed definition and its applicability to workers performing work "in connection with" covered contracts, the Department notes that Executive Order 14026 itself explicitly states its applicability to "workers working on or in connection with" a covered contract. 86 FR 22835. As recognized by commenters both in support of and opposition to the proposed definition, this definition also mirrors the definition set forth in the Department's regulations implementing Executive Order 13658, *see* 29 CFR 10.2. The Department believes that consistency between the two sets of regulations, where appropriate, will aid stakeholders in understanding their rights and obligations under Executive Order 14026, will enhance compliance assistance, and will minimize the potential for administrative burden on the part of contracting agencies and contractors. The potential for administrative burden resulting from the broad coverage of workers under the Executive order is further mitigated by the exclusion for FLSA-covered workers performing in

connection with covered contracts for less than 20 percent of their work hours in a given workweek set forth at proposed 23.40(f), which is discussed in greater detail in the accompanying preamble discussion for that exclusion.

The Department therefore adopts the proposed definition of the term *worker* as set forth in the NPRM. However, the Department has endeavored to provide additional clarification regarding worker coverage under Executive Order 14026, particularly with respect to the "in connection with" standard, as well as examples of the types of individuals that would qualify as covered workers, in the preamble section regarding worker coverage provisions at § 23.30 below.

Finally, the Department proposed to adopt the definitions of the terms *Administrative Review Board*, *Administrator*, *Office of Administrative Law Judges*, and *Wage and Hour Division* set forth in 29 CFR 10.2. The Department did not receive comments on these proposed definitions; accordingly, they are adopted as proposed.

Section 23.30 Coverage.

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

Several commenters, such as AGC, the AOA, and the Center for Workplace Compliance, requested that the Department provide additional clarification and examples regarding coverage of contracts, contractors, workers, and work throughout its preamble discussion of this provision. In response to these comments, and as set forth below, the Department has endeavored to further clarify the scope of coverage of Executive Order 14026 in the preamble discussion of § 23.30 below.

Some commenters also requested that the Department determine whether Executive Order 14026 applies to a wide range of particular factual arrangements and circumstances. To the extent that such commenters provided sufficient specific factual information for the Department to determine a particular coverage issue and such a discussion of the specific coverage issue would be useful to the general public, the Department has addressed the specific factual questions raised in the preamble discussion below. Where the Department is unable to explicitly address a particular factual question due to a lack of information provided by the commenter, or where stakeholders continue to have questions even after reviewing the general coverage principles addressed in this final rule, the Department encourages commenters and other stakeholders with specific coverage questions to contact the Wage and Hour Division for compliance assistance in determining their rights and responsibilities under Executive Order 14026.

Executive Order 14026 provides that agencies must, to the extent permitted by law, ensure that contracts, as defined in part 23 and as described in section 8(a) of the order, include a clause specifying, as a condition of payment, that the minimum wage paid to workers employed on or in connection with the contract shall be at least: (i) $15.00 per hour beginning January 30, 2022; and (ii) beginning January 1, 2023, and annually thereafter, an amount determined by the Secretary. 86 FR 22835. (*See* § 23.50 for a discussion of the methodology established by the Executive order to determine the future annual minimum wage increases.) Section 8(a) of the Executive order establishes that the order's minimum wage requirement only applies to a new contract, new solicitation, extension or renewal of an existing contract, and exercise of an option on an existing contract (which are collectively referred to in this rule as "new contracts"), if: (i)(A) it is a procurement contract for services or construction; (B) it is a contract for services covered by the SCA; (C) it is a contract for concessions, including any concessions contract excluded by the Department's regulations at 29 CFR 4.133(b); or (D) it is a contract entered into with the Federal Government in connection with Federal property or lands and related to offering

services for Federal employees, their dependents, or the general public; and (ii) the wages of workers under such contract are governed by the FLSA, the SCA, or the DBA. 86 FR 22837. Section 8(b) of the order states that, for contracts covered by the SCA or the DBA, the order applies only to contracts at the thresholds specified in those statutes. *Id*. It also specifies that, for procurement contracts where workers' wages are governed by the FLSA, the order applies only to contracts that exceed the micro-purchase threshold, as defined in 41 U.S.C. 1902(a), unless expressly made subject to the order pursuant to regulations or actions taken under section 4 of the order. *Id*. The Executive order states that it does not apply to grants; contracts or agreements with Indian Tribes under the Indian Self-Determination and Education Assistance Act (Public Law 93–638), as amended; or any contracts expressly excluded by the regulations issued pursuant to section 4(a) of the order. *Id*.

Proposed § 23.30(a) implemented these coverage provisions by stating that Executive Order 14026 and part 23 apply to, unless excluded by § 23.40, any new contract as defined in § 23.20, provided that: (1)(i) it is a procurement contract for construction covered by the DBA; (ii) it is a contract for services covered by the SCA; (iii) it is a contract for concessions, including any concessions contract excluded by Departmental regulations at 29 CFR 4.133(b); or (iv) it is a contract in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public; and (2) the wages of workers under such contract are governed by the FLSA, the SCA, or the DBA. 86 FR 22837. Proposed § 23.30(b) incorporated the monetary value thresholds referred to in section 8(b) of the Executive order. *Id*. Finally, proposed § 23.30(c) stated that the Executive order and part 23 only apply to contracts with the Federal Government requiring performance in whole or in part within the United States. As in the NPRM, several issues relating to the coverage provisions of the Executive order and § 23.30 are discussed below.

Coverage of Executive Agencies and Departments

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

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

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

As previously discussed in the context of the proposed definition of *executive departments and agencies*, the Department received several comments supporting its proposed coverage of contracting agencies, particularly with respect to its interpretation that independent agencies are included within the scope of coverage. A few commenters, such as the SEIU and the Teamsters, generally expressed support for this proposed interpretation but requested that the

Department expressly state that the U.S. Postal Service and other agencies and establishments within the meaning of 40 U.S.C. 102(4)(A) and (5) are covered by the definition of *executive departments and agencies*. The SEIU also asked the Deparment to include a list of independent establishments, government-owned corporations, and other entities covered by Executive Order 14026.

As explained above, the plain text of Executive Order 14026 reflects that the order applies to independent establishments but only to the extent that such establishments are subject to the Procurement Act, 40 U.S.C. 121 *et seq*. The Postal Reorganization Act sets forth an exclusive list of laws Congress applies to the Postal Service, and that list does not include the Procurement Act. *See* 39 U.S.C. 410(b). The Department does not have authority to confer coverage upon U.S. Postal Service contracts because the U.S. Postal Service is not an independent establishment subject to the Procurement Act.

As explained above in the discussion of the proposed definition of *executive departments and agencies*, the Department declines to provide a list of covered contracting agencies in this final rule because these classifications are not static and the Department believes it would be inadvisable to codify such lists in the regulations themselves. The Department will endeavor, however, to work with contracting agencies to ensure awareness of their potential obligations under Executive Order 14026 and to provide compliance assistance to the general public.

The Department therefore affirms its discussion of the proposed coverage of executive agencies and departments in the final rule.

Coverage of New Contracts with the Federal Government

The Department proposed in § 23.30(a) that the requirements of the Executive order generally apply to "contracts with the Federal Government." As discussed above, and consistent with the Department's regulations implementing Executive Order 13658, the Department proposed to set forth a broadly inclusive definition of the term *contract* that would include all contracts and any subcontracts of any tier thereunder, whether negotiated or advertised, including

any procurement actions, lease agreements, cooperative agreements, provider agreements, intergovernmental service agreements, service agreements, licenses, permits, or any other type of agreement, regardless of nomenclature, type, or particular form, and whether entered into verbally or in writing. The Department intended that the term *contract* be interpreted broadly as to include, but not be limited to, any contract within the definition provided in the FAR or applicable Federal statutes. This definition would include, but not be 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 would include, but would not be limited to, awards and notices of awards; job orders or task letters issued under basic ordering agreements; letter contracts; orders, such as purchase orders, under which the contract becomes effective by written acceptance or performance; exercised contract options; and bilateral contract modifications. Unless otherwise noted, the use of the term *contract* throughout the Executive order and part 23 included *contract-like instruments* and subcontracts of any tier.

As reflected in proposed § 23.30(a), the minimum wage requirements of Executive Order 14026 would apply only to "new contracts" with the Federal Government within the meaning of sections 8(a) and 9(a) of the order and as defined in part 23. 86 FR 22837. Section 9 of the Executive order states that the order shall apply to covered new contracts, new solicitations, extensions or renewals of existing contracts, and exercises of options on existing contracts, as described in section 8(a) of the order, where the relevant contract is entered into, or extended or renewed, or the relevant option will be exercised, on or after: (i) January 30, 2022, consistent with the effective date for the action taken by the FARC pursuant to section 4(a) of the order; or (ii) for contracts where an agency action is taken pursuant to section 4(b) of the order, on or after January 30, 2022, consistent with the effective date for such action. *Id*. Proposed § 23.30(a) of this rule therefore stated that, unless excluded by § 23.40, part 23 would apply to any new contract with the Federal Government as defined in § 23.20. As explained in the proposed

definition of *new contract* above, a *new contract* meant a contract that is entered into on or after January 30, 2022, or a contract that is renewed or extended (pursuant to an exercised option or otherwise) on or after January 30, 2022. For purposes of the Executive order, a contract that is entered into prior to January 30, 2022 will constitute a *new contract* if, on or after January 30, 2022: (1) the contract is renewed; (2) the contract is extended; or (3) an option on the contract is exercised. To be clear, for contracts that were entered into prior to January 30, 2022, the Executive Order 14026 minimum wage requirement applies prospectively as of the date that such contract is renewed or extended (pursuant to an exercised option or otherwise) on or after January 30, 2022; the Executive order does not apply retroactively to the date that the contract was originally entered into.

The Department noted that the plain language of Executive Order 14026 compels a more expansive definition of the term *new contract* here than under Executive Order 13658. For example, Executive Order 13658 coverage was not triggered by the unilateral exercise of a pre-negotiated option to renew an existing contract by the Federal Government, *see* 29 CFR 10.2. However, section 8(a) of this order makes clear that Executive Order 14026 applies to the "exercise of an option on an existing contract" where such exercise occurs on or after January 30, 2022. 86 FR 22837. In the NPRM, the Department noted that, under the SCA and DBA, the Department and the FARC generally require the inclusion of a new or current prevailing wage determination upon the exercise of an option clause that extends the term of an existing contract. *See, e.g.*, 29 CFR 4.143(b); 48 CFR 22.404–1(a)(1); All Agency Memorandum (AAM) No. 157 (1992); *In the Matter of the United States Army*, ARB Case No. 96–133, 1997 WL 399373 (ARB July 17, 1997).[10] The SCA's regulations, for example, provide that when the term of an existing

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

contract is extended pursuant to an option clause, the contract extension is viewed as a "new contract" for SCA purposes. *See* 29 CFR 4.143(b). In the NPRM, the Department observed that the application of Executive Order 14026's minimum wage requirements to contracts for which an option period is exercised on or after January 30, 2022 should be easily understood by contracting agencies and contractors.

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

The Department received a number of comments regarding the proposed coverage of new contracts under Executive Order 14026. Many commenters, including the AFL-CIO and CWA, NELP, the SEIU, the Strategic Organizing Center, and the Teamsters, expressed their strong support for the Executive order's coverage of new contracts, particularly for its inclusion of contracts that are entered into prior to January 30, 2022, if, on or after January 30, 2022, the contract is renewed, the contract is extended, or an option on the contract is exercised. For example, NELP commended the proposed interpretation of new contract coverage, stating that "adhering to the announced implementation date of January 30, 2022, and attaching the wage

increase to any renewals, extensions, or options on contracts signed before that date is critical to realizing the benefits of the executive order and to establishing consistency and equity in a system in which more than 500,000 contract actions were implemented in low-paying service industries just between the inauguration of President Biden and the date of the NPRM publication." The Center for Workplace Compliance noted that the Department's proposed definition and interpretation of *new contract* here departs from the interpretation set forth in the regulations implementing Executive Order 13658, particularly with respect to the proposed coverage of exercised option periods, but affirmed that such departure is "compelled" by and "consistent with" the text of Executive Order 14026.

Several commenters requested that the Department clarify whether covered task orders placed on or after January 30, 2022, under multiple-award contracts (MACs), such as GSA Schedules, Government Wide Acquisition Contracts, and other indefinite-delivery, indefinite-quantity contracts, that were entered into prior to January 30, 2022, qualify as "new contracts" covered by Executive Order 14026. Commenters, such as the SEIU and the Teamsters, requested the Department to expand the coverage of "new contracts" to include such task orders. AGC requested that, if the Department does clarify or expand coverage to include such task orders placed under existing IDIQ contracts, the Department should include an adjustments clause related to any increase of the Executive order minimum wage rate.

The Department greatly appreciates and has carefully considered the comments requesting the expansion of "new contract" coverage, but for the reasons explained below, has determined to reaffirm the approach to "new contract" coverage set forth in the NPRM. The Department clarifies in this final rule that task orders placed or issued under existing MACs (i.e., MACs entered into prior to January 30, 2022) will only be covered by Executive Order 14026 if and when the MAC itself becomes subject to Executive Order 14026. This interpretation is consistent with the approach to coverage of task orders adopted under the regulations implementing Executive Order 13658. The Department's treatment of task orders also is

consistent with its treatment of subcontracts, under both the regulations implementing Executive Order 13658 and this part, in that such agreements only are covered by the Executive order if the master or prime contract under which they are issued is also covered by the Executive order.

Although it is true that the scope of "new contract" coverage under Executive Order 14026 is more expansive than under Executive Order 13658, the broadening of contract coverage in the Executive order did not involve the coverage of task orders; rather, and as reflected in sections 8 and 9 of the order, the expansion of coverage was primarily focused on the exercise of option periods on or after January 30, 2022. The Department has thus determined that it would best effectuate the intent of the Executive order, and promote effective implementation and administration of the Executive order and this final rule, to maintain consistency with the coverage of task orders set forth in the regulations implementing Executive Order 13658 (including the interim final rule issued by the FARC) as well as with the coverage of subcontracts explained in those regulations as well as in this part.

At the same time, consistent with section 9(c) of Executive Order 14026, the Department strongly encourages agencies to bilaterally modify existing MACs, as appropriate, to include the minimum wage requirements of this rule even when such contracts are not otherwise considered to be a "new contract" under the terms of this rule. *See* 86 FR 22838. For example, pursuant to section 9(c) of the order, contracting officers are encouraged to modify existing IDIQ contracts in accordance with FAR section 1.108(d)(3) to include the Executive Order 14026 minimum wage requirements. The Department notes that, when the FARC issued its interim rule amending the FAR to implement Executive Order 13658 in December 2014, the FARC also expressly stated, "In accordance with FAR 1.108(d)(3), contracting officers are strongly encouraged to include the clause 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." 79 FR 74545. The Department expects, and strongly encourages,

the FARC to include this provision, or a substantially similar one, in its rule implementing Executive Order 14026.

Although the Department appreciates the comments encouraging an expansion of coverage to include all task orders placed on or after January 30, 2022 regardless of whether the master contract itself qualifies as a new contract, the Department declines to adopt such an approach. The Department's determination that task orders placed under existing MACs only qualify as covered new contracts when the MAC itself becomes subject to the Executive order is consistent with the approach adopted by the Department in its regulations implementing Executive Order 13658. *See* 79 FR 60649. As noted above, however, the Department anticipates that many such existing MACs will be covered by Executive Order 14026 based on the voluntary, but strongly encouraged, action taken by contracting agencies to insert the Executive Order 14026 contract clause as discussed above.

Relatedly, the Department declines AGC's request to direct that a contract price adjustment be given to contractors reflecting any higher short-term labor costs that could arise by applying Executive Order 14026 to new task orders on or after January 30, 2022, that are issued under master contracts that were entered into prior to January 30, 2022. As a general matter, price adjustments, if appropriate, would need to be based on the specific nature of the contract. Moreover, as outlined above, the Department is encouraging, but not requiring, contracting agencies to modify existing MACs that do not otherwise qualify as a "new contract" to include the relevant contract clause; until such time as the existing MAC becomes subject to Executive Order 14026, any task orders placed under such master contract are not required to comply with the order.

With respect to other comments regarding "new contract" coverage, the Professional Services Council (PSC) urged the Department to reconsider the following sentence set forth in the NPRM: "Consistent with section 9(c) of the Executive order, agencies are strongly encouraged to bilaterally modify existing contracts, as appropriate, to include the minimum wage

requirements of this rule even when such contracts are not otherwise considered to be a 'new contract' under the terms of this rule." In its comment, PSC requested that the Department delete the above-quoted language regarding bilateral modifications and instead insert language regarding how and when an agency would modify an existing contract to ensure contractors have clarity regarding timelines and requirements for compliance. The Department declines PSC's request because the sentence at issue is focused on generally encouraging contracting agencies to voluntarily take appropriate and permissible action to apply the Executive order minimum wage requirement even where not required to do so by the order or this part. The nature and timing of such voluntary action will be inherently fact-specific and is likely to differ based on the contracting agency and the underlying type of contract. Because such action is not required by this rule and will depend on the particular factual arrangement, the Department declines to set forth specific protocols for how and when agencies should engage with contractors to proactively insert the applicable Executive order contract clause in contracts that are not subject to the order.

Other commenters, such as River Riders, Inc., requested clarification as to how the Department's interpretation of new contract coverage affects permits that are currently exempt under Executive Order 13838. These comments are discussed in the preamble section below regarding the rescission of Executive Order 13838. To the extent that other commenters sought clarification regarding whether particular contractual situations involve a "new contract" under this final rule, such comments did not provide enough information for the Department to definitively opine on coverage. The Department encourages such commenters to reach out to the WHD for compliance assistance regarding their rights and responsibilities under this order.

Because the Department's proposed interpretation of new contract coverage accurately and appropriately implements the coverage principles compelled by sections 8(a) and 9(a) of Executive Order 14026, *see* 86 FR 22837, the Department adopts § 23.30(a) as proposed.

Interaction With Contract Coverage Under Executive Order 13658

As explained in the NPRM, beginning January 1, 2015, covered contracts with the Federal Government were generally subject to the minimum wage requirements of Executive Order 13658 and its implementing regulations at 29 CFR part 10. Executive Order 13658, which was issued in February 2014, required Federal contractors to pay workers working on or in connection with covered Federal contracts at least $10.10 per hour beginning January 1, 2015 and, pursuant to that order, the minimum wage rate has increased annually based on inflation. The Executive Order 13658 minimum wage is currently $10.95 per hour and the minimum hourly cash wage for tipped employees is $7.65 per hour. *See* 85 FR 53850. These rates will increase to $11.25 per hour and $7.90 per hour, respectively, on January 1, 2022. *See* 86 FR 51683. Executive Order 13658 applies to the same four types of Federal contracts as are covered by Executive Order 14026. *Compare* 79 FR 9853 (section 7(d) of Executive Order 13658) *with* 86 FR 22837 (section 8(a) of Executive Order 14026).

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

As explained above, however, Executive Order 14026 and part 23 only apply to a "new contract" with the Federal Government, which means a contract that is entered into on or after January 30, 2022, or a contract that is renewed or extended (pursuant to an exercised option or otherwise) on or after January 30, 2022. As explained in the NPRM, for some amount of time,

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

In order to minimize potential stakeholder confusion as to whether a particular contract is subject to Executive Order 13658 or to Executive Order 14026, the Department proposed to add clarifying language to the definition of "new contract" in the regulations that implemented Executive Order 13658, *see* 29 CFR 10.2, to make clear that a contract that is entered into on or after January 30, 2022, or a contract that was awarded prior to January 30, 2022, but is subsequently extended or renewed (pursuant to an option or otherwise) on or after January 30, 2022, is subject to Executive Order 14026 and part 23 instead of Executive Order 13658 and the 29 CFR part 10 regulations. The provision at 29 CFR 10.2 currently defines a "new contract" for purposes of Executive Order 13658 to mean "a contract that results from a solicitation issued on or after January 1, 2015, or a contract that is awarded outside the solicitation process on or after January 1, 2015." That definition further provides, *inter alia*, that Executive Order 13658 also

applies to contracts entered into prior to January 1, 2015, if, through bilateral negotiation, on or after January 1, 2015, the contract is renewed, extended, or amended pursuant to certain specified limitations explained in that regulation. *Id*. To provide clarity to stakeholders, the Department proposed to amend the definition of a "new contract" under Executive Order 13658 in 29 CFR 10.2 by changing the three references to "on or after January 1, 2015" to "on or between January 1, 2015 and January 29, 2022." This clarifying edit was intended to assist stakeholders in recognizing that, beginning January 30, 2022, the higher minimum wage requirement of Executive Order 14026 applies to new contracts.

As previously mentioned, the Department also proposed to add language to part 23 at § 23.50(d) explaining that, unless otherwise excluded by § 23.40, workers performing on or in connection with a covered new contract, as defined in § 23.20, must be paid at least the higher minimum hourly wage rate established by Executive Order 14026 and part 23 rather than the lower hourly minimum wage rate established by Executive Order 13658 and its regulations. The Department further proposed to add substantially similar language to the Executive Order 13658 regulations at § 10.1 to ensure that the contracting community is fully aware of which Executive order and regulations apply to their particular contract. Specifically, the Department proposed to amend § 10.1 by adding paragraph (d), which explained that, as of January 30, 2022, Executive Order 13658 is superseded to the extent that it is inconsistent with Executive Order 14026 and part 23. The proposed new paragraph would further clarify that a covered contract that is entered into on or after January 30, 2022, or that is renewed or extended (pursuant to an option or otherwise) on or after January 30, 2022, is generally subject to the higher minimum wage rate established by Executive Order 14026 and part 23. The Department also proposed to add corresponding information to § 10.5(c) to ensure that stakeholders were aware of their potential obligations under Executive Order 14026 and part 23 even if they inadvertently consult the regulations that were issued under Executive Order 13658.

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

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

An anonymous commenter asked the Department to clarify that renewed contracts on or after January 30, 2022 will be subject to the higher minimum wage rate set forth in Executive Order 14026. Consistent with the discussion in the NPRM, the Department confirms that, for a contract currently subject to Executive Order 13658 that was entered into prior to January 30, 2022, such contract will become subject to Executive Order 14026 and its higher minimum wage rate if such contract is is renewed or extended (pursuant to an option or otherwise) on or after

January 30, 2022. For example, a DBA-covered construction contract entered into on October 15, 2020 is currently subject to the $10.95 minimum wage rate established by Executive Order 13658. On January 1, 2022, the wage rate applicable to the contract under Executive Order 13658 will increase to $11.25 based on the annual inflation-based update to that rate. If that contract is subsequently extended pursuant to the exercise of an option on October 15, 2022, the contract will become subject to the $15.00 minimum wage rate established by Executive Order 14026 on the date of extension, October 15, 2022.

The Department also received several comments regarding Executive Order 14026's rescission of Executive Order 13838, which will be discussed below in the preamble section pertaining to that rescission.

Other than these comments, the Department did not receive any requests for specific clarifications in the proposed regulatory text discussing the interaction between Executive Order 13658 and Executive Order 14026. The Department therefore finalizes the corresponding proposed changes to the regulations implementing Executive Order 13658 at 29 CFR 10.1(d), 29 CFR 10.2 (specifically, the definition of *new contract*), and 29 CFR 10.5(c), as well as the proposed regulatory text at § 23.50(d).

Coverage of Types of Contractual Arrangements

Proposed § 23.30(a)(1) set forth the specific types of contractual arrangements with the Federal Government that are covered by Executive Order 14026. The Department noted that Executive Order 14026 and part 23 are intended to apply to a wide range of contracts with the Federal Government for services or construction. Proposed § 23.30(a)(1) would implement 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. The Department further noted that, as was

also the case under the Executive Order 13658 rulemaking, these categories are not mutually exclusive—a concessions contract might also be covered by the SCA, as might a contract in connection with Federal property or lands, for example. A contract that falls within any one of the four categories is covered. Each of these categories of contractual agreements is discussed in greater detail below.

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

The DBA applies, in relevant part, to contracts to which the Federal Government is a party, for the construction, alteration, or repair, including painting and decorating, of public buildings and public works of the Federal Government and which require or involve the employment of mechanics or laborers. 40 U.S.C. 3142(a). The DBA's regulatory definition of *construction* is expansive and includes all types of work done on a particular building or work by laborers and mechanics employed by a construction contractor or construction subcontractor. *See* 29 CFR 5.2(j). For purposes of the DBA and thereby the Executive order, a contract is "for construction" if "more than an incidental amount of construction-type activity" is involved in its performance. *See*, *e.g.*, *In the Matter of Crown Point, Indiana Outpatient Clinic*, WAB Case No. 86-33, 1987 WL 247049, at *2 (June 26, 1987) (citing *In re: Military Housing, Fort Drum, New York*, WAB Case No. 85-16, 1985 WL 167239 (Aug. 23, 1985)), *aff'd sub nom.*, *Building and*

Construction Trades Dep't, AFL-CIO v. Turnage, 705 F. Supp. 5 (D.D.C. 1988); 18 Op. O.L.C. 109, 1994 WL 810699, at *5 (May 23, 1994). The term "public building or public work" includes any building or work, the construction, prosecution, completion, or repair of which is carried on directly by authority of or with funds of a Federal agency to serve the interest of the general public. *See* 29 CFR 5.2(k).

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

The Center for Workplace Compliance expressed support for this proposed interpretation of procurement contracts for construction because it is consistent with the approach set forth in the regulations implementing Executive Order 13658, *see* 29 CFR 10.2. The Center for Workplace Compliance noted that it supports such consistency because "compliance with the new E.O. will be simplified to the extent that the compliance obligations are similar to those under E.O. 13658." The Department did not receive other specific comments regarding this category of contracts and therefore finalizes § 23.30(a)(1)(i) as proposed.

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

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

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

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

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

The Center for Workplace Compliance commended this interpretation of service contracts for its consistency with the approach taken in the regulations implementing Executive Order 13658. The Department also received a number of comments requesting that the Department opine as to whether a particular legal instrument is covered by the SCA and thus by Executive Order 14026. For example, the Cline Williams Law Firm requested that the Department determine that contracts between the Federal Government and Federally Qualified Health Centers (FQHCs) to provide medical services to the public are not covered by Executive

Order 14026 because they are not subject to the SCA.[11] The Home Care Association of America also requested that the Department exempt from SCA and/or Executive Order 14026 coverage home care providers providing services pursuant to certain agreements with the U.S. Veterans Administration (VA), including Veterans Care Agreements and services provided via the VA Community Care Network. Based on the information provided by these commenters, it does not appear that medical service contracts with FQHCs or the specified VA contracts would qualify as concessions contracts or as contracts in connection with Federal property or lands and related to offering services to Federal employees, their dependents, or the general public; the key question then is whether such contracts are subject to the Service Contract Act.

The Department notes that, with respect to these and similar comments seeking an official determination as to the SCA's applicability to a particular legal agreement, this rulemaking is not the proper forum for obtaining such a determination. A determination that a particular contract is covered by the SCA would have implications beyond this rulemaking, in part because SCA-covered contracts are also subject to other relevant Executive orders pertaining to federal contractors, including Executive Order 13658 and Executive Order 13706, "Establishing Paid Sick Leave for Federal Contractors." Moreover, and while the comments submitted on these questions were helpful, the Department lacks sufficient information and contract-related documentation about these particular legal instruments to definitively opine on their coverage under the SCA, which requires a fact-specific analysis. The Department invites

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[11] In its comment, the Cline Williams Law Firm asserts, inter alia, that FQHCs are not subject to the SCA because the services that they provide are essentially professional medical services that are performed predominantly by healthcare professionals. The Department confirms that a contract for professional services performed essentially by bona fide professional employees, with the use of service employees being only a minor factor in contract performance, is not covered by the SCA and thus would not be covered by the Executive Order or this part. *See* 41 U.S.C. 6702(a)(3); 29 CFR 4.113(a), 4.156; WHD Field Operations Handbook (FOH) ¶¶ 14b05, 14c07. As reflected in the FOH, however, WHD has explained that "[i]n practice, a 10 to 20 percent guideline has been used to determine whether there is more than a minor use of service employees." WHD FOH 14c07(b); *see also* 29 CFR 4.113(a)(3); *In re: Nat'l Cancer Inst.*, BSCA No. 93-10, 1993 WL 832143 (Dec. 30, 1993). The Department thus observes that, because their use of service employees often exceeds that threshold, many federal contracts for medical services are in fact covered by the SCA.

stakeholders with questions regarding potential SCA coverage of particular legal instruments to follow the procedures set forth in 29 CFR 4.101(g) to obtain an official ruling or interpretation as to SCA coverage. In the event that the Department is called upon to issue a coverage determination under the SCA regarding such contracts and determines that such contracts are not covered by the SCA, they would not be subject to Executive Order 14026 if, as appears to be the case, they do not fall within any other enumerated category of covered contracts. If such a contract is ultimately determined to be covered by the SCA, it would also qualify as a covered contract under Executive Order 14026 assuming all other requisite conditions were met (e.g., that the contract qualified as a "new contract" under this part). Because the Executive order reflects a clear intent to broadly cover federal service contracts and the Department finds the Home Care Association of America's general claims of hardship that could result from application of the order to the specified VA contracts to be inconsistent with the economy and efficiency rationale underlying Executive Order 14026, the Department believes that it would be inappropriate to grant a special exemption from the Executive order for these types of agreements.[12]

The Department notes that it received many comments, largely from stakeholders in the outdoor recreational industries, pertaining to the Executive Order's coverage of special use permits issued by the Forest Service, Commercial Use Authorizations (CUAs) issued by the National Park Service (NPS), and outfitter and guide permits issued by the Bureau of Land Management (BLM) and the U.S. Fish and Wildlife Service (USFWS), respectively. Although these comments are addressed in more detail in the preamble section pertaining to the coverage

[12] The Department acknowledges that the VA MISSION Act itself expressly provides that "an eligible entity or provider that enters into [a Veterans Care Agreement] under this section shall not be treated as a Federal contractor or subcontractor for purposes of chapter 67 of title 41 (commonly known as the 'McNamara-O'Hara Service Contract Act of 1965')." 38 U.S.C. 1703A(i)(3). Without opining more broadly on the other types of contracts discussed by the Home Care Association of America, the Department confirms that providers operating under agreements authorized by this specific statutory provision of the VA MISSION Act are thus not subject to the SCA and would likewise not be covered by Executive Order 14026.

of contracts in connection with Federal property and related to offering services, the Department notes that such contracts may also be covered by the SCA.

As recognized by the Department's Administrative Review Board (ARB), Forest Service special use permits generally qualify as SCA-covered contracts, unless they fall within the SCA exemption for certain concessions contracts contained in 29 CFR 4.133(b). *See Cradle of Forestry in America Interpretive Assoc.*, ARB Case No. 99-035, 2001 WL 328132, at *5 (ARB March 30, 2001) (stating that "whether Forest Service [special use permits] are exempt from SCA coverage as concessions contracts would need to be evaluated based upon the specific services being offered at each site"). Thus, because they generally qualify as SCA-covered contracts, Forest Service special use permits will typically be subject to Executive Order 14026's requirements under section 8(a)(i)(B) of the Order and § 23.30(a)(1)(ii). To the extent that the 29 CFR 4.133(b) exemption from SCA coverage applies with respect to a specific special use permit, such a contract will nonetheless generally be subject to the Executive order's requirements under section 8(a)(i)(C) or (D) of the Order and § 23.30(a)(1)(iii) or (iv).

Many stakeholders in the outdoor recreational industries described in their comments that they provide critical services to the general public on federal lands. The Department's understanding is that many such contractors enter into CUA agreements with the NPS, and outfitter and guide permit agreements with the BLM and USFWS, respectively. The principal purpose of these legal instruments (akin to the agreement at issue in the *Cradle of Forestry* decision cited above) seems to be furnishing services through the use of service employees. If this is true, the SCA and thus Executive Order 14026 may generally cover the CUA and outfitter and guide permit agreements that contractors enter into with the NPS, BLM, and USFWS, respectively. The Department notes that a further discussion of the application of section 8(a)(i)(D) of the Executive Order to Forest Service special use permits, NPS CUAs, and BLM and USFWS outfitter and guide permits is set forth below in the discussion of contracts in

connection with Federal property and related to offering services for Federal employees, their dependents, or the general public.

The Department did not receive other comments regarding its proposed coverage of service contracts and thus finalizes § 23.30(a)(1)(ii) as proposed.

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

The SCA generally covers contracts for concessionaire services. *See* 29 CFR 4.130(a)(11). Pursuant to the Secretary's authority under section 4(b) of the SCA, however, the SCA's regulations specifically exempt from coverage concession contracts "principally for the furnishing of food, lodging, automobile fuel, souvenirs, newspaper stands, and recreational equipment to the general public." 29 CFR 4.133(b); 48 FR 49736, 49753 (Oct. 27, 1983).[13] Proposed § 23.30(a)(1)(iii) extended coverage of the Executive order and part 23 to all concession contracts with the Federal Government, including those exempted from SCA coverage. For example, the Executive order generally covers souvenir shops at national monuments as well as boat rental facilities and fast food restaurants at National Parks. The Department noted that Executive Order 14026 and part 23 would cover contracts in connection

[13] 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).

with both seasonal recreational services and seasonal recreational equipment rental when such services and equipment are offered to the general public on Federal lands. In addition, consistent with the SCA's implementing regulations at 29 CFR 4.107(a), the Department noted that the Executive order generally applies to concessions contracts with nonappropriated fund instrumentalities under the jurisdiction of the Armed Forces or other Federal agencies.

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

The Department received many comments regarding Executive Order 14026's coverage of concessions contracts. As a threshold matter, a number of commenters, such as the AOA, the Association of Military Banks of America (AMBA), and the Defense Credit Union Council (DCUC), asserted in part that the concessionaires they represent do not qualify as federal contractors because they do not operate under procurement contracts and/or are not considered federal contractors subject to the FAR or other procurement statutes and regulations. As explained in the NPRM and above, Executive Order 14026 applies to both covered procurement and non-procurement contracts, including contracts that are not subject to the FAR.

Consistent with the regulations implementing Executive Order 13658, the Department has broadly defined a *concessions contract* as any contract under which the Federal Government

grants a right to use Federal property, including land or facilities, for furnishing services without any substantive restrictions on the type of services provided or the beneficiary of the services rendered. This broad interpretation of the term "concessions" best effectuates the inclusive nature of Executive Order 14026 and provides clarity and consistency to stakeholders by mirroring the existing coverage of Executive Order 13658. By expressly applying to both concessions contracts covered by the SCA as well as concessions contracts exempt from the SCA, Executive Order 14026 is explicitly intended to cover concessions contracts for the benefit of the general public as well as for the benefit of the Federal Government itself and its personnel. The Department would thus generally view contracts for the provision of noncommercial educational or interpretive services, energy, transportation, communications, or water services to the general public as within the scope of concessions contracts covered by the Order.

Importantly, and regardless of the scope of the term "concessions," the Department emphasizes that many such concessions contracts may qualify as SCA-covered contracts and are also likely to fall within the scope of the fourth category of covered contracts set forth at section 8(a)(i)(D) of the Executive Order because such contracts are entered into "in connection with Federal property" and "related to offering services for . . . the general public."[14] At the same time, the Department recognizes and agrees that the interpretation of the term "concessions" for purposes of Executive Order 14026 and this final rule, and the resulting determination that many concessionaires are federal contractors for purposes of this Executive order and rule, does not mean that such entities and contracts are covered by other laws pertaining to federal contractors; the Department's interpretation here is limited to Executive Order 14026.

The Department received a few comments, including from the U.S. Small Business Administration's Office of Advocacy (SBA Advocacy), expressing concern regarding

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[14] For example, the lease and operating agreement under which a bank or credit union operates on military installations may qualify as SCA-covered contracts, concessions contracts, and/or contracts in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public; if such a covered contract also qualifies as a "new contract" as described in this part, it will thus be subject to Executive Order 14026.

application of Executive Order 14026 to restaurant franchises on military installations. These comments generally assert that the order imposes a uniquely burdensome requirement on fast food restaurants on military bases because the restaurant owners receive no funding from the Federal Government. They state that such contractors generally pay rent and a portion of their sales in exchange for the ability to conduct business on the military installation. These commenters also assert that, due to restrictions in their contracts with the Federal Government, they cannot raise the prices that they charge for products sold on the military base above the prices offered by competitors in a three-mile radius. A franchise owner on a military base commented that he owns a small business and will not be able to absorb the increase in labor costs that may result from Executive Order 14026. The commenter asserted that being required to pay the Executive order minimum wage would result in his business terminating workers or closing store locations, both of which would affect customer service. This franchise owner also asserted that application of the Executive Order 14026 minimum wage to business establishments on military installations would cause them to operate at a competitive disadvantage because competitor businesses located off the military base would not be affected. For these reasons, some commenters urged the Department to exempt from the Executive Order 14026 minimum wage requirements any entities that do not receive direct funds from the Federal Government (e.g., concessionaires).

The Department received similar comments from the AMBA and the DCUC, respectively, requesting exemption of banks operating on military installations and defense credit unions operating on military installations. These comments raised similar concerns regarding the adverse economic impact on these types of businesses as the other concessaires voiced above. The AMBA explained that banks operating on military installations provide services to both the Federal Government and the base population pursuant to operating agreements between the Military Service and the bank, which generally operate under five-year lease agreements with the Military Service. The AMBA noted that rent is often increased under such leases. As with the

concessionaire comments discussed above, the AMBA expressed that banks operating on military bases generally do not receive direct funding from the Federal Government, are unable to raise the prices for their services, and cannot negotiate the rent. The AMBA further stated that, under such operating agreements, the bank is constrained from promoting its services outside the client base. The AMBA requested that the Department either exempt banks operating on military installations from coverage of Executive Order 14026 or require the Federal Government to offset increased labor costs and the value of bank services from lease costs. The DCUC similarly commented that defense credit unions operating on military installations are non-profit entities that provide their services free of charge as part of their operating agreement with the installation commander, which means that the credit unions generally cannot factor government-mandated costs into their pricing model. Both the AMBA and the DCUC assert that application of Executive Order 14026 to the businesses that they represent will lead to more banks and credit unions leaving military bases or otherwise reduce services being offered to the base.[15]

In response to all of the comments received about the economic impact of Executive Order 14026 upon businesses operating on military installations under concessions contracts and/or leases, the Department notes that such comments do not appear to account for several factors that the Department expects will substantially offset any potential adverse economic effects on their businesses. In particular, increasing the minimum wage of workers can reduce absenteeism and turnover in the workplace, improve employee morale and productivity, reduce supervisory costs, and increase the quality of services provided to the Federal Government and the general public. These commenters similarly did not discuss the potential that increased efficiency and quality of services will attract more customers, even where the customer base may be limited due to the enhanced security environment, and result in increased sales or service fees.

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[15] Many of these same concerns were expressed in comments pertaining to outfitter and guide permits and licenses. All such comments regarding such permits and licenses will be addressed in the discussion of contracts in connection with federal land or property and related to offering services below.

The Department further notes that the types of contracts covered by Executive Order 14026 are identical to the categories of contracts covered by Executive Order 13658. While the Department recognizes that the minimum wage under Executive Order 14026 is higher than that imposed by Executive Order 13658, contractors operating on military installations already have familiarity with the principles set forth in Executive Order 14026 and this rule and likely have already found ways to maintain their business operations, to reap the economy and efficiency benefits of the applicable minimum wage, and to absorb or offset any increased labor costs arising from the prior minimum wage rate increase. The Department received numerous similar comments regarding the potential adverse impacts of raising the minimum wage for concessionaires on military installations during the 2014 rulemaking to implement Executive Order 13658, *see* 79 FR 60653; despite the significant concerns expressed regarding the Executive Order 13658 rulemaking, the Department is not aware of any substantial adverse economic impact on such contractors resulting from that minimum wage increase or any widespread closure of such businesses on military installations due to Executive Order 13658 in the seven years since those regulations were finalized. Indeed, the commenters have not provided anecdotal or other specific evidence that wage rate increases as a result of Executive Order 13658 had any adverse economic impact on their operations. The Department acknowledges that the AMBA presented information demonstrating a general decline in banks operating on military installations since 2004 due to "a number of contributing economic and operational factors," but the stated period of decline began 10 years before Executive Order 13658 was issued, and AMBA does not refer to and the Department is not aware of any such closures as a result of Executive Order 13658 itself. The argument that an entity operating on a military installation must terminate workers, reduce services, or close businesses due to the new Executive order minimum wage requirements therefore overlooks the benefits of the wage increase and is not supported by the Department's experience in implementing and enforcing Executive Order 13658.

The Department further notes that, for many contracting agencies and contractors negotiating new contracts on or after January 30, 2022, such parties will be aware of Executive Order 14026 and can take into account any potential economic impact of the order on projected labor costs. For example, with respect to some commenters' concerns regarding the restrictions on pricing imposed by their concessions contracts, the Department notes that contractors may have the ability to negotiate a lower percentage of sales paid as rent or royalty to the Federal Government in new contracts prior to application of the Executive order that could help to offset any costs that may be incurred as a result of the order. The Department recognizes that these negotiations may not be possible or feasible for all contractual arrangements, but for at least some contractors, the assertion that a franchisee must terminate workers or close businesses due to the Executive Order 14026 minimum wage requirements overlooks alternatives that may be available through contract renegotiation.

Section 8(a)(i)(C) of Executive Order 14026 reflects a clear intent that concessions contracts with the Federal Government be subject to the minimum wage requirement. The Department therefore declines the commenters' request to exempt entities that do not receive direct funds from the Federal Government (e.g., concessionaires), including military banks and defense credit unions operating on military installations, because such an exemption would be wholly inconsistent with the Executive order's express statement that federal concessions contracts are covered by the order. With respect to AMBA's request that the Department require the Federal Government to offset increased labor costs and the value of bank services from lease costs, the Department lacks such authority. The Department does, however, strongly encourage contracting agencies to consider the economic impact of Executive Order 14026, particularly during contract negotiations, and to take all reasonable and legally permissible steps to ensure that individuals working pursuant to covered contracts are paid in accordance with Executive Order 14026 and to ensure that the economy and efficiency benefits of the order are realized.

With respect to general comments requesting additional examples of concessions contracts that would be covered by Executive Order 14026, the Department notes that such covered contracts would generally include fast food restaurants on military bases, equipment rental facilities at national parks, souvenir shops at national monuments, and snack or gift shops in federal buildings. The Department notes that such contracts could also fall within the scope of another specified category of covered contracts (i.e., they may also qualify as SCA-covered contracts or contracts in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public) because the four categories of contracts covered by Executive Order 14026 are not mutually exclusive.

As described above, after careful consideration of the comments received regarding this category of covered contracts, the Department finalizes its proposed coverage of concessions contracts and the relevant regulatory text at § 23.30(a)(1)(iii), as set forth in the NPRM.

Contracts in Connection with Federal Property or Lands and Related to Offering Services: Proposed § 23.30(a)(1)(iv) implemented section 8(a)(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* 86 FR 22837; *see also* 79 FR 60655 (Executive Order 13658 final rule preamble discussion of identical provisions in Executive Order 13658 and 29 CFR part 10). To the extent that such agreements are not otherwise covered by § 23.30(a)(1), the Department interpreted this provision in the NPRM as generally including leases of Federal property, including space and facilities, and licenses to use such property entered into by the Federal Government for the purpose of offering services to the Federal Government, its personnel, or the general public. In other words, as the Department explained in the NPRM, a private entity that leases space in a Federal building to provide services to Federal employees or the general public would be covered by the Executive order and part 23 regardless of whether the lease is subject to the SCA. Although evidence that an agency has retained some measure of

control over the terms and conditions of the lease or license to provide services is not necessary for purposes of determining applicability of this section, such a circumstance strongly indicates that the agreement involved is covered by section 8(a)(i)(D) of the Executive order and proposed § 23.30(a)(1)(iv). For example, a private fast food or casual dining restaurant that rents space in a Federal building and serves food to the general public would be subject to the Executive order's minimum wage requirements even if the contract does not constitute a concessions contract for purposes of the order and part 23. The Department included in the NPRM additional examples of agreements that would generally be covered by the Executive order and part 23 under this approach, regardless of whether they are subject to the SCA, such as delegated leases of space in a Federal building from an agency to a contractor whereby the contractor operates a child care center, credit union, gift shop, health clinic, or fitness center in the space to serve Federal employees and/or the general public. Consistent with contract coverage under Executive Order 13658, the Department reiterated that the four categories of contracts covered by Executive Order 14026 are not mutually exclusive. A delegated lease of space on a military base from an agency to a contractor whereby the contractor operates a barber shop, for example, would likely qualify both as an SCA-covered contract for services and as a contract entered into with the Federal Government in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public.

Despite this broad definition, the Department noted some limitations to the order's coverage. Coverage under this section only extends to contracts that are in connection with Federal property or lands. The Department did not interpret section 8(a)(i)(D)'s reference to "[F]ederal property" to encompass money; as a result, purely financial transactions with the Federal Government, *i.e.*, contracts that are not in connection with physical property or lands, would not be covered by the Executive order or part 23. For example, if a Federal agency contracts with an outside catering company to provide and deliver coffee for a conference, such a contract would not be considered a covered contract under section 8(a)(i)(D), although it would

be a covered contract under section 8(a)(i)(B) if it is covered by the SCA. In addition, section 8(a)(i)(D) coverage only extends to contracts "related to offering services for [F]ederal employees, their dependents, or the general public." Therefore, if a Federal agency contracts with a company to solely supply materials in connection with Federal property or lands (such as napkins or utensils for a concession stand), the Department would not consider the contract to be covered by section 8(a)(i)(D) because it is not a contract related to offering services. Likewise, because a license or permit to conduct a wedding on Federal property or lands generally would not relate to offering services for Federal employees, their dependents, or the general public, but rather would only relate to offering services to the specific individual applicant(s), the Department would not consider such a contract covered by section 8(a)(i)(D).

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

The Department received a number of comments regarding its proposed coverage of 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. Many of these comments pertained to the Executive order's applicability to outfitters and guides

operating on federal property or lands, although the Department notes that this category of covered contracts pertains to a much broader array of service contracts and industries than the outdoor recreational industry. As a threshold matter, the Department notes that it discusses all comments regarding the rescission of Executive Order 13838, which exempted certain recreational service contracts from coverage of Executive Order 13658, in the next section immediately following this discussion of contracts in connection with federal lands and related to offering services. Other relevant comments pertaining to this category of covered contracts are discussed below.

Several commenters, such as NELP and the Teamsters, expressed support for Executive Order 14026's coverage of 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, and for the Department's interpretation of such coverage in this part. However, many other commenters, including the National Forest Recreation Association and the National Park Hospitality Association, strongly opposed application of Executive Order 14026 to these legal arrangements and expressed skepticism that the President has authority under the Procurement Act to impose a minimum wage requirement upon non-procurement contracts falling within the scope of this provision. As previously discussed, the Department regards comments pertaining to the legality of the issuance of Executive Order 14026 as beyond the scope of this rulemaking.

Although many commenters recognized that the proposed coverage of this category of contracts mirrors the coverage principles enunciated in the final rule implementing Executive Order 13658, several commenters questioned whether particular legal instruments, such as Forest Service special use permits, NPS CUAs, and BLM and USFWS outfitter and guide permits, constitute "contracts" under Executive Order 14026.

As previously discussed in the context of the proposed definition of the terms *contract* and *contract-like instrunment*, the Department has defined these terms collectively for purposes

of the Executive order as an agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law. This definition broadly includes all contracts and any subcontracts of any tier thereunder, whether negotiated or advertised, including but not limited to lease agreements, licenses, and permits. The types of instruments identified above (i.e., outfitter and guide permits, SUPs, and CUAs) authorize the use of Federal land for specific purposes in exchange for the payment of fees to the Federal Government. Such instruments create obligations that are enforceable or otherwise recognizable at law and hence constitute contracts for purposes of Executive Order 14026 and this part.

The determination of whether an agreement qualifies as a *contract* under Executive Order 14026 and this part does not depend upon whether such agreements are characterized as "contracts" for other purposes, including under the specific programs that authorize and administer such agreements. However, the Department nonetheless notes that its conclusion that such instruments are contracts for purposes of Executive Order 14026 is consistent with relevant precedent. For example, and as noted above in the preamble discussion of SCA-covered contracts, the ARB has held that a Forest Service special use permit is a contract under the SCA, *see Cradle of Forestry*, 2001 WL 328132, at *5, and the Department likewise has determined that Forest Service special use permits constitute contracts for purposes of the FLSA. *See* DOL Opinion Letter, WH-449, 1978 WL 51447 (Jan. 26, 1978) (Forest Service SUP was a contract for purposes of FLSA section 13(a)(3)); DOL Opinion Letter, 1995 WL 1032476 (March 24, 1995) (Department of Agriculture license to operate amusement rides constituted a contract for purposes of FLSA section 13(a)(3)).

In its comment, Colorado Ski Country USA (CSCUSA) urged the Department to revisit its conclusion in the 2014 rulemaking implementing Executive Order 13658 that Forest Service ski area permits qualify as contracts or, if the Department reaffirms such a conclusion, requested that the Department specify in the final rule that this determination does not render ski area operators "federal contractors" with respect to other federal laws. In response to such comments,

and as noted elsewhere in this final rule, Executive Order 14026 expressly applies to nonprocurement contracts that are not subject to the FAR; the fact that Forest Service ski area permits, or other such agreements, are not subject to Federal procurement requirements does not weigh against application of the Executive order to such permits. Forest Service ski area permits constitute an agreement with the Federal Government creating obligations that are enforceable or otherwise recognizable at law; such permits enable the holder to offer services to the general public on federal land. However, the Department's conclusion that Forest Service special use permits, CUAs, and similar instruments constitute *contracts* under Executive Order 14026 and this final rule does not render the holders of such agreements "federal contractors" with respect to other laws.

Importantly, the fact that permits, licenses, and CUAs qualify as *contracts* for purposes of the Executive order does not necessarily mean individuals performing work on or in connection with such contract are covered workers. In order for the minimum wage protections of Executive Order 14026 to extend to a particular worker performing work on or in connection with a covered contract, that worker's wages must be governed by the DBA, FLSA, or SCA. The FLSA generally governs the wages of employees of holders of CUAs issued by the NPS and permits issued by the Forest Service, BLM and USFWS, at least to the extent such instruments are not covered by the SCA.

The Department received several comments requesting clarification as to the relevance under the Executive order of 29 U.S.C. 213(a)(3), which exempts employees of certain seasonal amusement and recreational establishments from the FLSA's minimum wage and overtime provisions. As reflected in the exclusion set forth at § 23.40(e) of this part, Executive Order 14026 does not apply to employees employed by establishments that qualify as "an amusement or recreational establishment, organized camp, or religious or non-profit educational conference center" and meet the criteria for exemption set forth at 29 U.S.C. 213(a)(3), unless such workers are otherwise covered by the DBA or SCA. That being said, the Department notes that the

FLSA's section 13(a)(3) exemption expressly "does not apply with respect to any employee of a private entity engaged in providing services or facilities (other than, in the case of the exemption from section 206 of this title, a private entity engaged in providing services and facilities directly related to skiing) in a national park or a national forest, or on land in the National Wildlife Refuge System, under a contract with the Secretary of the Interior or the Secretary of Agriculture." *See* 29 U.S.C. 213(a)(3). As explained above, the Department has concluded that the holders of CUAs issued by the NPS, and permits issued by the Forest Service, BLM and USFWS, are operating under a contract with the Secretary of the Interior or the Secretary of Agriculture. Thus, the FLSA's section 13(a)(3) exemption will typically not apply to such holders. In sum, to the extent that (i) an entity satisfies the criteria for the 29 U.S.C. 213(a)(3) exemption under the FLSA, and (ii) the wages of the entity's workers are also not governed by the SCA or DBA, Executive Order 14026 would not apply to the entity's workers.

Numerous commenters asserted that the types of agreements that the Department has determined fall within the scope of contracts in connection with federal property or land and related to offering services, such as Forest Service special use permits and BLM and USFWS outfitter and guide permits, contain unique provisions or reflect unique circumstances that render them unlike other more traditional federal contracts; many such commenters thus urged that such agreements be exempt from coverage of Executive Order 14026. Many commenters, including the AOA and SBA Advocacy, noted that, unlike procurement contracts, these instruments do not contain a mechanism by which the holder of the instrument can "pass on" potential costs related to operation of the Executive order to contracting agencies; indeed, such commenters noted that holders of these instruments typically pay the Federal Government for the opportunity to provide services on federal lands. Commenters, like the AOA, also noted that the holders of such instruments may have only limited ability to "pass on" increased labor costs to the public because rates are often subject to government regulation. In any event, such commenters observed, increasing costs charged to the general public for such services on federal lands would

run contrary to current policy efforts to expand access to outdoor recreational opportunities, particularly among traditionally underrepresented or underserved communities. Such commenters also generally argued that Executive Order 14026 will cause such permit holders to operate at a competitive disadvantage because competitor businesses not operating under contracts covered by the Executive order would not be affected and covered businesses could therefore lose customers to competitors.

Other commenters, such as AVA Rafting & Zipline, the Colorado Adventure Center, and the Nantahala Outdoor Center, noted that application of Executive Order 14026 to their outfitter and guide permits would result in their business needing to reduce employee work hours, reduce services, or increase prices such that only the wealthy will be able to enjoy the services offered, thereby potentially causing individuals to attempt excursions on federal lands without the use of expert guides. A few commenters, like Lasting Adventures, Inc., noted that Executive Order 14026 will significantly increase the labor costs of entities performing overnight and/or multi-day excursions in national parks, where overtime costs will be substantial and are unavoidable. Several commenters, including AOA and SBA Advocacy, thus asserted that application of Executive Order 14026 to such instrument holders, particularly for small businesses, will be financially devastating. For these reasons, some commenters, including the Clear Creek Rafting Company, the Colorado River Outfitters Association, Indian Head Canoes, Lasting Adventures, Inc., Nantahala Outdoor Center, and Plum Branch Yacht Club, requested that the Department exempt from coverage of Executive Order 14026 concessionaires, lease holders, and/or seasonal recreational businesses, or a smaller subset of such stakeholders, who have contracts and permits on Federal property or lands.

As a threshold matter, the Department notes that many of these comments regarding the financial impact of the Executive order upon this category of covered contracts are addressed in detail in the economic impact analysis set forth in section IV of the final rule. In response to these comments regarding the financial impact of Executive Order 14026 upon such permittees,

licensees, and CUA holders, the Department recognizes and acknowledges that there may be particular challenges and constraints experienced by non-procurement contractors that do not exist under more traditional procurement contracts. Nonetheless, the Department anticipates that the economy and efficiency benefits of Executive Order 14026 will offset potential costs, including for the holders of these legal instruments. As with the comments from businesses operating on military installations under concessions contracts discussed above, these comments generally do not account for several factors that the Department expects will substantially offset any potential adverse economic effects on their businesses arising from application of the Executive order. In particular, these commenters do not seem to consider that increasing the minimum wage of their workers can reduce absenteeism and turnover in the workplace, improve employee morale and productivity, reduce supervisory and training costs, and increase the quality of services provided to the Federal Government and the general public. These commenters similarly do not account for the potential that increased efficiency and quality of services will attract more customers and result in increased sales. Such benefits may be realized even where the contractor has limited ability to transfer costs to the contracting agency or raise prices of the services that it offers.

With respect to the comments requesting exemption of such contracts from coverage of Executive Order 14026, the Department notes that section 8(a)(i)(D) of Executive Order 14026 states that contracts in connection with Federal property and related to offering services for federal employees, their dependents, or the general public are subject to the minimum wage requirement. Moreover, and as discussed in the next section, Executive Order 14026 expressly rescinds, as of January 30, 2022, Executive Order 13838, which exempted many such contracts from coverage of Executive Order 13658. Executive Order 14026 thus evinces a clear intent that such contracts should be subject to its requirements. For the reasons explained above, the Department therefore declines commenters' request to create an exemption for permittees, licensees, and CUA holders.

With respect to commenter requests for clarification as to whether particular legal arrangements qualify as covered contracts in connection with federal property or lands and related to offering services, such comments generally did not provide sufficient information for the Department to be able to definitively opine on their coverage. The Department encourages commenters and other stakeholders with specific coverage questions to contact WHD for compliance assistance in determining their rights and responsibilities under Executive Order 14026. However, the Department can address a few specific questions and hypotheticals in order to provide additional clarity to the general public regarding the scope of coverage of this category of contracts. Importantly, coverage of contracts in connection with federal property or lands set forth in section 8(a)(i)(D) only extends to contracts "related to offering services for Federal employees, their dependents, or the general public." Thus, if an entity obtains a license or permit to provide services on federal lands, but such services are not being offered to the Federal Government, federal employees, their dependents, or the general public, that particular license or permit would not be subject to the Executive order. For example, the Center for Workplace Compliance requested clarification as to whether the Executive order would apply if a federal contractor negotiated a right-of-way to use federal lands, but that right-of-way was not related to offering services to federal employees, their dependents, or the general public. The Department confirms that, if the right-of-way is not in any way related to offering services to the Federal Government, its employees, their dependents, or the general public, such a legal instrument would not be covered by Executive Order 14026.

The Department also received a few comments, such as from MAD Adventures & Grand Adventures, the Nantahala Outdoor Center, and the NSAA, requesting clarification about how Executive Order 14026 applies to recreational service providers that operate businesses on both private and federal lands, including whether workers performing on private lands are subject to the Executive order. SBA Advocacy, for example, questioned how the Executive order would impact an outfitter providing river tours that has multiple Forest Service permits, but also

operates nearby activities, restaurants, and lodging on private lands and only 60 percent of their employees work in areas that have anything to do with the federal permits. In response to these and similar examples raised by commenters, the Department first emphasizes that the Executive order minimum wage rate must be paid to workers performing on or in connection with covered contracts, regardless of where such workers are located. *See* 79 FR 60658 (advising that Executive Order 13658 applies to "FLSA-covered employees working on or in connection with DBA-covered contracts regardless of whether such employees are physically present on the DBA-covered construction worksite"). For example, assume that a guide operates a business offering multi-day hiking and camping excursions in a national park pursuant to a permit that is covered by Executive Order 14026. If, during the course of the multi-day excursion, the guide briefly must lead its customers across a stretch of non-federal land that is technically owned by the state, such worker would still be regarded as performing "on" the covered contract and entitled to the Executive order minimum wage rate even for the time spent on non-federal land. If the guide employs a clerk at the company's off-site headquarters to process payroll for its workers leading excursions in the national park, that clerk would be regarded as peforming "in connection with" the covered contract even though they are not directly working on federal lands and would be entitled to the Executive order minimum wage for such time (unless they fall within the scope of the "20 percent exemption" provided at § 23.40(f) and discussed below).

Importantly, however, Executive Order 14026 only requires that workers be paid the Executive order minimum wage for hours worked on or in connection with a covered contract. The category of covered contracts set forth at section 8(a)(i)(D) of the order is limited to contracts that are in connection with federal lands or property. In the example presented by SBA Advocacy, the outfitter providing river tours pursuant to a covered Forest Service permit must pay the applicable Executive order minimum wage rate to its workers performing on or in connection with that permit. However, to the extent that the outfitter conducts separate and distinct activities on private land in the area, it is unlikely that the Executive order would apply

to such activities. Unless the contractor is operating pursuant to an SCA-covered contract with the Federal Government, that contractor's separate and distinct recreational services (or other commercial activities) on private land would not be subject to Executive Order 14026. (The Department notes that, to the extent that a permit or license is subject to the SCA because it is a contract with the Federal Government principally for services through the use of service employees, such contract would be covered by the Executive order regardless of whether the services are performed on public or private land. In the example given, however, where an outfitter operates river tours in an adjacent state park or owns a restaurant in a nearby town, for example, there is no indication that the SCA would apply to such situations.) This same analysis would apply to the Executive order's coverage of subcontracts.[16]

The Department also received several specific requests for the Department to provide clarification on the Executive order's application to particular factual circumstances that may fall within this category of contracts, such as wilderness therapy programs, outdoor behavioral health services, day and residential youth camps, and other arrangements for services provided on federal lands. The Department lacks sufficient factual information regarding these programs and their authorizing contracts to be able to definitively determine their coverage in this final rule, but encourages such stakeholders with questions regarding coverage of their particular contacts to either informally contact WHD for compliance assistance or to follow the procedures set forth in this rule to obtain a formal ruling or interpretation as to coverage.

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[16] In its comment, the NSAA asserts that "a unique, industry-specific federal law" called the Fee Provision Statute, *see* 16 U.S.C. 497c, essentially precludes the Department from asserting Executive Order 14026 coverage over subcontracts for ski areas operating under Forest Service special use permits that, inter alia, are performed on private land. The Department disagrees with such an assertion and perceives no conflict between these two laws. Executive Order 14026 creates an independent legal obligation that is distinct from requirements that may exist under the Fee Provision Statute; neither the Executive order nor this rule modify any applicable definitions or requirements under the Fee Provision Statute pertaining to subcontracts. Contrary to the NSAA's assertion, Executive Order 14026 in no way "seeks to redefine the scope of the rental fee provisions within these special use permits" as established under that statute.

The Department appreciates the many comments received regarding its proposed coverage of contracts in connection with federal property or lands and related to offering services. For the reasons explained above, the Department adopts § 23.30(a)(1)(iv) as proposed.

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

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

implementing Executive Order 13658. Consistent with such rescission, the Department also declined to exclude such contracts in part 23.

The Department received many comments regarding Executive Order 14026's rescission of Executive Order 13838 and the Department's proposed interpretation of such rescission. Several commenters, including A Better Balance, the AFL-CIO and CWA, AFSCME, NELP, the SEIU, and the Teamsters, expressed strong support for this rescission. NELP, for example, asserted that Executive Order 13838 "unjustly excluded those providing recreational service work on federal lands from the contractor minimum wage" and commended Executive Order 14026 for restoring minimum wage protections to workers performing on or in connection with such contracts. The Center for Workplace Compliance did not express any opinion on the policy decision itself, but stated that the Department's proposal that "[c]ertain concessions contracts with respect to seasonal recreational services or equipment rental are not excluded from coverage" pursuant to this rescission is "compelled by" and "consistent with" the policy decisions set forth in Executive Order 14026.

The Department also received many comments, including from the AOA, Nantahala Outdoor Center, and Tennessee Paddlesports Association, strongly opposing the rescission of Executive Order 13838 and requesting that the President or the Department extend the existing exemption for recreational service contracts under Executive Order 13658 and create a new similar exemption for such contracts under Executive Order 14026. Several commenters, including the AOA, asserted that the Department's NPRM "grossly misstate[d]" the future applicability of Executive Order 13658 and Executive Order 14026 to contracts covered by Executive Order 13838.

As a threshold matter, and as recognized by many commenters, section 6 of Executive Order 14026 explicitly revokes Executive Order 13838, as of January 30, 2022. *See* 86 FR 22836. The Executive order itself thus reflects a clear intent that, as of January 30, 2022, contracts entered into with the Federal Government in connection with seasonal recreational

services or seasonal recreational equipment rental for the general public on Federal lands should no longer be exempt from the minimum wage requirement of Executive Order 13658. Moreover, section 8 of Executive Order 14026 reflects that such contracts are intended to be covered by this Executive order to the extent they qualify as "new contracts" on or after January 30, 2022. The Department therefore does not have the authority to unilaterally exempt such contracts from either Executive Order 13658 or Executive Order 14026; such exclusions would be in clear derogation of both the letter and spirit of Executive Order 14026.

The Department recognizes, however, that some of its statements in the NPRM could be construed in an overbroad or imprecise manner and thus endeavors to clarify in this final rule the coverage of contracts that are currently exempt by Executive Order 13838. In order to do so, and in response to confusion and concern expressed by some commenters, such as the AOA and River Riders, Inc., the Department will address coverage regarding each potential subset of these contracts below:

(1) Recreational Service Contracts Entered Into Prior to January 1, 2015: In its comment, AOA states that there are "existing contracts in place pre-dating Executive Order 13658 that would not have been considered 'new' contracts under Executive Order 13658 and thus . . . would not be subject to the minimum wage requirements of that Executive Order." The Department agrees that, to the extent that an existing contract was entered into prior to January 1, 2015, and has not been subsequently renewed, extended, or amended pursuant to a modification that is outside the scope of the contract, such contract would not qualify as a "new contract" under Executive Order 13658 and would not be subject to its minimum wage requirement. The Department notes that, if such contract is renewed or extended, pursuant to an exercised option period or otherwise, on or after January 30, 2022, it would qualify as a "new contract" under Executive Order 14026.

(2) Recreational Service Contracts Entered Into, Renewed, Extended, or Amended Pursuant to a Modification Outside the Scope Between January 1, 2015 and January 29, 2022:

Executive Order 13838 currently exempts contracts in connection with seasonal recreational services or seasonal recreational equipment rental for the general public on federal lands that otherwise would have qualified as "new contracts" under Executive Order 13658 (i.e., contracts that were entered into, renewed, extended, or amended pursuant to an outside-the-scope modification between January 1, 2015 and January 29, 2022) from coverage of Executive Order 13658. The AOA correctly notes that Executive Order 13838 is not rescinded until January 30, 2022, and thus it presently exempts such contracts from the Executive Order 13658 minimum wage requirement. As of January 30, 2022, Executive Order 13838 is rescinded. To implement this rescission, contracting agencies will need to take steps, to the extent permitted by law, to exercise any applicable authority to insert the Executive Order 13658 contract clause into contracts that were entered into, renewed, extended, or amended pursuant to an outside-the-scope modification between January 1, 2015 and January 29, 2022, and to ensure that those contracts comply with the requirements of Executive Order 13658 on or after January 30, 2022.

The AOA accurately notes that Executive Order 13838 remains in place until January 30, 2022; solicitations that are issued and contracts that are entered into prior to January 30, 2022 thus will not include the Executive Order 13658 contract clause until on or after January 30, 2022. To the extent that the AOA suggests it is improper for the Department to remove the existing regulatory exclusion for recreational service contracts set forth at § 10.4(g) as part of this rulemaking, the Department strongly disagrees and notes that the removal of this provision will not be effective until January 30, 2022, consistent with the date of rescission stated in Executive Order 14026. To be clear, the Department is not requiring, or even encouraging, contracting agencies to take steps to insert (or re-insert) the Executive Order 13658 minimum wage clause in existing recreational service contracts until January 30, 2022; the Department agrees with AOA that action to incorporate the Executive Order 13658 contract clause into contracts exempted by Executive Order 13838 would not be permissible until after Executive Order 13838 is officially rescinded.

(3) Recreational Service Contracts Entered Into, Extended, or Renewed (Pursuant to an Option or Otherwise) On or After January 30, 2022: As recognized by most commenters, and consistent with the general "new contract" principles applicable to all covered contracts, Executive Order 14026 will apply to brand-new recreational service contracts that are entered into on or after January 30, 2022. Executive Order 14026 will also apply to recreational service contracts that were entered into prior to January 30, 2022, if, on or after January 30, 2022: (1) the contract is renewed; (2) the contract is extended; or (3) an option on the contract is exercised.

The Department expects that these clarifications will resolve much of the confusion expressed by commenters regarding the rescission of Executive Order 13838. The Department adopts the provisions implementing this rescission as proposed in the NPRM, but encourages contracting agencies, contractors, and workers with questions about the coverage of recreational service contracts to contact the WHD for compliance assistance as needed.

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

A few commenters, such as the AFL-CIO and CWA, NELP, the SEIU, and the Teamsters, requested that the Department expand coverage of Executive Order 14026 to contracts for goods, including contracts that are covered by the PCA. Although the Department appreciates such feedback, section 8 of Executive Order 14026 explicitly makes clear that the order only applies to the four enumerated types of service and construction contracts under which workers' wages are governed by the DBA, FLSA, or SCA. The Department does not have the authority in this rulemaking to expand coverage beyond the terms of the order to PCA-covered contracts.

Coverage of Subcontracts

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

Pursuant to this approach, only covered subcontracts of covered prime contracts are subject to the requirements of the Executive order. Just as the Executive order does not apply to prime contracts for the manufacturing or furnishing of materials, supplies, articles, or equipment, it likewise does not apply to subcontracts for the manufacturing or furnishing of materials, supplies, articles, or equipment. In other words, the Executive order does not apply to subcontracts for the manufacturing or furnishing of materials, supplies, articles, or equipment between a manufacturer or other supplier and a covered contractor for use on a covered Federal

contract. For example, a subcontract to supply napkins and utensils to a covered prime contractor operating a fast food restaurant on a military base is not a covered subcontract for purposes of this order. The Executive order likewise does not apply to contracts under which a contractor orders materials from a construction materials retailer.

Several commenters, including ABC, AOA, and NSAA, requested that the Department clarify the proposed coverage of subcontracts and specifically address whether suppliers and vendors are generally subject to Executive Order 14026. As explained in the NPRM, the coverage of subcontracts under Executive Order 14026 follows the same analysis as did subcontract coverage under Executive Order 13658. Consistent with the rulemaking implementing Executive Order 13658, the Department affirms that the same test for determining whether a prime contract is covered by Executive Order 14026 applies to determining whether a subcontract is covered by the order, with the only difference being that the value threshold requirements set forth in section 8(b) of the order do not apply to subcontracts. Pursuant to this approach, only covered subcontracts of covered prime contracts are subject to the requirements of Executive Order 14026.

The Department emphasizes that, just as Executive Order 14026 does not apply to prime contracts for the manufacturing or furnishing of materials, supplies, articles, or equipment, it likewise does not apply to subcontracts for the manufacturing or furnishing of materials, supplies, articles, or equipment. To be clear, the Executive order does not apply to subcontracts for the manufacturing or furnishing of materials, supplies, articles, or equipment between a manufacturer or other supplier and a covered contractor for use on a covered federal contract. For example, a contract to supply paper to a credit union operating on a military base is not a covered subcontract for purposes of Executive Order 14026. Likewise, a contract supplying tents to an outfitter company operating in a national park would not be a covered subcontract under the order. The Executive order likewise does not apply to contracts under which a contractor orders materials from a construction materials retailer.

With respect to the suggestion made by a few commenters, including AOA, that the Department amend the regulatory text to more clearly reflect the above analysis of subcontract coverage, the Department notes that § 23.30(d) expressly states that "[t]his 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.*" Moreover, § 23.20 defines the term *contract* to include all contracts and any subcontracts of any tier thereunder. The Department believes that the regulatory text is sufficiently clear for stakeholders to understand that subcontracts for the manufacturing or furnishing or supplies, materials, and equipment to the Federal Government are not subject to the Executive order. The same general coverage principles throughout this part apply to both prime contracts and subcontracts, with the sole exception of the value threshold; the Department thus believes that it is most straightforward for the regulatory text to address prime contracts and subcontracts collectively, except for the limited instances where the Executive order compels their disparate treatment.

However, the Department has carefully considered the comments expressing confusion regarding subcontract coverage and/or the requests to codify this preamble language. The Department has therefore decided to amend paragraph (h) of the contract clause set forth in Appendix A to explicitly add the following sentence: "Executive Order 14026 does not apply to subcontracts for the manufacturing or furnishing of materials, supplies, articles, or equipment, and this clause is not required to be inserted in such subcontracts." The Department believes that this clarification will mitigate the confusion expressed by some stakeholders regarding coverage of subcontracts and contractors' flow-down responsibilities.

Coverage of Workers

Proposed § 23.30(a)(2) implemented section 8(a)(ii) of Executive Order 14026, which provides that the minimum wage requirements of the order only apply to contracts covered by section 8(a)(i) of the order if the wages of workers under such contracts are subject to the FLSA,

SCA, or DBA. 86 FR 22837. The Executive order thus provides that its protections only extend to workers performing on or in connection with contracts covered by the Executive order whose wages also are governed by the FLSA, SCA, or DBA. *Id*. For example, the order does not extend to workers performing on contracts governed by the PCA. Moreover, as discussed in the NPRM and below, employees who are exempt from the minimum wage protections of the FLSA under 29 U.S.C. 213(a) would similarly not be subject to the minimum wage protections of Executive Order 14026, unless those workers' wages are calculated pursuant to section 14(c) certificates or those workers are otherwise covered by the DBA or SCA. The following discussion of worker coverage under Executive Order 14026 is consistent with the analysis of worker coverage that appeared in the Department's final rule implementing Executive Order 13658, *see* 79 FR 60658, but is repeated here for ease of reference.

Workers Whose Wages are "Governed By" the FLSA, SCA, or DBA

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

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

The Department also interpreted the language in section 8(a)(ii) of Executive Order 14026 and proposed § 23.30(a)(2) as extending coverage to FLSA-covered employees who provide support on an SCA-covered contract but who are not entitled to prevailing wages under the SCA. 41 U.S.C. 6701(3).[17] The Department noted that such workers would be covered by the plain language of section 8(a) of the Executive order because they are performing in connection with a contract covered by the order and their wages are governed by the FLSA.

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

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

connection with DBA-covered contracts regardless of whether such employees are physically present on the DBA-covered construction worksite.

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

Workers Performing "On Or In Connection With" Covered Contracts

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

Specifically, the Department noted that workers performing "on" a covered contract are those workers directly performing the specific services called for by the contract, and whether a worker is performing "on" a covered contract would be determined, as explained in the final rule implementing Executive Order 13658, *see* 79 FR 60660, in part by the scope of work or a similar statement set forth in the covered contract that identifies the work (*e.g.*, the services or construction) to be performed under the contract. Under this approach, all laborers and mechanics engaged in the construction of a public building or public work on the site of the work will be regarded as performing "on" a DBA-covered contract, and all service employees performing the specific services called for by an SCA-covered contract will also be regarded as performing "on" a contract covered by the Executive order. In other words, any worker who is

entitled to be paid prevailing wages under the DBA or SCA[18] would necessarily be performing "on" a covered contract. For purposes of concessions contracts and contracts in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public that are not covered by the SCA, the Department would regard any worker performing the specific services called for by the contract as performing "on" the covered contract.

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

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

The Department stated in the NPRM, that just as in the final rule implementing Executive Order 13658, the Executive order does not extend to workers who are not engaged in working on or in connection with a covered contract. For example, a technician who is hired to repair a DBA

[18] This includes workers with disabilities whose commensurate wage rates calculated pursuant to a section 14(c) certificate are based upon the applicable SCA prevailing wage rate.

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

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

The Department received a number of comments regarding the coverage of workers under Executive Order 14026. Many of the comments, including those submitted by the AFL-CIO and CWA, NELP, and the SEIU, were strongly supportive of the broad coverage of workers articulated in the Executive order and the NPRM. The SEIU, for example, commended the Department's expansive proposed coverage of workers, noting that such an interpretation "is necessary to ensure that contractors and subcontractors that conduct business with the federal government do not evade the Executive Order's requirements and thereby undercut the wage floor it is intended to establish." NELP observed that the Department's proposed interpretation of worker coverage "recognizes that many work activities—not just those specifically mentioned in the contract—are integral to the performance of that contract, and that all individuals performing these work activities should be covered by the EO." NELP further commended the definition because it "makes clear that the federal government takes misidentifying employment status seriously and will look beyond an employer's labeling of workers as 'independent contractors' and make its own determination of whether such workers are covered."

Although several commenters, including ABC, the Chamber, and Maximus, recognized that the proposed coverage of workers in this rule is identical to worker coverage under the regulations implementing Executive Order 13658, they argued that the standard for worker coverage will cause confusion and impose administrative burdens for the larger number of conractors affected by the wage increase associated with this rule. Such commenters expressed particular concern regarding the Department's proposed coverage of FLSA-covered workers performing on or in connection with DBA- and SCA-covered contracts. For example, ABC generally asserted that coverage of FLSA workers "creates unnecessary confusion and imposes administrative burdens" for DBA-covered contractors by creating new wage and recordkeeping obligations for workers who are not "laborers and mechanics" and therefore are not subject to the prevailing wage law, and who may not even be physically present on "the site of the work." Several other commenters requested clarification as to whether workers in particular factual

scenarios, including apprentices, would qualify as covered workers under the proposed definition.

As a threshold matter, the Department notes that Executive Order 14026 itself compels the conclusion that FLSA-covered workers performing on or in connection with DBA- and SCA-covered contracts are covered by the order. Section 1 of Executive Order 14026 explicitly states its applicability to "workers working on or in connection with" a covered contract. 86 FR 22835. Moreover, section 8(a) of the Executive order expressly extends its minimum wage requirements to all DBA- and SCA-covered contracts where "the wages of workers under such contract . . . are governed by the Fair Labor Standards Act." In light of these clear directives, the Department believes that it reasonably and appropriately interpreted both the plain language and intent of Executive Order 14026 to cover FLSA-covered employees that provide support on a DBA- or SCA-covered contract who are not entitled to prevailing wage rates under those laws but whose wages are governed by the FLSA.

Moreover, as recognized by commenters both in support of and opposition to the proposed standard for worker coverage, the interpretation that the order applies to both workers performing "on" a covered contract as well as workers performing "in connection with" a covered contract is identical to the worker coverage interpretation set forth in the Department's regulations implementing Executive Order 13658, *see* 29 CFR 10.2. The Department believes that consistency between the two sets of regulations, where appropriate, will aid stakeholders in understanding their rights and obligations under Executive Order 14026, will enhance compliance assistance, and will minimize the potential for administrative burden on the part of contracting agencies and contractors. For those contractors currently subject to Executive Order 13658, Executive Order 14026 imposes no new administrative or recordkeeping requirements beyond what the contractor is already required to do under Executive Order 13658, including with respect to the identification of workers performing "in connection with" covered contracts and the segregation of hours worked on covered and non-covered contracts. For contractors not

currently subject to Executive Order 13658, Executive Order 14026 imposes minimal burden because its recordkeeping requirements mirror those that already exist under the DBA, FLSA, and SCA. The Department's proposed recordkeeping requirements are discussed below in the preamble discussion of proposed § 23.260.

The potential for administrative burden is further mitigated by the exclusion for FLSA-covered workers performing in connection with covered contracts for less than 20 percent of their work hours in a given workweek set forth at § 23.40(f). The Department adopted this exclusion in its 2014 final rule implementing Executive Order 13658 based on contractor concerns regarding the administrative burden that could result from the breadth of worker coverage under that order. Consistent with the discussion in the NPRM implementing Executive Order 14026, the Department views this exclusion as a reasonable interpretation that ensures the broad coverage of workers performing on or in connection with covered contracts directed by Executive Order 14026 while also acknowledging the administrative challenges imposed by such broad coverage as expressed by contractors. That exclusion is discussed in greater detail below in the preamble discussion of proposed § 23.40(f).

The Department has carefully considered all relevant comments received regarding its proposed coverage of workers and, for the reasons explained below, has determined to finalize the worker coverage standard as proposed. The Department endeavors, however, to provide additional examples of workers performing both "on" and "in connection with" each of the four categories of covered contracts to assist stakeholders in understanding their rights and responsibilities under the order. With respect to a DBA-covered contract for construction, the laborers and mechanics performing the construction work called for by the contract at the construction site are covered workers performing "on" the contract for purposes of this Executive order. The construction contractor's off-site fabrication shop workers would be regarded as performing work "in connection with" a covered contract to the extent their services are necessary to the performance of the contract. Similarly, 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) would be viewed as workers performing "in connection with" the covered contract under Executive Order 14026.

With respect to an SCA-covered contract, the service employees performing the services called for by the contract are covered workers performing "on" the contract for purposes of Executive Order 14026. An accounting clerk who processes invoices for SCA contracts or a human resources employee who hires the employees performing work on the SCA-covered contract would qualify as workers performing "in connection with" the SCA-covered contract.

With respect to concessions contracts and contracts in connection with Federal property or lands and related to offering services, the workers performing the specific services called for by the contract (e.g., the workers operating the concessions stand at a national monument, the outfitters and guides leading the multi-day excursion in the national park, the employees working at the dry cleaning establishment in a federal building) are performing "on" the covered contract. Examples of covered workers performing "in connection with" the covered contract could include the clerk who handles the payroll for a dry cleaner that leases space in a Federal building or the administrative assistant who handles the billing and advertising for a multi-day excursion in a national park.

Workers Employed Under FLSA Section 14(c) Certificates

Executive Order 14026 expressly provides that its minimum wage protections extend to workers with disabilities whose wage rates are calculated pursuant to special certificates issued under section 14(c) of the FLSA. *See* 86 FR 22835. Consistent with the final rule implementing Executive Order 13658, *see* 79 FR 60662, the Department proposed to include language in the contract clause set forth in Appendix A explicitly stating that workers with disabilities whose wages are calculated pursuant to special certificates issued under section 14(c) of the FLSA must be paid at least the Executive Order 14026 minimum wage (or the applicable commensurate wage rate under the certificate, if such rate is higher than the Executive order minimum wage)

for hours spent performing on or in connection with covered contracts. All workers performing on or in connection with covered contracts whose wages are governed by FLSA section 14(c), regardless of whether they are considered to be "employees," "clients," or "consumers," are covered by the Executive order (unless the 20 percent of hours worked exclusion applies). Moreover, all of the Federal contractor requirements set forth in this proposed rule apply with equal force to contractors employing workers under FLSA section 14(c) certificates to perform work on or in connection with covered contracts.

The Department received several comments pertaining to the coverage of workers with disabilities whose wage rates are calculated pursuant to special certificates issued under section 14(c) of the FLSA. Many of the comments received, including those submitted by the Finger Lakes Independence Center, the National Industries for the Blind, the SEIU, and the Teamsters, supported the inclusion of workers employed under section 14(c) certificates in the scope of the order's coverage. Some commenters, such as SourceAmerica, stated that they supported the intent behind the Executive order but expressed concerns that the inclusion of workers employed under section 14(c) certificates could potentially lead to a loss of employment, a reduction in work hours, or the loss of public benefits for those workers. SourceAmerica suggested that, in order to mitigate these potential unintended consequences, the Department should increase the income thresholds for receipt of benefits under Social Security and Medicare and/or Medicaid or otherwise establish more flexibilities for such individuals who may depend upon the receipt of such benefits. SourceAmerica also recommended that the Department work with Congress to implement technical assistance and transitional funding programs to assist with the Executive Order 14026 minimum wage increase.

The Department appreciates the concerns raised regarding the potential loss or reduction of employment or reduction in public benefits that could result from requiring that the Executive Order 14026 minimum wage be paid to workers who are employed under an FLSA section 14(c) certificate and who are working on or in connection with covered contracts. The Department

notes that many workers employed under a section 14(c) certificate performing on or in connection with covered contracts would be covered by Executive Order 13658 and its minimum wage requirement in the absence of Executive Order 14026. Thus, these workers are currently subject to an hourly minimum wage of at least $10.95 for such covered contract work, mitigating some of the impact of Executive Order 14026's $15.00 minimum wage. The Department appreciates the concerns raised regarding a potential loss of public benefits that could result from application of the Substantial Gainful Activity limit to workers with disabilities paid at the Executive order minimum wage. The Department lacks the authority to alter the criteria used by other federal, state, and local agencies in determining eligibility for public benefits. However, the Department does not expect that public benefit eligibility will be significantly impacted as a result of this rule, particularly given that many workers employed under section 14(c) certificates, as noted above, may already be performing on or in connection with contracts covered by Executive Order 13658.

Finally, the Department notes that a few commenters, such as the D.C. Department on Disability Services, more broadly call for the general prohibition on the issuance of all section 14(c) certificates under the FLSA. The Department appreciates and will carefully consider such feedback, but notes that such requests are beyond the scope of the Department's rulemaking authority to implement Executive Order 14026, which only applies to federal contract workers. The Department will, however, continue to provide technical assistance to stakeholders and, where appropriate, work with Congress and other federal partners to support the transition of workers with disabilities away from subminimum wage employment and towards competitive integrated employment.

Apprentices, Students, Interns, and Seasonal Workers

Consistent with the Department's final rule implementing Executive Order 13658, *see* 79 FR 60663, the Department's proposed rule explained that individuals who are employed on an SCA- or DBA-covered contract and individually registered in a bona fide apprenticeship

program registered with the Department's Employment and Training Administration, Office of Apprenticeship, or with a State Apprenticeship Agency recognized by the Office of Apprenticeship, are entitled to the Executive order minimum wage for the hours they spend working on or in connection with covered contracts.

The Department noted that the vast majority of apprentices employed by contractors on covered contracts will be individuals who are registered in a bona fide apprenticeship program registered with the Department's Employment and Training Administration, Office of Apprenticeship, or with a State Apprenticeship Agency recognized by the Office of Apprenticeship. Such apprentices are entitled to receive the full Executive order minimum wage for all hours worked on or in connection with a covered contract. The Executive order directs that the minimum wage applies to workers performing on or in connection with a covered contract whose wages are governed by the DBA and the SCA. Moreover, the Department stated its belief that the Federal Government's interests in economy and efficiency are best promoted by generally extending coverage of the order to apprentices performing covered contract work.

In the NPRM, the Department proposed that DBA- and SCA-covered apprentices are subject to the Executive order but that workers whose wages are governed by special subminimum wage certificates under FLSA sections 14(a) and (b) are excluded from the order (*i.e.*, FLSA-covered learners, apprentices, messengers, and full-time students). Consistent with the Department's final rule implementing Executive Order 13658, *see* 79 FR 60663-64, the Department proposed to interpret the plain language of the Executive order as excluding workers whose wages are governed by FLSA sections 14(a) and (b) subminimum wage certificates (*i.e.*, FLSA-covered apprentices, learners, messengers, and full-time students). The order expressly states that the minimum wage must "be paid to workers employed in the performance of the contract or any covered subcontract thereunder, including workers whose wages are calculated pursuant to special certificates issued under section 14(c)." 86 FR 22835. The Department explained its belief that, in interpreting whether a worker's wages are governed by the FLSA for

purposes of determining coverage under Executive Order 14026, the Executive order's explicit inclusion of FLSA section 14(c) workers reflects an intent to omit from coverage workers whose wages are calculated pursuant to special certificates issued under FLSA sections 14(a) and (b).

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

The Department received a few comments expressing confusion or concern regarding the Department's proposed coverage of these specific types of workers. With respect to apprentices, ABC commented that "[t]he NPRM's treatment of apprentice wages is particularly confusing and impactful on contractors." ABC urged the Department to exclude from coverage apprentices performing work on DBA or SCA contracts because such apprentice "wages are tied to the journeyman rate on government contracts and there is no need for their wages to be affected by a new minimum wage."

The Department has carefully considered ABC's request, but has decided to adopt its proposed interpretation that DBA- and SCA-covered apprentices are subject to Executive Order 14026. As a threshold matter, the Department notes that such apprentices are also covered by Executive Order 13658 and thus contracting agencies, contractors, and workers should already be familiar with this coverage principle. As explained in the NPRM, most apprentices employed by contractors on covered contracts will be individuals who are registered in a bona fide apprenticeship program registered with the Department's Employment and Training

Administration, Office of Apprenticeship, or with a State Apprenticeship Agency recognized by the Office of Apprenticeship. Such apprentices are entitled to receive the full Executive Order 14026 minimum wage for all hours worked on or in connection with covered contracts. Executive Order 14026 directs that the minimum wage applies to workers performing on or in connection with a covered contract whose wages are governed by the DBA and the SCA; apprentices fall within this scope. Moreover, the Department believes that the Federal Government's interests in economy and efficiency are best promoted by extending coverage of the order to DBA- and SCA-covered apprentices.

To provide further clarification and to minimize stakeholder confusion, the Department notes that the only group of apprentices who are expressly excluded from coverage of Executive Order 14026 are workers whose wages are governed by special subminimum wage certificates under FLSA section 14(a). The Department notes that there are very few workers who fall within the scope of this exclusion. This conclusion is based on the plain language of Executive Order 14026, which expressly states that the minimum wage must be paid to workers performing on or in connection with covered contracts, "including workers whose wages are calculated pursuant to special certificates issued under section 14(c) of the Fair Labor Standards Act of 1938" but does not reference workers whose wages are governed by FLSA sections 14(a) and (b) subminimum wage certificates (i.e., FLSA-covered apprentices, learners, messengers, and full-time students). Consistent with its interpretation of Executive Order 13658, the Department believes that the explicit inclusion of workers employed under FLSA section 14(c) certificates as within the scope of Executive Order 14026 reflects an intent to omit from coverage workers whose wages are calculated pursuant to special certificates issued under FLSA sections 14(a) and (b). This narrow exclusion is codified at § 23.40(e)(1)-(2) to help provide clarity to stakeholders.

With respect to other comments received regarding particular categories of workers, a few commenters requested that the Department clarify whether seasonal workers and students, particularly in the outdoor recreational industries, are covered by the Executive order and this

part. SBA Advocacy noted that its members found this discussion in the NPRM to be particularly confusing.

In response to these comments, the Department clarifies that workers who are covered by the DBA or SCA are subject to Executive Order 14026, regardless of whether they are students or seasonal workers. However, if a worker is not subject to the DBA or SCA and is exempt from the FLSA's minimum wage protections pursuant to 29 U.S.C. 213(a) or 214(a)–(b), that worker is exempt from coverage of Executive Order 14026. This interpretation is set forth in the regulatory text at § 23.40(e). Pursuant to this exclusion, Executive Order 14026 does not apply to full-time students whose wages are calculated pursuant to special certificates issued under FLSA section 14(b), unless they are otherwise covered by the DBA or SCA. Employees employed by establishments that qualify as "an amusement or recreational establishment, organized camp, or religious or non-profit educational conference center" and meet the criteria for exemption set forth at 29 U.S.C. 213(a)(3) are also exempt from Executive Order 14026, unless such workers are otherwise covered by the DBA or SCA.

Because the Department does not know the specific relevant facts regarding the employment of particular seasonal workers and students employed by the small businesses mentioned in the above comments, the Department cannot determine whether such workers would be covered by the order. The Department encourages such commenters to contact the WHD as necessary for compliance assistance in determining their rights and responsibilities under the Executive order and the FLSA. Insofar as the commenters are seeking an exclusion of particular seasonal workers and students employed by small businesses because of an alleged financial hardship that would result from application of the Executive order, the Department disagrees with these assertions and finds that they are insufficiently persuasive or unique to warrant creation of a broad exclusion for all seasonal workers or students. Such assertions of economic hardship fail to account for the economy and efficiency benefits that the Department expects contractors will realize by paying their workers, including students and seasonal

workers, the Executive order minimum wage rate. The Department further notes that most contractors should already be familiar with the proposed general worker coverage standard under Executive Order 14026, including this discussion of students and seasonal workers, because it is identical to the worker coverage standard under Executive Order 13658.

Geographic Scope

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

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

As discussed in the context of the Department's proposed definition of *United States* above, the Department received a number of comments regarding its proposed interpretation that workers performing on or in connection with covered contracts in the specified U.S. territories are covered by Executive Order 14026. The vast majority of such comments voiced strong support for the Department's interpretation that Executive Order 14026 apply to covered contracts being performed in Puerto Rico, the Virgin Islands, Outer Continental Shelf lands as defined in the Outer Continental Shelf Lands Act, American Samoa, Guam, the Commonwealth of the Northern Mariana Islands, Wake Island, and Johnston Island. A wide variety of stakeholders expressed their agreement with this proposed geographic scope, including numerous elected officials, such as the Governor of Guam and several legislators from Puerto Rico and Guam; labor organizations, including the Labor Council for Latin American Advancement, AFL-CIO, the AFSCME, the Union de Profesionales de la Seguridad Privada de Puerto Rico, and the Teamsters; and other interested organizations, including One Fair Wage, Oxfam, ROC United; and the Leadership Conference on Civil and Human Rights. Several of these commenters expressed their concurrence that expansion of coverage to the enumerated U.S. territories will promote economy and efficiency in Federal Government procurement. For example, the Governor of Guam affirmed "that extending the E.O. 14026 minimum wage to workers performing contracts in Guam would promote the federal government's procurement interests in economy and efficiency" and "E.O. 14026's application to Guam will improve the morale and quality of life of 11,800 employees in Guam, Puerto Rico, and the U.S. Virgin Islands, who are laborers, nursing assistants, and foodservice and maintenance workers." Several legislators in Puerto Rico expressed similar support for the expansion of coverage to workers in Puerto Rico. NELP also commended the Department's proposed interpretation to cover contract work performed in the specified U.S. territories, commenting that "[j]ust as higher wages will result in lower turnover and higher productivity in the 50 US States, so too will economy and efficiency improve for contracts performed in these areas with the $15 minimum wage."

As discussed above in the proposed definition of *United States*, a few commenters, such as Conduent and the Center for Workplace Compliance, expressed concern with the Department's proposed interpretation that Executive Order 14026 applies to workers performing on or in connection with covered contracts in the enumerated U.S. territories. Such commenters generally asserted that the proposed coverage of the territories is not compelled by the text of Executive Order 14026 itself and could cause financial disruptions, including by adversely affecting private industry, in the territories unless the Executive Order minimum wage rate is phased in over a number of years. Due to its concern that the NPRM's "expanded geographic scope may have unintended consequences given the fact that E.O. 13658 did not apply in these jurisdictions and the increase in minimum wage may be significant," the Center for Workplace Compliance encouraged the Department "to carefully monitor implementation of the E.O. as it applies to jurisdictions outside of the fifty states and the District of Columbia and take a flexible approach with covered contractors through the exercise of enforcement discretion should significant unintended consequences occur."

The Department appreciates all of the feedback submitted regarding the proposed geographic scope of Executive Order 14026 and this rule. After careful review, the Department adopts its interpretation proposed in the NPRM that the Executive order applies to work performed on or in connection with covered contracts in the specified U.S. territories. Although it is true that the text of Executive Order 14026 does not compel the determination that the order has such geographic reach, the Department has exercised its delegated discretion to select a definition of *United States*, and corresponding geographic scope, that tracks the SCA and FLSA, as explained in the NPRM. As outlined in the NPRM and reflected in the final regulatory impact analysis in this final rule, the Department has further analyzed this issue since its Executive Order 13658 rulemaking in 2014 and consequently determined that the Federal Government's procurement interests in economy and efficiency would be promoted by expanding the geographic scope of Executive Order 14026. The vast majority of public comments received on

this issue support this determination, including perhaps most notably a wide variety of stakeholders located in the U.S. territories themselves.

With respect to the comments expressing concern regarding potential unintended consequences of such coverage in the U.S. territories, the Department appreciates such feedback and certainly intends to monitor the effects of this rule. However, such comments did not provide compelling qualitative or quantitive evidence for the assertions that application of the order to the U.S. territories will result in economic or other disruptions. As previously discussed, the Department further views requests for a gradual phase-in of the Executive Order 14026 minimum wage rate as beyond the purview of the Department in this rulemaking. The Department therefore adopts the proposed geographic scope of Executive Order 14026 as set forth in the NPRM.

Section 23.40 Exclusions

Proposed § 23.40 addressed and implemented the exclusionary provisions expressly set forth in section 8(c) of Executive Order 14026 and provided other limited exclusions to coverage as authorized by section 4(a) of the Executive order. *See* 86 FR 22836-37. Specifically, proposed § 23.40(a) through (d) and (g) set forth the limited categories of contractual arrangements for services or construction that would be excluded from the minimum wage requirements of the Executive order and part 23, while proposed § 23.40(e) and (f) established narrow categories of workers that would be excluded from coverage of the order and part 23. The Center for Workplace Compliance expressed its general support for the Department's proposed exclusions at § 23.40(a)-(f) because such exclusions are consistent with those that are codified in the regulations implementing Executive Order 13658 at 29 CFR 10.4(a)-(f). Maximus expressed its view that exclusions generally should be limited so that the Executive order impacts the greatest number of workers. Each of these exclusions, as well as any specific comments received on the exclusions, are discussed below.

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

The Cline Williams Law Firm requested that the Department clarify that Executive Order 14026 does not apply to grants and that, specifically, the Executive order does not apply to grants

received by Federally Qualified Health Centers (FQHCs) under Section 330 of the Public Health Services Act (PHSA). In response to this comment, the Department confirms that the Executive order does not apply to grants as defined in the Federal Grant and Cooperative Agreement Act, 31 U.S.C. 6301 *et seq*. The Department further reiterates that the mere receipt of federal financial assistance by an individual or entity does not render an agreement subject to the Executive order. Based on the comment received, the Department currently lacks sufficient information about the particular grants to FQHCs under Section 330 of the PHSA to be able to definitively determine whether such grants would be excluded from coverage of the Executive order. The Department invites the commenter, and other stakeholders with similar questions, to follow the procedures set forth at § 23.580 to obtain a ruling of the Administrator regarding the potential exclusion of such grants if needed.

The Department did not receive other comments regarding this proposed exclusion and therefore finalizes it as proposed.

Exclusion of contracts or agreements with Indian Tribes: Proposed § 23.40(b) implemented the other exclusion set forth in section 8(c) of Executive Order 14026, which states that the order does not apply to "contracts, contract-like instruments, or agreements with Indian Tribes under the Indian Self-Determination and Education Assistance Act (Public Law 93–638), as amended." 86 FR 22837. The Department did not receive any comments on this provision; accordingly, it is adopted as set forth in the NPRM.

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

regulatory exclusions and exemptions set forth in the FLSA, SCA, DBA, and Executive Order 13658.

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

The Department did not receive comments about this proposed exclusion and thus adopts it as set forth in the NPRM.

Exclusion for contracts for services that are exempted from SCA coverage: Similarly, the Department proposed to implement the coverage provisions set forth in sections 8(a)(i)(A) and (B) of the Executive order, which state that the order applies respectively to a "procurement contract . . . for services" and a "contract or contract-like instrument for services covered by the Service Contract Act," 86 FR 22837, by providing that the requirements of the order apply to all service contracts covered by the SCA. *See* proposed § 23.30(a)(1)(ii). Proposed § 23.40(d) provided additional clarification by incorporating, where appropriate, the SCA's exclusion of

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

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

obligations under Executive Order 14026, the Department proposed to make coverage of service contracts under the Executive order and part 23 consistent with coverage under the SCA to the greatest extent possible.

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

SCA for purposes of the Executive order. This proposed exclusion was identical to that adopted in the regulations implementing Executive Order 13658. *See* 29 CFR 10.4(d).

Although no commenters objected to this proposed exclusion, a few commenters, including the AFL-CIO and CWA, the SEIU, and the Teamsters, urged the Department to clarify the limited scope of SCA's statutory exemptions under 41 U.S.C. 6702(b)(3)-(5). The Department appreciates the feedback from these commenters, but declines to further elaborate on the scope of the SCA's statutory exemptions in this rulemaking. Subregulatory and other coverage determinations made by the Department for purposes of the SCA will govern whether a contract is covered by the SCA for purposes of the Executive order; however, such coverage determinations are independent of this Executive order and would be more appropriately addressed in an official ruling or interpretation under the SCA or in subregulatory guidance issued pursuant to that statute. Because the Department did not receive any other comments about this proposed exclusion, it is adopted as proposed.

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

Proposed § 23.40(e)(1) and (2) specifically would exclude from the requirements of Executive Order 14026 and part 23 workers whose wages are calculated pursuant to special certificates issued under 29 U.S.C. 214(a) and (b). Specifically, proposed § 23.40(e)(1) would

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

Maximus expressed its support for the Department's proposed exclusion of individuals employed in executive roles as "necessary and uncontroversial." As discussed above in the preamble section regarding coverage of apprentices, students, interns, and seasonal workers, the Department received a few requests for clarification regarding the potential exclusion of such workers and has addressed those comments above. Because the Department did not receive any comments requesting specific revisions to proposed § 23.40(e), the Department adopts the provision as proposed.

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

This proposed exclusion is identical to the exclusion that appears in the Department's regulations implementing Executive Order 13658. *See* 29 CFR 10.4(f). As the Department explained in the final rule for those regulations, *see* 79 FR 60660, the Department has used a 20 percent threshold for coverage determinations in a variety of SCA and DBA contexts. For

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

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

As explained in the NPRM, this proposed exclusion would not apply to any worker performing "on" a covered contract whose wages are governed by the FLSA, SCA, or DBA. Such workers will be entitled to the Executive Order 14026 minimum wage for all hours worked performing on or in connection with covered contracts. However, for a worker solely performing "in connection with" a covered contract, the Executive Order 14026 minimum wage requirements would only apply if that worker spends 20 percent or more of his or her hours

worked in a given workweek performing in connection with covered contracts. Thus, in order to apply this exclusion correctly, contractors must accurately distinguish between workers performing "on" a covered contract and those workers performing "in connection with" a covered contract based on the guidance provided in this section. The 20 percent of hours worked exclusion would not apply to any worker who spends any hours performing "on" a covered contract; rather, it would apply only to workers performing "in connection with" a covered contract who do not spend any hours worked performing "on" the contract in a given workweek.

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

workers would therefore be entitled to receive the Executive Order 14026 minimum wage for all hours worked on covered contracts, even if such time represents less than 20 percent of his or her overall work hours in a particular workweek.

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

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

In the context of DBA-covered contracts, workers who may qualify for this exclusion if they spend less than 20 percent of their hours worked performing work in connection with covered contracts could include an FLSA-covered security guard patrolling or monitoring several construction sites, including one where DBA-covered work is being performed, or an FLSA-covered clerk who processes the payroll for DBA contracts (either on or off the site of the

work). However, if the security guard or clerk in these examples also performed the duties of a DBA-covered laborer or mechanic (for example, by painting or moving construction materials), the 20 percent of hours worked exclusion would not apply to any hours worked on or in connection with the contract because that worker performed "on" the covered contract at some point in the workweek. Similarly, if the security guard or clerk in these examples spent more than 20 percent of their time in a workweek performing in connection with DBA- or SCA-covered contracts (e.g., the security guard exclusively patrolled a DBA-covered construction site), such workers would be covered by the Executive order and the exclusion would not apply.

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

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

Examples of workers in the SCA context who may qualify for this exclusion if they perform in connection with covered contracts for less than 20 percent of their hours worked in a given workweek include an accounting clerk who processes a few invoices for SCA contracts out of thousands of other invoices for non-covered contracts during the workweek or an FLSA-

covered human resources employee who assists for short periods of time in benefits enrollment of the workers performing on the SCA-covered contract in addition to benefits enrollment of workers on other non-covered projects. Neither the Executive order nor the exclusion would apply, however, to an FLSA-covered landscaper at the office of an SCA contractor because that worker is not performing the specific duties called for by the SCA contract or other services or work necessary to the performance of the contract.

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

As explained above, pursuant to this proposed exclusion, if a covered worker performs work "in connection with" contracts covered by the Executive order as well as on other work that

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

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

The quantum of affirmative proof necessary to adequately segregate non-covered work from the work performed on or in connection with a covered contract—or to establish, for

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

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

The Department received some comments pertaining to this proposed exclusion. The Center for Workplace Compliance expressed its particular support for the provision because it is consistent with the exclusion that was set forth in the regulations implementing Executive Order 13658. A few commenters requested general clarification regarding the Department's proposed coverage of FLSA-covered employees performing on or in connection with covered contracts, which the Department has addressed in the preamble discussion of worker coverage above. In its comment, Conduent requested clarity with respect to this exclusion and provided a hypothetical for the Department to address. Conduent stated its belief that, if an FLSA-covered worker

performed work "in connection with" four contracts in a given week, only one of which is a federal contract, then they must be paid the Executive Order 14026 minimum wage for work performed on all four contracts, even if three of the contracts are not covered by the order; Conduent then further elaborated on this hypothetical based on this assumption. However, the Department clarifies that the basic assumption made by Conduent is incorrect. As explained in the NPRM, workers are only required to be paid the Executive Order 14026 wage rate for hours that they spend performing on or in connection with a covered contract, assuming that the contractor has appropriately satisfied this rule's recordkeeping and segregation requirements. In the hypothetical presented by Conduent, the worker would not be entitled to the Executive order minimum wage rate for any of the time spent working on the three non-covered contracts. The worker would be entitled to receive the Executive order minimum wage for time spent performing work in connection with the one covered contract, but only if such time represented 20 percent or more of his or her hours worked in a given workweek.

For example, an FLSA-covered worker processes payroll and handles invoices for a construction contractor; each week, that worker performs work pertaining to one DBA-covered contract for that contractor and three non-federal contracts. In Week 1, the worker works 40 hours for the contractor, 10 hours of which are spent processing payroll and handling the billing in connection with the DBA-covered contract. In that week, the worker is required to be paid at least the Executive Order 14026 wage rate for 10 hours that week (the "20 percent exclusion" does not apply because 25 percent of the worker's hours worked that week were spent performing in connection with the covered contract). In Week 2, the worker works 40 hours for the contractor, only 4 of which are spent processing payroll and handling the billing for the DBA-covered contract. In that week, the worker is not required to be paid the Executive order minimum wage for any hours worked because the worker only performed in connection with a covered contract for 10 percent of her hours worked in the workweek and the exclusion would apply.

The Department hopes that these examples further provide clarity about the applicability of the exclusion. Because the Department did not receive any comments requesting specific changes to the proposed exclusion, it is adopted as set forth in the NPRM.

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

The National Forest Recreation Association (NFRA) commented that this proposed exclusion "results in inconsistent treatment between *original* contracts entered into between January 30, 2022 and March 30, 2022 and *options* entered into in that same time period when in both cases the contract or underlying contract resulted from a solicitation issued prior to January 30, 2022." The NFRA stated its belief that original contracts and exercised option periods should be treated in the same manner for purposes of this exclusion and therefore requested that the Department expand the exclusion set forth at § 23.40(g) to apply to both contracts and options entered into between January 30, 2022 and March 30, 2022, where the contract or underlying contract at issue resulted from a solicitation issued prior to January 30, 2022.

The Department has carefully considered the NFRA's suggestion, but declines to exempt option periods under covered contracts that are exercised on or between January 30, 2022 and March 30, 2022. As explained in the NPRM, the proposed exclusion at § 23.40(g) implements the narrow exception from general coverage principles set forth in section 9(b) of Executive Order 14026. *See* 86 FR 22837-38. The plain language of section 9(b) reflects that the exclusion only applies to "new" contracts or contract-like instruments that result from a solicitation issued prior to January 30, 2022, and that are entered into on or between January 30, 2022 and March 30, 2022. 86 FR 22837. Section 9(b)'s inapplicability to exercised options is reinforced by section 9(a) of the Order, which enumerates "new" contracts and contract-like instruments on the one hand and "exercises of options on existing contracts or contract-like instruments contracts" on the other as separate categories of generally covered contracts. *Id*. Moreover, section 9(b) expressly states that where "an option is subsequently exercised under that [new] contract or contract-like instrument," Executive Order 14026 will apply to that option. 86 FR 22838. The Executive order itself thus distinguishes between original contracts and exercised option periods in its discussion of this limited exclusion. Because the Department's proposed exclusion is based on the plain language of Executive Order 14026, the Department declines to expand the exclusion; this provision is therefore adopted as proposed in the NPRM.

Section 23.50 Minimum Wage for Federal Contractors and Subcontractors

Proposed § 23.50 sets forth the minimum wage rate requirement for Federal contractors and subcontractors established in Executive Order 14026. *See* 86 FR 22835-36. Here, the Department generally discusses the minimum hourly wage protections provided by the Executive order for workers performing on or in connection with covered contracts with the Federal Government, as well as the methodology that the Secretary will use for determining the applicable minimum wage rate under the Executive order on an annual basis beginning at least 90 days before January 1, 2023. The Executive order provides that the minimum wage beginning January 1, 2023, and annually thereafter, will be an amount determined by the Secretary. It further provides that such rates be increased by the annual percentage increase in the CPI for the most recent month, quarter, or year available as determined by the Secretary. Consistent with the regulations implementing Executive Order 13658, *see* 29 CFR 10.5, the Secretary proposed to base such increases on the most recent year available to minimize the impact of seasonal fluctuations on the Executive order minimum wage rate. This section also emphasized that nothing in the Executive order or part 23 shall excuse noncompliance with any applicable Federal or state prevailing wage law or any applicable law or municipal ordinance establishing a minimum wage higher than the minimum wage established under the Executive order and part 23. *See* 86 FR 22836.

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

and its regulations. A more detailed discussion of the interaction between the Executive orders appears above in the discussion of contract coverage under § 23.30.

The Department received several comments regarding proposed § 23.50. A few commenters, including the AOA, the NSAA, and the Tennessee Paddlesports Association asserted that the Department's proposed methodology for determining and announcing the annual inflation-based updates to the Executive Order 14026 wage rate does not afford contractors, particularly in the outdoor recreation industry, sufficient advanced notice. Such commenters argued that the annual adjustments will create uncertainty regarding budget and pricing for these contracts, especially for small business concessionaires. The AOA explained, for example, that "[d]ue to the popularity of some of the trips that our members provide, bookings can be made a year or more in advance, which locks in the price of the trip at that time. Moreover, rates for the services that our members provide under federal contracts in the National Parks generally are subject to federal rate approval processes that require long lead times for approval of rate requests." Because the Department is not required to publish notice of the annual updates to the minimum wage rate more than 90 days in advance of the effective date of the new rates, these commenters argued that the new wage rate is unlikely to be available when outfitters and guides set their prices, often in July or August, for the following summer. The AOA stated that this uncertainty with respect to the annual wage rate updates has particularly significant ramifications for outfitters and guides that enter into longer-term contracts. The NSAA requested that, given the alleged unique seasonality of ski area operations and pricing challenges as well as the fact that ski seasons straddle two calendar years, the Department include a provision allowing ski areas to implement any annual minimum wage increase not on January 1, but rather on October 1 of the following year after the minimum wage clause is included in a covered contract.

In response to these comments, the Department notes that the methodology underlying the annual wage rate updates to the Executive Order 14026 is established by sections 2(a) and (b) of the order; with the exception of the discretion accorded to the Department to base such

increases on the most recent month, quarter, or year available, all other provisions regarding this methodology are directed by the Executive order itself. The Department thus declines to adopt the NSAA's request to delay the effective date of any annual wage rate increase until October 1 of the following year because the methodology used to determine the applicable wage rate, as well as the effective date for such rate, are clearly stated in Executive Order 14026 and the Department does not have discretionary authority to otherwise modify the amount or timing of such annual updates. With respect to commenter concerns that the annual update methodology set forth in Executive Order 14026 makes it difficult for contractors to forecast labor costs and account for such costs at the time they enter into new contracts, the Department notes that the methodology that the Department will use to determine any annual wage rate increase is based on the CPI-W and clearly set forth in the Executive order and this part. Contractors concerned about potential increases in the Executive Order 14026 minimum wage rate may thus consult the CPI-W, which the Federal Government publishes monthly, to monitor the likely magnitude of any annual increase. Moreover, in anticipating the typical magnitude of the annual wage rate increases, the Department notes that stakeholders may consult as a reference the annual wage rate increases that have been determined and published by the Department for the prior six years under Executive Order 13658, which sets forth a nearly identical methodology for determining such increases.

Moreover, the Department has decided to include language in the required contract clause (provided in Appendix A of this part) that, if appropriate, requires contractors to be compensated for the increase in labor costs resulting from the annual inflation-based increases to the Executive Order 14026 minimum wage beginning on January 1, 2023. This provision in the contract clause should mitigate at least some contractors' concerns about unanticipated financial disruptions that theoretically could occur due to the annual updates.

With respect to proposed § 23.50(c), the AFL-CIO and CWA, as well as the Center for American Progress, urge the Department to clarify that the order does not allow noncompliance

with higher wages required under a CBA and that a CBA or wage law requiring a minimum wage lower than the Executive order's requirement does not allow noncompliance with the order. The Chamber, on the other hand, urged the Department to permit the payment of a wage rate lower than the applicable Executive order minimum wage where reflected in a CBA. These comments were discussed in the preamble section above regarding proposed § 23.10(b). As explained in that discussion, after careful consideration of the comments, the Department has determined to also add a clarification to § 23.50(c) to ensure full consistency between the regulatory text and the contract clause on this topic. The Department therefore amends § 23.50(c) by adding "or any applicable contract" to the provision, such that it reads as follows: "Nothing in the Executive Order or this part shall excuse noncompliance with any applicable Federal or state prevailing wage law or any applicable law or municipal ordinance, or any applicable contract, establishing a minimum wage higher than the minimum wage established under the Executive Order and this part." Other than this clarification, the Department adopts § 23.50 as proposed.

Section 23.60 Antiretaliation

Proposed § 23.60 established an antiretaliation provision stating that it shall be unlawful for any person to discharge or in any other manner discriminate against any worker because such worker has filed any complaint or instituted or caused to be instituted any proceeding under or related to Executive Order 14026 or part 23, or has testified or is about to testify in any such proceeding. Consistent with the Executive Order 13658 regulations, *see* 29 CFR 10.6, this language was derived from the FLSA's antiretaliation provision set forth at 29 U.S.C. 215(a)(3) and was consistent with the Executive order's direction to adopt enforcement mechanisms as consistent as practicable with the FLSA, SCA, or DBA. The Department believes that such a provision will help ensure effective enforcement of Executive Order 14026. Consistent with the Supreme Court's observation in interpreting the scope of the FLSA's antiretaliation provision, enforcement of Executive Order 14026 will depend "upon information and complaints received from employees seeking to vindicate rights claimed to have been

denied." *Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1, 11 (2011) (internal quotation marks omitted). Accordingly, the Department proposed to include an antiretaliation provision based on the FLSA's antiretaliation provision. *See* 29 U.S.C. 215(a)(3). Importantly, and consistent with the Supreme Court's interpretation of the FLSA's antiretaliation provision, the Department's proposed rule would protect workers who file oral as well as written complaints. *See Kasten*, 563 U.S. at 17.

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

The Department received many comments, including from the AFL-CIO and CWA, the Business and Professional Women of St. Petersburg-Pinellas, Inc., the Leadership Conference on Civil and Human Rights, the National Urban League, NELP, Oxfam America, the SEIU, and the Teamsters, expressing strong support for the proposed antiretaliation provision. In commending this proposed provision, for example, the AFL-CIO and CWA explained, "A $15 minimum wage requirement would mean little if employers could leverage their economic power over employees

to threaten, coerce, or punish workers for seeking to enforce it. The antiretaliation provision, modeled on the FLSA's, gives effect to the President's instruction to incorporate FLSA principles into the governing regulation 'to the extent practicable.'" The Teamsters similarly noted that workers "can play a significant role in enforcing the wage provision by identifying noncompliant employers," and that, without an antiretaliation provision like the one set forth in the proposed rule, such workers "would be less likely to speak out." The National Women's Law Center also expressed support for the provision, but urged the Department to clarify that an oral complaint need not be "filed" in a formal process to invoke the provision's protections and to affirm that these protections apply when an individual has a reasonable belief that the employer action about which they complain is a violation, even if that belief ultimately is mistaken. Jobs with Justice of East Tennessee similarly commended the provision, but encouraged the Department to "develop enforcement protocols that are responsive to questions and complaints and that provide robust protection against threats and retaliatory action for workers who bring wage violations to light."

The Department appreciates this feedback supportive of the proposed inclusion of an antiretaliation provision in this part and continues to believe that the antiretaliation provision serves an important purpose in effectuating and enforcing Executive Order 14026, as it does under Executive Order 13658. With respect to the National Women's Law Center's request for additional clarifications, the Department notes that the Executive order's antiretaliation provision is intended to mirror the scope of the FLSA's antiretaliation provision, as interpreted by the Department. For example, the Department regards the FLSA's antiretaliation provision as extending to internal complaints, and this final rule reflects that interpretation as well. With respect to the comment submitted by Jobs with Justice of East Tennessee encouraging the Department to develop enforcement protocols for this antiretaliation provision that are responsive to stakeholders and provide robust protection to workers, the Department agrees with the need for strong enforcement of this important provision. As explained in § 23.440(b), if the

Administrator determines that any person has discharged or otherwise discriminated against any worker because that worker filed any complaint or instituted or caused to be instituted any proceeding under or related to Executive Order 14026 or these regulations, or because such worker testified or is about to testify in any such proceeding, the Administrator may provide for "any relief to the worker as may be appropriate, including employment, reinstatement, promotion, and the payment of lost wages." The Department intends to robustly enforce the antiretaliation provision as explained in this rule.

The Department therefore adopts the antiretaliation provision at § 23.60 as proposed without modification.

Section 23.70 Waiver of rights

Proposed § 23.70 provided that workers cannot waive, nor may contractors induce workers to waive, their rights under Executive Order 14026 or part 23. The Supreme Court has consistently concluded that an employee's rights and remedies under the FLSA, including payment of minimum wage and back wages, cannot be waived or abridged by contract. *See*, *e.g., Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 302 (1985); *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 740 (1981); *D.A. Schulte, Inc. v. Gangi*, 328 U.S. 108, 112-16 (1946); *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 706-07 (1945). The Supreme Court has reasoned that the FLSA was intended to establish a "uniform national policy of guaranteeing compensation for all work" performed by covered employees. *Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers*, 325 U.S. 161, 167 (1945) (internal quotation marks omitted). Consequently, the Court has held that "[a]ny custom or contract falling short of that basic policy, like an agreement to pay less than the minimum wage requirements, cannot be utilized to deprive employees of their statutory rights." *Id.* (internal quotation marks omitted). In *Barrentine*, the Supreme Court reaffirmed the "nonwaivable nature" of these fundamental FLSA protections and stated that "FLSA rights cannot be abridged by contract or otherwise waived because this would 'nullify the purposes' of the statute and thwart the legislative policies it was

designed to effectuate." 450 U.S. at 740 (quoting *Brooklyn Sav. Bank*, 324 U.S. at 707). Moreover, FLSA rights are not subject to waiver because they serve an important public interest by protecting employers against unfair methods of competition in the national economy. *See Tony & Susan Alamo Found.*, 471 U.S. at 302. Releases and waivers executed by employees for unpaid wages (and fringe benefits) due them under the SCA are similarly without legal effect. 29 CFR 4.187(d). Because the public policy interests underlying the issuance of the Executive order would be similarly thwarted by permitting workers to waive, or contractors to induce workers to waive, their rights under Executive Order 14026 or part 23, the Department in proposed § 23.70 made clear that such waiver of rights is impermissible.

The Department received several comments, including comments from the AFL-CIO and CWA, SEIU, and Teamsters, expressing support for the Department's proposed prohibition on waiver of rights. The SEIU, for example, stated that it "supports DOL's inclusion of this provision because it would protect vulnerable workers against potentially unscrupulous contractors' efforts to coerce them into waiving their rights to receive the minimum wage provided by the Executive Order. If employers could induce workers to waive their rights under the Order, the minimum labor standard it imposes would be shot through with exceptions, undermining the unified contracting policy." The Teamsters similarly expressed that the Department "correctly imports" this important FLSA principle into its rule. The Department did not receive any comments opposing this provision. Accordingly, the Department adopts § 23.70 as proposed in the NPRM.

Section 23.80 Severability

Section 7 of Executive Order 14026 states that if any provision of the order, or the application of any such provision to any person or circumstance, is held to be invalid, the remainder of the order and the application shall not be affected. *See* 86 FR 22837. Consistent with this directive, the Department proposed to include a severability clause in part 23. Proposed § 23.80 explained that, if any provision of part 23 is held to be invalid or unenforceable by its

terms, or as applied to any person or circumstance, or stayed pending further agency action, the provision shall be construed so as to continue to give the maximum effect to the provision permitted by law, unless such holding shall be one of utter invalidity or unenforceability, in which event the provision shall be severable from part 23 and shall not affect the remainder thereof.

The Department did not receive any specific comments requesting changes to this provision, and it is therefore adopted as set forth in the NPRM.

Subpart B – Federal Government Requirements

Subpart B of part 23 establishes the requirements for the Federal Government to implement and comply with Executive Order 14026. Section 23.110 addresses contracting agency requirements and § 23.120 addresses the requirements placed upon the Department.

Section 23.110 Contracting Agency Requirements

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

clause will accomplish the same purposes as the clause set forth in Appendix A and be consistent with the requirements set forth in this rule.

As the Department noted in the rulemaking for Executive Order 13658 and the NPRM preceding this final rule, including the full contract clause in a covered contract is an effective and practical means of ensuring that contractors receive notice of their obligations under the Executive order. *See* 79 FR 60668. Therefore, the Department advised in the NPRM that it continues to prefer that covered contracts include the contract clause in full. However, the Department noted that there could be instances in which a contracting agency, or a contractor, does not include the entire contract clause verbatim in a covered contract, but the facts and circumstances establish that the contracting agency, or contractor, sufficiently apprised a prime or lower-tier contractor that the Executive order and its requirements apply to the contract. In such instances, the Department said it would be appropriate to find that the full contract clause has been properly incorporated by reference. *See Nat'l Electro-Coatings, Inc. v. Brock*, Case No. C86-2188, 1988 WL 125784 (N.D. Ohio 1988); *In re Progressive Design & Build, Inc.*, WAB Case No. 87-31, 1990 WL 484308 (WAB Feb. 21, 1990). The Department specifically noted that the full contract clause will be deemed to have been incorporated by reference in a covered contract if the contract provides that "Executive Order 14026 (Increasing the Minimum Wage for Federal Contractors), and its implementing regulations, including the applicable contract clause, are incorporated by reference into this contract as if fully set forth in this contract," with a citation to a webpage that contains the contract clause in full, to the provision of the Code of Federal Regulations containing the contract clause set forth at Appendix A, or to the provision of the FAR containing the contract clause promulgated by the FARC to implement Executive Order 14026 and this rule. *See* 86 FR 38837.

The Center for Workplace Compliance and the National Industry Liason Group commented in support of the Department's acknowledgement in the NPRM preamble that the required contract clause can be incorporated by reference in certain situations. The National

Industry Liason Group requested the Department to amend the language of the regulation and contract clause to explicitly permit incorporation of the contract clause by reference, which they asserted would reduce confusion. The Department declines to adopt such language, as the Department continues to prefer that contracting agencies and covered contractors include the required contract clause in full. Inclusion of the required contract clause in full reduces the risk of confusion or disputes over whether particular contractors or subcontractors received adequate notice that Executive Order 14026 and its requirements apply to their contracts.

Maximus requested that the Department add language ensuring that contracting agencies "include the application of this Order to a contract as a minimum requirement for offering requests for proposals (RFPs)." The Department declines this suggestion, because the text of proposed § 23.110(a) already proposed to require contracting agencies to include the contract clause in "solicitations" for covered contracts. *See also* 29 CFR 10.11(a) (establishing the same requirement for contracting agencies under Executive Order 13658).

The Department did not otherwise receive comments addressing proposed § 23.110(a), and accordingly finalizes the provision as proposed.

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

in a contract subject to the Executive order would enhance its ability to obtain compliance with the Executive order. *See* 86 FR 38837-38.

In the NPRM, the Department explained that, where a contract clause should have been originally inserted by the contracting agency, a contractor is entitled to an adjustment where necessary to pay any necessary additional costs when the contracting agency initially omits and then subsequently includes the contract clause in a covered contract. This approach, which is consistent with the SCA's implementing regulations, *see* 29 CFR 4.5(c), was therefore reflected in proposed § 23.440(e). The Department recognized that the mechanics of providing such an adjustment may differ between covered procurement contracts and the non-procurement contracts that the Department's contract clause covers. With respect to covered non-procurement contracts, the Department stated its belief that the authority conferred on agencies that enter into such contracts under section 4(b) of the Executive order includes the authority to provide such an adjustment. The Department noted that such an adjustment is not warranted under the Executive order or part 23 when a contracting agency includes the applicable Executive order contract clause but fails to include an applicable SCA or DBA wage determination. The proposed rule would require inclusion of a contract clause, not a wage determination, in covered contracts; thus, unlike the DBA's regulations at 29 CFR 1.6(f), it is a contracting agency's failure to include the required contract clause, not a failure to include a wage determination, that would trigger the entitlement to an adjustment as described in this paragraph. *See* 86 FR 38837-38.

The Center for Workplace Compliance expressed support for proposed § 23.110(b), pointing out its consistency with an analogous provision in the regulations implementing Executive Order 13658. *See* 29 CFR 10.11(b). The Department did not otherwise receive commenter feedback on proposed § 23.110(b), and has finalized the provision as proposed.

A few commenters requested that the Department clarify whether contracting agencies would be obligated to provide an equitable price adjustment to contractors in other circumstances. For example, AGC requested that the Department "establish a mandatory clause

that will allow for contract adjustments based on wage rate increases," which they asserted would "reduce the risks associated with forecasting operational costs in the pre-award phase of federal construction projects as well as reduce confusion, delay, cost overruns, and possible litigation during the project delivery phase." Relatedly, AGC requested the Department to delete or clarify the phrase "if appropriate" in the sentence of the proposed contract clause providing that: "[i]f appropriate, the contracting [agency] shall ensure the contractor is compensated only for the increase in labor costs resulting from the annual inflation increases in the Executive Order 14026 minimum wage beginning on January 1, 2023." Finally, Conduent requested "confirmation of a [contractor's] right to an equitable adjustment if the new minimum wage is extended to [options] contracts entered into prior to January 30, 2022."

The Department declines commenter requests to adopt a provision entitling contractors to mandatory price adjustments. As a threshold matter, the rules govering price adjustments for procurement contracts are governed by the FAR and are thus outside the scope of this rulemaking. If necessary, the FARC can address price adjustments in their rulemaking to implement Executive Order 14026, which will follow this rule. *See* 86 FR 22836. With respect to nonprocurement contracts, the Department believes that price adjustments are a discretionary tool that contracting agencies may provide to contractors if appropriate, based on the specific nature of the contract. If, for example, a multi-year contract assumes that worker wages will keep pace with economic inflation over time, the contractor presumably should not receive a price adjustment in response to an inflation-based increase in the Executive Order 14026 minimum wage rate. Among other things, the parties presumably would address whether and to what extent a contractor's increased labor costs will likely be mitigated or offset by efficiency gains and other benefits, discussed in Section IV(c)(4). For this reason, the Department has declined to add regulatory language addressing price adjustments to proposed § 23.110, and has retained the phrase "if appropriate" in paragraph (b)(2) of the required contract clause.

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

One commenter, the PSC, objected to the requirement in proposed § 23.110(c) that contracting agencies withhold funds from "any other Federal contract with the same prime contractor" where such withholding is necessary to pay workers the full amount of wages owed under a different contract. While agreeing that "[w]ithholdings against 'bad wage actors' on

individual contracts may be reasonable and proper," PSC asserted that "the withholding of payments, and by flow-down, operations on well-performing contracts may adversely affect the economy and efficiency in federal procurement by potentially stopping work on other important federal activities under unrelated contracts." Relatedly, the PSC asked for additional regulatory language clarifying "at what point and under what grounds a withholding decision will be imposed."

While the Department appreciates PSC's concerns about the potential consequences of cross-withholding, such withholding is a well-established and essential method of ensuring that workers receive the wages owed to them when insufficient funds are available under the contract on which they are working. Moreover, as explained in the NPRM, requiring contracting agencies to withhold funds from different government contracts involving the same prime contractor is essentially identical to the regulations implementing the DBA and SCA, as well as the text of the SCA itself and the regulations implementing Executive Order 13658. *See* 29 CFR 10.11(c). Consistent with the Executive order's command to "incorporate existing … procedures, remedies, and enforcement processes" under the DBA, SCA, and Executive Order 13658, *see* 86 FR 22836, the Department declines PSC's request to remove language authorizing cross-withholding from proposed § 23.110(c).

In response to PSC's request for additional language clarifying the circumstances when withholding actions will be initiated, the Department believes that the language in proposed § 23.110(c)—which mirrors language implementing Executive Order 13658 at 29 CFR 10.11(c)—is sufficiently clear and detailed, and that further elaboration is not necessary, particularly since § 23.120(d) provides that in the event of a withholding request by the Administrator, the Administrator and/or the contracting agency shall notify the affected prime contractor of the Administrator's withholding request. Accordingly, the Department has adopted proposed § 23.110(c) without change.

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

One commenter, Maximus, expressed concern that "opening the complaints process to those without a direct current or former employment relationship could lead to spurious, meritless claims that burden the Department, agencies, and contractors resources," and recommended the Department to "accept complaints only from those with a direct current or former employment relationship, or their legally recognized representative." The Department declines this request to bar third-party complaints. Although the Department has safeguards in place to protect worker complainants,[19] the Department's enforcement experience underscores

[19]For example, WHD generally does not disclose the reasons why it begins particular investigations (approximately half of all investigations are initiated without a prior complaint),

that workers are often reluctant to approach the government with valid wage and hour complaints due to fears of retaliation or other adverse consequences. For this reason, the Department has historically accepted third-party wage and hour complaints,[20] which in the Department's experience can provide valuable information to enhance the Department's enforcement efforts. Accordingly, consistent with its implementation of Executive Order 13658, the Department will accept third-party complaints with respect to alleged violations of Executive Order 14026.

The Department did not receive any other comments addressing proposed § 23.110(d), and has finalized the provision without change.

Section 23.120 Department of Labor Requirements

Proposed § 23.120 addressed the Department's requirements under the Executive order. Pursuant to the Executive order, proposed § 23.120(a) set forth the Secretary's obligation to establish the Executive order minimum wage on an annual basis, while proposed § 23.120(b) explained that the Secretary will determine the applicable minimum wages on an annual basis by using the method set forth in proposed § 23.50(b).

In response to these provisions, Maximus recommended that the Department "update all rates for all roles [under the DBA and SCA] to address the wage compression within and across job category wage determinations to ensure consistency across all contractors." PSC similarly requested the Department to "harmonize wage determinations" with Executive Order 14026 to maintain wage differentiation among classes of workers subject to the DBA and SCA. The Department declines these requests because they are outside the scope of this rulemaking, as Executive Order 14026's minimum wage requirement is a separate and distinct legal obligation from the DBA and SCA's prevailing wage requirements. The Department did not otherwise

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and will generally neither confirm nor deny the existence of complaint records in response to information requests submitted under the Freedom of Information Act. *See* 5 U.S.C. 552(b)(7)(D).

[20] *See* https://www.dol.gov/agencies/whd/contact/complaints/third-party.

receive any comments germane to proposed § 23.120(a) and (b), and has finalized these provisions as proposed.

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

Consistent with the rulemaking implementing Executive Order 13658, *see* 29 CFR 10.12(c), the Department noted its intent to publish a prominent general notice on SCA and DBA wage determinations, stating the Executive Order 14026 minimum wage and that it applies to all DBA- and SCA-covered contracts. The Department stated its intention to update this general notice on all DBA and SCA wage determinations annually to reflect any inflation-based adjustments to the Executive order minimum wage. As discussed in more detail in the preamble section pertaining to proposed § 23.290 in subpart C, the Department also proposed developing a poster regarding the Executive order minimum wage for contractors with FLSA-covered workers performing on or in connection with a covered contract, as it did in response to Executive Order 13658. *See* 79 FR 60670. The Department proposed requiring that contractors provide notice of the Executive order minimum wage to FLSA-covered workers performing work on or in connection with covered contracts via posting of the poster that will be provided by the

Department. This notice provision is discussed in the preamble section pertaining to § 23.290, and is also consistent with the rule implementing Executive Order 13658. *See* 29 CFR 10.29(b).

The Department did not receive any comments regarding the Department's methods for announcing future changes to the Executive Order 14026 wage rate, and has accordingly finalized § 23.120(c) as proposed.

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

As discussed earlier in response to Maximus' request for additional guidance on withholding actions in proposed § 23.110(c), the Department believes that the language in proposed § 23.120(d)—which discusses the Department's role in withholding actions and which is identical to the corresponding language in the regulations implementing Executive Order 13658 —is sufficiently clear. The Department did not otherwise receive any other comments relevant to proposed § 23.120(d), and has finalized this provision as proposed.

Subpart C – Contractor Requirements

Subpart C articulates the requirements that contractors must comply with under Executive Order 14026 and part 23. The subpart sets forth the general obligation to pay no less than the applicable Executive order minimum wage to workers for all hours worked on or in connection with the covered contract, and to include the Executive order minimum wage contract

clause in all contracts and subcontracts of any tier thereunder. Subpart C also sets forth contractor requirements pertaining to permissible deductions, frequency of pay, and recordkeeping, as well as a prohibition against taking kickbacks from wages paid on covered contracts.

Section 23.210 Contract Clause

Proposed § 23.210(a) required the contractor, as a condition of payment, to abide by the terms of the Executive order minimum wage contract clause described in proposed § 23.110(a). The contract clause contains the obligations with which the contractor must comply on the covered contract and is reflective of the contractor's requirements as stated in the proposed regulations. Proposed § 23.210(b) articulated the obligation that contractors and subcontractors must insert the Executive order minimum wage contract clause in any covered subcontracts and must require, as a condition of payment, that subcontractors include the clause in all lower-tier subcontracts. Under the proposal, the prime contractor and upper-tier contractor would be responsible for compliance by any covered subcontractor or lower-tier subcontractor with the Executive order minimum wage contract clause, consistent with analogous requirements under the SCA, DBA, and Executive Order 13658. *See* 29 CFR 4.114(b) (SCA); 29 CFR 5.5(a)(6) (DBA); 29 CFR 10.21 (Executive Order 13658). Finally, consistent with the rulemaking implementing Executive Order 13658, proposed § 23.210(b) advised that a contractor under part 23 would be responsible for compliance by all covered lower-tier subcontractors. This obligation would apply whether or not the contractor has included the Executive order contract clause, regardless of the number of covered lower-tier subcontractors, and regardless of how many levels of subcontractors separate the responsible prime or upper-tier contractor from the subcontractor that failed to comply with the Executive order.

The Department received a number of comments concerning proposed § 23.210. For example, AGC requested the Department to create a "safe harbor" from liability for prime and higher-tier subcontractors that properly flow down the required contract clause to their direct

subcontractors, asserting that "it is inequitable to hold such contractors responsible for all lower-tier subcontractors' noncompliance with the minimum wage requirements … when the higher-tier contractor has complied with the language flow-down requirement." The AOA similarly requested that the Department modify proposed § 23.210 so that "contractors have no further obligation with respect to enforcement and compliance by any subcontractor with the Executive Order's minimum wage requirements" beyond including the required contract clause, stating that "contractors lack the enforcement authority of a governmental entity." However, NELP specifically complimented the "flow-down" language in proposed § 23.210(b), observing that such language "ensur[es] that federal contractors cannot plead ignorance to any minimum wage violations that their subcontracted workers face."

After careful consideration, the Department has decided to adopt proposed § 23.210 as set forth in the NPRM. Specifically, the Department declines to adopt the request to provide a safe harbor from flow-down liability to a contractor that includes the contract clause in its contracts with subcontractors. As discussed more fully in the preamble section for § 29.440, which discusses remedies and sanctions under this part, neither the SCA nor DBA nor Executive Order 13658, all of which permit the Department to hold a contractor responsible for compliance by any lower-tier contractor, contain a safe harbor. Furthermore, the Executive Order directs the Department to look to the DBA, SCA, and Executive Order 13658 in adopting remedies. A safe harbor 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 flowdown responsibility. *In the Matter of Bongiovanni*, WAB Case No. 91–08, 1991 WL 494751 (WAB April 19, 1991). Additionally, 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 these reasons, the Department rejected similar requests for a safe harbor provision in the 2014 final rule implementing Executive Order 13658. *See* 79 FR 60671.

As discussed earlier in the context of contracting agency responsibilities under § 23.110(a), the Department acknowledges that the contract clause can be considered incorporated by reference in certain circumstances, including in subcontracts. However, because the Department recommends that contracting agencies and covered contractors include the required contract clause in full to reduce the risk of confusion or disputes over whether the contract clause was properly incorporated, the Department declines the National Industry Liason Group's request to add regulatory language explicitly allowing for incorporation of the contract clause by reference.

Section 23.220 Rate of Pay

Proposed § 23.220 addressed contractors' obligations to pay the Executive order minimum wage to workers performing work on or in connection with a covered contract under Executive Order 14026. Proposed § 23.220(a) stated the general obligation that contractors must pay workers the applicable minimum wage under Executive Order 14026 for all hours spent performing work on or in connection with the covered contract. The proposed section also provided that workers performing work on or in connection with contracts covered by the Executive order must receive not less than the minimum hourly wage of $15.00 beginning January 30, 2022.

Two commenters, ABC and AGC, requested that the Department modify the regulations so that the Executive Order 14026 wage rate at the onset of a multi-year contract would remain fixed for the duration of the contract, consistent with the treatment of wage determinations under the DBA. AGC asserted that applying minimum wage increases after contract award would create uncertainty and problems in the procurement process.

The Department rejects this request. As we advised in the NPRM, the Department believes that the applicable minimum wage rate under Executive Order 14026 must be subject to annual increases for the duration of multi-year contracts. This is consistent with the text of Executive Order 14026 as well as with the Department's interpretation of Executive Order

13658, as nothing in either Executive order suggests that the minimum wage requirement should remain stagnant during the span of a covered multi-year contract. *See* 79 FR 60673 (discussing Executive Order 13658). Allowing the applicable minimum wage to increase throughout the duration of multi-year contracts fulfills the Executive order's intent to raise the minimum wage of workers according to annual increases in the CPI-W. It additionally ensures simultaneous application of the same minimum wage rate to all covered workers, a simplicity that has presumably benefited contractors and workers alike in the application of Executive Order 13658. The Department further notes that contractors concerned about potential increases in the minimum wage provided under the Executive order may consult the CPI-W, which the Federal Government publishes monthly, to monitor the likely magnitude of the annual increase. Furthermore, as discussed in further detail in relation to § 23.440(e), the language of the required contract clause contained in Appendix A will require contracting agencies to ensure, if appropriate, that the contractor is compensated for an increase in labor costs resulting from annual inflation increases in the Executive Order 14026 minimum wage beginning on January 1, 2023. This provision in the contract clause should mitigate any potential contractor concerns about unanticipated financial burdens associated with annual increases in the Executive order minimum wage.

The Department notes that, in order to comply with the Executive order's minimum wage requirement, a contractor can compensate workers on a daily, weekly, or other time basis (no less often than semi-monthly), or by piece or task rates, so long as the measure of work and compensation used, when translated or reduced by computation to an hourly basis each workweek, would provide a rate per hour that is no lower than the applicable Executive order minimum wage. Whatever system of payment is used, however, must ensure that each hour of work in performance of the contract is compensated at not less than the required minimum rate. Failure to pay for certain hours at the required rate cannot be transformed into compliance with

the Executive order or part 23 by reallocating portions of payments made for other hours that are in excess of the specified minimum.

In determining whether a worker is performing within the scope of a covered contract, the Department proposed that all workers who are engaged in working on or in connection with the contract, either in performing the specific services called for by its terms or in performing other duties necessary to the performance of the contract, would be subject to the Executive order and part 23 unless a specific exemption is applicable. This standard was derived from the SCA's implementing regulations at 29 CFR 4.150, and is consistent with Executive Order 13658's implementing regulations at 29 CFR 10.22. As discussed earlier, the Department acknowledges commenter criticisms of the Executive Order's coverage of workers performing "in connection with" covered contracts, but notes that the Executive Order explicitly applies to such workers. In any event, the 20 percent exclusion codified in in § 23.40(f) should allay these concerns.

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

As explained earlier, the minimum wage requirements of Executive Order 14026 are separate and distinct legal obligations from the prevailing wage requirements of the SCA and the DBA. If a contract is covered by the SCA or DBA and the wage rate on the applicable SCA or DBA wage determination for the classification of work the worker performs is less than the applicable Executive order minimum wage, the contractor must pay the Executive order minimum wage in order to comply with the Order and part 23. If, however, the applicable SCA or DBA prevailing wage rate exceeds the Executive order minimum wage rate, the contractor

must pay that prevailing wage rate to the SCA- or DBA-covered worker in order to be in compliance with the SCA or DBA.[21]

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

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

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

lower than the Executive order minimum wage rate to govern the wages of workers covered by the order. The Department accordingly proposed that the Executive order minimum wage would apply to a covered contract even if the contractor has negotiated a CBA wage rate lower than the order's minimum wage.

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

ABC criticized proposed 23.220(b) on the grounds that it would be inconsistent with the treatment of fringe benefits under the DBA, where contractors can satisfy prevailing wage requirements with any combination of wages and bona fide fringe benefits as long as the wage component matches or exceeds the FLSA minimum wage.[22] ABC alleged that requiring DBA-covered contractors to satisfy Executive Order 14026's minimum wage requirement through wages alone would be "confusing to administer and will lead to needless burdens on contractors."

The Department declines ABC's request to allow contractors to credit fringe benefits towards the Executive Order 14026 minimum wage requirement. By repeatedly referencing that it is establishing a higher "hourly minimum wage" without any reference to fringe benefits, the text of the Executive order makes clear that a contractor cannot discharge its minimum wage obligation by furnishing fringe benefits. *See* 86 FR 22835. This interpretation is consistent with

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[22] *See* Chapter 15f07, Discharging minimum wage and fringe benefit obligations under DBRA, U.S. Department of Labor Field Operations Handbook (March 31, 2016), https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/FOH_Ch15.pdf; *see also* 40 US.C. 3141(2).

the SCA, which does not permit a contractor to meet its minimum wage obligation through the furnishing of fringe benefits, but rather imposes distinct "minimum wage" and "fringe benefit" obligations on contractors. 41 U.S.C. 6703(1)-(2); 29 CFR 4.177(a). Similarly, the FLSA does not allow a contractor to meet its minimum wage obligation through the furnishing of fringe benefits. Although the DBA specifically includes fringe benefits within its definition of minimum wage, thereby allowing a contractor to meet its minimum wage obligation, in part, through the furnishing of fringe benefits, 40 U.S.C. 3141(2), Executive Order 14026 contains no similar provision expressly authorizing a contractor to discharge its Executive order minimum wage obligation through the furnishing of fringe benefits. Consistent with the Executive order, and the Department's regulations implementing Executive Order 13658, *see* 29 CFR 10.22(b), the Department has decided to finalize § 23.220(b) as proposed, precluding a contractor from discharging its minimum wage obligation by furnishing fringe benefits.

Proposed § 23.220(b) also prohibited a contractor from discharging its Executive order minimum wage obligation to workers whose wages are governed by the SCA by furnishing the cash equivalent of fringe benefits. As noted, the SCA imposes distinct "minimum wage" and "fringe benefit" obligations on contractors. 41 U.S.C. 6703(1)-(2); 29 CFR 4.177(a). A contractor cannot satisfy any portion of its SCA minimum wage obligation by furnishing fringe benefits or their cash equivalent. *Id.* Consistent with the treatment of fringe benefits or their cash equivalent under the SCA, proposed § 23.220(b) would not allow contractors to discharge any portion of their minimum wage obligation under the Executive order to workers whose wages are governed by the SCA through the provision of either fringe benefits or their cash equivalent. The Department did not receive any comments on this aspect of proposed § 23.220(b), and has adopted this language without change.

Finally, proposed § 23.220(c) stated that a contractor may satisfy the wage payment obligation to a tipped employee under the Executive order through a combination of paying not less than a determined hourly cash wage and taking a credit toward the minimum wage required

by the order based on tips received by such employee, pursuant to the provisions in proposed § 23.280. Contractors may not credit employee tips toward their minimum wage obligation after January 1, 2024, when 100 percent of the minimum wage required under the order must be paid as a cash wage. *See* § 23.280(a)(1)(iii). The Department did not receive any comments on proposed § 23.220(c), and has finalized it as proposed.

Section 23.230 Deductions

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

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

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

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

Finally, proposed § 23.230(d) permitted deductions made for the reasonable cost or fair value of board, lodging, and other facilities. *See* 29 CFR part 531 (FLSA); 29 CFR 4.168(a)

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

The Department did not receive any comments addressing proposed § 23.230 or the general topic of deductions. Accordingly, the Department has finalized § 23.230 as proposed.

Section 23.240 Overtime Payments

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

Proposed § 23.240(b) addressed the payment of overtime premiums to tipped employees who are paid with a tip credit. In calculating overtime payments, the regular rate of an employee paid with a tip credit would consist of both the cash wages paid and the amount of the tip credit taken by the contractor. Overtime payments would not be computed based solely on the cash wage paid. For example, if on or after January 30, 2022, a contractor pays a tipped employee

performing on a covered contract a cash wage of $10.50 and claims a tip credit of $4.50, the worker is entitled to $22.50 per hour for each overtime hour ($15.00 × 1.5), not $15.75 ($10.50 × 1.5). Accordingly, as of January 30, 2022, for contracts covered by the Executive order, if a contractor pays the minimum cash wage of $10.50 per hour and claims a tip credit of $4.50 per hour, then the cash wage due for each overtime hours would be $18.00 ($22.50 - $4.50). Tips received by a tipped employee in excess of the amount of the tip credit claimed are not considered to be wages under the Executive order and are not included in calculating the regular rate for overtime payments.

The AFL-CIO and CWA, the SEIU, and the Teamsters commented in support of the Department's interpretation in proposed § 23.240(b) that tipped employees who work overtime are entitled to time and half based on both the cash wages paid and the amount of the tip credit the contractor takes. Specifically, these commenters opined that including the tip credit in a tipped employee's regular rate of pay will ensure that tipped employees are paid appropriately for overtime work and will promote the broader efficiency interests motivating the Executive order. The Department agrees, and further notes that the interpretation in proposed § 23.240(b) is consistent with the treatment of tipped employees under the FLSA, *see* 29 CFR 531.60, as well as an analogous provision implementing Executive order 13658. *See* 29 CFR 10.24(b).

The Department did not otherwise receive any comments addressing proposed § 23.240 or the mechanics of how to determine overtime pay for workers covered by Executive Order 14026. Accordingly, the Department has finalized § 23.240 as proposed.

Section 23.250 Frequency of Pay

Proposed § 23.250 described how frequently the contractor must pay its workers. Under the proposed rule, wages must be paid no later than one pay period following the end of the regular pay period in which such wages were earned or accrued. Proposed § 23.250 also provided that a pay period under the Executive order may not be of any duration longer than semi-monthly. (The Department noted in the NPRM that workers whose wages are governed by

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

Maximus recommended adding clarifying language to proposed § 23.250 advising that, should a payroll error occur, it is the responsibility of the contractor to make good faith efforts to compensate employees and adhere to state-by-state pay laws. The Department agrees that a contractor would be required to ensure that it had properly compensated its employees in accordance with this final rule in the event of a payroll error, but declines to add additional language to proposed § 23.250 because the regulatory text at § 23.50(c) and § 23.220(a) already makes sufficiently clear that this rule does not excuse noncompliance with applicable state laws. The Department did not otherwise receive comments on proposed § 23.250 and has finalized it as proposed.

Section 23.260 Records to be Kept by Contractors

Proposed § 23.260 explained the recordkeeping and related requirements for contractors. The obligations set forth in proposed § 23.260 were derived from and consistent across the FLSA, SCA, DBA, and regulations implementing Executive Order 13658. *See* 29 CFR 516.2(a) (FLSA); 29 CFR 4.6(g)(1) (SCA); 29 CFR 5.5(a)(3)(i) (DBA); 29 CFR 10.26 (Executive Order

13658). Proposed § 23.260(a) stated that contractors and subcontractors shall make and maintain, for three years, records containing the information enumerated in that section for each worker. The proposed section further provided that contractors performing work subject to the Executive order must make such records available for inspection and transcription by authorized representatives of the WHD.

The recordkeeping requirements enumerated in proposed § 23.260(a)(1)-(6) required that contractors maintain records reflecting each worker's (1) name, address, and social security number; (2) occupation or classification (or occupations/classifications); (3) rate or rates of wages paid; (4) number of daily and weekly hours worked; (5) any deductions made; and (6) total wages paid. Contractor obligations to maintain these records were derived from and consistent across the FLSA, SCA, and DBA, and were identical to the recordkeeping requirements enumerated in 29 CFR 10.26(a), which implemented Executive Order 13658. These recordkeeping requirements thus imposed no new burdens on contractors.[23] The Department noted that while the concept of "total wages paid" is consistent in the FLSA's, SCA's, and DBA's implementing regulations, the exact wording of the requirement varies ("total wages paid each pay period," *see* 29 CFR 516.2(a)(11) (FLSA); "total daily or weekly compensation of each employee," *see* 29 CFR 4.6(g)(1)(ii) (SCA); "actual wages paid," *see* 29 CFR 5.5(a)(3)(i) (DBA)). The Department opted to use the language "total wages paid" in the proposed rule for simplicity; however, compliance with this recordkeeping requirement would be determined in relation to the applicable statute (FLSA, SCA, and/or DBA).

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

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

Because workers covered by Executive Order 14026 are entitled to its minimum wage protections for all hours spent performing work on or in connection with a covered contract, a computation of their hours worked on or in connection with the covered contract in each workweek is essential. *See* 29 CFR 4.178. For purposes of the Executive order, the hours worked by a worker generally include all periods in which the worker is suffered or permitted to work, whether or not required to do so, and all time during which the worker is required to be on duty or to be on the employer's premises or to be at a prescribed workplace. *Id.* The hours worked which are subject to the minimum wage requirement of the Executive order are those in which the worker is engaged in performing work on or in connection with a contract subject to the Executive order. *Id.*

In the NPRM, the Department noted that in situations where contractors are not exclusively engaged in contract work covered by Executive Order 14026, and there are adequate records segregating the periods in which work was performed on or in connection with contracts subject to the order from periods in which other work was performed, the minimum wage requirement of Executive Order 14026 need not be paid for hours spent on work not covered by the order. *See* 29 CFR 4.169, 4.178, and 4.179; *see also* 79 FR 60672 (discussing the documentation of employee work not covered by Executive Order 13658). However, in the absence of records adequately segregating non-covered work from the work performed on or in connection with a covered contract, all workers working in the establishment or department where such covered work is performed shall be presumed to have worked on or in connection with the contract during the period of its performance, unless affirmative proof establishing the

contrary is presented. *Id.* Similarly, a worker performing any work on or in connection with the covered contract in a workweek shall be presumed to have continued to perform such work throughout the workweek, unless affirmative proof establishing the contrary is presented. *Id*.

The Department noted in the proposed rule that if a contractor desires to segregate covered work from non-covered work under the Executive order for purposes of applying the minimum wage established in the order, the contractor must identify such covered work accurately in its records or by other means. The Department stated its belief that the principles, processes, and practices reflected in the SCA's implementing regulations, which incorporate the principles applied under the FLSA as set forth in 29 CFR part 785, will be useful to contractors in determining and segregating hours worked on contracts with the Federal Government subject to the Executive order. *See* 29 CFR 4.169, 4.178, and 4.179; WHD FOH ¶¶ 14c07, 14g00-01.[24] In this regard, an arbitrary assignment of time on the basis of a formula, as between covered and non-covered work, is not sufficient. However, if the contractor does not wish to keep detailed hour-by-hour records for segregation purposes under the Executive order, it may be possible in certain circumstances to segregate records on the wider basis of departments, work shifts, days, or weeks in which covered work was performed. For example, if on a given day no work covered by the Executive order was performed by a contractor, that day could be segregated and shown in the records. *See* WHD FOH ¶ 14g00.

Finally, the Department noted that the Supreme Court has held that when an employer has failed to keep adequate or accurate records of employees' hours under the FLSA, employees should not effectively be penalized by denying them recovery of back wages on the ground that

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

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

The Department received a few comments pertaining to the NPRM's discussion of the segregation of work that is covered by the Executive order from work that is not covered. Specifically, the AOA asserted that it would be "absurdly unrealistic to believe that a company could pay an employee engaged in work both on and apart from a covered contract one wage for their time they spend working on or in connection with a covered contract and a different wage for the time they spend working on other activities," opining that "even if it were practically feasible, the recordkeeping alone associated with doing so would be cost-prohibitive." The Department respectfully disagrees with this comment, as it is fairly routine for contractors subject to the SCA's and DBA's prevailing wage requirements to segregate and document employee work that is and is not covered by those laws. Indeed, the well-established recordkeeping requirements under the SCA and DBA may be more substantial than those under the order, particularly since workers on SCA- and DBA-covered contracts may perform work in multiple classifications with different prevailing wage rates. *See, e.g.,* 29 CFR 5.5(a)(1)

("Laborers or mechanics performing work in more than one classification may be compensated at the rate specified for each classification for the time actually worked therein; Provided, That the employer's payroll records accurately set forth the time spent in each classification in which work is performed"). Moreover, the recordkeeping obligations imposed by Executive Order 14026 are consistent with those that already exist under Executive Order 13658. In any event, Executive Order 14026 does not require employers to pay workers a different wage rate for work that is not covered by the order, and such voluntary business practices are outside the scope of this rulemaking.

The Department therefore finalizes § 23.260 as proposed, with one technical correction to change reference from regulations "in this chapter" to "in this title."

Section 23.270 Anti-kickback

Consistent with the regulations implementing Executive Order 13658, *see* 29 CFR 10.27, proposed § 23.270 made clear that all wages paid to workers performing on or in connection with covered contracts must be paid free and clear and without subsequent deduction (unless set forth in proposed § 23.230), rebate, or kickback on any account. Kickbacks directly or indirectly to the contractor or to another person for the contractor's benefit for the whole or part of the wage would also be prohibited. This proposal was intended to ensure full payment of the applicable Executive order minimum wage to covered workers. The Department also noted that kickbacks may be subject to civil penalties pursuant to the Anti-Kickback Act, 41 U.S.C. 8701-8707. The Department received no comments related to proposed § 23.270 and has accordingly retained the section in its proposed form.

Section 23.280 Tipped Employees

Proposed § 23.280 explained how tipped workers must be compensated under the Executive order on covered contracts. As described earlier, section 3 of Executive Order 14026 provides that, as of January 30, 2022, contractors must pay tipped workers covered by the Executive order performing on covered contracts a cash wage of at least $10.50, provided that

each tipped worker receives enough tips to equal or surpass the initial $15.00 minimum wage under section 2, when combined with their cash wage. *See* 86 FR 22836. On January 1, 2023, the required minimum cash wage increases to 85 percent of the applicable minimum wage under section 2 of the Executive order, rounded to the nearest multiple of $0.05. *Id*. For subsequent years, beginning on January 1, 2024, the cash wage for tipped employees is 100 percent of the applicable Executive Order 14026 minimum wage—*i.e.*, eliminating a contractor's ability to claim a tip credit under Executive Order 14026. *Id*. When a contractor is using a tip credit to meet a portion of its wage obligations under the Executive order, the amount of tips received by the employee must equal at least the difference between the required cash wage paid and the Executive order minimum wage. If the employee does not receive sufficient tips, the contractor must increase the cash wage paid so that the cash wage in combination with the tips received equals the Executive order minimum wage. *Id*.

For purposes of Executive Order 14026 and part 23, tipped workers (or tipped employees) are defined by section 3(t) of the FLSA. *See* 29 U.S.C. 203(t). The FLSA defines a tipped employee as "any employee engaged in an occupation in which he customarily and regularly receives more than $30 a month in tips." *Id.* Section 3 of the Executive order sets forth a wage payment method for tipped employees that is similar to the tipped employee wage provision of the FLSA. 29 U.S.C. 203(m)(2)(A). As with the FLSA's "tip credit" provision, the Executive order permits contractors to take a partial credit against their wage payment obligation to a tipped employee under the order based on tips received by the employee, until the Executive Order 14026 tip credit is phased out on January 1, 2024. In other words, the wage paid to a tipped employee to satisfy the Executive Order 14026 minimum wage comprises both the cash wage paid under section 3(a) of the Executive order and the amount of tips used for the tip credit, which is limited to the difference between the cash wage paid and the Executive order minimum wage. Because contractors with a contract subject to the Executive order may be required by the SCA or any other applicable law or regulation to pay a cash wage in excess of the Executive

order minimum wage, section 3(b) of the order provides that in such circumstances contractors must pay the difference between the Executive order minimum wage and the higher required wage in cash to the tipped employees and may not make up the difference with additional tip credit. *See* 86 FR 22836.

In the proposed regulations implementing section 3 of the Executive order, the Department set forth principles and procedures that closely follow the FLSA requirements for payment of tipped employees with which employers are already familiar. This was consistent with the directive in section 4(c) of the Executive order that regulations issued pursuant to the order should, to the extent practicable, incorporate existing principles and procedures from the FLSA, SCA, and DBA. *See* 86 FR 22836.

Proposed § 23.280(a) set forth the provisions of section 3 of the Executive order explaining how contractors can meet their wage payment obligations under section 2 for tipped employees. Under no circumstances may a contractor claim a higher tip credit than the difference between the required cash wage and the Executive order minimum wage to meet its minimum wage obligations; contractors may, however, pay a higher cash wage than required by section 3 and claim a lower tip credit. Because the sum of the cash wage paid and the tip credit equals the Executive order minimum wage, any increase in the amount of the cash wage paid will result in a corresponding decrease in the amount of tip credit that may be claimed, except as provided in proposed § 23.280(a)(4). For example, if on January 30, 2022, a contractor on a contract subject to the Executive order paid a tipped worker a cash wage of $11.50 per hour instead of the minimum requirement of $10.50, the contractor would only be able to claim a tip credit of $3.50 per hour to reach the $15.00 Executive order minimum wage. If the tipped employee does not receive sufficient tips in the workweek to equal the amount of the tip credit claimed, the contractor must increase the cash wage paid so that the amount of cash wage paid and tips received by the employee equal the section 2 minimum wage for all hours in the workweek. To clarify, contractors with tipped employees do not need to claim a tip credit; contractors can

comply with Executive Order 14026 by simply paying their tipped employees a cash wage that meets or exceeds the applicable minimum wage rate, including the $15.00 per hour rate in effect in 2022.

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

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

Proposed § 23.280(c) provided that the same definitions and requirements set forth in 29 CFR 10.28(b)-(f) generally apply with respect to tipped employees performing on or in connection with covered contracts under this Executive order.[25] These definitions and requirements address the tip credit, the characteristics of tips, service charges, tip pooling, and

[25] On June 23, 2021, the Department issued a notice of proposed rulemaking, Tip Regulations Under the Fair Labor Standards Act (FLSA); Partial Withdrawal, proposing changes to 29 CFR 10.28(b).

notice. To the extent that § 10.28(f) requires that an employer provide notice of the "amount of the cash wage that is to be paid by the employer, which cannot be lower than the cash wage required by paragraph (a)(1) of this section," the proposed regulation specified that the minimum required cash wage shall be the minimum required cash wage described in proposed § 23.280(a)(1), rather than in § 10.28(a)(1). The definitions and requirements incorporated in § 23.280(b) generally follow definitions and requirements under the FLSA, and are familiar to employers of tipped employees generally, as well as to employers subject to § 10.28.

The Department received numerous comments regarding the Executive order's treatment of tipped employees, but few comments specifically relevant to proposed § 23.280. For example, the AFL-CIO, the SEIU, and the Teamsters commended the order for "ensuring that tipped workers receive more predictable and reliable cash wages in addition to tips," which they asserted would "promot[e] the Order's policies in support of increased employee productivity and morale and reducing turnover and absenteeism." Other worker advocacy groups, including A Better Balance, One Fair Wage, ROC United, and Workplace Fairness, asserted that the Executive order's phase-out of the tip credit constituted a step towards ending "long standing discriminatory practices" in federal contracting. Similarly, one commenter who identified themselves as a tipped employee wrote that "[t]ipping for services keeps folks impoverished, propagates racial and gender inequities and makes restaurants undesirable places to work." By contrast, the National Park Hospitality Association asserted that "increasing the base wage of tipped employees may result in concessioners having to increase wages of many other employees currently paid more than minimum wage to reflect the higher total amount received by tipped employees," which they alleged would result in higher costs for visitors to national parks. As mentioned earlier, the Chamber asserted that the Executive order's phase-out of the tip credit on covered contracts conflicts with the FLSA because it "would eliminate the credit employers are allowed to take in compensating tipped employees" under the FLSA.

Comments addressing the alleged conflict between the FLSA and Executive Order 14026 with respect to the treatment of tipped employees are addressed elsewhere in this final rule. The Department notes, however, that it does not have the discretion to deviate from the explicit terms of the Executive order, including its gradual phase-out of the tip credit for covered workers who receive tips.

Specific to the proposed regulatory language in § 23.280, the AFL-CIO, the SEIU, and the Teamsters commented favorably upon proposed § 23.280 for "set[ing] forth procedures that mirror the FLSA's requirements for the payment of tipped employees," which they opined "will facilitate compliance with the Order's requirements." The Department did not otherwise receive comments germane to proposed § 23.280, and has finalized the provision as proposed.

Section 23.290 Notice

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

Consistent with the regulations implementing Executive Order 13658, *see* 29 CFR 10.29, the Department explained that contractors could satisfy this proposed notice requirement in a variety of ways. For example, with respect to service employees on contracts covered by the SCA and laborers and mechanics on contracts covered by the DBA, proposed § 23.290(a) clarified that contractors may meet the notice requirement by posting, in a prominent and accessible place at the worksite, the applicable wage determination.[26] As stated earlier, the Department intends to publish a prominent general notice on all SCA and DBA wage determinations informing workers of the applicable Executive order minimum wage rate, to be updated on an annual basis in the event of any inflation-based increases to the rate pursuant to § 23.50(b)(2). Because contractors covered by the SCA and DBA are already required to display the applicable wage determination in a prominent and accessible place at the worksite pursuant to those statutes, *see* 29 CFR 4.6(e) (SCA), 29 CFR 5.5(a)(1)(i) (DBA), the Department explained that the notice requirement in proposed § 23.290 would not impose any additional burden on contractors with respect to those workers already covered by the SCA, DBA, or Executive Order 13658.

Proposed § 23.290(b) provided that contractors with FLSA-covered workers performing on or in connection with a covered contract could satisfy the notice requirement by displaying a poster provided by the Department of Labor in a prominent or accessible place at the worksite. The Department explained that this poster would be appropriate for contractors with FLSA-covered workers performing work "in connection with" a covered SCA or DBA contract, as well as for contractors with FLSA-covered workers performing on or in connection with concessions contracts and contracts in connection with Federal property or lands and related to offering

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

services for Federal employees, their dependents, or the general public. The Department expressed its intent to make the poster available on the WHD website and provide the poster in a variety of languages. The Department noted that the poster would be updated annually to reflect any inflation-based increases to the Executive Order 14026 minimum wage rate that is published by the Department, and that contractors must display the currently applicable poster.

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

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

The Department further noted that contractors may have additional obligations under other laws, such as the Americans with Disabilities Act of 1990, to ensure that the notice required by proposed part 23 is provided in an accessible format to workers with disabilities.

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

The Department received numerous comments from worker advocacy organizations who asserted that "[i]n addition to the posting suggested by the proposed rules, there should be opportunities to fully educate employers on their responsibilities and workers on their rights." These commenters did not provide specific suggestions to further educate workers and employers regarding their rights and obligations under Executive Order 14026 beyond the notice

requirement provided in proposed § 23.290. However, the Department fully intends to engage with contractors, industry associations, worker advocacy groups, and other members of the public about the requirements of Executive Order 14026, just as it has in implementing and enforcing Executive Order 13658.

The NSAA requested the Department to "create notices and posters specific to seasonal employers that reference that [the order's] minimum wage rate may not apply to employees if they are exempt under the seasonal recreation exemption under FLSA 29 U.S.C. 213(a) et seq.," which they asserted would "eliminate employee confusion and prevent unnecessary or unauthorized claims against employers who are legally exempt from this Executive Order." The Department declines this request. Given the breadth of industries, contractors, workers, and job classifications covered by Executive Order 14026, the Department believes that compliance with the order is best promoted by providing a single uniform poster explaining worker rights under Executive Order 14026 in order to ensure that affected workers are being notified of the most important information that they need to know regarding their rights. It would be infeasible for the Department to create separate industry-specific posters for all potentially affected contractors and could be confusing for stakeholders to know which poster would be most appropriate for their particular circumstances. Moreover, the Department notes that the Executive Order 14026 poster appropriately advises that the order "may not apply to certain … occupations and workers." This language is sufficient to alert both contractors and workers that they may need to reach out to the WHD for further compliance assistance if they have questions; the poster also provides the WHD's contact information.

Having received no other comments in response to proposed § 23.290 and its notice requirement, the Department finalizes the provision as proposed. However, the Department made a number of non-substantive edits to the Executive Order 14026 poster that published in the NPRM, to improve the poster's readability. An image of the revised Executive Order 14026 poster is included as an appendix to this final rule and will be available on the WHD website.

Subpart D – Enforcement

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

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

Section 23.410 Complaints

The Department proposed a procedure for filing complaints in proposed § 23.410. Proposed § 23.410(a) outlined the procedure to file a complaint with any office of the WHD. It additionally provided that a complaint may be filed orally or in writing and that the WHD will accept a complaint in any language. Proposed § 23.410(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).

Maximus commented that only a current or former employee or an employee's legally recognized representative should be allowed to file a complaint under this provision. As discussed earlier in the preamble to § 23.110(d), the Department declines to adopt this limitation. Section 23.410, as proposed, is identical to the corresponding provision in the regulations implementing Executive Order 13658, which was in turn based on the regulations implementing

the SCA. Thus, the Department believes that this provision, as proposed, is consistent with the Executive order's instruction to incorporate existing procedures and enforcement remedies under the SCA and the regulations issued to implement Executive Order 13658.

The Department appreciates Maximus' concern that there will be "spurious, meritless" claims if the complaint process is opened up to those without a current or former employment relationship. However, in the Department's enforcement experience under identical or nearly identical complaint provisions, the Department has not experienced a high volume of spurious or meritless complaints. Moreover, the Department accepts third party wage and hour complaints because the Department understands that some workers may be reluctant to file a complaint on their own behalf. The Department believes that allowing those without a current or former employment relationship to file complaints will ensure effective enforcement of and compliance with Executive Order 14026. Therefore, while the Department appreciates the commenter's recommendation, it declines to adopt Maximus' suggestion.

NELA commented that within 30 days of any employee complaint regarding work on a covered contract for which an employee was improperly compensated, the Department should automatically send a letter to the contractor seeking a response to the allegations and documentary evidence that the contractor had in fact paid the Executive order minimum wage. While the Department appreciates NELA's suggestion, as the Department always endeavours to improve internal processes, the conduct of WHD's internal management of complaints and any responses to those complaints is more properly addressed in internal enforcement directives or subregulatory guidance. In addition, the provision, as proposed, is identical to the corresponding provision in the final rule implementing Executive Order 13658. The Department believes that the corresponding provision under Executive Order 13658 has worked well to effectuate that order's intent, and should thus be retained in this rulemaking.

For the reasons explained above, the Department has adopted § 23.410 as proposed.

Section 23.420 Wage and Hour Division Conciliation

The Department proposed in § 23.420 to establish an informal complaint resolution process for complaints filed with the WHD. The provision would allow the WHD, after obtaining the necessary information from the complainant regarding the alleged violations, to contact the party against whom the complaint is lodged and attempt to reach an acceptable resolution through conciliation. The Department received no comments pertinent to § 23.420 and has adopted the section as proposed.

Section 23.430 Wage and Hour Division Investigation

Proposed § 23.430, which outlined WHD's investigative authority, would permit the Administrator to initiate an investigation either as the result of a complaint or at any time on his or her own initiative. As part of the investigation, the Administrator would be able to inspect the relevant records of the applicable contractors (and make copies or transcriptions thereof) as well as interview the contractors. The Administrator would additionally be able to interview any of the contractors' workers at the worksite during normal work hours, and require the production of any documentary or other evidence deemed necessary for inspection to determine whether a violation of part 23 (including conduct warranting imposition of debarment) has occurred. The section would also require Federal agencies and contractors to cooperate with authorized representatives of the Department in the inspection of records, in interviews with workers, and in all aspects of investigations.

Maximus commented that the Department should add language that any investigations, inspections, and interviews "be produced no earlier than two business weeks from the date the notice of complaint is received by the contractor, as opposed to when postmarked/date of letter sent by the WHD to the contractor." While the Department appreciates the suggestion, this section does not set time frames for investigations, inspections, and interviews because such particulars of WHD's investigative procedures are most appropriately established outside the rulemaking process, and the Administrator's ability to initiate investigations is not contingent upon receipt of a complaint. Instead, pursuant to this section, the Administrator can initiate an

investigation at any time on his or her own initiative. In addition, the enforcement provisions of the regulations implementing the DBA, FLSA, SCA, and Executive Order 13658 do not provide details regarding when investigations, inspections, and interviews under those authorities will occur. Thus, the Department believes that this provision is consistent with the Executive order's directive to incorporate existing procedures and enforcement processes under the DBA, FLSA, SCA, and Executive Order 13658.

For the reasons explained above, the Department has adopted § 23.430 as proposed.

Section 23.440 Remedies and Sanctions

The Department proposed remedies and sanctions to assist in enforcement of the Executive order in § 23.440. Proposed § 23.440(a), provided that when the Administrator determines a contractor has failed to pay the Executive order's minimum wage to workers, the Administrator will notify the contractor and the applicable contracting agency of the violation and request the contractor to remedy the violation. It additionally stated that if the contractor does not remedy the violation, the Administrator would direct the contractor to pay all unpaid wages identified in the Administrator's investigative findings letter issued pursuant to proposed § 23.510. Proposed § 23.440(a) further provided that the Administrator could additionally direct that payments due on the contract or any other contract between the contractor and the Government be withheld as necessary to pay unpaid wages, and that, upon the final order of the Secretary that unpaid wages are due, the Administrator may direct the relevant contracting agency to transfer the withheld funds to the Department for disbursement. To the extent the Department received comments specifically related to withholding, it has discussed them in the preamble to § 23.110(c). Because the Department received no comments directly related to § 23.440(a), the final rule adopts the section as proposed.

Proposed § 23.440(b), which the Department derived from the FLSA's antiretaliation provision set forth at 29 U.S.C. 215(a)(3), stated that the Administrator could provide for any relief appropriate, including employment, reinstatement, promotion and payment of lost wages,

when the Administrator determined that any person had discharged or in any other manner discriminated against a worker because such worker had filed any complaint or instituted or caused to be instituted any proceeding under or related to Executive Order 14026 or part 23, or had testified or was about to testify in any such proceeding. *See* 29 U.S.C. 215(a)(3), 216(b). Consistent with the Supreme Court's observation in interpreting the scope of the FLSA's antiretaliation provision, enforcement of Executive Order 14026 will depend "upon information and complaints received from employees seeking to vindicate rights claimed to have been denied." *Kasten*, 563 U.S. at 11 (internal quotation marks omitted). For the reasons described in the preamble to subpart A, the Department believes that this antiretaliation provision will promote and ensure effective compliance with the Executive order, and has accordingly retained the provision as proposed.

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

As the DBA, SCA, and the regulations implementing Executive Order 13658 contain debarment provisions, inclusion of a debarment provision in this final rule reflects both the Executive order's instruction that the Department incorporate remedies from the DBA, FLSA,

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

AGC recommended that the final rule include "knowingly or recklessly" in front of the term "disregard" throughout § 23.520. The commenter expressed concern that, without this limitation, the provision could lead to debarment proceedings involving "minor or inadvertent mistakes." As the NPRM stated, the Department originally derived the "disregard of obligations" standard from the DBA's implementing regulations, and the Department used this standard in the final rule implementing Executive Order 13658, *see* 29 CFR 10.52. The Administrative Review Board (ARB) interprets this standard to require a level of culpability beyond mere negligence in order to justify debarment. *See, e.g.*, *Thermodyn Mech. Contractors, Inc.*, ARB Case No. 96-116, 1996 WL 697838, at *4 (ARB Oct. 25, 1996) (noting that "[t]o support a debarment order, the evidence must establish a level of culpability beyond mere negligence"). The Department intends for the same standard to apply under this Executive order. The requirement to show some form of culpability beyond mere negligence confirms this debarment standard is not one involving strict liability. However, for example, a showing of "knowing or reckless" disregard of

obligations is not necessary in order to justify a debarment. Adopting a "knowing or reckless disregard" standard would constitute a departure from the DBA's debarment standard as well as from the SCA's debarment standard (under which debarment is warranted for SCA violations unless the Secretary of Labor recommends otherwise because of ususual circumstances), and would therefore be inconsistent with the Executive order's directive to adopt remedies and enforcement processes from the DBA, FLSA, SCA, and the regulations implementing Executive Order 13658 to the extent practicable. The Department accordingly declines to adopt AGC's request to require a showing of "knowing or reckless" disregard to justify debarment under Executive Order 14026.

One individual commenter requested clarification whether an individual or firm debarred under this part may request removal from the ineligible list after six months from the date the person or firm's name appears on the ineligible list. This commenter observed that this right exists when the Secretary has debarred a contractor for aggravated or willful violations of the labor standards provisions of the applicable statutes listed in 29 CFR 5.1 other than the DBA ("Davis-Bacon Related Acts"). 29 CFR 5.12(c). The commenter stated that such a provision "discourages compliance" and should not be included in the rule. In response to this comment, the Department clarifies that, as was true for the NPRM, the final rule does not contain a provision such as the one applicable to the Davis-Bacon Related Acts, and that those debarred pursuant to this part do not have the right to request removal from the debarment list after six months. As this right does not exist under the DBA, SCA, or regulations implementing Executive Order 13658, the Department's decision not to create such a right is consistent with the Executive order's instruction to incorporate existing principles, remedies, and enforcement processes under the DBA, SCA, and regulations implementing Executive Order 13658. In addition, the Department believes that debarment is an important enforcement mechanism under the DBA, SCA, and Executive Order 13658; thus, the Department does not see reason to depart from those regulatory schemes.

ABC sought a "safe harbor" from debarment for contractors that can demonstrate their wages are in compliance with the DBA, FLSA, and SCA. Debarment, as discussed above, is an important remedy to obtain compliance with the Executive order, and is a remedy that exists without a safe harbor provision under the DBA, SCA, and the regulations implementing Executive Order 13658. Moreover, as discussed previously, the minimum wage requirements of Executive Order 14026 are separate and distinct legal obligations from the prevailing wage requirements of the DBA and SCA; a contractor's compliance with the DBA or SCA therefore does not absolve it of responsibility to also comply with Executive Order 14026 on covered contracts. The Department is accordingly unwilling to provide a waiver from a possible debarment remedy for violations of the Executive order.

The Department therefore adopts proposed 23.440(c) in this final rule without change.

Proposed § 23.440(d), which was identical to 29 CFR 10.44(d), which the Department had in turn derived from the SCA, 41 U.S.C. 6705(b)(2), would allow for initiation of an action, following a final order of the Secretary, against a contractor in any court of competent jurisdiction to collect underpayments when the amounts withheld under § 23.110(c) are insufficient to reimburse workers' lost wages. Proposed § 23.440(d) would also authorize initiation of an action, following the final order of the Secretary, in any court of competent jurisdiction when there are no payments available to withhold. This is particularly necessary because the Executive order covers concessions and other contracts under which the contractor may not receive payments from the Federal Government and in some instances, the Administrator may be unable to direct withholding of funds because at the time the Administrator discovers that a contractor owes wages to workers, it may be that no payments remain owing under the contract or another contract between the same contractor and the Federal Government. With respect to such contractors, there will be no funds to withhold. Proposed § 23.440(d) accordingly provided that the Department may pursue an action in any court of competent jurisdiction to collect underpayments against such contractors. Proposed § 23.440(d)

additionally provided that any sums the Department recovers would be paid to affected workers to the extent possible, but that sums not paid to workers because of an inability to do so within three years would be transferred into the Treasury of the United States. The Department received no comments on proposed § 23.440(d) and has adopted the language as proposed.

In proposed § 23.440(e), the Department addressed what remedy will be available when a contracting agency fails to include the contract clause in a contract subject to the Executive order. The section provided that the contracting agency will, on its own initiative or within 15 calendar days of notification by the Department, incorporate the clause retroactive to commencement of performance under the contract through the exercise of any and all authority necessary. As the NPRM noted, this incorporation would provide the Administrator authority to collect underpayments on behalf of affected workers on the applicable contract retroactive to commencement of performance under the contract. The NPRM noted that the Administrator possesses comparable authority under the DBA, 29 CFR 1.6(f), and that the Department believed a similar mechanism for addressing a failure to include the contract clause in a contract subject to the Executive order will further the interest in both remedying violations and obtaining compliance with the Executive order. The Department did not receive comments relating to this section and has therefore adopted the language as proposed.

Proposed § 23.440(e) also reflected that a contractor is entitled to an adjustment when a contracting agency initially omits and then subsequently includes the contract clause in a covered contract. This approach is consistent with the SCA's implementing regulations, *see* 29 CFR 4.5(c) and the regulations implementing Executive Order 13658. The Department recognizes that the mechanics of effectuating such an adjustment may differ between covered procurement contracts and the non-procurement contracts that the Department's contract clause covers. With respect to covered non-procurement contracts, the Department believes that the authority conferred on agencies that enter into such contracts under section 4(b) of the Executive order includes the authority to provide such an adjustment.

The Department believes that the remedies it proposed in its NPRM and adopts here will be sufficient to obtain compliance with the Executive order.

The AOA asked the Department to clarify whether contractors have any obligations with respect to enforcement and compliance by any subcontractor other than including the required contract clause in any covered subcontract. The Department reiterates, as it noted in the NPRM, its intent to follow the general practice of holding contractors responsible for compliance by any covered lower-tier subcontractor(s) with the Executive order minimum wage. In other words, a contractor's responsibility for compliance flows down to all covered lower-tier subcontractors. Thus, to the extent a lower-tier subcontractor fails to pay its workers the applicable Executive order minimum wage even though its subcontract contains the required contract clause, an upper-tier contractor may still be responsible for any back wages owed to the workers. Similarly, a contractor's failure to fulfill its responsibility for compliance by covered lower-tier subcontractors may warrant debarment if the contractor's failure constituted a disregard of obligations to workers and/or subcontractors. For example, a contractor that included the contract clause in a subcontract but then purposely ignored clear violations of the minimum wage requirements of Executive Order 14026 and this part by its subcontractor, despite actual knowledge of those violations, would not have fulfilled its obligations under the Executive order and this part. The Department notes that its general practice under the DBA and SCA is to seek payment of back wages from the subcontractor that directly committed the violation before seeking payment from the prime contractor or any other upper-tier subcontractors.

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

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

Subpart E – Administrative Proceedings

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

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

Section 23.510 Disputes Concerning Contractor Compliance

Proposed § 23.510, which the Department derived primarily from 29 CFR 5.11, addressed how the Administrator will process disputes regarding a contractor's compliance with part 23. Proposed § 23.510(a) provided that the Administrator or a contractor may initiate a proceeding covered by § 23.510. Proposed § 23.510(b)(1) provided that when it appears that relevant facts are at issue in a dispute covered by § 23.510(a), the Administrator will notify the affected contractor (and the prime contractor, if different) of the investigation's findings by certified mail to the last known address. Pursuant to the NPRM, if the Administrator determined there were reasonable grounds to believe the contractor should be subject to debarment, the investigative findings letter would so indicate. The Department did not receive any comments on proposed § 23.510. The final rule therefore adopts the section as proposed.

Proposed § 23.510(b)(2) provided that a contractor desiring a hearing concerning the investigative findings letter is required to request a hearing by letter postmarked within 30 calendar days of the date of the Administrator's letter. It further required the request set forth those findings which are in dispute with respect to the violation(s) and/or debarment, as appropriate, and to explain how such findings are in dispute, including by reference to any applicable affirmative defenses. The Department received no comments on proposed § 23.510(b)(2) and adopts the language as proposed.

Proposed § 23.510(b)(3) provided that the Administrator, upon receipt of a timely request for hearing, will refer the matter to the Chief Administrative Law Judge (ALJ) by Order of Reference for designation of an ALJ to conduct such hearings as may be necessary to resolve the disputed matter in accordance with the procedures set forth in 29 CFR part 6. It also required the Administrator to attach a copy of the Administrator's letter, and the response thereto, to the Order of Reference that the Administrator sends to the Chief ALJ. The Department did not receive any comments on this proposed provision. The final rule therefore adopts the provision as proposed.

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

Proposed § 23.510(c)(2)(ii) required the Administrator to examine the information timely submitted in the response alleging the existence of a factual dispute. Where the Administrator determines there is a relevant issue of fact, the Administrator will refer the case to the Chief ALJ as under § 23.510(b)(3). If the Administrator determines there is no relevant issue of fact, the Administrator will so rule and advise the contractor(s) accordingly. The Department did not receive any comments on this proposed provision. The final rule therefore adopts the provision as proposed.

Proposed § 23.510(d) provided that the Administrator's investigative findings letter becomes the final order of the Secretary if a timely response to the letter was not made or a timely petition for review was not filed. It additionally provided that if a timely response or a timely petition for review was filed, the investigative findings letter would be inoperative unless and until the decision is upheld by the ALJ or the ARB, or the letter otherwise became a final order of the Secretary. The Department received no comments on this provision and the final rule adopts the provision as proposed.

Section 23.520 Debarment Proceedings

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

Proposed § 23.520(b)(1) provided that where the Administrator finds reasonable cause to believe a contractor has committed a violation of the Executive order or part 23 that constitutes a disregard of its obligations to its workers or subcontractors, the Administrator will notify by certified mail to the last known address the contractor and its responsible officers (and/or any firms, corporations, partnerships, or associations in which the contractor or responsible officers are known to have an interest) of the finding. Pursuant to proposed § 23.520(b)(1), the Administrator will additionally furnish those notified a summary of the investigative findings and afford them an opportunity for a hearing regarding the debarment issue. Those notified must request a hearing on the debarment issue, if desired, by letter to the Administrator postmarked within 30 calendar days of the date of the letter from the Administrator. The letter requesting a hearing must set forth any findings which are in dispute and the reasons therefore, including any affirmative defenses to be raised. Proposed § 23.520(b)(1) also required the Administrator, upon receipt of a timely request for hearing, to refer the matter to the Chief ALJ by Order of Reference, to which would be attached a copy of the Administrator's investigative findings letter and the response thereto, for designation of an ALJ to conduct such hearings as may be necessary to determine the matters in dispute. Proposed § 23.520(b)(2) provided that hearings under § 23.520 would be conducted in accordance with 29 CFR part 6. 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 on this proposed provision. The final rule adopts the provision as proposed.

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

The Department derived proposed § 23.530 from the DBA and SCA rules of practice for administrative proceedings in 29 CFR part 6. Proposed § 23.530(a) provided that upon receipt of a timely request for a hearing under § 23.510 (where the Administrator has determined that relevant facts are in dispute) or § 23.520 (debarment), the Administrator would refer the case to the Chief ALJ 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 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 § 23.530(b) stated that at any time prior to the closing of the hearing record, the complaint or answer may be amended with permission of the ALJ upon such terms as the ALJ shall approve, and that for proceedings initiated pursuant to § 23.510, such an amendment could include a statement that debarment action was warranted under § 23.520. It further provided that such amendments would be allowed when justice and the presentation of the merits are served thereby, provided there was no prejudice to the objecting party's presentation on the merits. 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 § 23.530(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 which had happened

since the date of the pleadings and which 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 related to proposed § 23.530 and the final rule adopts the provision as proposed.

Section 23.540 Consent Findings and Order

Proposed § 23.540, which the Department derived from 29 CFR 6.18 and 6.32, provided a process whereby parties may at any time prior to the ALJ's receipt of evidence or, at the ALJ's discretion, at any time prior to issuance of a decision, agree to dispose of the matter, or any part thereof, by entering into consent findings and an order. Proposed § 23.540(b) identified four requirements of any agreement containing consent findings and an order. Proposed § 23.540(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. As the Department received no comments related to proposed § 23.540, the final rule adopts the provision as proposed.

Section 23.550 Proceedings of the Administrative Law Judge

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

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

Proposed § 23.550(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 must contain appropriate findings, conclusions of law, and an order and be served upon all parties to the proceeding. Proposed § 23.550(c)(2) provided that if the Administrator requested debarment, and the ALJ concluded the contractor has violated the Executive order or part 23, the ALJ would issue an order regarding whether the contractor is subject to the ineligible list that would include any findings related to the contractor's disregard of its obligations to workers or subcontractors under the Executive order or part 23.

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

Proposed § 23.550(e) provided that if the ALJ concluded a violation occurred, the final order would require action to correct the violation, including, but not limited to, monetary relief for unpaid wages. It also required an ALJ to determine whether an order imposing debarment was appropriate, if the Administrator has sought debarment. Proposed § 23.550(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 receied no comments related to § 23.550. The final rule accordingly adopts the provision as proposed.

Section 23.560 Petition for Review

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

Proposed § 23.560(b) 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 letter or decision, or the letter or 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 decision would be effective immediately. Proposed § 23.560(b) additionally stated that judicial review would not be available unless a timely petition for review to the ARB was 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. As the Department received no comments related to proposed § 23.560, the final rule adopts the provision as proposed.

Section 23.570 Administrative Review Board Proceedings

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

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

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

The Department received no comments related to proposed § 23.570. The final rule adopts the provision as proposed.

Section 23.580 Administrator Ruling

Proposed § 23.580 set forth a procedure for addressing questions regarding the application and interpretation of the rules contained in part 23. Proposed § 23.580(a), which the Department derived primarily from 29 CFR 5.13, 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. Requests for rulings under this section should be addressed to the Administrator, Wage and Hour Division, U.S. Department of Labor, Washington, D.C. 20210. Any interested party could, pursuant to § 23.580(b), appeal a final ruling of the Administrator issued pursuant to § 23.580(a) to the ARB.

Maximus commented that only a current or former employee, or their legally recognized representative, should be able to appeal a final ruling of the Administrator issued under § 23.580(a). After careful consideration, the Department declines to adopt this limitation. The provision, as proposed, is identical to the corresponding provision in the regulations implementing Executive Order 13658. Thus, the Department believes that this provision, as proposed, is consistent with the Executive order's instruction to incorporate to the extent practicable existing procedures and enforcement remedies under the regulations issued to implement Executive Order 13658. In addition, if Maximus' proposed limitation were adopted and only an employee or their legally recognized representative could seek ARB review of a final ruling of the Administrator, a contractor, for example, would not be permitted to file an appeal. The Department believes that appellate review should be more expansive, and that any interested party should be afforded the opportunity to appeal a final ruling letter of the Administrator to the ARB. Therefore, while the Department appreciates the commenter's recommendation, it declines to adopt Maximus' suggestion and adopts the provision as proposed.

Appendix A to Part 23 (Contract Clause)

Section 2 of Executive Order 14026 provides that executive departments and agencies, including independent establishments subject to the Federal Property and Administrative Services Act, must, to the extent permitted by law, ensure that new contracts, contract-like

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

A few commenters, including AFL-CIO, SEIU, and the Teamsters, requested that the Department issue an All Agency Memorandum with an interim contract clause that instructs contracting agencies to immediately incorporate the Executive Order 14026 minimum wage into pending solicitations, awards, extensions, renewals, and options exercised before January 30, 2022. NELP similarly requested that the Department provide concrete guidance and instructions to agencies in order to ensure that existing contracts incorporate the Executive Order 14026 minimum wage. The Department appreciates commenters' recommendations for interim guidance encouraging agencies to take steps to incorporate the requirements of Executive Order 14026 into contract actions taken before January 30, 2022. As the Department has emphasized elsewhere in this rule, consistent with section 9(c) of Executive Order 14026, the Department strongly encourages agencies to bilaterally modify existing contracts, as appropriate, to include the minimum wage requirements of this rule even when such contracts are not otherwise considered to be a "new contract" under the terms of this rule. *See* 86 FR 22838. For example, pursuant to the order, contracting officers are encouraged to modify existing IDIQ contracts in accordance with FAR section 1.108(d)(3) to include the Executive Order 14026 minimum wage requirements. As noted earlier, when the FARC issued its interim rule amending the FAR to implement Executive Order 13658 in December 2014, the FARC expressly stated that "In accordance with FAR 1.108(d)(3), contracting officers are strongly encouraged to include the clause 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." 79 FR 74545. The Department expects, and strongly encourages, the FARC to include this provision, or a substantially similar one, in its rule implementing Executive Order 14026. More generally, the Department encourages contracting agencies, to the extent permitted by law, to ensure that with respect to all existing contracts, solicitations issued between the date of Executive Order 14026 and the effective dates set forth in section 9 of the order, and contracts entered into between the date of Executive Order 14026 and the effective dates set

forth in section 9 of the order, the hourly wages paid under such contracts are consistent with the minimum wages specified in sections 2 and 3 of the order. The Department will work with the FARC and contracting agencies to ensure compliance with and awareness of the provisions of Executive Order 14026 to the greatest extent possible.

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

Paragraph (a) of the proposed contract clause set forth in Appendix A provided that the contract in which the clause is included is subject to Executive Order 14026, the regulations issued by the Secretary of Labor at 29 CFR part 23 to implement the order's requirements, and all the provisions of the contract clause. The Department did not receive any comments on proposed paragraph (a) of the contract clause and thus implements the paragraph as proposed.

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

SCA, or the DBA, regardless of the contractual relationship alleged to exist between the individual and the contractor.

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

As explained in the NPRM, the effect of paragraphs (b)(1) and (2) will be to require the contractor to adjust the minimum wage of workers performing work on or in connection with a contract subject to the Executive order each time the Secretary's annual determination of the minimum wage results in a higher minimum wage than the previous year. For example, paragraph (b)(1) will require a contractor on a contract subject to the Executive order in 2022 (beginning on January 30, 2022) to pay covered workers at least $15.00 per hour for work performed on or in connection with the contract. If workers continue to perform work on or in connection with the covered contract in 2023 and the Secretary determines the applicable minimum wage to be effective January 1, 2023, was $15.10 per hour for example, paragraphs (b)(1) and (2) will require the contractor to pay covered workers $15.10 for work performed on or in connection with the contract beginning January 1, 2023, thereby raising the wages of any workers paid $15.00 per hour prior to January 1, 2023.

ABC requested that the Department allow a "multi-year grace period" prior to implementation of this final rule, claiming that the rule will require considerable time for absorption and implementation by government contractors. However, the Executive order expressly requires that, as of January 30, 2022, workers performing on or in connection with covered contracts must be paid $15 per hour unless exempt. *See* 86 FR 22835-38. There is no indication in the Executive order that the Department has authority to modify the timing of the minimum wage requirement, much less to adopt a multiple year "grace period" before implementing this rule. Moreover, most contractors should already be familiar with Executive Order 13658 and its implementing regulations, *see* 29 CFR part 10, and thus will only need to familiarize themselves with the limited number of provisions in this final rule that differ from those under Executive Order 13658. For these reasons, the Department declines the request to allow a multi-year grace period before implementing this rule.

Section (b)(2) of the proposed contract clause also included a provision that would require contracting agencies to ensure that contractors are compensated for any increase in labor costs resulting from the annual inflation increases in the Executive Order 14026 minimum wage beginning on January 1, 2023. The Department noted, however, that such compensation is only warranted "if appropriate." For example, if the contracting agency and contractor have already anticipated an increase in labor costs in pricing the applicable contract, it would not be appropriate for a contractor to receive compensation in addition to whatever consideration it has already received for any increase in labor costs in the applicable contract. The Department further noted that contractors shall be compensated "only for" increases in labor costs resulting from operation of the annual inflation increases. Thus, contractors are entitled to be compensated under the provision only for any increases in labor costs directly resulting from the annual inflation increase. For example, contractors are not entitled to be compensated for labor costs they allege they incurred related to raising wages for non-covered workers due to operation of the annual inflation increase for covered workers. Compensation adjustments would necessarily

be made on a contract-by-contract basis, and where any annual inflation increase does not increase labor costs because, for example, of the efficiency and other benefits resulting from the increase, the contractor will not ultimately receive additional compensation as a result of the annual inflation increase.

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

As noted in the discussion of § 23.110, AGC requested that the Department delete or clarify the phrase "if appropriate" in the sentence of section b(2) of the proposed contract clause providing that "[i]f appropriate, the contracting [agency] shall ensure the contractor is compensated only for the increase in labor costs resulting from the annual inflation increases in the Executive Order 14026 minimum wage beginning on January 1, 2023." The Department declines to adopt the requested change, which would operate to entitle contractors to mandatory price adjustments for the increase in labor costs resulting from the annual inflation increases in the Executive Order 14026 minimum wage. The rules govering price adjustments for procurement contracts are governed by the FAR and are thus outside the scope of this rulemaking. If necessary, the FARC can address price adjustments in their rulemaking to implement Executive Order 14026, which will follow this rule. *See* 86 FR 22836. With respect to nonprocurement contracts, and as explained in more detail in the discussion of § 23.110, the Department believes that price adjustments are a discretionary tool that contracting agencies may provide to contractors if appropriate, based on the specific nature of the contract. As a result, the

Department has retained the phrase "if appropriate" in paragraph (b)(2) of the required contract clause.

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

Paragraph (b)(4) of the proposed contract clause provided that the prime contractor and any upper-tier subcontractor(s) will be responsible for the compliance by any subcontractor or lower-tier covered subcontractor with the Executive order minimum wage requirements. Proposed paragraph (b)(4) also stated that the contractor and any subcontractor(s) responsible therefore will be liable for unpaid wages in the event of any violation of the minimum wage obligation of these clauses. As discussed earlier, the Department has found this flow-down model of responsibility to be an effective method to obtain compliance with the DBA, SCA, and Executive Order 13658, and to ensure that covered workers receive the wages to which they are statutorily entitled even if, for example, the subcontractor that employed them is insolvent. The Department opined that the flow-down model of responsibility will likewise prove an effective model to enforce the Executive order's obligations and ensure payment of wages to covered

workers. The Department did not receive any comments seeking to alter the language of paragraph (b)(4) of the proposed contract clause, and therefore adopts the language as proposed.

Proposed paragraph (b)(5) of the contract clause in Appendix A stated that workers with disabilities whose wages are calculated pursuant to special certificates issued under section 14(c) of the FLSA must be paid at least the Executive order minimum wage (or the applicable commensurate wage rate under the certificate, if such rate is higher than the Executive order minimum wage) for time spent performing work on or in connection with covered contracts. The Department did not receive comments specifically addressing paragraph (b)(5) of the proposed contract clause and therefore adopts the paragraph as proposed.

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

Proposed paragraph (d) stated the circumstances under which the contracting agency and/or the Department could suspend, terminate, or debar a contractor for violations of the Executive order. It provided that in the event of a failure to comply with any term or condition of the Executive order or 29 CFR part 23, including failure to pay any worker all or part of the wages due under the Executive order, the contracting agency could on its own action, or after

authorization or by direction of the Department and written notification to the contractor, take action to cause suspension of any further payment, advance, or guarantee of funds until such violations have ceased. Paragraph (d) additionally provided that any failure to comply with the contract clause may constitute grounds for termination of the right to proceed with the contract work and, in such event, for the Federal Government to enter into other contracts or arrangements for completion of the work, charging the contractor in default with any additional cost. Paragraph (d) also provided that a breach of the contract clause may be grounds to debar the contractor as provided in 29 CFR part 23.

Several commenters, including AFL-CIO, NELA, SEIU, Strategic Organizing Center, and the Teamsters, requested that the Department amend the contract clause to include language expressly stating that compliance with the minimum wage requirements of Executive Order 14026 and 29 CFR part 23 is a material condition of payment under the contract. These commenters suggested that such a statement could aid in False Claims Act (FCA) litigation based on violations of Executive Order 14026 and 29 CFR part 23 because "materiality" is an essential element of FCA claims. While the Department appreciates the commenters' suggestion, the Department believes that the contract clause as proposed is sufficient to put a contractor on notice that a violation of the minimum wage requirements of Executive Order 14026 is material within the meaning of the FCA. For this reason, and because the relevant language of the contract clause as proposed is identical to the contract clause issued by the Department to implement Executive Order 13658, the Department declines to adopt the commenters' suggestion.

Executive Order 14026, the implementing regulations, and the proposed contract clause itself all make clear that compliance with the applicable minimum wage requirements is a condition of payment. Section 2 of the Executive Order expressly states that its requirements are a condition of payment, 86 FR 22835, and § 23.210(a) of this final rule similarly states that the contractor must abide by the contract clause "as a condition of payment." In addition, the

contract clause's withholding provision makes compliance with the Executive order minimum wage a condition of payment. *See United States ex rel. Int'l Bhd. of Elec. Workers Loc. Union No. 98 v. Farfield Co.*, 5 F.4th 315, 344–45 (3d Cir. 2021) (explaining that the government's right under the DBA to unilaterally withhold payment from a contractor supported the conclusion that compliance with the DBA was a *material* condition of payment under the contract).

As the withholding provision of the contract clause already makes clear, *see* paragraph (c), to ensure the availability of funds for the payment of back wages to workers when a contractor has failed to pay the full amount of wages required by Executive Order 14026, the contracting agency shall withhold from the contractor the funds necessary to pay workers the full amount of required wages. In other words, if the condition of payment is not satisfied, the contractor will not be paid in full unless and until the violation is remedied. Thus, the contract clause, as proposed, provides the contractor with notice that compliance with the minimum wage requirements of Executive Order 14026 is a condition of payment under the contract.

The Department believes that the these provisions suffice to place a contractor on notice that a violation of the minimum wage requirements of Executive Order 14026 is material to the government's decision to pay in full under the contract. As noted, this conclusion is consistent with the contract clause issued by the Department to implement Executive Order 13658, which does not contain "condition of payment" language or expressly refer to materiality, as well as with the Supreme Court's most recent FCA decision, in which the Court stated that "[w]hat matters is not the label the Government attaches to a requirement, but whether the defendant knowingly violated a requirement that the defendant knows is material to the Government's payment decision." *Universal Health Servs., Inc. v. United States ex rel. Escobar*, 136 S.Ct. 1989, 1995 (2016). For these reasons, the Department declines the commenters' suggestion and adopts paragraph (d) of the contract clause as proposed.

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

Paragraph (e), as proposed, also prohibited a contractor from discharging its minimum wage obligation to workers whose wages are governed by the SCA by providing the cash equivalent of fringe benefits, including vacation and holidays. As discussed above, the SCA imposes distinct "minimum wage" and "fringe benefit" obligations on contractors. 41 U.S.C. 6703(1)-(2). A contractor cannot satisfy any portion of its SCA minimum wage obligation through the provision of fringe benefit payments or cash equivalents furnished or paid pursuant to 41 U.S.C. 6703(2). 29 CFR 4.177(a). Consistent with the treatment of fringe benefit payments

or their cash equivalents under the SCA, proposed paragraph (e) would not allow contractors to discharge any portion of their minimum wage obligation under the Executive order to workers whose wages are governed by the SCA through the provision of either fringe benefits or their cash equivalent. The Department did not receive any comments specifically concerning paragraph (e) and the Department thus adopts the paragraph as proposed.

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

Proposed paragraph (g) set forth recordkeeping and related obligations that were consistent with the Secretary's authority under section 5 of the order to obtain compliance with the order, and that the Department viewed as essential to determining whether the contractor has paid the Executive order minimum wage to covered workers. The obligations in proposed paragraph (g) were identical to the obligations that the Department derived in the Executive Order 13658 rulemaking. *See* 79 FR 60689. The Department originally derived these obligations from the DBA, FLSA, and SCA. Proposed paragraph (g)(1) listed specific payroll records obligations of contractors performing work subject to the Executive order, providing in particular that such contractors shall make and maintain for three years, work records containing the

following information for each covered worker: name, address, and social security number; the worker's occupation(s) or classification(s); the rate or rates paid to the worker; the number of daily and weekly hours worked by each worker; any deductions made; and total wages paid. The records required to be kept by contractors pursuant to proposed paragraph (g)(1) are coextensive with recordkeeping requirements that already exist under, and are consistent across, the FLSA, DBA, and SCA; as a result, compliance by a covered contractor with the proposed payroll records obligations would not impose any obligations to which the contractor is not already subject under the FLSA, DBA, and SCA.

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

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

implementing regulations. The Department received no comments on paragraph (g) and adopts the paragraph as proposed.

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

As explained in the discussion of coverage of subcontracts in Subpart A of this part, the Department received several comments expressing confusion regarding the coverage of subcontracts, particularly with respect to vendor and supplier agreements. As discussed above, the Department has therefore decided to amend paragraph (h) of the contract clause to explicitly add the following sentence: "Executive Order 14026 does not apply to subcontracts for the manufacturing or furnishing of materials, supplies, articles, or equipment, and this clause is not required to be inserted in such subcontracts." The Department believes that this clarification will help minimize any confusion regarding subcontract coverage. Except for this modification, the Department adopts paragraph (h) of the contract clause as proposed.

Proposed paragraph (i), which the Department derived from the SCA contract clause, 29 CFR 4.6(n), set forth the certifications of eligibility the contractor makes by entering into the contract. Paragraph (i)(1) stipulated that by entering into the contract, the contractor and its officials will be certifying that neither the contractor, the certifying officials, nor any person or firm with an interest in the contractor's firm is a person or firm ineligible to be awarded Federal contracts pursuant to section 5 of the SCA, section 3(a) of the DBA, or 29 CFR 5.12(a)(1). Paragraph (i)(2) constituted a certification that no part of the contract will be subcontracted to any person or firm ineligible to receive Federal contracts. Paragraph (i)(3) contained an acknowledgement by the contractor that the penalty for making false statements is prescribed in

the U.S. Criminal Code at 18 U.S.C. 1001. The Department received no comments related to paragraph (i) and adopts the provision's language as proposed.

The Department based proposed paragraph (j) on section 3 of the Executive order. It addressed the employer's ability to use a partial wage credit based on tips received by a tipped employee (tip credit) to satisfy the wage payment obligation under the Executive order. The provision set the requirements an employer must meet in order to claim a tip credit. The Department received no comments on paragraph (j) of the contract clause and adopts it as proposed.

Proposed paragraph (k) established a prohibition on retaliation that the Department derived from the FLSA's antiretaliation provision that is consistent with the Secretary's authority under section 5 of the order to obtain compliance with the order. It prohibited any person from discharging or discriminating against a worker because such worker has filed any complaint or instituted or caused to be instituted any proceeding under or related to Executive Order 14026 or part 23, or has testified or is about to testify in any such proceeding. The Department proposed to interpret the prohibition on retaliation in paragraph (k) in accordance with its interpretation of the analogous FLSA provision. The Department received no comments on paragraph (k) and adopts the paragraph as proposed.

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

Several commenters, including AFL-CIO, Center for American Progress, NELA, SEIU, and the Teamsters requested that the Department add language to the contract clause stating that

workers covered by Executive Order 14026 are intended third party beneficiaries of the contract's minimum wage provisions required by Executive Order 14026. Commenters explained that this would allow workers to enforce the Executive order's minimum wage requirements through private litigation. After careful consideration, the Department declines to add such language to the contract clause. Section 10(c) of the Executive order states 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." 86 FR 22838. Given this language, the Department does not have the discretion to create or authorize a private right of action under Executive Order 14026 and thus declines to amend the contract clause to expressly designate workers as third party beneficiaries of the contract's minimum wage requirements. The Department notes, however, that whether or not a worker could make a third party beneficiary claim under relevant state law would be determined by such state law. As explained earlier, neither the Executive order nor this part are intended to modify any existing private rights of action that workers may possess under other applicable laws. The Department did not receive additional comments related to paragraph (l) of the contract clause and thus adopts the paragraph as proposed.

Proposed paragraph (m) related to the contractor's responsibility in providing notice to workers of the applicable Executive order minimum wage. The methods of notice contained in proposed paragraph (m) reflected those contained in proposed § 23.290. A full discussion of the methods of notice contained in proposed paragraph (m), including the Department's responses to comments submitted in relation to § 23.290, can accordingly be found in the preamble describing the operation of § 23.290. For the reasons discussed in the preamble to § 23.290, the Department adopts paragraph (m) of the contract clause as proposed.

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 collection burdens imposed on the public. Under the PRA, an agency may not collect or sponsor 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. In accordance with the PRA, the Department solicited public comments on the proposed changes to those information collections in the NPRM, as discussed below. *See* 86 FR 38816 (July 22, 2021). 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). On September 2, 2021, the OMB issued a notice that continued the previous approval of the information collections under the existing terms of clearance and ask the Department to resubmit the requests upon promulgation of the final rule and after consideration of the public comments received.

Circumstances Necessitating Collection:

Executive Order 14026 establishes a higher minimum wage requirement for certain Federal contracts beginning January 30, 2022 than would otherwise be required by Executive Order 13658. *See* 86 FR 22835. Specifically, Executive Order 14026 establishes an initial minimum wage requirement of $15.00 per hour and an initial minimum cash wage for tipped employees of $10.50 per hour, both of which will be higher than the corresponding rates that will be in effect on January 30, 2022 under Executive Order 13658. *See* 86 FR 22835-36. Like Executive Order 13658, Executive Order 14026 requires the Department to update the order's minimum wage requirement each subsequent year to account for inflation. *Id.* However, Executive Order 14026 gradually phases out a contractor's ability to pay a subminimum cash

wage for tipped employees under Executive Order 14026, raising the minimum cash wage for tipped employees to 85 percent of the order's applicable minimum wage on January 1, 2023, and to 100 percent of the order's applicable minimum wage on January 1, 2024. *See* 86 FR 22836.

Finally, effective January 30, 2022, section 6 of Executive Order 14026 revokes Executive Order 13838. *See* 86 FR 22836. Executive Order 13838 presently exempts contracts in connection with seasonal recreational services or seasonal recreational equipment rental offered for public use on Federal lands from the minimum wage requirements established under Executive Order 13658. Consequently, as of January 30, 2022, these contracts will no longer be exempt from the minimum wage requirement of Executive Order 13658 and/or will become subject to Executive Order 14026, to the extent that they qualify as "new contracts."

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

Subpart C states compliance requirements for contractors covered by Executive Order 14026. As discussed above, § 23.210 states that the contractor and any subcontractor, as a condition of payment, must abide by the Executive order minimum wage contract clause and must include in any covered lower-tier subcontracts the minimum wage contract clause. This final rule at § 23.260 describes recordkeeping requirements for contractors subject to Executive Order 14026. Finally, § 23.290 includes a notice requirement, requiring contractors to notify all workers performing work on or in connection with a covered contract of the applicable minimum wage rate under Executive Order 14026.

The disclosure of information originally supplied by the Federal Government for the purpose of disclosure is not included within the definition of a collection of information subject

to the PRA. *See* 5 CFR 1320.3(c)(2). The Department has thus determined that §§ 23.210 and 23.290 do not include an information collection subject to the PRA. The Department also notes that the recordkeeping requirements in § 23.260 are requirements that contractors must already comply with under the FLSA, SCA, DBA, and/or Executive Order 13658 under an OMB-approved collection of information (OMB control number 1235–0018). The Department believes that the final rule does not impose any additional notice or recordkeeping requirements on contractors for PRA purposes. Therefore, the burden for complying with the recordkeeping requirements in this final rule is subsumed under the current approval.

WHD obtains PRA clearance under control number 1235–0021 for an information collection covering complaints alleging violations of various labor standards that the agency administers and enforces. An ICR has been submitted to revise the approval to incorporate the regulatory citations in this 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 Executive Order 14026's higher minimum wage requirement. Note that the Department has increased the estimate slightly from the proposed rule due to a slight increase in the number of affected workers shown in the regulatory impact analysis. Subpart E establishes administrative proceedings to resolve investigation findings. Particularly with respect to hearings, the rule imposes information collection requirements. The Department notes that information exchanged between the target of a civil or an administrative action and the agency in order to resolve the action would be exempt from PRA requirements. *See* 44 U.S.C. 3518(c)(1)(B); 5 CFR 1320.4(a)(2). This exemption applies throughout the civil or administrative action (such as an investigation and any related administrative hearings). Therefore, the Department has determined the administrative requirements contained in subpart E of this final rule are exempt from needing OMB approval under the PRA.

Information and technology: There is no particular order or form of records prescribed by the regulations. A contractor may meet the requirements of this final rule using paper or

electronic means. WHD, in order to reduce burden caused by the filing of complaints that are not actionable by the agency, uses a complaint filing process in which complainants discuss their concerns with WHD professional staff. This process allows agency staff to refer complainants raising concerns that are not actionable under wage and hour laws and regulations to an agency that may be able to offer assistance.

Public comments: The Department sought comments on its analysis that the proposed rule created a slight increase in paperwork burden associated with ICR 1235–0021 but did not create a paperwork burden on the regulated community of the information collection provisions contained in ICR 1235–0018. The Department received a few comments expressing concern about additional recordkeeping requirements under the proposed rule. For example, the Chamber argued that there will be a "tremendous administrative burden" resulting from this rule because contractors will need to segregate time that workers spend performing on or in connection with covered contracts from hours worked on other non-covered matters. The AOA similarly expressed that, even if it were "practically feasible" for a contractor to engage in such segregation, the recordkeeping would be "cost-prohibitive," especially for "small businesses that may be more likely to have employees splitting time between federal and non-federal work."

As explained in the preamble discussion above regarding worker coverage and recordkeeping requirements, for those contractors currently subject to Executive Order 13658, Executive Order 14026 imposes no new recordkeeping requirements beyond what the contractor is already required to comply with under Executive Order 13658, including with respect to the identification of workers performing "in connection with" covered contracts and the segregation of hours worked on covered and non-covered contracts. For contractors not currently subject to Executive Order 13658, Executive Order 14026 imposes minimal burden because its recordkeeping requirements mirror those that already exist under the DBA, FLSA, and SCA. For example, with respect to the comments noted above expressing concern about administrative burdens resulting from the segregation of time spent performing under federal contracts and time

spent performing on non-covered matters, the Department notes that tracking the rate of pay for a worker is not a new information collection requirement. A worker's rate of pay is already a required record under the DBA, FLSA, SCA, and Executive Order 13658. Moreover, in the Department's experience, employers already routinely track different rates of pay for different workers and for different job classifications or projects. The Department thus did not propose any additional recordkeeping requirements beyond what is already approved by OMB under this information collection.

An agency may not conduct an information collection unless it has a currently valid OMB approval, and the Department submitted the identified information collection contained in the proposed rule to OMB for review in accordance with the PRA under Control numbers 1235–0021 and 1235–0018. *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 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: Revisions to currently approved information collections.

Agency: Wage and Hour Division, Department of Labor.

Title: Employment Information Form.

OMB Control Number: 1235–0021.

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

Estimated number of respondents: 38,244 (169 from this rulemaking).

Estimated number of responses: 38,244 (169 from this rulemaking).

Frequency of response: On occasion.

Estimated annual burden hours: 12,748 (56 burden hours due to this final rule).

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

Title: Records to be kept by Employers.

OMB Control Number: 1235–0018.

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

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

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

Frequency of response: Various.

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

Estimated annual burden costs: $0 from this rulemaking.

IV. Executive Order 12866, Regulatory Planning and Review; and Executive Order 13563, Improved Regulation and Regulatory Review

Under Executive Order 12866, OMB's Office of Information and Regulatory Affairs (OIRA) determines whether a regulatory action is significant and, therefore, subject to the requirements of the Executive order and OMB review.[27] Section 3(f) of Executive Order 12866 defines a "significant regulatory action" as a regulatory action that is likely to result in a rule that may: (1) have an annual effect on the economy of $100 million or more, or adversely affect in a material way a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, or tribal governments or communities (also referred to as economically significant); (2) create serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees or loan programs or the rights and obligations of recipients thereof; or (4) raise

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

novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive order. OIRA has determined that this final rule is economically significant under section 3(f) of Executive Order 12866.

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

The Department received a number of comments on the NPRM's regulatory analysis. Other substantive comments are addressed thoughout this analysis in the specific section relevant to the comment.

A. Introduction

1. Background

This final rulemaking implements Executive Order 14026, "Increasing the Minimum Wage for Federal Contractors." This Executive order seeks to promote "economy and efficiency" in Federal procurement by increasing the hourly minimum wage paid by the parties that contract with the Federal Government to $15.00 for those workers working on or in connection with a covered Federal contract beginning January 30, 2022. For covered tipped workers, the minimum required cash wage will be $10.50 per hour beginning January 30, 2022, gradually rising to the full Executive Order 14026 minimum wage on January 1, 2024. The Executive order states that raising the minimum wage enhances worker productivity and

generates higher-quality work by boosting workers' health, morale, and effort; reducing absenteeism and turnover; and lowering supervisory and training costs. Executive Order 14026 supersedes Executive Order 13658, which established a lower minimum wage for contractors, to the extent that the orders are inconsistent. Finally, effective January 30, 2022, Executive Order 14026 will revoke Executive Order 13838, which presently exempts contracts entered into with the Federal Government in connection with seasonal recreational services or seasonal recreational equipment rental for the general public on Federal lands from coverage of Executive Order 13658.

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

The Department estimated the number of employees who would, as a result of the Executive order and this final rule, see an increase in their hourly wage, *i.e.*, "affected employees." The Department estimates there will be 327,300 affected employees in the first year of implementation (Table 1).[28] During the first 10 years the rule is in effect, average annualized direct employer costs are estimated to be $2.4 million assuming a 7 percent real discount rate (hereafter, unless otherwise specified, average annualized values will be presented using a 7 percent real discount rate). This estimated annualized cost includes $1.9 million for regulatory familiarization and $538,500 for implementation costs. Other potential costs are discussed qualitatively.

The direct transfer payments associated with this rule are transfers of income from employers to employees in the form of higher wage rates.[29] Estimated average annualized transfer payments are $1.7 billion per year over 10 years. This transfer estimate may be an underestimate because it does not capture workers already earning above $15.00 that may have their wages increased as well (i.e., spillover costs). Additionally, employers with Federal

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

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

contracts may increase wages for their workers who are not working on the contract. Transfer payment estimates are somewhat larger here than in the NPRM due to the inclusion of overtime pay.

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

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

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

	Year 1	Future Years		Average Annualized Value	
		Year 2	Year 10	3% Real Rate	7% Real Rate
Affected employees (1,000s)	327.3	329.3	345.6	--	--
Direct employer costs (million)	$17.1	$0	$0	$2.0	$2.4
Regulatory familiarization	$13.4	$0	$0	$1.6	$1.9
Implementation	$3.8	$0	$0	$0.4	$0.5
Transfers (millions)	$1,711	$1,721	$1,806	$1,755	$1,752

B. Number of Affected Firms and Employees

1. Overview and Data

This section explains the Department's methodology to estimate the number of affected firms and employees. The Department estimates there are 507,200 potentially affected firms. The Department estimates that of the 1.8 million potentially affected workers, 327,300 will be affected and see an increase in wages. No substantive comments were received countering the estimated number of covered firms and employees. Some commenters asserted that transfer payments would apply to a broader population, such as workers earning above $15 per hour or workers employed by a covered contractor who do not perform work on or in connection with covered contracts. These comments are addressed in section IV.B.3. Therefore, this methodology is the same as the NPRM. The Economic Policy Institute (EPI) submitted a comment citing their research which found similar results (1.9 million contract workers in 2022 and 390,000 affected workers). The Department appreciates such information and notes that EPI's findings are consistent with the Department's analysis and conclusions.

The number of firms is estimated primarily from the General Services Administration's (GSA) System for Award Management (SAM). This is supplemented with a variety of other data sources. There are no government data on the number of employees working on Federal contracts; therefore, to estimate the number of Federal contract employees, the Department employed the approach used in two previous Executive order rulemakings, the 2016 rule implementing Executive Order 13706, "Establishing Paid Sick Leave for Federal Contractors," which was an updated version of the methodology used in the 2014 rulemaking implementing Executive Order 13658.[30] This approach uses data from USASpending.gov, a database of Government contracts from the Federal Procurement Data System–Next Generation (FPDS-NG).

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

Although more recent data is available, the Department generally used data from 2019 to avoid any shifts in the data associated with the COVID-19 pandemic in 2020. Any long-run impacts of COVID-19 are speculative because this is an unprecedented situation, so using data from 2019 is the best approximation the Department has for future impacts. The pandemic could cause structural changes to the economy, resulting in shifts in industry employment and wages. The transfers to employees associated with this rule could be an underestimate or an overestimate, depending on how employment and wages change in the industries affected by this rule.

After approximating the total number of Federal contract employees, the Department estimated the share who would receive an increase in earnings (*i.e.*, affected employees). Specifically, the Department used 2019 data from the Current Population Survey (CPS) to identify the share of workers, by industry, who earned between the 2019 minimum wage for Federal contract employees, $7.40 per hour for tipped employees and $10.60 per hour for non-tipped employees, and $15 per hour.[31] [32] This ratio was then applied to the population of Federal contract employees.

2. Number of Affected Firms

The main data source used to estimate the number of affected firms is SAM. All entities bidding on Federal procurement contracts or grants must register in SAM. Using May 2021 SAM data, the Department estimated there are 428,300 registered firms.[33] The Department excluded firms with expired registrations, firms only applying for grants,[34] government entities

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

[32] As discussed in Section IV.B.4.b, the Department used a separate methodology to estimate the number of affected workers in the U.S. territories because the CPS data did not include the territories.

[33] Data released in monthly files. Available at: https://sam.gov/data-services/Entity%20Registration?privacy=Public.

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

(such as city or county governments), foreign organizations, and companies that only sell products and do not provide services. SAM provides the primary North American Industry Classification System (NAICS) for all companies.[35, 36]

SAM includes all prime contractors and some subcontractors (those who are also prime contractors or who have otherwise registered in SAM). However, the Department is unable to determine the number of subcontractors who are not in the SAM database. Therefore, the Department examined five years of USASpending data (2015 through 2019)[37] and found 33,500 unique subcontractors who did not hold contracts as primes in 2019 (and thus may not be included in SAM), and added these firms to the total from SAM (Table 2). This results in 461,800 potentially affected firms that may hold Federal contracts.

In addition, some entities operating on nonprocurement contracts are covered by Executive Order 14026. Estimating the number of covered firms involves many data sources and assumptions.[38] There are seven types of contracts included in this analysis of nonprocurement contracts (Table 3):

1. National Park Service (NPS) concessions contracts.
2. NPS Commercial Use Authorizations (CUAs).

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

[36] In some instances the primary NAICS was listed as Public Administration, which is excluded from the analysis because it is not available for other data sources required (see section B.3.). Therefore, these companies are redistributed to other NAICS based on the current distribution.

[37] 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.

[38] 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 Ass'n*, ARB Case No. 99-035, 2001 WL 328132 (ARB March 30, 2001)).

3. U.S. Forest Service (FS) Special Use Authorizations (SUAs).
4. NPS special use permits.
5. Bureau of Land Management (BLM) special recreation permits.
6. Retail and concession leases in federally owned buildings.
7. Operations and concessions on military bases.

First, the Department estimated the number of contractors with NPS concessions contracts. The NPS website contains a list of entities operating under concessions contracts on NPS lands.[39] The Department downloaded all 441 records contained on the website, identified unique firms by name, and assigned them to industries based on the first type of "service" listed. This resulted in 401 unique entities operating under concessions contracts on NPS lands.

Second, the Department estimated the number of NPS CUAs. The Department informally consulted with the NPS and learned that the NPS had approximately 5,900 CUAs in FY 2015. An NPS CUA is a written authorization to provide services to park area visitors. *See* 36 CFR 18.2(c). The Department has assumed, solely for purposes of the economic analysis, that all NPS CUAs are contracts covered by the Executive order. Because the number of CUAs does not take into account that one firm may hold multiple authorizations, the Department multiplied the total number of CUAs by the ratio of unique firms holding NPS concessions contracts to total NPS concessions contracts (401 divided by 441 = 91 percent) for an estimated 5,340 unique firms with CUAs. The Department used the industry distribution from NPS concessions contracts to assign CUA permit holders to industries because industry information was not available.

Third, the Department estimated the number of FS SUAs. The Department informally consulted the FS, which informed the Department that 77,353 SUAs were in effect in FY 2015. FY 2015 data were the latest year of data available to DOL. Based on further informal

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[39] Available at: https://www.nps.gov/subjects/concessions/concessioners-search.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.

consultations with the FS, the Department estimated that approximately 36 percent of these SUAs may be covered contracts.[40] No data are available to determine whether a contractor holds more than one permit; therefore, the Department used the NPS ratio of unique concessions contract holders to total concessions contract holders (91 percent) to estimate 25,076 unique contractors with FS permits. The Department used its best professional judgement to determine the relevant industry for each type of permit because data were not available.

Fourth, the Department estimated the number of affected NPS special use permits. During informal discussions, NPS officials estimated that it issued 33,735 special use permits in FY 2015.[41] FY 2015 data were the latest year of data available to DOL. It is likely that many of these permits will not be covered by the rulemaking, but the Department has no method for directly determining the number of such permits that might be covered. Therefore, the Department assumed, solely for purposes of the economic analysis, that the EO would cover 36 percent of NPS special use permits (the ratio of FS SUAs that are covered) and that 91 percent of the permits are held by unique contract holders (based on NPS data for CUAs). This resulted in an estimated 10,936 entities holding special use permits and covered by the rule. These permit holders were assigned to the "arts, entertainment, and recreation" industry.

Fifth, BLM reports 4,737 special recreation permits in FY 2019.[42] The Department again relied on the FS data to assume that 36 percent of these permits will be covered, and the NPS data to assume that 91 percent will be held by unique contractors.[43] This results in 1,536 entities holding BLM special recreation permits. The Department assumed that these are in the "arts,

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

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

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

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

entertainment, and recreation" industry. These estimates for the NPS, FS, and BLM do not account for the possibility that the same firms may hold concessions contracts with more than one agency.

Sixth, the Department estimated the number of retail and concession leases in federally owned buildings. Data are not available on the prevalence of these contracts, but during the 2016 rulemaking implementing Executive Order 13706's paid sick leave requirements that covered a similar population, the Department estimated there were a total of 1,120 unique entities (1,232 entities times 91 percent assumed to be held by unique contractors). To account for blind vendors who enter into operating agreements with states who obtain contracts or permits from Federal agencies to operate vending facilities on Federal property under the Randolph-Sheppard Act, the Department has added 767 contractors to its estimate.[44] However, the Department notes that some of these vendors may already be counted in the 1,120 estimate. The Department assumed these entities are in the "retail trade" and "accommodation and food services" industries.

Seventh, to account for operations and concessions on military bases, the Department identified that the Army and Air Force, the Navy, the Marine Corps, and the Coast Guard have bases with retail and concessions contracts. These include both the military Exchanges and private companies with concessions contracts to operate on base. The Department counted each of the branch's Exchange organizations as one firm. Based on general information about services on bases, the Department assumed these entities are in the "retail trade" and "accommodation and food services" industries. According to Exchange and Commissary News (a business magazine), the Army & Air Force Exchange Service (AAFES) has 586 concessions contracts.[45] The Department assumed each is with a unique firm and that these entities are not listed in SAM.

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[44] DOL communications with the Department of Education.
[45] Exchange and Commissary News. (2017). Exchange QSR Clicks with Customers. http://www.ebmpubs.com/ECN_pdfs/ecn0517_AAFESQSRNBFF.pdf.

The Department also assumed that 68 percent of these concessions contracts are domestic, resulting in an estimated 401 concessions contracts.[46]

Data are not available on the number of concessions contracts for other branches of the military. However, data are available on the number of name-brand fast-food establishments at AAFES, Navy Exchange Service Command (NEXCOM), and the Marine Corps Exchange (MCX). The Department assumed the distribution of fast-food establishments across branches is similar to the distribution of total concessions contracts. The Department calculated the ratio of the number at NEXCOM or MCX fast-food establishments relative to AAFES and then multiplied that ratio by the 401 AAFES concessions contracts.[47] In total, the Department estimates 553 concessions contracts (401 for AAFES, 119 for NEXCOM, and 33 for MCX).

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

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

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

Table 2: Number of Potentially Affected Contractors

Industry	NAICS	Total Potentially Affected Firms	Firms From SAM	Subcon-tractors	Federal Prop. and Lands
Agriculture, forestry, fishing & hunting	11	5,895	5,808	1	86
Mining	21	1,209	1,100	44	65
Utilities	22	5,144	2,613	52	2,479
Construction	23	60,316	52,149	7,941	226
Manufacturing	31-33	55,731	47,283	8,417	31
Wholesale trade	42	20,335	19,686	649	0
Retail trade	44-45	10,683	8,292	31	1,833
Transportation and warehousing	48-49	22,194	15,897	401	5,896
Information	51	19,601	13,400	329	5,872
Finance and insurance	52	3,713	3,665	48	0
Real estate and rental and leasing	53	20,318	20,317	1	0
Professional, scientific, and technical	54	119,543	107,411	11,622	510
Management of companies & enterprises	55	551	551	0	0
Administrative and waste services	56	39,433	35,203	3,581	649
Educational services	61	17,210	16,889	250	71
Health care and social assistance	62	36,676	36,629	17	30
Arts, entertainment, and recreation	71	29,209	4,911	0	24,298
Accommodation and food services	72	15,622	12,474	7	3,141
Other services	81	24,366	24,005	94	267
Total private	**--**	**507,222**	**428,283**	**33,485**	**45,454**

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

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

3. Number of Potentially Affected Employees

There are no Government data on the number of employees working on Federal contracts; therefore, to estimate the number of Federal contract employees, the Department employed the approach used in the 2016 rulemaking implementing Executive Order 13706's paid sick leave requirements, which was an updated version of the methodology used in the 2014 rulemaking for Executive Order 13658.[48] The Department estimated the number of employees who work on Federal contracts that will be covered by Executive Order 14026, representing the number of "potentially affected employees" (1.8 million). Additionally, the Department estimated the share of potentially affected employees who will receive wage increases as a result of the Executive order. These employees are referred to as "affected" (327,300).

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

a. SCA and DBA Procurement Contracts in the Fifty States and Washington, D.C.

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

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

[48] *See* 81 FR 9591, 9591-9671 and 79 FR 60634-60733.

Where i = 2-digit NAICS

The Department used Federal contracting expenditures from USASpending.gov data, which tabulates data on Federal contracting through the FPDS-NG. According to 2019 data (used to avoid any potential impacts of COVID-19), the government spent $312 billion on service contracts in 2019 with a place of performance in the fifty states or Washington, D.C. This excludes (1) financial assistance such as direct payments, loans, and insurance; (2) contracts performed outside the fifty states or Washington, D.C. (because contracts performed in the U.S. territories are addressed later); and (3) expenditures on goods purchased by the Federal government because the final rule does not apply to contracts for the manufacturing and furnishing of materials and supplies.[49]

To determine the share of all output associated with Government contracts, the Department divided industry-level contracting expenditures by that industry's gross output.[50] For example, in the information industry, $10.1 billion in contracting expenditures was divided by $1.9 trillion in total output, resulting in an estimate that covered Government contracts comprise 0.52 percent of every dollar of output in the information industry.

The Department then multiplied the ratio of covered-to-gross output by private sector employment to estimate the share of employees working on covered contracts for each 2-digit NAICS industry. Private sector employment is from the May 2019 Occupational Employment

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

[50] "Gross output (GO) is the value of the goods and services produced by the nation's economy. It is principally measured using industry sales or receipts, including sales to final users (GDP) and sales to other industries (intermediate inputs)." Bureau of Economic Analysis. (2020). Table 8. Gross Output by Industry Group. https://www.bea.gov/news/2020/gross-domestic-product-industry-fourth-quarter-and-year-2019.

and Wage Statistics (OEWS), formerly the Occupational Employment Statistics.[51,52] All workers performing services on or in connection with a covered contract are covered by the Executive order and this final rule, however, unincorporated self-employed workers are excluded from the OEWS. Thus, the OEWS data are supplemented with data from the 2019 Current Population Survey Merged Outgoing Rotation Group (CPS MORG) to include unincorporated self-employed in the estimate of covered workers. To demonstrate, in the information industry, there were approximately 3.0 million private sector employees in 2019 and covered Government contracts comprise 0.52 percent of every dollar of gross output. The Department multiplied 3.0 million by 0.52 percent to estimate that the Executive order will potentially affect 15,400 workers on covered procurement contracts in the information industry.[53]

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

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

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

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

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

NAICS	Private Employees (1,000s) [a]	Total Private Output (Billions) [b]	Covered Contracting Output (Millions) [c]	Share Output from Covered Contracting	Employees on SCA and DBA Contracts (1,000s) [d]	Employees on Federal Lands and Concessions (1,000s) [e]	Total Contract Employees (1,000s)
11	1,168	$450	$408	0.09%	1	0	1.1
21	699	$577	$103	0.02%	0	0	0.2
22	547	$498	$2,399	0.48%	3	4	6.7
23	9,100	$1,662	$35,692	2.15%	195	3	197.9
31-33	12,958	$6,266	$28,603	0.46%	59	0	59.3
42	5,955	$2,098	$161	0.01%	0	0	0.5
44-45	16,488	$1,929	$327	0.02%	3	37	39.4
48-49	6,215	$1,289	$14,217	1.10%	69	119	187.2
51	2,971	$1,942	$10,076	0.52%	15	23	38.2
52	6,180	$3,161	$12,482	0.39%	24	0	24.4
53	2,699	$4,143	$931	0.02%	1	0	0.6
54	10,581	$2,487	$150,888	6.07%	642	9	650.6
55	2,470	$675	$0	0.00%	0	0	0.0
56	10,158	$1,141	$36,313	3.18%	323	14	337.3
61	3,271	$381	$4,250	1.11%	36	1	37.2
62	20,791	$2,648	$11,099	0.42%	87	0	87.5
71	2,949	$382	$81	0.02%	1	17	17.4
72	14,303	$1,192	$1,018	0.09%	12	33	45.6
81	5,260	$772	$2,686	0.35%	18	1	18.9
Total	**134,761**	**$33,691**	**$311,733**	**0.93%**	**1,491**	**259**	**1,750**

[a] OEWS May 2019. Excludes Federal U.S. Postal service employees, employees of government hospitals, and employees of government educational institutions. Added to the OEWS employee estimates were unincorporated self-employed workers from the 2019 CPS MORG data.
[b] Bureau of Economic Analysis, national income and product account (NIPA) Tables, Gross output. 2019.
[c] USASpending.gov. Contracting expenditures for covered contracts in 2019.
[d] Assumes share of expenditures on contracting is same as share of employment. Assumes employees work exclusively, year-round on Federal contracts. Thus, this may be an underestimate if some employees are not working entirely on Federal contracts.
[e] Calculated by multiplying the number of firms by the average employees per firm.

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

The methodology to estimate potentially affected workers in the U.S. territories is similar to the methodology above. The primary difference is that data on gross output in the territories are not available, and so the Department had to make some assumptions. Federal contracting expenditures from USASpending.gov data show that the Government spent $1.8 billion on service contracts in 2019 in Puerto Rico, Guam, and the U.S. Virgin Islands. Other territories were excluded from this analysis because necessary data are not available (i.e., OEWS employment data which are used to estimate number of potentially affected workers, and OEWS wage data which are used to estimate affected workers).[54] The Department approximated gross output in these three territories by calculating the ratio of the Gross Domestic Product (GDP) to total gross output for the U.S., then applying that ratio to GDP in each territory. For example, the Department estimated that Puerto Rico's gross output totaled $140.5 billion.[55]

The rest of the methodology follows the methodology for the fifty states and Washington, D.C. To determine the share of all output associated with Government contracts, the Department divided contracting expenditures by gross output. The Department then multiplied the ratio of covered contract spending to gross output by private sector employment to estimate the share of employees working on covered contracts.[56] This analysis was not conducted at the industry level because GDP data for the territories is not available by NAICS. Additionally, the number of USASpending observations in some industries is very small, making estimates imprecise. The

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[54] The other territories comprise a very small share of Federal contracting expenditure and thus the impact of their exclusion from this analysis is expected to be very small (0.1 percent of all Federal contracting expenditures in 2019). This includes American Samoa and the Commonwealth of the Northern Mariana Islands.

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

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

Department estimated 11,800 employees will be potentially affected in Puerto Rico, Guam, and the U.S. Virgin Islands.

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

The above analysis found 1.5 million potentially affected employees on SCA and DBA contracts. However, the employees of entities operating under covered nonprocurement contracts on Federal property or lands may not be included in that total. To account for these employees, the Department used a variety of sources. First, the Department estimated the number of entities operating under covered nonprocurement contracts on Federal property or lands (section IV.B.2.). Then the Department multiplied the number of contracting firms by the number of potentially affected employees per contracting firm, by industry. This ratio was calculated by dividing the potentially affected employees on direct contracts by the number of contractors (prime and subcontractors) with potentially affected employees from USASpending. For example, in the information industry, there are 15,400 potentially affected workers in 4,000 entities, for an average of 3.9 potentially affected workers per firm. This estimate of potentially affected workers per firm is multiplied by the estimated 5,872 entities in the information industry operating under covered nonprocurement contracts on Federal property or lands, resulting in 22,800 potentially affected employees in these firms.

The exception to the above methodology is for employees of military Exchanges. These 41,500 employees are directly included because Exchanges are very large employers and using the ratio method above would underestimate employment.[57] The AAFES employs 35,000 employees,[58] NEXCOM employs 13,000 associates,[59] and MSX employs 12,000 workers.[60] Data on employment for the Coast Guard Exchange (CGX) was not available and so the Department

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[57] Many of these employees are Federal employees, but because it may include some contractors, the Department has chosen to include these workers in the analysis.
[58] AAFES. (2019). *Exchange Fact Sheet 2019*. https://www.aafes.com/Images/AboutExchange/factsheet2017b.pdf.
[59] Navy Supply Systems Command. (2020). *2019 Navy Exchange Service Command Annual Report*. https://www.mynavyexchange.com/assets/Static/NEXCOMEnterpriseInfo/AR19.pdf.
[60] Marine Corps Community Services. (n.d.). *About Us*. https://usmc-mccs.org/about/.

estimated there are 613 employees.[61] These numbers were then reduced by 32 percent to remove employees stationed overseas, based on the share of AAFES net sales that occur outside the continental U.S.[62] Summing these calculations over all industries results in an additional 259,300 covered employees for a total of 1.8 million potentially affected employees.

d. Additional Considerations

Because the Executive order's requirements only apply to certain contracts entered into, renewed, or extended after January 30, 2022, some of these potentially affected workers may not be impacted in the first year after implementation. However, the Department believes the majority will be impacted in Year 1. For example, section 9(c) of the Executive order "strongly encourage[s]" agencies administering existing contracts "to ensure that the hourly wages paid under such contracts or contract-like instruments are consistent with the minimum wages specified [under the order]." Additionally, if workers are staffed on more than one contract, contractors may increase the workers' hourly wage rates on all contracts as soon as any one of the contracts is impacted. Lastly, rather than increasing pay for only a subset of their workers, some employers may increase wages for all potentially affected workers earning less than $15 per hour at the time their first contract is affected (rather than paying different wage rates to employees working on new contracts and employees working on existing contracts). For these reasons, the Department included all workers in the analysis of Year 1 impacts. This assumption may result in an overestimate of Year 1 impacts, but the Department believes it is preferable to overestimate transfers in Year 1 than to underestimate transfers because of uncertainty when contractors will be affected.

While some SCA contracts are for terms of more than a year (and hence may not be covered by Executive Order 14026 for several years if the contract was entered into in the last

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

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

year or two), many consist of a base term of one year followed by a series of 1-year option periods. Executing a new option year under such a contract will trigger the Executive order's provisions. It is reasonable to assume that many such contracts (whether base or option period) will be entered into during the first effective year.

The Department notes that at first glance the estimated number of potentially affected firms (507,200) and potentially affected employees (1.8 million) may seem inconsistent because this is an average of only 3.5 potentially affected employees per contracting firm. This perceived inconsistency is partially due to the two separate data sources used (SAM and USAspending) and the fact that the number of affected firms is likely overestimated to ensure costs are not underestimated. For example, the number of potentially affected firms includes firms without active contracts and potentially some firms that only supply products. If the number of firms in USASpending is used instead of SAM, the Department estimates that there are 167,800 firms (88,800 prime contractors in USASpending, 33,500 subcontractors from USASpending, and 45,500 entities with contracts on Federal property or lands) with 10.5 potentially affected employees per firm. Additionally, it is helpful to recall that the estimate of potentially affected employees represents employees working exclusively and year-round on covered contracts. This may only be a segment of a contracting firm's workforce.

4. Number of Affected Employees

The Department estimates that of the 1.8 million potentially affected employees identified above, 327,300 will be affected and see an increase in wages. The Department performed calculations for workers in the fifty states and Washington, D.C., then seperately for the territories due to data limitations for the territories. This section concludes by projecting affected workers in future years.

a. Affected Workers in the Fifty States and Washington, D.C.

The Department used the 2019 Current Population Survey Merged Outgoing Rotation Groups (CPS MORG) to estimate the percentage of workers in the fifty states and Washington,

D.C. earning between the applicable 2019 minimum wage for federal contractors and $15.[63,64,65] In 2019, the applicable minimum wage rates under Executive Order 13658 were $10.60 for non-tipped workers and $7.40 for tipped workers. The Department used 2019 data due to concerns that because of effects attributable to the COVID-19 pandemic, 2020 data may not accurately reflect the affected workforce.

The Department limited its analysis to employed individuals in the private sector (with a class of worker of "private, for profit" or "private, nonprofit"). Earnings for self-employed workers are not included in the CPS MORG; therefore, the Department assumed the wage distribution for self-employed workers was similar to that for employees. The Department used the hourly rate of pay variable for hourly workers[66] and calculated an hourly rate based on usual weekly earnings and usual hours worked per week for non-hourly workers.[67,68] The Department

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

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

[65] The Department has not used state-specific wage distributions here, because there are very few instances in which the place of performace for a contract is definitively known. Additionally, the CPS sample sizes are too low to get reliable state level estimates that are also broken down by industry. If the distribution of contract spending across states is different from the geographic distribution of total employment, then there could be a difference in estimates based on national and state wage distributions.

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

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

[68] As explained earlier, §§ 23.20 and 23.40 exclude workers employed in a bona fide executive, administrative, or professional (EAP) capacity, as those terms are defined in 29 CFR part 541, from the requirements of Executive Order 14026. Among other requirements, these workers generally must be paid, on a salary or fee basis, a certain minimum amount, which increased from $455 per week to $684 per week on January 1, 2020. *See* 29 CFR 541.600 through 541.606; 84 FR 51230 (increasing the standard salary level generally required to exempt a

excluded workers with unlikely wages or earnings—i.e., those who reported usually earning less than $50 per week (including overtime, tips, and commissions) and workers with an hourly rate of pay less than $1 or more than $1,000.

Some non-hourly workers had missing hourly wage rates, primarily because they respond that usual hours per week vary.[69] The Department distributed the weights of the non-hourly workers with missing hourly rates to non-hourly workers with valid hourly wage rates, then dropped the workers with missing hourly rates.

To ensure the appropriate denominator for the percentage of workers earning an hourly rate in the affected range, the Department dropped workers earning less than the 2019 rate required by Executive Order 13658. First, the Department defined tipped workers as those in occupations of "Waiters and waitresses" or "Bartenders" and in the "Restaurants and other food services" or "Drinking places, alcoholic beverages" industries.[70] The Department dropped tipped workers earning less than $7.40 per hour and non-tipped workers earning less than $10.60 per hour.[71] Lastly, the Department calculated the share of workers earning less than $15 per hour by 2-digit NAICS code industry (Table 5).

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worker as an EAP from $455 per week to $684 per week). However, due to uncertainties regarding whether and to what extent non-hourly workers earning at or below the equivalent of $15 per hour perform the requisite job duties to qualify as bona fide EAPs, the Department has not accounted for EAPs in its estimate of affected workers. The Department estimated that by assuming all non-hourly workers who earned at least $455 per week in 2019 are exempt, the number of affected workers would decrease by 18 percent. Using the current salary level of $684 per week as the threshold for the EAP exemption would reduce the number of affected workers by 7 percent. These are overestimates, because there are millions of workers who meet the part 541 salary criteria who do not qualify for the EAP exemption due to their job duties. *See, e.g.*, 84 FR 51257 (Figure 1).

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

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

[71] About 10 percent of tipped workers report being paid nonhourly. These workers may have tips included in the hourly rate calculated here because there is no way to determine how much of usual weekly pay is tips. To the extent that any of these nonhourly tipped workers have tips included in their calculated hourly rate, this would result in a slight overestimation of the average hourly rate for all tipped workers.

This method assumes that the distribution of wages is similar between Federal Government contract employees and the broader workforce, as there is not a reputable source for data on wages paid to Federal contract employees. If covered workers' wages are higher, then this will result in an overestimate of transfers. The Department requested comments and data on the earnings of Federal Government contract employees but did not receive any applicable responses.

The methodology to estimate potentially affected workers captures tipped workers earning less than $15 per hour. However, the rule only requires tipped workers to be paid a minimum cash wage of $10.50 in 2022, with incremental increases until parity with non-tipped workers is reached on January 1, 2024. Therefore, the Department may overestimate transfers for tipped workers in the first two years after this rulemaking taking effect. The Department believes this potential bias is small because contractors on the most commonly occurring DBA- and SCA-covered contracts rarely engage tipped employees on or in connection with such contracts. Additionally, as was the case with the 2014 rulemaking implementing Executive Order 13658,[72] the Department received no data from interested commenters indicating that a significant number of tipped employees would be covered by that Executive order.

Multiplying these shares of workers earning below $15 per hour by the estimated number of employees covered by this rule yields an estimated 320,100 affected employees in Year 1 (Table 5). Although employees on some covered contracts may not be affected in Year 1, the Department assumes all are affected to ensure impacts are not underestimated (*see* section IV.B.3. for a discussion on this assumption).

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

NAICS	Total Employees (1,000s)	Share Below $15	Affected Employees (1,000s)
11	1.10	48%	0.5
21	0.18	9%	0.0
22	6.67	7%	0.4

[72] *See* 79 FR 60696.

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

Executive Order 13838 presently exempts contracts entered into with the Federal Government in connection with seasonal recreational services and also seasonal recreational equipment rental for the general public on Federal lands from coverage of Executive Order 13658.[73] Executive Order 14026 revokes Executive Order 13838 as of January 30, 2022. The Department believes these currently exempt workers are already captured in the number of "potentially affected" workers—*i.e.*, all workers on federal contracts of the kind covered by Executive Order 14026. However, the methodology to estimate "affected" workers may not adequately capture all of these seasonal workers because their wages may not be between $10.60 and $15 per hour (i.e., they may earn as low as $7.25 per hour). The Department believes that the number of workers potentially missing is very small. In the final rule implementing Executive Order 13838, the Department estimated there were 1,191 affected employees (i.e., exempt

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

seasonal workers earning between $7.25 and $10.30 per hour).[74] A similar number is likely missing from the current analysis because they earn less than $10.60 per hour. Affiliated Outfitter Associations (AOA) asserted that the Department has grossly underestimated the number of seasonal recreation workers. They point to the fact that the "Grand Canyon National Park alone has over 1,000 seasonal recreational workers." However, these numbers are not comparable. The Department's estimate of 1,191 is the number of workers potentially underestimated, not the total number of workers currently exempt under Executive Order 13838. Also, with respect to the specific example given, the Department further notes that the state of Arizona's minimum wage in 2019 was $11 per hour, which was above the Executive Order 13658 minimum wage rate of $10.60 per hour. The Department's methodology should not result in any underestimate for seasonal recreation workers in any state where such workers were paid a minimum wage above $10.60 per hour in 2019.

b. Affected Workers in U.S. Territories

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

The OEWS reports wage percentiles for Puerto Rico, Guam, and the U.S. Virgin Islands. The Department used these percentiles and a uniform distribution to infer the percentile associated with $15 per hour. The Department then applied this percentile to the population of potentially affected workers. For example, in Puerto Rico, the Department estimated that 71 percent of the 4,500 potentially affected employees (3,200 workers) earn less than $15 per hour. In total, the Department estimated 7,200 workers will be affected in these three U.S. territories.

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

c. Affected Worker Projections

To estimate the number of affected workers in later years, the Department first considered whether workers affected in Year 1 will continue to experience wage increases as a result of this final rule in Years 2 through 10. The Department assumes they will because the Executive Order 14026 minimum wage will continue to increase on an annual basis according to inflation, as measured by the CPI-U. In the absence of this final rule, the Department assumes that affected workers' wages would increase at the rate required under Executive Order 13658, which also increases on an annual basis according to the CPI-U. Therefore, workers affected by this rule in Year 1 will continue to experience a comparably higher wage rate than they otherwise would in Years 2 through 10, but would still have experienced wage rate increases under the baseline situation.

The Department accounted for employment growth by using the compounded annual growth rate based on the ten-year employment projection for 2019 to 2029 from the Bureau of Labor Statistics' (BLS') Employment Projections program.[75] In Year 10, there will be 345,600 affected workers.

The number of affected workers in Year 1 implicitly takes into account current state minimum wages by looking at the distribution of wage rates paid. If states increase their minimum wages in the future, and the current method is applied to those future years, then affected workers or transfers associated with increased wages could be somewhat lower than estimated.

5. Demographics of Employees in the Affected Wage Rate Ranges

This section presents demographic and employment characteristics of the general population of workers in the affected wage rate ranges. The Department notes that the demographic characteristics of Federal contractors may differ from the general population in the

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

affected hourly wage rate ranges; however, data on the demographics of only affected workers are not available.

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

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

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

	Distribution of All Workers	Distribution of Workers with Wages in the Affected Range
By Occupation		
Management, business, & financial	16.1%	5.1%
Professional & related	13.9%	5.7%
Services	23.7%	33.9%
Sales and related	10.9%	14.3%
Office & administrative support	12.1%	15.4%
Farming, fishing, & forestry	0.8%	1.9%
Construction & extraction	5.3%	4.1%
Installation, maintenance, & repair	3.4%	2.2%
Production	6.7%	8.4%
Transportation & material moving	7.0%	9.0%
By Region / Division		
Northeast	18.1%	16.6%

New England	5.1%	4.7%
Middle Atlantic	12.9%	11.9%
Midwest	21.8%	21.2%
East North Central	15.0%	14.3%
West North Central	6.9%	7.0%
South	36.8%	37.2%
South Atlantic	19.3%	19.5%
East South Central	5.5%	5.6%
West South Central	12.0%	12.0%
West	23.3%	25.0%
Mountain	7.4%	8.1%
Pacific	15.8%	16.9%
By Metropolitan Status		
Metropolitan	88.7%	86.5%
Non-metropolitan	10.7%	12.6%
Not identified	0.6%	0.9%

Note: CPS data for 2019.

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

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

	Distribution of All Workers	Distribution of Workers with Wages in the Affected Range
By Sex		
Male	53.3%	45.6%
Female	46.7%	54.4%
By Race		
White only	77.1%	74.5%
Black only	12.4%	15.7%
All others	10.5%	9.8%
By Ethnicity		
Hispanic	18.1%	25.7%
Not Hispanic	81.9%	74.3%
By Age		
16-25	16.7%	29.5%

26-35	24.5%	23.7%
36-45	20.7%	15.8%
46-55	19.2%	14.6%
56+	19.0%	16.4%
By Education		
No degree	8.9%	14.7%
High school diploma	45.2%	60.8%
Associate's degree	10.7%	10.4%
Bachelor's degree	23.7%	11.1%
Master's degree	8.5%	2.2%
Professional degree	1.3%	0.4%
PhD	1.8%	0.4%

Note: CPS data for 2019.

C. Impacts of the Final Rule

1. Overview

This section quantifies direct employer costs and transfer payments (i.e., wage increases) associated with the final rule. These impacts were projected for 10 years. The Department estimated average annualized direct employer costs of $2.4 million and transfer payments of $1.8 billion. 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 and asserts that they will offset any direct employer costs.

2. Costs

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

a. Regulatory Familiarization Costs

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

Department used one hour of time. The Department has used a smaller time estimate here because most of the affected firms will already be familiar with the previous requirements and will only have to familiarize themselves with the parts that have changed (predominantly the level of the minimum wage). Additionally, this is the average amount of time spent. The Department believes that many of the potentially affected firms will have little to no regulatory familiarization costs because they are not practically affected (e.g., they do not hold active government contracts or all their workers already earn at least $15 per hour.) However, if review of regulations occurs at the establishment level, the Department's regulatory familiarization costs may be underestimated.

The Department requested comments on the estimated time spent on regulatory familiarization. A few commenters asserted that the time estimates were low. The AOA, for example, asserted that the half-hour time estimate is vastly underestimated. In particular, they note that a half-hour is not enough time to review an 82 page proposed rulemaking. As discussed above, the Department has used a small time estimate here because most of the affected firms will already be familiar with the previous requirements and will only have to familiarize themselves with the parts that have changed (predominantly the level of the minimum wage). This estimate represents an assumption about the average time spent across all firms; many will have negligible or no familiarization costs. If some firms take longer than a half-hour to review the rule, it is not inconsistent with the Department's average estimate. Additionally, the Department notes that many firms may not need to review the entire proposed or final rulemaking to determine if and how it applies to them because they will likely review summary materials provided by the Department.

The cost of this time is the median loaded wage for a Compensation, Benefits, and Job Analysis Specialist of $52.65 per hour.[76] Therefore, the Department has estimated regulatory

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[76] This includes the median base wage of $32.30 from the May 2020 Occupational Employment and Wage Statistics (OEWS) plus benefits paid at a rate of 46 percent of the base wage, as

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

Table 8: Year 1 Costs

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

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

b. Implementation Costs

The Department believes firms will incur costs associated with implementing this rule. There will be costs to adjust the pay rate in the records and tell the affected employees, among other minimal staffing changes and considerations made by managers. The Department assumed

estimated from the BLS's Employer Costs for Employee Compensation (ECEC) data, and overhead costs of 17 percent. OEWS data available at: http://www.bls.gov/oes/current/oes131141.htm.

that firms would spend ten minutes on implementation costs per newly affected employee. This estimate was chosen because for most affected workers management decisions will be negligible and the time to adjust the systems is very small. However, costs for some firms may be larger, as discussed below.

Implementation time will be spread across both human resource workers who will implement the changes and managers who may need to assess whether to adjust their schedule. The Department splits the time between a Compensation, Benefits, and Job Analysis Specialist and a Manager. Compensation, Benefits, and Job Analysis Specialists earn a loaded hourly wage of $52.65 per hour.[77] Workers in Management Occupations earn a loaded hourly wage of $86.02 per hour.[78] The estimated number of newly affected employees in Year 1 is 327,300 (Table 8). Therefore, total Year 1 implementation costs were estimated to equal $3.8 million ([$52.65 × 5 minutes × 327,300 employees] + [$86.02 × 5 minutes × 327,300 employees]).

The Department believes implementation costs will generally be a function of the number of affected employees in Year 1. The Department believes there will be no implementation costs for new hires in later years because the cost to set wages would be similar for new hires under the baseline scenario and this final rule. Under Executive Order 13658, contractors were required to increase wages according to the new inflation-adjusted rates published by the Department each year. Assuming all costs are in Year 1, the average annualized implementation costs over ten years, using a 7 percent discount rate, is $538,500.

Some commenters noted that costs will be larger for firms whose workers work on both covered and non-covered work. These firms may track hours separately for covered and non-

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

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

covered work and calculate weekly pay as a function of multiple wage rates. A few commenters assert that the Department's implementation cost time estimate is too low due to these time tracking requirements. The AOA asserts that the cost to track workers' time across covered and non-covered work both exceeds 10 minutes and is an ongoing cost (opposed to a one-time cost as the Department calculated). They state that it is "absurdly unrealistic to believe that a company could pay an employee" different rates for different work but that even if it were feasible that "the recordkeeping alone associated with doing so would be cost-prohibitive." The Department agrees that some of the few firms that were previously exempt from Executive Order 13658 but will be covered by Executive Order 14026 may have to newly track employees' time across covered and non-covered work, and this extra time may exceed 10 minutes.[79] However, as noted above, the estimated implementation time of 10 minutes per newly-affected employee is the average across all affected employees, and many firms were already tracking employees' time across covered and non-covered work under Executive Order 13658 and other applicable laws, so they will not see any additional ongoing costs. The slightly higher cost is limited to a small subset of firms. Many firms' employees only work on covered tasks, and many firms already track workers' time as required by law and by contract. Therefore, the Department believes 10 minutes is still appropriate for the average firm.

Additionally, it is fairly routine for contractors subject to the SCA's and DBA's prevailing wage requirements to segregate and document employee work that is and is not covered by those laws. Workers on SCA- and DBA-covered contracts may also perform work in

[79] As discussed earlier in Section II(B), Executive Order 14026 does not require employers to pay workers a different wage rate for work that is not covered by the order. Employers who respond to the Executive order by paying affected employees at least the Executive order wage rate for all work the employee performs will not have to distinguish between work that is or is not covered by the order.

multiple classifications with different prevailing wage rates.[80] Therefore, the Department believes that additional recordkeeping costs for firms will be limited.

c. Other Potential Costs and Eventual Bearers of Transfers

In addition to the costs discussed above, there may be additional costs that have not been quantified. These include compliance costs, increased consumer costs, and reduced profits. The latter two hinge on the belief that employers' costs will increase by more than the associated productivity gains and cost-savings. As discussed in further detail in Section IV.C.4, employers could experience multiple benefits associated with this rule that could offset adverse impacts to prices or profits. One commenter asserted that the Department should quantify these additional costs and provide a more thorough analysis. The Department has not quantified these costs because it would require making many assumptions for which adequate data are not available. However, the Department has expanded the analysis provided earlier in the NPRM in response to comments.

i. Contract Clause Compliance Costs

This final rule requires Federal executive departments and agencies to include a contract clause in any contract covered by the Executive order. The clause describes the requirement to pay all workers performing work on or in connection with covered contracts at least the Executive order minimum wage. Contractors and their subcontractors will need to incorporate the contract clause into covered lower-tier subcontracts. The Department believes that the compliance cost of incorporating the contract clause will be negligible for contractors and subcontractors. Contractors subject to the SCA and/or DBA have long had a comparable flow-down obligation for the compliance of subcontractors by operation of the SCA and DBA. Thus, upper-tier contractors' flow-down responsibility, and lower-tier subcontractors' need to comply

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[80] *See, e.g.*, 29 CFR 5.5(a)(1) ("Laborers or mechanics performing work in more than one classification may be compensated at the rate specified for each classification for the time actually worked therein; *Provided*, That the employer's payroll records accurately set forth the time spent in each classification in which work is performed").

with prevailing wage-related legal requirements when they are incorporated into their subcontracts, are well understood concepts to SCA and DBA contractors. *See* 29 CFR 5.5(a)(6) and 4.114(b). Moreover, the flow-down provisions of Executive Order 14026 are identical to the flow-down obligations that currently exist under Executive Order 13658. The Department therefore expects that there will be very few contractors covered by Executive Order 14026 who do not have familiarity with the flow-down liability principles in this final rule.

ii. Procurement Contracts - Consumer Costs, Prices, and Profits

In general, the relevant consumer for procurement contracts is the Federal Government. If the rulemaking increases employers' costs (beyond offsetting productivity gains and cost-savings), and contractors pass along part or all of the increased cost to the government in the form of higher contract prices, then Government expenditures may rise. Alternatively, profits may shrink. However, as discussed later, benefits attributable to the Executive order are expected to accompany any such increase in expenditures, resulting in greater value to the Government. Even without accounting for increased productivity and cost-savings, direct costs to employers and transfers are relatively small compared to Federal covered contract expenditures (about 0.4 percent of contracting revenue, *see* section IV.C.5.), and thus the Department believes that any potential increase in contract prices or decrease in profits will be negligible. Impacts to profits may be larger for firms that pay lower wages, for firms with more affected workers, and for firms that cannot as readily pass increased costs onto the government or the consumer. Commenters generally did not present concerns with the Department's synopsis of consumer costs for procurement contracts.

iii. Non-procurement Contracts - Consumer Costs, Prices, Profits, Business Closures, and Competitiveness

Non-procurement contracts on Federal lands, such as concessions contracts and permittee contracts, may experience different impacts than procurement contracts. This is predominantly because these contractors cannot as directly pass costs along to the Federal Government in the form of an increased bid amount or similar charge for the next contract. One commenter who

owns Subway restaurants noted that they may have to close an establishment as a consequence of the Executive order. As discussed elsewhere in this final rule, the Department notes that there may be actions employers can take to mitigate costs, in addition to the various benefits they will observe, such as increased productivity and reduced turnover. In some instances, increased contractor costs may be passed along to the public in the form of higher prices. In limited cases, where price pass-through is limited either by government oversight of prices or by competition, this may result in reduced profits in certain instances, assuming that none of the beneficial effects or mitigating employer responses discussed in this analysis apply. Multiple commenters expressed concern about the impact of the Executive order on their prices, competitiveness, and ultimately their viability.

On average, direct costs and payroll costs (i.e., transfers) are a relatively small share of total payroll (less than 0.7 percent, *see* section IV.C.5.). Even in the accommodation and food services industry, where wages tend to be lower, costs and transfers are estimated to be less than 5 percent of payroll on average. However, as discussed in response to comments below, this will vary across firms.

The literature tends to find that minimum wages result in increased prices, but that the size of that increase can vary substantially. Ashenfelter and Jurajda (2021)[81] found that wage increases resulted in "full or near-full price pass-through" to the cost of a Big Mac, estimated to be about 70 percent, meaning that 70 percent of the increase in labor costs gets passed through to increased prices. Basker and Khan (2016) note that, "[e]ven with full price pass-through, the income effect of [a] price increase is likely to be very small. The average price of a burger in 2014, according to the C2ER data used in this paper, was approximately $3.77. [Thus, for

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

example, a] 3 [percent] increase in this price amounts to only about 10 cents."[82] Echoing the minimal anticipated price increase, Lemos (2008) found that an increase in the minimum wage of 10 percent raises food prices by no more than 4 percent, and overall prices by no more than 0.4 percent.[83]

Several commenters expressed concern that the proposed rule would have large impacts on their prices, much larger than the average impact presented here by the Department. The Department agrees that the size of price increases will vary based on the company and industry. Companies with larger payroll costs, or more low-wage workers, would have larger impacts. However, the Department believes the size of the increase has been overstated by commenters, because increasing the minimum wage of their workers is expected to help reduce absenteeism and turnover in the workplace and improve employee morale and productivity. Additionally, increased efficiency and quality of services could attract more customers and result in increased sales. Contractors may also be able to offset wage increases by negotiating a lower percentage of sales paid as rent or royalty to the Federal government in new contracts.[84]

Price increases and impacts may be more pronounced among affected firms which are not currently covered by Executive Order 13658, including seasonal recreational businesses exempt under Executive Order 13838. Whereas most affected contractors are already required to pay $10.95 per hour (as of January 1, 2021), some firms not presently subject to Executive Order 13658 may pay lower wages, e.g., the FLSA minimum wage of $7.25 per hour. However, with respect to seasonal recreational businesses presently exempt under Executive Order 13838, the Department notes that many of these entities were subject to Executive Order 13658 from 2015

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

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

[84] This ability to negotiate is not universal. For example, permits for ski areas, marinas, and organizational camps are subject to land use fees that are determined by federal statute or agency regulations or directives.

through most of 2018, which required them to pay workers a minimum wage of $10.10 to $10.35 per hour before Executive Order 13838 exempted them. It is unlikely these establishments would have lowered their employees' pay substantially from these rates. This appears consistent with comments submitted by some outfitter and guide establishments that indicate they currently pay more than $7.25 per hour. Additionally, the Department believes the efficiency gains noted above are also applicable here.

In non-procurement contracts, commenters asserted these price increases could impact their customers (those individuals who purchase goods and services from private companies on Federal property), especially low-wage customers. Many also claimed this regulation undermines recent government and non-profit efforts to expand access to Federal parks and lands. For example, the AOA wrote that "increasing costs to the public is contrary to current policy efforts to expand access to outdoor recreation opportunities, particularly among traditionally underrepresented or underserved populations." The National Park Hospitality Association wrote, "NPS has recently increased its efforts to promote more diversity and inclusion in our national parks through its Office of Relevancy, Diversity and Inclusion […] [This rule] will directly contradict and frustrate efforts to increase diversity and inclusion in our national parks." The Department believes in general that any price increase needed to cover increased payroll costs will not be large enough to deter access. As noted above, the payroll increases are generally small, and likely only a subset of those increases are passed along to consumers in the form of higher prices. For example, one commenter indicated that increasing entry level wages to $15 per hour, as well as increasing the wages of more experienced workers would increase their wage bill by $2.1 million per year. However, the commenter also stated they average 500,000 customers per year, so the Department calculated that if the commenter was to increase their price by $4.20 per customer, it would cover the increased wage costs. Additionally, the Department believes that the increased productivity and reduced turnover benefits, as well as the alternatives available through renegotiation, as discussed above, would help offset the costs.

Commenters also noted that these price increases would impact their profits, competitiveness, and viability. Although some commenters mentioned that increasing the minimum wage reduces profits, no commenters provided data or substantive information on the extent to which profits would be impacted. Additionally, the Department found little literature showing a link between minimum wages and profits. One paper by Draca et al. (2011) did find a statistically significant, but not necessarily large, negative link between minimum wages and profits in the United Kingdom.[85]

Several commenters discussed the impacts of the Executive order on competitiveness, and how this limits the potential price increases they can make. SBA Office of Advocacy wrote, "[s]mall businesses in recreation industries on federal lands may not be able to pass on these extra wage costs to their customers because of competition from nearby recreation businesses that do not have ties to Federal land. One outfitter providing river tours noted that they had multiple competitors nearby that are not on federal land and only pay a minimum wage of $7.25 an hour." MAD Adventures/Grand Adventures wrote, "[w]e have to choose to either eat the additional cost [or] pass it along to our customers. In highly competitive [industries] such as mine, it is difficult to pass along the additional cost to customers when some of competitors never operate on federal land." A Subway franchise operator located on military bases noted that competitors are not subject to the same wage increases. The Department believes that establishments operating on Federal property compete on characteristics other than price. Specifically, recreating on Federal lands has many advantages to non-Federal lands (such as aesthetics and remoteness). This is evidenced by the willingness of contractors, including permittees, to pay greater costs to operate on Federal lands. Therefore, these operators may be able to remain competitive even after moderate price increases. Similarly, fast-food operators on military bases have a distinct advantage to off-base competitors due to location convenience.

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

Several commenters noted that their prices are either regulated by the government or must be approved by the government, making it harder to pass costs along to consumers in the form of higher prices. Consequently, the impact on profits and business closures may be more pronounced for these firms. The Department notes that in many cases, these firms may be able negotiate a lower percentage of sales paid as rent or royalty to the Federal government in new contracts.[86] Additionally, although requiring approval to increase prices may be an additional hurdle for some, it does not prevent price increases. Prospective increases in contract amounts due to higher labor costs for companies with procurement contracts also need to be tacitly "approved" by the government agency awarding the new contract. While the Department does acknowledge that price restrictions will be detrimental to some firms' ability to adapt, as noted earlier, the increase in cost is expected to generally be small. The increased productivity associated with increased wages may also lead to increased sales and business, potentially offsetting any costs.

iv. Other Costs Noted by Commenters

A variety of other costs were noted by commenters. Rocky Mountain Adventures and the National Ski Area Association argued that this rule will generate wage compression by raising the wages of the lowest paid workers and potentially restricting firms' ability to give raises to more experienced workers, or by restricting hiring. Additionally, as other commenters pointed out, raising the minimum wage for lower-paid workers could also lead to spillover effects in the form of wage increases for higher-paid workers. *See* Section IV.C.3.c for a discussion of these effects. Additionally, higher entry-level wages will attract more workers to the field, and may with time result in more experienced personnel.

An anonymous commenter noted specific concerns for the private construction industry in U.S. territories. They assert that by paying more on Federal contracts, it will increase prices

[86] If a reduction in profits results in fewer vendors competing to lease a property, the agency owning the property may have to lower its rent or risk no one wanting to lease their property.

for private construction, make it harder to find labor, and drive out private construction. The Department disagrees with the magnitude of these assertions. This rule may result in the most-skilled workers favoring Federal construction jobs, but the total supply of labor in the territories will not decrease. In fact, with an upward sloping labor supply curve, higher wages should entice additional workers into the labor market. Workers who cannot obtain work on the higher-paying Federal contracts would continue to work at the current market wage rates.

One commenter, the Colorado River Outfitters Association, noted that permittees pay the Federal government fees based on prices. Therefore, price increases will result in higher fees. The Department notes that the size of this increase is likely to be small because price increases are likely to be small and fees are a small percentage of the price increase.

3. Transfer Payments

The Department estimated transfer payments to workers in the form of higher wages. Directly, these are transfers from employers to the employees; however, ultimately these transfer costs to firms may be offset by higher productivity, cost-savings, or cost pass-throughs to the government and consumers. The Department believes negative impacts on employment or fringe benefits will be small to negligible (sections IV.C.3.d. and IV.C.3.e.). Additionally, some workers currently earning at least $15 per hour, or working on non-covered contracts, may also receive pay raises due to spill-over effects (this is also discussed qualitatively in section IV.C.3.c.).

Many papers have found increased earnings for low-wage workers associated with a minimum wage increase. The Congressional Budget Office's (CBO's) 2019 paper provides an overview of this literature.[87] Based on this research, economists have continually found that increasing the minimum wage can, under certain conditions, increase earnings and alleviate poverty. The CBO (2019) estimates a national $15 per hour minimum wage, implemented by

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

2025, could raise earnings for 27 million workers, 17 million of whom would have their rate increased to the new minimum wage and ten million of whom may receive spillover effects.

a. Calculating Transfer Payments, Year 1

To estimate transfers, the Department used the population of affected workers estimated in section IV.B.4 and the 2019 CPS data. Hourly transfers (excluding overtime pay) are estimated on an industry basis as the difference between $15 per hour and the average current hourly wage of workers with wages in the affected wage rate range.[88, 89] *See* Table 9 for the average hourly wage used for each industry. Hourly transfers are then multiplied by average weekly hours in the industry and 52 weeks. Using wage data by industry results in Year 1 base pay transfer payments of $1.5 billion in 2020 dollars (Table 9). 2019 transfers were inflated to 2020 dollars using the GDP deflator.[90]

In the NPRM, the Department did not estimate transfers associated with overtime pay. However, in response to commenter feedback from entities such as the AOA and SBA's Office of Advocacy, the Department has incorporated estimates of increased overtime payments into the final rule's transfer estimate. To calculate increased overtime payments, the Department used hours and wages for the subset of affected workers who work overtime. Annual overtime transfers are then calculated, by industry, as the product of the number of affected overtime workers, the average wage rate, the average number of weekly overtime hours, the overtime premium of 0.5 times the hourly rate, and 52 weeks. After inflating to 2020 dollars, this results in annual overtime pay transfers of $244.9 million and annual total transfers of $1.7 billion.

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

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

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

There are several reasons Year 1 transfers may be over- or underestimated, but the Department believes the net effect is an overestimate. First, as noted in section IV.B.3., the Department assumed all workers would be affected in Year 1, whereas in reality some will not receive transfers until later years. Second, some workers will not be impacted until partway through 2022. For example, many contracts may not be impacted until the beginning of the fiscal year on October 1, 2022. Therefore, annualizing Year 1 transfers for a full 52 weeks should result in an overestimate. Third, the Department assumed the number of overtime hours worked would remain the same, whereas increased overtime payments could result in some employers attempting to offset or minimize overtime costs by reducing employees' overtime hours. Conversely, transfers may be underestimated because the Department did not account for higher wages paid on non-Federal work or to workers already earning at least $15 (section IV.C.3.c.).

Some commenters believe the transfer payments are underestimated. For example, SBA Office of Advocacy noted an apparent disconnect between the size of the per-firm transfer estimate and the approximately 37 percent increase in the minimum wage. However, as shown in Table 5, only a minority of employees will receive wage increases and of those, some employees are earning above the Executive Order 13658 minimum wage, thus the average increase in pay is much less than 37 percent (Table 9). Other commenters noted that the Department excluded spillover costs to workers already earning $15 per hour or working on non-covered contracts. These comments are addressed in section IV.C.3.c. Associated Builders and Contractors believe the transfer payment is underestimated due to data limitations for U.S. territories. The Department used the best available data on wage distributions for the territories which only existed for Puerto Rico, Guam, and the U.S. Virgin Islands. The remaining territories are such a small share of Federal government contracting that any bias introduced due to data limitations is likely to be small.

Table 9: Base Pay Transfer Payment Calculation, Year 1

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

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

[b] Inflated to 2020$ using GDP Deflator.

[c] Mean wage and hours among workers earning at least between $10.60 ($7.40 for tipped workers) and $15 per hour is unavailable for territories; therefore, the Department used 2019 CPS MORG data from the fifty states and Washington, D.C.

Table 10: Overtime Pay Transfer Payment Calculation and Total Transfers, Year 1

NAICS	Affected Employees Working Overtime			Annual Overtime Transfers		Total Transfers (Base and Overtime) in 2020$ (Millions)
	Number (1,000s)	Average Overtime Hours	Average Wage [a]	In 2019 (Millions)	In 2020$ (Millions) [b]	
11	0.2	14.0	$12.46	$0.8	$0.8	$3.7
21	0.0	20.0	$13.28	$0.0	$0.1	$0.1
22	0.1	18.8	$12.81	$0.7	$0.7	$2.8
23	5.6	11.3	$13.08	$21.7	$21.9	$154.5
31-33	2.2	10.2	$13.04	$7.5	$7.6	$53.1
42	0.0	11.6	$13.01	$0.1	$0.1	$0.5
44-45	1.8	11.1	$12.79	$6.6	$6.7	$74.2

48-49	9.9	15.4	$13.03	$51.4	$52.0	$241.4
51	0.9	11.7	$12.79	$3.5	$3.6	$24.9
52	0.4	10.4	$13.05	$1.3	$1.3	$11.7
53	0.0	14.5	$13.03	$0.1	$0.1	$0.6
54	10.0	13.5	$13.12	$46.3	$46.9	$242.9
55	0.0	12.6	$12.33	$0.0	$0.0	$0.0
56	16.5	11.4	$12.84	$62.9	$63.7	$543.4
61	0.8	14.2	$12.94	$4.0	$4.0	$28.2
62	2.7	14.9	$12.88	$13.5	$13.7	$94.3
71	0.6	11.2	$12.71	$2.3	$2.3	$25.7
72	2.9	11.7	$12.30	$11.0	$11.2	$143.9
81	0.8	12.3	$12.80	$3.3	$3.4	$27.2
Territories [c]	1.1	12.4	$12.84	$4.7	$4.8	$37.7
Total	**56.7**	**N/A**	**N/A**	**$242.0**	**$244.9**	**$1,710.6**

[a] CPS MORG 2019. Mean wage for workers earning between $10.60 ($7.40 for tipped workers) and $15 per hour.
[a] Inflated to 2020$ using GDP Deflator.
[c] Mean wage and hours among workers earning at least $10.60 unavailable for territories; therefore, used the 2019 CPS MORG data from the fifty states and Washington, D.C.

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

Commenters asserted that the transfer estimates are not appropriate for outfitters and guides on Federal lands, particularly due to the long hours that some workers of such entities may work on overnight or multi-day trips. For example, SBA Office of Advocacy, wrote, "[w]hile some employers can manage costs by limiting employees to 40 hours per week, it would not be feasible to switch out these recreational workers after 40 hours as they would be in the middle of remote trips in these parks." The Department has partially addressed these concerns by incorporating overtime pay into the transfer calculation. This reflects the impact of overtime for

the arts, entertainment, and recreation industry as a whole. However, the Department does acknowledge that those working on multi-day trips in remote areas do pose a unique situation, and hence the Department discusses commenters' concerns specific to this industry in more detail here.

First, the Department notes that some of these employers may be able to use a partial overtime pay exemption under FLSA section 13(b)(29).[91] This exemption provides, under specific circumstances involving employees of a private "amusement or recreational establishment located in a national park or national forest or on land in the National Wildlife Refuge System" operating under a contract with the Secretary of the Interior or the Secretary of Agriculture to provide services or facilities on such land, that overtime pay only needs to be paid for time worked in excess of 56 hours in a week. Employers that meet the criteria for this exemption would see a reduction in the amount of overtime pay required. Second, employers may be able to exclude from compensable hours worked bona fide sleep time and other periods when the employee is free from duty where they meet the requirements for doing so under the FLSA. *See* 29 CFR part 785 (providing guidance for determining compensable hours worked). Third, overtime is calculated based on a workweek basis and so for short trips, employers may be able to generally avoid or minimize overtime costs by reducing employee worktime elsewhere in the workweek. Similarly, employers may schedule longer trips to spread across two separate workweeks. *See* 29 CFR 778.105 (providing guidance for determining the workweek).

b. Transfer Payment Projections

For longer-run projected transfers, the Department employed the same method used for Year 1 but used the projected number of employees. The Department applied an employment

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[91] Section 13(b)(29) exempts "any employee of an amusement or recreational establishment located in a national park or national forest or on land in the National Wildlife Refuge System if such employee (A) is an employee of a private entity engaged in providing services or facilities in a national park or national forest, or on land in the National Wildlife Refuge System, under a contract with the Secretary of the Interior or the Secretary of Agriculture, and (B) receives compensation for employment in excess of fifty-six hours in any workweek at a rate not less than one and one-half times the regular rate at which he is employed."

growth rate that is the compounded annual growth rate based on the ten-year projected growth. The Department assumed that wage growth will be similar to growth in the Federal contractor minimum wage (which is indexed annually based on the CPI-W).[92] Therefore, the number of affected workers in Year 1 would also apply in future years. Due to employment growth, transfers increase slightly each year, reaching $1.81 billion in Year 10 (up from $1.71 billion in Year 1). Average annualized transfers over these ten years, using both the 3 percent and 7 percent discount rates, are $1.8 billion. Year 1 transfers implicitly account for current state minimum wages through the distribution of wage rates paid.[93] If states increase their minimum wages in the future, and the current method is applied to those future years, then estimated transfers might be somewhat lower.

This rule would also increase payroll taxes and workers' compensation insurance premiums in addition to the increase in wage payments because these are calculated as a percentage of the wage payment. The Department recognizes that it will be incumbent upon contractors to pay the applicable percentage increase in payroll and unemployment taxes.

c. Spillover Effects

Employees earning above $15 per hour, at affected firms, may also see wage increases. Employers often increase earnings of workers earning above the minimum wage to prevent wage compression. Consider a scenario where a supervisor makes $15 per hour and now the workers that the supervisor supervises receive pay increases to $15 per hour. The supervisor will likely receive a pay increase to maintain a premium over the workers reporting to them. Ashenfelter and Juraida (2012) find evidence of this spillover effect as a method to retain workers in limited-

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

[93] In using the CPS MORG data to estimate the percentage of workers earning a wage rate in the affected range, the Department did not drop workers reporting wages that were less than the state minimum wage. However, state minimum wages are reflected in the Department's estimate of workers earning wage rates in the affected range because workers in those states generally report earning at least the state minimum wage.

function restaurants.[94] Cengiz et al. (2019) also found modest spillover effects up to $3 over the new minimum wage, even at higher levels of minimum wages.[95] Nguyen (2018) estimates that by increasing the Federal minimum wage from $7.25 to $10.10 "up to a third of the work force other than minimum wage earners would also see their earnings increase, such as supervisors who had earned $10.10 and now would see an increase in salary."[96] Dube and Lindner (2021) find spillover effects up to about the 30th percentile of the wage distributions.[97]

A similar type of spillover effect may also occur for workers on non-covered contracts. For example, if two employees perform similar work, but one is on a Federal contract and the other is not, the employer may raise both workers' wages for fairness. Similarly, if an employee works on both covered and non-covered contracts, the employer may increase the employee's wage for all hours, rather than bifurcating by contract.

Several commenters discussed potential spillover effects and some requested the Department quantify these transfer payments. The Department agrees that there will likely be wage increases for some workers earning above $15 per hour or working on non-covered contracts. However, the Department has not quantified this change for several reasons. First, there is uncertainty as to how many workers would receive wage increases and by how much. Second, although contractors may voluntarily raise the wages of such workers to avoid wage compression or maintain fairness, doing so is not a requirement of compliance with Executive Order 14026 or the rule. Additionally, inclusion of potential spillover effects is unlikely to drastically change the Department's findings. EPI conducted an analysis similar to the

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

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

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

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

Department's analysis but with the inclusion of spillover costs for workers earning up to $17.25 per hour. They estimated 390,000 workers would receive pay raises, compared with the Department's estimate of 327,000. EPI also estimated annual transfers of $1.2 billion per year, which is actually lower than the Department's estimate of $1.7 billion (likely due to other methodological differences).

d. Disemployment

The Department reviewed evidence relevant to this final rule's potential to have disemployment effects. Disemployment of low-wage workers occurs when employers substitute capital or fewer more productive higher-wage workers to perform work previously performed by larger numbers of low-wage workers. Economists have studied the size of this potential disemployment effect of increased minimum wages for decades. The consensus among a substantial body of research is that disemployment effects can be small or non-existent.[98] Therefore, the Department believes this final rule would result in negligible or no disemployment effects.

Manning (2020) found no significant impact of increased minimum wages on employment through comprehensive literature reviews.[99] Wolfson and Belman's (2019) conclusion as a result of a meta-analysis of 37 studies found a small disemployment effect, but the effect has decreased over time.[100] Some authors even found positive effects on employment as a result of minimum wage increases (Ahn, Arcidiacono and Wessels, 2011).[101]

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

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

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

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

Ashenfelter and Jurajda (2021) found that increased minimum wages does not inherently facilitate automation in low-wage, low skill jobs, though this research only studied limited-service restaurants.[102] Lordan and Neumark (2018)[103] found that low-skilled workers were more likely to lose their jobs to automation because of minimum wage increases, and workers are able and likely to shift sectors to retail or service as a result. Meanwhile, higher-skilled workers saw increased job opportunities with minimum wage increases. Two studies by Jardim et al. (2018) find mixed employment effects from Seattle's Minimum Wage Ordinance that increased the minimum wage from $9.47 to $11 in 2015 and to $13 in 2016.[104]

The employment effects of a $15 minimum wage can be quite different depending on whether current wages are already close to $15 or substantially lower. A CBO study estimates a disemployment effect of 0.9 percent, but the elasticity underlying that result is quite high (-0.25).[105] Allegretto, Godoey, Nadler, & Reich (2018), for example, estimate elasticities of between -0.03 and -0.11 (not statistically significant), based on minimum wages of $10 to $13 in six large cities between 2014 and 2016.[106]

EPI agreed with the Department's conclusion that this rule would result in negligible or no disemployment. They also cited Dube (2019) as evidence that minimum wage increases generally do not result in disemployment. Additionally, they note that "a federal contracting wage standard is unlike the minimum wage increases studied in that literature: most of the resulting labor cost increases due to a federal contracting standard are funded by government

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

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

[105] Congressional Budget Office (CBO), The Budgetary Effects of the Raise the Wage Act of 2021, (Feb. 2021), https://www.cbo.gov/system/files/2021-02/56975-Minimum-Wage.pdf.

transfers. Therefore there is little incentive for employers to substitute away from low-wage workers in response to the proposed rule."

Conversely, several commenters disagreed with the Department's conclusion that disemployment will be negligible. Representatives Virginia Foxx and Fred Keller cite four sources to demonstrate the potential for negative employment effects. Two of these are surveys asking speculatively about the impacts of a $15 national minimum wage. A 2021 survey conducted by the National Federation of Independent Business found that 74 percent of small businesses said a phased-in $15 minimum wage would negatively impact their business and 58 percent responded that they would reduce the number of employees working for them. A 2019 survey conducted by the Employment Policies Institute of 197 U.S. economists found 84 percent believe a $15 Federal minimum wage would have negative effects on youth employment and that 77 percent believe it would have a negative impact on jobs available. The Department places greater weight on literature evaluating impacts of past minimum wage increases, or literature modeling impacts of future increases, than survey responses that are not necessarily representative or substantiated.

Representatives Foxx and Keller also cite a 2021 working paper by David Neumark and Peter Shirley that reviewed 30 years of literature on the impacts of a minimum wage increase. The commenters note that 79 percent of the studies showed that an increase in the minimum wage leads to a decrease in the level of employment. However, only 54 percent of the cited studies found a statistically significant negative impact at a 10 percent significance threshold; not statistically significant impacts cannot be distinguished from zero impact. Additionally, the median elasticity from the literature is -0.112. This implies that for a 1 percentage point increase in wages, employment would fall by 0.112 percent. An elasticity of this magnitude is generally considered small. Finally, many of the studies in this review are not applicable to this specific rule.

Lastly, Representatives Foxx and Keller cite the Congressional Budget Office's (CBO's) 2021 report studying the impacts of a $15 Federal minimum wage. CBO estimates that a Federal minimum wage increase to $15 would result in 1.4 million job losses. Representatives Foxx and Keller assert that "[s]imilar results would be expected among federal contractors if this $15 minimum wage is enacted." The Department disagrees that similar results are applicable for Federal contractors. Because many federal contractors can pass most of the cost increase on to the Federal Government, the disemployment effects are likely to be much smaller. Additionally, workers on federal contract are already often paid at a rate higher than the Federal minimum wage of $7.25; in fact, many workers are currently subject to a $10.95 per hour minimum wage, so the increase in wages will be much smaller. The Department does note that employment effects among companies operating on Federal lands under nonprocurement contracts, who might be more limited in their ability to pass costs along to the Federal government, may have impacts more in line with the CBO's analysis. However, CBO's primary estimate is fairly small, a reduction of 0.9 percent employment from increasing the minimum wage from $7.25 per hour to $15 per hour (a 107 percent increase). Additionally, CBO uses a larger elasticity than the Department believes is appropriate based on a review of the literature discussed earlier.

Based on the summary above, even after evaluating this additional literature highlighted by some commenters, the Department continues to believe disemployment effects will be small.

e. Reduction in Benefits or Bonuses

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

The National Park Hospitality Association noted that many concessionaires on Federal lands provide additional benefits, such as room and board. They assert that this rule may result in

employees being charged for those benefits. The Department recognizes and understands that some concessionaire contractors on federal lands provide benefits, such as room and board, to their employees. FLSA section 3(m) permits an employer, under conditions specified in 29 CFR part 531, to count toward its minimum wage obligation the reasonable cost of furnishing board, lodging, or other facilities that are customarily furnished to employees. Therefore, an employer/contractor who meets the specified conditions may take a credit against the minimum wage for the provision of board, lodging, and other facilities.[107]

4. Benefits

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

Several commenters supported the Department's analysis of potential benefits. Conversely, the AOA expressed concern that the Department did not quantify these benefits but yet asserts that they will offset employer costs. The Department agrees that ideally these would be quantified, but lacks the data to do so. Therefore, the Department has continued to rely on general findings from the literature to draw its conclusions. The AOA also noted that the findings presented here may not apply to the outfitters and guides industry. The Department believes that

[107] When the criteria are met, the reasonable cost or fair market value of board, lodging, or other facilities may be considered compensation to the employee, regardless of whether the employer calculates charges for such facilities as additions to or deductions from wages. 29 CFR 531.29.

benefits such as increased morale and productivity and decreased turnover findings tend to be general rather than industry-specific, and there is no evidence to suggest that these benefits would not apply to the outfitters and guide industry as well.

a. Improved Government Services

The Department expects the quality of government services to improve when the minimum wage of Federal contract workers is raised. In some cases, higher-paying contractors may be able to attract higher quality workers who are able to provide higher quality services, thereby improving the experience of citizens who engage with these government contractors. For example, a study by Reich, Hall, and Jacobs (2003) found that increased wages paid to workers at the San Francisco airport increased productivity and shortened airport lines.[108] In addition, higher wages can be associated with a higher number of bidders for Government contracts, which can be expected to generate greater competition and an improved pool of contractors. Multiple studies have shown that the bidding for municipal contracts remained competitive or even improved when living wage ordinances were implemented (Thompson and Chapman, 2006).[109]

Various commenters agreed that raising the minimum wage for Federal contract workers would improve government services. EPI agreed "that the quality of federal contract work will improve with a higher minimum wage. Ruffini (2021) provides direct evidence that minimum wage increases at nursing homes improved worker performance and production efficiency. In that study, inspection violations, preventable health conditions, and resident mortality all fell in response to minimum wage increases." NELP said, "Employment practices that create a high morale, highly motivated, long-tenured, and productive workforce are imperative for federal agencies to realize a good return on the public dollars they allocate to contracts. Decent wages

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

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

are one of those practices."[110] NWLC also noted that implementing these wage standards also helps level the playing field and encourages more companies to bid for contracts. They cite a study showing that, "[A]fter Maryland implemented a contractor living wage standard, the average number of bids for contracts in the state increased by 27 percent."[111]

b. Increased Morale and Productivity

Increased productivity could occur through numerous channels, such as employee retention and level of effort. A strand of economic research, commonly referred to as "efficiency wage" theory, considers how an increase in compensation may be met with greater productivity.[112] Efficiency wages may elicit greater effort on the part of workers, making them more effective on the job.[113] Increases in the minimum wage have also been shown to increase worker morale and consequently productivity. Kim and Jang (2019) showed that wage raises increase productivity for up to two years after the wage increase.[114] They found that in both full and limited-service restaurants productivity increased due to improved worker morale after a wage increase. Potentially, higher morale leading to increased productivity can also lead to additional productivity gains. Mas and Moretti (2009) found that the presence of high-productivity grocery store cashiers was an implicit social pressure that encouraged low-productivity grocery store cashiers to perform better, especially those nearest and within line of sight of the high productivity employee.[115] Taken together, these publications provide evidence

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[110] Paul Sonn and Tsedeye Gebreselassie, "The Road to Responsible Contracting: Lessons from States and Cities for Ensuring the Federal Contracting Delivers Good Jobs and Quality Services" (New York, N.Y.: National Employment Law Project, 2009).
[111] Michael C. Rubenstein, Impact of the Maryland Living Wage, MARYLAND DEP'T OF LEG. SERVICES 10 (2008), http://dlslibrary.state.md.us/publications/OPA/I/IMLW_2008.pdf.
[112] Akerlof, G. A. (1982). Labor Contracts as Partial Gift Exchange. *The Quarterly Journal of Economics,* 97(4), 543-569.
[113] 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.
[114] Kim, H. S., & Jang, S. (2019). Minimum Wage Increase and Firm Productivity: Evidence from the Restaurant Industry. Tourism Management 71, 378-388. https://doi.org/10.1016/j.tourman.2018.10.029.
[115] Mas, A., & Moretti, E. (2009). Peers at Work. American Economic Review 99(1), 112–45. https://www.aeaweb.org/articles?id=10.1257/aer.99.1.112.

that increasing the minimum wage increases morale and productivity directly. Furthermore, as morale directly increases productivity for some workers, this may lead to increased productivity in others. The Department believes that this final rule could increase productivity for the Federal contracting community as well.

Multiple commenters agreed that increasing the minimum wage for Federal contract workers would increase productivity. NWLC said that raising the contractor minimum wage could lead to a more productive workforce, citing a review of literature showing that higher wages motivate employees to work harder.[116] NELP cited multiple studies finding that as minimum wage increases, employers see a rise in productivity. For example, they note that, "A 2020 analysis of the effects of higher pay at a Fortune 500 company found that a 1 percent wage increase reduced turnover by 3.0 to 4.5 percent, increased staff recruitment by 3.2 to 4.2 percent, and increased productivity by $1.10."[117] The Department has no reason to believe that the trends found in the literature do not also apply to the Federal contract worker community, and expects this rule to result in increased productivity for these workers.[118]

c. Reduced Turnover

An increase in the minimum wage has been shown to decrease both turnover rates and the rate of worker separation (Dube, Lester and Reich, 2011; Liu, Hyclak and Regmi, 2015; Jardim et al., 2018).[119] This decrease in turnover and worker separation can lead to an increase in

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[116] Justin Wolfers & Jan Zilinsky, Higher Wages for Low-Income Workers Lead to Higher Productivity, PETERSON INST. FOR INT'L ECON. (Jan. 13, 2015), https://piie.com/blogs/realtime-economic-issues-watch/higher-wages-low-income-workers-lead-higher-productivity.

[117] Natalia Emanuel and Emma Harrington, "The Payoffs of Higher Pay: Elasticities of Productivity and Labor Supply with Respect to Wages," Harvard University Publications, 2020

[118] The Department acknowledges that the literature discussed here examines changes to productivity following employers' voluntary increases to employees' wages. The mandated wage increase in this rule may not generate as many positive feelings towards the employer as a voluntary wage increase would, but it still has the potential to generate productivity benefits related to efficiency wages.

[119] Dube, A., Lester, T. W., & Reich, M. (2011). *Do Frictions Matter in the Labor Market? Accessions, Separations, and Minimum Wage Effects. (Discussion Paper No. 5811)*. IZA.

the profits of firms, as the hiring process can be both expensive and time consuming. A review of 27 case studies found that the median cost of replacing an employee was 21 percent of the employee's annual salary.[120] One manager of a fast-food restaurant (Hirsch, Kaufman and Zelenska, 2011)[121] when interviewed, estimated that each turnover cost $300-$400. Fairris et al. (2005)[122] found the cost reduction due to lower turnover rates ranges from $137 to $638 for each worker. Managers of various traditionally low-wage firms explained that in nearly all instances, increased wages led to both a decrease in turnover and an increase in profits. Howes (2005) discovered that as San Francisco increased the city-wide minimum wage to $10 between 1997 and 2001 ($4.85 above the then Federal minimum of $5.15) the turnover rate fell 31 percent for all healthcare providers and 57 percent for new healthcare providers.[123]

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

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https://www.iza.org/publications/dp/5811/do-frictions-matter-in-the-labor-market-accessions-separations-and-minimum-wage-effects.
Liu, S., Hyclak, T. J., & Regmi, K. (2015). Impact of the Minimum Wage on Youth Labor Markets. *Labour 29*(4). doi: 10.1111/labr.12071.
Jardim, E., Long, M. C., Plotnick, R., van Inwegen, E., Vigdor, J., & Wething, H. (2018, October). *Minimum Wage Increases and Individual Employment Trajectories* (Working paper No. 25182). NBER. doi:10.3386/w25182.

[120] 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.

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

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

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

A handful of commenters discussed impacts to turnover rates, and some cited the literature discussed above. AFL-CIO, EPI, Maximus, NWLC, One Fair Wage, Workplace Fairness, and others agreed that minimum wage increases tend to lead to reductions in turnover, which may result in sizable cost-savings to firms.

d. Reduced Absenteeism

Studies on absenteeism have demonstrated that there is a negative effect on firm productivity as absentee rates increase.[124] Zhang et al., in their study of linked employer-employee data in Canada, found that a 1 percent decline in the attendance rate reduces productivity by 0.44 percent.[125] Allen (1983) similarly noted that a 10-percentage point increase in the absenteeism corresponds to a decrease of 1.6 percent in productivity.[126] Increasing wages can result in decreased absenteeism. Fairris et al. (2005) demonstrated that as a worker's wage increases there is a reduction in unscheduled absenteeism.[127] They attribute this to workers standing to lose more if forced to look for new employment and an increase in pay paralleling an increase in access to paid time off. Pfeifer's (2010) study of German companies provides similar results, indicating a reduction in absenteeism if workers experience an overall increase in pay.[128] Although there is a study that attributes a decrease in absenteeism to mechanisms of the firm other than an increase in worker pay, the Department believes that the other evidence is strong

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

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

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

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

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

enough to suggest a relationship between increased wages and reduced absenteeism.[129] The Department believes both the connection between minimum wages and absenteeism, and the connection between absenteeism and productivity are well enough established that this is a feasible benefit of the final rule.

Many commenters agreed with the Department's general benefit discussion, and mentioned reduced absenteeism as a likely benefit of this rule. For example, AFL-CIO noted that, "The Unions agree with the central policy findings in the Order and the Proposed Rule: that '[r]raising the minimum wage enhances worker productivity and generates higher-quality work by boosting workers' health, morale and effort; reducing absenteeism and turnover; and lowering supervisory and training costs.' These findings have a firm empirical basis in the economic literature as the Proposed Rule's Regulatory Impact Analysis ably surveys."

e. Reduced Poverty and Income Inequality

Raises in the minimum wage have been shown to reduce the level of poverty among the entire population, and specifically among children, within high impact areas.[130] Himmelstein and Venkataramani (2019) estimate that nearly 5 percent of people living in poverty are healthcare workers, and that a $15 per hour minimum wage increase would lead to 215,476 workers and 163,472 children lifted above the poverty line.[131] Reducing poverty will benefit historically marginalized communities, as they have the highest poverty rates. The CBO estimates that a $15 per hour minimum wage would alleviate poverty for 1.3 million Americans.[132] Although a reduction in poverty would be smaller for Federal contract workers to the extent that they are

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

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

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

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

already earning at least $10.95 in 2021, the Department nonetheless believes that this final rule could alleviate poverty for some Federal contract workers. As noted in the NPRM and echoed by numerous worker advocacy organizations (including CLASP, the National Urban League, and the Shriver Center on Poverty Law), if a Federal contract worker works full time (40 hours per week for 52 weeks a year) at $10.95, their annual salary would be $22,776, which is below the 2020 Census Poverty Threshold for a family of four.[133] The reduction in poverty could also be larger for Federal contract workers in the U.S. territories, because prior to this rule, they could have been earning less than the minimum wage rate specified by Executive Order 13658. In their comment, Sindicato Puertorriqueño de Trabajadores (Puerto Rican Workers' Union, local 1996 of the International Union of Service Employees (SPT/SEIU)) noted that this rule will help reduce income inequality in Puerto Rico. They stated, "It should be noted that 50% of the population lives below the poverty line and, according to a study from February 2020 by the Institute of Youth Development, 58% of our children live below the poverty line and 37%, in extreme poverty."

Not only does a wage increase elevate earnings for the lowest earners working for Federal contractors, studies show that minimum wage increases can also reduce the income differential between the lowest earners and the highest earners, as well as between the lowest earners and the middle wage workers (Mishel 2014).[134] Income inequality is reduced with respect to all low-wage earners, but reduced income inequality across gender and race are additionally valuable considerations. Oka and Yamada (2019) found that increases in the minimum wage increased real wages for women, less educated, and younger workers.[135] Increasing the minimum wage has the potential to drastically aid those living in poverty, and as a

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[133] U.S. Census Bureau. Poverty Thresholds. https://www.census.gov/data/tables/time-series/demo/income-poverty/historical-poverty-thresholds.html.
[134] Mishel, L. (2014). The Tight Link Between the Minimum Wage and Wage Inequality. Economic Policy Institute. https://www.epi.org/blog/tight-link-minimum-wage-wage-inequality/.
[135] Oka, T., & Yamada, K. (2019, July). Heterogeneous Impact of the Minimum Wage: Implications for Changes in Between- and Within-group Inequality. arXiv. https://arxiv.org/pdf/1903.03925.pdf.

disproportionate number of people of color are those currently impoverished (Creamer 2020),[136] increasing the minimum wage will aid in reducing racial income inequality. For example, EPI's analysis found that "half of affected workers are Black or Hispanic, even though these groups comprise a smaller share of the overall workforce. Because they are otherwise paid disproportionately low wages, Black and Hispanic workers would also receive the largest pay increases." NELP also noted that many of the contracts that would be covered by this rule can be found in "industries characterized by low pay and workforces largely comprised of BIPOC, women, and LGBTQ+ workers." They cite data showing, "Federal agencies contract billions of dollars each year to businesses in industries like building services (13% Black, 41% Latinx, 56% female), administrative services (12% Black, 45% female), warehousing (22% Black, 20% Latinx), food service (14% Black, 27% Latinx, 52% female), security services (26% Black, 18% Latinx, 23% female), waste management and remediation (15% Black, 22% Latinx), and construction (30% Latinx).[137]"

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

5. Impacts by Industry

This section analyzes the costs and transfers by industry relative to government contracting expenditures, revenues, and payroll. This analysis excludes territories because revenue and payroll data are not available for territories. The Department used Year 1 impacts rather than average annualized impacts to demonstrate the size of the impacts in the year where costs are largest. The Department considers total employer costs (direct costs and transfers) here

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

[137] George Faraday, "Promises Broken #1" (Washington, D.C.: Good Jobs Nation, 2018); Demographics by industry from the US Bureau of Labor Statistics, "Labor Force Statistics from the Current Population Survey," 2019 data.

because those are the relevant costs to businesses. The Department also limited the analysis to firms actively holding government contracts (e.g., firms in USASpending in 2019 rather than all firms in SAM) to better approximate costs for firms with potentially affected employees. Including all firms would underestimate costs among truly affected firms.

Across all industries, total employer costs are about 0.4 percent of government contracting revenues (Table 11). Contracting revenue represents the revenue obtained by these firms specifically for work performed on Federal contracts. This measure may be most appropriate when considering cost pass-throughs to the Federal Government in the form of higher contract prices. Since many covered contractors garner revenue from non-Federal contracts, the transfer payment estimate is almost certainly a lower percentage of their total revenues. *See* section IV.B.3. for details on how Federal contracting expenditures are calculated. This analysis only includes employer costs associated with firms holding active SCA or DBA contracts (121,200). It excludes firms holding nonprocurement contracts because the Department believes these firms are not included in the USASpending data on Federal contracting revenues (i.e., the denominator). Using this methodology, the industry where costs and transfers are estimated to be the largest share of contracting revenue is the accommodation and food services industry, where employer costs are 3.8 percent of Federal contracting revenues.

The Department also compared employer costs to estimated revenues and payrolls using the 2017 Statistics of U.S. Businesses (SUSB). Total revenues and payroll from SUSB were adjusted to reflect the share of businesses impacted by this rulemaking and estimated to have affected employees (166,700).[138] Total employer costs were then compared to these revenues and payrolls. This analysis includes both Federal contractors and firms holding nonprocurement contracts. Using this methodology, employer costs are less than 0.2 percent of revenues and less than 0.7 percent of payroll on average. The industry where costs and transfers are estimated to be

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

the largest share of revenue is accommodation and food services (1.3 percent) and of payroll is retail trade (4.8 percent).

These findings are averages across 2-digit NAICS codes. When disaggregated to more detailed industries, the impacts would likely vary more. However, there is a tradeoff between providing an analysis at a more detailed level and maintaining adequate sample sizes to assess impacts with reasonable validity. Some commenters requested the Department conduct impact analyses specific to sub-industries, such as the outfitter and guide industry and the convenience services industry. However, sufficient data are generally not available to adequately assess impacts at this level of detail.

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

NAICS	Employer Costs and Transfers ($1,000s)	Covered Contracting Revenue (Millions) [a]	Employer Costs and Transfers as Share of Contracting Revenue
11	$3,596	$413	0.87%
21	$88	$104	0.08%
22	$1,134	$2,428	0.05%
23	$153,351	$36,124	0.42%
31-33	$53,478	$28,950	0.18%
42	$485	$163	0.30%
44-45	$5,288	$331	1.60%
48-49	$88,680	$14,389	0.62%
51	$10,163	$10,198	0.10%
52	$11,742	$12,633	0.09%
53	$657	$942	0.07%
54	$241,156	$152,717	0.16%
55	$1	$0	0.45%
56	$522,303	$36,754	1.42%
61	$27,813	$4,301	0.65%
62	$94,295	$11,233	0.84%
71	$952	$82	1.16%
72	$38,714	$1,030	3.76%
81	$26,656	$2,718	0.98%
--	**$1,280,553**	**$315,512**	**0.41%**

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

Table 12: Costs and Transfer Payments in Year 1, Firms with Affected Workers, as Share of Firm Revenue and Payroll (2020$)

NAICS	Employer Costs and Transfers ($1,000s)	Revenue (Millions) [a]	Employer Costs and Transfers as Share of Revenue	Payroll (Millions) [a]	Employer Costs and Transfers as Share of Payroll
11	$3,726	$4,167	0.089%	$809	0.461%
21	$129	$4,494	0.003%	$564	0.023%
22	$2,871	$411,211	0.001%	$48,815	0.006%
23	$155,327	$52,328	0.297%	$10,458	1.485%
31-33	$53,603	$312,190	0.017%	$38,312	0.140%
42	$485	$34,114	0.001%	$1,741	0.028%
44-45	$74,430	$17,090	0.436%	$1,556	4.782%
48-49	$242,098	$49,210	0.492%	$12,921	1.874%
51	$25,165	$206,290	0.012%	$46,393	0.054%
52	$11,742	$9,096	0.129%	$1,359	0.864%
53	$657	$6,212	0.011%	$1,073	0.061%
54	$244,420	$92,801	0.263%	$36,934	0.662%
55	$1	$23	0.006%	$58	0.002%
56	$545,003	$47,639	1.144%	$22,553	2.417%
61	$28,356	$17,564	0.161%	$5,931	0.478%
62	$94,704	$28,422	0.333%	$11,158	0.849%
71	$26,415	$54,885	0.048%	$17,194	0.154%
72	$144,342	$11,440	1.262%	$3,294	4.382%
81	$27,531	$9,186	0.300%	$2,273	1.211%
--	**$1,718,696**	**$1,368,361**	**0.126%**	**$263,395**	**0.653%**

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

6. Regulatory Alternatives

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

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

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

The Department considered defining the term *United States* to exclude contracts performed in the territories listed above, consistent with the discretionary decision made in the Department's prior rulemaking implementing Executive Order 13658. Such an alternative would result in fewer contracts covered by Executive Order 14026 and fewer workers entitled to an initial $15 hourly minimum wage for work performed on or in connection with such contracts. This would result in a smaller income transfer to workers. The Department rejected this alternative because, as discussed more fully above in the preamble and as reflected in the RIA, the Department has further examined the issue since its prior rulemaking in 2014 and consequently determined that the Federal Government's procurement interests in economy and efficiency would be promoted by extending the Executive Order 14026 minimum wage to workers performing on or in connection with covered contracts in Puerto Rico, the Virgin Islands, Outer Continental Shelf lands as defined in the Outer Continental Shelf Lands Act,

American Samoa, Guam, the Commonwealth of the Northern Mariana Islands, Wake Island, and Johnston Island.

The Department also rejected this alternative of excluding the territories from coverage of Executive Order 14026 because each of the territories listed above is covered by both the SCA, *see* 29 CFR 4.112(a), and the FLSA, *see, e.g.*, 29 U.S.C. 213(f); 29 CFR 776.7; Fair Minimum Wage Act of 2007, Pub. L. 110-28, 121 Stat. 112 (2007). Because contractors operating in those territories will generally have familiarity with many of the requirements set forth in part 23 based on their coverage under the SCA and/or the FLSA, the Department does not believe that the extension of Executive Order 14026 and part 23 to such contractors will impose a significant burden. Finally, as noted earlier in Section II(B)'s discussion of the Executive Order's geographic coverage, several elected officials and other commenters wrote in support of applying Executive Order 14026 to contract work performed in U.S. territories.

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

As the first alternative related to this exclusion, the Department considered eliminating the exclusion for FLSA-covered workers performing in connection with covered contracts for less than 20 percent of their workhours in a given workweek. The Department considered the elimination of this exclusion as an alternative, in part because Executive Order 14026 expressly

states that its minimum wage protections apply to "workers working on or in connection with" covered contracts. 86 FR 22835.

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

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

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

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

the requirements of Executive Order 14026 and reduce costs while ensuring broad application of the Executive order minimum wage.

V. 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. Based on the analysis below, this rule is not expected to have a significant economic impact on a substantial number of small entities.

A. Need for Rulemaking

On April 27, 2021, President Joseph R. Biden, Jr. issued Executive Order 14026, "Increasing the Minimum Wage for Federal Contractors." The Executive order states that the Federal Government's procurement interests in economy and efficiency are promoted when the Federal Government contracts with sources that adequately compensate their workers. The Executive order therefore seeks to raise the hourly minimum wage paid by those contractors to workers performing work on or in connection with covered Federal contracts to $15.00 per hour, beginning January 30, 2022; and beginning January 1, 2023, and annually thereafter, an amount determined by the Secretary of Labor (Secretary). The Executive order directs the Secretary to issue regulations by November 24, 2021, consistent with applicable law, to implement the order's requirements. This final rule therefore establishes standards and procedures for implementing and enforcing the minimum wage protections of the Executive order.

B. Number of Affected Small Entities and Employees

The total number of potentially affected firms (507,200) is explained in section IV.B.2. This section describes how the Department determined that 385,100 of those firms are smallentities. The RFA defines a "small entity" as a (1) small not-for-profit organization, (2) small governmental jurisdiction, or (3) small business. SBA establishes separate standards for

each 6-digit NAICS industry code, and standard cutoffs are typically based on either the average annual number of employees or average annual receipts. For example, businesses may be defined as small if employing fewer than 100 to 1,500 employees, depending on the NAICS. In other industries, firms are small if annual receipts are less than $1 million to $41.5 million.[139]

The Department used three methods to identify small firms based on the data source:

1. For firms identified in SAM, the Department identified small contractors based on the six-digit NAICS code listed as their primary NAICS and whether SAM flagged the firm as small in that NAICS.[140] Of the 428,300 firms in SAM, 327,900 are small firms. The data in SAM is self-reported, so firms may not always indicate if they are small, or may not update their data, which may result in firms being listed as small when they no longer are. As a result, it is uncertain whether the number of small firms in SAM may be an under- or over-estimate.

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

3. For entities operating under covered contracts on Federal properties or lands (*see* section IV.B.2), the Department applied the national ratio of businesses with less than 500 employees to total businesses, by industry, from the 2017 Statistics of U.S. Businesses (SUSB) data. The Department used businesses with fewer than 500 employees as a rough approximation for small businesses.[141] Of the 45,500 firms identified, 45,000 are small firms.

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

[140] 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.

[141] As noted above, the SBA size standard definitions vary by industry, but the Department believes businesses with less than 500 employees is a transparent method that provides a reasonable approximation of the number of firms SBA defines as small businesses. Additionally,

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

This estimated number of potentially affected small contractors includes some firms with no current Federal contracts covered by the Executive order. These firms may accrue regulatory familiarization costs despite not having employees affected, although their cost will be minimal. However, these firms should be removed when we consider costs per establishment with affected employees. Information was not available to eliminate these firms from the SAM database. Thus, the Department used data from USASpending to estimate a more appropriate number of small contractors with affected employees. Using the 2019 USASpending database, the Department found 64,500 private small prime contracting firms.[142,143] Adding in the small subcontractors and the small entities operating under covered contracts on Federal properties or lands, yields an estimated 121,700 small contractors with active contracts in Year 1.

The number of employees in small contracting firms is unknown. The Department estimated the share of total Federal contracting expenditures in the USASpending data associated with contractors labeled as small, by industry. The Department then applied these shares to all affected employees to estimate the share of affected employees in small entities by industry, then summed over all industries, to find that 97,900 employees of small contractors would be affected by the rule in Year 1 (Table 13).

In industries where the number of affected employees is smaller than the number of affected firms, the Department reduced the number of affected firms to the number of affected

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to apply the separate definitions by NAICS codes, the most recent data available with the information needed is the 2012 SUSB.

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

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

employees. This results in an estimated 67,700 small contractors with affected employees in Year 1. The calculations of direct costs and transfers per small contractor with affected employees, shown in Table 15 and Table 16, include only these 67,700 small firms.

Table 13: Small Federal Contracting Firms and Their Employees

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

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

C. Small Entity Costs of the Final Rule

Small entities will have regulatory familiarization, implementation, and payroll costs (*i.e.*, transfers). These are discussed in detail in section IV.C.2 and IV.C.3. and summarized below. Total direct costs (*i.e.*, excluding transfers) to small contractors in Year 1 were estimated to be $11.3 million (Table 14). This is 66 percent of total direct costs, among all firms, in Year 1 (compared with 30 percent of affected employees in small contracting firms). Calculation of these costs is discussed in the following paragraphs.

Regulatory familiarization costs apply to all small firms that potentially hold covered contracts (385,100). Regulatory familiarization costs were assumed to take one half hour of time per firm. This is an average across potentially affected contractors of all sizes and those with and without affected employees. An hour of a Compensation, Benefits, and Job Analysis Specialist's time is valued at $52.65 per hour.[144,145]

Contractors with affected employees will experience implementation costs. For each affected employee, a worker will have to implement the changes and a manager will need to make minimal staffing changes and considerations. There will be costs to adjust the pay rate in the records and tell the affected employees, among other minimal staffing changes and considerations made by managers The Department splits a total implementation time of 10 minutes per affected employee between a Compensation, Benefits, and Job Analysis Specialist and a manager. Because of this component, costs vary with contractor size. Compensation, Benefits, and Job Analysis Specialists earn a loaded hourly wage of $52.65 per hour.[146] Workers

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

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

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

in management occupations earn a loaded hourly wage of $86.02 per hour.[147] The estimated number of newly affected employees in Year 1 is 97,900 (Table 13). Therefore, total Year 1 implementation costs were estimated to equal $1.1 million ([$52.65 × 5 minutes × 97,900 employees] + [$86.02 × 5 minutes × 97,900 employees]).

To calculate payroll costs, the Department began with total transfers estimated in section IV.C.3. and multiplied this by the ratio of affected employees in small contracting firms to all affected employees. This yields the share of transfers occurring in small Federal contracting firms, $508.1 million in Year 1 (Table 14), which is 30 percent of total transfers for all contracting firms in Year 1.

Table 14: Costs and Transfers to Small Contractors in Year 1 (2020$)

NAICS	Direct Employer Costs ($1,000s)			Transfers in 2020$ ($1,000s)
	Regulatory Familiarization	Implementation	Total	
11	$111	$5	$116	$2,918
21	$28	$0	$28	$34
22	$109	$1	$110	$301
23	$1,263	$153	$1,416	$67,929
31-33	$1,118	$13	$1,132	$5,975
42	$454	$1	$455	$303
44-45	$240	$65	$305	$27,545
48-49	$510	$104	$614	$51,235
51	$453	$13	$465	$5,660
52	$63	$1	$64	$349
53	$211	$1	$212	$339
54	$2,462	$174	$2,636	$76,167
55	$7	$0	$7	$0
56	$859	$335	$1,193	$150,625
61	$308	$24	$332	$9,556
62	$445	$46	$492	$20,121
71	$728	$43	$771	$16,814
72	$347	$109	$456	$54,225
81	$399	$16	$415	$6,938
Sum	**$10,115**	**$1,103**	**$11,218**	**$497,033**
Territories	$22	$28	$50	$11,041

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

Total	**$10,137**	**$1,131**	**$11,268**	**$508,074**

To assess the impact on small contracting firms with affected employees, the Department assumed that affected employees would be distributed uniformly over small contracting firms within each industry. In an industry with fewer affected employees than firms, the Department assumed one affected employee would be in each firm with affected employees. For example, in NAICS 11, there are 423 affected workers and 2,199 small contractors with potentially affected workers. The Department assumed that 423 of the 2,199 firms would each have one affected worker. In industries in which the number of affected workers exceeds the number of small contractors, the Department divided the number of affected workers by the number of small contractors. For example, in NAICS 44-45, the Department assumed each of the 2,032 small firms had 2.8 affected workers per firm (5,652 affected workers divided by 2,032 small firms). Table 15 contains the average costs and transfers per small contractor with affected employees by industry. Average Year 1 costs and transfers per small contractor with affected employees range from $4,578 to $14,221 by industry.

Table 15: Average Costs and Transfers per Small Contractor with Affected Employees in Year 1 (2020$)

NAICS [a]	Small Contractors with Potentially Affected Employees [b]	Small Contractors with Affected Employees	Direct Employer Costs per Small Contractor	Transfers (Increased Wages) per Small Contractor	Total Costs and Transfers (Increased Wages) per Small Contractor
11	2,199	423	$30.71	$6,898	$6,928
21	155	4	$30.71	$7,629	$7,660
22	2,757	48	$30.71	$6,307	$6,338
23	11,923	11,923	$31.18	$5,697	$5,728
31-33	5,910	1,157	$30.71	$5,163	$5,194
42	443	52	$30.71	$5,801	$5,832
44-45	2,032	2,032	$38.53	$13,557	$13,595
48-49	7,908	7,908	$31.30	$6,479	$6,510
51	8,073	1,112	$30.71	$5,088	$5,119
52	181	73	$30.71	$4,819	$4,849
53	1,995	65	$30.71	$5,222	$5,253
54	24,733	15,093	$30.71	$5,046	$5,077
55	0	0	N/A	N/A	N/A

56	10,621	10,621	$38.30	$14,182	$14,221
61	2,275	2,074	$30.71	$4,607	$4,637
62	4,035	4,013	$30.71	$5,014	$5,045
71	24,677	3,697	$30.71	$4,548	$4,578
72	5,205	5,205	$34.28	$10,417	$10,452
81	5,710	1,402	$30.71	$4,950	$4,980
Sum	**120,834**	**66,903**	**N/A**	**N/A**	**N/A**
Territories	841	841	$38.91	$13,129	$13,168
Total	**121,675**	**67,744**	**N/A**	**N/A**	**N/A**

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

To estimate whether these costs and transfers will have a substantial impact on these small entities with affected employees, they are compared to total revenues for these firms. Based on SUSB data, small Federal contractors with affected employees had total annual revenues of $115.1 billion from all sources (Table 16).[148] Transfers from small contractors and costs to small contractors in Year 1 ($499.2 million) are about 0.4 percent of revenues on average and exceed 1.0 percent in only the administrative and waste services industry (1.1 percent). Additionally, much of this cost will either be reimbursed by the Federal Government or offset by productivity gains and cost-savings. Therefore, the Department believes this final rule will not have a significant impact on small businesses.

Table 16: Costs and Transfers as Share of Revenue in Small Contracting Firms in Year 1 [a]

NAICS	Total Costs and Transfers ($1,000s)	Small Contracting Firm Revenues (Billions) [b]	Total as Share of Revenues

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

11	$2,931	$0.6	0.489%
21	$34	$0.0	0.121%
22	$302	$0.9	0.033%
23	$68,300	$27.1	0.252%
31-33	$6,010	$6.6	0.091%
42	$305	$0.5	0.057%
44-45	$27,624	$6.4	0.430%
48-49	$51,483	$15.2	0.339%
51	$5,694	$3.7	0.154%
52	$352	$0.2	0.168%
53	$341	$0.1	0.385%
54	$76,630	$20.0	0.383%
55	N/A	$0.0	N/A
56	$151,031	$13.1	1.149%
61	$9,620	$3.3	0.293%
62	$20,245	$5.9	0.344%
71	$16,927	$4.7	0.358%
72	$54,403	$5.5	0.988%
81	$6,981	$1.3	0.555%
--	**$499,213**	**$115.1**	**0.434%**

[a] Excludes U.S. territories because SUSB does not include territories.
[b] Source: Total revenue for firms with less than 500 employees from 2017 SUSB, inflated to 2020$ using the GDP Deflator. Revenues for small contractors calculated by multiplying total revenue by the ratio of small contracting firms to total number of small firms (approximated by those with less than 500 employees in the 2017 SUSB).

To estimate average annualized costs to small contracting firms the Department projected small business costs and transfers forward 9 years. To do this, the Department calculated the ratio of affected employees in small contracting firms to all affected employees in Year 1, then multiplied this ratio by the 10-year projections of national costs and transfers (*see* section IV.C.). This yields the share of projected costs and transfers attributable to small businesses (Table 17).

Table 17: Projected Costs to Small Businesses (Millions of 2020$)

Year/Discount Rate	Direct Employer Costs	Transfers	Total
Years 1 Through 10			
Year 1	$11.3	$508.1	$519.3
Year 2	$0.0	$511.1	$511.1
Year 3	$0.0	$514.2	$514.2
Year 4	$0.0	$517.3	$517.3

Year 5	$0.0	$520.5	$520.5
Year 6	$0.0	$523.6	$523.6
Year 7	$0.0	$526.8	$526.8
Year 8	$0.0	$530.0	$530.0
Year 9	$0.0	$533.2	$533.2
Year 10	$0.0	$536.5	$536.5
Average Annualized Amounts			
3% discount rate	$1.3	$521.4	$522.7
7% discount rate	$1.5	$520.4	$521.9

D. Response to Public Comments on Issues Related to Small Businesses

Several commenters claimed that the Department underestimated the impacts to small businesses. Some stated that small businesses are already at a disadvantage for obtaining federal contracts and that this regulation further exacerbates this disadvantage. For example, Representatives Foxx and Keller claimed that "[s]mall businesses already face significant challenges when it comes to participating in the federal procurement process" and that this rule will increase these challenges. However, these commenters did not provide data or information on how these costs would impact small businesses in particular. Other commenters noted that the Department did not include the cost of extra overtime to small businesses. For example, SBA Advocacy said, "Small recreational businesses such as outfitters and guides commented that the higher minimum wage requirement would be extremely costly and unprofitable because they operate multi-day trips in National Parks and log many overtime wage hours; at a cost of $22.50 per hour the increased costs would have a significant impact." As discussed in Section IV.3.b, the Department has added in an estimate of increased overtime payments for all businesses. Even with the inclusion of these increased payments, costs are still only 0.4% of revenues for small contracting firms. Other commenters claimed the Department underestimated costs for a specific subset of small businesses. The National Automatic Merchandising Association commented that the Department needs to conduct an impact analysis for small businesses in the convenience services industry. The AOA generally stated that the "Proposed Rule wholly fails to account for its impact on the outfitter and guiding industry." The Department notes that the small business

impacts presented are average impacts, meaning that some small businesses will have smaller impacts while others will have larger impacts. The Department conducted its analysis at a higher level of industry aggregation because sufficient data at a more detailed level are generally not available.[149] Additionally, the AOA claimed that the Department failed to include the payroll costs from increasing wages that are not on or in connection with a federal contract, stating that there are "small businesses that may be more likely to have employees splitting time between federal and non-federal work." As noted in section IV.C.2.b., paying workers the minimum wage specified in this rule is not required for non-federal contract work and the Department disagrees that paying a worker different hourly wage rates imposes a high cost on businesses.

E. Response to Comment filed by the Chief Council for Advocacy of the Small Business Administration

SBA Advocacy submitted a comment in response to the Department's proposed rule. The Department has responded to specific parts of SBA Advocacy's comment throughout this final rule in the relevant discussions, but has also provided a summary here.

As a threshold matter, SBA asserted that because the Department "provided an Initial Regulatory Flexibility Analysis (IRFA), indicating that the proposed rule will have a significant economic impact on a substantial number of small entities," the Department's certification under Section 605 of the RFA that the rule will not have a significant economic impact on a substantial number of small entities "lacks a factual basis and is invalid." The Department disagrees that the NPRM's inclusion of an IFRA constituted an acknowledgment that the rule will have a significant economic impact on a substantial number of small entities. Rather, as we did in the 2014 final rule to implement Executive Order 13658,[150] the Department prepared an IFRA in its

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[149] For example, outfitters is a subset of the 6-digit NAICS for "all other amusement and recreation" industries. Even if adequate data are available for this 6-digit NAICS, that still does not adequately reflect the outfitter industry.

[150] *See* 79 FR 60705 ("After careful consideration of the comments received and based on the analysis below, the Department believes that this final rule will not have an appreciable economic impact on the vast majority of small businesses subject to [Executive Order 13658].

proposed rule as a courtesy to the public to better understand the rulemaking to implement Executive Order 14026 and its impact on small entities.

SBA Advocacy's comment further stated that they are concerned that the proposed rule will result in financial hardship for affected small businesses and that they believe that DOL has underestimated small business compliance costs. The Department notes that all direct employer costs, such as rule familiarization and implementation costs, are an average. Some contractors will spend more time reviewing the rule and implementing any changes, and some contractors will spend less or no time. Additionally, regarding wage costs, which are characterized as transfers in the regulatory impact analysis, the estimate of per business cost also represents an average. Some businesses may have many employees who currently earn the Executive Order 13658 minimum wage, but others may currently be paying their employees closer to $15, so will have a much lower wage cost.

SBA also said that the Department should consider regulatory alternatives that would minimize the impact of the rule on small entities. At both the NPRM stage and in this final rule, the Department has explained why any alternatives are foreclosed by the prescriptive language used in Executive Order 14026.

F. Alternatives to the Final Rule

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

1. Differing Compliance and Reporting Requirements for Small Entities:

However, in the interest of transparency, the Department has prepared the following Final Regulatory Flexibility Analysis (FRFA) to aid the public in understanding the small entity impacts of the final rule.").

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

Some commenters stated that the Department did not fulfill the requirements of the RFA because it did not provide alternatives such as excluding small businesses from the regulation or a phasing-in of the requirements for small businesses. The Department believes that such alternatives are foreclosed by the prescriptive language used in Executive Order 14026. The Executive order itself establishes the basic coverage provisions, sets the minimum wage, and establishes the timeframe when the minimum wage rate becomes effective. Section 3 of Executive Order 14026 gradually phases in the full Executive order minimum cash wage rate for tipped employees. With that lone exception, the order clearly requires that, as of January 30, 2022, workers performing on or in connection with covered contracts must be paid $15 per hour unless exempt. There is no indication in the Executive order that the Department has authority to modify the amount or timing of the minimum wage requirement, except where the Department is expressly directed to implement the future annual inflation-based adjustments to the wage rate pursuant to the methodology set forth in the order. *See* 86 FR 22835-39. In any event, the Department has determined that this rule would not significantly impact small businesses and thus believes it is not necessary to provide differing requirements for small businesses. Additionally, the Department believes that having different requirements for small businesses would undermine the benefits of improved government services and increased productivity. It

would also cause inequality between employees of small businesses and those of large businesses.

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

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

3. Use of Performance Rather Than Design Standards

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

4. Exemption from Coverage of the Rule for Small Entities

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

VI. Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1532, requires that agencies prepare a written statement, which includes an assessment of anticipated costs and benefits, before proposing any Federal mandate that may result in excess of $100 million (adjusted annually for inflation) in expenditures in any one year by state, local, and tribal

governments in the aggregate, or by the private sector. This statement must: (1) identify the authorizing legislation; (2) present the estimated costs and benefits of the rule and, to the extent that such estimates are feasible and relevant, its estimated effects on the national economy; (3) summarize and evaluate state, local, and Tribal government input; and (4) identify reasonable alternatives and select, or explain the non-selection, of the least costly, most cost-effective, or least burdensome alternative.

A. Authorizing Legislation

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

B. Assessment of Costs and Benefits

For purposes of the UMRA, this final rule includes a Federal mandate that would result in increased expenditures by the private sector of more than $158 million in at least one year, and could potentially result in increased expenditures by state and local governments that hold contracts with the Federal Government.[151] It will not result in increased expenditures by Tribal govenments because they are generally excluded from coverage under section 8(c) of the order. In the Department's experience, state and local governments are parties to a relatively small number of SCA- and DBA-covered contracts. Additionally, because costs are a small share of revenues, impacts to governments and tribes should be small.

The Department determined that the final rule would result in Year 1 direct employer costs to the private sector of $17.1 million, in regulatory familiarization and implementation costs. The final rule will also result in transfer payments for the private sector of $1.7 billion in Year 1, with an average annualized value of $1.8 billion over ten years.

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

UMRA requires agencies to estimate the effect of a regulation on the national economy if such estimates are reasonably feasible and the effect is relevant and material.[152] However, OMB guidance on this requirement notes that such macroeconomic effects tend to be measurable in nationwide econometric models only if the economic effect of the regulation reaches 0.25 percent to 0.5 percent of Gross Domestic Product (GDP), or in the range of $52.3 billion to $104.7 billion (using 2020 GDP).[153] A regulation with a smaller aggregate effect is not likely to have a measurable effect in macroeconomic terms, unless it is highly focused on a particular geographic region or economic sector, which is not the case with this rule.

The Department's RIA estimates that the total costs of the final rule will be $1.8 billion. Given OMB's guidance, the Department has determined that a full macroeconomic analysis is not likely to show that these costs would have any measurable effect on the economy.

VII. Executive Order 13132, Federalism

The Department has (1) reviewed this final 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 final 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.

List of Subjects in 29 CFR Parts 10 and 23

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[152] *See* 2 U.S.C. 1532(a)(4).
[153] According to the Bureau of Economic Analysis, 2020 GDP was $20.9 trillion. https://www.bea.gov/sites/default/files/2021-04/gdp1q21_adv.pdf.

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

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

PART 10—ESTABLISHING A MINIMUM WAGE FOR CONTRACTORS

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

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

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

§ 10.1 Purpose and scope.

* * * * *

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

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

§ 10.2 Definitions.

* * * * *

New contract means a contract that results from a solicitation issued on or between January 1, 2015 and January 29, 2022, or a contract that is awarded outside the solicitation process on or between January 1, 2015 and January 29, 2022. This term includes both new contracts and replacements for expiring contracts. It does not apply to the unilateral exercise of a pre-

negotiated option to renew an existing contract by the Federal Government. For purposes of the Executive Order, a contract that is entered into prior to January 1, 2015 will constitute a new contract if, through bilateral negotiation, on or between January 1, 2015 and January 29, 2022:

(1) The contract is renewed;

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

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

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§ 10.4 [Amended]

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

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

§ 10.5 Minimum wage for Federal contractors and subcontractors.

* * * * *

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

6. Add part 23 to read as follows:

PART 23 -- INCREASING THE MINIMUM WAGE FOR FEDERAL CONTRACTORS

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

Subpart B – Federal Government Requirements

23.110 Contracting agency requirements.
23.120 Department of Labor requirements.

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

Subpart D – Enforcement
23.410 Complaints.
23.420 Wage and Hour Division conciliation.
23.430 Wage and Hour Division investigation.
23.440 Remedies and sanctions.

Subpart E – Administrative Proceedings
23.510 Disputes concerning contractor compliance.
23.520 Debarment proceedings.
23.530 Referral to Chief Administrative Law Judge; amendment of pleadings.
23.540 Consent findings and order.
23.550 Proceedings of the Administrative Law Judge.
23.560 Petition for review.
23.570 Administrative Review Board proceedings.
23.580 Administrator ruling.

Appendix A to Part 23 -- Contract Clause

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

Subpart A—General

§ 23.10 Purpose and scope.

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

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

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

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

(c) *Scope.* Neither Executive Order 14026 nor this part creates or changes any rights under the Contract Disputes Act, 41 U.S.C. 7101 *et seq*., or any private right of action that may exist under other applicable laws. The Executive Order provides that disputes regarding whether

a contractor has paid the minimum wages prescribed by the Order, to the extent permitted by law, shall be disposed of only as provided by the Secretary in regulations issued under the Order. However, nothing in the Order or this part is intended to limit or preclude a civil action under the False Claims Act, 31 U.S.C. 3730, or criminal prosecution under 18 U.S.C. 1001. The Order similarly does not preclude judicial review of final decisions by the Secretary in accordance with the Administrative Procedure Act, 5 U.S.C. 701 *et seq*.

§ 23.20 Definitions.

For purposes of this part:

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

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

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

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

Contract or *contract-like instrument* means an agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law. This definition includes, but is not limited to, a mutually binding legal relationship obligating one party to

furnish services (including construction) and another party to pay for them. The term *contract* includes all contracts and any subcontracts of any tier thereunder, whether negotiated or advertised, including any procurement actions, lease agreements, cooperative agreements, provider agreements, intergovernmental service agreements, service agreements, licenses, permits, or any other type of agreement, regardless of nomenclature, type, or particular form, and whether entered into verbally or in writing. The term *contract* shall be interpreted broadly as to include, but not be limited to, any contract within the definition provided in the Federal Acquisition Regulation (FAR) at 48 CFR chapter 1 or applicable Federal statutes. This definition includes, but is not limited to, any contract that may be covered under any Federal procurement statute. Contracts may be the result of competitive bidding or awarded to a single source under applicable authority to do so. In addition to bilateral instruments, contracts include, but are not limited to, awards and notices of awards; job orders or task letters issued under basic ordering agreements; letter contracts; orders, such as purchase orders, under which the contract becomes effective by written acceptance or performance; exercised contract options; and bilateral contract modifications. The term *contract* includes contracts covered by the Service Contract Act, contracts covered by the Davis-Bacon Act, concessions contracts not otherwise subject to the Service Contract Act, and contracts in connection with Federal property or land and related to offering services for Federal employees, their dependents, or the general public.

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

Contractor means any individual or other legal entity that is awarded a Federal Government contract or subcontract under a Federal Government contract. The term *contractor* refers to both a prime contractor and all of its subcontractors of any tier on a contract with the Federal Government. The term *contractor* includes lessors and lessees, as well as employers of

workers performing on or in connection with covered Federal contracts whose wages are calculated pursuant to special certificates issued under 29 U.S.C. 214(c). The term *employer* is used interchangeably with the terms *contractor* and *subcontractor* in various sections of this part. The U.S. Government, its agencies, and instrumentalities are not contractors, subcontractors, employers, or joint employers for purposes of compliance with the provisions of the Executive Order.

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

Executive departments and agencies means executive departments, military departments, or any independent establishments within the meaning of 5 U.S.C. 101, 102, and 104(1), respectively, and any wholly owned Government corporation within the meaning of 31 U.S.C. 9101.

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

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

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

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

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

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

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

(1) The contract is renewed;

(2) The contract is extended; or

(3) An option on the contract is exercised.

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

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

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

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

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

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

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

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

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

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

Worker means any person engaged in performing work on or in connection with a contract covered by the Executive Order, and whose wages under such contract are governed by the Fair Labor Standards Act, the Service Contract Act, or the Davis-Bacon Act, other than individuals employed in a bona fide executive, administrative, or professional capacity, as those terms are defined in 29 CFR part 541, regardless of the contractual relationship alleged to exist between the individual and the employer. The term *worker* includes workers performing on or in

connection with a covered contract whose wages are calculated pursuant to special certificates issued under 29 U.S.C. 214(c), as well as any person working on or in connection with a covered contract and individually registered in a bona fide apprenticeship or training program registered with the U.S. Department of Labor's Employment and Training Administration, Office of Apprenticeship, or with a State Apprenticeship Agency recognized by the Office of Apprenticeship. A worker performs "on" a contract if the worker directly performs the specific services called for by the contract. A worker performs "in connection with" a contract if the worker's work activities are necessary to the performance of a contract but are not the specific services called for by the contract.

§ 23.30 Coverage.

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

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

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

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

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

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

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

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

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

§ 23.40 Exclusions.

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

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

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

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

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

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

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

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

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

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

§ 23.50 Minimum wage for Federal contractors and subcontractors.

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

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

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

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

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

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

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

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

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

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

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

§ 23.60 Antiretaliation.

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

§ 23.70 Waiver of rights.

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

§ 23.80 Severability.

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

Subpart B – Federal Government Requirements

§ 23.110 Contracting agency requirements.

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

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

necessary additional costs, and its authority under any contract provision authorizing changes, cancellation and termination).

(c) *Withholding*. A contracting officer shall upon his or her own action or upon written request of an authorized representative of the Department of Labor withhold or cause to be withheld from the prime contractor under the covered contract or any other Federal contract with the same prime contractor, so much of the accrued payments or advances as may be considered necessary to pay workers the full amount of wages required by the Executive Order. In the event of failure to pay any covered workers all or part of the wages due under Executive Order 14026, the agency may, after authorization or by direction of the Department of Labor and written notification to the contractor, take action to cause suspension of any further payment or advance of funds until such violations have ceased. Additionally, any failure to comply with the requirements of Executive Order 14026 may be grounds for termination of the right to proceed with the contract work. In such event, the contracting agency may enter into other contracts or arrangements for completion of the work, charging the contractor in default with any additional cost.

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

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

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

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

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

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

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

(2) [Reserved]

§ 23.120 Department of Labor requirements.

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

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

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

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

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

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

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

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

Subpart C—Contractor Requirements

§ 23.210 Contract clause.

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

(b) *Flow-down requirement.* The contractor and any subcontractors shall include in any covered subcontracts the Executive Order minimum wage contract clause referred to in § 23.110(a) and shall require, as a condition of payment, that the subcontractor include the minimum wage contract clause in any lower-tier subcontracts. The prime contractor and any

upper-tier contractor shall be responsible for the compliance by any subcontractor or lower-tier subcontractor with the Executive Order minimum wage requirements, whether or not the contract clause was included in the subcontract.

§ 23.220 Rate of pay.

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

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

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

§ 23.230 Deductions.

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

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

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

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

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

§ 23.240 Overtime payments.

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

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

§ 23.250 Frequency of pay.

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

§ 23.260 Records to be kept by contractors.

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

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

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

(3) The rate or rates of wages paid;

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

(5) Any deductions made; and

(6) The total wages paid.

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

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

§ 23.270 Anti-kickback.

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

§ 23.280 Tipped employees.

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

(1) An hourly cash wage of at least:

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

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

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

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

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

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

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

§ 23.290 Notice.

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

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

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

Subpart D—Enforcement

§ 23.410 Complaints.

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

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

§ 23.420 Wage and Hour Division conciliation.

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

§ 23.430 Wage and Hour Division investigation.

The Administrator may investigate possible violations of the Executive Order or this part either as the result of a complaint or at any time on his or her own initiative. As part of the investigation, the Administrator may conduct interviews with the relevant contractor, as well as the contractor's workers at the worksite during normal work hours; inspect the relevant contractor's records (including contract documents and payrolls, if applicable); make copies and transcriptions of such records; and require the production of any documentary or other evidence the Administrator deems necessary to determine whether a violation, including conduct warranting imposition of debarment, has occurred. Federal agencies and contractors shall

cooperate with any authorized representative of the Department of Labor in the inspection of records, in interviews with workers, and in all aspects of investigations.

§ 23.440 Remedies and sanctions.

(a) *Unpaid wages*. When the Administrator determines a contractor has failed to pay the applicable Executive Order minimum wage to workers, the Administrator will notify the contractor and the applicable contracting agency of the unpaid wage violation and request the contractor to remedy the violation. If the contractor does not remedy the violation of the Executive Order or this part, the Administrator shall direct the contractor to pay all unpaid wages to the affected workers in the investigative findings letter it issues pursuant to § 23.510. The Administrator may additionally direct that payments due on the contract or any other contract between the contractor and the Government be withheld as necessary to pay unpaid wages. Upon the final order of the Secretary that unpaid wages are due, the Administrator may direct the relevant contracting agency to transfer the withheld funds to the Department of Labor for disbursement.

(b) *Antiretaliation*. When the Administrator determines that any person has discharged or in any other manner discriminated against any worker because such worker filed any complaint or instituted or caused to be instituted any proceeding under or related to the Executive Order or this part, or because such worker testified or is about to testify in any such proceeding, the Administrator may provide for any relief to the worker as may be appropriate, including employment, reinstatement, promotion, and the payment of lost wages.

(c) *Debarment*. Whenever a contractor is found by the Secretary of Labor to have disregarded its obligations under the Executive Order, or this part, such contractor and its responsible officers, and any firm, corporation, partnership, or association in which the contractor or responsible officers have an interest, shall be ineligible to be awarded any contract or subcontract subject to the Executive Order for a period of up to three years from the date of publication of the name of the contractor or responsible officer on the ineligible list. Neither an

order for debarment of any contractor or its responsible officers from further Government contracts nor the inclusion of a contractor or its responsible officers on a published list of noncomplying contractors under this section shall be carried out without affording the contractor or responsible officers an opportunity for a hearing before an Administrative Law Judge.

(d) *Civil action to recover greater underpayments than those withheld*. If the payments withheld under § 23.110(c) are insufficient to reimburse all workers' lost wages, or if there are no payments to withhold, the Department of Labor, following a final order of the Secretary, may bring action against the contractor in any court of competent jurisdiction to recover the remaining amount of underpayments. The Department of Labor shall, to the extent possible, pay any sums it recovers in this manner directly to the underpaid workers. Any sum not paid to a worker because of inability to do so within three years shall be transferred into the Treasury of the United States as miscellaneous receipts.

(e) *Retroactive inclusion of contract clause*. If a contracting agency fails to include the applicable contract clause in a contract to which the Executive Order applies, the contracting agency, on its own initiative or within 15 calendar days of notification by an authorized representative of the Department of Labor, shall incorporate the contract clause in the contract retroactive to commencement of performance under the contract through the exercise of any and all authority that may be needed (including, where necessary, its authority to negotiate or amend, its authority to pay any necessary additional costs, and its authority under any contract provision authorizing changes, cancellation and termination).

Subpart E—Administrative Proceedings

§ 23.510 Disputes concerning contractor compliance.

(a) This section sets forth the procedure for resolution of disputes of fact or law concerning a contractor's compliance with subpart C of this part. The procedures in this section may be initiated upon the Administrator's own motion or upon request of the contractor.

(b)(1) In the event of a dispute described in paragraph (a) of this section in which it appears that relevant facts are at issue, the Administrator will notify the affected contractor(s) and the prime contractor (if different) of the investigative findings by certified mail to the last known address.

(2) A contractor desiring a hearing concerning the Administrator's investigative findings letter shall request such a hearing by letter postmarked within 30 calendar days of the date of the Administrator's letter. The request shall set forth those findings which are in dispute with respect to the violations and/or debarment, as appropriate, and explain how the findings are in dispute, including by making reference to any affirmative defenses.

(3) Upon receipt of a timely request for a hearing, the Administrator shall refer the case to the Chief Administrative Law Judge by Order of Reference, to which shall be attached a copy of the investigative findings letter from the Administrator and response thereto, for designation to an Administrative Law Judge to conduct such hearings as may be necessary to resolve the disputed matters. The hearing shall be conducted in accordance with the procedures set forth in 29 CFR part 6.

(c)(1) In the event of a dispute described in paragraph (a) of this section in which it appears that there are no relevant facts at issue, and where there is not at that time reasonable cause to institute debarment proceedings under § 23.520, the Administrator shall notify the contractor(s) of the investigation findings by certified mail to the last known address, and shall issue a ruling in the investigative findings letter on any issues of law known to be in dispute.

(2)(i) If the contractor disagrees with the factual findings of the Administrator or believes that there are relevant facts in dispute, the contractor shall so advise the Administrator by letter postmarked within 30 calendar days of the date of the Administrator's letter. In the response, the contractor shall explain in detail the facts alleged to be in dispute and attach any supporting documentation.

(ii) Upon receipt of a timely response under paragraph (c)(2)(i) of this section alleging the existence of a factual dispute, the Administrator shall examine the information submitted. If the Administrator determines that there is a relevant issue of fact, the Administrator shall refer the case to the Chief Administrative Law Judge in accordance with paragraph (b)(3) of this section. If the Administrator determines that there is no relevant issue of fact, the Administrator shall so rule and advise the contractor accordingly.

(3) If the contractor desires review of the ruling issued by the Administrator under paragraph (c)(1) or (c)(2)(ii) of this section, the contractor shall file a petition for review thereof with the Administrative Review Board postmarked within 30 calendar days of the date of the ruling, with a copy thereof to the Administrator. The petition for review shall be filed in accordance with the procedures set forth in 29 CFR part 7.

(d) If a timely response to the Administrator's investigative findings letter is not made or a timely petition for review is not filed, the Administrator's investigative findings letter shall become the final order of the Secretary. If a timely response or petition for review is filed, the Administrator's letter shall be inoperative unless and until the decision is upheld by the Administrative Law Judge or the Administrative Review Board, or otherwise becomes a final order of the Secretary.

§ 23.520 Debarment proceedings.

(a) Whenever any contractor is found by the Secretary of Labor to have disregarded its obligations to workers or subcontractors under Executive Order 14026 or this part, such contractor and its responsible officers, and any firm, corporation, partnership, or association in which such contractor or responsible officers have an interest, shall be ineligible for a period of up to three years to receive any contracts or subcontracts subject to Executive Order 14026 from the date of publication of the name or names of the contractor or persons on the ineligible list.

(b)(1) Whenever the Administrator finds reasonable cause to believe that a contractor has committed a violation of Executive Order 14026 or this part which constitutes a disregard of its

obligations to workers or subcontractors, the Administrator shall notify by certified mail to the last known address, the contractor and its responsible officers (and any firms, corporations, partnerships, or associations in which the contractor or responsible officers are known to have an interest), of the finding. The Administrator shall afford such contractor and any other parties notified an opportunity for a hearing as to whether debarment action should be taken under Executive Order 14026 or this part. The Administrator shall furnish to those notified a summary of the investigative findings. If the contractor or any other parties notified wish to request a hearing as to whether debarment action should be taken, such a request shall be made by letter to the Administrator postmarked within 30 calendar days of the date of the investigative findings letter from the Administrator, and shall set forth any findings which are in dispute and the reasons therefor, including any affirmative defenses to be raised. Upon receipt of such timely request for a hearing, the Administrator shall refer the case to the Chief Administrative Law Judge by Order of Reference, to which shall be attached a copy of the investigative findings letter from the Administrator and the response thereto, for designation of an Administrative Law Judge to conduct such hearings as may be necessary to determine the matters in dispute.

(2) Hearings under this section shall be conducted in accordance with the procedures set forth in 29 CFR part 6. If no hearing is requested within 30 calendar days of the letter from the Administrator, the Administrator's findings shall become the final order of the Secretary.

§ 23.530 Referral to Chief Administrative Law Judge; amendment of pleadings.

(a) Upon receipt of a timely request for a hearing under § 23.510 (where the Administrator has determined that relevant facts are in dispute) or § 23.520 (debarment), the Administrator shall refer the case to the Chief Administrative Law Judge by Order of Reference, to which shall be attached a copy of the investigative findings letter from the Administrator and response thereto, for designation of an Administrative Law Judge to conduct such hearings as may be necessary to decide the disputed matters. A copy of the Order of Reference and attachments thereto shall be served upon the respondent. The investigative findings letter from

the Administrator and response thereto shall be given the effect of a complaint and answer, respectively, for purposes of the administrative proceedings.

(b) At any time prior to the closing of the hearing record, the complaint (investigative findings letter) or answer (response) may be amended with the permission of the Administrative Law Judge and upon such terms as he/she may approve. For proceedings pursuant to § 23.510, such an amendment may include a statement that debarment action is warranted under § 23.520. Such amendments shall be allowed when justice and the presentation of the merits are served thereby, provided there is no prejudice to the objecting party's presentation on the merits. When issues not raised by the pleadings are reasonably within the scope of the original complaint and are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings, and such amendments may be made as necessary to make them conform to the evidence. The presiding Administrative Law Judge may, upon reasonable notice and upon such terms as are just, permit supplemental pleadings setting forth transactions, occurrences or events which have happened since the date of the pleadings and which are relevant to any of the issues involved. A continuance in the hearing may be granted or the record left open to enable the new allegations to be addressed.

§ 23.540 Consent findings and order.

(a) At any time prior to the receipt of evidence or, at the Administrative Law Judge's discretion prior to the issuance of the Administrative Law Judge's decision, the parties may enter into consent findings and an order disposing of the proceeding in whole or in part.

(b) Any agreement containing consent findings and an order disposing of a proceeding in whole or in part shall also provide:

(1) That the order shall have the same force and effect as an order made after full hearing;

(2) That the entire record on which any order may be based shall consist solely of the Administrator's findings letter and the agreement;

(3) A waiver of any further procedural steps before the Administrative Law Judge and the Administrative Review Board regarding those matters which are the subject of the agreement; and

(4) A waiver of any right to challenge or contest the validity of the findings and order entered into in accordance with the agreement.

(c) Within 30 calendar days after receipt of an agreement containing consent findings and an order disposing of the disputed matter in whole, the Administrative Law Judge shall, if satisfied with its form and substance, accept such agreement by issuing a decision based upon the agreed findings and order. If such agreement disposes of only a part of the disputed matter, a hearing shall be conducted on the matters remaining in dispute.

§ 23.550 Proceedings of the Administrative Law Judge.

(a) *General*. The Office of Administrative Law Judges has jurisdiction to hear and decide appeals concerning questions of law and fact from the Administrator's investigative findings letters issued under §§ 23.510 and 23.520. Any party may, when requesting an appeal or during the pendency of a proceeding on appeal, timely move an Administrative Law Judge to consolidate a proceeding initiated hereunder with a proceeding initiated under the Service Contract Act or the Davis-Bacon Act.

(b) *Proposed findings of fact, conclusions, and order*. Within 20 calendar days of filing of the transcript of the testimony or such additional time as the Administrative Law Judge may allow, each party may file with the Administrative Law Judge proposed findings of fact, conclusions of law, and a proposed order, together with a supporting brief expressing the reasons for such proposals. Each party shall serve such proposals and brief on all other parties.

(c) *Decision*. (1) Within a reasonable period of time after the time allowed for filing of proposed findings of fact, conclusions of law, and order, or within 30 calendar days of receipt of an agreement containing consent findings and order disposing of the disputed matter in whole,

the Administrative Law Judge shall issue a decision. The decision shall contain appropriate findings, conclusions, and an order, and be served upon all parties to the proceeding.

(2) If the respondent is found to have violated Executive Order 14026 or this part, and if the Administrator requested debarment, the Administrative Law Judge shall issue an order as to whether the respondent is to be subject to the ineligible list, including findings that the contractor disregarded its obligations to workers or subcontractors under the Executive Order or this part.

(d) *Limit on scope of review*. The Equal Access to Justice Act, as amended, does not apply to proceedings under this part. Accordingly, Administrative Law Judges shall have no authority to award attorney's fees and/or other litigation expenses pursuant to the provisions of the Equal Access to Justice Act for any proceeding under this part.

(e) *Orders*. If the Administrative Law Judge concludes a violation occurred, the final order shall mandate action to remedy the violation, including, but not limited to, monetary relief for unpaid wages. Where the Administrator has sought imposition of debarment, the Administrative Law Judge shall determine whether an order imposing debarment is appropriate.

(f) *Finality*. The Administrative Law Judge's decision shall become the final order of the Secretary, unless a timely petition for review is filed with the Administrative Review Board.

§ 23.560 Petition for review.

(a) *Filing a petition for review.* Within 30 calendar days after the date of the decision of the Administrative Law Judge (or such additional time as is granted by the Administrative Review Board), any party aggrieved thereby who desires review thereof shall file a petition for review of the decision with supporting reasons. Such party shall transmit the petition in writing to the Administrative Review Board with a copy thereof to the Chief Administrative Law Judge. The petition shall refer to the specific findings of fact, conclusions of law, or order at issue. A petition concerning the decision on debarment shall also state the disregard of obligations to workers and/or subcontractors, or lack thereof, as appropriate. A party must serve the petition for review, and all briefs, on all parties and the Chief Administrative Law Judge. It must also timely

serve copies of the petition and all briefs on the Administrator, Wage and Hour Division, and on the Associate Solicitor, Division of Fair Labor Standards, Office of the Solicitor, U.S. Department of Labor, Washington, DC 20210.

(b) *Effect of filing*. If a party files a timely petition for review, the Administrative Law Judge's decision shall be inoperative unless and until the Administrative Review Board issues an order affirming the letter or decision, or the letter or decision otherwise becomes a final order of the Secretary. If a petition for review concerns only the imposition of debarment, however, the remainder of the decision shall be effective immediately. No judicial review shall be available unless a timely petition for review to the Administrative Review Board is first filed.

§ 23.570 Administrative Review Board proceedings.

(a) *Authority*--(1) *General*. The Administrative Review Board has jurisdiction to hear and decide in its discretion appeals concerning questions of law and fact from investigative findings letters of the Administrator issued under § 23.510(c)(1) or (2), Administrator's rulings issued under § 23.580, and decisions of Administrative Law Judges issued under § 23.550.

(2) *Limit on scope of review*. (i) The Board shall not have jurisdiction to pass on the validity of any provision of this part. The Board is an appellate body and shall decide cases properly before it on the basis of substantial evidence contained in the entire record before it. The Board shall not receive new evidence into the record.

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

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

(c) *Orders*. If the Board concludes a violation occurred, the final order shall mandate action to remedy the violation, including, but not limited to, monetary relief for unpaid wages. Where the Administrator has sought imposition of debarment, the Board shall determine whether an order imposing debarment is appropriate. The Board's order is subject to discretionary review by the Secretary as provided in Secretary's Order 01-2020 (or any successor to that order).

(d) *Finality*. The decision of the Administrative Review Board shall become the final order of the Secretary in accordance with Secretary's Order 01-2020 (or any successor to that order), which provides for discretionary review of such orders by the Secretary.

§ 23.580 Administrator ruling.

(a) Questions regarding the application and interpretation of the rules contained in this part may be referred to the Administrator, who shall issue an appropriate ruling. Requests for such rulings should be addressed to the Administrator, Wage and Hour Division, U.S. Department of Labor, Washington, 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 23 -- Contract Clause

The following clause shall be included by the contracting agency in every contract, contract-like instrument, and solicitation to which Executive Order 14026 applies, except for procurement contracts subject to the Federal Acquisition Regulation (FAR):

(a) *Executive Order 14026*. This contract is subject to Executive Order 14026, the regulations issued by the Secretary of Labor in 29 CFR part 23 pursuant to the Executive Order, and the following provisions.

(b) *Minimum wages*. (1) Each worker (as defined in 29 CFR 23.20) engaged in the performance of this contract by the prime contractor or any subcontractor, regardless of any

contractual relationship which may be alleged to exist between the contractor and worker, shall be paid not less than the applicable minimum wage under Executive Order 14026.

(2) The minimum wage required to be paid to each worker performing work on or in connection with this contract between January 30, 2022 and December 31, 2022, shall be $15.00 per hour. The minimum wage shall be adjusted each time the Secretary of Labor's annual determination of the applicable minimum wage under section 2(a)(ii) of Executive Order 14026 results in a higher minimum wage. Adjustments to the Executive Order minimum wage under section 2(a)(ii) of Executive Order 14026 will be effective for all workers subject to the Executive Order beginning January 1 of the following year. If appropriate, the contracting officer, or other agency official overseeing this contract shall ensure the contractor is compensated only for the increase in labor costs resulting from the annual inflation increases in the Executive Order 14026 minimum wage beginning on January 1, 2023. The Secretary of Labor will publish annual determinations in the Federal Register no later than 90 days before such new wage is to take effect. The Secretary will also publish the applicable minimum wage on https://alpha.sam.gov/content/wage-determinations (or any successor website). The applicable published minimum wage is incorporated by reference into this contract.

(3) The contractor shall pay unconditionally to each worker all wages due free and clear and without subsequent deduction (except as otherwise provided by 29 CFR 23.230), rebate, or kickback on any account. Such payments shall be made no later than one pay period following the end of the regular pay period in which such wages were earned or accrued. A pay period under this Executive Order may not be of any duration longer than semi-monthly.

(4) The prime contractor and any upper-tier subcontractor shall be responsible for the compliance by any subcontractor or lower-tier subcontractor with the Executive Order minimum wage requirements. In the event of any violation of the minimum wage obligation of this clause, the contractor and any subcontractor(s) responsible therefore shall be liable for the unpaid wages.

(5) If the commensurate wage rate paid to a worker performing work on or in connection with a covered contract whose wages are calculated pursuant to a special certificate issued under 29 U.S.C. 214(c), whether hourly or piece rate, is less than the Executive Order minimum wage, the contractor must pay the Executive Order minimum wage rate to achieve compliance with the Order. If the commensurate wage due under the certificate is greater than the Executive Order minimum wage, the contractor must pay the worker the greater commensurate wage.

(c) *Withholding*. The agency head shall upon its own action or upon written request of an authorized representative of the Department of Labor withhold or cause to be withheld from the prime contractor under this or any other Federal contract with the same prime contractor, so much of the accrued payments or advances as may be considered necessary to pay workers the full amount of wages required by Executive Order 14026.

(d) *Contract suspension/Contract termination/Contractor debarment*. In the event of a failure to pay any worker all or part of the wages due under Executive Order 14026 or 29 CFR part 23, or a failure to comply with any other term or condition of Executive Order 14026 or 29 CFR part 23, the contracting agency may on its own action or after authorization or by direction of the Department of Labor and written notification to the contractor, take action to cause suspension of any further payment, advance or guarantee of funds until such violations have ceased. Additionally, any failure to comply with the requirements of this clause may be grounds for termination of the right to proceed with the contract work. In such event, the Government may enter into other contracts or arrangements for completion of the work, charging the contractor in default with any additional cost. A breach of the contract clause may be grounds for debarment as a contractor and subcontractor as provided in 29 CFR 23.520.

(e) *Workers who receive fringe benefits*. The contractor may not discharge any part of its minimum wage obligation under Executive Order 14026 by furnishing fringe benefits or, with respect to workers whose wages are governed by the Service Contract Act, the cash equivalent thereof.

(f) *Relation to other laws*. Nothing herein shall relieve the contractor of any other obligation under Federal, state or local law, or under contract, for the payment of a higher wage to any worker, nor shall a lower prevailing wage under any such Federal, State, or local law, or under contract, entitle a contractor to pay less than $15.00 (or the minimum wage as established each January thereafter) to any worker.

(g) *Payroll records*. (1) The contractor shall make and maintain for three years records containing the information specified in paragraphs (g)(1)(i) through (vi) of this section for each worker and shall make the records available for inspection and transcription by authorized representatives of the Wage and Hour Division of the U.S. Department of Labor:

(i) Name, address, and social security number;

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

(iii) The rate or rates of wages paid;

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

(v) Any deductions made; and

(vi) Total wages paid.

(2) The contractor shall also make available a copy of the contract, as applicable, for inspection or transcription by authorized representatives of the Wage and Hour Division.

(3) Failure to make and maintain or to make available such records for inspection and transcription shall be a violation of 29 CFR part 23 and this contract, and in the case of failure to produce such records, the contracting officer, upon direction of an authorized representative of the Department of Labor, or under its own action, shall take such action as may be necessary to cause suspension of any further payment or advance of funds until such time as the violations are discontinued.

(4) The contractor shall permit authorized representatives of the Wage and Hour Division to conduct investigations, including interviewing workers at the worksite during normal working hours.

(5) Nothing in this clause limits or otherwise modifies the contractor's payroll and recordkeeping obligations, if any, under the Davis-Bacon Act, as amended, and its implementing regulations; the Service Contract Act, as amended, and its implementing regulations; the Fair Labor Standards Act, as amended, and its implementing regulations; or any other applicable law.

(h) *Flow-down requirement*. The contractor (as defined in 29 CFR 23.20) shall insert this clause in all of its covered subcontracts and shall require its subcontractors to include this clause in any covered lower-tier subcontracts. Executive Order 14026 does not apply to subcontracts for the manufacturing or furnishing of materials, supplies, articles, or equipment, and this clause is not required to be inserted in such subcontracts. The prime contractor and any upper-tier subcontractor shall be responsible for the compliance by any subcontractor or lower-tier subcontractor with this contract clause.

(i) *Certification of eligibility*. (1) By entering into this contract, the contractor (and officials thereof) certifies that neither it (nor he or she) nor any person or firm who has an interest in the contractor's firm is a person or firm ineligible to be awarded Government contracts by virtue of the sanctions imposed pursuant to section 5 of the Service Contract Act, section 3(a) of the Davis-Bacon Act, or 29 CFR 5.12(a)(1).

(2) No part of this contract shall be subcontracted to any person or firm whose name appears on the list of persons or firms ineligible to receive Federal contracts.

(3) The penalty for making false statements is prescribed in the U.S. Criminal Code, 18 U.S.C. 1001.

(j) *Tipped employees*. In paying wages to a tipped employee as defined in section 3(t) of the Fair Labor Standards Act, 29 U.S.C. 203(t), the contractor may take a partial credit against the wage payment obligation (tip credit) to the extent permitted under section 3(a) of Executive Order 14026. In order to take such a tip credit, the employee must receive an amount of tips at least equal to the amount of the credit taken; where the tipped employee does not receive sufficient tips to equal the amount of the tip credit the contractor must increase the cash wage

paid for the workweek so that the amount of cash wage paid and the tips received by the employee equal the applicable minimum wage under Executive Order 14026. To utilize this proviso:

(1) The employer must inform the tipped employee in advance of the use of the tip credit;

(2) The employer must inform the tipped employee of the amount of cash wage that will be paid and the additional amount by which the employee's wages will be considered increased on account of the tip credit;

(3) The employees must be allowed to retain all tips (individually or through a pooling arrangement and regardless of whether the employer elects to take a credit for tips received); and

(4) The employer must be able to show by records that the tipped employee receives at least the applicable Executive Order minimum wage through the combination of direct wages and tip credit.

(k) *Antiretaliation*. It shall be unlawful for any person to discharge or in any other manner discriminate against any worker because such worker has filed any complaint or instituted or caused to be instituted any proceeding under or related to Executive Order 14026 or 29 CFR part 23, or has testified or is about to testify in any such proceeding.

(l) *Disputes concerning labor standards*. Disputes related to the application of Executive Order 14026 to this contract shall not be subject to the general disputes clause of the contract. Such disputes shall be resolved in accordance with the procedures of the Department of Labor set forth in 29 CFR part 23. Disputes within the meaning of this contract clause include disputes between the contractor (or any of its subcontractors) and the contracting agency, the U.S. Department of Labor, or the workers or their representatives.

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

requirement by posting, in a prominent and accessible place at the worksite, the applicable wage determination under those statutes. With respect to workers performing work on or in connection with a covered contract whose wages are governed by the FLSA, the contractor must post a notice provided by the Department of Labor in a prominent and accessible place at the worksite so it may be readily seen by workers. Contractors that customarily post notices to workers electronically may post the notice electronically provided such electronic posting is displayed prominently on any website that is maintained by the contractor, whether external or internal, and customarily used for notices to workers about terms and conditions of employment.

Signed in Washington, D.C. this 16th day of November, 2021.

Jessica Looman,

Acting Administrator, Wage and Hour Division.

NOTE: The following appendix will not appear in the Code of Federal Regulations.

Appendix – Increasing the Minimum Wage for Federal Contractors

WORKER RIGHTS
UNDER EXECUTIVE ORDER 14026

FEDERAL MINIMUM WAGE FOR CONTRACTORS

$15.00 PER HOUR

EFFECTIVE JANUARY 30, 2022 – DECEMBER 31, 2022

The law requires certain federal contractors to display this poster where employees can easily see it.

MINIMUM WAGE

Executive Order 14026 (EO) requires that federal contractors pay workers performing work on or in connection with covered contracts at least (1) $15.00 per hour beginning January 30, 2022, and (2) beginning January 1, 2023, and every year thereafter, an inflation-adjusted amount determined by the Secretary of Labor in accordance with the EO and appropriate regulations. The EO hourly minimum wage in effect from January 30, 2022 through December 31, 2022 is $15.00.

TIPS

Covered tipped employees must be paid a cash wage of at least $10.50 per hour effective January 30, 2022 through December 31, 2022. If a worker's tips combined with the required cash wage of at least $10.50 per hour paid by the contractor do not equal the EO hourly minimum wage for contractors, the contractor must increase the cash wage paid to make up the difference. Certain other conditions must also be met.

EXCLUSIONS

- The EO minimum wage may not apply to some workers who provide support "in connection with" covered contracts for less than 20 percent of their hours worked in a week.
- The EO minimum wage may not apply to certain other occupations and workers.

ENFORCEMENT

The U.S. Department of Labor's Wage and Hour Division (WHD) is responsible for enforcing this law. WHD can answer questions about your workplace rights and protections, investigate employers, and recover back wages. All WHD services are free and confidential. Employers cannot retaliate or discriminate against someone who files a complaint or participates in an investigation. WHD will accept a complaint in any language. You can find your nearest WHD office at *www.dol.gov/whd/local* or by calling toll-free 1-866-4US-WAGE (1-866-487-9243). We do not ask workers about their immigration status. **We can help**.

ADDITIONAL INFORMATION

- The EO applies only to new federal construction and service contracts, as defined by the Secretary in the regulations at 29 CFR part 23.
- Workers with disabilities whose wages are governed by special certificates issued under section 14(c) of the Fair Labor Standards Act must also receive no less than the full EO minimum wage rate.
- Some state or local laws may provide greater worker protections; employers must comply with both.
- More information about the EO is available at: *www.dol.gov/agencies/whd/government-contracts/eo14026*

WHD
WAGE AND HOUR DIVISION
UNITED STATES DEPARTMENT OF LABOR

1-866-487-9243
TTY: 1-877-889-5627
www.dol.gov/agencies/whd

WH1091 REV 11/21

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