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Guidance for Executive Order 13673, "Fair Pay and Safe Workplaces";

Final Guidance

**DEPARTMENT OF LABOR****Office of the Secretary****48 CFR Parts 22 and 52**

ZRIN 1290-ZA02

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

**SUMMARY:** The Department of Labor (the Department) is publishing final guidance (the Guidance) to assist the Federal Acquisition Regulatory Council (the FAR Council) and Federal contracting agencies in the implementation of Executive Order 13673, Fair Pay and Safe Workplaces. Executive Order 13673 (the Order) contains new requirements designed to increase efficiency and cost savings in the Federal contracting process. By law, Federal agencies already must contract only with "responsible" sources. Among other directives, the Order provides explicit new instructions for Federal contracting officers to consider a contractor's compliance with certain Federal and State labor laws as a part of the determination of contractor "responsibility" that contracting officers presently must undertake before awarding a Federal contract. In addition, the Order directs the FAR Council to propose the rules and regulations necessary to carry out the Order and the Department to develop guidance to help implement the new requirements. In this final Guidance, the Department provides detailed definitions for various terms used in the Order and the FAR rule to categorize and classify labor law violations, and the Department provides a summary of the processes through which contracting agencies will assess a contractor's overall record of labor law compliance and carry out their other duties under the Order.

**DATES:** This final Guidance is being published simultaneously with the FAR Council's final rule. The final FAR rule is published elsewhere in this issue of the **Federal Register** and is effective on October 25, 2016. Contractors and Federal agencies may use this Guidance beginning August 25, 2016.

**FOR FURTHER INFORMATION CONTACT:** Stephanie Swirsky, Deputy Assistant Secretary for Policy, U.S. Department of Labor, Room S-2312, 200 Constitution Avenue NW., Washington, DC 20210; telephone: (202) 693-5959 (this is not a toll-free number). Copies of this final Guidance may be obtained in alternative

formats (large print, Braille, audio tape or disc), upon request, by calling (202) 693-5959 (this is not a toll-free number). TTY/TDD callers may dial toll-free [1-877-889-5627] to obtain information or request materials in alternative formats.

**SUPPLEMENTARY INFORMATION:** The Department publishes this final Guidance to assist in the implementation of Executive Order 13673, Fair Pay and Safe Workplaces, dated July 31, 2014 (79 FR 45309, Aug. 5, 2014). Executive Order 13673 was amended by Executive Order 13683, December 11, 2014 (79 FR 75041, Dec. 16, 2014) to correct a statutory citation. The Order was further amended by Executive Order to modify the handling of subcontractor disclosures and clarify the requirements for public disclosure of documents.

**Table of Contents**

- I. Background
  - A. GAO Studies of Federal Procurement
  - B. State and Local Responsible-Contracting Policies
- II. Summary of the Executive Order
- III. Overview of the Final Guidance
- IV. Summary of Comments Received
- V. Discussion of General Comments
  - A. Comments Requesting Changes to the Order or the Proposed FAR Rule
  - B. Comments About Costs and Burdens of the Order
  - C. Comments About Alternatives and the Need for the Order
  - D. Comments About the Legal Authority for the Order

**Section-By-Section Analysis**

- I. Purpose and Summary of the Order
- II. Preaward Disclosure Requirements (Formerly "Disclosure Requirements")
  - A. Covered Contracts (Formerly "Who Must Make Disclosures Under the Order")
  - B. Labor Law Decisions (Formerly "What Triggers the Disclosure Obligations")
    - 1. Defining "Administrative Merits Determination"
    - 2. Defining "Civil Judgment"
    - 3. Defining "Arbitral Award or Decision"
    - 4. Successive Labor Law Decisions Arising From the Same Underlying Violation
  - C. Information That Must Be Disclosed (Formerly "What Information Must Be Disclosed")
- III. Preaward Assessment and Advice (Formerly "Weighing Violations of the Labor Laws")
  - A. Classifying Labor Law Violations
    - 1. Serious Violations
    - 2. Repeated Violations
    - 3. Willful Violations
    - 4. Pervasive Violations
  - B. Weighing Labor Law Violations and Mitigating Factors (Formerly "Assessing Violations and Considering Mitigating Factors")
    - 1. Mitigating Factors That Weigh in Favor of a Satisfactory Record of Labor Law Compliance

- 2. Factors That Weigh Against a Satisfactory Record of Labor Law Compliance
- C. Advice Regarding a Contractor's Record of Labor Law Compliance
- IV. Postaward Disclosure and Assessment of Labor Law Violations
- V. Subcontractor Responsibility
- VI. Preassessment
- VII. Paycheck Transparency
  - A. Wage Statement Provisions
    - 1. Rate of Pay
    - 2. Itemizing Additions To and Deductions From Wages
    - 3. Information To Be Included in the Wage Statement
    - 4. Weekly Accounting of Overtime Hours Worked
    - 5. Electronic Wage Statements
    - 6. Substantially Similar State Laws
    - 7. Request to Delay Effective Date
    - 8. FLSA Exempt-Status Notification
  - B. Independent Contractor Notice
    - 1. Clarifying the Information in the Notice
    - 2. Independent Contractor Determination
    - 3. Frequency of the Independent Contractor Notice
    - 4. Workers Employed by Staffing Agencies
    - 5. Translation Requirements
- VIII. Effective Date and Phase-In of Requirements
- IX. Other Comments
  - A. Public Availability of Disclosures and Assessment Information
  - B. Participation of Third-Parties
  - C. Anti-retaliation and Whistleblower Protections for Reporting Information

**I. Background**

Spending on Federal contracts has almost doubled since 2000, and it has substantially increased as a percentage of total Federal spending.<sup>1</sup> This increase has spurred new attention by Congress and the current administration to address inefficiencies and gaps in oversight of Federal contractors and subcontractors, including through investment in new information-technology systems and guidance for the Federal contracting officers who do the critical day-to-day work of managing billions of dollars in contracts. Executive Order 13673, Fair Pay and Safe Workplaces (the Order), is one of several of such initiatives intended to provide new information, tools, and guidance for contracting officers to better serve in their roles as gatekeepers for and stewards of Federal agency resources.

The Order reinforces current Federal procurement procedures. Existing law requires Federal agencies to contract

<sup>1</sup> In 2000, total spending on Federal contracts was \$276.9 billion; by 2012, that number had increased to \$518.4 billion. See Cong. Budget Office, "Federal Contracts and the Contracted Workforce," Letter from Director Douglas Elmendorf 1, 4 (Mar. 11, 2015), Table 1, available at <https://www.cbo.gov/sites/default/files/114th-congress-2015-2016/reports/49931-FederalContracts.pdf>.

only with “responsible” sources.<sup>2</sup> To implement this responsibility requirement, an agency contracting officer must make an affirmative determination of a contractor’s responsibility before the contracting officer makes any contract award.<sup>3</sup> Under existing law, a contractor must have “a satisfactory record of integrity and business ethics” to be a responsible source.<sup>4</sup> To strengthen this requirement, the Order now instructs contracting officers to consider whether a contractor has a history of certain labor law violations within the last three years as a factor in determining if the contractor has such a satisfactory record.<sup>5</sup>

Numerous violations of applicable laws in the course of business operations should raise questions about a contractor’s integrity and business ethics. Even the most limited definition of “business ethics” requires a business to obey the law.<sup>6</sup> Despite this fact, multiple studies conducted over the last two decades suggest that consideration of contractor labor law violations during

the Federal procurement process has been the exception rather than the rule.

#### A. GAO Studies of Federal Procurement

In the mid-1990s, the congressional General Accounting Office (GAO), now known as the Government Accountability Office, issued two reports finding that Federal contracts worth billions of dollars had been awarded to companies that had violated the National Labor Relations Act (NLRA) and the Occupational Safety and Health Act (the OSH Act).<sup>7</sup> The GAO observed that contracting agencies already had the authority to consider these violations when awarding Federal contracts under the existing regulations, but were not doing so because they lacked adequate information about contractors’ noncompliance.<sup>8</sup>

Over a decade later, with contracting expenditures escalating, the GAO again found a similar pattern. Looking at the companies that had the largest wage violations and workplace health-and-safety penalties from fiscal years 2005 to 2009, the GAO found that a surprisingly high percentage of those companies subsequently received Federal contracts.<sup>9</sup>

A 2013 report by the Senate Health, Education, Labor, and Pensions (HELP) Committee corroborated these findings. That report reviewed violations of the Fair Labor Standards Act (FLSA) and other laws enforced by the Department’s Wage and Hour Division (WHD) and Occupational Safety and Health Administration (OSHA) between 2007 and 2012 and found that some 49 Federal contractors were responsible for 1,776 separate violations of these laws

and paid \$196 million in penalties and back wage assessments.<sup>10</sup> In 2012, those same companies were awarded \$81 billion in Federal contracts.<sup>11</sup> Looking at the 100 largest wage and OSHA violations, the Committee found that 35 Federal contractors had violated both wage and safety-and-health laws.<sup>12</sup>

As the GAO had done 15 years earlier, the HELP Committee Report noted that contracting officers had the legal authority to consider labor law violations during the procurement process, but were not doing so. The Committee noted that contracting officers generally do not seek information regarding responsibility matters outside of the limited databases they are required by law to review.<sup>13</sup> And, even if they did have access to such information, the report found, contracting officers would be reluctant to act on it because of a lack of guidance regarding when labor law violations add up to an unsatisfactory record of integrity and business ethics.<sup>14</sup>

#### B. State and Local Responsible-Contracting Policies

During the decades in which the GAO and HELP Committee studies of Federal procurement were conducted, many State and local governments responded to similar challenges by incorporating labor standards into contracting policies.<sup>15</sup> Preward screening for labor

<sup>2</sup> 10 U.S.C. 2305(b); 41 U.S.C. 3703. This requirement dates to 1884. See Act of July 5, 1884, ch. 217, 23 Stat. 107, 109. The Federal Acquisition Regulation (FAR) contains a similar requirement. See FAR 9.103(a). The FAR can be found at title 48 of the Code of Federal Regulations. Citations in this Guidance to the FAR use format FAR [section] instead of 48 CFR [section].

<sup>3</sup> FAR 9.103(b). Agency “contracting officers” are the only Federal officials who can enter into and sign contracts on behalf of the Government. *Id.* 1.601. Contracting officers have authority to enter into, administer, or terminate contracts and make related determinations and findings. *Id.* 1.602–1(a). They also have the responsibility to ensure that all requirements of law, Executive orders, regulations, and all other applicable procedures, including clearances and approvals, have been met. *Id.* 1.602–1(b).

<sup>4</sup> 41 U.S.C. 113(4); FAR 9.104–1(d).

<sup>5</sup> See Order, sections 2(a)(ii) and (iii).

<sup>6</sup> See Milton Friedman, “The Social Responsibility of Business is to Increase Its Profits,” *New York Times Magazine* (Sept. 13, 1970); see also Rob Atkinson, “Growing Greener Grass: Looking from Legal Ethics to Business Ethics, and Back,” 1 U. St. Thomas L.J. 951, 969 (2004) (“A great deal of business ethics focuses on precisely this issue: What norms, beyond the minima of obeying the law and making a profit, govern what business managers should do?”). While court cases addressing the relationship between labor violations and “integrity and business ethics” are not common, the Comptroller General has, on occasion, concluded that the violation of various labor-related laws can support a finding of lack of integrity and business ethics. See, e.g., *ALM, Inc.*, B–225679 et. al, 87–1 CPD ¶ 493, at 1–2 (Comp. Gen. May 8, 1987) (discussing alleged violations of the Service Contract Act (SCA) in the context of FAR 9.104–1(d)); *Gen. Painting Co.*, B–219449, 85–2 CPD ¶ 530 at 4 (Comp. Gen. Nov. 8, 1985) (discussing failure to fulfill minimum wage requirements as a potential basis for nonresponsibility under FAR section 9.104–1(d)); *Wash. Moving & Storage Co.*, B–175845, 1973 WL 8012, at 2 (Comp. Gen. Mar. 9, 1973) (upholding NASA’s debarment of contractor for failure to comply with labor laws).

<sup>7</sup> See U.S. General Accounting Office, GAO/HEHS–96–8, “Worker Protection: Federal Contractors and Violations of Labor Law,” Report to Senator Paul Simon (1995) (documenting awards to companies that had violated the NLRA), available at <http://www.gao.gov/assets/230/221816.pdf>; U.S. General Accounting Office, GAO/HEHS–96–157, “Occupational Safety and Health: Violations of Safety and Health Regulations by Federal Contractors,” Report to Congressional Requesters (1996) (documenting awards to companies that had violated safety-and-health regulations), available at <http://www.gao.gov/assets/230/223113.pdf>.

<sup>8</sup> See U.S. General Accounting Office, GAO/T–HEHS–98–212, “Federal Contractors: Historical Perspective on Noncompliance With Labor and Worker Safety Laws,” Statement of Cornelia Blanchette before the Subcommittee on Oversight and Investigations, Committee on Education and the Workforce, House of Representatives, 2 (July 14, 1998) (drawing conclusions from the 1995 and 1996 GAO reports cited above in note 8), available at <http://www.gao.gov/assets/110/107539.pdf>.

<sup>9</sup> U.S. Government Accountability Office, GAO–10–1033, “Federal Contracting: Assessments and Citations of Federal Labor Law Violations by Selected Federal Contractors,” Report to Congressional Requesters 7–8 (2010), available at <http://www.gao.gov/new.items/d101033.pdf>.

<sup>10</sup> Majority Staff of Senate Committee on Health, Education, Labor, and Pensions, “Acting Responsibly? Federal Contractors Frequently Put Workers’ Lives and Livelihoods at Risk,” 1 (2013) (hereinafter HELP Committee Report), available at <http://www.help.senate.gov/imo/media/doc/Labor%20Law%20Violations%20by%20Contractors%20Report.pdf>.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 18.

<sup>13</sup> *Id.* at 25.

<sup>14</sup> *Id.* at 27–28.

<sup>15</sup> See Paul K. Sonn & Tsedeye Gebreselassie, *The Road to Responsible Contracting: Lessons from States and Cities for Ensuring That Federal Contracting Delivers Good Jobs and Quality Services*, 31 Berkeley J. Emp. & Lab. L. 459, 464–87 (2010) (listing examples). In addition, responsible-contractor policies have been increasingly employed by private actors. As one safety consultant for a Fortune 500 company noted, “[i]n the long term, carefully selected contractors are amazingly superior to those chosen based on cost or supposed productivity. The front-end investment for careful selection delivers an ROI far beyond the cost to go through the ‘dating-engagement-marriage’ process.” Mike Williamsen, “Choosing Great Contractors for Your Needs,” *Indus. Hygiene News* (July/Aug. 2012), available at <http://www.rimbach.com/cgi-bin/Article/IHN/Number.idc?Number=559>. These sorts of long-term benefits also make responsible-contractor policies attractive to large pension funds, the largest of which, CALPERS, has had a responsible-contractor policy in place for almost 20 years. See California Public Employees’ Retirement System, “Statement of Investment Policy for Responsible Contractor Program,” 7, 16 (2015), available at <https://>

law violations became standard practice in some State and local jurisdictions in the form of pre-qualification programs.<sup>16</sup> These programs have “come to be viewed in the public contracting field as a best practice and a key management strategy.”<sup>17</sup> In North Carolina, for example, contractors must be prequalified to bid on projects for the State’s Department of Transportation. As part of this prequalification, contractors have to disclose whether they have received any final or nonfinal repeat or willful OSHA violations within the past 2 years, and they must include copies of those violations with the prequalification application.<sup>18</sup>

Research tracking the results of these State and local efforts and of other similar Federal programs has suggested that responsible-contracting policies—including those policies that require payment of prevailing wages—can have a positive effect on contract performance, at limited cost and without negatively affecting competition. One recent study analyzed State and Federal highway-construction contracts in Colorado between 2000 and 2011 and found no statistically significant difference in the cost of the State projects, despite the additional prevailing-wage regulations on the federally financed projects.<sup>19</sup> The study

found that the Federal regulations were “not associated with reduced bid competition, an important determinant of project cost.”<sup>20</sup> Similarly, a study of local prevailing wage regulations in California in 2012 showed that the regulations “[did] not decrease the number of bidders nor alter the bidding behavior of contractors relative to the . . . value of the project.”<sup>21</sup> And a recent study of the use of local responsible-contractor policies across the State of Ohio showed no statistically discernible impact on school construction bid costs.<sup>22</sup>

These studies have shown that strengthening procurement labor standards and contractor labor-law compliance policies can play an important role in appropriately managing competition in procurement. When correctly managed, competition between contractors can increase accountability and the quality of services provided.<sup>23</sup> However, where compliance with legal norms is weak, price competition alone may instead result in an increase in unlawful behavior and poor contract performance.<sup>24</sup> State and local responsible-contracting policies have shown that contracting agencies can improve the quality of competition by encouraging bids from more responsible contractors that might otherwise abstain from bidding out of concern about not being able to compete with less scrupulous corner-cutting companies.<sup>25</sup>

In sum, studies of State and local initiatives have shown that—by properly managing competition—responsible-contractor policies can deliver better quality without significant cost increases for government agencies that employ them.

The Fair Pay and Safe Workplaces Order applies lessons learned from these developments in State and local contracting policy, and, by doing so, addresses the longstanding deficiencies highlighted in the GAO reports.

## II. Summary of the Executive Order

Executive Order 13673 (the Order) was signed by President Barack Obama on July 31, 2014. The Order contains three discrete parts, each designed to help executive departments and agencies identify and work with contractors who will comply with labor laws while performing Federal contracts.

The first part of the Order directs agency contracting officers to consider contractors’ records of labor law violations as the agencies make certain contracting decisions. To assure that contracting officers have sufficient information, the Order requires contractors to disclose their recent labor law violations to contracting officers. Specifically, the Order requires contractors to disclose violations of 14 Federal labor laws and Executive orders and equivalent State laws (collectively, “Labor Laws”). The Order instructs contracting officers to review a contractor’s Labor Law violations to assess the contractor’s record of Labor Law compliance during the preaward “responsibility” determination and when making postaward decisions such as whether to exercise contract options. The Order also creates a new position—Agency Labor Compliance Advisors (ALCA)—to assist contracting officers.

The first part of the Order also contains parallel requirements that apply to certain subcontractors working on covered contracts. The Order, as amended, and the final FAR rule require these covered subcontractors to disclose their Labor Law violations to the Department, which provides advice regarding subcontractors’ records of Labor Law compliance. Contractors then consider this advice from the Department when determining whether their subcontractors are responsible sources.

The second part of the Order creates new paycheck-transparency protections for workers on Federal contracts. This part, section 5 of the Order, contains two separate requirements. It requires contracting agencies to ensure that certain workers on covered Federal

[www.calpers.ca.gov/docs/policy-responsible-contractor-2015.pdf](http://www.calpers.ca.gov/docs/policy-responsible-contractor-2015.pdf).

<sup>16</sup> Daniel D. McMillan, Erich R. Luschei, “Prequalification of Contractors by State and Local Agencies: Legal Standards and Procedural Traps,” *Constr. Law.*, Spring 2007, at 21, 22 (“Public owners in numerous states now view prequalification as a useful, if not essential, element to ensure successful completion of construction projects.”).

<sup>17</sup> Sonn & Gebreselassie, *supra* note 15 at 477.

<sup>18</sup> North Carolina Dep’t of Transp., Subcontractor Prequalification Form, 14 (2014), available at <https://connect.ncdot.gov/business/Prequal/Documents/Subcontractor%20Prequalification%20Form.pdf>; The States of California, Massachusetts, and Connecticut have similar programs applicable to a broad array of public works. See Sonn & Gebreselassie, *supra* note 15 at 474–76. Other examples include the Illinois Department of Transportation; the City of Los Angeles; the Los Angeles Unified School District; the Santa Clara County, CA, Valley Transportation Authority; and the statute authorizing the construction of the Atlanta Beltline. *Id.* at 476 (discussing policies of the Illinois Department of Transportation and the City of Los Angeles); McMillan et al., *supra* note 16 at 22 (discussing the Los Angeles Unified School District program); P’ship for Working Families, “Policy & Tools: Responsible Contracting,” <http://www.forworkingfamilies.org/page/policy-tools-responsible-contracting> (last visited July 11, 2016) (discussing for the Santa Clara and Atlanta examples); see also 44 Ill. Admin. Code 650.240 (2006) (implementing prequalification for the Illinois Department of Transportation).

<sup>19</sup> Kevin Duncan, “The Effect of Federal Davis-Bacon and Disadvantaged Business Enterprise Regulations on Highway Maintenance Costs,” 68 *ILR Review* 212 (2015).

<sup>20</sup> *Id.*

<sup>21</sup> Jaewhan Kim et al., “The Effect of Prevailing Wage Regulations on Contractor Bid Participation and Behavior,” 54 *Indus. Relations* 874 (2012).

<sup>22</sup> C. Jeffrey Waddoups & David C. May, “Do Responsible Contractor Policies Increase Construction Bid Costs?,” 53 *Indus. Relations*, 273 (2014). Similarly, studies of local living-wage policies have shown “only a modest impact on costs, if any.” See Sonn & Gebreselassie, *supra* note 15 at 480. A study of Baltimore’s 1994 living-wage policy, for example, found a contract cost increase of just 1.2 percent, lower than the rate of inflation. See *id.*

<sup>23</sup> See Kate Manuel, Cong. Research Serv., R40516, “Competition in Federal Contracting: An Overview of the Legal Requirements,” 2–3 (2011) (discussing benefits and costs associated with competition in Federal contracting).

<sup>24</sup> See, e.g., Melissa S. Baucus & Janet P. Near, “Can Illegal Corporate Behavior Be Predicted? An Event History Analysis,” 34 *Acad. Mgmt. J.*, 9, 31 (1991) (“If a firm’s major competitors in an industry are performing well, in part as a result of illegal activities, it becomes difficult for managers to choose only legal actions, and they may regard illegal actions as a standard industry practice.”).

<sup>25</sup> See Sonn & Gebreselassie, *supra* note 16 at 477, 480; see also Maryland Dep’t of Legislative Servs., “Impact of the Maryland Living Wage,” 10 (2008), available at [http://dlslibrary.state.md.us/publications/OPA/IIMLW\\_2008.pdf](http://dlslibrary.state.md.us/publications/OPA/IIMLW_2008.pdf) (finding that the average number of bidders for service contracts increased from 3.7 bidders to 4.7 bidders after Maryland’s living-wage law took effect).

contracts and subcontracts receive a wage statement that that contains information concerning that individual's hours worked, overtime hours, pay, and any additions made to or deductions made from pay. It also instructs covered contractors and subcontractors to inform individuals in writing if the individual is being treated as an independent contractor, and not an employee.

The third part of the Order limits the use of pre-dispute arbitration clauses in employment agreements on covered Federal contracts.

The Order creates detailed implementation roles for the FAR Council, the Department, the Office of Management and Budget (OMB), and the General Services Administration (GSA). The FAR Council has the rulemaking responsibility to amend the Federal Acquisition Regulation (FAR) to implement the Order. Section 7 of the Order provides that the FAR Council will "propose such rules and regulations and issue orders as are deemed necessary and appropriate to carry out this order."

The Order instructs the Secretary of Labor (the Secretary) to, among other duties, develop guidance that defines certain terms in the Order. The Order directs the Secretary to define the categories of Labor Law violations that contractors must disclose (administrative merits determinations, civil judgments, and arbitral awards or decisions); identify the State laws that are equivalent to the 14 Federal labor laws for which violations must be disclosed; define the terms (serious, repeated, willful, and pervasive) that will be used to assess disclosed violations; consult with ALCAs as they carry out their responsibilities under the Order; and specify which State wage-statement laws are substantially similar to the Order's wage-statement requirement.

The Order also directs the Secretary to develop processes for regular interagency meetings, develop processes by which contracting officers and ALCAs may give appropriate consideration to determinations and agreements made by the Department and other enforcement agencies, develop processes by which contractors may enter into agreements with the Department or other enforcement agencies, and review and improve the Department's data collection systems.

The final Guidance document that follows this **SUPPLEMENTARY INFORMATION** contains a more detailed summary of the Order.

### III. Overview of the Final Guidance

Consistent with its obligations under the Order, the Department issued its Proposed Guidance on May 28, 2015, on the same date that the FAR Council issued its proposed rule to implement the Order. See 80 FR 30548 (proposed FAR rule); 80 FR 30574 (Proposed Guidance). Both the Department and the FAR Council solicited public comment, and the initial written comment periods closed on July 27, 2015. In response to requests for additional time to comment, however, the Department and the FAR Council extended the comment periods through August 26, 2015. After reviewing and carefully considering all of the timely submitted comments, the FAR Council and the Department are now simultaneously publishing final versions of the rule and the Guidance.

The Proposed Guidance contained sections addressing the purpose and summary of the Order, including a discussion of the existing FAR framework and the legal authority for the Order; the disclosure requirements; weighing Labor Law violations; the paycheck transparency provisions; an invitation to comment; and next steps. The Department solicited written comments on all aspects of the Proposed Guidance and also invited public comment on a variety of specific issues.

In the final Guidance, the Department has made several significant adjustments to accurately describe the modifications that the FAR Council made to its rule. In addition, in response to the comments about topics specifically tasked to the Department, the Department has clarified various definitions of terms used in the Order and included a more detailed narrative of the process for disclosing, categorizing, and weighing labor law violations.

The final Guidance, which follows this **SUPPLEMENTARY INFORMATION**, has the same basic structure as the Proposed Guidance with some additional sections added for clarity. It contains the following sections: (I) Purpose and summary of the Order, (II) Preaward disclosure requirements, (III) Preaward assessment and advice, (IV) Postaward disclosure and assessment, (V) Subcontractor responsibility, (VI) Preassessment, (VII) Paycheck transparency, and (VIII) Effective date and phase-in of requirements.

This Guidance satisfies most of the Department's responsibilities for issuing guidance, and the Department will publish at a later date a second guidance that satisfies its remaining responsibilities. The second guidance will be, as this Guidance was, submitted

for notice and comment, published in the **Federal Register**, and accompanied by a proposed amendment to the FAR rule. The Department will likewise submit for notice and comment and publish any future updates to the Guidance that will have a significant effect beyond the operating procedures of the Department or that will have a significant cost or administrative impact on contractors or offerors. The Department will coordinate with the FAR Council in determining whether updates will have a significant cost or administrative impact.

### IV. Summary of Comments Received

The Department received 7,924 comments on the Proposed Guidance from a wide variety of sources. Among these comments, some 7,784 were in the nature of mass mailings expressing general support for the Order, the FAR Council's proposed rule, and the Department's Proposed Guidance (collectively "the Order and the proposals"). Another 30 comments were in the nature of form letters, most of which expressed general opposition to the Order and the proposals. The Department also received an additional 109 individual submissions.

As discussed above, the FAR Council is issuing the implementing regulations for the Order by amending the FAR. The FAR Council published its proposed rule on the same date as the Department published its Proposed Guidance and similarly extended the comment period on the proposed rule to August 26, 2015. The Department and the FAR Council have coordinated efforts to assure the comments submitted that are relevant to the Guidance or to the FAR rule are shared with the appropriate agency, regardless of which agency may have initially received any specific comment.

A wide variety of interested parties submitted comments on the Proposed Guidance. Commenters included Members of Congress; State executive agencies; individual Federal contractor entities; national and State-level employer associations and advocacy organizations; professional associations; labor union federations; worker advocacy organizations; civil rights and human rights advocacy organizations; other non-profit advocacy organizations; and the Small Business Administration's Office of Advocacy, among others.

The Department recognizes and appreciates the value of comments, ideas, and suggestions from all those who commented on the proposal, and the final Guidance was developed only

after consideration of all the material submitted.

## V. Discussion of General Comments

This section of the preamble to the final Guidance discusses the general comments that the Department received.

### A. Comments Requesting Changes to the Order or the Proposed FAR Rule

Several industry commenters took issue with the text of the Order itself. In promulgating the Guidance and rule, the Department and the FAR Council are guided by the plain language of the Order. For example, several commenters argued that the FAR Council and the Department should change the contract value that will trigger the Order's disclosure requirements. Yet this \$500,000 threshold comes from section 2 of the Order itself. Comments such as these are generally not addressed here.

Similarly, several commenters from both industry and worker-advocacy organizations took issue with requirements specific to the FAR Council's proposed rule, and not to the Guidance. The government's response to these comments will appear in the FAR Council's final rule. They are generally not addressed here.

### B. Comments About Costs and Burdens of the Order

A number of employers and employer associations expressed concern that the requirements and processes established by the Order and the proposals will impose a heavy compliance burden that will increase their costs and cause delays in Federal contracting. Several of these industry commenters suggested that these potential costs and delays would harm the government and the public by increasing bid prices, discouraging companies from bidding on Federal contracts, or delaying the acquisition of key government goods and services.

Other commenters expressed general support for the Order and the proposals. Several argued that the disclosure requirements do not go far enough. These commenters suggested that contractors should be required to provide more information about each Labor Law violation than proposed by the Department, and argued that all of the information disclosed to contracting agencies should be compiled in a public, searchable database.

The Department recognizes that compliance with the Order's and the proposals' new requirements and processes will involve costs to contractors associated with the required representation and disclosures. These costs and burdens are addressed in the

Regulatory Impact Analysis (RIA) that accompanies the final FAR rule. Accordingly, the Department does not specifically list and respond to each comment about costs and burdens in this final Guidance document. Likewise, comments asserting that the RIA in the proposed FAR rule was flawed are addressed by the FAR Council and therefore are not summarized or answered here.

### C. Comments About Alternatives and the Need for the Order

Various industry commenters suggested that the Order and its requirements are unnecessary because any problems associated with Labor Law violations by Federal contractors can be addressed through existing rules and processes. Several commenters suggested that problems associated with Labor Law violations should be addressed in the existing suspension-and-debarment process instead of through the preaward responsibility process. Others suggested that the Order's disclosure requirements, specifically, are unnecessary because the government already obtains information about violations under the laws covered by the Order. These commenters argued that enforcement agencies already have the necessary information and that the disclosure requirements are duplicative of other reporting and information-gathering projects already in existence.

While these commenters have raised important issues, the Department does not believe that the Order is unnecessary or duplicative of existing processes. As an initial matter, the Department emphasizes that the purpose of the Order is to increase efficiency in contracting by encouraging compliance during contract performance, not to increase the use of suspension and debarment. The Order's new requirements and processes are designed to identify and help contractors address Labor Law violations and come into compliance before a contracting agency turns to the suspension-and-debarment process. The Order does not in any way alter the suspension-and-debarment process; however, the expectation is that its new requirements and processes will help contractors avoid the consequences of that process.

The Department believes that focusing on the preaward process—in addition to a functional suspension-and-debarment regime—is efficient for the government as well as for those contractors that are given the opportunity to avoid suspension or debarment. Without effective preaward screening, the

government faces the difficult decision about whether to expend resources on suspending or debarbing a company that may in fact not be planning to subsequently bid on a government contract.<sup>26</sup> And, as the chief construction inspector for the Los Angeles Bureau of Contract Administration has explained, front-end responsibility screening “is more effective and more beneficial to the public than a reactionary system. When you get a bad contractor on the back end, they've already done the damage, and then it's a costly process of kicking them out.”<sup>27</sup>

Moreover, when one Federal agency suspends or debarbs a contractor, that action applies across the entire Federal Government. The collateral consequences—both for a debarred contractor and for other contracting agencies that may need the services of that contractor—can be severe.<sup>28</sup> Thus, while the suspension-and-debarment process plays an important role in addressing significant concerns regarding an entity's responsibility and has a broad-reaching impact,<sup>29</sup> the preaward framework employed by the Order is an equally important tool, one that allows responsibility concerns to be addressed on a procurement-by-procurement basis with attendant benefits to both the government and the contracting community.

Recognition of the benefits of early detection and prevention underlies the existing Federal procurement rules that require disclosure and consideration of various non-labor violations at the preaward stage. A bidder must disclose

<sup>26</sup> See Yuri Weigel, “Is ‘Protection’ Always in the Best Interests of the Government?: An Argument to Narrow the Scope of Suspension and Debarment,” 81 *Geo. Wash. L. Rev.* 627, 660–61 (2013) (arguing that suspension and debarment are not always worth the administrative costs); HELP Committee Report, *supra* note 11 at 28–29 (discussing the inefficacies of the suspension and debarment process).

<sup>27</sup> Sonn & Gebreselassie, *supra* note 16, at 476–77.

<sup>28</sup> See Robert Stumberg et al., “Turning a Blind Eye: Respecting Human Rights in Government Purchasing,” *Int'l Corp. Accountability Roundtable*, 39–40 (2014) available at <http://icar.ngo/wp-content/uploads/2014/09/Procurement-Report-FINAL.pdf>; see also John B. Warnock, “Principled or Practical Responsibility: Sixty Years of Discussion,” 41 *Pub. Cont. L.J.* 881, 914 (2012) (“Government-wide debarment is punitive debarment to the extent that it disregards agencies' individual requirements and abilities to mitigate procurement risks.”).

<sup>29</sup> In some cases, denying access to Federal contracts may in fact “be the only realistic means of deterring contractors from [labor violations] based on a cold weighing of the costs and benefits of non-compliance.” *Janik Paving & Constr., Inc. v. Brock*, 828 F.2d 84, 91 (2d Cir. 1987) (holding that the Department had authority to debar a contractor over violations of the Contract Work Hours and Safety Standards Act).

information such as tax delinquencies in excess of \$3,500 and certain criminal convictions, indictments, civil judgments, and charges (for example, for violations of Federal or State antitrust statutes related to the submission of offers, commission of embezzlement, and making false statements); and a bidder with Federal contracts and grants totaling in excess of \$10 million must additionally disclose information such as civil and administrative findings of fault and liability in connection with the award to or performance by the bidder of a Federal contract or grant.<sup>30</sup>

By mandating preaward consideration of Labor Law violations, the Order does no more than treat such violations the same as these other existing responsibility red flags. By doing so, the Order will facilitate timely communication, coordination, and cooperation among Government officials—including contracting officers, suspending and debaring officials, and others—regarding responses to Labor Law violations to the fullest extent appropriate to the matter and permissible by law. By working together in this way, Federal Government agencies can better protect the government's interests in efficient contract administration and high-quality contract performance.

The Department also disagrees with the commenters that suggested the Order's disclosure requirements, specifically, are unnecessary and therefore unnecessarily burdensome. The Order's disclosure requirements are carefully tailored: It requires only a limited yes-or-no representation by all bidders and reserves the more detailed disclosure only for bidders for whom the contracting officer is making a responsibility determination—which most often is only the apparent awardee of the contract. The disclosure requirement is thus designed to request information from only those contractors for whom it is necessary in order for the contracting officer to assure that he or she is contracting with a responsible source, as required under existing law.

While some commenters stated that this disclosure requirement was unnecessarily burdensome, others found the Order's disclosure requirement to be appropriate. The National Employment Law Project, for example, argued that the contractor is "best positioned to furnish complete and accurate records about its labor violation." The Department finds this argument to be persuasive. The Order requires disclosure of various categories of information that the Federal

Government does not have in its possession, including information about State law violations, private litigation, and arbitration. Contractors are the best source of this information.

In addition, the Order balances the disclosure requirement with a parallel instruction for the Department to review its own data collection requirements and processes, and to work with the Director of the Office of Management and Budget, the Administrator for the General Services Administration, and other agency heads to improve those processes and existing data collection systems, as necessary, to reduce the burden on contractors and increase the amount of information available to agencies. *See* Order, section 4(a)(iii). As noted in the Initial Regulatory Flexibility Analysis that was part of the proposed FAR rule, this review and the related improvement to Federal databases has been initiated, and the Department is confident that it will ultimately be successful in further reducing the disclosure burden associated with the Order's disclosure requirements. *See* 80 FR 30562. Until that time, however, the system of disclosure created under the Order is the most efficient and least burdensome method of making information about labor violations available to contracting officers. *See id.*

#### *D. Comments About the Legal Authority for the Order*

The Department received a number of comments challenging the legal authority upon which the Order and the proposals were issued. The commenters alleged that several provisions of the Proposed Guidance were contrary to Federal law and constitutional principles. The Department briefly summarizes those arguments and provides the following response:

##### 1. The Procurement Act

Several industry commenters questioned the President's use of the Federal Property and Administrative Services Act (the Procurement Act), 40 U.S.C. 101 *et seq.*, as the legal authority for the Order. They argued that the Order and the proposals do not have the nexus to "economy and efficiency" in government procurement that courts have required for Executive action taken under the Procurement Act. The commenters argued that, instead, the Order will lead to higher procurement costs and a more burdensome procurement system. Commenters also questioned whether there is a relationship at all between labor law violations and poor contract performance.

After carefully reviewing these comments and the relevant case law, the Department disagrees with the commenters. The Order, the FAR rule, and this Guidance do not exceed the President's authority under the Procurement Act. The Procurement Act grants the President broad authority to prescribe policies and directives that the President considers necessary to carry out the statutory purposes of ensuring economical and efficient government procurement. The requisite nexus exists where the President's explanation for how an Executive order promotes efficiency and economy is reasonable and rational. As the Department discussed in the Proposed Guidance, the overall objective of the Order is to increase the government's ability to contract with companies that will comply with labor laws, thereby increasing the likelihood of timely, predictable, and satisfactory delivery of goods and services. The Department believes that agencies will benefit from additional information—through the new disclosure requirements—to better determine if a potential contractor is a responsible source.

The Order and the FAR rule provide ample basis for concluding that the goals of economy and efficiency in procurement are served. The RIA cites various studies showing a correlation between labor law violations and poor quality construction, low performance ratings, wasteful practices, and other performance problems.<sup>31</sup> And, by looking at contractors' recent violations of the law, Federal agencies can reasonably predict future behavior. As one academic study found, the existence of three or more prior violations of the law by a corporation is a "highly significant" predictor of subsequent illegal activity.<sup>32</sup> The President's explanation for how the Order promotes economy and efficiency is reasonable and rational. The final FAR rule and Department Guidance are therefore appropriate under the Procurement Act.

<sup>31</sup> The Department notes that both a correlation and a causal relationship exist between labor law violations and contract performance. In predicting and explaining unlawful corporate behavior, many academic researchers have emphasized the problem, above all, of "top management in tolerating, even shaping, a corporate culture that allows for deviance." William S. Laufer, "Corporate Liability, Risk Shifting, and the Paradox of Compliance," 52 Vand. L. Rev. 1343, 1410–11 (1999) (citing various studies). Thus, in many cases, labor law violations and other harmful practices (such as contract fraud)—both of which cause poor contract performance—may all be symptoms of the underlying management failures or malfeasance.

<sup>32</sup> Baucus & Near, *supra* note 25 at 27.

<sup>30</sup> *See* FAR 52.209–5, 52.209–7.

## 2. Separation of Powers

Several commenters argued that the Order and the proposals impinge on separation-of-powers principles. These arguments were presented in two ways: (1) The Order is preempted by the Labor Laws, and (2) the Order improperly amends Federal laws by creating new categories of violations and imposing new penalties. Several commenters focused specifically on the NLRA, citing court decisions in *Wis. Dep't. of Indus. v. Gould, Inc.*, 475 U.S. 282 (1986), and *Chamber of Commerce v. Reich*, 74 F.3d 1322 (D.C. Cir. 1996).<sup>33</sup>

After careful review of the comments and the law, the Department concludes that the Order does not offend separation-of-powers principles. The Department disagrees with the commenters who suggested that traditional preemption principles apply to Federal Executive actions. Rather, the appropriate question is whether the Executive action under the Procurement Act conflicts with some more specific statute Congress has enacted. An Executive action may not prohibit activity that Congress has explicitly declared permissible, or vice versa. Here, however, the Order and proposals do neither.

The Department also disagrees with the characterization of the Order as creating new categories of violations or a new penalty—the possibility of being found nonresponsible and denied government contract work. The Order does not materially alter the current procurement process. As discussed above in the background section, contracting officers already may consider Labor Law violations when assessing a contractor's responsibility. Other than requiring disclosure of Labor Law violations, the Order does no more regarding the responsibility determination process than provide additional assistance to contracting officers to assist them in carrying out their existing duties.

The purpose of the existing FAR responsibility determination is to evaluate conduct that may be remediable or punishable under other statutes. Contractors are already required to report numerous types of conduct, including fraud, anti-competitive conduct, embezzlement, theft, forgery, bribery, falsification or

destruction of records, making false statements, tax evasion, receiving stolen property, and tax delinquencies, that are unlawful and separately punishable under existing Federal and State laws. See FAR 52.209–5(a)(1)(i)(B)–(D). Such reporting and consideration does not create a new penalty under those statutes because the purpose of these FAR provisions is not to penalize a contractor, but rather to assure that the government contracts with responsible parties as it carries out its proprietary business. For the same reason, the Order's express consideration of the Labor Laws does not create new categories of violations or new penalties.

Finally, the Department disagrees that this analysis applies differently to the NLRA than to the other Labor Laws covered under the Order. Courts have upheld various Executive orders absent a direct conflict with the NLRA's statutory provisions. The decisions in *Gould* and *Reich* relied upon by the commenters do not suggest otherwise. Those two decisions involved initiatives that directly targeted only NLRA-covered violations. Moreover, the *Gould* decision did not involve a Federal Executive order, but rather a State law, and one that the Court found to have “the manifest purpose” of enforcing the requirements of the NLRA and which could not even “plausibly be defended as a legitimate response” to local procurement needs. 475 U.S. at 291. The *Reich* decision did involve an Executive order, but one which the court found to have the intent and effect of depriving contractors of the ability to hire permanent replacements during a strike—something that “promise[d] a direct conflict” with the NLRA. 74 F.3d at 1338. In both cases, the courts found that the provisions at issue were intended to affect the relationship between management and organized labor as opposed to seeking to advance a narrow proprietary interest with a close nexus to achieving economy and efficiency in Federal procurement. In contrast, here the Order endeavors only to treat the NLRA no differently than any of the other 13 covered Labor Laws. Thus, unlike in *Gould* and *Reich*, the inclusion of the NLRA in the Order here demonstrates the Order's intent to promote the government's proprietary interest in efficient contracting in an evenhanded manner.

## 3. Due Process

Many industry commenters expressed concern that that the Order and the proposals do not provide contractors with constitutionally sufficient due process protections. For example, two

employer representatives argued that the Order and the proposals could infringe upon protected liberty interests because an adverse responsibility determination could harm a prospective contractor's reputation. Others argued that a contractor's protected property interests may be infringed where postaward violations lead to an adverse action such as the non-renewal of an option, contract termination, or debarment.

The Department agrees that the preaward responsibility determination, the exercise of postaward contract remedies, and the suspension-and-debarment process each require consideration of a contractor's right to due process. However, the Department emphasizes that neither the Order nor the Guidance diminish the existing procedural safeguards already afforded to prospective contractors during the preaward responsibility determination or to contractors after they have been awarded a contract. Moreover, the Order does not infringe upon liberty or property interests because contractors receive notice that the responsibility determination is being made and are offered a pre-decisional opportunity to be heard by submission of any relevant information—including mitigating circumstances related to any Labor Law violation that must be disclosed.<sup>34</sup> Finally, nothing in the Order diminishes contractors' post-decisional opportunity to be heard through existing administrative processes and the Federal courts.

Various commenters also challenged the Proposed Guidance's definition of administrative merits determinations, claiming that requiring contractors to report nonfinal and appealable allegations denies them due process. Commenters asserted that a contractor may feel pressured to negotiate or sign a labor compliance agreement and forgo a challenge to a nonfinal administrative merits determination in order to receive a pending contract.

The Department has carefully considered this argument, but does not believe that the specific requirement to

<sup>34</sup> See FAR 22.2004–2(b)(1)(ii). Several commenters argued that the definition of administrative merits determination will be costly because it will force contractors to litigate a Labor Law violation in two separate fora—first, in front of the enforcement agency that has made the determination; and, second, by submitting mitigating circumstances to a contracting officer when submitting a bid. While mindful of the additional costs that this process may entail for some contractors, the Department submits that contractors' opportunity to provide relevant information (including mitigating circumstances) during the responsibility determination addresses the due process concerns raised by the employer associations.

<sup>33</sup> Various commenters also made a separation-of-powers type of argument about the Federal Arbitration Act (FAA) and the Order's limits on certain pre-dispute mandatory arbitration clauses. The Department is not providing guidance regarding that section of the Order and therefore does not address the legal arguments about the FAA. The FAR Council addresses FAA-related legal arguments in the preamble to its final rule.



disclose nonfinal administrative merits determinations violates contractors' rights to due process. Though the Order and FAR rule (and therefore the Guidance) place value on a contractor's effort to remediate violations through a settlement or labor compliance agreement, neither contains any requirement that a contractor must settle all open cases in order to be found responsible and receive a contract award—a fact that the Department has emphasized in the final Guidance. *See* Guidance, section III(B)(1)(a). Similarly, the final Guidance also emphasizes that a contractor may enter into a labor compliance agreement while at the same time continuing to contest an underlying Labor Law violation. *See id.* section III(C)(1). Because a contractor is not required to forgo the right to appeal any nonfinal Labor Law violation in order to secure a Federal contract, the requirement to disclose nonfinal violations clearly does not violate due process.

#### 4. The Administrative Procedure Act

Some commenters argued that the Guidance does not comply with the Administrative Procedure Act (APA), 5 U.S.C. 553(b). They asserted that the Guidance is, in effect, a legislative rule that requires notice and comment. The Department has reviewed these comments and finds them to be without merit. The Guidance is not a legislative rule; it does not bind private parties or agency officials, and it does not meet the four-part test for a legislative rule that would require notice and comment. *See Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1109 (D.C. Cir. 1993).

First and foremost, the Order provides an independent and adequate basis for enforcement, apart from the Guidance. *See Am. Mining*, 995 F.2d at 1112. The Order and the FAR Council rule provide disclosure and process requirements that bind private parties and agency officials. The Guidance only supplies additional clarity to these requirements through the Department's interpretation of certain terms of the Order and narrative description of the process. Second, the Department has not explicitly invoked its general legislative authority. *See id.* Rather, it has acted to create a guidance document at the explicit instruction of the Order itself. *See* Guidance, section I(B). Third, the Guidance does not effectively amend the Order or any regulations; rather, it is consistent with their requirements. An agency action “does not, in this inquiry, become an amendment merely because it supplies crisper and more detailed lines than the authority being

interpreted.” *Am. Mining*, 995 F.2d at 1112. Finally, the Guidance will not be published in the Code of Federal Regulations. *See id.*

Moreover, even if the Guidance were considered to be a legislative rule, the Department met the APA's procedural requirements by publishing the Proposed Guidance in the **Federal Register** and soliciting and considering comments before issuing the final Guidance.

In another set of comments directed at procedural aspects of the Guidance, a few employer groups raised concerns that the impact of the Guidance could not be properly assessed because the Department decided to identify only a small number of the State laws equivalent to the 14 Federal laws listed in the Order and to leave the remaining State laws for a subsequent guidance document. One commenter also stated that the Proposed Guidance did not contain a sufficient justification for this two-step process, suggesting that the final Guidance cannot be upheld unless the Department provides appropriate reasons for delaying the identification of equivalent laws. The Department has reviewed these comments and finds that they are premature and without merit. The Department has identified in this Guidance that OSHA State Plans are equivalent State laws; but the Department has decided to delay the identification of additional equivalent State laws as part of the phase-in of the Order's requirements that will allow contractors and contracting agencies time to adjust to the new requirements. The comments also do not account for the fact that the additional guidance released in the future will also be submitted as a proposal with an opportunity for comment and accompanied by a proposed amendment to the FAR and a Regulatory Impact Analysis.

Finally, one employer advocacy group commented that the Order directs the Department to issue guidance regarding only a single portion of the paycheck transparency provision, which is the identification of substantially similar State wage-statement laws. This commenter, Equal Employment Advisory Council (EEAC), requested clarification regarding what authority the Department has for issuing the “guidance, binding or not, on the additional provisions of the paycheck transparency provision.” The commenter misunderstands the reason that the Department addressed all aspects of the paycheck-transparency requirements in the Proposed Guidance. The Department intends the Guidance to be a stand-alone document that will

be helpful to agency officials and contractors as they implement the requirements in the Order and the FAR rule. Accordingly, the Department has included in the final Guidance a description of the requirements of the Order and the FAR—regardless of whether the Order specifically required the Department to provide guidance on those specific provisions.

#### Section-by-Section Analysis

In addition to submitting general comments, commenters also commented on specific elements of the Proposed Guidance. The Department appreciates the effort from these commenters to carefully review the Order and the Proposed Guidance. The Department now modifies the final Guidance in response to those comments in a number of areas. The comments, responses, and modifications are summarized below in a section-by-section analysis.

#### I. Purpose and Summary of the Order

Section I of the Guidance is an introduction that explains the purpose of Executive Order 13673, briefly summarizes the legal authority for the Order and the existing FAR rules to which the Order applies, and recites a summary of the new requirements and processes contained in the Order. The subsection on legal authority specifically identifies the Procurement Act, 40 U.S.C. 101 *et seq.*, as providing the statutory authority for the Order.

The Department received a number of comments questioning whether the Order would achieve its stated purpose of increasing economy and efficiency in Federal procurement, and—as a related matter—whether the President was justified in issuing the Order under the Procurement Act. As discussed above, the Department disagrees with those commenters that have questioned the purpose of and authority for the Order. The Department therefore concludes that it is not necessary to amend this section in response to these comments. The Department does, however, amend section I of the final Guidance to include the discussion of the purpose of the Order previously included in another section of the Proposed Guidance, to conform the summary to changes made to the FAR rule, to add language reiterating that the Guidance is not a legislative rule, and to improve its clarity.

#### II. Preaward Disclosure Requirements (Formerly “Disclosure Requirements”)

During both the preaward and postaward periods, the Order requires contractors and subcontractors

(collectively, “contractors”) to disclose administrative merits determinations, civil judgments, and arbitral awards or decisions rendered for violations of the Labor Laws (collectively, “Labor Law decisions”).<sup>35</sup> Section II of the Guidance assists agencies in interpreting the preaward disclosure requirements in the Order and the FAR rule.<sup>36</sup> Because the FAR rule governs the requirements discussed below, the Department has modified the Guidance to parallel changes made in the final FAR rule and has included additional descriptions of the rule’s requirements to assist contractors and contracting agencies.

#### *A. Covered Contracts (Formerly “Who Must Make Disclosures Under the Order”)*

The first part of section II of the Guidance discusses the types of contracts covered by the Order and the scope of a contractor’s requirement to disclose Labor Law decisions. These types include contracts between Federal agencies and prime contractors that meet certain conditions (covered procurement contracts). And they include subcontracts that meet similar, but not identical, conditions (covered subcontracts). The Guidance uses the term “covered contract” to refer to both covered procurement contracts and covered subcontracts.

The Department received several comments requesting that the definition of the various types of covered contracts be amended. One industry commenter, the Aerospace Industries Association (AIA), suggested that all commercial item contracts—and especially commercial item subcontracts—should be excluded from the Order’s disclosure requirements. AIA noted that the Order does expressly exclude subcontracts for commercially available off-the-shelf items (COTS), and it asserted that there is no basis for distinguishing between contracts for COTS items and contracts for commercial items. It noted that there is a “major government initiative” to increase government acquisition of commercial items.

<sup>35</sup> The Department has made several nonsubstantive changes to the Guidance in the disclosure section for clarity. The final Guidance now uses “contractors” to refer to both prime contractors and subcontractors; where relevant, however, the distinction between prime contractors and subcontractors is noted. In addition, the Guidance now refers to a contractor’s requirement to provide information as “disclosure” instead of “reporting.” This change is intended only for consistency with the language of the FAR rule.

<sup>36</sup> The Department has summarized the FAR’s rules on postaward disclosures and assessment in section IV of the Guidance. The comments regarding the postaward process are discussed in a parallel section below.

The Department declines to amend the Guidance as suggested. The definition of covered contracts is within the jurisdiction of the FAR Council. As the FAR Council indicates in the preamble to its final rule, the plain language of the Order does not provide for a blanket exclusion of commercial item contracts, which are distinct from COTS contracts in the FAR. The Order expressly excludes contracts for COTS items from covered subcontracts, *see* Order, section 2(a)(iv), and does not specifically address commercial items. Had the Order intended to also exclude contracts for commercial items, it would have done so expressly. The Guidance thus adopts the proposed definitions of “covered procurement contracts,” “covered subcontracts,” and “covered contracts;” and the Department has added additional language to highlight the applicability of the Order to procurement contracts for both COTS and commercial items.

The Department also received multiple comments about the definition of a “contractor” in this section. The Proposed Guidance explained that references to “contractors” include both individuals and entities and both offerors on and holders of contracts. Several employer organizations asked the Department to clarify whether this definition of “contractor” requires parties bidding on or holding covered contracts to disclose the violations of their parent corporations, subsidiaries, or affiliates. One commenter, the U.S. Chamber of Commerce, suggested that the Guidance the term contractor be limited to mean “the entity that legally executes a contract with the Government” and should not include “affiliated legal entities.” Another commenter, the Society for Human Resource Management et al., recommended that disclosure be at the Commercial and Government Entity (CAGE) Code level because it would be less burdensome and because any alternative would not be reasonably related to the responsibility of the “specific entity that will perform the federal contract.” Other industry commenters requested clarity on which entity is obligated to report the violations of affiliated entities after acquisitions, spinoffs, and mergers occur and any violations that occurred at facilities no longer in use.

In contrast, union and worker-advocacy organizations suggested that the Guidance define “contractor” to expressly include a contractor’s affiliates and/or recommended that the Guidance otherwise require contractors to report the Labor Law violations of their affiliates. Some recommended that

the Guidance use the FAR definition of “affiliates” at FAR 2.101, which defines “affiliates” in the context of direct or indirect control of an entity or business.

The Department declines to amend the definition of “contractor” in the final Guidance. The applicability of the Order’s disclosure requirements to a contracting entity’s corporate affiliates is within the jurisdiction of the FAR Council. As the FAR Council indicates in the preamble to its final rule, the scope of prime contractor and subcontractor representations and disclosures follows the general principles and practice of the FAR that are the same for other FAR provisions requiring representations and disclosures. The requirement to represent and disclose applies to the legal entity whose name and address is entered on the bid/offer and that will be legally responsible for performance of the contract. Consistent with current FAR practice, representations and disclosures do not apply to a parent corporation, subsidiary corporation, or other affiliates, unless a specific FAR provision (*e.g.*, FAR 52.209–5) requires that additional information. The Department additionally notes that the Order’s disclosure requirements do not amend the existing FAR provisions regarding the relationship between a contractor’s affiliates and its responsibility. The FAR continues to require contracting officers to consider all relevant information when reviewing a contractor’s responsibility—including the past performance and integrity of a contractor’s affiliates when they affect the prospective contractor’s responsibility. *See* FAR 9.104–3(c).

The Department also received comments specifically directed at “covered subcontracts.” In the final Guidance, the Department created a new section dedicated specifically to subcontractor responsibility. *See* Guidance, section V. The comments about subcontract coverage are addressed in a parallel section of the section-by-section analysis below.

#### *B. Labor Law Decisions (Formerly “What Triggers the Disclosure Obligations”)*

The second part of section II discusses the categories of Labor Law decisions that contractors must disclose. The Order requires contractors to disclose Labor Law decisions rendered against them within the preceding 3-year period for a violation of the Labor Laws. *See* Order, sections 2(a)(i), 2(a)(iv)(A). The Proposed Guidance interpreted the relevant 3-year period to be the 3-year period preceding the date of the offer, contract bid, or proposal. 80 FR 30574, 30578. Labor Law decisions rendered

during that 3-year period must be disclosed even if the underlying unlawful conduct occurred more than 3 years prior to the date of the report. *See id.* The Proposed Guidance further explained that contractors must disclose Labor Law decisions that were issued during the relevant 3-year period even if they were not performing or bidding on a covered contract at the time of the decision. *Id.* at 30578–79.

#### Timing of the Initial Representation Requirement

The FAR Council proposed rule provided that, consistent with the Order, all “offerors” must initially represent at the time of their bids whether they have decisions that must be disclosed. *See* 80 FR 30552. One industry commenter proposed that only the contractor selected for an award of the contract should have to make the initial representation required by the Order. The FAR rule reasonably creates a two-step process requiring an initial representation equivalent to “yes or no.” *See* FAR 22.2004–1(a). And only contractors for whom a contracting officer will initiate a responsibility determination must make more detailed disclosures. *Id.* This staggered process provides an appropriate balance by requiring detailed disclosures only from offerors for whom the contracting officer is conducting a responsibility determination.

#### The 3-Year Disclosure Period

Several commenters addressed the 3-year disclosure period. For example, the Aerospace Industries Association (AIA) argued that, at least with respect to administrative merits determinations, “only those determinations based on conduct that occurred or ceased within the prior three years” should be disclosed. However, the Order states that contractors must disclose violations “rendered against” the contractor within the 3-year disclosure period. Order, sections 2(a)(i), 2(a)(iv)(A). This language clearly refers to the date of the Labor Law decision, as opposed to when the underlying conduct occurred. The final Guidance includes an additional example to illustrate this principle.

The Council of Defense and Space Industry Associations (CODSIA) requested that the period of coverage for the disclosure requirements be reduced to 6 or 12 months. The plain language of the Order provides for a 3-year disclosure period, *see* Order, section 2(a)(i); thus it is not possible to permanently reduce the disclosure period. However, as described in section VIII of the Guidance and the corresponding section of the section-by-

section analysis below, the final FAR rule phases in the disclosure period so that the full 3-year period will not be fully effective until October 25, 2018.

#### Proposal To Add Labor Laws

Some commenters suggested requiring disclosures for violations of statutes other than the enumerated Labor Laws. For example, the United Food and Commercial Workers International Union (UFCW) proposed adding “the anti-discrimination provisions of the Immigration and Nationality Act as amended by the Immigration Reform and Control Act of 1986 which are codified at [8 U.S.C. 1324b].” Two labor union commenters urged the Department to require disclosure of safety-and-health violations under statutory authority separate from the OSH Act, such as the Atomic Energy Act, 42 U.S.C. 2282c.<sup>37</sup>

The Department declines to adopt these proposals. The Order specifically identifies 14 Federal laws and Executive orders for which violations must be disclosed. Order, section 2(a)(i)(A)–(N). The Department cannot alter the list of laws covered by the Order.

#### Disclosure of Criminal Violations

The Center for American Progress Action Fund (CAPAF) requested clarification as to whether the Order requires disclosure of criminal violations of the Labor Laws, as the FLSA, the Migrant and Seasonal Agricultural Worker Protection Act (MSPA), and the OSH Act provide for criminal sanctions. CAPAF is concerned that, if not, there would be a “significant loophole.”

The Department declines to modify the final Guidance in response to this comment. The Order does not reference criminal violations of the Labor Laws. The Order requires disclosure only of a civil judgment, arbitral award or decision, or administrative merits determination, and a criminal conviction is not encompassed within those terms.<sup>38</sup>

<sup>37</sup> Although the Order does not require the disclosure of violations of other Federal occupational safety-and-health statutes, such violations may be otherwise considered during the contracting process. For example, a contractor may bid on a Department of Energy contract for which the work will be covered by the Atomic Energy Act rather than the OSH Act. Such a contractor, however, may be performing work, or has performed work, that is covered by the OSH Act for another government agency or in the private sector. It is clear from the plain terms of the Order that a contractor, when bidding on a contract, must disclose any violations of the OSH Act, even if the work for which the contractor is bidding will not be covered by the OSH Act.

<sup>38</sup> While disclosure of criminal convictions is not required under the provisions of the Order, the

#### OSHA State Plans

The Order directs the Department to define the State laws that are equivalent to the 14 identified Federal labor laws and Executive orders. Order, section 2(a)(i)(O). The Proposed Guidance stated that OSHA-approved State Plans are equivalent State laws for purposes of the Order’s disclosure requirements because the OSH Act permits certain States to administer OSHA-approved State occupational safety-and-health plans in lieu of Federal enforcement of the OSH Act. *See* 80 FR 30574, 30579.

Several commenters addressed the inclusion of OSHA-approved State Plans as equivalent State laws. One labor organization commenter agreed that State Plans are equivalent to the OSH Act, as the State Plans function in lieu of the OSH Act in those States, and the National Council for Occupational Safety and Health (National COSH) called it “essential” to the Order’s purpose that both the OSH Act and “its state law equivalents” be included.

In contrast, the U.S. Chamber of Commerce argued that the State Plans are not equivalent State laws. The Chamber noted that while State Plans must be “at least as effective” as the Federal OSHA program,<sup>39</sup> substantial differences nevertheless exist, because some State Plans “impose requirements . . . that are not required by, or differ from, federal law.”

The Department declines to modify this aspect of the Proposed Guidance. As an initial matter, the Department interprets the Chamber’s comment to suggest that a State law must be identical to be considered “equivalent” under the Order. The Department notes that other commenters emphasized that “equivalent” does not equate to “identical.” The Department agrees with these commenters; requiring equivalent State laws to be identical would be underinclusive because State laws are rarely if ever identical to Federal laws.

The Department finds State Plans to be equivalent to the OSH Act because they perform the same functions as OSHA—setting standards, conducting enforcement inspections, and issuing citations. OSHA has only limited enforcement authority in those twenty-two States with State Plans, so failing to include OSHA State Plans as equivalent State laws would lead to a gap in disclosure for safety-and-health violations in those States under the Order. Including the State Plans results

Department notes that the FAR does require contractors to disclose criminal convictions in certain circumstances. *See* FAR 52.209–7.

<sup>39</sup> *See* Section 18(c) of the OSH Act, 29 U.S.C. 667 (c).

in a more level playing field than would excluding them. For these reasons, the Guidance adopts the inclusion of OSHA-approved State Plans as equivalent State laws. The Guidance now also includes additional resources about State Plans and a link to a list of OSHA-approved State Plans on the OSHA Web site.

#### Disclosure of All Relevant Violations

Several industry commenters objected to disclosing Labor Law violations where the underlying conduct did not occur in the course of performance of a Federal contract. In contrast, several employee-advocacy groups supported requiring contractors to disclose Labor Law violations regardless of whether the violation arose from the performance of a Federal contract.

The Order's disclosure requirement does not distinguish between violations committed during performance of a Federal contract and those that are not. *See* Order, sections 2(a)(i), 2(a)(iv)(A). The Order aims to incorporate the full picture of a contractor's Labor Law compliance into the responsibility determination process. A contractor's past performance—whether in the course of performing a Federal contract or not—is an indicator of the contractor's future performance.<sup>40</sup> It is also relevant to a determination of the contractor's integrity and business ethics. The existing responsibility determination process already requires contractors to disclose unlawful conduct that may not have occurred during work on government contracts. FAR 52.209-5(a)(1)(i)(B)–(D). Thus, contractors must disclose any Labor Law decision issued for a violation of the Labor Laws, even if the violation was not committed in the performance of work on a Federal Government contract or subcontract. Because some commenters thought this was not clear in the Proposed Guidance, the Department modifies the Guidance for clarity.

#### Violations Related to Actions or Omissions of a Federal Agency

Several industry commenters suggested that contractors should not be required to disclose Labor Law violations that result from actions or omissions of the contracting agency. For example, two such commenters cited a wage violation resulting from the failure

of the contracting agency to include the applicable clause or wage determination in the contract. Furthermore, although one trade association commenter and one advocacy organization commenter acknowledged that the Proposed Guidance would allow contractors to present additional information and mitigating factors along with the disclosed violation, they expressed concern that the information will not be properly evaluated.

The Department declines to adopt the proposed changes to the Guidance. It recognizes that some Labor Law violations may result where a Federal contract did not include a required clause or wage determination. Whatever the reason for the failure to include the required clause or wage determination, a violation still occurred. *See, e.g.*, 41 CFR 60-1.4(e) (stating that the Executive Order 11246 equal opportunity clause “shall be considered to be a part of every [covered] contract . . . whether or not it is physically incorporated in such contracts”). Thus, the Department believes the better approach is to take this information into account as a mitigating factor, rather than to make exceptions to the disclosure requirements.

The Proposed Guidance was clear that contractors are encouraged to submit any additional information they believe may be helpful in assessing the violations at issue—particularly mitigating information. The Proposed Guidance stated that mitigating factors can include situations where the findings of the enforcement agency, court, arbitrator, or arbitral panel support a conclusion that the contractor acted in good faith and had reasonable grounds for believing that it was not violating the law. 80 FR 30574, 30591. As discussed below, the Guidance lists “good faith and reasonable grounds” as a mitigating factor that weighs in favor of a recommendation that a contractor has a satisfactory record of Labor Law compliance. That discussion specifically provides the example of a situation where a violation is caused by the failure of a contracting agency to include a required clause in the contract.

#### Disclosure of “Relatively Minor” Violations

The Association of General Contractors (AGC) suggested that it is “burdensome and unfair” to require the disclosure of “relatively minor violations” that are not serious, repeated, willful, or pervasive as defined by the Department. Because only violations deemed serious, repeated, willful, or pervasive bear on

the assessment of the contractor's integrity and business ethics, AGC recommended that only those violations should be disclosed.

The Department declines to adopt AGC's proposal. The Order plainly requires contractors to disclose all violations of the Labor Laws that result in Labor Law decisions. The disclosed violations are then classified as serious, repeated, willful, and/or pervasive—or not. *See* Order, sections 2(a)(i), 2(a)(iv)(A), 4(a)–(b). Only those violations classified as serious, repeated, willful, and/or pervasive will be considered as part of the weighing step and will factor into the ALCA's written analysis and advice. Violations determined by the ALCA to not be serious, repeated, willful, or pervasive will be annotated as such in the analysis that the ALCA provides to the contracting officer.

#### Disclosure of Violations That Are Subsequently Settled

Jenner & Block LLP commented that it was unfair to require disclosure of violations that have been settled, thus rendering them “potentially sanctionable[ ] event[s].” According to the comment, doing so would cause “the Federal government to violate its own contractual obligations” when there is a non-admission provision in the settlement agreement.

The Department declines to amend the Guidance's treatment of settled violations. The Order requires the disclosure of violations, and the fact that a violation was subsequently settled does not negate the fact that the enforcement agency, after a thorough investigation, found a violation to have occurred.

In some settlements, the enforcement agency may agree as part of the settlement to vacate a prior administrative merits determination. In such a case, the settlement would have the same effect as a court decision reversing or vacating the original violation. As the Guidance notes, in such a circumstance, the contractor does not need to disclose the original Labor Law decision. *See* Guidance, section II(B)(4).

Unless an enforcement agency has agreed to vacate or rescind the underlying violation entirely, however, the contractor must still disclose the related Labor Law decisions when required by the Order, notwithstanding any settlement agreement. A non-admission provision, for example, does not generally involve an enforcement agency's agreement to withdraw any finding of a violation. Thus, a non-admission provision does not affect the

<sup>40</sup> This principle is the same one a contractor uses when conducting a review of prospective subcontractors. A contractor would consider any prior misconduct or performance problems by the subcontractor, regardless of where the problems occurred and for which contractor the subcontractor was working at the time they occurred.

existence of any prior Labor Law decision, and therefore does not change the Order's requirement that a contractor must disclose any Labor Law decision that preceded the settlement. Similarly, an enforcement agency will not include, and an ALCA will not consider, language in a settlement agreement purporting to determine or affect whether a violation or related Labor Law decision must be disclosed under the Order.<sup>41</sup>

Although settlement agreements will not affect a contractor's disclosure requirements under the Order, a settlement agreement may be an important factor in the ALCA's overall assessment of the contractor's compliance record. The Order requires ALCAs to consider steps taken to correct the violation or improve compliance, and the Guidance accordingly provides that the remediation of a Labor Law violation through a settlement agreement is an important mitigating factor that can weigh in favor of a satisfactory record of Labor Law compliance. See Guidance, section III(B)(1).

#### Comments About Specific Subsections

The Order instructs the Department to define the three categories of Labor Law decisions that must be disclosed: "administrative merits determination," "civil judgment," and "arbitral award or decision." Order, section 2(a)(i).

##### 1. Defining "Administrative Merits Determination"

In the Proposed Guidance, the Department described an administrative merits determination as including

notices or findings—whether final or subject to appeal or further review—issued by an enforcement agency following an investigation that indicates that the contractor or subcontractor violated any provision of the Labor Laws.

80 FR 30574, 30579–80.

The Department defined "enforcement agency" as including the Department and its agencies—OSHA, WHD, and the Office of Federal Contract Compliance Programs (OFCCP). Enforcement agencies also include the Occupational Safety and Health Review Commission (OSHRC); the Equal Employment Opportunity Commission (EEOC); the National Labor Relations Board (NLRB); and certain State agencies.

<sup>41</sup> Nor will an enforcement agency include, or an ALCA consider, language in a settlement agreement purporting to determine how a violation will be classified under the Order (e.g., language stating that, for the purposes of the Order, the violation was not serious, willful, repeated, or pervasive).

The Department identified the specific notices and findings issued by these agencies that are administrative merits determinations. The Department provided that administrative merits determinations also include "a complaint filed by or on behalf of an enforcement agency with a Federal or State court, an administrative judge, or an administrative law judge alleging that the contractor or subcontractor violated any provision of the Labor Laws," and "any order or finding from any administrative judge, administrative law judge, the Department's Administrative Review Board [(ARB)], the [OSHRC] or State equivalent, or the [NLRB] that the contractor or subcontractor violated any provision of the Labor Laws." 80 FR 30574, 30579–80. This list of notices, findings, and documents was an exhaustive one.

##### a. Inclusion of Nonfinal and Appealable Decisions

A number of industry commenters objected on due process and related grounds to the inclusion of nonfinal and appealable decisions in the definition of "administrative merits determination." These commenters characterized such determinations as "allegations." One form comment submitted by various employers and employer groups asserted that requiring disclosure of nonfinal agency actions could cause contractors to lose a contract because of cases that are not yet fully adjudicated. The form comment stated that this would infringe upon Federal contractors' due process rights.

These commenters also argued that the notices, findings, and documents identified as administrative merits determinations in the Proposed Guidance often reflect mistakes by the enforcement agencies and/or are often reversed or settled, and that requiring disclosure of nonfinal and appealable determinations assumes that contractors are guilty until proven innocent. One form comment asserted that a number of the proposed administrative merits determinations are "routinely overturned once the initial determination is challenged." A few of these commenters asserted that the disclosure of "nonfinal allegations" may cause economic and reputational harms to contractors, particularly if the reported violation is later reversed.

For these commenters, administrative merits determination should include only final and adjudicated agency decisions. Jenner & Block, in a representative comment, suggested that only "final decision[s] of administrative bodies with quasi-judicial authority" should be administrative merits

determinations. These commenters suggested that such a limit might include only decisions of administrative bodies such as OSHRC or the ARB, and those decisions of individual administrative law judges that are not appealed and therefore become final agency actions.

Several commenters, including the Society for Human Resource Management, the Council for Global Immigration, and the College and University Professional Association for Human Resources, also noted that the FAR Council's "Contractor Responsibility" rulemaking in 2000,<sup>42</sup> which was later rescinded, would have required the reporting of "adverse decisions by federal administrative law judges, boards or commissions" but not "preliminary agency assessments." One industry commenter asserted that the FAR Council previously rejected the notion that nonfinal allegations should influence the procurement process.

In contrast, union and worker-advocacy commenters supported the scope of agency determinations included in the proposed definition of administrative merits determination. For example, Change to Win (CTW) emphasized its strong support for including initial agency findings in the responsibility inquiry because, otherwise, violations would go undisclosed while "awaiting the outcome of potentially and often frivolous employer challenges to such findings and orders." Another commenter, North America's Building Trades Unions (NABTU), explained that:

[t]he fact that a government enforcement agency has decided, after conducting an investigation, to pursue a citation, complaint or other action against a contractor is a signal of potential serious problems that could go unreported if the contractor were permitted to wait until the case is completely adjudicated—a process that can take years[.]

The Department believes that the due process and related critiques of the proposed definition of administrative merits determination are unwarranted. The Order delegates to the Department the authority to define the term. See Order, section 2(a)(i). The proposed definition is consistent with the Order and the authority delegated. The Department limited the definition to a finite number of findings, notices, and documents—and only those issued "following an investigation by the

<sup>42</sup> Federal Acquisition Regulation; Contractor Responsibility, Labor Relations Costs, and Costs Relating to Legal and Other Proceedings, 65 FR 80256 (Dec. 20, 2000).

relevant enforcement agency.” 80 FR 30574, 30579.

If the Department limited its definition of administrative merits determination solely to findings of an ALJ, board, or commission, then thousands of uncontested enforcement agency determinations that Labor Laws have been violated would go undisclosed. For example, most WHD determinations that the FLSA’s minimum wage and/or overtime provisions have been violated are never contested before an adjudicative body; rather, they are resolved prior to any litigation by the employer agreeing to pay the back wages reflected in a WH–56 form. Likewise, 89.1 percent of citations issued by OSHA between October 1, 2012 and September 30, 2015 were not contested or were settled using OSHA’s informal settlement agreements or expedited informal settlement agreements.<sup>43</sup> And, at the NLRB, the settlement rate for meritorious unlawful labor practices cases was 92.4 percent in fiscal year 2015.<sup>44</sup>

Moreover, a narrower definition of administrative merits determination would also exclude all those initial agency determinations that a contractor is actively contesting. Excluding these determinations would in many cases result in a particularly long delay between the prohibited conduct and the obligation to disclose. For example, contested OSHA citations frequently take years to become final. In the interim, a contractor with many OSHA citations could secure Federal contracts without any consideration of those citations. In addition, the assertion by some commenters that administrative merits determinations are routinely overturned is not the case. For example, in fiscal year 2015 the NLRB’s litigation success rate before ALJs and the Board was 88 percent, and 80 percent of Board decisions were enforced in whole or in part by courts of appeals.<sup>45</sup> An even smaller percentage of all OSHA citations—less than 2 percent—are later vacated.

The definition of administrative merits determination simply delineates the scope of contractors’ disclosure obligations—the first stage in the Order’s process. Not all disclosed Labor

Law decisions are relevant to a recommendation regarding a contractor’s integrity and business ethics. Only those that involve violations classified as serious, repeated, willful, and/or pervasive will be considered as part of the weighing step and will factor into the ALCA’s written analysis and advice.<sup>46</sup> Moreover, when disclosing Labor Law decisions, a contractor has the opportunity to submit all relevant information it deems necessary to demonstrate responsibility, including mitigating circumstances and steps taken to achieve compliance with Labor Laws. *See* FAR 22.2004–2(b)(1)(ii). As the Guidance provides, the information that the contractor is challenging or appealing an adverse administrative merits determination will be carefully considered. The Guidance also states that Labor Law violations that have not resulted in final determinations, judgments, awards, or decisions should be given lesser weight. The Department believes that contractors’ opportunity to provide all relevant information—including mitigating circumstances—and the Guidance’s explicit recognition that nonfinal administrative merits determinations should be given lesser weight resolve any due process concerns raised by the commenters.

#### b. Specific Categories of Administrative Merits Determinations

In the Proposed Guidance, the Department enumerated an agency-by-agency list of notices, findings, and documents that will be considered to be administrative merits determinations. A number of commenters commented about these agency-specific lists.

##### WH–56 Summary of Unpaid Wages Form

The Proposed Guidance identified several types of documents issued by WHD, including a WH–56 “Summary of Unpaid Wages” form (WH–56 form), as administrative merits determinations. *See* 80 FR 30574, 30579. Several industry commenters objected to the inclusion of the WH–56 form as an administrative merits determination. For example, one commenter, SAIC, stated that a WH–56 form is “not an admission of liability” but “a mechanism of settlement to resolve conflicts arising out of the investigation, and has been used as a practical and effective means of resolving complaints short of the litigation process.” Another

commenter, Jenner & Block, argued that a WH–56 form is “not a ‘merits determination’ at all,” “includes solely a list of names, dates, and dollars owed,” and “contains no description of the purported violation, and no findings regarding any investigation that may have preceded its issuance.” And another commenter, Jackson Lewis LLC, asserted that WH–56 forms are regularly issued “before the employer has been provided a full opportunity to refute the basis of alleged violations and/or back pay calculated by the DOL in connection with the alleged violation,” and are issued in a “speculative and inconsistent” manner.<sup>47</sup>

The Department retains the WH–56 form as an administrative merits determination in the Guidance. WH–56 forms reflect WHD’s determination that an employer violated one or more wage-and-hour laws and owes back wages. The WH–56 forms contain the specific amount of back wages due to each employee, the statute(s) violated, and the date(s) of the violation(s). WHD issues WH–56 forms only after an investigation—during which employers are given the opportunity to provide relevant information and articulate their legal position. Moreover, WHD’s policy is to issue a WH–56 form only after the employer has been informed of the investigation findings, has been provided an opportunity to explain the reasons for the violation(s), has been advised of how to comply with the law(s) at issue, and, most importantly, has agreed to fully comply with the law(s) going forward. In almost every case when WHD issues a WH–56 form, there is no further violation determination by WHD, a court, or an ALJ; the WH–56 is almost always the final assessment of an employer’s back wage liability. In 88.2 percent of cases concluded in fiscal years 2013 through 2015 in which WHD issued a WH–56 form after determining that a Labor Law was violated, the employer paid all or some (usually all) of the back wages due on the form.<sup>48</sup>

<sup>47</sup> One commenter, Littler’s Workplace Policy Institute, stated that the Department “would require a contractor to report as an ‘administrative merits determination’ a FLSA letter determination from the Wage and Hour Division, yet the agency has vigorously argued that such letters do not constitute final agency action that a company can challenge.” However, the Order does not indicate that the required disclosures be defined by reference to the Administrative Procedure Act. Rather, the Order requires the disclosure of “administrative merits determinations” and authorizes the Department to define that term.

<sup>48</sup> This information was compiled from data recorded in the Wage and Hour Investigative Support and Reporting Database maintained by WHD. When the employer does not pay back wages due, it may be because it is unable to pay or refuses

<sup>43</sup> This information and additional information below regarding OSHA citations were compiled from citations issued by Federal OSHA offices (as opposed to by State agencies under OSHA-approved State Plans) and recorded in OSHA’s Information System.

<sup>44</sup> NLRB, “NLRB FY 2015 Performance and Accountability Report” 36, [https://www.nlr.gov/sites/default/files/attachments/basic-page/node-1674/14445%20NLRB%20PAR%202015%20v2\\_508.pdf](https://www.nlr.gov/sites/default/files/attachments/basic-page/node-1674/14445%20NLRB%20PAR%202015%20v2_508.pdf).

<sup>45</sup> *Id.* at 36, 58.

<sup>46</sup> In addition, contractors are encouraged to disclose the subsequent reversal or modification of Labor Law decisions, which will reduce the potential impact of any erroneous administrative merits determination.

## OSHA Citations

The Proposed Guidance identified several types of documents issued by OSHA, including citations, as administrative merits determinations. See 80 FR 30574, 30579. Some industry commenters opposed the use of OSHA citations as administrative merits determinations. For example, Jenner & Block, citing OSHA's regulations at 29 CFR 1903.14(a)–(b) and 1903.15(a), argued that “an OSHA citation is merely an ‘alleged violation,’ not a merits determination,” and “is issued merely if an OSHA Area Director ‘believes’ that an employer has violated an OSHA law or regulation, not after a ‘determination’ has been made” (emphasis in original). This comment emphasized that “when a contractor receives a citation, the employer has received very limited information about the enforcement agency’s facts and legal position regarding the alleged violation . . . a citation is merely an allegation of violation of specified or general duty OSHA standards.” Associated Builders and Contractors asserted that “most OSHA citations are routinely changed after investigation and negotiation between the employer and the investigating agency, resulting in a lesser fine or type of citation.”

The Department retains the OSHA citation as an administrative merits determination in the Guidance. OSHA issues citations only after conducting inspections during which OSHA affords employers the opportunity to put forth their position. The OSHA regulations cited above simply recognize that, under the applicable administrative scheme, citations are not “final,” may be contested, and are “alleged” until they are made final—either by OSHRC adjudication or because they were not contested. See 29 U.S.C. 659(a), (c). That does not mean that citations are not reasoned agency determinations that an OSH Act violation has occurred. Moreover, as the Supreme Court has recognized, OSHA citations can be entitled to deference:

The Secretary’s interpretation of OSH Act regulations in an administrative adjudication, however, is agency action, not a *post hoc* rationalization of it. Moreover, when embodied in a citation, the Secretary’s interpretation assumes a form expressly provided for by Congress.

*Martin v. OSHRC*, 499 U.S. 144, 157 (1991) (citing 29 U.S.C. 658) (emphasis in original).

Furthermore, contrary to some commenters’ claims, OSHA citations are

rarely overturned. Of citations issued between October 1, 2012 and September 30, 2015, 89.1 percent were not formally contested and either became final under 29 U.S.C. 659(a) or were settled using OSHA’s informal settlement agreements or expedited informal settlement agreements. Of those that were contested, over one-half (58.7 percent) have settled, and the vast majority (82 percent) of those settlements upheld at least part of the citation. Of those that did not settle, the citation was upheld in the vast majority (81.6 percent) of contested cases that have been resolved by an ALJ, OSHRC, or a court as of April 2016 (some contested cases from the time period are ongoing), more often than not without any reduction in penalty. Less than 2 percent of all of the citations issued during the time period have been vacated.

## OFCCP Show Cause Notices

The Proposed Guidance identified “a show cause notice for failure to comply” issued by OFCCP as an administrative merits determination. See 80 FR 30,574, 30,579. OFCCP uses such notices to enforce the affirmative action and nondiscrimination rules in Executive Order 11246 and other laws.

Some industry commenters argued that OFCCP show cause notices should not be considered administrative merits determinations. For example, one commenter, Roffman Horvitz, objected to the inclusion of show cause notices because they are not “final agency determinations reviewable in the Federal courts under the Administrative Procedures Act.” According to this comment, OFCCP issues show cause notices to contractors at the outset of audits if the contractor does not provide the requested information within an initial 30-day period. The commenter alleged that OFCCP “has become extremely reluctant to grant extensions of time” of that period and “approaches conciliation with a take-it-or-leave-it attitude.”

Another commenter, DirectEmployers Association, stated that a show cause notice generally contains “alleged violations related to highly technical Affirmative Action Program drafting and recordkeeping issues, or a failure to engage in adequate outreach and recruitment of women and/or minorities.” This commenter asserted that a “very small minority of the [show cause notices] that OFCCP issues may also contain allegations of unlawful discrimination (typically fewer than in 2 percent of all OFCCP audits).”

The same commenter also stated that “routine” show cause notices are issued “prior to . . . completion of the

investigatory phase of the audit” and “prior to considering the contractor’s response to the agency’s preliminary investigative conclusions” (emphasis in original). According to this commenter, “oftentimes the alleged violations raised in [a show cause notice] are voluntarily withdrawn by OFCCP,” “are resolved through conciliation, or are later dismissed by an administrative court.”

The Department retains the OFCCP show cause notice as an administrative merits determination. OFCCP issues a show cause notice when it determines that a contractor has violated one or more of the laws under OFCCP’s jurisdiction. See Federal Contract Compliance Manual, ch. 8D01 (Oct. 2014). OFCCP issues fewer than 200 show cause notices per year, and issues them after a substantial process. OFCCP typically issues show cause notices after it has investigated, made findings, issued a notice of violation,<sup>49</sup> given the contractor an opportunity to respond, considered any response from the contractor, and attempted to resolve the issue through conciliation. OFCCP may issue a show cause notice if a contractor fails, after being requested by OFCCP, to submit the affirmative action plans or other information that it is required by law to maintain. Contrary to the commenter’s assertion, OFCCP gives a contractor multiple chances, including extensions of time, to provide the requested information; and it gives a contractor the opportunity to explain its position before issuing a show cause notice. OFCCP must, if other efforts are unsuccessful, issue show cause notices in those few circumstances when contractors refuse to comply with their legal obligations to provide information. These obligations are crucial to OFCCP’s ability to enforce its laws and investigate potential violations. Indeed, OFCCP cannot determine whether there was in fact unlawful discrimination until it receives the plans or other information that the contractor is required by law to maintain and provide.

## EEOC Letters and Actions

The Proposed Guidance identified “a letter of determination that reasonable cause exists to believe that an unlawful employment practice has occurred or is occurring” issued by the EEOC and “a civil action filed on behalf of the EEOC” as administrative merits determinations. See 80 FR 30574, 30579.

Several industry commenters objected. Some argued that reasonable cause letters are a preliminary action

to pay, or for some other reason. When the employer does not pay, the Department may pursue further action, including litigation.

<sup>49</sup> Notices of violations are not administrative merits determinations under the Order.

and are not based on sound proof that a violation actually occurred. Some asserted that few reasonable cause findings result in a court complaint or an eventual judgment. Others noted that reasonable cause findings are often excluded as evidence in subsequent litigation because their prejudicial value outweighs their probative value.

The Department retains reasonable cause letters as a type of administrative merits determination. An EEOC reasonable cause determination reflects an assessment of a charge's merits: "that there is reasonable cause to believe that the charge is true," 42 U.S.C. 2000e-5(b), based on information obtained in the investigation, including that provided by the employer, *see* EEOC, "What You Can Expect After a Charge is Filed," <http://www.eeoc.gov/employers/process.cfm>. In fiscal year 2015, about 3.5 percent of charges filed with the EEOC resulted in reasonable cause determinations.<sup>50</sup> After making a reasonable cause determination, the agency transitions from its investigatory, fact-finding role to its role as a conciliator and, if conciliation efforts fail, the agency becomes a potential litigant with authority to file a lawsuit to protect the public interest, including to obtain relief for individuals harmed by the discriminatory practices on which reasonable cause was found. The agency does not revisit the reasonable cause determination in conciliation. Rather, the EEOC must try to "eliminate" the "alleged unlawful employment practice" through conciliation before it can sue. 42 U.S.C. 2000e-5(b).

That the EEOC decides to sue in a relatively small percentage of cases in which it has found reasonable cause has little to no bearing on the determinations' merits. A large portion of reasonable cause determinations are conciliated. *See* 42 U.S.C. 2000e-5(b) (describing the conciliation process). For example, in fiscal years 2014 and 2015 combined, the EEOC successfully conciliated 41 percent of its reasonable cause determinations. Because of limited resources, EEOC can file lawsuits in only a small proportion of cases where it finds reasonable cause. Rather, the EEOC decides which cases to litigate based on a range of factors, including "the wider impact the lawsuit could have on EEOC efforts to combat workplace discrimination." EEOC, "Litigation Procedures," <http://www.eeoc.gov/eeoc/litigation/>

<sup>50</sup> The EEOC data in this paragraph and the following paragraph are available on the EEOC's Web site at <http://www.eeoc.gov/eeoc/statistics/enforcement/all.cfm>.

*procedures.cfm*. Thus, the Department concludes that it is appropriate to include EEOC reasonable cause letters as administrative merits determinations.

As mentioned above, the Proposed Guidance also included as an EEOC administrative merits determination "a civil action filed on behalf of the EEOC." 80 FR 30574, 30579. This was unnecessary because the Proposed Guidance generally identified complaints filed by or on behalf of enforcement agencies with courts as administrative merits determinations. The Department eliminates this redundancy in the final Guidance.

#### NLRB Complaints

The Proposed Guidance identified "a complaint issued by any Regional Director" of the NLRB as an administrative merits determination. 80 FR 30574, 30579. Several industry commenters opposed this proposal, arguing that such complaints are only allegations. For example, one such commenter, the Littler Workplace Policy Institute, characterized such complaints as being based on "investigatory findings without judicial or quasi-judicial safeguards." This commenter further argued that "[e]ven the [NLRB]'s own determinations are not self-enforcing, as section 10 of the NLRA makes clear, because only a court of appeals can enforce orders of the Board."

Industry commenters also asserted that a relatively low percentage of complaints issued by NLRB Regional Directors result in NLRB determinations, and that even fully litigated NLRB decisions are often overturned by courts of appeals. And commenters stated that the NLRB sometimes pursues legal theories that have been rejected by some U.S. Courts of Appeals, meaning a contractor could be forced to disclose a decision involving conduct that some courts have ruled does not amount to a violation. Others argued that they must purposefully violate the NLRA in certain circumstances in order to test the validity of the NLRB's certification of a representation election in Federal court.

The Department retains the definition of administrative merits determinations for NLRA violations as proposed. The Department disagrees with the premise of the industry commenters' comments. As discussed above, the fiscal year 2015 NLRB settlement rate was 92.4 percent, the litigation success rate of General Counsel complaints before ALJs and the Board was 88 percent, and 80 percent of Board decisions were enforced in whole or in part by Courts of Appeals. The

Department also disagrees that NLRB complaints should not be disclosed because some employers may purposefully violate the NLRA to "test" the validity of an election. Disclosure is only the first step in the Order's process; when disclosing Labor Law decisions, contractors are encouraged to submit all relevant information, including mitigating factors.

Some labor organizations suggested that the definition of "administrative merits determination" should be expanded. These commenters advocated including as administrative merits determinations those NLRB General Counsel findings in which the General Counsel notifies employers that it will issue a complaint absent settlement. The Department considers this addition to be unwarranted. If the General Counsel does issue a complaint, the complaint itself will be an administrative merits determination that must be disclosed. Accordingly, the Department maintains the definition as proposed.

#### Complaints Filed With Courts or Administrative Agencies

The list of administrative merits determinations in the Proposed Guidance included "a complaint filed by or on behalf of an enforcement agency with a Federal or State court, an administrative judge, or an administrative law judge alleging that the contractor or subcontractor violated any provision of the Labor Laws." 80 FR 30574, 30579.

Several industry commenters criticized this category. One commenter, Jenner & Block, stated that a civil action "can *only* represent a set of allegations and can never be viewed as a determination on the merits" (emphasis added). Another commenter questioned whether the Department was justified in distinguishing between a government agency's complaint and a private litigant's complaint—as the latter was not included as an administrative merits determination.

The Department retains the Guidance as proposed. The distinction between complaints filed by an enforcement agency and complaints filed by private parties to initiate lawsuits is valid. Agencies pursue litigation only after fully investigating the case, soliciting the adverse party's position, and making efforts to resolve the matter. Thus, the filing of a complaint by an enforcement agency in court or before an administrative agency is an agency determination that the relevant law has been violated.<sup>51</sup> Moreover, the inclusion

<sup>51</sup> Jenner & Block asserted that including "civil actions as reportable events directly conflicts with



of court complaints filed by or on behalf of enforcement agencies is necessary because some of the most egregious violations of the Labor Laws found by agencies may be enforced only through court actions depending on the particular Labor Law's enforcement scheme.

Finally, while it is true that not every complaint filed by an enforcement agency succeeds, the Department reiterates that the definition of administrative merits determination is relevant only to the initial disclosure requirement. The definition simply determines the scope of contractors' disclosure obligations—the first step in the Order's process. Not all disclosed violations are relevant to contractors' integrity and business ethics; only those that are serious, repeated, willful, and/or pervasive will be considered as part of the weighing step and will factor into the ALCA's written analysis and advice.

#### Retaliation Violations

Several commenters representing labor and worker advocacy organizations advocated that the definition of “administrative merit determinations” include notices or findings of violations of the anti-retaliation provisions of the OSH Act, 29 U.S.C. 660(c) (“Section 11(c)”), and the FLSA, 29 U.S.C. 215(a)(3) (“Section 15(a)(3)”). These anti-retaliation provisions are vital components to the enforcement of the OSH Act and the FLSA, and the Department did not intend to exclude them. The relevant administrative merits determination for these anti-retaliation violations is a complaint filed on behalf of the agency in court. As discussed above, such complaints are included in the Guidance's definition of “administrative merits determination.”<sup>52</sup>

In addition to such court actions, WHD also may issue determination letters finding retaliation in violation of FLSA section 15(a)(3). The Proposed Guidance incorrectly limited the residual category of administrative

the terms of the Order, which requires only ‘civil judgments’ to be reported.” (emphasis added). However, the Order separately requires “administrative merits determinations” to be disclosed, and for the reasons explained above, a complaint filed by an enforcement agency in court or before and administrative agency is an administrative merits determination even though it is not a civil judgment.

<sup>52</sup> This would also cover the OSHA-approved State Plans that enforce their equivalents to section 11(c) through State courts. To the extent some State Plans enforce their anti-retaliation provisions through administrative processes, the relevant administrative merits determinations will be identified in the second guidance to be issued by the Department identifying the State laws that are equivalent to the Federal Labor Laws.

merits determinations to “a letter indicating that an investigation disclosed a violation of sections six or seven of the FLSA . . .”<sup>53</sup> To assure that WHD letters finding a retaliation violation will be disclosed, the Department has revised the Guidance to remove the phrase “of sections six or seven.” Thus, a WHD determination letter finding *any* FLSA violation—not just minimum wage and overtime violations—is an administrative merits determination.

One commenter expressed concern that violations of the anti-retaliation provisions of the statutes enforced by the EEOC may not meet the definition of administrative merits determinations because it is possible that retaliation is not an “unlawful employment practice.” The Department and the EEOC consider the phrase “unlawful employment practice” to include unlawful retaliation.

#### False Statement Violations Under the OSH Act

One commenter requested that the Guidance include violations of section 17(g) of the OSH Act, 29 U.S.C. 666(g), which prohibits knowingly making false statements in reports or other documents required to be maintained by the OSH Act, as violations that must be disclosed under the Order. False statement violations have only criminal sanctions under the OSH Act. *See id.* As discussed above, criminal convictions of the Labor Laws are not reflected in the administrative merits determinations, civil judgments, or arbitral awards or decisions that must be disclosed. The Department therefore declines to amend the Guidance as requested.

#### c. Settlements

Several commenters representing labor and worker advocacy organizations urged the Department to define administrative merits determination to expressly include settlements reached with an enforcement agency before the institution of legal proceedings, which would mean that contractor would be required by the Order to disclose any such settlements as “Labor Law decisions.” Commenters argued that their proposal would address a concern that employers might repeatedly negotiate preemptive settlements with an enforcement agency during an investigation, and thus avoid the issuance of a Labor Law decision that would otherwise have to be disclosed.

<sup>53</sup> Sections six and seven refer to the FLSA's minimum wage and overtime provisions, 29 U.S.C. 206, 207.

In such situations, according to these commenters, these employers' apparently clean records would not reflect their repeated unlawful conduct. Another commenter agreed that settlements should not be considered reportable findings of violation, but argued that they should nevertheless be disclosed as part of a responsibility determination. Another sought clarification whether a settlement reached prior to a complaint being filed must be disclosed under the Order.

The Department maintains the Guidance as proposed. Settlements are not administrative merits determinations, and therefore contractors are not required by the Order to disclose them. The Department believes that the inclusion of settlements as administrative merits determinations could serve as a disincentive against settlements. Settlements at the earliest possible stage of a dispute are often the ideal outcome for both employers and their employees and the most efficient outcome for contracting agencies, as early settlements generally include improved compliance with the Labor Laws. The Department also notes that most settlements of agency investigations or enforcement actions follow or are accompanied by a notice or finding from the agency that meets the definition of an administrative merits determination. For example, OSHA settlements usually include the affirmation of citations.

Those citations are *themselves* administrative merits determinations that must be disclosed. Likewise, settlements of FLSA investigations are often accompanied by a WH-56 form indicating WHD's determination that back wages are due because of an FLSA violation. The WH-56 form is an administrative merits determination and must be disclosed. However, any settlement agreement itself is not an administrative merits determination and therefore need not be disclosed.

Although settlement agreements are not administrative merits determinations, a settlement including remediation of violations is considered to be a mitigating factor that the contractor may choose voluntarily to disclose. As a result, in cases where a settlement accompanies or follows a Labor Law decision that must be disclosed, the Department anticipates that contractors will voluntarily disclose the settlement because it is in the contractor's interest to show that it has remedied the violation. As discussed in the preaward assessment and advice section of the Guidance, remediation of a violation is the most important mitigating factor in the weighing

process before an ALCA recommendation. *See* Guidance, section III(B).

In sum, the Department considers the addition of settlements themselves as a type of administrative merits determination to be unwarranted.

## 2. Defining “Civil Judgment”

The Proposed Guidance defined “civil judgment” as

any judgment or order entered by any Federal or State court in which the court determined that the contractor or subcontractor violated any provision of the Labor Laws, or enjoined or restrained the contractor or subcontractor from violating any provision of the Labor Laws.

80 FR 30574, 30580. The Proposed Guidance discussed the types of court judgments or orders that meet the definition of “civil judgment” and explained that a “private settlement where the lawsuit is dismissed by the court without any judgment being entered is not a civil judgment.” *Id.* The Proposed Guidance provided that “civil judgment” includes a judgment or order that is not final or is subject to appeal. *Id.*

A number of industry commenters who objected to the inclusion of nonfinal agency determinations in the definition of administrative merits determination had similar concerns about the definition of civil judgment. They objected to defining civil judgments to include court judgments that are either nonfinal or still subject to appeal, and they were concerned that they could lose a contract as a result of a judgment that is later reversed. For these commenters, a civil judgment should include only final orders or judgments where all appeals have been exhausted or not pursued. In addition, several industry commenters objected to including preliminary injunctions.

The Department has carefully considered all of these comments and declines to limit the definition of civil judgment. The Proposed Guidance defined civil judgment to include some nonfinal and subject-to-appeal court judgments for the same reasons that it defined administrative merits determinations to include nonfinal agency determinations. In addition to those reasons, which the Department incorporates here as well, the Department notes that it would make little sense to exclude Federal court judgments that follow a full discovery process under the Federal rules simply because these judgments still may be subject to appeal or have been appealed to a Federal court of appeals.

The Department also reiterates that the Guidance’s definition of civil

judgment does not include all court decisions that are nonfinal. The Guidance’s definition is limited to those judgments or orders in which the court “determined” that there was a Labor Law violation or “enjoined or restrained” a violation. This means that, for example, a court order denying an employer’s motion to dismiss a complaint about an alleged Labor Law violation or an order denying an employer’s motion for summary judgment would not be “civil judgments.” In both of those examples, the court has found only that it is possible that the complainant may be able to succeed later at trial; it has not made a determination that a Labor Law has been violated.

As several commenters noted, a type of nonfinal court order that the Department explicitly included as a civil judgment in the Proposed Guidance is a preliminary injunction that “enjoins or restrains a violation of the Labor Laws.” 80 FR 30574, 30580. Preliminary injunctions issued in Federal court are not considered to be “final” orders. However, enforcement agencies may pursue injunctive relief when faced with the most egregious violations of the Labor Laws (for example, imminent danger actions under the OSH Act or 10(j) injunctions under the NLRA), and courts grant preliminary injunctions only in extraordinary circumstances and after a strong showing of a likelihood of success. Accordingly, the Department concludes that the granting of such relief may be relevant to the assessment of a contractor’s respect for legal obligations and workplace conditions. It is therefore appropriate to require disclosure.

Finally, the Department reiterates that the definition of “civil judgment” simply determines the scope of contractors’ disclosure obligations—the first stage in the Order’s process. Not all disclosed violations are relevant to contractors’ integrity and business ethics. Only those that are later determined to be serious, repeated, willful, and/or pervasive will be considered as part of the weighing step and will factor into the ALCA’s written analysis and advice. Moreover, contractors have an opportunity to submit any additional information—including mitigating information—that they believe may be helpful in assessing their overall record of compliance. In sum, court judgments and orders that meet the definition of “civil judgment” must be disclosed—even where nonfinal or still subject to appeal.

While the Department is not changing the definition of civil judgment, two

clarifications are necessary. One commenter, the Equal Employment Advisory Council (EEAC), expressed concern that the definition of civil judgment would include temporary restraining orders (TROs). The Proposed Guidance did not intend to include TROs under the definition of civil judgment. TROs are distinct from preliminary injunctions under the Federal Rules of Civil Procedure and can, in certain circumstances, be issued without notice to the adverse party. *Compare* Fed. R. Civ. Proc. 65(a) (preliminary injunctions) *with* Fed. R. Civ. Proc. 65(b) (TROs). To avoid any confusion, the Guidance has been revised to clarify that TROs are not civil judgments for the purposes of the Order, and need not be disclosed.

Another commenter, National Security Technologies, LLC, requested that the Department limit the definition of civil judgments to exclude judgments entered pursuant to accepted Offers of Judgment under Federal Rules of Civil Procedure 68, which are “in the nature of settlements.” The Department agrees that accepted offers of judgment under Rule 68 are akin to settlements and are not “civil judgments” for the purposes of the Order. The Guidance has been revised accordingly.

## 3. Defining “Arbitral Award or Decision”

The Proposed Guidance defined “arbitral award or decision” as

any award or order by an arbitrator or arbitral panel in which the arbitrator or arbitral panel determined that the contractor or subcontractor violated any provision of the Labor Laws, or enjoined or restrained the contractor or subcontractor from violating any provision of the Labor Laws.

80 FR 30580. The Proposed Guidance stated that arbitral awards and decisions must be disclosed “even if the arbitral proceedings were private or confidential.” *Id.* It further provided that “arbitral award or decision” includes an award or order that is not final or is subject to being confirmed, modified, or vacated by a court. *Id.*

Several industry commenters objected to disclosing arbitral awards or decisions that are confidential or private. The AARP, on the other hand, supported the disclosing of private or confidential arbitration awards and decisions. Industry commenters contended that disclosing awards may have a chilling effect on arbitration, that disclosure may require the breaking of arbitration or labor contracts, and that the confidentiality of arbitration is provided by some State laws. One commenter, the Aerospace Industries Association, suggested excluding

arbitral awards from confidential or private arbitrations conducted under arbitration agreements executed before the effective date of any final rule implementing the Order.

The Department declines to narrow its interpretation of the disclosure requirement to exclude confidential or private arbitrations. The Order specifically requires the disclosure of arbitral awards or decisions without exception, *see* Order, section 2(a)(i), and confidentiality provisions generally have exceptions for disclosures required by law. Moreover, there is nothing particularly sensitive about the four pieces of basic information that contractors must publicly disclose about each arbitral award or decision—the Labor Law that was violated, the case number, the date of the award or decision, and the name of arbitrator. *See* FAR 22.2004–2(b)(1)(i). Parties routinely disclose more information about an arbitral award when they file a court action seeking to have the award vacated, confirmed, or modified.

In addition to the commenters discussed above who object generally to disclosing any nonfinal determinations or judgments, some industry commenters specifically objected to disclosing nonfinal arbitration awards or decisions. The Department declines to modify the Guidance in response to these comments. The disclosure of arbitral awards that are nonfinal or still subject to court review is appropriate for all of the same reasons discussed above supporting the Department's inclusion of administrative merits determinations and civil judgments that are nonfinal or subject to appeal. Furthermore, the Department notes that the Federal Arbitration Act provides a very high standard that must be met for a court to vacate or modify an arbitral award. *See* 9 U.S.C. 10 (standard for vacating award); 9 U.S.C. 11 (standard for modifying award).

The AARP supported the proposed definition of arbitral award or decision, but proposed broadening the definition to include awards and decisions where the employee has succeeded “on any significant issue or receives even some of the benefits sought.” Under this proposal, an award or decision would have to be disclosed, “even if there was no formal determination of a legal violation.” The Department declines to modify the Guidance in response to this comment. The Order requires disclosure of arbitral awards or decisions rendered against the contractor “for violations of any of the [Labor Laws].” Order, section 2(a)(i). The Department believes that this requires a finding that a Labor Law

was violated in order to trigger the Order's disclosure requirement.

Two industry commenters requested clarification about arbitral decisions that involve both a collective bargaining agreement (CBA) and one of the Labor Laws. One asserted that the Guidance's disclosure requirements should expressly exclude arbitral decisions finding CBA violations that do not amount to statutory violations. The other commenter, the Association of General Contractors of America (AGC), stated that arbitral decisions involving CBAs are often unclear about whether their rulings are “on a matter of law, contract, or both.” The Department agrees that an arbitrator's decision finding only a CBA violation does not trigger the disclosure requirement. However, where the arbitrator does make an express finding that there was a violation of one of the Labor Laws, then the decision or award must be disclosed, regardless of whether the same conduct also violated the CBA.

#### 4. Successive Labor Law Decisions Arising From the Same Underlying Violation

The Proposed Guidance addressed and gave examples regarding how contractors should disclose successive administrative merits determinations, civil judgments, and/or arbitral awards or decisions that arise from the same underlying violation. *See* 80 FR 30580–81. One commenter, Jackson Lewis LLC, stated that this discussion would have been “unnecessary” had the Department not required disclosure of “alleged violations.” According to this comment, “[n]othing in the already dense DOL Guidance is more complex than sorting what successive determinations must be reported and what need not be reported.” After considering this comment, the Department modifies this section of the Guidance for improved readability—but does not make any substantive changes. The Department believes that the examples provided, including a new example, will help contractors meet their disclosure obligations under the Order.

#### C. Information That Must Be Disclosed (Formerly “What Information Must Be Disclosed”)

The Order itself contains guidance for what information a contractor must disclose. *See* Order, section 2(a). And the FAR rule includes specific disclosure requirements and processes. *See* FAR 22.2004–1(a). This section of the Proposed Guidance directly tracked the language of the proposed FAR rule. Where the FAR Council has modified relevant language in its final rule, the

Department has modified the final Guidance accordingly. In addition, in one nonsubstantive change to this section of the Guidance, the Department has created a separate subsection to highlight the process for contracting officers to give contractors the opportunity to submit any additional relevant information (including mitigating factors) about Labor Law violations. Several commenters submitted concerns or suggestions about this section; however, because comments took issue with the content of the FAR rule, the FAR Council has addressed those comments, and the comments are not summarized or discussed here.

#### Specific Disclosure Requirements

The Proposed Guidance included the requirements from the proposed FAR rule about the specific information that a contractor must disclose, at the time of the responsibility determination, about each Labor Law decision. It provided that, for each decision, the contractor disclose: (1) The Labor Law that was violated; (2) the case number, inspection number, charge number, docket number, or other unique identification number; (3) the date of the determination, judgment, award, or decision; and (4) the name of the court, arbitrator(s), agency, board, or commission that rendered it. *See* 80 FR 30574, 30581.

Several labor unions and employee advocacy organizations suggested requiring disclosure of more information than the four types of information listed above. The Department retains the Guidance as proposed. The specific disclosure requirements are promulgated in the final FAR rule, FAR 22.2004–2(b)(1)(i), and they are included in the Guidance only for completeness. Moreover, the Department notes that contracting officers have an existing duty under the FAR to obtain such additional information as may be necessary to be satisfied that a contractor has a satisfactory record of integrity and business ethics, *see* FAR 9.105–1(a), and the FAR rule requires contracting officers to request Labor Law decision documents from contractors where the ALCA is otherwise unable to obtain them, *see* FAR 22.2004–2(b)(2)(iii). While the Department has not amended the list of specific disclosure requirements, it has added to the final Guidance a list of the relevant unique identification numbers for each category of violation.

### Accuracy of Contractor Disclosures

One group of worker-advocacy organizations expressed concern that the Guidance does not instruct contracting officials to verify the accuracy of the information that a contractor submits. The comment noted that a new Labor Law violation might be found against a contractor after the contractor's initial representation about its record. In such a case, the comment suggested, a contractor that responds negatively at the initial representation stage should be required at the subsequent preaward stage to provide an update about any new violations (assuming that a responsibility determination is undertaken at that point).

Several unions and worker-advocacy groups applauded the proposed FAR rule and the Proposed Guidance for significantly improving reporting requirements and public disclosures; however, they also expressed concerns that the penalties for contractors who misrepresent or omit information when disclosing Labor Law violations should be strengthened. Several of these commenters argued that disclosures regarding Labor Law violations should be provided under oath and/or under penalty of perjury. Another commenter, the AARP, suggested that the FAR Council should clearly state that "failure to report violations will lead to a determination of nonresponsibility."

The Department does not believe that contractor representations regarding Labor Law matters should be treated differently than other representations related to responsibility. Under the FAR, a contractor who fails to furnish a certification related to responsibility matters or to furnish such information as may be requested by the contracting officer related to that contractor's responsibility shall be given an opportunity to remedy the deficiency. *See* FAR 9.104–5. Ultimately, failure to furnish the certification or such information "may render the offeror nonresponsible." *Id.* In addition, well-established penalties already exist for bad faith and material misrepresentations regarding responsibility matters.<sup>54</sup>

<sup>54</sup> A contractor may be disqualified, the award canceled, or the contract terminated if the misrepresentation is made in bad faith or has materially influenced the agency's responsibility determination. *See Impresa Costruzioni Geom. Domenico Garufi v. United States*, 238 F.3d 1324, 1339–40 (Fed. Cir. 2001). Where the award is canceled, the contractor can be precluded from bidding on a reprocurement contract. *See Northrop Grumman Corp. v. United States*, 50 Fed. Cl. 443, 468 (2001). Moreover, under appropriate circumstances, a contractor may also be suspended or debarred, or held liable under the False Claims

The Department does recognize that a substantial period of time may pass between the contractor's initial representation and the date of the award. In particular, as the commenter referenced above suggested, a contractor may initially represent that it has no Labor Law decisions to disclose, but a Labor Law decision may be rendered against it after that initial representation prior to the date of an award. Contractors have a duty to provide an update to the contracting officer prior to the date of an award if the contractor's initial representation is no longer accurate. Thus, the final FAR rule now provides that if a new Labor Law decision is rendered or the contractor otherwise learns that its representation is no longer accurate, the contractor must notify the contracting officer of an update to its representation. *See* FAR 52.222–57(e). This means that if the contractor made an initial representation that it had no Labor Law decision to disclose, and since the time of the offer the contractor has a Labor Law decision to disclose, the contractor must notify the contracting officer. The reverse is also true: If, for example, an offeror made an initial representation that it has a Labor Law decision to disclose, and since the time of the offer that Labor Law decision has been vacated by the enforcement agency or a court, the contractor must notify the contracting officer.

### Postaward Disclosure Updates

The disclosure section of the Proposed Guidance included a description of the Order's requirement that contractors update their disclosures postaward, during performance of a covered procurement contract. *See* 80 FR 30574, 30581. The Department has reorganized the final Guidance to consolidate discussion of postaward disclosure and assessment issues in a new section (Section IV). Comments about the postaward disclosure are addressed in a parallel section of this preamble section-by-section analysis, below.

### Subcontractor Disclosures

The disclosure section of the Proposed Guidance also included an explanation of the Order's subcontractor disclosure provisions. *See* 80 FR 30574, 30582. The Department has reorganized the final Guidance to consolidate discussion of subcontractor issues in a new section (Section V). Comments about the subcontractor disclosure provisions are addressed in a parallel

Act, among other available remedies. *See* 31 U.S.C. 3730; 18 U.S.C. 1001.

section of this preamble section-by-section analysis, below.

### III. Preaward Assessment and Advice (Formerly "Weighing Violations of the Labor Laws")

Section III of the Guidance explains the process by which ALCAs classify, weigh, and provide advice about a contractor's violations of the Labor Laws during the preaward period. Based on the comments received, the Department believes that the separate steps in this process may not have been emphasized clearly enough in the Proposed Guidance. Several commenters, for example, appeared to conflate the determination that a contractor had committed a serious, repeated, willful, and/or pervasive violation with a finding of nonresponsibility.

In response to these comments, the final Guidance clarifies that the ALCA's preaward assessment of a contractor's Labor Law violations and the contracting officer's responsibility determination are separate process points, performed by two separate individuals: The ALCA assesses the nature of the violations and provides analysis and advice; the contracting officer, informed by the ALCA's analysis and advice, makes the responsibility determination—the determination of whether the contractor is a responsible source to whom a contract may be awarded. Contracting officers consider assessments provided by ALCAs consistently with advice provided by other subject matter experts during the responsibility determination.

The final Guidance also clarifies that the ALCA's role involves a three-step process. First, an ALCA reviews all of the contractor's violations to determine if any are serious, repeated, willful, and/or pervasive. Second, the ALCA then weighs any serious, repeated, willful, and/or pervasive violations in light of the totality of the circumstances, including the severity of the violation(s), the size of the contractor, and any mitigating factors that are present. Third, after this holistic review, the ALCA provides written analysis and advice to the contracting officer regarding the contractor's record of Labor Law compliance, and whether a labor compliance agreement or other action is warranted.

As noted above, the final Guidance clarifies that it is the contracting officer who makes the final determination of whether a contractor is, or is not, a responsible source.

The assessment of violations postaward, during the performance of the contract, is now addressed separately in section IV of the Guidance.

Similarly, the assessment of subcontractor violations is addressed separately in section V of the Guidance.

The Department has modified Appendix E to reflect changes in the final Guidance's description of the PreAward Assessment and Advice process.

#### A. Classifying Labor Law Violations (Step One)

The first step in this process is the classification of Labor Law violations as serious, repeated, willful, and/or pervasive. The Order specifically directs the Department to develop guidance to assist agencies in making these classification determinations. Order, section 4(b)(i). The Order specifies that the Department's Guidance should "incorporate existing statutory standards for assessing whether a violation is serious, repeated, or willful" where they are available. *Id.* In addition, the Order provides the Department with parameters for developing standards where none are provided by statute. *Id.*

#### Subjectivity of Classification Criteria

A number of industry commenters argued that the Proposed Guidance's definitions of serious, repeated, willful, and pervasive violations are too subjective and do not provide enough direction for contractors to determine whether their violations could put them at risk of losing Federal contracts. Some commenters expressed concern that whether a violation is serious, repeated, or willful may depend in some cases on an exercise of discretion by the official or investigator at the enforcement agency that issued the underlying administrative merits determination. In contrast, many worker-advocacy organizations and labor unions expressed support for the flexibility of these classification criteria and the Department's overall approach to weighing violations and assessing mitigating factors.

While the Department acknowledges that some of the criteria for classifying Labor Law violations require closer analysis, the Department notes that many of the definitions set out objective criteria that leave little, if any, room for ambiguity. For example, whether a violation involves at least \$10,000 in back wages or \$5,000 in fines or penalties (one of the criteria for classifying serious violations), or whether a violation occurs within 3 years of a prior violation (one of the criteria for classifying repeated violations) are straightforward matters. Furthermore, the Department expects that ALCAs will develop substantial expertise in administering the Order

and will be well-positioned to classify and weigh each violation. In some cases, as set forth below, the Department has modified criteria that were not sufficiently clear.

Moreover, the Department disagrees that the contracting officer's responsibility determination will be arbitrary if it includes consideration of the ALCA's assessment of Labor Law enforcement actions that themselves involve the exercise of prosecutorial discretion, such as an enforcement agency's decision as to how much of a fine or penalty to assess, or whether to find one violation or multiple violations. The Department believes that the legitimate exercise of such discretion is inherent in prosecuting Labor Law violations—just as it is for prosecuting violations of fraud, tax, and other laws that are already expressly considered in the responsibility determination under the FAR—and does not undermine the contracting officer's consideration of Labor Law enforcement actions under the Order.

Furthermore, ALCAs are advisors to the contracting officer on one aspect of responsibility: Integrity and business ethics with regard to labor law compliance. Contracting officers consider the information provided by advisors such as ALCAs, as well as advice from other experts in fields such as audit, law, engineering, information security, and transportation.

#### Relationship of Classification Criteria to Disclosure Requirements

A few commenters representing employers also expressed concern that they would be uncertain as to which violations must be disclosed due to perceived ambiguities in the definitions of serious, repeated, willful, and pervasive violations. Such comments misapprehended the role that these definitions play in the implementation of the Order. All Labor Law decisions must be disclosed, whether or not they involve violations that are serious, repeated, willful, or pervasive. As described above, the definitions of these four terms are used by ALCAs during the classification process to screen out minor infractions that have been disclosed, not by contractors to determine whether the decisions must be disclosed in the first place. The Department clarifies this point in the final Guidance.

#### Standard for Determining Application of Classification Criteria

One industry commenter questioned what quantum of evidence will be necessary to support a determination that a Labor Law violation meets one of

the criteria for establishing that a violation is serious, repeated, willful, or pervasive. In this regard, the commenter focused on language in the Proposed Guidance stating that a violation would meet one of the classification criteria if the Labor Law decision "support[s] a conclusion" that the criterion in question had been met, and the commenter expressed concern that this standard suggested that contractors could be found to have committed a serious, repeated, willful, or pervasive violation based on only scant evidence in the record supporting such a classification.

The Department has clarified in the Guidance that to serve as the basis for a determination that a violation is serious, repeated, willful, and/or pervasive, the relevant criteria must be readily ascertainable from the Labor Law decision itself. This means that ALCAs should not second-guess or re-litigate enforcement actions or the decisions of reviewing officials, courts, and arbitrators. It also means that a contractor will not be deemed to have committed a serious, repeated, willful, or pervasive violation based on a minimal or arguable showing. While ALCAs and contracting officers may seek additional information from the enforcement agencies to provide context, they should rely on only the information contained in the Labor Law decisions themselves to determine whether violations are serious, repeated, willful, or pervasive.

#### Subcontractor Violation Classification

Some of the comments by employer groups voiced additional concern about the way the Proposed Guidance described the process for a prime contractor to classify and weigh its subcontractors' Labor Law violations. These commenters asserted that many prime contractors, especially small businesses, will not have access to labor law experts or legal counsel familiar with the intricacies of the fourteen Labor Laws, and that these prime contractors would not be well-equipped to evaluate whether violations are serious, repeated, willful, or pervasive.

The Guidance now contains a separate section addressing subcontractor responsibility (Section V). The Department addresses comments related to subcontractor responsibility in a parallel section of the preamble section-by-section analysis, below.

#### Scope of Classification Criteria

Many commenters representing employer groups argued that the criteria for serious, repeated, willful, and pervasive violations were too broad and

would encompass too many violations, which would increase the burden of the Order by subjecting more contractors to scrutiny. These commenters expressed concern that a prospective contractor would be found nonresponsible based on, for example, a pair of violations that were inadvertent but nonetheless met the criteria for repeated violations; or one or two OSH Act violations that, while meeting the statutory criteria for serious violations, caused no harm and were addressed swiftly. Some feared that even a single serious violation would necessarily lead to a nonresponsibility determination.

The Department believes that this fear is misplaced. Below, in parts 1 through 4 of this subsection, the Department responds to commenters' specific concerns regarding the criteria used to classify violations as serious, repeated, willful, or pervasive. In some cases, as explained below, the definitions have been narrowed in response to concerns of over-inclusiveness.

The Department believes the final Guidance appropriately defines its criteria, given their use in the classification and weighing process. It is important to note that the classification of a contractor's violation as serious, repeated, willful, or pervasive does not mean that the contractor loses an award. Rather, as noted in the Guidance, one of the purposes of classifying violations as serious, repeated, willful, and pervasive is to screen out many violations that may be inadvertent or less likely to have a significant impact. These classifications limit consideration of a contractor's violations to those that may merit closer examination. After the initial screening, ALCAs will conduct a review of these more significant violations, taking into account the totality of the circumstances, including any mitigating factors. In this weighing phase, the serious, repeated, willful, and pervasive classifications provide a useful framework for analysis and help ensure government-wide consistency. In the final Guidance, the Department clarifies the description of this process and has reiterated that classifying a violation as serious, repeated, willful, or pervasive does not automatically result in a finding that a contractor lacks integrity and business ethics.

In sum, the Department believes the criteria set forth in the final Guidance for determining whether violations are serious, repeated, willful, or pervasive are fair, appropriate, and administrable.

#### Classification of Violations Involving Retaliation

Some commenters representing employee interests expressed concern

that the definitions of serious, repeated, and willful violations did not sufficiently account for violations involving retaliation. In general, it is the intent of the Guidance that violations of the Labor Laws that involve retaliation must be reported and assessed under the Order. The Department has made a number of modifications to the Guidance—discussed further below in the separate sections on serious, repeated, and willful violations—to ensure that this is the case. As stated in both the proposed and final Guidance, all violations involving retaliation are considered serious violations under the Order.

#### Effect of Reversal or Vacatur of Basis for Classification

Some commenters expressed concern that under the Proposed Guidance, a violation could be classified as serious, repeated, willful, and/or pervasive based on a determination by an agency, arbitrator, or court that was later reversed, vacated, or otherwise rescinded. For example, some of these commenters expressed concern that a contractor could be found to have committed a serious violation based on an OSHA citation that was originally classified as “serious” and later changed to “other than serious” or withdrawn entirely.

In response to these comments, the final Guidance clarifies that if a Labor Law decision or portion thereof that would otherwise cause a violation to be classified as serious, repeated, willful, and/or pervasive is reversed or vacated, the violation will not be classified as such under the Order. Just as a Labor Law decision that is reversed or vacated in its entirety need not be disclosed, so too, if a Labor Law decision is modified such that the underlying basis for the violation's classification as serious, repeated, willful, or pervasive has been reversed or vacated, the classification no longer applies.

The sections below discuss comments received regarding the criteria for classifying violations as serious, repeated, willful, or pervasive and the changes that the Department has made to the Guidance in response to these comments. In addition to the changes discussed below, where necessary, the Department has also made conforming changes to the examples in the four appendices listing examples of the four categories of violations.

#### 1. Serious Violations

The Proposed Guidance set forth several classification criteria for determining whether a violation is serious under the Order. As an initial

matter, some commenters indicated that the Proposed Guidance was unclear as to whether a violation needs to meet only one of the listed criteria in order to be considered serious. The Department believes that the Proposed Guidance was clear on this point in that it stated that a Labor Law violation that meets “at least one” of the listed classification criteria for seriousness will be considered a serious violation. To provide additional clarity, the final Guidance states that a violation involving “any one” of the listed criteria will be classified as serious. The Guidance also further clarifies that separate criteria apply to OSH Act violations enforced through citations, as discussed in the section below.

#### a. OSH Act and OSHA-Approved State Plan Violations Enforced Through Citations and Equivalent State Documents (Formerly “OSH Act”)

In the Proposed Guidance, the Department stated that a violation is serious under the Order if OSHA or an OSHA-approved State Plan issued a citation that it designated as serious, issued a notice of failure to abate, or issued an imminent danger notice. The Proposed Guidance also listed several criteria under which violations of any of the Labor Laws can be classified as serious. The Department received several comments regarding the classification of violations under the OSH Act and OSHA-approved State Plans.

#### Classification of Non-Citation OSHA Violations

Several commenters requested clarification about the classification of OSH Act and OSHA-approved State Plan violations that are not enforced through citations—such as retaliation, false-statement violations, notices of failure to abate, and imminent danger notices (“non-citation OSHA violations”). These commenters noted that such violations are enforced not through citations but through notices or through complaints filed in court. Thus, for these violations, OSHA and State Plan agencies never make a designation of “serious,” as they do with OSH Act and State Plan violations enforced by citation (“citation OSHA violations”). These commenters suggested that the Guidance should be clarified to ensure that non-citation OSHA violations may still be classified as serious under the Order.

The Department agrees that non-citation OSHA violations may still be classified as serious under the Order. The final Guidance therefore clarifies the treatment of OSH Act violations by

dividing serious violations into two categories. The first consists of citation OSHA violations, while the second consists of all other violations of the Labor Laws. This second category includes all non-citation OSHA violations, as well as violations of the other Labor Laws. The final Guidance states that a citation OSHA violation is serious if—and only if—the violation involves a citation or equivalent State document that was designated as serious or an equivalent State designation.<sup>55</sup> Non-citation OSHA violations are classified as “serious” according to the same criteria that are used to classify violations of the other Labor Laws. For example, if a court issues a civil judgment finding that a contractor violated the OSH Act’s anti-retaliation provisions by firing a worker in retaliation for filing a complaint with OSHA, an ALCA should find that this violation is serious because it meets the retaliation criterion for serious violation under the Order, as discussed below in section III(A)(1)(b)(vi) of this section-by-section analysis.<sup>56</sup>

#### Classification of Citation OSHA Violations

With respect to OSH Act and State Plan violations enforced through citations, the Department received several comments. Employee advocates generally supported the Department’s proposal to use OSHA or OSHA-approved State Plan designations of “serious” as the basis for classifying violations as “serious” under the Order. In contrast, industry commenters expressed concern with this approach. The industry commenters pointed out that a substantial majority of OSHA violations were designated as serious.<sup>57</sup> They argued that while the term “serious” may be appropriate in the context of OSH Act enforcement, the use of the OSH Act’s “serious” designation for the Order is inconsistent with the Proposed Guidance’s goal of identifying those violations that are “most concerning and bear on an

assessment of a contractor’s or subcontractor’s integrity and business ethics.” Some of the industry commenters noted that serious violations under the OSH Act may in some cases include what they characterized as “technical violations” of certain standards.

While the Department recognizes these commenters’ concerns, the final Guidance retains this aspect of the definition of serious violations. The Order requires that the Department’s Guidance “shall . . . where available, incorporate existing statutory standards for assessing whether a violation is serious, repeated, or willful.” Order, section 4(b)(i)(A). The OSH Act is alone among the Labor Laws identified in the Order in that it contains an explicit statutory standard for assessing whether a violation is serious. *See* 29 U.S.C. 666(k) (stating that a violation is serious “if there is a substantial probability that [the hazard created by the violation could result in] death or serious physical harm . . . unless the employer did not, and could not with the exercise of reasonable diligence, know” of the existence of the violation). This standard reflects a congressional determination that OSH Act violations that meet the above definition are serious and should be evaluated and enforced accordingly. Moreover, this standard underscores the severe consequences that can result from such violations, regardless of their relative prevalence.

Accordingly, the Guidance’s definition explicitly incorporates the OSH Act’s definition of a serious violation, as contemplated by the Order. The Guidance retains the approach under which ALCAs will classify as “serious” under the Order any citation that the relevant enforcement agency designated as serious. As noted above, the classification of a violation as serious under the Order does not mean that the contractor will not receive an award. Rather, the purpose of classifying certain violations as serious is to limit the scope of violations that will be considered by an ALCA to those that merit closer examination. Moreover, in the second step of the assessment process, ALCAs will review all mitigating factors provided by the contractor, including whether a violation has been remediated.

#### b. All Other Violations of the Labor Laws

The Proposed Guidance listed several other criteria that, if met, would result in the classification of a violation as serious. As noted above, under the final Guidance, these criteria apply to all

violations except OSH Act and OSHA-approved State Plan violations that are enforced through citations and equivalent State documents. Comments on each of these classification criteria are addressed in turn below.

#### i. Violation Affects at Least 10 Workers Making up at Least 25 Percent of the Contractor’s Workforce at the Worksite or Overall (Formerly “25% of the Workforce Affected”)

The Proposed Guidance stated that a Labor Law violation is serious if the affected workers made up 25 percent or more of the workforce at the worksite. Consistent with the Order’s direction, the Department believes that violations impacting a significant number of employees are serious. The Department specifically sought comments on this classification criterion.

Some unions and employee-advocacy organizations argued that this threshold may exclude violations that affect significant numbers of people—such as a violation that affects all of the workers in a particular job category—but do not reach the 25 percent threshold. Some groups advocated for a lower threshold such as 5 percent, while others argued that additional thresholds should be added, such as deeming a violation serious if it affects at least a certain number of employees (e.g., at least 50 employees). Some of these groups also argued that a violation should be serious if it affects at least 25 percent of a contractor’s overall workforce—in addition to the worksite-specific threshold.

In contrast, some employer groups argued that the 25 percent threshold is too low and will be over-inclusive. Some asserted that certain types of violations, such as an employer’s failure to post required employee-rights notices or establishment of general workplace policies that are found to violate the law but whose consequences may not be readily apparent, should not qualify as serious. Some of these commenters proposed eliminating the 25 percent criterion, raising the threshold, tailoring it to each Labor Law, or permitting it to be waived under appropriate circumstances. Some recommended that this threshold, if it remains in the Guidance, apply only to employers with at least a specified minimum number of employees to avoid situations in which the threshold is triggered by a very small number of affected workers.

Additionally, some commenters requested that the Department clarify how the 25 percent threshold would apply to violations spanning multiple worksites. Two of these commenters criticized the Department’s definition of

<sup>55</sup> Thus, OSH Act and State Plan citations that were designated by the relevant enforcement agency as other-than-serious cannot be classified as serious under the Order, even if they satisfy one of the criteria applicable to other violations of the Labor Laws (such as violations that affect 25 percent of the workforce).

<sup>56</sup> As a result of this clarification, notices of failure to abate a violation and imminent danger notices, which are non-citation OSHA violations, are now discussed below in subsection (v) of section III(A)(1)(b), “All other violations of the Labor Laws.”

<sup>57</sup> In 2015, approximately 74 percent of OSHA violations were designated as serious. This data is available on OSHA’s Web site at [https://www.osha.gov/dep/2015\\_enforcement\\_summary.html](https://www.osha.gov/dep/2015_enforcement_summary.html).

the term “worksite,” suggesting that it was ambiguous when compared with the regulatory definition under the Worker Adjustment and Retraining Notification (WARN) Act, 29 U.S.C. 2101–2109. *See* 20 CFR 639.3. Two commenters requested the Department clarify how the 25 percent threshold would apply to construction contractors. One proposed that the Guidance state that “a violation is serious if it affects 25 [percent] of the workforce of the particular contractor or subcontractor, working at a specific construction site.” Another noted that in the construction industry the number of workers at a worksite often varies, so it would be difficult to determine the total number of workers for this analysis.

After careful consideration of all these comments, the Department retains the 25 percent threshold for this criterion in the final Guidance, though with some modifications. The Order explicitly directs the Department to take into account “the number of employees affected” in determining whether a violation is serious. Order, section 4(b)(i)(B)(1). Accordingly, the Department considers a violation affecting numerous employees to be serious, even if it may not result in significant back wages or penalties or place workers in danger of immediate harm. This includes precisely the types of violations identified by industry commenters. Failing to post a legally required notice, for example, is serious because it deprives employees of knowledge of their rights under the Labor Laws, which could result in violations not being detected. The Department believes that the threshold is appropriate.

In response to the commenters’ concerns, however, the Department has modified the 25 percent threshold so it applies only when the violation affects at least 10 workers. This change avoids triggering the 25 percent threshold when only a few workers are affected. The Department declines to set a higher minimum number of workers because it believes that violations affecting a significant percentage of a workforce are serious even if the overall size of a workforce is small. For example, if a small business that employs only 40 employees commits a violation that affects 15 of those employees, such a violation should be considered serious even though the overall number of affected employees is relatively low.

The Department has also added an example to the Guidance to help clarify how this criterion applies to worksites with multiple employers. The Proposed Guidance stated that for purposes of

calculating the 25 percent threshold, the number of workers at the worksite

does not include workers of another entity, unless the underlying violation of the Labor Laws includes a finding that the contractor or subcontractor is a joint employer of the workers that the other entity employs at the worksite.

*80 FR 30583.* The final Guidance now explains that if a contractor employs 40 workers at a worksite, then a violation is serious if it affects at least 10 of the contractor’s workers at the site, even if other companies also employ an additional 40 workers at the same site.

The Department declines to replace the 25 percent threshold entirely with a threshold based on an absolute minimum number of workers. Such a threshold would disproportionately affect larger employers. The Department also declines to adopt a criterion based on a violation’s effect on all employees in a particular job classification. Such a criterion would not be easily administrable because it would frequently require ALCAs to perform the difficult task of distinguishing between job classifications.

The Department also declines to lower the threshold of affected workers from 25 percent. While any threshold will necessarily include some violations and exclude others, the Department believes that 25 percent is an appropriate benchmark for determining whether a violation affects a sufficient number of workers to be considered serious—therefore warranting further review. While recognizing the concerns of employee advocates that certain violations may fall short of the threshold, the Department notes that these violations may meet other criteria for seriousness. The Department also recognizes the concerns of employer groups that the 25 percent threshold is overinclusive, but the Department believes that these concerns will be addressed by the overall assessment of a contractor’s violations, and particularly the assessment of mitigating factors.

The Department declines to make other changes to the definition of “worksite.” The Department notes that the definition in the Guidance is already similar to the definition of “single site of employment” under WARN Act regulations. Both definitions provide that: (1) A worksite can be a single building or a group of buildings in one campus or office park, but that separate buildings that are not in close proximity are generally separate worksites; and (2) for workers who do not have a fixed worksite, their worksite is the site to which they are assigned as their home

base, from which their work is assigned, or to which they report. *See* 20 CFR 639.3(i). These similarities support the Department’s conclusion that the definition of “worksite” in the Guidance is appropriate.

With regard to construction workers specifically, the Department anticipates that construction workers who regularly work at multiple sites will in most cases fall into the latter category described above; namely, their worksite will be the site to which they are assigned as their home base, from which their work is assigned, or to which they report. The FMLA’s implementing regulations, which adopt a similar definition of worksite, provide helpful examples for determining the number of workers at construction worksites. *See* 29 CFR 825.111(a)(2).

The Department agrees with the commenters who suggested that a violation should be serious if it affects at least 25 percent of a contractor’s overall workforce (provided that it affects at least 10 workers). The final Guidance has been modified accordingly. In practice, in the vast majority of cases (if not all cases) in which a violation affects at least 25 percent of a contractor’s overall workforce, it will also affect at least 25 percent of the contractor’s workforce at a particular worksite; however, this criterion has been added to ensure coverage of violations that are not specific to a particular worksite.

#### ii. Fines, Penalties, and Back Wages (Formerly “Fines, Penalties, Back Wages, and Injunctive Relief”)

The Proposed Guidance stated that a violation would be serious if fines and penalties of at least \$5,000 were assessed, back wages of at least \$10,000 were due, or injunctive relief was imposed by an enforcement agency or a court.

#### Threshold Amounts

Numerous commenters addressed the proposed \$5,000 and \$10,000 thresholds. These commenters were divided as to whether the thresholds were too high or too low. Industry commenters advocated raising these amounts. In particular, they argued that the \$10,000 back-wage threshold is overbroad and would encompass too many violations. A few of these commenters addressed the fine-and-penalty thresholds and urged the Department to base them on the amount collected rather than assessed. One commenter suggested that the back wage threshold should be tied to the size of the contractor. Another organization argued that such a standard is overbroad



as it applies to violations of anti-discrimination Labor Laws. This commenter asserted that the monetary thresholds under this criterion would disproportionately classify discrimination violations as serious when compared, for instance, to wage-and-hour violations. Another commenter similarly asserted that most actions under Title VII, the ADA, the ADEA, and the NLRA seeking backpay would trigger a finding of a serious violation using a \$10,000 threshold.

In contrast, many employee-advocacy and union commenters asserted that the \$10,000 back-wage threshold is too high and would not capture violations affecting low-wage workers. Several requested clarification regarding whether the back-wage threshold could be satisfied by adding together the back wages due to multiple employees in the same matter. Three of these commenters proposed, as an alternative or additional metric, that a violation be characterized as serious when the amount of back wages due is equal to ten percent or more of wages paid the worker annually. Some commenters also suggested that the Department define a violation as serious any time that fees are awarded or penalties are assessed for wage-and-hour violations.

After carefully reviewing all of these comments, the Department retains the \$5,000 and \$10,000 thresholds in the final Guidance. The Order explicitly instructs the Department to take into account “the amount of damages incurred or fines or penalties assessed with regard to the violation.” Order, section 4(b)(i)(B)(1).

While violations of some Labor Laws may satisfy the monetary thresholds more often than others, the Department concludes that creating statute-specific thresholds would not further the goals of the Order. First, even if discrimination violations are more likely than wage-and-hour law violations to result in back-wage awards of greater than \$10,000, in both cases an employer has wrongfully denied employee(s) \$10,000 in wages.<sup>58</sup> In terms of the economic impact on the workforce, \$10,000 in lost wages due to discrimination is just as serious as \$10,000 in lost wages due to a wage-and-hour violation. A sum of \$10,000 is over 18 percent of the median household income in the United States,

and over 31 percent of the median nonfamily household income.<sup>59</sup>

Second, as described above, classifying violations as serious, repeated, willful, and pervasive aims to screen out Labor Law violations that are less significant for purposes of the Order and to focus on those violations that are more likely to implicate a contractor’s integrity and business ethics. After this initial screening, an ALCA then weighs these violations in light of the totality of the circumstances and any mitigating factors that are present. Thus, while a single civil judgment awarding \$15,000 in back wages to an employee in a Title VII lawsuit will be classified as serious under the Order, an ALCA generally should not make a negative assessment of the contractor’s record of Labor Law compliance based on this violation standing alone.

It is also noteworthy that, as discussed below, many violations of the Labor Laws will not implicate these thresholds at all because back wages and penalties have not, or cannot, be assessed. For example, reasonable cause determinations by the EEOC cannot implicate these thresholds because they do not specify an amount of back wages. Similarly, as discussed below, the \$5,000 threshold for fines and penalties (as opposed to back wages) will only be implicated in administrative enforcement matters where fines and penalties are assessed, and not private litigation or arbitration where they are not.

The Department also declines to lower the amounts of the monetary thresholds under this criterion because it believes the amounts are appropriate. Some unions and employee advocates appeared to construe the Proposed Guidance as suggesting that the \$10,000 back-wage threshold applied only on a per-employee basis. The Department clarifies in the final Guidance that the thresholds are cumulative; *i.e.*, they can be satisfied by summing the fines and penalties assessed for all workers affected by the violation or by summing the back wages due to all affected employees.

Similarly, the Department rejects the proposal to classify as serious all wage-and-hour violations involving fees or penalties. The Order instructs the Department to take into account “the amount” of fines or penalties assessed in defining serious violations. Order, section 4(b)(i)(B)(1). Thus, the Order contemplates that the Department will

establish a threshold for fines or penalties assessed for the purposes of determining whether a violation is serious.

The Department also does not adopt the proposal to use an alternative criterion for serious violations based on the ratio of back wages due compared with the affected workers’ annual pay. While this could be an informative metric, this information will generally not be readily ascertainable from Labor Law decisions. To facilitate efficient and consistent enforcement of the Order, the Department seeks to ensure that ALCAs rely only on information that can be easily obtained by reviewing Labor Law decisions.

However, in response to these and other comments, the Department has modified the guidance on monetary thresholds in several respects. First, the Proposed Guidance stated that the threshold amounts are measured by the amount the enforcement agency “assessed.” Many employer groups argued that this threshold should instead take into consideration any later reduction in the assessed amount—either where the enforcement agency unilaterally reduces this amount or where it is reduced during settlement negotiations. These commenters asserted that enforcement agencies may initially assess a very high amount or the statutory maximum as a negotiating tactic with little regard for the seriousness of the violation. One commenter further argued that the meaning of “assessed” is ambiguous given that some enforcement agencies, such as the NLRB, typically do not quantify or otherwise assess monetary amounts in a complaint.

The Department agrees with industry commenters on this point and has modified the Guidance accordingly. The final Guidance states that the thresholds are measured by the amount “due.” This means that if an enforcement agency consents to accept a reduced amount of either back wages or penalties for a violation, it is that lesser amount that will be used to determine seriousness. As stated in the Proposed Guidance, a reduced settlement amount may be based on factors other than the seriousness of a violation. In other circumstances, however, the reduction may reflect the enforcement agency’s judgment that a lower assessment more appropriately reflects the seriousness of a particular violation. The Department believes that reliance on the final agreed-upon amount will avoid confusion because this amount will likely be the one memorialized in the parties’ records. Similarly, if the amount initially assessed by an enforcement

<sup>58</sup> The Department has removed one paragraph from the Guidance relating to statistics on the WHD administrative merits determinations that would meet the \$10,000 and \$5,000 thresholds. This modification is intended to eliminate extraneous information from the final Guidance and does not indicate any substantive change in its application.

<sup>59</sup> See U.S. Census Bureau, “Income, Poverty and Health Insurance Coverage in the U.S.: 2015,” <http://www.census.gov/newsroom/press-releases/2015/cb15-157.html> (Sept. 16, 2015).

agency is later reduced by an adjudicative body—for example, if the Department files a civil complaint in an FLSA case seeking \$15,000 in back wages but a court awards only \$8,000—it is the reduced amount that is relevant for evaluating seriousness.

Reliance on a lesser amount will not apply if an employer files for bankruptcy and cannot pay the full amount, or simply refuses to pay such that the full penalty is never collected. In such cases, the original assessed amount is the amount due, and therefore should be used when evaluating seriousness.

The Department has also modified the definition of “fines and penalties” that will implicate the \$5,000 threshold. Specifically, this definition now includes only monetary penalties imposed by an administrative agency and does not include liquidated damages under the ADEA or punitive damages under other statutes. This change has been made both in response to concerns about the scope of the \$5,000 threshold and to simplify administration of the Order. As noted in Guidance, however, liquidated damages under the FLSA are included in the calculation of back wages because they are compensatory in nature.

For clarity, the Department has also added a paragraph to the Guidance explaining that if an enforcement agency issues an administrative merits determination that does not include an amount of back wages due or fines or penalties assessed—for example, if the Department files a complaint seeking back wages but does not specify the amount—then the violation cannot be classified as serious using this criterion until the amount has been determined.

Finally, one commenter recommended clarifying the Guidance to address any mitigation of damages from an employee’s interim employment. The commenter argued that employees’ earnings from obtaining interim employment should not be factored into the amount of total back wages for the purpose of the \$10,000 threshold. The Department declines to modify the Guidance on this point. ALCAs will use the amount of back wages due set forth in the Labor Law decision, whether or not that amount reflects an adjustment for mitigation. To facilitate efficient and consistent enforcement of the Order, the Department seeks to ensure that ALCAs rely only on information that is readily ascertainable from Labor Law decisions.

#### Injunctive Relief

The Proposed Guidance stated that a violation would be classified as serious

if injunctive relief “was imposed by an enforcement agency, a court, or an arbitrator or arbitral panel.” 80 FR at 30584.

In response to the proposal, some industry groups commented that the imposition of injunctive relief alone should not justify classifying a violation as serious. In their view, injunctive relief is often imposed regardless of the nature or severity of the violation, and as a result, they expressed concern that this criterion would capture minor or technical violations. For example, these commenters noted that the NLRB always or almost always imposes injunctive relief, including requiring the employer to post a notice that it has been found in violation of the NLRA. These commenters suggested that this criterion should be eliminated or modified to include additional criteria justifying the conclusion that the violation was serious. In contrast, commenters representing workers agreed with the Proposed Guidance that the imposition of injunctive relief warrants characterizing the violation as serious, given that such relief is rarely imposed by courts.

After the consideration of the above comments, the Department has removed injunctive relief from the list of criteria used to classify violations as serious in the final Guidance. The Department agrees that including all injunctions entered by courts, arbitrators, and enforcement agencies as serious may include violations that do not necessarily bear on a contractor’s integrity and business ethics.

However, the Department believes that the imposition of injunctive relief by courts could be relevant to the ALCA’s ultimate assessment of a contractor’s record of Labor Law compliance. Courts issue injunctions only in rare circumstances.<sup>60</sup> A preliminary injunction—an injunction entered before a final judgment—is an “extraordinary remedy.” *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 22, 24 (2008). Specifically,

[a] plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.

<sup>60</sup>For example, as an article cited by one commenter noted, studies have found that courts issue injunctions in less than 3 percent of Federal employment discrimination cases. See Mark D. Gough, “The High Costs of an Inexpensive Forum: An Empirical Analysis of Employment Discrimination Claims Heard in Arbitration and Civil Litigation,” 35 Berkeley J. Emp. & Lab. L. 91, 105 n.62 (2015).

*Id.* at 20. Thus, in cases involving the enforcement of the Labor Laws, preliminary injunctions will be issued only when a court has concluded that the employer has likely violated one of the Labor Laws and that such conduct threatens to irreparably harm workers and the public interest. A permanent injunction—one issued at the end of litigation—requires essentially the same showing, except that the plaintiff must show actual success on the merits rather than a likelihood of success. See *Amoco Prod. Co. v. Vill. of Gambell, AK*, 480 U.S. 531, 546 n.12 (1987).

Because both preliminary and permanent injunctions imposed by courts are rare and require a showing of compelling circumstances, including irreparable harm to workers and a threat to the public interest, the Department believes that if a contractor has already been found to have committed serious, repeated, willful, and/or pervasive violations, ALCAs should examine whether any of those violations resulted in the imposition of injunctive relief by a court. The Department has therefore moved the discussion of injunctive relief into the “weighing” section of the Guidance: “Factors that weigh against a satisfactory record of Labor Law compliance.” See Guidance, section III(B)(2). Thus, the imposition of injunctive relief alone will not result in a violation being classified as serious. However, if a violation has already been classified as serious, repeated, willful, and/or pervasive, the imposition of injunctive relief for such a violation will weigh against a finding that the contractor is responsible.

iii. Any Violations That Cause or Contribute to Death or Serious Injury (Formerly “MSPA or Child Labor Violations That Cause or Contribute to Death or Serious Injury”)

Under the Proposed Guidance, any violation of MSPA or the FLSA child labor provisions that causes or contributes to the death or serious injury of one or more workers is a serious violation.

Several employee advocacy organizations suggested that a violation of any Labor Law, not just MSPA or the FLSA, should be serious when the violation causes or contributes to the death or serious injury of a worker. Many also requested that physical assault—whether or not it results in death or a serious injury—be considered a serious violation. They argued that any physical assault was inherently severe and so should be deemed serious. Similarly, some commenters suggested that any violation involving sexual

harassment should be deemed a serious violation.

The Department adopts the first of these proposals but not the latter two. The Proposed Guidance limited this criterion to MSPA and the FLSA child-labor provisions because, other than the OSH Act and State Plans, violations of MSPA's health-and-safety provisions and the FLSA's child-labor provisions are most likely to have the potential to result in death or serious injury.<sup>61</sup> However, in the less likely event that a violation of one of the remaining Labor Laws causes or contributes to death or serious injury, the Department agrees that the violation would be serious. The Department therefore adopts this change in the final Guidance. As a related matter, the final Guidance also modifies the definition of "serious injury" for purposes of this criterion; rather than incorporating by reference the meaning of "serious injury" from the FLSA's child labor provisions, the Guidance explicitly defines "serious injury" as an injury that requires the care of a medical professional beyond first-aid treatment or results in more than five days of missed work.

The Department does not adopt the suggestions regarding physical assault or sexual harassment. While the Department agrees that many violations involving physical assault or sexual harassment are serious, the Department declines to broaden this criterion because these terms can also include more minor workplace altercations or interactions.

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

The Department did not receive comments directly addressing this criterion. The Department retains the Guidance as proposed.

#### v. Notices of Failure To Abate and Imminent Danger Notices

The Proposed Guidance stated that a violation is serious under the Order if it involves a notice of failure to abate an OSH Act violation or an imminent danger notice under the OSH Act or an OSHA-approved State Plan. The Department did not receive comments specifically addressing these criteria, with the exception of the comments

described above requesting that the Department clarify that non-citation OSHA violations such as these are serious under the Order despite not having being designated as "serious" by the relevant enforcement agency.

As noted above, the Department has clarified this matter in the final Guidance by dividing OSH Act and OSHA-approved State Plan violations into two categories: Citation OSHA violations, which are serious if, and only if, they were designated as such by the relevant enforcement agency; and Non-Citation OSHA Violations, which are serious if they meet other criteria listed in the Guidance. Because notices of failure to abate and imminent danger notices fall into the second category, the final Guidance lists them separately from citation OSHA violations. The final Guidance also clarifies that notices of failure to abate State Plan violations (as well as any State equivalents of notices of failure to abate or imminent danger notices) are serious violations because failing to correct a hazard after receiving formal notification of the need to do so represents a serious disregard for the law.

#### vi. Retaliation (Formerly "Adverse Employment Actions or Unlawful Harassment for Exercising Rights Under Labor Laws")

The Proposed Guidance classified violations involving "adverse employment actions or unlawful harassment for exercising rights under Labor Laws," *i.e.*, retaliation, as serious. The Department defined "adverse employment actions" to include discharge, refusal to hire, suspension, demotion, or threats.

A number of commenters expressed general support for the inclusion of retaliation within the definition of a serious violation. Some supportive commenters were concerned, however, that the Department had limited "adverse employment action" to only the five types of adverse action explicitly listed in the Proposed Guidance. These commenters urged the Department to adopt instead the Supreme Court's definition of adverse employment action in *Burlington Northern & Santa Fe Railway Company v. White*, 548 U.S. 53 (2006). Under *Burlington Northern*, to prove retaliation under Title VII, a plaintiff "must show that a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Id.* at 68 (internal citations and quotation marks omitted). While this definition does not

include "petty slights, minor annoyances, and simple lack of good manners," it does include constructive discharges; transfers to undesirable shifts, locations, or positions; or changes in other terms and conditions of employment, *see id.*, none of which were specifically listed in the Proposed Guidance.

The Department finds the comments regarding *Burlington Northern* persuasive. In particular, it agrees with the AARP comment that "[r]etaliation that could deter a reasonable worker from exercising a protected right [under the Labor Laws] is per se serious." The Department concludes that *Burlington Northern* provides a useful standard for what constitutes an adverse action sufficient to support a finding of retaliation, and modifies the Guidance to adopt it. The Department further notes that the list of examples of adverse actions in the Guidance is not meant to be exclusive.

In contrast to the generally supportive comments about this criterion from employee-advocacy groups, several employer groups opposed the classification of violations involving retaliation as serious. These industry commenters argued that many allegations of discrimination include accusations of retaliation as a matter of course, and that many large employers will have one or more such allegations pending at any given time.

The Department retains retaliation as a classification criterion for serious violations. As noted in the Proposed Guidance, retaliation is serious because it dissuades workers from reporting violations and therefore may mask other serious conduct by employers. In response to concerns that retaliation allegations may be included in discrimination complaints as a matter of course, the Department reiterates that a private complaint is not disclosable as a Labor Law decision under the Order unless and until it leads to an administrative merits determination, a civil judgment, and or an arbitral award or decision. A complaint alone must be disclosed only if it has been filed by an enforcement agency following an investigation, and therefore constitutes an administrative merits determination. In sum, the Department believes that retaliation is serious, and the final Guidance retains this criterion.

While retaining the criterion, the Department modifies it for clarity. Two industry commenters suggested that the language in the Proposed Guidance could have allowed a finding that an "adverse employment action" alone is a serious violation under the Order—regardless of whether it was taken in

<sup>61</sup> The Proposed Guidance did not reference the OSH Act or OSHA-approved State Plans here because any violation of the OSH Act or OSHA-approved State Plans involving a risk of death or serious injury will be enforced with a citation designated as serious and thus will already be a serious violation under the Order. This criterion is intended to capture violations of other Labor Laws that result in death or serious injury.

retaliation for protected activity. That was not the Department's intent. Rather, an adverse employment action only becomes relevant to this criterion when it is taken in retaliation for a worker exercising a right protected by any of the Labor Laws. To clarify the Guidance, the Department has changed the title of this criterion to "retaliation" and has adjusted the wording of the description accordingly.<sup>62</sup>

One commenter expressed concern about the NLRA example of a serious violation in Appendix A, which describes a contractor that fired the employee who was the lead union adherent during the union's organizing campaign. The commenter noted that such behavior would only be unlawful if the discharge was in retaliation for the employee's protected activity. The Department agrees with the commenter and modifies the example in the Appendix A of the final Guidance to clarify this point.

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

The Proposed Guidance stated that violations involving a "pattern or practice of discrimination or systemic discrimination" are serious. Specifically, the Proposed Guidance defined a pattern or practice of discrimination as involving "intentional discrimination against a protected group of employees, rather than discrimination that occurs in an isolated fashion." 80 FR 30585. Systemic discrimination involves "a pattern or practice, policy, or class case where the discrimination has a broad impact on an industry, profession, company or geographic area." *Id.* Systemic discrimination also includes "policies and practices that are seemingly neutral but may cause a disparate impact on protected groups." *Id.*

Several employee-advocacy commenters argued that the Guidance should explicitly state that systemic discrimination is not limited to class actions or government agency enforcement, so that individual or multi-plaintiff lawsuits challenging a widely-applicable practice or rule

should fall within the definition of serious. Because the definition in the Proposed Guidance singled out "class cases," these commenters believed that one could infer that the Guidance excludes individual or multi-plaintiff non-class action cases in which the Labor Law decision includes a finding that systemic discrimination occurred. The Department agrees that systemic discrimination is not limited to litigation brought in a class action, and has clarified this point in the final Guidance.

Several of these commenters also advocated that this criterion for serious violations should not be limited to "systemic discrimination," but instead should include all "systemic labor law" violations. Commenters cited the misclassification of employees as independent contractors and the failure to provide adequate safety equipment to an entire workforce as systemic violations involving company-wide policies that should be deemed serious.

The Department declines to expand the definition of systemic discrimination. The term "systemic discrimination" has a well-established meaning under anti-discrimination laws, and the Department intended to restrict this criterion to such violations. Moreover, the Department expects that many widespread violations unrelated to discrimination will likely be classified as serious under other criteria in the Guidance.

Finally, one industry commenter criticized the systemic discrimination criterion, asserting that it was too broad because virtually all of OFCCP's discrimination allegations are "pattern or practice" or systemic allegations. The Department disagrees. While OFCCP does focus on this category of discrimination, only a small fraction of OFCCP's show-cause notices include a finding that systemic discrimination has occurred. Additionally, as noted earlier, OFCCP issues fewer than 200 show-cause notices per year; thus, the overall number of OFCCP cases implicated by this criterion is not large. In the Department's view, systemic or pattern-or-practice discrimination remains an appropriate criterion for determining whether a violation is serious.

While the Department has not made any substantive changes to the definitions for this criterion, the Department has added a list of the Labor Laws to which this criterion will generally apply, as well as a reference to a leading Supreme Court case defining "pattern or practice," *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 336 (1977).

#### viii. Interference With Investigations

The Proposed Guidance stated that a Labor Law violation is serious if the Labor Law decision's findings support a conclusion that the contractor interfered with an enforcement agency's investigation. The Proposed Guidance also listed several examples of interference.

Several industry commenters voiced concern about this category. Specifically, these commenters argued that this category could penalize contractors for raising good-faith challenges to the scope of an agency's investigation. For example, commenters stated that a contractor may refuse to provide documents to an agency because it takes the position that the agency's request is overbroad. Some of these commenters argued that the contractor has a right to challenge the scope of a subpoena, document request, or request for information, and that the assertion of such rights should not be construed as interference—regardless of whether a court ultimately decides in favor of the contractor. One commenter suggested that such disputes should be distinguished from more serious obstruction such as threatening workers who speak to enforcement agency investigators, falsifying or destroying records, or making misrepresentations to investigators.

After careful consideration of the comments received, the Department is retaining this criterion for serious violations in the final Guidance but is limiting its scope. The Department views interference with investigations as serious because such behavior severely hinders enforcement agencies' ability to conduct investigations and correct violations of law. The Department also recognizes, however, that employers may have good-faith disputes with agencies about the scope or propriety of a request for documents or access to the worksite.

Accordingly, the Department has narrowed the "interference" criterion such that interference is defined to include only the following circumstances:

(1) A civil judgment was issued holding the contractor in contempt for failing to provide information or physical access to an enforcement agency in the course of an investigation; or

(2) It is readily ascertainable from the Labor Law decision that the contractor—

(a) Falsified, knowingly made a false statement in, or destroyed records to frustrate an investigation under the Labor Laws;

<sup>62</sup> Similarly, the Business Roundtable commented on one of the Proposed Guidance's examples of retaliatory behavior that referenced an employee who is disciplined for making a complaint about potential violations of Labor Laws. The Business Roundtable expressed concern that any employee complaint could be deemed a serious violation. However, the Proposed Guidance did not suggest that the employee's complaint itself could be considered a serious violation; rather, the relevant serious violation would be where an administrative merits determination, civil judgment, or arbitral award or decision finds that the employer retaliated against the employee for making the complaint.

(b) Knowingly made false representations to an investigator; or  
(c) Took or threatened to take adverse actions against workers (for example, termination, reduction in salary or benefits, or referral to immigration or criminal authorities) for cooperating with or speaking to government investigators or for otherwise complying with an agency's investigation (for example, threatening workers if they do not return back wages received as the result of an investigation).

This revision aims to capture two primary categories, both of which the Department considers serious: First, instances in which a court not only concludes that the employer unlawfully withheld documents or access from an agency, but holds the employer in contempt for doing so; and second, instances in which an employer takes affirmative steps to frustrate an investigation.

ix. Material Breaches and Violations of Settlements, Labor Compliance Agreements, or Orders (Formerly "Material Breaches and Violations of Settlements, Agreements, or Orders")

The Proposed Guidance stated that a violation is serious if it involves a breach of the material terms of any agreement or settlement, or a violation of a court or administrative order or arbitral award. One commenter expressed concern regarding this criterion, stating that the Guidance did not clearly explain how to determine that a settlement agreement had been materially breached.

The Department retains this criterion for serious violations in the Guidance, with a clarification. The concept of material breach is well-established in law. *See, e.g., Frank Felix Associates, Ltd. v. Austin Drugs, Inc.*, 111 F.3d 284, 289 (2d Cir. 1997) (stating that a material breach, under New York law, is one that "go[es] to the root of the agreement between the parties"). The Department believes that in most cases, the existence of a material breach will be clear. For example, if an employer agrees in a settlement to classify certain types of workers as employees, but continues to classify them as independent contractors, this will constitute a material breach. The intent of this provision is not to capture technical or questionable breaches; rather, it is to capture those cases in which an employer agrees, as part of a settlement, to take certain steps to remedy Labor Law violations but then fails to do so. The Department also clarifies the relevant "agreements" whose material breach will constitute a serious violation. The term

"agreements" includes settlements and labor compliance agreements.

c. Table of Examples

The Department has updated the table of examples to reflect the changes in the final Guidance.

d. Other Comments on Serious Violations

The National Women's Law Center suggested that the Guidance should include a separate subcategory of serious violations that captures "the scope and severity of harm caused by a violation," such as violations that implicate more than one right under the Labor Laws, severe monetary losses, or other types of severe losses.

The Department agrees that the Guidance should capture the scope and severity of harm caused by a violation, but does not believe it is necessary to create an additional criterion or separate subcategory of serious violations. The existing criteria for serious violations generally seek to capture the scope and severity of harm, by focusing on, for example, the degree of monetary harm, the number of affected workers, and the extent to which a violation risked or caused death or serious injury. In addition, scope and severity of harm are taken into consideration during the process by which ALCAs weigh a contractor's overall record of Labor Law compliance. As discussed below, in analyzing a contractor's record during the weighing process, an ALCA does not need to give equal weight to two violations that receive the same classification. Some violations may have more significant consequences on a contractor's workforce than others, and therefore will be given more weight during the determination of whether a contractor has a satisfactory record of Labor Law compliance. *See* Guidance, section III (B).

Several industry commenters expressed concern that a contractor could be found to have committed a serious violation based on a novel legal theory asserted by an agency or upheld for the first time by a court. These commenters cited, for example, recent NLRB complaints challenging employee handbooks and corporate social media policies and EEOC reasonable cause determinations challenging employer background check policies.

The Department declines to adopt a per se rule under which violations based on a novel legal theory would not be deemed serious. Many cases call for the application of established legal rules to new circumstances, and the fact that no identical violation has been previously prosecuted is not relevant to

the measure of the violation's effect on the contractor's workers. If a contractor believes that a violation should carry less weight because it was based on a novel legal theory, the contractor should make such arguments when submitting mitigating information about the violation. The Guidance provides that a recent legal or regulatory change may be a factor weighing in favor of a satisfactory record of Labor Law compliance. This may be the case where "prior agency or court decisions suggested that a practice was lawful, but the Labor Law decision finds otherwise." Guidance, section III (B)(1)(e).

One labor union commenter urged that an NLRA "hallmark violation" should be treated as a serious violation, and that more than one hallmark violation should be considered pervasive. Hallmark violations include certain violations that are particularly coercive, including "threats of plant closure or loss of employment, discharge or other serious adverse action against union adherents, and grants of significant benefits to employees." *Regency Manor Nursing Home*, 275 NLRB 1261, 1262 (N.L.R.B. 1985).

The Department declines to modify the definitions of serious and pervasive violations to include a new criterion of NLRA hallmark violations. Unlike, for example, OSHA, which clearly designates citations as "serious" on the face of the citation, the General Counsel of the NLRB does not characterize violations as "hallmark" in a complaint. Thus, the ALCA would have to make a determination regarding whether a violation is a hallmark one, and the Department does not envision ALCAs having such a role. Nevertheless, the Department notes that many hallmark violations would likely be considered serious under one of the existing criteria, such as the criteria on retaliation and violations that affect at least 10 workers comprising 25 percent of a contractor's workforce.

Similarly, another labor union commenter suggested that the Guidance add a criterion addressing corporate policies that significantly chill employees' rights to speak out, organize, or file complaints. The commenter specifically suggested that multiple policies aimed at silencing workers should be considered serious. The Department declines to adopt this suggestion. When a contractor is found to have maintained such an unlawful, corporate policy governing employee conduct, such a policy will likely affect at least 25 percent of the employer's workforce and will be classified as

serious on that basis. As noted above, the criterion setting out the 25 percent threshold is meant to capture violations to the extent that they affect a sufficient number of employees. Accordingly, the Department believes that an additional category of serious violations that captures only certain types of corporate policies is unnecessary.

## 2. Repeated Violations

The Order provides that the standard for repeated violations should “incorporate existing statutory standards” to the extent such standards exist. Order, section 4(b)(i)(A). The Order further provides that, where no statutory standards exist, the standards for repeated should take into account “whether the entity has had one or more additional violations of the same or a substantially similar requirement in the past 3 years.” *Id.* section 4(b)(i)(B)(2). None of the Labor Laws contains an explicit statutory definition of the term “repeated.” Accordingly, the Proposed Guidance defined “repeated” violations using the “substantially similar” language suggested by the Order. *See* 80 FR 30587.

The final Guidance generally maintains the Proposed Guidance’s definition of “repeated” violations, with some modifications. First, where the Proposed Guidance included a general definition followed by a list of examples, the final Guidance instead sets forth a statute-specific, exhaustive list of repeated violations. This list closely parallels the examples that were presented in the Proposed Guidance, with the exception of some changes explained below.

The Department has made several nonsubstantive changes to the definition for clarity. The Guidance now uniformly refers to the initial violations that form the basis for a repeated violation as “prior” violations, instead of “predicate” violations. Where discussing the relationship between the prior violation and the repeated violation itself, the Guidance refers to the latter as the “subsequent violation.” The Guidance also now refers to the relevant 3-year period for determining if a violation is repeated as the “3-year look-back period.” The Department also has changed the order of and retitled some of the subsections within the definition, and has created a separate sub-heading for “citation OSHA violations.” Finally, the Department has made a few additional changes to the definition in response to comments, as discussed below.

a. OSH Act and OSHA-Approved State Plan Violations Enforced Through Citations or Equivalent State Documents

The Proposed Guidance stated that “[f]or violations of the OSH Act, violations are repeated if they involve the same or a substantially similar hazard.” 80 FR 30574, 30588.

Employee-advocacy commenters as well as an industry commenter submitted comments on this criterion. These commenters stated that this definition seemed to classify some violations as repeated for the purposes of the Order that would not be considered “repeat” under the OSH Act. The reason is that the enforcement scheme of the OSH Act includes both OSHA and the OSHA-approved State Plans. Under that scheme, violations of State Plans are not considered by Federal OSHA when classifying a Federal violation as “repeat.” Similarly, State Plan agencies typically do not cite an employer for a repeat violation if the prior violation occurred outside the State’s jurisdiction.

The employee advocates supported application of the “substantially similar” standard as proposed in the Guidance, regardless of the variance from the OSH Act. The industry commenter argued that ALCAs and contracting officers would not have the expertise to determine that two violations were substantially similar if the relevant enforcement agency did not originally designate them as such.

After carefully considering all of the comments received, the Department has decided to modify the Guidance criterion for repeated violations under the OSH Act and OSHA-approved State Plans. It was not the Department’s intention to expand the scope of repeated violations beyond those already deemed “repeat” under the OSH Act and OSHA State Plans. Rather, the Department’s reference in the Proposed Guidance to violations that involve the same or a substantially similar hazard was solely intended to incorporate the Federal OSH Act’s standard for repeated violations. *See Potlatch Corp.*, 7 O.S.H. Cas. (BNA) 1061, 1063 (O.S.H.R.C. 1979). Therefore, the Guidance now states that an OSH Act or OSHA-approved State Plan violation that was enforced through a citation or equivalent State document (a “citation OSHA violation”) will only be “repeated” under the Order if OSHA or the relevant State Plan agency originally designated the citation as repeated, repeat, or any similar State designation.

While modifying the OSHA definition in this way, the Department retains the 3-year timeframe limitation discussed in

the Proposed Guidance. In making “repeated” designations, OSHA’s current policy is to consider whether the employer has violated a substantially similar requirement any time within the previous 5 years. The Order, however, indicates that a 3-year look-back period is appropriate. Accordingly, when a contractor discloses a decision involving an OSH Act “repeated” violation, the ALCA will need to review the decision to determine whether the prior violation occurred in the previous 3 years. This means that the prior violation must have become a final order of the OSHRC or equivalent State agency within the previous 3 years. In sum, only those citations that have been designated as repeated and where the prior violation occurred in the 3 years preceding the second citation should be classified as repeated under the Order.

The final Guidance also deletes a statement from the Proposed Guidance that violations of MSPA and the OSH Act may be substantially similar if they involve substantially similar hazards. Upon further consideration, the Department believes that such an approach is not easily administrable.

For non-citation OSHA violations, neither OSHA nor State Plan agencies make “repeated” designations. Accordingly, the Guidance clarifies that ALCAs will classify non-citation violations as repeated using the same general criteria that apply to all other violations. *See* Guidance, section III(A)(2)(b).

## b. All Other Violations

Under the final Guidance, for all Labor Law violations other than citation OSHA violations, a violation is “repeated” if it is

the same as or substantially similar to a prior violation of the Labor Laws that was the subject of a separate investigation or proceeding arising from a separate set of facts, and became uncontested or adjudicated within the previous 3 years.

Guidance, section III(A)(2). Comments related to this definition are discussed below.

### i. Prior Violation Must Have Been Uncontested or Adjudicated (Formerly “Type of Violations”)

The Proposed Guidance stated that the prior violation that forms the basis for a repeated violation must be a civil judgment, arbitral award or decision, or adjudicated or uncontested administrative merits determination. Under the Proposed Guidance, this restriction did not apply to the subsequent violation. In other words,

the violation classified as repeated did not itself need to be adjudicated.

Several employer groups challenged this distinction. Most of these commenters argued that the definition should require both the prior and subsequent violations to have been adjudicated for the subsequent one to be classified as repeated. One commenter asserted that limiting the prior violation to adjudicated or uncontested administrative merits determinations implicitly recognizes that unadjudicated determinations are inherently suspect. Many of these comments echoed those made by employer groups regarding the required disclosure of nonfinal administrative merits determinations, in which these groups suggested that only final agency decisions should have to be disclosed under the Order.

In the final Guidance, the Department generally retains the proposed framework, though with some modifications discussed below. The purpose of classifying a violation as repeated is to identify those employers who fail to modify their conduct after having committed a previous substantially similar violation. Employers who have repeatedly violated the law are more likely than other contractors to commit future similar Labor Law violations during performance of a Federal contract. Because an ALCA will give a repeated violation additional scrutiny, it is appropriate to create more limited parameters for the prior violation by requiring it to have been uncontested or adjudicated. As the Guidance notes, this framework is intended to ensure that violations will only be classified as repeated when the contractor has had the opportunity—even if not exercised—to present facts or arguments in its defense before an administrative adjudicative authority concerning the prior violation.

Moreover, the Department chose to require the prior violation to be uncontested or adjudicated because this formulation is similar to the one used to designate repeated violations under the OSH Act. In enforcing the OSH Act, OSHA requires a prior substantially similar violation to have become a final order of the OSHRC before the occurrence of the subsequent violation. The subsequent violation itself, however, need not be a final order of the OSHRC. The Department has chosen to model the definition of “repeated” under the Order after the OSH Act practice.

While the Department declines to change basic underlying framework, the final Guidance contains a few minor

changes in response to the comments received and for clarity.

First, for clarity, the final Guidance explains that any Labor Law decision—not just administrative merits determinations—must be uncontested or adjudicated to be a prior violation. Since civil judgments and arbitral awards or decisions are inherently adjudicated proceedings, this change is nonsubstantive; but it is made to emphasize that the same basic standard applies to all Labor Law decisions.

Second, in response to concerns of employer commenters, the final Guidance narrows the definitions of “uncontested” and “adjudicated,” as follows:

An “uncontested” violation is now defined as a violation that is reflected in:

- (1) A Labor Law decision that the employer has not contested or challenged within the time limit provided in the Labor Law decision or otherwise required by law; or
- (2) A Labor Law decision following which the employer agrees to at least some of the relief sought by the agency in its enforcement action.

These changes are made to ensure that a violation will not be considered uncontested unless it is resolved or any applicable time period to contest it has expired. Under the Proposed Guidance’s definition, an administrative merits determination would have been considered uncontested unless a timely appeal of the determination was filed or pending. This definition, however, did not account for cases in which a contractor may intend to dispute an agency’s determination, but the burden is on the agency to initiate litigation in order to continue enforcement, such as in the case of EEOC reasonable cause determinations or FLSA enforcement proceedings brought by WHD. Under the revised definition, such violations will not be considered uncontested.

An “adjudicated” violation is now defined as a violation that is reflected in:

- (1) A civil judgment,
- (2) an arbitral award or decision, or
- (3) an administrative merits determination that constitutes a final agency order by an administrative adjudicative authority following a proceeding in which the contractor had an opportunity to present evidence or arguments on its behalf.

The Guidance explains that “administrative adjudicative authority,” as used in (3) above, means an administrative body empowered to hear adversary proceedings, such as the ARB, the OSHRC, or the NLRB. ALJs are also administrative adjudicative authorities;

however, their decisions will only constitute adjudicated violations if they are adopted as final agency orders. The Guidance notes that this typically will occur, for example, if the party subject to an adverse decision by an ALJ does not file a timely appeal to the agency’s administrative appellate body, such as those referenced above. Thus, if an administrative merits determination is subject to multiple levels of appellate review, such as proceedings before the Department that go before an ALJ and then the ARB, only a decision following the final level of appellate review constitutes an adjudicated administrative merits determination.

Finally, the Department also modifies the Guidance to clarify that the prior violation must be uncontested or adjudicated before the date of the Labor Law decision for the subsequent violation in order for the subsequent violation to be classified as repeated. The Guidance includes an example illustrating this point.

#### ii. 3-Year Look-Back Period (Formerly “Timeframe”)

The Proposed Guidance stated that the prior violation for a repeated violation must have occurred within the 3-year “reporting period.”

As an initial matter, the Department has recognized that this characterization did not accurately describe the 3-year timeframe for considering whether a violation is repeated. The 3-year “reporting period” (which the Guidance now refers to as the “3-year disclosure period”) is relevant to the Order’s basic requirement of which Labor Law decisions a contractor must disclose at all—not to the determination of whether a violation was repeated. This disclosure time period extends back from the date of the contractor’s offer. The Department, however, interprets section 4(b)(i)(B)(2) of the Order, which directs the Department to consider “whether the entity has had one or more additional violations of the same or a substantially similar requirement in the past 3 years,” to refer to a distinct look-back period for identifying repeated violations—wherein the prior violation must have occurred no earlier than 3 years prior to the date of the subsequent violation (not the date of the offer). The Department has included language clarifying this distinction in the Guidance.<sup>63</sup>

<sup>63</sup> Along the same lines, the Department notes that although, as noted above, there will be a phase-in of the 3-year disclosure period, there is no such phase-in for the 3-year look-back period for classification of repeated violations. Thus, an ALCA may find that violation was repeated based on the

Some employee-advocacy groups argued that a 3-year look-back period is too short. Two of these groups argued that the look-back period should be expanded beyond 3 years, stating that because agency investigations and related litigation often take months or even years, it will be difficult to identify patterns of repeated violations within only a 3-year window. These commenters suggested that in the preaward phase, the contractor should be asked if it committed any similar violations during the previous 5 years, and in the postaward phase, the look-back period should be expanded to include all years in which the contractor held contracts.

The Department declines to modify the Guidance in response to these suggestions. The 3-year look-back period is explicitly set forth in the Order and reflects the intention of the President that only violations during this time period will be considered in determining whether violations are repeated. *See* Order, section 4(b)(i)(B)(2). A 5-year period would be inconsistent with the Order.

In contrast, one industry commenter suggested that the 3-year look-back period is too long, and would result in the consideration of a contractor's conduct that may have occurred long before the beginning of the look-back period. Even if the prior violation itself occurred within the 3-year look-back period, argued the commenter, the underlying conduct that led to that prior determination could have taken place much earlier, especially if the prior violation has a long litigation history.

As noted earlier in the discussion of disclosure requirements, the Department recognizes that there will be Labor Law decisions that must be disclosed under the Order where the underlying conduct occurred outside the 3-year disclosure period. This is unavoidable in a system under which violations need not be disclosed until there is an administrative merits determination, civil judgment, or arbitral award or decision. The same is true for the separate 3-year look-back period for repeated violations.

However, the Department understands the commenter's concern that, under the Proposed Guidance, a violation that is the subject of lengthy litigation could create a later repeated violation that the Order clearly did not intend to classify as such. For example, OFCCP could issue a show cause notice

occurrence of a prior violation even if the Labor Law decision related to the prior violation was not disclosed by the contractor but was instead identified by the ALCA using government enforcement databases.

to a contractor on January 1, 2017. The contractor could contest the violation, resulting in an ALJ determination on January 1, 2018, an ARB determination on January 1, 2019, a civil judgment by a district court on January 1, 2020, and a civil judgment by a court of appeals on January 1, 2021. If the contractor commits a substantially similar violation on December 31, 2023, it would be less than 3 years after the court of appeals decision. But it would be 6 years after the initial OFCCP show cause notice was rendered—far outside the 3-year look-back period. The Department agrees that it would be contrary to the spirit of the Order to use the 2021 date to determine whether the conduct in 2023 is “repeated.”

To address this issue, the Department has modified the Guidance in the following manner: The final Guidance explains that for a violation to be classified as repeated, the prior violation must have become uncontested or adjudicated (in other words, first become adjudicated) no more than 3 years prior to the date of the repeated violation (that is, the violation that is classified as repeated).

The final Guidance explains that the violation becomes uncontested either on the date on which any time period to contest the violation has expired, or on the date of the employer's agreement to at least some of the relief sought by the agency in its enforcement action (*e.g.*, the date a settlement agreement is signed). A prior violation becomes adjudicated on the date on which the violation first becomes an adjudicated violation. This means that the violation becomes adjudicated on the date when the violation first becomes a civil judgment, arbitral award or decision, or a final agency order by an administrative adjudicative authority following a proceeding in which the contractor had an opportunity to present evidence or arguments on its behalf.

Thus, for a violation that is the subject of successive adjudications such as in the above example, the dates of subsequent decisions after the first adjudication are not relevant. Accordingly, in the above example—which is reproduced in the final Guidance—the relevant date of the prior violation is January 1, 2019, the date of the ARB order, because this is the date on which the violation becomes a final agency order by the ARB, and therefore first becomes an adjudicated violation. It could serve as a prior violation only for a substantially similar violation decision that is issued after January 1,

2019 and prior to January 1, 2022.<sup>64</sup> The dates of the subsequent Federal court decisions are not relevant.

### iii. Separate Investigations or Proceedings

The Proposed Guidance also stated that “[t]he prior violation(s) must be the subject of one or more separate investigations or proceedings.” 80 FR 30587. One industry commenter expressed concern that this requirement could be applied inconsistently in cases where multiple agencies (*e.g.*, OSHA and WHD) investigate an employer. The commenter suggested that if both agencies conduct a joint investigation, then no violations would be repeated, but if the agencies conduct separate investigations, some of the violations could be repeated.

The Department agrees that the language in the Proposed Guidance was ambiguous and modifies the Guidance to address this issue. The final Guidance clarifies that for violation to be classified as repeated, it must be based upon a separate set of facts from those underlying the prior violation. Although the Department does not foresee a scenario along the lines of the one envisioned by the commenter (in part because violations investigated by different agencies are less likely to be substantially similar), the new language clarifies that this scenario would not give rise to a repeated violation.

### iv. Violation Committed by the Contractor (Formerly “Company-Wide Consideration”)

Under the Proposed Guidance, the determination of a repeated violation takes a company-wide approach; that is, a prior violation by any establishment of a multi-establishment company can render subsequent violations repeated, provided the other relevant criteria are satisfied. Several labor unions and employee-advocacy groups expressed strong support for this approach. One employer association expressed opposition to this approach, arguing that large companies often have disparate components that are managed independently. Finally, three commenters suggested that the Department clarify the scope of “company-wide” and “establishment.”

The Department retains this provision in the Guidance and clarifies that “company-wide” includes any

<sup>64</sup> This modification of the guidance on repeated violations does not, however, affect the contractor's disclosure requirements. The disclosure requirements for violations that involve successive Labor Law decisions are discussed in section II(B)(4) of the Guidance and the preamble section-by-section analysis.



violations committed by the same legal entity. By using the term “establishment” in the phrase “multi-establishment company,” the Guidance simply means a physical location where the contractor operates, such as an office, factory, or construction worksite. Thus, for the purposes of determining whether a violation is repeated, prior violations that occurred at different physical locations will be considered as long as they were committed by the same legal entity.

This approach is consistent with the Order, which uses the term “entity” in its requirement that the Department’s definition to take into account “whether the entity has had one or more additional violations of the same or a substantially similar requirement in the past 3 years.” Order, section 4(b)(i)(B)(2). This is also consistent with the manner in which the Federal agencies administering the two statutory regimes that currently assess “repeated” violations—the FLSA and the OSH Act—evaluate repeated violations. In short, this principle simply affirms that all violations by a contractor will be considered in assessing whether the contractor committed repeated violations.

#### v. Substantially Similar Violations

The Proposed Guidance provided a definition for how to determine whether violations are “substantially similar” for the purposes of classifying a later violation as “repeated.” The Proposed Guidance included a general principle and illustrative examples. It stated that substantially similar does not mean “exactly the same”; rather, two things may be substantially similar where they share “essential elements in common.” 80 FR 30574, 30587 (internal citation omitted). It further noted that “[w]hether a violation is ‘substantially similar’ to a past violation turns on the nature of the violation and underlying obligation itself.” *Id.* The Proposed Guidance then provided examples of how this general principle applies in the context of the various Labor Laws. The Department specifically sought comment regarding this definition.

#### General Comments

Several labor unions and other employee advocacy groups expressed general support for the way that the Proposed Guidance addressed substantially similar violations. In contrast, employer groups and advocates argued that the Department’s proposed guidance on these violations was too broad or too vague, particularly in the context of those Labor Laws that concern equal employment opportunity

and nondiscrimination. One commenter representing industry interests argued that repeated violations should be limited to the same type of violation of the same statute.

In response to concerns that the guidance on the meaning of “substantially similar” was insufficiently clear, the final Guidance, rather than proceeding by way of a general definition and statute-specific examples, sets forth a statute-specific, exhaustive list of violations that are substantially similar to each other, similar to the Department’s statute-specific guidance on serious and willful violations. This list largely tracks the examples that were presented in the Proposed Guidance, but some changes have been made, as noted below. The Department believes that this approach will increase clarity and lessen ambiguity regarding the classification of repeated violations.

Under the final Guidance, as in the Proposed Guidance, certain violations may be substantially similar to each other even though they arise under different statutes. While the Department recognizes that there may be violations that will be “repeated” under the Guidance that are different in character or degree, such violations will often point to underlying compliance practices in a company that the Order seeks to eliminate from the performance of Federal contracts. An overly narrow definition will fail to capture many violations that could help identify such practices. While any definition of “substantially similar” would likely draw criticism for both over-inclusiveness and under-inclusiveness, the Department believes that the definitions in the final Guidance strike the appropriate balance. The Department also believes that these definitions are sufficiently clear for ALCAs to be able to apply them.

The Department did not receive specific comments on the definitions of “substantially similar” for violations of the FLSA, DBA, SCA, Executive Order 13658, and MSPA, or on its proposal to treat as substantially similar any two violations involving retaliation, any two recordkeeping violations, or any two failures to post required notices. The Department did receive comments on the definitions of “substantially similar” for other Labor Laws, as discussed below.

#### Family and Medical Leave Act

One advocacy organization commenter addressed the treatment of repeated violations of the FMLA. The individual notice provisions of the FMLA require that when an employee

requests leave for a qualifying reason, the employer must notify the employee of certain rights and other information. The commenter argued that violations of this notice provision should be treated as substantially similar to other FMLA violations, such as interference and discrimination, because the FMLA’s individual notice provisions relate to a specific leave request and an individual’s ability to exercise his or her FMLA rights.

The Department declines to change this aspect of the definition of repeated violations. The general notice and individual notice requirements are both included in the same provision of the FMLA regulations. 29 CFR 825.300. This provision is separate from the regulatory provisions governing interference and discrimination. While the Department agrees that a violation of individual notice requirements could potentially be tied to, or result in, interference and discrimination, this is also true for violations of the general notice provisions. The Department believes that notice requirements are sufficiently different from an employer’s actual failure to provide leave or other benefits that they should not be considered substantially similar to those violations in the context of repeated violations.

#### National Labor Relations Act

The Proposed Guidance stated, by way of example, that any two violations of section 8(a)(3) of the NLRA would be substantially similar to each other, but would not be substantially similar to violations of section 8(a)(2). The Department did not provide further guidance on the circumstances under which other NLRA violations would be substantially similar. Consistent with the Department’s decision to set forth statute-specific definitions rather than examples, the final Guidance states that any two violations of the same numbered subsection of section 8(a) of the NLRA, which lists unfair labor practices by employers, will be substantially similar. The Department also notes that any two violations of the NLRA (or any of the Labor Laws) that involve retaliation are substantially similar.

One labor organization commenter argued that the amendment of an NLRB complaint should constitute a separate administrative merits determination for the purpose of determining whether an employer has committed a repeated violation. The commenter noted that sometimes the NLRB will amend a complaint rather than issuing a new one where an employer has committed

violations relating to an ongoing labor dispute over a long period of time.

The final Guidance does not incorporate this suggestion. First, a pending and contested NLRB complaint cannot serve as a prior violation for the purposes of a repeated violation determination. As discussed above, only an uncontested or adjudicated Labor Law decision can constitute a prior violation. After adjudication or settlement of an NLRB complaint, the complaint typically would not be amended. Additionally, because complaints can be amended for numerous reasons other than those identified by the commenter, the Department believes that it would be impractical to require ALCAs to examine complaints in order to determine when and why they were amended. As such, a single NLRB complaint, regardless of whether it is amended, will constitute a single administrative merits determination.

The same commenter also recommended that the Department treat violations of section 8(a)(1), which prohibits employers from interfering with, restraining, or coercing employees in the exercise of the rights guaranteed in section 7 of the NLRA, as substantially similar to violations of section 8(a)(3), which generally prohibits employers from discriminating in regard to hire or tenure of employment, or any term or condition of employment, to encourage or discourage membership in a labor organization, for the purposes of determining whether a violation was repeated. The Department declines to adopt this suggestion, as it believes that it is overbroad in scope and could result in dissimilar violations being classified as repeated.

#### Anti-Discrimination Labor Laws<sup>65</sup>

Some employer-group commenters expressed concern about the application of the definition to the anti-discrimination laws. Under the Proposed Guidance, such violations would be substantially similar if they involved the same or an overlapping protected status, even if they did not involve the same employment practice. One noted that, for example, under the definition in the Guidance, if a company employed a hiring test resulting in a disparate impact on women, and within

<sup>65</sup> The term “anti-discrimination Labor Laws” refers to Title VII, section 503 of the Rehabilitation Act of 1973, the ADA, the ADEA, section 6(d) of the FLSA (known as the Equal Pay Act, 29 U.S.C. 206(d)), Executive Order 11246 of September 24, 1965, the Vietnam Era Veterans’ Readjustment Assistance Act of 1972, and the Vietnam Era Veterans’ Readjustment Assistance Act of 1974.

3 years, an individual manager in a different department engaged in sexual harassment, the company would be found to have committed repeated violations.

In response to these comments, the Department has made modifications to narrow the definition of repeated violations in the discrimination context. For purposes of the anti-discrimination Labor Laws, violations are substantially similar if they involve (1) the same protected status, and (2) at least one of the following elements in common: (a) The same employment practice, or (b) the same worksite. In nonsubstantive changes, the Department has removed the reference to “overlapping” protected statuses and the list of examples of protected statuses, but has clarified that violations are considered to involve the same protected status as long as the same status is present in both violations, even if other protected statuses may be involved as well. For the purpose of determining whether violations involve the same worksite, the same definition of “worksite” that was used in the discussion of the 25 percent criterion for a serious violation applies, except that any two or more company-wide violations are considered to involve the same worksite. The Department believes that this narrower definition will better capture violations that are substantially similar to each other.

Also, a number of employee advocates argued in their comments that discrimination on the basis of sex, gender identity, sexual orientation, and pregnancy should be considered to be “the same or overlapping” protected statuses for the purpose of determining whether a violation was repeated. These commenters asserted that discrimination on the basis of these characteristics typically arises out of gender-based stereotypes and that it would be appropriate to treat such violations as substantially similar for purposes of the Order.

The Department has incorporated this suggestion in part. The treatment of discrimination on the basis of pregnancy as a type of sex discrimination is consistent with Title VII as amended by the Pregnancy Discrimination Act. *See* 42 U.S.C. 2000e(k). Additionally, the treatment of discrimination on the basis of gender identity (including transgender status) as a type of sex discrimination is consistent with the views of the EEOC, the Department, the Department of Justice, and two Federal courts of appeals.<sup>66</sup> With regard to discrimination

<sup>66</sup> *See Macy v. Holder*, Appeal No. 0120120821, 2012 WL 1435995 (EEOC 2012), Dep’t of Labor, Ofc.

on the basis of sexual orientation, some courts have recognized in the wake of *Price Waterhouse v. Hopkins*<sup>67</sup> that discrimination “because of sex” includes discrimination based on sex stereotypes about sexual attraction and sexual behavior<sup>68</sup> or about deviations from “heterosexually defined gender norms.”<sup>69</sup> In addition, the EEOC has concluded that Title VII’s prohibition of discrimination “because of sex” includes sexual orientation discrimination because discrimination on the basis of sexual orientation necessarily involves sex-based considerations.<sup>70</sup> The Department has taken the position that discrimination on the basis of sex includes, at a minimum, sex discrimination related to an individual’s sexual orientation where the evidence establishes that the discrimination is based on gender stereotypes.<sup>71</sup> Consistent with recent regulatory activity,<sup>72</sup> the Department will continue to monitor the developing law on sexual orientation discrimination as sex discrimination under Title VII and will interpret E.O. 11246’s prohibition of sex discrimination in conformity with Title VII principles.

In recognition of Title VII’s explicit incorporation of pregnancy discrimination as a type of sex discrimination and the Department’s previously articulated positions on gender identity discrimination related to sexual orientation based on gender stereotyping, the Department clarifies in the final Guidance that violations involving discrimination on the bases of sex, pregnancy, gender identity

of Fed. Contract Compliance Programs, Final Rule, Discrimination on the Basis of Sex, 81 FR 39108, 39118–19 (June 15, 2016) (“OFCCP Sex Discrimination Final Rule”); Memorandum from Attorney General Eric Holder to United States Attorneys and Heads of Department Components (Dec. 15, 2014), <https://www.justice.gov/file/188671/download>; *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011); *Smith v. City of Salem*, 378 F.3d 566, 575 (6th Cir. 2004).

<sup>67</sup> 490 U.S. 228 (1989).

<sup>68</sup> *See Videckis v. Pepperdine Univ.*, No. CV 15–00298, 2015 WL 8916764, at \*5 (C.D. Cal. Dec. 15, 2015).

<sup>69</sup> *Isaacs v. Felder Servs.*, No. 2:13cv693–MHT, 2015 WL 6560655, at \*4 (M.D. Ala. Oct. 29, 2015) (internal quotation omitted).

<sup>70</sup> *Baldwin v. Dep’t of Transp.*, Appeal No. 0120133080, 2015 WL 4397641, at \*5 (EEOC 2015). For a more comprehensive discussion on the state of the law on these issues, please see the OFCCP Sex Discrimination Final Rule cited above; see also Dep’t of Labor, Ofc. of the Sec’y, Notice of Proposed Rulemaking, Implementation of the Nondiscrimination and Equal Opportunity Provisions of the Workforce Innovation and Opportunity Act, 81 FR 4494, 4507 (Jan. 26, 2016) (“CRC WIOA NPRM”).

<sup>71</sup> OFCCP Sex Discrimination Final Rule, 81 FR at 39118; CRC WIOA NPRM, 81 FR at 4508–09.

<sup>72</sup> *See id.*

(including transgender status), and sex stereotyping (including discrimination related to sexual orientation based on such stereotyping) are considered to involve discrimination on the basis of the same protected status for the purpose of determining whether two violations are substantially similar. While the use of the term “same” does not intend to suggest that all of these forms of discrimination are identical, these violations are sufficiently similar to be classified as substantially similar violations under the Order.

Finally, one union commenter argued that any time an employer commits multiple discrimination violations, regardless of whether they involve the same protected status or employment practice, they should be considered repeated violations. The Department declines to adopt this suggestion. Violations of anti-discrimination requirements are often fact-intensive and the Department does not believe it would be appropriate to treat all such violations as substantially similar absent the additional factors described above.

#### Alternative Proposal

A few commenters, including unions and other employee advocates, argued that the scope of repeated violations should be expanded to include any time a contractor has violated any one of the covered Labor Laws five times in the last 3 years. The final Guidance does not adopt this suggestion because it is inconsistent with the Order’s specific direction that a determination of a repeated violation be based on “the same or a substantially similar requirement.” However, the Department notes that multiple violations that are not substantially similar to each other may be properly considered in an evaluation of whether such violations show sufficient disregard for the Labor Laws that they constitute pervasive violations.

### 3. Willful Violations

The Proposed Guidance set forth several classification criteria for determining whether a violation of one of the Labor Laws is a willful violation under the Order. 80 FR 30585. Under the Proposed Guidance, a willful violation was specifically defined for five Labor Laws—the OSH Act or an OSHA-approved State Plan; the FLSA (including the Equal Pay Act), the ADEA, Title VII, and the ADA. Under these statutes, the term “willful” has a well-established meaning or an analogous statutory standard exists that is consistent with the Order. The Proposed Guidance included a residual criterion for all other Labor Laws,

stating that a violation would be willful if

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

*Id.*

#### a. OSH Act or OSHA-Approved State Plan Violations Enforced Through Citations or Equivalent State Documents

The Proposed Guidance set forth a specific definition of a willful violation for the OSH Act and OSHA-approved State Plans. It stated that OSH Act and OSHA-approved State Plan violations would be willful if the relevant enforcement agency had designated the citation as willful or any equivalent State designation. 80 FR 30585.

As noted above, a few worker-advocate commenters expressed concern that the Proposed Guidance’s definitions of serious, repeated, willful, and pervasive violations did not sufficiently account for OSH Act violations that are not enforced through citations, such as retaliation violations. As a result of these comments, the Department has clarified this point of ambiguity by dividing OSH Act and OSHA-approved State Plan violations into two categories: Citation OSHA violations and non-citation OSHA violations. For the former, an OSHA or OSHA-approved State Plan designation of “willful” (or an equivalent State designation) controls the classification of the violation under the Order. For the latter, a violation is willful if it meets the residual standard for a willful violation—knowledge, reckless disregard, or plain indifference.

In a nonsubstantive change, the final Guidance has also deleted language stating that OSH Act and OSHA-approved State Plan citations designated as willful are willful violations under the Order only if the designation has not been subsequently vacated. This language is unnecessary in light of the broader statement in the final Guidance that if a Labor Law decision or portion thereof that would otherwise cause a violation to be classified as serious, repeated, willful, or pervasive is reversed or vacated, then the violation will not be classified as such under the Order.

#### b. Violations of the Minimum Wage, Overtime, and Child Labor Provisions of the FLSA

The Proposed Guidance stated that a violation of the FLSA would be willful

if an administrative merits determination sought or assessed civil monetary penalties for a willful violation, or there was a civil judgment or arbitral award or decision finding the contractor or subcontractor liable for back wages for greater than 2 years or affirming the assessment of civil monetary penalties for a willful violation. 80 FR 30586. As in the case of OSH Act violations, these criteria did not sufficiently account for all violations of the FLSA because these criteria apply only to the FLSA’s provisions on minimum wage, overtime, and (in the case of civil monetary penalties) child labor. *See* 29 U.S.C. 216(e)(1)(A)(ii), 216(e)(2), 216(e)(3)(C), 255. Accordingly, the final Guidance clarifies that these criteria will only be used to classify these violations of the FLSA, while other violations of the FLSA—such as retaliation, *see* 29 U.S.C. 215(a)(3)—will be classified using the residual criterion.

One commenter also expressed concern that it would be inappropriate to classify an FLSA violation as willful due to the assessment or award of more than 2 years of back wages because there are occasions when employers agree to pay back wages for greater than 2 years even when an FLSA violation is not willful. The Department declines to change the Guidance in response to the above comment. Under the FLSA, WHD’s standard practice is to use an investigative period of up to 2 years for non-willful violations and up to 3 years for willful violations, and to assess back wages for the relevant investigative period. Thus, WHD’s standard practice is to assess no more than 2 years of back wages in a form WH-56 unless the agency makes an investigative finding that the violation was willful.

As a related matter, however, the Department has clarified that for civil judgments and arbitral awards or decisions under the FLSA’s minimum wage and overtime provisions, a violation will only be classified as willful under the Order if the Labor Law decision includes a finding that the violation was willful. This is because in such litigation, the 2-year limit for non-willful violations only limits the recovery to the 2 years prior to the commencement of the litigation. *See* 29 U.S.C. 255. It does not affect the recovery of additional back wages if the violations continue while the litigation is pending. If the violations continue after the commencement of litigation, back wages can ultimately be awarded for more than 2 years—for up to 2 years prior to the commencement of the litigation, plus any additional period of time from the date the litigation is

initiated until final judgment. Thus, because a non-willful violation of the FLSA's minimum wage or overtime provisions reflected in a civil judgment or arbitral award or decision may result in more than 2 years of back wages, the final Guidance clarifies that whether such violations are willful under the Order depends on whether the court or arbitrator(s) makes a finding of willfulness—and does not depend on the number of years of back wages awarded.

#### c. Violations of the ADEA

The Proposed Guidance stated that violations of the ADEA are willful if the enforcement agency, court, arbitrator, or arbitral panel assessed or awarded liquidated damages. One commenter asserted that an ADEA violation might be willful even if liquidated damages are not awarded, and therefore suggested that the Department apply the willfulness residual criterion to ADEA violations in addition to the liquidated damages criterion. The Department declines to expand the application of the residual criterion to cover the ADEA. As discussed below, in the discussion of the residual criterion generally, an expansion of the residual criterion is unnecessary and would not further the efficient administration of the Order.

#### d. Title VII and the ADA

One commenter suggested that the statute-specific criteria for willful violations under Title VII and the ADA did not sufficiently account for violations involving retaliation, and suggested adding the words “or retaliatory” to describe the types of violations that could involve punitive damages. The Department, however, believes that the language in the Proposed Guidance sufficiently accounts for retaliation cases. The criteria specified in the Guidance for willful violations under Title VII and the ADA already applies to their anti-retaliation provisions. *See* 42 U.S.C. 1981a(b)(1) (stating that punitive damages may be awarded for any violation of Title VII or the ADA in which the employer acts with malice or reckless indifference). As such, no changes to the Guidance are necessary to clarify that retaliation violations of these statutes may be classified as willful if they meet the listed criteria.

#### e. Any Other Violations of the Labor Laws (Formerly “Other Labor Laws”)

The Proposed Guidance stated that for any Labor Laws for which a specific criterion for willfulness was not listed, a violation would be willful if

the findings of the relevant enforcement agency, court, arbitrator, or arbitral panel support a conclusion that the contractor . . . knew that its conduct was prohibited by any of the Labor Laws or showed reckless disregard for, or acted with plain indifference to, whether its conduct was prohibited by one or more requirements of the Labor Laws. 80 FR 30586.

Several employee advocates argued that this residual standard should apply to all of the Labor Laws, including the five statutes for which the Guidance also includes statute-specific criteria (OSH Act/OSHA-Approved State Plans, FLSA, ADEA, Title VII, ADA). These commenters argued that the statute-specific criteria would not necessarily capture all violations of those statutes in which the employer engaged in willful conduct.

The Department declines to broaden the application of the residual standard to all of the Labor Laws. The purpose of listing specific standards for the five laws that already incorporate a concept of willfulness (or, in the case of Title VII and the ADA, the related standard of malice or reckless indifference) is to further the efficient administration of the Order. Moreover, the Department believes it is inappropriate for ALCAs to second-guess the decisions of enforcement agencies, arbitrators, or courts as to whether or not a violation was willful. Accordingly, for Labor Laws with an existing willfulness framework, violations are only willful under the Order if the relevant Labor Law decision explicitly includes such a finding.<sup>73</sup> In contrast, for Labor Laws that do not have a willfulness framework, an ALCA may examine the relevant Labor Law decision to determine whether it is readily ascertainable from the decision that the violation was willful under the residual criterion.

A number of industry commenters expressed concern that the Proposed Guidance's residual criterion is too vague, overbroad, and would not be applied correctly or consistently. Several of these commenters expressed particular concern about how prime contractors would be able to apply this standard when assessing violations by subcontractors.

The final Guidance retains the residual criterion for willful violations. While the Department agrees that a determination of knowledge, reckless disregard, or plain indifference will

depend on the facts of individual cases, it believes that ALCAs will be able to implement this standard with assistance of this Guidance and its appendices. This standard is well-established, having been applied for many years by courts and administrative agencies in the context of the OSH Act, FLSA, and ADEA. The Department is confident that it can be applied in the context of other Labor Laws as well. The Department also notes that the key language of the residual criterion comes from the Order itself, which states that where no statutory standards exist, the standard for willfulness should take into account “whether the entity knew of, showed reckless disregard for, or acted with plain indifference to the matter of whether its conduct was prohibited by the requirements of the [Labor Laws].” Order, section 4(b)(i)(B)(3). The residual criterion in the Proposed Guidance conforms to the Order's text, and the Department declines to narrow it further.

One industry commenter argued that this definition was too broad and could in some cases be counterproductive, such as by penalizing contractors for having a written policy in place which could in turn be used as evidence of the contractor's knowledge of its legal requirements. While the Department recognizes the commenter's concerns, an employer's deviation from a written policy is plainly evidence that the employer was aware of its legal obligations but chose to ignore them. The Department believes that employers have sufficient existing incentives to maintain written policies such that classifying a violation as willful under these circumstances will not cause employers to forgo written policies.

Another industry commenter expressed concern that one of the examples of a non-willful VEVRAA violation in Appendix B of the Proposed Guidance (now Appendix C in the final Guidance) described a disparate impact case, which the commenter believed could create confusion by suggesting that a disparate impact case under certain circumstances could be a willful violation. The Department agrees that disparate impact cases under VEVRAA, absent unusual circumstances, will not be willful violations under the Order, and the intent of the example is to illustrate just that.

The Department believes that the final FAR rule addresses the industry commenters' concerns about application of the residual willfulness standard by prime contractors. As noted in section V of this section-by-section analysis, below, the final FAR rule clarifies that subcontractors will make their detailed

<sup>73</sup> Some worker-advocacy commenters noted that the EEOC does not assess punitive or liquidated damages at the reasonable-cause stage. The Department recognizes that this means EEOC reasonable cause determinations will not provide a basis for finding a violation “willful.”

Labor Law disclosures directly to the Department, and will receive advice about their record of compliance from DOL which they may provide to contractors. Under this structure, contractors will be able to rely on the Department's classification determinations rather than making the classification determinations themselves.

The Department further emphasizes that a determination of willfulness will only be made if it is readily ascertainable from the findings of the Labor Law decision. ALCAs will not examine case files or evidentiary records in order to make assessments of willfulness. Where the findings of the Labor Law decision do not include any facts that indicate that a violation was willful, the violation will not be considered willful under the Order.

#### f. Table of Examples

The Department has updated the table of examples to reflect the changes in the final Guidance.

#### g. Other Comments on Willful Violations

Some employer groups also argued that the definition of willful violations fails to account for the fact that employers sometimes must deliberately commit a violation to obtain review of an agency's ruling. They noted that, for example, employers must violate section 8(a) of the NLRA by refusing to bargain with a union in order to obtain appellate review of the NLRB's determination that a group of employees is an appropriate bargaining unit. Two of these groups asserted that such violations are "technical" violations that should not be considered willful or even to be violations at all.

The Department declines to adopt a bright-line rule under which so-called "technical" violations would not be considered violations or would not be classified as willful. A contractor's belief that it had justifiable reasons for committing a Labor Law violation is best considered as a possible mitigating factor during the weighing process described in section III(B) of the Guidance.

Some industry commenters also suggested that a violation should only be classified as willful where the violation has been "adjudicated." According to these commenters, agencies will often initially allege that an employer's actions are willful or knowing, even though they may not be. For example, OSHA might initially designate a violation as willful in a citation, only to eventually retreat from this position. Therefore, these

commenters suggested, willful violations should be limited solely to those administrative merits determinations made by a neutral fact-finder after the employer has been accorded the opportunity for a hearing.

For the same reasons the Department has provided in support of its use of non-adjudicated administrative merits determinations generally, the Department declines to limit willful violations to adjudicated proceedings. However, as discussed above under "Effect of reversal or vacatur of basis for classification," the final Guidance clarifies that a violation should not be classified as willful if an agency has rescinded or vacated the aspect of an administrative merits determination upon which a willfulness determination was based.

#### 4. Pervasive Violations

The Proposed Guidance defined pervasive violations to be violations that reflect a basic disregard by the contractor for the Labor Laws as demonstrated by a pattern of serious or willful violations, continuing violations, or numerous violations. See 80 FR 30588. The Proposed Guidance also included additional factors and examples.

##### In General

Several employer groups expressed concern about the Proposed Guidance's explanation of pervasive violations. These groups generally argued that the definition was not sufficiently specific and would not be applied consistently. Some of these commenters argued that the category of pervasive violations should be eliminated entirely and that the analyses relevant to pervasive violations (such as the involvement of upper management) should instead be incorporated into the overall assessment of a contractor's responsibility. Some argued that the definition should instead be based on more "objective" criteria such as numeric thresholds. One commenter, the Equal Employment Advisory Council, urged the Department to amend the definition such that only a contractor with a "clear record of violations that unambiguously demonstrates a lack of commitment to compliance responsibilities" may be found to have pervasive violations. In contrast, employee advocates and civil rights groups generally supported the Department's definition of pervasive violations. One labor union commenter suggested that a large employer's violations be treated as pervasive if multiple violations occur at a particular targeted facility, and that multiple violations be treated as pervasive if they

impact at least 25 percent of the employees in the portion of the workforce targeted by the employer.

The Department declines to eliminate the definition of pervasive. The Order specifically instructs the Department to define a classification of "pervasive" violations. Moreover, the Department disagrees that the inquiry into whether a contractor has pervasive violations is identical to the determination of whether that contractor is responsible. In particular, a contractor with pervasive violations may nonetheless ultimately be found responsible, depending on the existence of mitigating factors and, potentially, the adoption of a labor compliance agreement.

The Department also declines to make significant modifications to the definition of pervasive or to adopt bright-line criteria. In the Department's view, this definition necessarily must be flexible. Notwithstanding the utility of the definitions of serious, repeated, and willful violations, the Department recognizes that violations falling within these classifications may still vary significantly in their gravity, impact, and scope. Thus, it would not be reasonable to require a finding of "pervasive" violations based on a set number or combination of these violations. Similarly, the Department declines to adopt rigid criteria that would mandate, for example, that any company of a certain size with at least a certain designated number of serious, repeated, or willful violations would be deemed to have pervasive violations.

The lack of a bright-line test is not unique to the definition of pervasive violations. The FAR provides contracting officers with significant flexibility when assessing other elements of a contractor's responsibility and past performance. See FAR 9.104-1, 42.1501. For example, as a part of the responsibility determination, contracting officers must consider a number of factors, including "integrity and business ethics" and whether the contractor has "the necessary organization, experience, accounting and operational controls, and technical skills, or the ability to obtain them." *Id.* 9.104-1. Similarly, in past performance evaluations, contracting officers consider factors such as whether the contractor has exhibited "reasonable and cooperative behavior and commitment to customer satisfaction" and "business-like concern for the interest of the customer." *Id.* 42.1501(a). Finally, during the suspension and debarment process, a suspending and debarment official has the discretion not to debar a contractor based on a holistic

evaluation of multiple factors, such as the contractor's cooperation, remedial measures, and effective internal control systems, which may demonstrate a contractor's responsibility. *See id.* 9.406–1(a). Accordingly, the Department does not believe that it is necessary or appropriate to adopt rigid numerical criteria to define pervasive. The Department notes, however, that violations will not be classified as pervasive if they are minimal in nature, given that this category seeks to encompass those contractors who act with a basic disregard for their obligations under the Labor Laws. To that end, the Department expects that this classification will be applied sparingly.

#### Size of the Contractor

The Order provides that the standards for pervasive should take into account the number of violations of a requirement or the aggregate number of violations of requirements in relation to the size of the entity.

Order, section 4(b)(i)(B)(4). The Proposed Guidance stated that whether a contract is found to have pervasive violations “will depend on the size of the contractor . . . , as well as the nature of the violations themselves.” 80 FR 30574, 30588. The Proposed Guidance specifically requested comments by interested parties regarding how best to assess the number of a contractor's violations in light of its size.

One industry commenter requested clarification on how the size of a contractor will impact the determination of whether violations are pervasive, and on the meaning of the terms “small,” “medium-sized,” and “large” within the meaning of the examples set out in the Guidance. In contrast, several employee advocates cautioned against giving undue weight to a company's size when assessing whether violations are pervasive. These commenters argued that while smaller companies with numerous violations clearly should be considered pervasive violators, the size of a large company alone should not excuse its violations of Labor Laws.

The Department declines to modify the definition of pervasive either to eliminate or to further specify criteria for measuring company size. The Department does not eliminate the company-size factor because, as noted above, the Order explicitly requires the Department to take this factor into account in the definition of pervasive. Order, section 4(b)(i)(B)(4). This makes sense because, as the Proposed Guidance notes, larger companies can

be expected to have a greater number of violations overall than smaller companies. The Department agrees, however, that an employer's size does not automatically excuse any violations. Rather, the size of the employer will be one factor among many assessed when considering whether violations are pervasive. Likewise, the Department declines to establish specific criteria for how company size will affect the determination of pervasive violations. As noted above, the violations that ALCAs will consider and assess will vary significantly, making the imposition of bright-line rules for company size inadvisable. However, the Department has modified the examples in the Guidance so that each example notes the number of employees for the contractor. These examples are not intended to serve as minimum requirements, but simply as illustrations of circumstances under which violations may be classified as pervasive.

#### Involvement of Higher-Level Management

The Proposed Guidance also explained that a violation is more likely to be pervasive when higher-level management officials are involved in the misconduct. This is because such involvement signals to the workforce that future violations will be tolerated or condoned. Involvement of high-level managers may also dissuade workers from reporting violations or raising complaints. The Guidance also noted that if managers actively avoid learning about Labor Law violations, this may also indicate that the violations are pervasive.

While worker-advocacy groups supported the inclusion of the higher-level management factor, some employer groups asked the Department to clarify what constitutes higher-level management and expressed concern that this criterion would be applied to low-level management. For example, one commenter suggested that discrimination or harassment by a “rogue” manager should not result in a determination that the violations are pervasive if the company had strong nondiscrimination and anti-harassment policies in place and takes swift and appropriate remedial action upon learning of the manager's actions. Another commented that the Guidance should add that managers need to be trained only to the extent needed to perform their managerial duties.

By using the term “higher-level management,” the Department did not suggest that the involvement of any employees with managerial

responsibilities would be deemed a pervasive violation. The Department agrees that a violation is unlikely to be classified as pervasive where the manager involved is low-level (such as a first-line supervisor), acting contrary to a strong company policy, and the company responds with appropriate remedial action, and the Department has clarified this point in the final Guidance. The Department further notes that in the weighing step of the assessment process (discussed below), an ALCA will consider a contractor's remedial action as an important factor that may mitigate the existence of a violation.

#### *B. Weighing Labor Law Violations and Mitigating Factors (Step Two) (Formerly “Assessing Violations and Considering Mitigating Factors”)*

As discussed above, an ALCA's assessment of and advice regarding a contractor's Labor Law violations involves a three-step process. In the classification step, the ALCA reviews all of the contractor's violations to determine if any are serious, repeated, willful, and/or pervasive. In the weighing step, the ALCA then analyzes any serious, repeated, willful, and/or pervasive violations in light of the totality of the circumstances, including any mitigating factors that are present. In the final advice step, the ALCA provides written analysis and advice to the contracting officer regarding the contractor's record of Labor Law compliance, and whether a labor compliance agreement or other action is needed.

Based on the comments and additional deliberations, the Department modifies the final Guidance to improve the clarity and organization of the weighing section. For example, the Department has changed the reference in the Proposed Guidance to violations that “raise particular concerns” to “factors that weigh against a satisfactory record of Labor Law compliance.” The Department has also included further explanation of the process to clarify that ALCAs do not make findings that specific violations are “violations of particular concern.” Rather, the ALCA proceeds with a holistic review that considers the totality of the circumstances and considers all of the relevant factors.

A summary of the comments, the Department's responses, and any changes adopted in the final Guidance are set forth below.

#### ALCA Capacity and Training

A number of commenters expressed concern about the capacity of ALCAs to

complete their duties effectively. One employer representative argued that ALCAs will not be equipped to analyze employer submissions regarding mitigating factors. This commenter believed that contractors will likely attempt to show mitigating circumstances by submitting evidence in an effort to re-litigate whether a violation actually occurred or whether the amount of damages awarded was correct. Contractors will also make legal arguments about “good faith” and whether remediation was appropriate. The commenter asserted that ALCAs may have difficulty sifting through the legal complexities of these submissions.

As a related matter, some commenters stressed the importance of adequate training and support for ALCAs. For example, several labor unions highlighted the need for ALCA training, and suggested such training should include a role of unions and other interested parties. A number of employer representatives argued that the Federal Government likely did not have sufficient resources to provide enough staff and training to prevent bottlenecks in evaluating contractor integrity and business ethics.

The Department has considered these comments and, as a general matter, believes that they support the Department’s development of this Guidance to include specific guidelines for classifying Labor Law violations and for evaluating the totality of the circumstances. The Department’s intent with this Guidance has been to create a document that contains appropriate context and narrative description to assist ALCAs and other interested parties with carrying out their responsibilities under the Order.

In response to these comments, the Department has also added language to the Guidance that clarifies the role of ALCAs in assessing contractors’ records of compliance. The Guidance clarifies that in classifying Labor Law decisions, ALCAs consider “information that is readily ascertainable from the Labor Law decisions themselves.” Guidance, section III(A). And, while mitigating circumstances will be considered, the Department has clarified in the Guidance that re-litigation of a disclosed Labor Law decision is not appropriate. *See id.* (“ALCAs do not second-guess or re-litigate enforcement actions or the decisions of reviewing officials, courts, and arbitrators.”). The Department has also tailored the “good faith” mitigating factor to situations where “the findings in the relevant Labor Law decision” support the contractor’s argument, so that the consideration of good faith does not become a far-reaching effort to re-

litigate the decision itself. *See id.* section III(B)(1)(f).

Finally, the Department strongly agrees with the comments on the importance of adequate training and support for ALCAs, and the Department—in coordination with the Office of Management and Budget—will provide such training as part of the implementation of the FAR rule and the Guidance.

#### Exercise of Discretion

Numerous employer organizations argued that the guidelines for weighing violations of particular concern and mitigating factors are subjective and ambiguous, which may lead to inconsistent determinations between ALCAs and across agencies. These groups argued that the Proposed Guidance gave ALCAs and contracting officers too much discretion in how to weigh the various factors and whether to require negotiation of a labor compliance agreement.

The Department rejects the argument that the weighing process will involve improper subjective decision-making by ALCAs or contracting officers. These assessments will necessarily involve exercising judgment and discretion, but the exercise of judgment and discretion are a fundamental part of the pre-existing FAR responsibility determination.<sup>74</sup>

As discussed above, the FAR provides contracting officers with significant flexibility when assessing other elements of a contractor’s responsibility. *See FAR 9.104–1*. Contracting officers must consider a number of factors, such as “a satisfactory performance record,” “integrity and business ethics,” and whether the contractor has “the necessary organization, experience, accounting and operational controls, and technical skills, or the ability to obtain them.” *Id.* The test for debarment similarly relies on a holistic evaluation of multiple factors, such as the contractor’s cooperation, remedial measures, and effective internal control systems. *See FAR 9.406–1(a)*.

The Department does not believe that the new requirements and processes that implement the Order require the exercise of more discretion or subjectivity than these existing determinations. To the contrary, the final FAR rule and the final Guidance

contain detailed guidelines and examples to assist ALCAs and contracting officers in their respective roles.

The Department also notes that the Order expressly requires the FAR and the Department to create processes to ensure government-wide consistency in the implementation of the Order. ALCAs will work closely with the Department during more complicated determinations, and the Department will be able to assist ALCAs in comparing a contractor’s record with records that have in other cases resulted in advice that a labor compliance agreement is needed, or that notification of the suspending and debarment official is appropriate. Through its work with enforcement agencies, the Department also will provide assistance in analyzing whether remediation efforts are sufficient to bring contractors into compliance with Labor Laws and whether contractors have implemented programs or processes that will ensure future compliance in the course of performance of Federal contracts. This level of coordination will ensure that ALCAs (and through them, contracting officers), receive guidance and structure.

#### Concern About Delays in the Procurement Process

Industry commenters raised various concerns about burdens associated with the assessment by ALCAs of a contractor’s Labor Law violations, citing potential regulatory bottlenecks and delays. For example, commenters opined that an awarding agency’s ALCA could disagree with another agency’s ALCA on the impact of a particular violation on the contractor’s responsibility—or that an ALCA could disagree with its own agency’s contracting officer, delaying one agency’s award until the differences could be resolved.

The Department has carefully considered these comments, but finds them to take issue largely with the structure mandated by the Order itself and not with any specific aspect of the Department’s Guidance. The plain text of the Order requires contracting officers to consider Labor Law violations as part of the responsibility determination and requires contracting officers to consult with ALCAs as a part of this process. Order, section 2(a)(iii).

The Department also notes that the FAR Council has structured the assessment and advice process to limit the risk of delay. As discussed below, the final FAR rule maintains the default 3-day period for an ALCA to provide advice. FAR 22.2004–2(b)(2)(i). It also retains the requirement that if the

<sup>74</sup> *See Impresa Construzioni Geom. Domenico Garuffi v. United States*, 238 F.3d 1324, 1334–35 (Fed. Cir. 2001) (“Contracting officers are generally given wide discretion in making responsibility determinations and in determining the amount of information that is required to make a responsibility determination.” (internal quotations marks and citations omitted)).

contracting officer has not received timely advice, the contracting officer must proceed with the responsibility determination “using available information and business judgment.” *Id.* 22.2004–2(b)(5)(iii). The Department believes that this authority granted to contracting officers will allow contracting officers to proceed without delay where necessary.

#### 1. Mitigating Factors That Weigh in Favor of a Satisfactory Record of Labor Law Compliance

The Order instructs contracting officers to afford contractors the opportunity to disclose any steps taken to come into compliance with Labor Laws. Order, section 2(a)(ii). It also seeks to ensure that ALCAs and contracting officers give appropriate consideration to remedial measures and other mitigating factors when assessing a contractor’s record. *See id.* section 4(a)(ii). The Department’s Proposed Guidance provided a non-exclusive list of mitigating factors that ALCAs should consider in the weighing process. 80 FR 30574, 30590–91. It stated that remediation efforts—actions to correct the violation and prevent its recurrence—are typically the most important mitigating factor. *Id.* at 30590.

#### General Comments

A number of unions and employee-advocacy organizations raised concerns with the mitigating factors listed in the Guidance. One commenter stated that the Guidance should not treat circumstances such as “a long period of compliance” or “a single violation” as mitigating factors. It argued that these factors may not provide an accurate assessment of the contractor’s behavior, as a single violation may be severe and impactful. The commenter also noted that the low number of violations may be due to infrequent inspections by the enforcement agency during the 3-year period, rather than conduct that actually complies with Labor Laws.

Some worker-advocacy organizations argued that the Guidance should not take into account the number of violations relative to the size of the contractor. These commenters cautioned that size should not be an excuse for a large number of major violations. They further noted that large companies, due to their greater resources, may actually be more capable of preventing and remedying violations than smaller companies.

Similarly, a number of commenters discussed whether a contractor’s safety-and-health program should be considered a mitigating factor. Some union and employee-advocacy

organizations argued that only certain, qualifying safety-and-health programs should be considered as mitigating factors. They suggested that the contractor must show that its program is being actively and effectively implemented and meets other requirements. For example, some commenters stated that a contractor with repeated or pervasive OSHA violations should not be able to point to its safety-and-health program as a mitigating factor because the violations demonstrate that the employer’s safety-and-health programs have not been adequate.

The Department declines to make any substantive changes to the guidance on mitigating factors. In most instances, the number of violations, the period of compliance, the violations relative to size, and the implementation of compliance programs will be important factors in weighing the significance of a contractor’s Labor Law violations. In response to the commenters’ concerns, the Department notes that the ALCA will weigh a contractor’s Labor Law violations based on the totality of the circumstances. For example, it is generally true that a single violation will not lead to a conclusion that the contractor has an unsatisfactory record of Labor Law compliance. However, it is possible that a single violation may merit advice that a labor compliance agreement is needed because of the violation’s severity and because the harm has not been remediated. Similarly, concerns about “paper” compliance programs will also be addressed through the ALCAs’ consideration of the totality of the circumstances—which may include the adequacy of a compliance program put forth as a mitigating circumstance.

#### Remediation Efforts

The Proposed Guidance explained that ALCAs should give greater mitigating weight to contractors’ remediation efforts when they involve two components: (1) “correct[ing] the violation itself, including by making any affected workers whole” and (2) taking steps to ensure future compliance so that violations do not recur. *See* 80 FR 30574, 30590. The Proposed Guidance stated that the fact that a contractor has entered into a labor compliance agreement should be considered a mitigating factor. *Id.*

Several employer groups stated that the discussion of remediation efforts in the Proposed Guidance was confusing, and they expressed concerns about the extent of their obligations under the Order. In particular, some objected to the Proposed Guidance statement that

“in most cases, the most important mitigating factors will be the extent to which the contractor or subcontractor has remediated the violation and taken steps to prevent its recurrence.” 80 FR at 30590. In their view, this suggests that ALCAs—through labor compliance agreements—could impose remediation measures that go beyond what is required to comply with the labor law at issue. They also argued that the Proposed Guidance was unclear about what constitutes appropriate remedial measures.

One employer representative, the Equal Employment Advisory Council (EEAC), urged the Department to clarify the Proposed Guidance’s reference to “making any affected workers whole.” 80 FR at 30590. EEAC suggested that where an employer has entered into a settlement agreement with an enforcement agency for backpay that is less than the amount initially proposed in an administrative merits determination, the compromise amount of relief should be accepted as a “make whole” remedy of the violation.

Finally, several employer representatives objected to the use of remediation as a mitigating factor when the employer has challenged the violation and the matter has not yet been fully adjudicated—that is, while the employer is seeking administrative or judicial review of an administrative merits determination. The EEAC asserted that a contractor “cannot enter into remediation as described by the proposal if it chooses to contest the agency’s finding through administrative tribunals, in court, or elsewhere.” The EEAC argued that the Guidance should “recognize that where a violation is being contested, a contractor may still demonstrate mitigating factors apply, although remediation may not be the most important factor in such cases.”

After carefully considering all the comments, the Department modifies the discussion of remediation in the Guidance for clarity, but otherwise declines to make substantive changes. The Department does not believe that the Guidance was unclear about what constitutes a remedial measure. As the Guidance notes, remedial measures can include measures taken to correct an unlawful practice, make affected employees whole, or otherwise comply with a contractor’s obligations under the Labor Laws. *See* Guidance, section III(B)(1)(a). The measures taken to correct an unlawful practice or make employees whole are necessarily specific to the Labor Law violation at issue. For example, where WHD finds that an employee was misclassified as an independent contractor and not paid



a minimum wage or overtime under the FLSA, remedial measures could include correcting the practice by appropriately classifying the employee going forward (or appropriately classifying all similarly situated employees going forward) and making the employee whole by paying to the employee the back wages that the Labor Law decision specifies are owed to the employee.

The Department does not agree that the Guidance should limit consideration of preventative measures as “remediation” because those measures may go beyond the basic legal requirements under the Labor Laws. The commenters that suggested such a limit confuse both the purpose of the Order and the authority under which it was promulgated. The purpose of the Order is not to better enforce the Labor Laws generally, and the President did not promulgate the Order under the legal authority of the specific Labor Law statutes. Rather, the Order’s purpose is to increase efficiency and cost savings in the work performed by parties that contract with the Federal Government by ensuring that they understand and comply with labor laws. *See* Order, section 1. And the Order was promulgated under the President’s authority under the Procurement Act, not the Labor Laws. Accordingly, ALCAs and contracting officers are not barred from crediting contractors for implementing future-oriented measures that go beyond the minimum specifically required under the Labor Laws—whether voluntarily, through a settlement with an enforcement agency, or through a labor compliance agreement negotiated at the suggestion of an ALCA.<sup>75</sup>

The Guidance recognizes enterprise-wide efforts and enhanced settlement agreements as particularly important because they reflect a contractor’s commitment to preventing future Labor Law violations and may include internal compliance mechanisms that will catch (and encourage the correction of) potential problems at an early stage. These kinds of preventative measures are exactly the type of policies and practices that increase efficiency in

Federal contracting by limiting the likelihood that violations will occur during the subsequent performance of a Federal contract. The Department clarifies in the final Guidance that ALCAs thus may appropriately consider such efforts or measures as weighing in favor of a satisfactory record of Labor Law compliance.

The Department agrees with the EEAC that ALCAs should not second-guess the remediation that has already been negotiated by enforcement agencies. A contractor’s prior settlement with an enforcement agency should generally be considered to be “make-whole” relief on behalf of affected workers. Such settlement agreements reflect the agency’s decisions about the appropriate amount of backpay owed and the specific steps needed to correct the violations or otherwise make affected workers whole. Accordingly, ALCAs will not revisit whether an existing agreement with an enforcement agency adequately corrects a violation.

Nonetheless, the existence of a settlement agreement does not bar an ALCA from considering that a violation occurred in the first place. Nor does remediation carried out because of such a settlement agreement necessarily have great weight where there are other factors present—such as an extensive pattern of violations, other violations that were not within the jurisdiction of the agency negotiating the settlement, or the existence of new violations subsequent to the settlement. In such circumstances, if the settlement agreement does not include measures to prevent future violations, then a contracting officer (in consultation with an ALCA) may decide that a labor compliance agreement is warranted in order to consider the contractor to be responsible or may find the contractor nonresponsible. *See* Guidance, section III(C).

With regard to the commenters’ concerns about engaging in remediation during ongoing litigation, the Department does not believe any change to the Guidance is necessary. It is not clear from the EEAC comment why a contractor could not remediate while continuing to contest a violation. Employers often choose to remediate during ongoing litigation for various reasons, including to limit backpay liability.

Finally, the Department rejects the commenters’ implication that crediting remediation during ongoing litigation violates a contractor’s right to due process. Employers who receive administrative findings of Labor Law violations have the right to due process, including various levels of adjudication

and review before administrative and judicial tribunals, depending on the labor law involved in the violation. The purpose of the Order is not to circumvent that adjudicatory and appellate process. Rather, contracting officers have a duty to protect the procurement process by conducting responsibility determinations (and ALCAs have a duty to provide advice regarding Labor Law violations) to ensure that Federal contractors are responsible and that they will not engage in Labor Law violations that could undermine the quality and timeliness of Federal contract performance. Thus, the purpose of valuing remediation as a mitigating factor—even during ongoing litigation—is to give a contractor with a significant record of non-compliance an opportunity to take corrective action and make systemic changes in order to prevent violations during the performance of a future Federal contract.

#### Worker Participation in Safety-and-Health Programs

Several unions proposed that to qualify as a mitigating factor, safety-and-health programs should encourage active worker participation. One union commented that these programs must encourage the reporting of work hazards and injuries without penalty. Some commenters also supported the implementation of joint labor-management safety-and-health committees. One industry commenter recommended that the category of mitigating factors related to safety-and-health programs should “explicitly include participation in OSHA Voluntary Protection Programs” as well as include reference to ISO 45001, which is a voluntary consensus standard for occupational safety-and-health management systems currently under development. The commenter argued that both of these include elements similar to the standards already referenced in the Proposed Guidance, including employee involvement and continuous improvement.

As discussed above, the Department considers further specific guidance on the content of safety-and-health programs to be unnecessary. ALCAs will have the ability to take additional information about safety-and-health programs into consideration as part of their review of the totality of the circumstances. In particular, the Department agrees that OSHA’s Voluntary Protection Programs and the ISO 45001 consensus standard are similar to the programs and standards

<sup>75</sup> The Department has modified the Guidance to include a separate and more extensive explanation of labor compliance agreements as a part of the subsequent section III(C), “Advice regarding a contractor’s record of Labor Law compliance.” Accordingly, the Department summarizes and responds to comments regarding labor compliance agreements below as a part of a parallel section in this section-by-section analysis. In that section, the Department responds to commenters’ concern about whether it is appropriate for a labor compliance agreement to require preventative measures that may go beyond minimum compliance with the Labor Laws.

cited in the proposed guidance on mitigating factors. As such, employers who participate in such programs or have adopted safety-and-health management systems pursuant to recognized consensus standards are encouraged to include this information when they have an opportunity to provide relevant information, including regarding mitigating factors.

#### Other Compliance Programs

One commenter suggested that other types of compliance programs—not just safety-and-health programs or grievance procedures—should be considered as mitigating factors. The commenter recommended retitling this factor or adding a separate subsection specifically on compliance programs.

The Department agrees that other compliance programs should be included in this category, and notes that the Proposed Guidance already references “other compliance programs” in the mitigating factors discussion. To improve clarity, the Department adopts the commenter’s recommendation to retitle this factor. This category is now entitled “Safety-and-health programs, grievance procedures, or other compliance programs.”

#### Good Faith and Reasonable Grounds

One industry commenter, the Associated General Contractors of America (AGC), expressed concern that contractors’ good-faith defenses “will not carry considerable weight in the responsibility determination.” AGC argued that while ALCAs may have the legal understanding to make informed judgments about good faith disputes, the contracting officers who ultimately make a responsibility determination do not—and will instead defer to the agency determination or court judgment.

The Department believes that it is important to provide contractors with an opportunity to explain violations in cases where the contractor may have made efforts to ascertain and meet its legal obligations, but nonetheless have violated the law because of reliance on advice of a government official or an authoritative agency or court decision.

For example, several commenters proposed that the Guidance should account for situations where a violation is due to an agency error. With regard to the DBA and the SCA, for example, commenters noted that some violations are caused by the failure of the contracting agency to include the appropriate wage determination contract language. One commenter argued that contractors should not have to disclose these types of violations,

while the other noted that the Proposed Guidance is unclear about how the Department will assess these types of violations. The Department agrees that it is important to account for violations that result from errors beyond the contractor’s control. Where the contractor submits information showing that a violation occurred as the result of action or inaction by the contracting agency, such as the failure to include a required contract clause or wage determination, this information supports a conclusion that the contractor acted in good faith and had reasonable grounds for its conduct. While the Department believes that the language of the Proposed Guidance was broad enough to incorporate this concept, the final Guidance includes a clarification to this effect.

In addition, as discussed above in section III(A)(3)(e), some employer groups noted that employers must violate section 8(a) of the NLRA by refusing to bargain with a union in order to obtain appellate review of the NLRB’s determination that a group of employees is an appropriate bargaining unit. While the Department does not view such violations as excusable or merely “technical,” it does agree that the contractor’s belief that it had justifiable reasons for committing a Labor Law violation should be taken into account as a possible mitigating factor during the weighing process.

The Department believes that the Order and the related new requirements and processes adequately address AGC’s concerns about the capacity of contracting officers to weigh good-faith arguments. As discussed above, GAO reports have repeatedly stated that prior to the Order, contracting officers had the authority to consider labor violations during the responsibility determination process, but were reluctant to do so in part because of a lack of expertise on the matter. In response, the Order directed executive agencies to designate ALCAs and to coordinate with the Department so that contracting officers receive enough support. ALCAs will assist contracting officers with interpreting information about good faith and reasonable grounds as part of ALCAs’ analysis and advice regarding contractor’s record of Labor Law compliance.

#### Significant Period of Compliance

One employee-advocacy organization suggested that the Guidance should not include the “long period of compliance” factor. The organization commented that this factor may not provide an accurate assessment of the contractor’s responsibility because a long period of

“compliance” may be the result of infrequent inspections by Federal enforcement agencies during the 3-year disclosure period. It also commented that the duration of the “significant period of compliance” was not clearly defined.

Although the Department has declined to eliminate this factor, the Department has added language to address the concern that the duration of “significant period” was not defined. The Department has clarified that this factor is a stronger mitigating factor where the contractor has a recent Labor Law decision that it must disclose, but the underlying conduct took place significantly before the 3-year disclosure period and the contractor has had no subsequent violations.

#### Proposals To Expressly Include Additional Mitigating Factors

The Department also received comments that the Guidance should include additional mitigating factors.

Some labor organizations proposed that a contractor’s participation in a collective bargaining agreement (CBA) should be considered a mitigating factor. This proposal is based on the view that workers covered by a CBA are likely to feel more secure reporting violations and working to get the violations resolved. In these circumstances, unionized employers may have a higher number of disclosed Labor Law decisions than non-union employers, particularly in the area of safety and health.

While the final Guidance does not explicitly list a CBA as a mitigating factor, the Department clarifies in response to this comment that the list of mitigating factors in the Guidance is non-exclusive. The FAR rule states that an ALCA’s analysis and advice must include whether there are “any” mitigating factors. FAR 22.2004–2(b)(4)(iii). Thus, to the extent that a contractor believes that a CBA provision is relevant to the violation at issue, a contractor should submit this information for consideration as a mitigating factor.

Finally, one industry commenter stated that the FAR rule and Guidance sections on mitigating circumstances should place greater emphasis on a contractor’s overall commitment to compliance to Labor Laws (as evidenced by its policies and practices), and require ALCAs and contracting officers to consider such information. The Department considers any such modification to be unnecessary. The Proposed Guidance already recognized the importance of a contractor’s overall commitment to compliance by assessing

various factors such as the number and severity of violations, the existence of safety-and-health programs, and arguments about good faith and reasonable grounds.

## 2. Factors That Weigh Against a Satisfactory Record of Labor Law Compliance

The Department received numerous comments about the Proposed Guidance's explanation of violations that "raise particular concerns" about contractor integrity and business ethics. The Proposed Guidance provided a non-exclusive list of certain types of violations that raise particular concern: Pervasive violations, violations that meet two or more of the serious, repeated, or willful classifications, violations that are reflected in final orders, and violations of particular gravity. Some commenters felt that these categories were too broad, while others proposed expanding them further.

Several employer organizations argued that the Proposed Guidance did not provide sufficient detail on how ALCAs and contracting officers are to assess the various factors. These commenters said that the categories of violations that "raise particular concern" were vague and too expansive, and as a result ALCAs and contracting officers would have unchecked discretion when making assessments.

The Department declines to modify the Guidance in this respect. The Department does not agree that the categories of violations discussed in this section of the Guidance are too broad or vague. The categories are specific and are based on concrete, factual information—for example, the total damages and penalties assessed—that will usually be readily apparent from the findings in the Labor Law decisions.

However, the Department has changed the name of this category from "violations of particular concern" to "factors that weigh against a satisfactory record of Labor Law compliance." This change is not substantive but helps make clear that ALCAs will not make a finding as to whether any individual violation is a "violation of particular concern." Rather, ALCAs will assess all facts and circumstances that weigh for and against a conclusion that a contractor has a satisfactory record of compliance in order to provide helpful analysis and advice to the contracting officer.

### Pervasive Violations

The Proposed Guidance stated that pervasive violations should receive greater weight because they raise particular concern about a contractor's

integrity and business ethics. Several industry representatives commented that the Guidance does not provide sufficient direction on how to weigh whether pervasive violations would trigger the requirement for a labor compliance agreement. One suggested that quantitative information based on DOL enforcement data should be used to make an empirical definition of pervasiveness, based on a comparison with other employers in the same industry and jurisdiction. Other employer representatives repeated their view that the pervasive category is overly broad and vaguely defined, giving contracting officers and ALCAs too much discretion in assessing the record of a contractor with pervasive violations or deciding whether a labor compliance agreement is warranted.

The Department declines to modify the guidance on weighing pervasive violations. As explained above and in the previous discussion of the definition of pervasive, flexibility and discretion are necessary when assessing the severity of pervasive violations, given the range of factors that must be considered. The Department does not believe it would be appropriate to set a finite threshold for the number or types of violations that indicate a lack of integrity and business ethics and therefore suggest that a labor compliance agreement may be warranted.

### Violations That Meet Two or More of the Serious, Repeated, or Willful Classifications

The Proposed Guidance stated that violations that fall into at least two of the serious, repeated, or willful classifications are violations of particular concern. Some industry groups questioned this approach. For example, one employer organization argued that these classifications are defined so broadly that many violations will fall into two of them even though the violations themselves are not significant enough to bear on contractor integrity and business ethics. The Department retains this criterion as an example of a factor that weighs against a satisfactory record of Labor Law compliance; and the Department has added an additional clarification to section III(A) of the Guidance that a single violation may satisfy the criteria for more than one classification. As explained above, the Department disagrees that the serious, repeated, and willful classifications are defined too broadly.

### Violations That Are Reflected in Final Orders

In the Proposed Guidance, the Department stated that violations reflected in final orders should receive greater weight. Several commenters supported this proposal. The Service Employees International Union (SEIU), however, argued that lodging an appeal should not prevent a determination from receiving greater weight if the contractor's "appeal is clearly non-meritorious or frivolous and was taken in order to delay compliance." SEIU further stated that, conversely, if an appeal of an adverse determination is "of a close or unsettled point of law, lesser weight should be given to the nonfinal violation(s)."

The Department declines to change the Guidance in this manner. ALCAs will not be able to evaluate the legal merit of or motivation behind a contractor's appeal, nor should they attempt to do so. However, the Department agrees with SEIU commenter that whether a violation involves a "close or unsettled point of law" may in certain circumstances be relevant in the assessment process. For example, as discussed above, the Guidance provides that a contractor's good-faith effort to meet its legal obligations may be a mitigating factor—and that this may occur where a new statute, rule, or standard is first implemented and the issue presented is novel.

SEIU's underlying concern is that providing extra weight to final decisions could incentivize contractors to contest a Labor Law decision that they might otherwise not have contested—simply in order to delay it from becoming final under after a contract has been awarded. The Department acknowledges that such an outcome would be problematic and could lead to unnecessary litigation and uncertainty, and perhaps a delay in the correction of a violation or relief to injured workers. However, the Department does not believe that this outcome will be the practical result of the Guidance.

As an initial matter, if a Labor Law decision is contested, subsequent decisions (e.g., on an appeal) will themselves be Labor Law decisions that will need to be disclosed under the Order. See Guidance, section II(B)(4). However, an uncontested (and therefore final) decision will no longer be considered by an ALCA during review of the contractor's record, nor by the contracting officer during the responsibility determination, after 3 years. And, as the final Guidance notes, "[w]hile a violation that is not final

should be given lesser weight, it will still be considered as relevant to a contractor's record of Labor Law compliance." *Id.* section III(B)(2)(e). This provides a counterweight to the perceived incentive to contest violations.

An even more significant counterweight is the value placed on mitigating factors, and, in particular, remediation as a mitigating factor. If a contractor has remediated the violation, that factor weighs in favor of a satisfactory record of compliance. Thus, while there may be an incentive for contractors to contest a violation, contractors have an equally powerful incentive to stop contesting a violation and remediate. As the Guidance notes, "[d]epending on the facts of the case, even where multiple factors [weighing against a satisfactory record] are present, they may be outweighed by mitigating circumstances." Guidance, section III(B)(2). Thus, a prospective contractor with Labor Law violations that is planning to bid on future contracts may be best served by considering how to remediate and resolve violations, not by contesting them.

The Department also received a comment from the Equal Employment Advisory Council (EEAC) that questioned the manner in which the Proposed Guidance treated final orders. The EEAC agreed that final orders generally should be given more weight, but argued that this is not appropriate when the final order only involves "minor or technical violations."

The Department declines to modify the Guidance in response to this comment. In general, the question of whether a violation is "minor" or "technical" is addressed by the classification of violation as serious, repeated, willful, and/or pervasive. If a violation is not classified as serious, repeated, willful, or pervasive, then it is not factored into the ultimate analysis and advice—whether or not it has been the subject of a final order. Moreover, even where a violation is classified as serious, repeated willful, or pervasive and has also been the subject of a final order, it will not necessarily result in a finding that the contractor has an unsatisfactory record of Labor Law compliance. As explained above, the assessment process requires consideration of the totality of circumstances, including any mitigating factors. Thus, while a final order may provide additional weight against a finding of a satisfactory record in a given case, the contractor's good-faith arguments and remediation of the violation may weigh even more heavily in the other direction. The Department

believes that these processes for considering the totality of the circumstances are sufficient to take into account any argument that a particular violation or violations was "minor" or "technical."

#### Violations for Which Injunctive Relief is Granted

As explained above in section III(A)(1)(b) of this section-by-section analysis, the Department has determined that the granting of injunctive relief by a court is better considered as part of the weighing process than as a criterion for a serious violation. This means that the fact that injunctive relief has been granted is only relevant during an ALCA's assessment process if the violation at issue is already classified as serious, repeated, willful, and/or pervasive. If the violation is so classified, then the fact that injunctive relief was granted as part of the remedy for the violation is a factor that will weigh against a satisfactory record of Labor Law compliance.

As discussed above, taking injunctive relief into consideration in this manner is responsive to concerns that it would be overinclusive as a criterion for a serious violation—and it still appropriately values the fact that courts rarely grant either preliminary or permanent injunctions and require a showing of compelling circumstances, including irreparable harm to workers and a threat to the public interest. Accordingly, where a court grants injunctive relief to remedy a violation that is already classified as serious, repeated, willful, and/or pervasive, the ALCA should take this into account as a factor that increases the significance of that violation to the contractor's overall record of Labor Law compliance.

#### Violations of Particular Gravity

The purpose of the "particular gravity" factor is to identify examples of violations that generally have more severe adverse effects on workers and more potential to disrupt contractor performance, and thus should receive greater weight in determining whether a labor compliance agreement is needed or other action is necessary. In the Proposed Guidance, the Department listed four examples of violations of particular gravity: "violations related to the death of an employee; violations involving a termination of employment for exercising a right protected under the Labor Laws; violations that detrimentally impact the working conditions of all or nearly all of the workforce at a worksite; and violations where the amount of back wages,

penalties, and other damages awarded is greater than \$100,000." 80 FR 30,574, 30,590.

Several industry commenters criticized this category. In a representative comment, the EEAC articulated several of these concerns:

[T]he Department's category of violations of "particular gravity" is also too broad. Equating every type of retaliation claim with violations resulting in the death of an employee strains credibility. Further, including in this category any violation where the amount of back wages, penalties, and other damages is greater than \$100,000 would include an overrepresentative proportion of routine administrative merits determinations found by the EEOC. . . . Finally, the category of violations that "detrimentally impact the working conditions of all or nearly all the workforce at a worksite" is unclear as the guidance provides no direction as to what conduct will constitute "detrimental impact" of working conditions.

Other employer groups echoed these concerns.

While unions and worker-advocacy groups generally supported the definition of "violations of particular gravity," several suggested that the Department should modify one of the examples in its list of violations of particular gravity. These commenters proposed broadening the retaliatory termination example to include interference with any protected right and clarifying that it includes retaliatory constructive-discharge situations.

The Department has considered the concerns raised by industry comments and declines to make any substantive changes to the category of violations of particular gravity.

First, the Department does not agree that this factor is too broad because it includes both violations that involve the death of an employee and violations involving retaliatory termination of an employee. While the Department agrees that the death of a worker is a tragedy that cannot be easily compared to other violations, it would be unreasonable to suggest that other violations are not of a particular gravity simply because there has been no loss of life. Moreover, the EEAC's comment misstates the treatment of retaliation in the proposed guidance. Retaliation can involve many types of adverse action. The guidance specifies only that violations "involving a termination of employment for exercising a right protected under the Labor Laws" receive greater weight. By this language, the Department did not intend to suggest (as the EEAC stated) that "every type of retaliation claim" is considered per se to be of particular gravity.

Second, the Department believes that the Guidance's \$100,000 threshold is appropriate, as the amount of damages in a case provides a practical measure of the extent losses experienced by employees. The Department does not agree with the argument that such a threshold is inappropriate because it would include an "overrepresentative" proportion of EEOC determinations. The Department believes that it is misguided to focus on the proportion of decisions that would meet a monetary test of gravity. Rather, it is appropriate to give additional weight to those violations that have a severe harmful effect on workers. In terms of the economic impact on the workforce, \$100,000 in lost wages due to discrimination is just as severe as \$100,000 in lost wages due to a wage-and-hour violation.

Third, the Department considers it appropriate to give greater weight to those violations that "detrimentally impact the working conditions of all or nearly all the workforce at a worksite." 80 FR 30574, 30590. When unlawful conduct causes negative impact that is widespread in scope, additional weight is warranted.

Finally, in response to employee groups' concerns, the Department believes that it is unnecessary to state explicitly that a retaliation violation involving a constructive discharge should be considered the same as a retaliation violation involving a termination. Enforcement agencies are responsible for finding violations. The enforcement agencies and adjudicatory tribunals—not ALCAs—decide whether a constructive discharge amounts to an unlawful termination. The Department also finds it unnecessary to characterize all violations involving an interference with protected rights as violations of particular gravity. The list of violations of particular gravity is not an exclusive list, and the Department does not intend to limit an ALCA's ability to describe a violation as one of particular gravity where the facts of the case merit such a description.

### C. Advice Regarding a Contractor's Record of Labor Law Compliance (Step Three)

In the final Guidance, the Department creates a new subheading for the discussion of an ALCA's advice to contracting officers and the relationship of labor compliance agreements to that process. The core parameters of this process are defined in the FAR rule. The Department has modified the description of the advice process in the Guidance to conform to the structure in the rule. The Department received many comments about this process. Because

these comments and the reasons for changes to the proposed FAR rule are discussed in the preamble to the final FAR rule, they are not included here.

While the FAR rule governs the advice process, the Department and its individual enforcement agencies play an important role in negotiating labor compliance agreements and assisting ALCAs with their duties. The Order instructs contracting officers to consult with ALCAs about Labor Law violations and labor compliance agreements during the preaward responsibility determination and also during the postaward period when considering whether to take actions such as the exercise of an option on a contract. Order, section 2(a)(iii), (b)(ii). The Order directs ALCAs to provide this advice in consultation with the Department or other relevant enforcement agencies. *Id.* section 3(d)(ii). As a result, the Department has expanded its discussion of labor compliance agreements in the final Guidance and addresses relevant comments below.

### Summary of the "Advice and Analysis" Component of the Final FAR Rule

The final FAR rule discusses the written advice and analysis that an ALCA provides to the contracting officer for use in the responsibility determination. FAR 22.2004–2(b)(3). The rule provides that ALCAs may make one of several recommendations, including that a labor compliance agreement is necessary, the appropriate timing for negotiations of an agreement, and whether notification of the agency suspending and debarment official is appropriate. *Id.* Contracting officers consider advice provided by ALCAs along with advice provided by other subject matter experts.

The ALCA's advice and analysis must also include the number of Labor Law violations; their classification as serious, repeated, willful, and/or pervasive; any mitigating factors or remedial measures; and any additional information that the ALCA finds to be relevant. FAR 22.2004–2(b)(4). If the ALCA concludes that a labor compliance agreement or other appropriate action is warranted, then the written analysis must include a supporting rationale. *See id.*

### Timeframe for ALCA Advice and Analysis

The FAR Council's proposed rule set out a 3-day period for ALCAs to provide contracting officers with recommendations about the contractor's record of Labor Law compliance. The Department received many comments expressing concern that this timeframe is infeasible and will lead to unfair

responsibility determinations. Commenters representing both employers and employees commented that in some cases ALCAs will have to review a large amount of information to make their recommendations. One union, in a representative comment, argued that while 3 days may be enough in many cases, this timeframe would be too short when an ALCA's recommendation involves weighing existing labor compliance agreements; high severity violations; or multiple willful, pervasive, or repeated violations.

The proposed rule suggested that contracting officers would be permitted to make a responsibility determination without input from an ALCA if the ALCA failed to make a recommendation within the 3-day period. Some employer organizations speculated that the contracting officer might delay the contract award while waiting for the ALCA recommendation, regardless of the authority to act independently; or, if he or she does act independently, the contracting officer might make a determination inconsistent with other contracting officers, contracting agencies, or ALCAs.

These comments are addressed in the preamble to the final FAR rule and therefore are not addressed here. In brief, the final FAR rule retains the default 3-day period for an ALCA to provide advice. *See* FAR 22.2004–2(b)(2)(i). It also retains the possibility for the contracting officer to provide the ALCA with "another time period" for submitting the advice. *See id.* And it retains the requirement that if the contracting officer has not received timely advice, the contracting officer must proceed with the responsibility determination using available information and business judgment. *See id.* 22.2004–2(b)(5)(iii).

### De Facto Debarment

Members of Congress and industry advocates also expressed concern that the short timeframe for ALCA advice may lead to "de facto" debarment of contractors that have been subject to a prior nonresponsibility determination. "De facto debarment occurs when a contractor has, for all practical purposes, been suspended or blacklisted from working with a government agency without due process, namely, adequate notice and a meaningful hearing." *Phillips v. Mabius*, 894 F.Supp.2d 71, 81 (D.D.C.2012). These commenters suggested that contracting officers might try to save time and effort by improperly following earlier determinations without conducting their own assessments. This, the commenters

suggested, would result in effectively “blacklisting” certain companies from Federal contracting.

De facto debarment may occur where a contracting agency effectively avoids the due process requirements of a debarment hearing by instead repeatedly finding a contractor nonresponsible and denying individual contracts based on one initial nonresponsibility determination. *See generally Old Dominion Dairy Prods., Inc. v. Sec’y of Def.*, 631 F.2d 953 (D.C. Cir. 1980). A single nonresponsibility determination is insufficient to establish a de facto debarment. *Redondo-Borges v. U.S. Dep’t of Hous. & Urban Dev.*, 421 F.3d 1, 9 (1st Cir. 2005). However, because an initial nonresponsibility determination based on a lack of integrity or business ethics must be recorded in the Federal Awardee Performance and Integrity Information System (FAPIS), *see* FAR 9.105–2(b), and contracting officers must review FAPIS during each subsequent responsibility determination, *id.* 9.104–6(b), a risk of de facto debarment is inherent in the existing Federal procurement system—and contracting agencies, OMB, and the Office of Federal Procurement Policy must continually guard against it.

The Department disagrees with the commenters that the Order and the related structure of the FAR rule present an unreasonable risk of de facto debarment. The Department agrees that it would be inappropriate for an ALCA to base his or her advice and analysis solely on a prior analysis of a contractor’s Labor Law compliance record. However, the FAR requires contracting officers—with the assistance of ALCAs—to make independent decisions in every case based on the information provided by contractors during the respective solicitation process. *See generally* FAR 22.2004–2. Circumstances Warranting Negotiation of a Labor Compliance Agreement

The Department received several comments that the proposed rule and Proposed Guidance did not clearly specify when an ALCA and a contracting officer will require a contractor to negotiate a labor compliance agreement. One employer organization argued that determining whether an agreement is necessary or sufficient calls for subjective decisions by ALCAs. The organization also expressed concern that labor unions might use labor compliance agreements to pressure employers while negotiating neutrality or collective bargaining agreements.

Numerous worker-advocacy organizations commented that a labor compliance agreement should be required as a condition of receiving a contract, especially if the employer has “violations of particular concern,” as they are described in the Proposed Guidance. Several commenters proposed that a labor compliance agreement should always be required when a contractor violates the Labor Laws during the performance of a Federal contract, unless the ALCA determines that the violation is minor, old, or unlikely to recur after a long period of time.

The Department has carefully considered these comments and has included additional language discussing when it is appropriate for an ALCA to recommend that a labor compliance agreement is warranted. *See* Guidance, section III(C)(1). A labor compliance agreement may be warranted where the ALCA has concluded that a contractor has an unsatisfactory record of Labor Law compliance. *Id.* section III(C)(1). This may be the case where the contractor has serious, repeated, willful, and/or pervasive Labor Law violations that are not outweighed by mitigating factors—but the ALCA identifies a pattern of conduct or policies that could be addressed through preventative actions. Where this is the case, the contractor’s record of Labor Law violations demonstrates a risk to the contracting agency of repeated violations during contract performance, but these risks may be mitigated through the implementation of appropriate enhanced compliance measures. A labor compliance agreement also may be warranted where the contractor presently has a satisfactory record of Labor Law compliance, but there are also clear risk factors present, and a labor compliance agreement would reduce these risk factors and demonstrate steps to maintain Labor Law compliance during contract performance.

A labor compliance agreement is not needed where a contractor has no Labor Law violations within the 3-year disclosure period or has no violations that meet the definitions of serious, repeated, willful, or pervasive. A labor compliance agreement may also not be needed where the contractor does have violations that meet the definitions of serious, repeated, willful, or pervasive, but under the totality of the circumstances the existence of the violations is outweighed by mitigating factors or other relevant information.

Finally, there are circumstances in which a contractor may have an unsatisfactory record of Labor Law

compliance, but a labor compliance agreement is not warranted—and instead the agency suspending and debarbing official should be notified. This is the case where the contractor has serious, repeated, willful, and/or pervasive Labor Law violations that are not outweighed by mitigating factors—and, in addition, there are indications that a labor compliance agreement would not be successful in reducing the risk of future noncompliance. The final Guidance contains examples that illustrate when this may be the case.

However, the Department disagrees with the commenters—both industry and worker-advocacy groups—that argued that the final Guidance should further limit the discretion of contracting officers and ALCAs. Contracting officers and ALCAs must have the ability to review all relevant facts concerning Labor Law violations and mitigating factors, and to make determinations as to when agreements are appropriate. As discussed above, ALCAs and contracting officers are provided with robust parameters for making this underlying determination—from the FAR and the Guidance, and also through consultation with the enforcement agencies.

Moreover, the Department specifically declines to adopt the employee advocate suggestion that a labor compliance agreement is always warranted where a contractor has a “violation of particular concern.” As discussed above in section III(B) (Weighing Labor Law violations and mitigating factors) of this section-by-section analysis, the Department has clarified that it did not intend for ALCAs to make specific findings that violations are “violations of particular concern.” Rather, the analysis requires a weighing process, where certain factors will weigh in favor of an overall conclusion that a contractor has a satisfactory record of Labor Law compliance, and others will weigh against. Thus, it is not appropriate to tie advice about the need for a labor compliance agreement to existence of any one of these factors.

#### Negotiation of a Labor Compliance Agreement

The Department notes that some commenters may have incorrectly understood that ALCAs or contracting officers would negotiate labor compliance agreements directly with contractors. The final FAR rule and the final Guidance clarify that it is enforcement agencies—not ALCAs or contracting officers—who negotiate labor compliance agreements. The Guidance provides additional detail on the roles and duties of each of these

actors—ALCAs, contracting officers, and enforcement agencies—with regard to determining the need for and negotiation of labor compliance agreements.

The ALCA conducts a holistic review of the circumstances surrounding the contractor's Labor Law violations, including any mitigating factors. Guidance, sections III(A) (classification step), III(B) (weighing step). If the ALCA concludes that a contractor has an unsatisfactory record of Labor Law compliance, the ALCA will consider whether the negotiation of a labor compliance agreement may be warranted. After that, the ALCA produces a written advice and analysis for the contracting officer. *Id.* section III(C) (advice and analysis step).

If the ALCA assessment indicates a labor compliance agreement is warranted, the contracting officer provides written notice to the contractor. FAR 22.2004–2(b)(7). The notice includes the name of the enforcement agency with which the contractor should confer regarding the negotiation of the agreement. *Id.* The contractor and the enforcement agency may then initiate negotiations. Any resulting labor compliance agreement will be an agreement between that enforcement agency and the contractor.

#### Labor Compliance Agreements as a Mitigating Factor

In its discussion of remediation as a mitigating factor, the Proposed Guidance stated that enhanced settlement agreements and labor compliance agreements between a contractor and an enforcement agency represent important ways to mitigate the weight of a Labor Law violation. The Proposed Guidance noted that entering into a labor compliance agreement indicates that the contractor recognizes the importance that the Federal Government places on compliance with the Labor Laws.

Industry commenters criticized how the Proposed Guidance addressed the relationship between mitigating factors and labor compliance agreements. Several stated that requiring such agreements raised due process and fairness concerns. They asserted that a contractor may feel pressured to negotiate or sign a labor compliance agreement and forgo a challenge to a nonfinal administrative merits determination in order to receive a pending contract. Several employer organizations argued that labor compliance agreements would unfairly penalize contractors by subjecting them to multiple rounds of remedial

requirements in response to the same underlying conduct.

The Department declines to change the Guidance in response to the criticisms discussed above. The Department notes that considering labor compliance agreements in the mitigating factor analysis is consistent with the Order and the FAR rule. *See* Order, section 2(a)(ii); FAR 22.2004–2(b)(3)–(4). Labor compliance agreements may contain remedial measures (such as the payment of back wages) or enhanced compliance measures (such as the implementation of new safety-and-health programs). When implemented outside of the context of a labor compliance agreement, these types of measures are individually mitigating factors. It is therefore reasonable to consider a labor compliance agreement containing such measures also to be a mitigating factor.

The Department disagrees that labor compliance agreements raise due process concerns. As the Department has clarified in the final Guidance, in appropriate circumstances contractors may enter into labor compliance agreements while at the same time continuing to contest an underlying Labor Law violation. And, if a contractor and a contracting officer disagree about whether a labor compliance agreement is necessary and the contractor refuses to negotiate an agreement, the existing procurement process provides ample opportunity to contest any resulting nonresponsibility determination. The contractor can bring a bid protest and receive a hearing and judicial review of the agency action.

The Department also disagrees with the argument that labor compliance agreements will unfairly penalize contractors. The purpose of a labor compliance agreement is not to penalize a contractor for past violations; it is to protect the Federal Government's interest in economy and efficiency in the prospective contract at issue. As discussed above, Federal agencies have a duty to contract only with responsible sources, and a track record of Labor Law violations raises serious questions about whether a contractor can be trusted to comply with Labor Laws—or with other non-labor laws—during the course of contract performance. Labor compliance agreements provide contractors that are otherwise at risk of being found nonresponsible with an additional opportunity to take the steps necessary to assure contracting officers that their past noncompliance will not be repeated during contract performance. Thus, they are properly understood as an opportunity for contractors, not a penalty.

#### Duration of a Labor Compliance Agreement

One employer organization commented that contractors needed more information about the procedural aspects of labor compliance agreements. One question this commenter raised is how long labor compliance agreements will last.

The Department declines to specify a set duration for labor compliance agreements. In general, the duration of an agreement will be the subject of negotiations between the contractor and the enforcement agency—and the enforcement agency will take a position regarding the appropriate length of agreement based on the facts and circumstances of the case and that agency's current practices in negotiating enhanced compliance agreements. However, the extent to which a labor compliance agreement extends beyond the expected duration of the contract will not be taken into consideration in determining a contractor's responsibility or in other decisions related to the contract at issue.

#### Elements of a Labor Compliance Agreement

Several unions and worker groups proposed that the Guidance should require that all labor compliance agreements contain a prescribed list of elements. Suggestions included (1) remedies for any labor law violation; (2) notice and training for workers about the labor compliance agreement and instructions for reporting violations; (3) a plan to prevent future violations; (4) an agreement that the contractor will self-report any alleged violations of the agreement; and (5) enforceable safeguards to prevent employer retaliation against employees who lodge complaints.

The Department does not agree that it should prescribe the content of labor compliance agreements. The enforcement agencies, which will negotiate labor compliance agreements, will determine the terms of each labor compliance agreement on a case-by-case basis, taking into consideration the totality of the circumstances.

#### Remedial Measures To Be Included in Labor Compliance Agreements

Labor union and worker-advocacy commenters emphasized that labor compliance agreements should require employers to take remedial actions that would prevent future violations. In contrast, numerous employer representatives commented that labor compliance agreements should not impose “enhanced compliance”

measures—or remedial measures that go beyond basic compliance with the requirements of the labor law that has been violated. For example, one employer organization raised a question about whether an agreement would apply only to the business unit or location with the alleged violation—or would apply company-wide. Other commenters raised similar concerns that labor compliance agreements might impose remedial measures that are broader than remedies that could be imposed by courts or enforcement agencies under the Federal labor laws.

Another employer organization expressed a related point about what remedial actions can be expected in labor compliance agreements:

While we agree that any contractor practices that go above and beyond the requirements of the law may constitute evidence of remediation or otherwise serve as a mitigating factor, these provisions should not be read so as to require remediation efforts that exceed the law's requirement simply to get "full credit" for remediation.

The Department agrees with the commenters that assert that labor compliance agreements are not limited to providing compensation for individual employees, abating a hazard, or changing an unlawful policy. Rather, agreements may (and often should) contain additional provisions that are directed at ensuring future compliance with the law. The Order expressly requires that the contracting officer, when making a responsibility determination, must give a contractor with a violation the opportunity to disclose "any agreements entered into with an enforcement agency." Order, section 2(a)(ii). The ALCA then must advise the contracting officer about the need for an agreement to implement remedial measures or steps to "avoid further violations." *Id.*

The requirement that contractors take actions to avoid future violations is not new in the Federal contracting process. Because contracting with the Federal Government is a privilege and not a right, contracting agencies can generally require that contractors meet specific conditions in order to receive a contract award. Accordingly, Federal contractors already have a duty to implement programs intended to prevent some labor law violations. For example, FAR 36.513 Accident Prevention requires a contractor to submit a written safety-and-health plan for identifying and controlling hazards where work is of a hazardous nature. Similarly, under current practice, suspending and debarring officials routinely negotiate "administrative agreements" that contain exactly the sort of enhanced

compliance measures about which the industry commenters raised concerns.<sup>76</sup> By entering into a labor compliance agreement, a contractor agrees to take specific actions designed to achieve and maintain compliance during the contract period; this is not any different than administrative agreements.

In addition, as commenters' references to "enhanced compliance agreements" indicate, the negotiation of preventative measures as part of a settlement is also a traditional aspect of both criminal and civil law enforcement—of the Labor Laws and otherwise. Enforcement agencies such as OSHA, WHD, and OFCCP currently negotiate enhanced compliance agreements, including enterprise-wide agreements, as part of the settlement of enforcement actions under their respective Labor Laws. In sum, the inclusion of preventative measures in labor compliance agreements—which are negotiated with these enforcement agencies—is a reasonable and well-established mechanism for enforcing the existing law and protecting the integrity of the Federal contracting process.

#### Relationship of Labor Compliance Agreement Terms to the Procurement Contract

Several unions and worker-advocacy organizations proposed that the terms of a labor compliance agreement should be incorporated into the procurement contract. One commenter stated that the terms of labor compliance agreements should operate as mandatory contract clauses that are enforceable, whether or not expressly included in the contract language. Many worker-advocacy organizations argued that labor compliance agreements should provide for specific penalties, including contract termination, if the contractor fails to implement agreed-upon remedial measures during the contract period.

<sup>76</sup> See Office of Management and Budget, M-06-26, "Suspension and Debarment, Administrative Agreements, and Compelling Reason Determinations" (2006), available at <https://www.whitehouse.gov/sites/default/files/omb/assets/omb/memoranda/fy2006/m06-26.pdf> ("Agencies sometimes enter into administrative agreements . . . as an alternative to suspension or debarment."); Interagency Suspension & Debarment Comm., "Report by the Interagency Suspension And Debarment Committee on Federal Agency Suspension and Debarment Activities for FY 2012 and FY 2013," 10 (2014) ("[T]he use of administrative agreements increase the Government's access to responsible sources and, thereby, promotes competition in the Federal marketplace."); see also Jennifer S. Zucker and Joseph Fratarcangeli, "Administrative Compliance Agreements: An Effective Tool in the Suspension and Debarment Process," *The Army Lawyer* (Feb. 2005), at 19–24 (describing the content of administrative agreements negotiated between the Army and contractors).

Employer groups also suggested that the Guidance delineate the consequences of violating a labor compliance agreement.

The Department notes that final FAR rule does include reference to consequences for the breach of a labor compliance agreement. Breach of labor compliance agreement during the performance of a contract may justify the exercise of contract remedies, such as electing not to exercise an option, terminating the contract, or notifying the agency suspending and debarring official. See FAR 22.2004–3(b)(3)(v)(C), (b)(4)(i)(B)(2)–(4). Additionally, where a prospective contractor has previously breached a labor compliance agreement, this may justify and ALCA's recommendation that the contracting officer could find that the contractor has an unsatisfactory record of integrity and business ethics and that the suspending and debarring official should be notified. See *id.* 22.2004–3(b)(3)(v); see also Guidance, section III(C)(1)(e).

#### Timing of Negotiation

Certain unions and employee advocacy organizations argued that if the contracting officer determines that a labor compliance agreement is necessary in order to establish that an employer can be considered a responsible contractor, then the agreement must be fully negotiated prior to the award of the contract. These commenters proposed that merely engaging in good-faith negotiations should not be considered sufficient to overcome a record of Labor Law violations. Rather, they suggested that a finalized enforceable remedial agreement should be required in order to permit a finding of contractor responsibility. SEIU proposed in the alternative that a labor compliance agreement should be executed within 2 months of the contract award and if the contractor fails to comply, "payments due the contractor under the contract should be withheld until [a labor compliance agreement] is executed."

The Department believes these comments address issues outside the scope of the Guidance and directs commenters to the preamble to the final FAR rule. However, the Department notes that, as discussed above, the final FAR rule provides that a contracting officer may require the contractor to commit, prior to award, to negotiate a labor compliance agreement "in good faith within a reasonable period of time." FAR 22.2004–2(b)(7)(ii). The contracting officer may also require that the contractor negotiate and execute an agreement prior to award. See *id.* 22.2004–2(b)(7)(iii). The ALCA is also required, during the performance of a



contract, to report to the contracting officer whether the contractor is continuing to negotiate a labor compliance agreement or whether the contractor is adhering to an agreement that has been established. *Id.* 22.2004–3(b)(3)(i). The contracting officer then uses this information to determine whether to, among other actions, elect to exercise an option on the contract. *Id.* 22.2004–3(b)(4)(i).

#### Relationship Between Labor Compliance Agreements and Settlement Agreements for Violations Under Litigation

Several industry commenters raised concerns about the relationship between labor compliance agreements and litigation-specific settlements for violations. One commenter stated that labor compliance agreements could overlap with and contradict provisions of settlement agreements that are already in place or administrative agreements reached as part of suspension and debarment proceedings.

One industry group argued that the negotiation process for labor compliance agreements could conflict with the Title VII conciliation process, citing a recent Supreme Court decision, *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645 (2015). *Mach Mining* addressed a statutory provision that requires EEOC to conciliate with employers following a reasonable cause determination. This commenter argued that the Order would remove the determination of good faith negotiation from Federal courts and place it in the hands of ALCAs or contracting officers.

The Department believes that concerns about labor compliance agreements conflicting with existing settlements are unwarranted. Contractors are encouraged to disclose information about existing settlements as a potential mitigating factor in the weighing process. In determining whether a labor compliance agreement is necessary, the ALCA will consider any preexisting settlement agreement—and recommend a labor compliance agreement only where the existing settlement does not include measures to prevent future violations.

In addition, the Department notes that a labor compliance agreement is an agreement between a contractor and an enforcement agency. Enforcement agencies will know if they previously entered into agreements with the contractor and can assure that any labor compliance agreement does not conflict with prior agreements.

Finally, the Department disagrees with the commenter's interpretation of *Mach Mining*. *Mach Mining* does not

apply here because a labor compliance agreement is not a conciliation agreement, nor does it replace the EEOC's efforts to conciliate. Negotiation of a labor compliance agreement is separate and distinct from the conciliation process under Title VII.

#### Public Access to Labor Compliance Agreements, Recommendations, and Responsibility Determinations

Union commenters proposed that the Guidance specify that ALCA advice and analysis must be included in a public database, and that contracting officers' responsibility determinations, along with the reasons on which they are based, also must be made accessible to the public. Several also proposed that a contracting officer should be required to justify in writing if he or she makes a decision not to adopt an ALCA's recommendation that a labor compliance agreement be negotiated, and that this explanation should be made available to the public.

Several of these commenters also proposed that labor compliance agreements, as well as the contracting officers' responsibility determinations and ALCA recommendations, should be public documents. They stated that labor compliance agreements should be public so that employees and other commenters can monitor whether contractors meet their obligations under the terms of the agreements.

The Department declines to adopt the public-disclosure proposal. Mechanisms for public access to information on government contracts already exist, including the Freedom of Information Act (FOIA), USAspending.gov, and the Federal Awardee Performance and Integrity Information System (FAPIIS)—a government database that tracks contractor misconduct and performance. FAPIIS will indicate where a contractor has entered into a labor compliance agreement. In addition, the enforcement agencies that negotiate labor compliance agreements have the discretion to make the agreements themselves publicly available.

However, the Department notes that the final FAR rule does require the contracting officer to document in the contract file how he or she has taken into account an ALCA's recommendation and analysis—including whether a labor compliance agreement is warranted—in making the responsibility determination for the award. *See FAR* 22.2004–2(b)(5)(ii). In addition, the final FAR rule also states that where a contractor enters into a labor compliance agreement, the entry will be noted in FAPIIS by the ALCA and the fact that a labor compliance

agreement has been agreed to will be public information. *Id.* 22.2004–2(b)(9). The Department has added reference to this procedure in section II(C)(3) of the Guidance.

#### Other Criticism of Labor Compliance Agreements

One employer advocate, in a representative comment, stated that the use of labor compliance agreements forces contractors to defend themselves in multiple forums on the same issues. Other employer organizations commented that the use of labor compliance agreements would deter businesses from seeking Federal contracts because they will add another layer of negotiation and uncertainty.

The Department has carefully considered these comments but does not modify the Guidance in response. Labor compliance agreements will enable contractors with a significant record of Labor Law violations, who might not otherwise be considered responsible, to obtain government contracts. Thus, as discussed above, labor compliance agreements are properly viewed as expanding opportunity and not imposing additional burdens. With regard to the question of competition, the commenters have not provided any objective evidence to support their statement that the use of labor compliance agreements would deter, rather than encourage, participation in Federal contracting. And, the Department also received comments from employee representatives stating that the Order's requirement that remedial measures be put in place through labor compliance agreements will enhance fair competition. These commenters argued that law-abiding contractors are currently deterred from seeking government business because they believe they will be underbid by unscrupulous contractors. The Department believes that the final FAR rule's inclusion of a structure for labor compliance agreements can only benefit competition by allowing contractors that might otherwise be barred from contracting—either through an individual nonresponsibility determination, suspension, or debarment—a path to responsibility instead.

#### IV. Postaward Disclosure and Assessment of Labor Law Violations

The Order requires contractors that made initial preaward disclosures of Labor Law violation information to update that information semiannually during performance of the covered procurement contract. Order, section 2(b). Where new Labor Law violation

information is disclosed or otherwise brought to the attention of the contracting officer, the Order requires the contracting officer to consider whether the action is necessary—including agreements requiring appropriate remedial measures or remedies such as decisions not to exercise an option on a contract, contract termination, or referral to the agency suspending and debarring official. *Id.* section 2(b)(ii). The Proposed Guidance referenced these provisions of the Order, and explained that postaward disclosures should include both (a) any new Labor Law decisions rendered since the last disclosure and (b) updates to previously disclosed information. 80 FR 30574, 30581.

#### Disclosure Update Requirements

The Department received a number of comments discussing the Order's postaward disclosure requirements. In general, employee-advocacy organizations approved of the requirements and urged the Department to strengthen them—particularly with regard to the consequences of violating a labor compliance agreement. In contrast, several industry commenters expressed concern that the semiannual, postaward disclosure requirement is unduly burdensome. These commenters suggested elimination of the requirement entirely.

The Department does not amend the Guidance to eliminate the postaward disclosure requirement. The final FAR rule has implemented this requirement in section 22.2004-3 of the FAR, and created a contract clause that incorporates these requirements into covered contracts, *see id.* 55.222-59(b). The Department agrees that this requirement is appropriate, because the Order expressly mandates postaward disclosures. *See Order*, section 2(b).

The Department also received multiple comments from industry groups requesting clarification about the timing of postaward disclosure and whether each contract would have its own disclosure cycle based on the date of each award. Some of these commenters asserted that companies with multiple Federal contracts would have an onerous reporting burden because the Order and the proposals will require such companies to constantly make disclosures. They proposed alternative ways to schedule their disclosure requirements; in particular, they suggested that the Department establish a unified, fixed-date disclosure schedule as opposed to reporting on the anniversary of each contract award.

The Department notes that the timing of postaward disclosures is a question that is resolved in the FAR rule. In response to similar comments, the final FAR rule provides the flexibility requested by commenters, allowing the contractor to use any date that it chooses before the six-month anniversary date of the award. FAR 22.2004-3(a)(2). The Department has included this clarified language in the Guidance.

#### Postaward Assessment of Labor Law Violations

Some industry commenters expressed concern that it would be disruptive to find a contractor nonresponsible in the middle of the performance of a contract based on a violation that is disclosed postaward. Similarly, other industry commenters were critical of using postaward violations as a basis for terminating a contract that was otherwise being properly and timely performed. These commenters argued that such information should only be used in connection with a contracting officer's consideration of whether to exercise an option to extend the contract.

The consideration of appropriate postaward actions is within the jurisdiction of the FAR Council, and the Department has deferred to the treatment of these issues in the final FAR rule. Under the final rule, the ALCA will follow a similar assessment process for postaward disclosures as for preaward disclosures. *See FAR 22.2004-3(b)(3)*. The ALCA assesses the information disclosed and provides analysis and advice to the contracting officer regarding, among other questions, whether violations should be considered serious, repeated, willful, and/or pervasive, *see id.* 22.2004-3(b)(3)(i); and whether the contractor is adequately adhering to any labor compliance agreements, *see id.* 22.2004-3(b)(3)(v)(C). The contracting officer may then take no action and continue the contract, or may exercise one or more contract remedies under existing FAR regulations and procedures. FAR 22.2004-3(b)(4).

The Department believes that the FAR Council's rule appropriately implements the plain language of the Order requiring postaward consideration of the specified contract remedies. The Order expressly includes various appropriate remedies, including contract termination. Order, section 2(b)(ii). The Department notes that the Order and the final rule do not deviate in any significant way from what the FAR otherwise requires when a contracting officer receives information

during contract performance that implicates a contractor's responsibility.

#### V. Subcontractor Responsibility

The Department has re-organized the discussions of subcontractor responsibility that appeared in several locations of the Proposed Guidance into a new section V of the final Guidance. The Department received several comments about the extent of subcontracts covered by the Order, the method of subcontractor disclosure, and the assessment by prime contractors of their subcontractors' responsibility. These comments are discussed in turn below.

##### Covered Subcontracts

The Proposed Guidance described "covered subcontracts" as including subcontracts for commercial items, but, as prescribed by the Order, excluding those for commercially available off-the-shelf (COTS) items. As discussed above in section II(A) of this section-by-section analysis, one industry commenter suggested that all commercial item subcontracts—and especially commercial item subcontracts—should be excluded from the Order's disclosure requirements. The commenter asserted that there is no basis for distinguishing between contracts for COTS items and contracts for commercial items.<sup>77</sup> In the alternative, the commenter suggested that coverage of commercial item subcontracts be delayed 5 years.

The Department declines to adopt the commenter's suggestions. As noted above, contract coverage is within the jurisdiction of the FAR Council, and the final FAR rule maintains the inclusion of "commercial item" subcontracts as proposed. *See FAR 52.244-6*. The final FAR rule also did not adopt the commenter's alternative request that coverage of commercial item subcontracts be delayed 5 years. However, in recognition of the additional complexity of the prime contractors' determination of subcontractor responsibility, the FAR Council has delayed implementation of all of the subcontractor disclosure and assessment requirements in the Order for an additional year beyond the

<sup>77</sup> Another commenter, Ogletree Deakins, asked a specific question about the definition of COTS items. The law firm stated that a construction company client "is of the opinion that its construction materials qualify as COTS items" and "seeks confirmation" from the Department that this opinion is correct. In response, the Department notes that Order does not require the Department to provide guidance regarding the definition of COTS items. The Department, however, interprets the use of "commercially available off-the-shelf items" in the Order as subject to the definition of that term in the FAR. *See Order*, section 2(a)(iv); FAR 2.101.

effective date of the final rule. See FAR 22.2007(b).

#### Subcontractor Disclosures

The Proposed Guidance contemplated that subcontractors would disclose Labor Law violations to prime contractors for assessment. See 80 FR 30577. However, the Proposed Guidance also noted that “the FAR Council is considering allowing contractors to direct their subcontractors to report violations to the Department, which would then assess the violations” (instead of contractors). *Id.* n.9.

Various industry commenters raised concerns about the original subcontractor disclosure and assessment provision in the Proposed Guidance. In a representative form comment, one commenter stated that the task of assessing subcontractor responsibility under the Order would be overly burdensome for prime contractors, who may have up to 30 subcontractors for a multimillion dollar contract. Another commenter, SAIC, raised a concern with the structure by which subcontractors would give violation information to prime contractors on the grounds that the subcontractor and the prime may be competitors on the next contract, and “competitors should not have access to sensitive information about one another.”

In contrast, another commenter objected to the structure of the proposed alternative. In a comment made to the FAR Council on the proposed FAR rule, the commenter questioned whether there might be conflicts of interest if the Department is given the authority to assess subcontractor violations. The commenter suggested that a conflict could arise because the Department would often be charged with classifying and assessing the weight of violations that may be under active enforcement or litigation by enforcement agencies within the Department; presumably the concern would be that the Department could tip the scales in its own ongoing litigation by providing a more negative assessment of the subcontractor’s record than it might otherwise do in order to force the contractor into settling.

After carefully considering these and other similar comments, the FAR Council decided to adopt the proposed alternative structure under which subcontractors will be able to make detailed disclosures to the Department instead of to prime contractors directly. See FAR 52.222–59(c)(3)(ii). Pursuant to Order (as amended), the FAR Council has the express authority to designate the entity to which subcontractors submit disclosure information.

Under the final FAR rule, upon receiving a subcontractor’s disclosure, the Department will provide advice that the subcontractor provides to the contractor for the contractor’s use in the determining the subcontractor’s responsibility. See FAR 52.222–59(c)(4). Ultimately, however, the Order does not change the underlying principle in the FAR that it is the prime contractor (and not the Department) that has the duty to make a determination that its subcontractors are responsible sources. See *id.* 9.104–1.

The FAR Council and the Department have carefully considered the concern that the structure of the subcontractor responsibility assessment would create a conflict of interest, and we have concluded that the proposed structure is appropriate. ALCA training will include material that addresses prevention of such conflicts of interest. The Guidance clarifies that in assessing violations, the Department will apply the same Guidance language that ALCAs apply in classifying and weighing violations and that any Labor Law decisions from an enforcement agency will be evaluated objectively and without regard for the enforcement agency’s litigation interests. See Guidance, section V(B). As the FAR Council notes in its response to this issue, administrative decision makers enjoy a presumption of honesty and integrity. See *Withrow v. Larkin*, 421 U.S. 35, 47 (1975). Moreover, if the subcontractor disagrees with the Department about the assessment, it may provide an explanation of its disagreement, along with the relevant information, to the contractor, FAR 52.222–59(c)(4)(ii)(C)(3), and in this situation the contractor may award the subcontract notwithstanding the Department’s negative assessment, *id.* 52.222–59(c)(5).

In sum, the Department has tracked the FAR rule in the final Guidance. The Department believes that the FAR Council’s modification of the subcontractor responsibility structure will address the above-described concerns that contractors (and especially small business contractors) would find it challenging to assess subcontractors’ violations. This change will also ensure a greater degree of expertise and consistency in assessing subcontractors’ Labor Law violations.

#### VI. Preassessment

The Proposed Guidance noted that the Department will be available to consult with contractors to assist them in fulfilling their obligations under the Order, and, specifically, that contractors would have the opportunity to receive early guidance before bidding on a

contract. In this “preassessment,” contractors would receive the Department’s advice as to “whether any of their violations of the labor laws are potentially problematic, as well as the opportunity to remedy any problems.” 80 FR 30575 n.7.

The Department received few comments specifically addressing preassessment. However, several commenters stated that contracting agencies must provide enough time for ALCAs to assess the information disclosed regarding violations, mitigating circumstances, and remedial measures. Many commenters stated that the 3-day timeframe for ALCAs to give analysis and advice to contracting officers is insufficient and will cause delays in decision-making. The Department believes that the preassessment process will help avoid such delays. With regard to subcontractor preassessment, AGC stated in its comment that “pre-approving national subcontractors may be helpful,” while noting that there are disadvantages to limiting the pool of acceptable subcontractors to those that have been pre-approved.

After considering these comments, the Department has decided that there will be a preassessment process whereby contractors may voluntarily agree to have their record of Labor Law violations assessed by the Department. The preassessment process does not limit the pool of contractors in the manner that AGC suggested could be disadvantageous. Rather, preassessment will provide contractors with early information that their record of Labor Law compliance is satisfactory—and, if that is not the case, with information about how to address any issues before bidding on a contract. The preassessment process does not circumvent or replace the structured preaward disclosure and assessment process required by the Order.

The Guidance now clarifies that the Department’s advice during preassessment is similar to the analysis that ALCA’s provide to contracting officers during the preaward assessment process—including “advice regarding whether any of the disclosed violations are serious, repeated, willful, and/or pervasive; and regarding whether a labor compliance agreement is warranted.” Guidance, section VI. And, it clarifies that if a contractor whose record have been assessed by the Department subsequently submits a bid, and the contracting officer initiates a responsibility determination of the contractor, the contracting officer and the ALCA may rely on the Department’s assessment that the contractor has a

satisfactory record of Labor Law compliance unless additional Labor Law violations have been disclosed.

## VII. Paycheck Transparency

Section VII of the Guidance assists agencies in interpreting the paycheck transparency provisions of the Order and the FAR rule. The purpose of these provisions is to increase transparency in compensation information and employment status, which will enhance workers' awareness of their rights, promote greater employer compliance with Labor Laws, and thereby increase economy and efficiency in government contracting.

### A. Wage Statement Provisions

Section 5(a) of the Order requires covered contractors, including subcontractors, to provide "all individuals performing work" under the contract for whom the contractor must maintain wage records under the FLSA, the DBA, the SCA, or equivalent State laws with a "document" each pay period containing "information concerning that individual's hours worked, overtime hours, pay, and any additions made to or deductions made from pay." As the Department noted in the Proposed Guidance, this means that a wage statement must be provided to every worker subject to the FLSA, all laborers and mechanics subject to the DBA, and all service employees covered by the SCA—regardless of the contractor's classification of the worker as an employee or independent contractor. *See* 80 FR 30591.

In the Proposed Guidance, the Department interpreted the term "pay" in the Order to mean the total or "gross pay" that is due the worker for the pay period. 80 FR 30591. The Proposed Guidance noted that additions to gross pay may include bonuses, awards, and shift differentials, and that deductions from gross pay may include withholding for taxes and for employee contributions to health insurance premiums or retirement accounts. 80 FR 30591–30592.

The Order requires that the wage statement must be issued every pay period and contain the total number of hours worked in the pay period and any overtime hours worked, among other information. Order, section 5(a). In those cases where the wage statement is not provided weekly and is instead provided bi-weekly or semi-monthly, the FAR Council's proposed rule provided that the hours worked and overtime hours detailed in the wage statement be broken down to correspond to the period for which overtime is actually calculated and paid

(which will almost always be weekly). 80 FR 30571.

The Proposed Guidance suggested that if the contractor regularly provides documents to workers electronically, the wage statement may be provided electronically if the worker can access it through a computer, device, system, or network provided or made available by the contractor. 80 FR 30591. The FAR Council proposed the requirement that, if a significant portion of the contractor's workforce is not fluent in English, the contractor must provide the wage statements in English and the language(s) in which the significant portion(s) of the workforce is fluent. 80 FR 30572.

The Department received many comments regarding the different aspects of the proposed wage-statement requirements discussed above. Employee advocates generally supported the Order's wage-statement provisions.<sup>78</sup> Employer organizations, on the other hand, commented that the wage-statement provisions are overly burdensome and in addition made several specific suggestions and objections. The Department addresses these comments below.

#### 1. Rate of Pay

Several unions and employee advocacy organizations suggested that contractors should be required to include in the wage statement: (a) The worker's rate of pay, (b) hours and earnings at the basic rate, and (c) hours and earnings at the overtime rate. In their view, these would allow "a worker to fully understand the basis for his or her net pay." They argued that the term "pay" in the Order should be defined to include both the worker's regular rate of pay and the total amount of pay for the pay period. SEIU noted that several States, including Alaska, California, New York, and Hawaii, already require rate-of-pay information in wage statements, "demonstrating the reasonableness of this requirement." The Midwest Region Foundation for Fair Contracting and the Foundation for Fair Contracting of Massachusetts suggested that the wage statement should include the "overtime rate of pay and hours calculated," reasoning that the "rate of pay alone is not sufficient for a worker to calculate his or her overtime hours[.]" The Center for American Progress Action Fund (CAPAF) and SEIU also suggested that the Guidance "should make clear that

<sup>78</sup> The Department received many comments generally supporting the paycheck transparency provisions, including more than 1,700 comments submitted by the National Women's Law Center (NWLC).

the terms used in the paycheck transparency provisions have the same meaning as they do under the FLSA."

In response to similar comments, the FAR Council has included in its final rule that rate-of-pay is a required element on the wage statement. *See* FAR 52.222–60(b)(1)(iii). The Department has modified the final Guidance accordingly. The Department believes that this decision accords with the plain text of the Order, which states that the wage statement must contain the worker's "pay." Order, section 5(a). As the commenters above noted, the term "pay" can and should be defined to include both "gross pay" and "rate of pay."

The Department believes that a worker's rate of pay is a crucial piece of information that should appear in the wage statement, because a worker's knowledge of his or her rate of pay enables the worker to more easily determine whether all wages due have been paid. Inclusion of rate of pay in wage statements will therefore reduce the time an employer spends resolving pay disputes because workers will have available the information on which his or her pay was determined, and be able to identify any problems at an earlier date. By aiding in the early identification of problems, including rate of pay in the wage statement will help to implement the Order's purpose of reducing execution delays and avoiding distractions and complications that arise from Labor Law noncompliance during the course of contract performance. *See* Order, section 1. All parties have an interest in ensuring workers receive their full pay when it is earned—including contractors themselves, who benefit from fair competition, employee satisfaction, and reduced liability for damages resulting from unpaid wages.

Also, in most cases, contractors compute gross pay by multiplying the regular hours worked by the worker's rate of pay and, in overtime workweeks, by also multiplying the overtime hours worked by time-and-one-half of the rate of pay. As contractors cannot compute the worker's earnings without the rate-of-pay information, workers similarly cannot easily determine how their earnings are computed without inclusion of the rate-of-pay information in the wage statement.

Moreover, the relevant laws already require that the employer keep a record of the rate of pay. As one employee-advocacy organization pointed out, an employer must maintain a record of a non-exempt employee's rate of pay under the FLSA. *See* 29 CFR 516.2(a)(6)(i). A requirement to keep

rate-of-pay information also applies to SCA-covered contracts, *see* 29 CFR 4.6(g)(1)(ii), and to DBA-covered contracts, *see* 29 CFR 5.5(a)(3)(i).<sup>79</sup> In addition, a number of States currently require the worker's rate of pay to be included in wage statements.<sup>80</sup> Contractors located in one of these States already are including the rate of pay in the wage statements that they provide. Therefore, including this information in the wage statement helps to realize the purposes of the Order with limited burden to contractors.

The rate of pay information on the wage statement will most often be the regular hourly rate of pay. If the worker is not paid by the hour, the rate of pay information should reflect the basis of pay by indicating the monetary amount paid on a per-day, per-week, per-piece, or other basis. *See* FAR 52.222–60(b)(1)(iii). This information is required to be kept by the employer for non-exempt employees under the FLSA, and would allow the worker to recognize any underpayments. *See* 29 CFR 516.2(a)(6)(i)–(ii), 778.109.

The Department, however, believes that it is not essential for the overtime rate of pay to be included in the wage statement. For example, in order to check the accuracy of the wages paid in weeks when overtime hours are worked, a worker can generally perform the following calculation: (1) The rate of pay multiplied by 40 hours equals regular earnings; (2) rate of pay multiplied by 1.5 equals the overtime rate of pay; (3) overtime rate of pay multiplied by the overtime hours worked equal overtime earnings; and (4) regular earnings plus overtime earnings equals gross pay. The inclusion of the overtime rate of pay in the wage statement would only slightly simplify this calculation for the worker by eliminating step two. In most situations, once the worker knows his or her rate of pay, the worker can readily determine what the overtime pay rate should be by

<sup>79</sup> In general, for DBA and SCA, the basic hourly rate listed in the wage determination is considered the rate of pay that is to be included in the wage statement. Under the FLSA, the regular hourly rate of pay is determined by dividing the employee's total remuneration (except statutory exclusions) by total hours worked in the workweek. *See* 29 CFR 778.109.

<sup>80</sup> States that currently require rate of pay information to be included in wage statements are: Alaska, California, Colorado, Hawaii, Kansas, Maryland, Massachusetts, Minnesota, New York, North Dakota, Pennsylvania, Texas, Vermont, Washington, and Wisconsin. This list is not the list of "Substantially Similar Wage Payment States" that the Order requires the Department to identify. As discussed below, whether a State law is substantially similar requires consideration of all of the required elements in a wage statement—not simply rate of pay.

simply multiplying the rate of pay by time and one half (by a factor of 1.5).

In addition, the FLSA, SCA, and DBA regulations do not require contractors to keep a record of the overtime pay rate in their payroll records.<sup>81</sup> Similarly, with some exceptions, State laws generally do not require that the overtime rate of pay be included in wage statements. Therefore, requiring the overtime rate of pay in the wage statement would be a new burden on contractors and, as discussed above, having the overtime pay-rate information in the wage statement does not significantly improve the worker's ability to determine whether the correct wages were paid.

With regard to SEIU's comment that the Guidance should make clear that the terms used in the Order's paycheck transparency provision should be given the same meaning as in the FLSA, the Department agrees with this comment to the extent the FLSA provides relevant meaning and context to the terms in the Order's paycheck transparency provisions. The Department has cited to the FLSA regulations where applicable.

## 2. Itemizing Additions to and Deductions From Wages

Employee advocates urged the Department to require contractors to itemize additions to and deductions from wages in the wage statement. SEIU stated that there should be "no lump sums for additions or deductions." The AFL–CIO urged the Department to require contractors to "itemize the contributions for fringe benefits and identify each plan or fund to which such contributions are being paid." NABTU noted that a number of States require contractors to itemize in this manner in the certified payroll records that are filed with the State. The Indiana-Illinois-Iowa Foundation for Fair Contracting (Foundation for Fair Contracting) suggested that wage statements required by the Order should include the hourly fringe benefit rates, the name and address of each fringe benefit fund, and the plan sponsor and administrator of each fringe benefit plan, if applicable. Foundation for Fair Contracting noted that the Illinois

<sup>81</sup> Of the three Federal statutes referenced in section 5(a) of the Order, only the FLSA requires the payment of overtime; however, the FLSA recordkeeping regulations do not require the contractor to maintain overtime rates of pay on payroll records. The FLSA regulations do require a supplemental record documenting the overtime pay calculation. *See* 29 CFR 516.6(a)(2). The DBA and SCA do not contain an overtime pay provision and, as a result, the regulations governing these statutes make no reference to listing overtime rates of pay on payroll records. *See* 29 CFR 5.5(a)(3)(i) and 5.32(a) for DBA; 29 CFR 4.6(g) and 4.180 for SCA.

Prevailing Wage Act requires contractors on public-works projects to submit certified payrolls that contain such information.

In response to similar comments, the FAR Council has included in its final rule the requirement that additions and deductions to gross pay must be itemized in the wage statement. *See* FAR 52.222–60(b)(1)(v). Accordingly, the final Guidance clarifies that additions and deductions must be itemized.

The Department agrees that it is appropriate to require itemization of additions and deductions. Section 5(a) of the Order provides that the wage statement should, among other items, include "any additions made to or deductions made from pay." The Order, therefore, already contemplates that any and all additions or deductions be separately noted in the wage statement; in other words, the wage statement must itemize or identify each addition or deduction, and not merely provide a lump sum for the total additions and deductions.

The Department notes that the relevant FLSA regulations require covered employers to maintain records regarding the nature of each type of addition to or deduction from gross wages. For instance, besides having to record the total additions to or deductions from wages, the FLSA regulations at 29 CFR 516.2(a)(10) also require covered employers to maintain records for non-exempt employees of the dates, amounts, and nature of the items which make up the total additions and deductions. Also, both DBA and SCA regulations require covered contractors to maintain a record of deductions from wages paid. *See* 29 CFR 5.5(a)(3)(i), 4.6(g)(1)(iv).<sup>82</sup> Because these statutes already require contractors to maintain a record of any additions or deductions, requiring contractors to provide the same itemized information to workers in the wage statement will not be overly burdensome.

The Department did not receive comments specifically objecting to the itemization of additions or deductions. Many States currently require itemized deductions to be included in wage statements.<sup>83</sup> Contractors working in

<sup>82</sup> Optional form WH–347 that is typically used by contractors and subcontractors on Federal or federally-aided construction-type contracts and subcontracts to submit weekly certified payrolls, for instance, lists deductions from the worker's gross pay.

<sup>83</sup> States that currently require itemized deductions include: Alaska, Connecticut, Hawaii, Illinois, Indiana, Kansas, Kentucky, Maine,

one of these States are already including itemized deductions from gross pay in the wage statements that they provide. The Department thus believes that it is reasonable to presume that contractors who already furnish wage statements usually provide information identifying any additions or deductions from gross pay.

Moreover, including itemized additions and deductions in the wage statement allows workers to determine whether they are paid correctly, identify any error, and promptly raise any questions with the contractor as necessary. As the Department noted in the Proposed Guidance, “[p]roviding a worker with gross pay and all additions to and deductions from gross pay will necessarily allow the worker to understand the net pay received and how it was calculated.” 80 FR 30592.

With regard to suggestions by employee advocates that the wage statements should identify the name and address of each fringe benefit fund, and the plan sponsor and administrator of each fringe benefit plan, the Department believes that listing such information in the wage statement would be duplicative. Generally, when a worker participates in a fringe benefit fund or plan, he or she must complete an enrollment form for the fund or plan to become a registered participant in the fund or plan. An enrolled or registered worker is given a document with the fund or plan contact information including, but not limited to: The name of the fund or plan; the fund’s or plan’s address, contact number, and email address; and the amount of the worker’s contributions into the fund or plan. The worker also receives quarterly earnings statements or plan usage statements, as well as a summary of worker contributions. See 29 CFR 2520.102–2, .102–3. This information is also typically available online via the fund’s or plan’s Web site. Furthermore, the fund or plan contact information is not essential in order to understand and calculate the worker’s earnings on a pay period basis or to timely detect errors in their pay; therefore, the Department does not believe that including this information in the worker’s wage statement is necessary to meet the Order’s requirements and purposes.

Michigan, Minnesota, Montana, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, Oklahoma, Oregon, Rhode Island, Texas, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming. This list is not the list of “Substantially Similar Wage Payment States” that the Order requires the Department to identify. As discussed below, whether a State law is substantially similar requires consideration of all of the required elements in a wage statement—not simply of itemized additions and deductions.

Foundation for Fair Contracting also requested that the hourly fringe-benefit rate be listed in the wage statement. The Department does not believe it is essential to include the hourly fringe-benefit rate in the wage statement. The amount of the fringe benefit required by the DBA or SCA is typically expressed as an hourly rate in the wage determinations issued by the Department.<sup>84</sup> The contractor may pay this amount as a contribution to a fringe benefit fund or plan, or in “cash” as an addition to the worker’s wages. Section 5(a) of the Order requires any additions made to gross pay to be listed in the wage statement. The Department believes that fringe-benefit amounts paid by the contractor into a fund or plan (e.g., health insurance or retirement plan) on behalf of the worker should not be considered additions to the worker’s gross pay for purposes of the Order. Such fringe-benefit contributions are excludable from the regular rate for purposes of computing overtime pay under the FLSA<sup>85</sup> and are not taxable. Fringe-benefit contributions paid by the contractor on behalf of the worker thus do not need to be included in the wage statement, as such information has no bearing on determining whether the worker received the correct cash wages as reported in the wage statement.

On the other hand, when the contractor elects to meet their fringe benefit obligation under the DBA or SCA by paying all or part of the stated hourly amount in “cash” to the worker, the payments are subject to tax withholdings, and the wage statement should list the fringe benefit amounts paid as an addition to the worker’s pay.<sup>86</sup> Such amounts are part of gross pay.

### 3. Information To Be Included in the Wage Statement

As discussed above, in order to implement the purposes of the Order’s wage-statement requirement, the final FAR rule has interpreted the term “pay” to mean both gross pay and rate of pay. See FAR 52.222–60(b)(1). And the final

<sup>84</sup> The wage determination issued under the DBA and SCA that is applicable to the contract must be posted by the contractor at the site of work in a prominent and accessible place where it can be easily seen by the workers. See 29 CFR 5.5(a)(1)(i), 4.6(e). Workers therefore have access to fringe benefit rate information, further negating the necessity to include the fringe benefit rate amount in the wage statement.

<sup>85</sup> See 29 U.S.C. 207(e)(4); 29 CFR 778.214, 778.215.

<sup>86</sup> When the fringe benefit (or a portion thereof) is paid in cash, that amount is excludable from the regular rate for purposes of computing overtime pay. See 29 CFR 4.177(e), 5.32(c)(1).

rule has clarified that any additions to or deductions made from gross pay be itemized or identified in the wage statement. See *id.* The final Guidance, therefore, provides that wage statements required under the Order must contain the following information: 1) hours worked, 2) overtime hours, 3) rate of pay (whether the regular hourly rate of pay or the monetary amount paid on a per-day, per-week, per-piece, or other basis), 4) gross pay, and 5) an itemization of each addition to or deduction from gross pay. See Guidance, section VII(A).<sup>87</sup>

### 4. Weekly Accounting of Overtime Hours Worked

The Department also received comments from industry commenters regarding the proposed requirement that if the wage statement is not provided weekly and is instead provided bi-weekly or semi-monthly (because the pay period is bi-weekly or semi-monthly), that the hours worked and overtime hours contained in the wage statement would need to be broken down to correspond to the period for which overtime is actually calculated and paid (which will almost always be weekly). See 80 FR 30571 (proposed rule); 80 FR 30591 (Proposed Guidance). Several employer representatives stated that contractors generally issue wage statements on a bi-weekly basis, and do not separately provide the number of hours worked (regular and overtime hours) for the first and second workweeks of the bi-weekly pay period. These commenters stated that requiring a weekly accounting of regular hours worked (i.e., hours worked up to 40 hours) and overtime hours worked in the wage statement would be costly to implement and unnecessary.

The final FAR rule continues to require that “the hours worked and overtime hours contained in the wage statement . . . be broken down to correspond to the period (which will almost always be weekly) for which overtime is calculated and paid.” FAR 52.222–60(b)(2). The Department accordingly declines to change the Guidance in response to the comments received.

As the Department discussed in the Proposed Guidance, transparency in the relationships between employers and their workers is critical to workers’ understanding of their legal rights and to the speedy resolution of workplace disputes. See 80 FR 30591. The calculation of overtime pay on a workweek-by-workweek basis as

<sup>87</sup> Nothing prohibits the contractor from including more information in the wage statement (e.g., exempt-status notification, overtime-pay rate).

required by the FLSA has been a bedrock principle of labor protections since 1938. 29 U.S.C. 207(a). A wage statement that is provided bi-weekly or semi-monthly that does not separately state the hours worked during the first workweek from those worked during the second workweek of the pay period fails to provide workers with sufficient information about their pay to be able to determine if they are being paid correctly. For example, a worker who receives a wage statement showing 80 hours worked during a bi-weekly pay period and all hours paid at the regular (straight-time) rate may, in fact, have worked 43 hours the first week and 37 hours the second week. In this case, to comply with the FLSA, the employer should have paid the worker at time and one half of the worker's regular rate of pay for the three hours worked after 40 hours in the first workweek. Without documentation of the weekly hours, it would be difficult for this worker to determine whether overtime pay is due.

The FLSA already requires that employers calculate overtime pay after 40 hours worked per week; and the implementing regulations under the FLSA, DBA, and SCA require employers to maintain payroll records for at least 3 years. Under the FLSA regulations at 29 CFR 516.2(a)(7), for instance, an employer must maintain a record of a non-exempt employee's total hours worked per week. A requirement to keep records of hours worked also applies to SCA-covered contracts, *see* 29 CFR 4.6(g)(1)(iii), and to DBA-covered contracts, *see* 29 CFR 5.5(a)(3)(i). Moreover, workers covered under DBA must be paid on a weekly basis requiring a workweek-by-workweek accounting of overtime hours worked. *See* 29 CFR 5.5(a)(1)(i). Therefore, including hours worked information in the wage statement derived on a workweek basis will not be overly burdensome.

#### 5. Electronic Wage Statements

With regard to providing wage statements electronically, one industry commenter agreed that providing wage statements electronically should be an option. One labor union, the United Brotherhood of Carpenters and Joiners of America (UBCJA), advocated that workers should be allowed to access wage statements using the contractor's computer network during work hours. According to UBCJA, merely providing workers with the Web site address to access their wage statements on their own would be insufficient as such an arrangement would require the worker to purchase internet connection to access the information. One employee

advocate suggested that the contractor should be allowed to provide wage statements electronically only with written permission from the worker and if written instructions on how to access the wage statements are provided to the worker.

The final FAR rule provides that contractors have the option of providing wage statements either by paper-format (e.g., paystubs), or electronically if the contractor regularly provides documents electronically and if the worker can access the document through a computer, device, system, or network provided or made available by the contractor. FAR 52.222-60(e)(2). The final Guidance accordingly provides the same. *See* Guidance, section VII(A). The Department agrees with UBCJA that merely providing workers with a Web site address would be insufficient; the contractor must provide the worker with internet or intranet access for purposes of viewing this information.

The Department, however, believes that it is not necessary to require contractors to allow workers such access during work hours. The Department assumes that employees will, in most cases, access wage statements (or other employer-provided documents, such as leave statements or tax forms) using the contractor's network or system during the workday—including during the worker's rest breaks or meal periods. However, the Department believes it is not necessary to specifically prescribe a requirement regarding the time period during which a wage statement can be accessed.

The Department also believes that it is not necessary to require that workers give consent before receiving the wage statement electronically, or to require that workers be given written instructions on how to access the wage statement using the contractor's computer, device, system, or network. As the Proposed Guidance noted, the employer must already be regularly providing documents to workers electronically in order to provide wage statements in the same manner. *See* 80 FR 30592. Contractors that already provide documents electronically presumably also provide general instructions regarding accessing personnel records on their intranet Web pages; therefore, additional written instructions specific to accessing the worker's wage statement using the contractor's computer, device, network, or system is not necessary. Similarly, requiring a written consent by the worker is not necessary because the workers for such employers should already be familiar with the process for receiving documents electronically.

#### 6. Substantially Similar State Laws

The Order provides that the wage-statement requirement "shall be deemed to be fulfilled" where a contractor "is complying with State or local requirements that the Secretary of Labor has determined are substantially similar to those required" by the Order. Order, section 5(a). If a contractor provides a worker in one of these "substantially similar" States with a wage statement that complies with the requirements of that State, the contractor would satisfy the Order's wage-statement requirement. In the Proposed Guidance, the Department stated that two requirements do not have to be exactly the same to be "substantially similar"; they must, however, share "essential elements in common." 80 FR 30587 (quoting *Alameda Mall, L.P. v. Shoe Show, Inc.*, 649 F.3d 389, 392 (5th Cir. 2011)). The Proposed Guidance offered two options for determining whether State requirements are substantially similar to the Order's requirements.

The first proposed option identified as substantially similar those States and localities that require wage statements to have the essential elements of overtime hours or earnings, total hours, gross pay, and any additions to or deductions made from gross pay. As the Proposed Guidance noted, when overtime hours or earnings are disclosed in a wage statement, workers can identify from the face of the document whether they have been paid for overtime hours. Applying this method, the current list of Substantially Similar Wage Payment States would be Alaska, California, Connecticut, the District of Columbia, Hawaii, New York, and Oregon. *See* 80 FR 30592.

The second proposed option would have allowed wage statements to omit overtime hours or earnings, as long as the wage statements included "rate of pay," in addition to the essential elements of total hours, gross pay, and any additions to or deductions made from gross pay. The intent of this option was to allow greater flexibility while still requiring wage statements to provide enough information for a worker to calculate whether he or she has been paid in full. The Department noted that one drawback of this option was that failure to pay overtime would not be as easily detected when compared with the first option. The worker would have to complete a more difficult calculation to identify an error in pay. Applying this second method, the current list of Substantially Similar Wage Payment States would be Alaska, California, Connecticut, the District of Columbia, Hawaii, Massachusetts,

Minnesota, New York, Oregon, Pennsylvania, Texas, Vermont, Washington, and Wisconsin. *See* 80 FR 30592.

The Department requested comments regarding the two options and stated that it could also consider other combinations of essential elements or other ways to determine whether State or local requirements are substantially similar. 80 FR 30592.

Numerous employee advocates and members of Congress strongly supported the first option. These commenters observed that employers and workers benefit when workers can easily understand their pay by reviewing their wage statement. These commenters noted that wage statements also provide an objective record of compensated hours, which helps employers to more easily meet their burden of demonstrating wages paid for hours worked. National Employment Law Project (NELP), the National Women's Law Center (NWLC), and the Service Employees International Union (SEIU) thus advocated for the first option because it brings "greater . . . clarity on the face of the wage statement," making it "easier . . . for an employee to notice any errors and bring them to the attention of her employer." A comment by members of Congress favored the first option because "[d]isclosing whether workers have been paid at the overtime rate is critical to enabling workers to discern whether they have been paid fairly." While recommending the first option, SEIU and CAPAF further recommended that the first option be adopted with the modification that rate-of-pay information also be included as an essential element.

The employee advocates found the second option—which would have allowed wage statements to omit overtime hours or earnings, as long as the wage statements include the rate of pay—to lack transparency. The American Federation of State, County, and Municipal Employees (AFSCME) stated that workers "should not be required to apply a mathematical formula to determine the accuracy of wage payment." The United Food and Commercial Workers (UFCW) noted that omitting overtime hours and earnings "will impede employees' ability to recognize whether employers have failed to pay workers overtime." The second option is less transparent, according to the NWLC, because it makes "it more difficult and confusing for employees to understand their paychecks." The UBCJA stated that overtime hours or earnings are vital pieces of information that should not be omitted as such information is

"necessary to protect workers in low-wage industries who are the most likely to be exploited and the least likely to have the math skills" required to determine if the wage paid is accurate. As NELP pointed out, contractors have workers' overtime hours and earnings readily available as they are required to retain this information under the law; it would, therefore, not be burdensome to require such information on wage statements.

On the other hand, the Aerospace Industries Association (AIA) recommended that the second option be adopted, primarily because it would result in more substantially similar States and localities than would the first option—thereby reducing compliance burdens and providing greater flexibility to contractors. Associated Builders and Contractors (ABC) also believed the second option "is more in line with employers' practices and is less burdensome than the first option." Citing the paycheck-transparency provisions' alleged "significant burdens," the law firm of Ogletree Deakins encouraged the Department to adopt both options, and include a provision allowing contractors "to design their own substantially similar wage statements that will comply" with the Order. The U.S. Chamber of Commerce (the Chamber) stated that the Proposed Guidance was not clear regarding whether complying the requirement for any one of the substantially similar States (*e.g.*, the California) "means that the contractor has met the [Order's] requirement for all employees or just employees in that State (*i.e.*, California employees)." The Chamber recommended that contractors "be deemed to be in compliance with the wage statement requirements if they adopt one State's version nationwide." Finally, the National Association of Manufacturers (NAM) opposed implementation of any wage-statement requirement until the Department has provided the public an opportunity to comment on the substantially similar State and local wage statement laws the Department ultimately identifies.

After carefully reviewing the comments received regarding the two options discussed above, the Department adopts the first option for determining whether wage-statement requirements under State law are substantially similar. The list of Substantially Similar Wage Payment States now adopted in the final Guidance is: 1) Alaska, 2) California, 3) Connecticut, 4) the District of Columbia, 5) Hawaii, 6) New York, and 7) Oregon. These States and the District of Columbia require wage statements to

include the essential elements of hours worked, overtime hours, gross pay, and any itemized additions to and deductions from gross pay. The list of Substantially Similar Wage Payment States will be available on the Department's Web site at <http://www.dol.gov/fairpayandsafeworkplaces/>. *See also* FAR 52.222–60(c) (providing that the Order's wage-statement requirement is fulfilled if the contractor complies with the wage statement laws of these States and localities).

The Department agrees with employee advocates who commented that the second option—which would allow wage statements to omit overtime hours worked, as long as the wage statements include the rate of pay—is less transparent and helpful to workers. Excluding the overtime hours worked from the wage statement would require a worker to complete a more difficult computation in order to determine whether the correct wages were paid. Moreover, the Department agrees with commenters who noted that including the overtime hours in the wage statement would not be overly burdensome as contractors are already required to keep such information in their payroll records under the FLSA.

With regard to SEIU's comment that the Department should adopt the first option with the modification that the rate of pay be a required item in the wage statement, the Department declines to do so. As set forth in the final FAR rule, rate of pay is a required element of the core wage-statement obligation under the Order. Accordingly, covered workers in most States will receive wage statements that include rate-of-pay information. Only in those States and localities deemed "substantially similar" will it be permissible to provide a wage statement that does not include rate of pay. The Department believes that this accords with the definition of "substantially similar," which means only that the substantially similar laws "share essential elements" with the Order's requirement—not that they be identical. Moreover, the Department notes that four of the States included in the first option (Alaska, California, Hawaii, and New York) do already require wage statements to have the rate-of-pay information.<sup>88</sup> Thus, contractors that have workers in those States will already need to include the rate of pay in their wage statements to comply with

<sup>88</sup> For Alaska's wage-statement requirements, *see* 8 AAC 15.160(h); for California, *see* Labor Code sec. 226(a); for Hawaii, *see* HRS sec. 387–6(c); and for New York, *see* NY Labor Law, art. 6, sec. 195(3).



State law—regardless of the Department’s definition in this Guidance.

The Department disagrees with comments by Ogletree Deakins encouraging the Department to adopt both options. Adopting both options would mean effectively adopting the second option, which the Department has deemed to be not as transparent. The Department also declines to allow contractors “to design their own substantially similar wage statements that will comply” with the Order, as this would likely result in a variety of wage-statement content, and the provision would then be difficult to administer. Moreover, the Order does not give the Department authority to allow contractors to design their own wage statements for purposes of satisfying the Order’s “substantially similar” criteria; thus, this specific suggestion is outside the scope of the final Guidance.

The Chamber requested clarification regarding whether complying with a State requirement (e.g., the California State requirement) means that the contractor has met the Federal requirement for all employees or just employees in that State. The Department believes that as long as the contractor complies with the wage-statement requirements of any of the Substantially Similar Wage Payment States, the contractor will be in compliance with the final rule. For example, if a contractor has workers in California and Nevada, the contractor will comply with the final FAR rule if it provides to workers in both States the same wage statements as long as the statements adhere to California State law.<sup>89</sup> In other words, the contractor would be in compliance with the final rule if it adopts the wage-statement requirements of any particular State or locality in the list of Substantially Similar Wage Payment States in which the contractor has workers, and applies this model for its workers elsewhere.

The Department disagrees with NAM’s comment opposing implementation of any wage-statement requirement until the Department has specifically identified “the so-called ‘substantially equivalent’ state and local laws” and provided an opportunity to comment. This comment may have conflated (1) the Department’s duty under section 5(a) of the Order to identify State and local wage-statement laws that are “substantially similar” to

the Order’s wage-statement requirement with (2) the Department’s duty under section 2(a) of the Order to identify the State laws that are “equivalent” to the 14 Federal labor laws and Executive orders for which violations must be disclosed.

Finally, the Department received many substantive comments related to the two options discussing whether certain State and local requirements are substantially similar to the Order’s wage-statement requirement. The Department developed this final Guidance based on a careful review of the comments received.

#### 7. Request To Delay Effective Date

One employer advocate suggested that the Department and the FAR Council allow Federal contractors time to comply with the wage-statement provisions. The commenter noted that, in the short term, contractors will have to devise manual wage statements to comply with the Order until automated systems are able to generate compliant wage statements. Citing the Department’s Home Care rule regarding the application of the FLSA to domestic service, see 78 FR 60454 (Oct. 1, 2013), which had an effective date 15 months after the publication of the final rule, the commenter recommended that contractors be provided at least 12 to 15 months within which to comply with the wage-statement requirement.

The FAR Council Rule provides that the paycheck transparency requirements are effective on January 1, 2017. See FAR 22.2007(d). The Department believes that this delay provides a reasonable length of time and is sufficient for contractors to update their systems to comply with the wage-statement provision. Further delaying the effective date of the wage-statement provision is not warranted. As discussed above, the Order’s wage-statement requirement is deemed fulfilled where a contractor complies with a State law that the Department has determined to be “substantially similar.” And, in States with wage-statement laws that are not substantially similar to the Order’s requirements, contractors will need only to supplement the wage statements already provided pursuant to State law in order to conform to the Order’s requirements.

Moreover, the Department’s enforcement experience has shown that many employers, including Federal contractors, in the small minority of States that do not require wage statements have opted to provide wage statements to their workers as part of their general payroll practice. A contractor in these States may choose

either to include in the wage statements all of the information required by the Order, or follow the wage-statement requirements of any of the Substantially Similar Wage Payment States in which it has employees. Finally, as discussed above, all of the information required to be included in the wage statement consists of items that contractors already maintain as part of their normal recordkeeping obligations and general bookkeeping or payroll practices. The provisions of the wage-statement requirement, in large part, require contractors only to fine-tune the wage statements they already provide to workers to include any additional required information.

#### 8. FLSA Exempt-Status Notification

According to the Order, the wage statement provided to workers who are exempt from the overtime pay provisions of the FLSA “need not include a record of hours worked if the contractor informs the individuals of their exempt status.” Order, section 5(a). Because such workers do not have to be paid overtime under the FLSA, hours-worked information need not be included in the wage statement. See 80 FR 30592. Thus, if the contractor determines that a worker is exempt from overtime pay under the FLSA and intends to not include the worker’s hours-worked information on the wage statement provided to the worker, notification of the worker’s exempt status must be provided to the worker first.

The Department suggested in its Proposed Guidance that in order to exclude the hours-worked information in the wage statement, the contractor would have to provide a written notice to the worker stating that the worker is exempt from the FLSA’s overtime pay requirements; oral notice would not be not sufficient. 80 FR 30592. The final FAR rule provides that such notices of exempt status must be in writing. FAR 52.222–60. The Department further proposed that if the contractor regularly provides documents to workers electronically, the document informing the worker of his or her exempt status may also be provided electronically if the worker can access it through a computer, device, system, or network provided or made available by the contractor. 80 FR 30592. The FAR Council adopted this proposal regarding electronic notice in its final rule. See FAR 52.222–60. Finally, the proposals suggested that if a significant portion of the contractor’s workforce is not fluent in English, the document provided notifying the worker of exempt status must also be in the language(s) other

<sup>89</sup> California is among the States included in the list of Substantially Similar Wage Payment States, while Nevada requires minimal information in the wage statement provided to workers.

than English in which the significant portion(s) of the workforce is fluent.<sup>90</sup> See 80 FR 30592. The FAR Council adopted this translation requirement in its final rule. See FAR 52.222–60.

The Department received comments regarding the following issues related to FLSA exempt status: Type and frequency of the notice, differing interpretations by the courts regarding exemptions under the FLSA, and phased-in implementation.

#### a. Type and Frequency of the Notice

One labor union commented that the contractor should be excused from recording the overtime hours worked in the wage statement only if the worker is correctly classified as exempt from the FLSA's overtime pay requirements. The commenter also recommended that workers should be informed of their exempt status on each wage statement. An employer-advocate requested clarification on whether the exempt-status notice should be provided once (e.g., in a written offer of employment) or on a recurring basis (e.g., on each wage statement).

With regard to the labor union's comment on the importance of correctly determining the exempt status of a worker under the FLSA, the Department agrees that employers should correctly classify their workers, but does not change the Guidance in the manner suggested. An employer who claims an exemption from the FLSA is responsible for ensuring that the exemption applies. See *Donovan v. Nekton, Inc.*, 703 F.2d 1148, 1151 (9th Cir. 1983). However, the fact that an employer provides the exempt-status notice to a worker does not mean that the worker is necessarily classified correctly. The Department will not consider the notice provided by the contractor to the worker as determinative of or even relevant to the worker's exempt status under the FLSA. Therefore, the FAR has clarified that a contractor may not in its exempt-status notice to a worker indicate or suggest that the Department or the courts agree with the contractor's determination that the worker is exempt. See 52.222–60(b)(3). The Department has modified the Guidance to reflect this clarification.

With regard to the type of notice to be provided to the worker and how often it should be provided, the final FAR rule requires that contractors provide notice to workers one time before the worker performs any work under a

covered contract, or in the worker's first wage statement under the contract. See 52.222–60(b)(3). After carefully reviewing the comments received, the Department believes that this requirement is sufficient. If during performance of the contract, the contractor determines that the worker's status has changed from non-exempt to exempt (for example, because of a change in the worker's pay, duties, or both), it must provide notice to the worker either (a) prior to providing a wage statement without hours worked information or (b) in the first wage statement after the change. See *id.* The notice must be in writing; oral notice is not sufficient. See *id.* The notice can be a stand-alone document or be included in the offer letter, employment contract, position description, or wage statement provided to the worker. See *id.*

The Department does not believe it is necessary to require a contractor to include the exempt-status information on each wage statement. Although it is permissible to provide notice on each wage statement, it is also permissible to provide the notice one time before any work on the covered contract is performed or one time upon a change from non-exempt to exempt status during the performance of the contract. If the contractor provides such a one-time notice, there is no need to provide notice in each wage statement. If the worker's status later changes from exempt to non-exempt, no notice of the change is required under the Order, but the contractor must thereafter include hours worked information on the wage statements provided to the worker.

#### b. Differing Interpretations by the Courts of an Exemption Under the FLSA

One industry commenter stated that it would not be prudent to require employers to report on the exempt or non-exempt status of workers where there is disagreement among the courts on who is and who is not exempt under the FLSA. The commenter noted that, for example, while two Circuit Courts have held that service advisors are exempt "salesmen" under section 13(b)(10)(A) of the FLSA, the Ninth Circuit disagreed and found that the exemption is inapplicable to service advisors. See, e.g., *Navarro v. Encino Motorcars, LLC*, 780 F.3d 1267 (9th Cir. 2015).<sup>91</sup>

The Department understands that some court decisions regarding the exemption status of certain workers

under the FLSA may not be fully consistent. The Department, however, does not find this to be a persuasive reason to relieve contractors from providing the exempt-status notice to employees. Regardless of any inconsistency in court decisions, contractors already must make decisions about whether to classify their employees as exempt or non-exempt under the FLSA in order to determine whether to pay them overtime. Such determinations are based on the facts of each particular situation, the statute, relevant regulations, guidance from the Department, and advice from counsel. In addition, in making these determinations, contractors already must consider any inconsistent court decisions.

The Order does not change this status quo. Under the Order, the contractor retains the authority and responsibility to determine whether to claim an exemption under the FLSA. All that is required under the Order is notice to the workers of the status that the employer has already determined. And such notice is only required if the employer wishes to provide workers with a wage statement that does not contain the worker's hours worked.

#### c. Request To Delay Implementation of the Exempt-Status Notice

One industry association suggested that compliance with the exempt-status notice requirements be postponed until the Department has finalized its proposal to update the regulations defining the "white collar" exemptions under section 13(a)(1) of the FLSA. See 80 FR 38515 (July 6, 2015); <http://www.dol.gov/whd/overtime/NPRM2015/>. The white-collar exemptions define which executive, administrative, and professional employees are exempt from the FLSA's minimum wage and overtime pay protections. See 29 CFR part 541.

The Department believes that such a delay is unnecessary. The Department published its final rule updating the white-collar exemption regulations on May 23, 2016, see 81 FR 32391, and all employers covered by the FLSA will continue to make determinations of FLSA exempt status both before and after the update to the regulations becomes effective on December 1, 2016, see *id.* The Order does not affect this continuing obligation. The only new obligation under the Order is to provide notice to employees of the determination that the contractor has already made—and only if the contractor wishes to provide employees with a wage statement without a record of hours worked. Because contractors

<sup>90</sup> Translation requirements are also discussed below in the context of the independent contractor notice, in section VII(B)(5) of the section-by-section analysis.

<sup>91</sup> The Supreme Court has since vacated the Ninth Circuit's decision and remanded the case for further proceedings. See [http://www.supremecourt.gov/opinions/15pdf/15-415\\_mhho.pdf](http://www.supremecourt.gov/opinions/15pdf/15-415_mhho.pdf).

will need to make exempt-status determinations regardless of any requirements under the Order, the Department finds the argument that the Order's requirements be delayed for this reason to be unwarranted.<sup>92</sup>

#### B. Independent Contractor Notice

Section 5(b) of the Order states that if a contractor treats an individual performing work under a covered contract as an independent contractor, then the contractor must provide "a document informing the individual of this [independent contractor] status." Order, section 5(b). Contractors have to incorporate this same provision into covered subcontracts. See FAR 52.222-60(f).

The proposed FAR Council rule specified that the notice informing the individual of his or her independent contractor status must be provided before the individual performs any work on the contract. 80 FR 30572. As the Department noted in the Proposed Guidance, the notice must be in writing and provided separately from any independent contractor agreement entered into between the contractor and the individual. See 80 FR 30593. The Proposed Guidance also noted that if the contractor regularly provides documents to its workers electronically, the notice may also be provided electronically if the worker can access it via a computer, device, system, or network provided or made available by the contractor. *Id.*

The Proposed Guidance further stated that the provision of the notice to a worker informing the worker that he or she is an independent contractor does not mean that the worker is correctly classified as an independent contractor under the applicable laws. 80 FR 30593. The determination of whether a worker is an independent contractor under a particular law remains governed by that law's definition of "employee" and the law's standards for determining which workers are independent contractors and not employees. See *id.*

The Department received comments from several unions and other employee advocates that were supportive of the Order's independent contractor notice provisions. In contrast, several industry advocates commented that aspects of the independent contractor notice requirement need to be clarified. The Department has organized the comments in the corresponding sections below.

#### 1. Clarifying the Information in the Notice

The Department received comments requesting clarification of the information that should be included in the independent contractor notice. Several employee advocates recommended that the document also notify the worker that, as an independent contractor, he or she is not entitled to overtime pay under the FLSA, is not covered by worker's compensation or unemployment insurance, and is responsible for the payment of relevant employment taxes.

One employee advocate recommended that the notice include a statement notifying the worker that the contractor's designation of a worker as an independent contractor does not mean that the worker is correctly classified as an independent contractor under the applicable law. Several commenters suggested that the notice also include information regarding which agency to contact if the worker has questions about being designated as an independent contractor or needs other types of assistance. One labor union also recommended that the Department establish a toll-free hotline that provides more information on misclassification of employees as independent contractors or tools to challenge the independent contractor classification.

One industry commenter suggested that the FAR Council or the Department publish a model independent contractor notice with recommended language. Another industry commenter requested more detailed guidance on what the independent contractor notice should include.

As discussed above, section 5(b) of the Order requires that the worker be informed in writing by the contractor if the worker is to be classified as an independent contractor and not an employee. Thus, the final FAR rule clarifies that the notice must be in writing and provided separately from any independent contractor agreement entered into between the contractor and the individual. See FAR 52.222-60(d)(1).

The Order, however, does not require the provision of the additional information suggested by commenters. The Department believes that notifying the worker of his or her status as an independent contractor satisfies the Order's requirement. Providing such notice enables workers to evaluate their status as independent contractors and raise any concerns. The objective is to minimize disruptions to contract performance and resolve pay issues

early and efficiently. If the worker has questions or concerns regarding the particular determination, then he or she can raise such questions with the contractor and/or contact the appropriate government agency for more information or assistance.

As stated above, the fact that a contractor has provided a worker with notice that he or she is an independent contractor does not mean that the worker is correctly classified as an independent contractor. A contractor may not in its notice to a worker indicate or suggest that any enforcement agency or court agrees with the contractor's determination that the worker is an independent contractor. See FAR 52.222-60(d)(1). The Department will not consider the notice when determining whether a worker is an independent contractor or employee under the laws that it enforces.

With regard to comments recommending that the Department establish a hotline that provides information on issues involving misclassification of employees as independent contractors, the relevant agencies within the Department already have toll-free helplines that workers and contractors can access to obtain this type of information and for general assistance. Members of the public, for example, can call the Wage and Hour Division's toll-free helpline at 1(866) 4US-WAGE (487-9243), the Occupational Safety and Health Administration at 1(800) 321-OSHA (6742), the Office of Federal Contract Compliance Programs at 1(800) 397-6251. The National Labor Relations Board can be reached at 1(866) 667-NLRB, and the Equal Employment Opportunity Commission can be reached at 1(800) 669-4000. Moreover, the enforcement agencies' respective Web sites contain helpful information regarding employee misclassification.

With regard to comments requesting a sample independent contractor notice, the Department does not believe it is necessary to create a template notice. The Department expects that any notice will explicitly inform the worker that the contractor has made a decision to classify the workers as an independent contractor.

#### 2. Independent Contractor Determination

Several industry commenters suggested that the Department clarify which statute should provide the basis for determining independent-contractor status for purposes of the Order's requirement. These commenters noted that the Proposed Guidance stated that the determination of whether a worker

<sup>92</sup> As discussed in section VII(A)(7) of the Guidance, the final FAR rule delays the effective date of the Order's paycheck transparency provisions generally until January 1, 2017.

is an independent contractor or employee under a particular law remains governed by that law's definition of "employee." See 80 FR 30593. The commenters stated that they are uncertain as to what definition should be used in determining whether a worker is an employee or independent contractor.

The Department does not believe that it is necessary or appropriate to pick one specific definition of "employee" for the Order's independent-contractor notice requirement. Employers already make a determination of whether a worker is an employee (or an independent contractor) whenever they hire a worker. The Order does not affect this responsibility; it only requires the contractor to provide the worker with notice of the determination that the contractor has made. If the contractor has determined that the worker is an independent contractor, then the employer must provide the notice.

### 3. Frequency of the Independent Contractor Notice

The Department received comments regarding the number of times an individual who is classified as an independent contractor and engaged to perform work on several covered contracts should receive notice of his or her independent contractor status. Two industry commenters, for example, noted that an independent contractor who provides services on multiple covered contracts on an intermittent basis could receive dozens of identical notices, resulting in redundancy and inefficiencies. Other industry commenters believed that providing multiple notices for the same work performed on different covered contracts is burdensome and unnecessary. Two industry commenters suggested that an independent contractor agreement between the relevant parties should satisfy the Order's independent contractor notice requirement.

The final FAR rule provides that the notice informing the individual of his or her independent contractor status must be provided at the time that an independent contractor relationship is established with the individual or before he or she performs any work under the contract. FAR 52.222-60(d)(1). The FAR Council has also clarified in its final rule that contractors must provide the independent contractor notice to the worker for each covered contract on which the individual is engaged to perform work as an independent contractor. See *id.* The Guidance reflects this clarification. The Department agrees that there may

be circumstances where a worker who performs work on more than one covered contract would receive more than one independent contractor notice. The Department, however, believes that because the determination of independent contractor status is based on the circumstances of each particular case, it is reasonable to require that the notice be provided on a contract-by-contract basis even where the worker is engaged to perform the same type of work. It is certainly possible that the facts may change on any of the covered contracts such that the work performed requires a different status determination. Moreover, if the contractor determines that a worker's status while performing work on a covered contract changes from employee to independent contractor (because the nature of the relationship between the worker and contractor changes), the contractor must provide the worker with notice of independent contractor status before the worker performs any work under the contract as an independent contractor. See *id.* If a contractor provides a worker on a covered contract with an independent contractor notice and later determines that the worker's status under that contract has changed to that of an employee, no notice of the change is required under the Order.

### 4. Workers Employed by Staffing Agencies

The Department received several comments regarding contractors that use temporary workers employed by staffing agencies and whether these contractors must provide such workers with a document notifying them that they are independent contractors. NAM believed that in such cases, "temporary workers are neither independent contractors nor employees of the contractor." Several industry commenters suggested that the final Guidance clarify that contractors would not be required to provide notice of independent contractor status to temporary workers who are employees of a staffing agency or similar entity, but not of the contractor. Some of these commenters also recommended that the independent contractor status notice be given only to those workers to whom the contractor provides an IRS Form 1099.

In situations where contractors use temporary workers employed by staffing agencies to perform work on Federal contracts, the contract with the staffing agency may be a covered subcontract under the Order. Section 5 of the Order requires that the independent contractor status notice requirement be incorporated into subcontracts of

\$500,000 or more. See Order, section 5(a). If the contract with the staffing agency is a covered subcontract, and the staffing agency treats the workers as employees, then no notices would be required. If the contract with the staffing agency is a covered subcontract, and the staffing agency treats the workers as independent contractors, then the staffing agency (not the contractor) is required to provide the workers with notice of their independent contractor status.<sup>93</sup>

The Department disagrees with comments suggesting that the contractor should provide independent contractor notices only to those workers to whom the contractor already provides an IRS Form 1099. Employers use a Form 1099-MISC to report, among other items, "payments made in the course of a trade or business to a person who is not an employee or to an unincorporated business."<sup>94</sup> The Order does not limit the requirement to provide the independent contractor notice to workers who receive a Form 1099-MISC. To the extent the contractor has classified an individual as an independent contractor for Federal employment tax purposes and provides the individual a Form 1099-MISC, the contractor must provide the individual with the independent-contractor status notice. The Department, however, declines to interpret the Order as limiting the universe of workers who should receive an independent contractor notice to only those workers to whom the contractor already provides a Form 1099.

### 5. Translation Requirements

The FAR Council's proposed regulations required that if a significant portion of the contractor's workforce is not fluent in English, the document notifying a worker of the contractor's determination that the worker is an independent contractor, and the wage statements to be provided to the worker, must also be in the language(s) other than English in which the significant portion of the workforce is "more

<sup>93</sup> When using a staffing agency, a contractor should consider whether it jointly employs the workers under applicable laws. The Department recently issued guidance under the FLSA and MSPA for determining joint employment. See "Joint employment under the Fair Labor Standards Act and the Migrant and Seasonal Agricultural Worker Protection Act," [https://www.dol.gov/whd/flsa/Joint\\_Employment\\_AI.pdf](https://www.dol.gov/whd/flsa/Joint_Employment_AI.pdf).

<sup>94</sup> See "Form 1099-MISC & Independent Contractors," [https://www.irs.gov/Help-&-Resources/Tools-&-FAQs/FAQs-for-Individuals/Frequently-Asked-Tax-Questions-&-Answers/Small-Business,-Self-Employed,-Other-Business/Form-1099-MISC-&-Independent-Contractors/Form-1099-MISC-&-Independent-Contractors](https://www.irs.gov/Help-&Resources/Tools-&-FAQs/FAQs-for-Individuals/Frequently-Asked-Tax-Questions-&-Answers/Small-Business,-Self-Employed,-Other-Business/Form-1099-MISC-&-Independent-Contractors/Form-1099-MISC-&-Independent-Contractors) (last visited July 22, 2016).

familiar.” 80 FR 30572. The FAR Council’s final rule provides a translation requirement. FAR 52.222–60(e)(1).

The Department received comments requesting clarification regarding what would constitute a “significant portion” of the workforce sufficient to trigger the translation requirement. One industry commenter stated that the final Guidance should set a specific threshold. Another stated that the translation requirement is unnecessary and should be removed. One labor union commenter recommended that the term “significant portion” of the workforce be defined as 10 percent or more of the workforce under the covered contract.

One industry commenter, AGC, posited a situation where there are various foreign languages spoken in the workplace. AGC requested clarification regarding whether the contractor would be required to provide the wage statement and the independent contractor notice to workers in every language that is spoken by workers not fluent in English. AGC suggested that the wage-statement translation requirement be revised such that the contractor need only provide the wage statement in English and “in each other language in which a significant portion of the workforce is fluent.”

With regard to translating the independent contractor notice, AGC recommended that this requirement apply only when the company is aware that the worker is not fluent in English. Another industry commenter also stated that it would not be sensible to require contractors to provide notice in Spanish to an independent contractor who only speaks English simply because a significant portion of the contractor’s workforce is fluent in Spanish. AGC further advocated that, instead of including the complete translation in each wage statement or independent contractor notice for each worker, contractors should be allowed to provide only a Web site address where the translations are posted.

After carefully reviewing the comments, the Department declines to provide a specific threshold interpreting what would constitute a “significant portion” of the workforce sufficient to trigger the translation requirement. The Department notes that this requirement is similar to regulatory requirements implementing two of the Labor Laws, the FMLA, 29 CFR 825.300(a)(4), and MSPA, 29 CFR 500.78. The term “significant portion” has not been defined under these regulations, and the lack of a definition or bright-line test has not prevented employers from

complying with the requirement. For these reasons, the term is not defined in the final Guidance.

The Department agrees with AGC’s suggestion about workplaces where multiple languages are spoken. Where a significant portion of the workforce is not fluent in English, the Department believes that the contractor should provide independent-contractor notices to workers in each language in which a significant portion of the workforce is fluent. However, the Department does not agree with AGC’s suggestion that it will be sufficient in all cases to provide a Web site address where the translated notice would be posted. Where workers are not fluent in English, providing a link to a Web site for the translation would be ineffective at providing the required notice.

### **VIII. Effective Date and Phase-in of Requirements**

The effective date of the FAR Council’s final rule is October 25, 2016. The Department received various comments related to the effective date of the Order’s requirements. These commenters expressed two general concerns: First, about the burden of the disclosure requirements and the need for time to implement the necessary systems to track Labor Law violations; and second, about fairness related to the consideration of Labor Law violations that occurred before the effective date of the FAR rule. As discussed below, the FAR Council is phasing in the effective date of the disclosure requirements to address these concerns. The Department has created a separate section of the Guidance, section VIII, that contains a summary of the relevant provisions.

#### **Phase-in of Disclosure Requirements**

Multiple industry commenters expressed concern that contractors would not have time to be prepared for the implementation of the FAR rule unless the effective date of the rule is delayed. One commenter specifically expressed concern that existing contractor staff are not equipped to gather and report all violations. Another expressed concern specifically about the difficulty for prime contractors of making responsibility determinations for their subcontractors, and requested that subcontractor disclosure requirements be phased in over the course of 5 years.

In response to these concerns, the FAR Council has staggered the phase in of the Order’s core disclosure requirements. From the October 25, 2016 effective date to April 24, 2017, the Order’s prime-contractor disclosure requirements will apply only to

solicitations with an estimated value of \$50 million or more, and resultant contracts. FAR 22.2007(a) and (c)(1). After April 24, 2017, the prime-contractor disclosure requirements will apply to all solicitations greater than \$500,000—which is the amount specified in the Order—and resultant contracts. *Id.* 22.2007(a) and (c)(2); Order, section 2(a). This also applies to the commercial items equivalent for prime contractors, at FAR 52.212–3(s). The subcontractor disclosure requirements are further staggered; they are not effective for the first year of operation of the FAR rule implementing the Order. While the rule overall is effective on October 25, 2016, the subcontractor disclosure requirements are not effective until October 25, 2017. *See* FAR 22.2007(b). This phasing in of the requirements is discussed in the new “Effective date and phase-in of requirements” section of the Guidance.

#### **“Retroactivity” of Disclosure Requirement**

With regard to the concern about fairness of disclosing violations prior to the effective date of the FAR rule, a number of commenters expressed concern that the 3-year disclosure period will require contractors to “retroactively” disclose Labor Law violations during the rule’s first years of operation. For example, the HR Policy Association argued that it is “fundamentally unfair” to require contractors to disclose violations Labor Law decisions that were rendered prior to the effective date of the Order and that any disclosure “should be only prospective in nature.” The Section of Public Contract Law of the American Bar Association (PCL Section) recommended that the disclosure requirement be phased-in and that only decisions after the disclosure requirement’s effective date be disclosed. According to the PCL Section, a phase-in of the 3-year disclosure period would allow “contractors the opportunity to put systems in place” and would give “the federal procurement process time to adapt[.]”

The Department agrees that the requirement to look back 3 years when disclosing Labor Law decisions should be phased-in, and the FAR Council’s final rule provides for such a phase-in. *See* FAR 55.222–57(c)(1)–(2), 55.222–58(b). This 3-year disclosure period is being phased in so that contractors will not disclose any decisions that were rendered against them prior to October 25, 2015. In the language of the FAR, disclosures of Labor Law violations must be made for decisions rendered

during “the period beginning on October 25, 2015 to the date of the offer, or for 3 years preceding the date of the offer, whichever period is shorter.” *Id.* 55.222–57(c)(1)–(2), 55.222–58(b). Thus, full implementation of the 3-year disclosure period will not be reached until October 25, 2018. As a result of this phase-in, contractors will not disclose Labor Law decisions that were rendered against them more than 1 year prior to the effective date of the FAR rule.<sup>95</sup>

#### Phased Implementation of Equivalent State Laws

The Order directs the Department to define the State laws that are equivalent to the 14 identified Federal labor laws and Executive orders. Order, section 2(a)(i)(O). Contractors are required to disclose violations of these equivalent State laws, in addition to the 14 Federal laws and orders. *See id.* In the Proposed Guidance, the Department proposed that OSHA-approved State Plans should be considered equivalent State laws for purposes of the Order, and stated that the Department would identify additional equivalent State laws in a second guidance to be published in the **Federal Register** at a later date. *See* 80 FR 30574, 30579.

Several commenters expressed concern with this proposed phased implementation and argued that the Guidance is incomplete without identification of all equivalent State laws. A number of them argued that without knowing all of the equivalent State laws, employers are unable to estimate the costs associated with implementing the Order, including the disclosure requirements. One commenter asserted that by failing to identify equivalent State laws, the Proposed Guidance ignored the costs of tracking and disclosing violations of potentially hundreds of additional laws and the potential costs of entering into labor compliance agreements with respect to those additional laws. Some industry commenters called for a delay of the implementation of the Order’s requirements until guidance identifying the equivalent State laws is issued. NAM requested that the second guidance not be issued at all because the requirement will be “unworkable.” Several employee advocates, in contrast,

encouraged the Department to issue the second guidance “swiftly” before the end of 2015.

The Department has considered these comments and declines to modify the Guidance as suggested. The final Guidance reiterates that the Department will identify the equivalent State laws in addition to OSHA-approved State plans in a second guidance published in the **Federal Register** at a later date. The Department notes that the future guidance and accompanying FAR rulemaking on equivalent State laws will themselves be subject to notice and comment, and the rulemaking will address any additional economic burden resulting from the addition of equivalent State laws to the list of laws for which violations must be disclosed.

While the Department believes that contractors may incur some limited costs when adjusting compliance tracking systems to track violations of any newly-identified State laws, the Department believes such costs will be de minimis. In contrast, delaying implementation of the entirety of the Order’s disclosure requirements until the subsequent rulemaking would have negative consequences on economy and efficiency of Federal contracting by allowing contractors who have unsatisfactory records of compliance with the 14 Federal labor laws identified in the Order, and OSHA-approved State Plans, to secure new contracts in the interim.

#### Paycheck Transparency Provisions

The final FAR rule implementing the paycheck transparency provisions specifies that contracting officers will be required to insert the paycheck transparency contract clause into covered contracts beginning on January 1, 2017. FAR 22.2007(d). This delayed effective date is included in the final Guidance.

### IX. Other Comments

#### A. Public Availability of Disclosures and Assessment Information

Concerns about the accuracy of the information that contractors will disclose were the basis of a number of requests from commenters that the information disclosed be made publicly available. Many unions and worker-advocacy groups suggested that the information disclosed by contractors pursuant to the Order’s requirements be made available in a database or Web page that is accessible to the public and easy to use. Commenters argued that making this information public will help ensure that the contractors disclose their entire legal record and interested

parties are able to spot incomplete or inaccurate disclosures.<sup>96</sup> For some of these commenters, public disclosure requirements are essential to effective third-party involvement, which in their view is the most effective means to capture contractor misrepresentations or ongoing violations. Several commenters stated that making information publicly available is key in ensuring transparency in the process. A group of labor and employment lawyers stated that

[r]esponsible contractors should welcome greater transparency and accountability because it will ensure that they do not face unfair competition from companies that cut corners by cheating their workers or ignoring important health-and-safety obligations.<sup>97</sup>

In contrast, industry commenters believed that the disclosure requirements are already too public. They suggested that protections be put in place to protect confidential and proprietary information in disclosures made by contractors pursuant to the Order’s requirements. Several also suggested that any information disclosed by contractors and made publicly available should be redacted to remove any personally identifiable information. A few commenters were concerned that the release of information disclosed by contractors would have a negative effect on a contractor’s business and reputation, especially if there are errors in the data presented, and as such, these commenters requested that the Department or the FAR establish a means of correcting information made publicly available.

The Department believes that the final FAR rule provides a reasonable balance between these two opposing views. The final FAR rule distinguishes between the required Labor Law decision disclosures and the optional additional relevant information that a contractor can submit to demonstrate its responsibility. The required initial representation and disclosure of limited information about each Labor Law

<sup>96</sup> Similarly, some of these commenters expressed concern that OSHA’s public database of violations does not include, or does not include enough information about, violations of section 11(c) of the OSH Act. The Department notes that OSHA’s database does include information about certain 11(c) cases, and it does include information from some OSHA-approved State Plans about their retaliation cases.

<sup>97</sup> One commenter recommended that a list of the companies undergoing responsibility reviews be published and updated by the Department. Another commenter proposed that each contracting agency track and annually report to the Department specific information regarding its contractors’ compliance with the Labor Laws. However, these recommendations are beyond the Department’s authority under the Order.

<sup>95</sup> As discussed above, the date on which the Labor Law decision was rendered—not the date of the underlying conduct—controls whether a decision must be disclosed. Therefore, even with the phase in of the disclosure requirements, a contractor may still need to disclose Labor Law decisions for which the underlying conduct occurred more than 1 year prior to the effective date of the FAR rule.

decision is information that will be publicly available in the Federal Awardee Performance and Integrity Information System (FAPIIS). FAR 22.2004–2(b)(1)(i); *id.* 52.222–57(f). Similarly, where a contractor enters into a labor compliance agreement, the entry will be noted in FAPIIS by the ALCA and the fact that a labor compliance agreement has been agreed to will be public information. *Id.* 22.2004–2(b)(9). The optional additional information that a contractor provides, however, will only be made public if the contractor determines that it wants the information to be made public. *Id.* 22.2004–2(b)(1)(ii). The Department believes that this strikes an appropriate balance; it allows access to Labor Law decision information so that the public can assist in assuring full disclosure, while protecting more sensitive information about internal business practices.

With regard to the comments about personally-identifiable information and other confidential information, the Department adds that information disclosed by contractors pursuant to the Order will—like any other information submitted during the procurement process—be subject to the protections of the Freedom of Information Act (FOIA) and the Privacy Act. The Department does not believe that the information submitted should be made any more or less publicly available than other information already disclosed by contractors as part of the contracting process and responsibility determinations. Although the Order's disclosure requirements may be new, the disclosed information fits into an existing process for making responsibility determinations, and the public availability of information disclosed pursuant to the Order should be the same as the public availability of information that already must be disclosed—which includes information about violations of other laws, organizational capacity, financing, and other potentially sensitive or confidential information.

#### B. Participation of Third-Parties

Many employee advocacy groups urged the Department to provide more specific guidance about the participation of interested third-parties in the processes required by the Order. Several of these commenters suggested that the Department provide further specificity about how third-parties should submit information about a contractor's Labor Law violations to ALCAs for consideration when assessing a contractor's record. The commenters identified parties that might provide information as: The

general public, worker representatives, community groups, labor-management cooperative committees, other contractors, worker advocate groups, and others. One commenter, NABTU, warned that competitors should not be considered “stakeholders” in this process, “to avoid contractors using the responsibility determination process to undercut one another.”

The Department agrees that the participation of interested third-parties is an important element of the effective implementation of the Order. The Order contemplates that information regarding Labor Law violations will be “obtained through other sources.” Order, section 2(b)(ii). The Department interprets this term to include any other relevant source—including employees, worker representatives, community groups, and the public. The Department finds no reason to exclude competitors from this process. Under longstanding Federal procurement rules, “[c]ontracting officers are ‘generally given wide discretion’ in making responsibility determinations and in determining the amount of information that is required to make a responsibility determination.” *Impresa Costruzioni Geom. Domenico Garufi v. United States*, 238 F.3d 1324, 1334–35 (Fed. Cir. 2001) (quotations marks and citations omitted). The Department does not believe that the Order intended to limit the sources of information that contracting officers may consider—either during the preaward or postaward process.

If an interested third party has information about relevant Labor Law decisions that it believes has not been properly disclosed by a contractor, the interested party is encouraged to provide that information to the relevant ALCA. The Department will maintain a list of ALCAs, including the Department's ALCA, and their contact information on its Web site at <http://www.dol.gov/fairpayandsafeworkplaces>. Relevant third-party information can further inform ALCAs and help them perform duties such as encouraging prospective contractors with serious, repeated, willful, and/or pervasive violations to work with enforcement agencies to address compliance problems; providing input to past performance evaluations; and notifying agency suspending and debarring officials when appropriate. However, the Department notes, the amount of information given out to the public about ongoing procurements is limited and controlled, *see* Procurement Integrity Act, 41 U.S.C. Chapter 21, and therefore contracting officers cannot contact third parties during an ongoing

procurement to solicit information about a prospective contractor.

Numerous worker-advocacy organizations also suggested that ALCAs and contracting officers should be required to consult with worker representatives during negotiation of a labor compliance agreement. These commenters observed that employees have direct knowledge of working conditions, and therefore that they and their representatives can provide useful input about what remedial measures would be most effective and should be included in a labor compliance agreement. One worker advocacy organization proposed that labor compliance agreements should contain a process for contracting officers to receive third-party complaints about grievances and Labor Law violations, monitoring arrangements, or labor compliance agreements. Several labor organizations commented that employees and their representatives should be able to report compliance problems to the ALCA or the Department with protections against retaliation.

The Department declines to modify the Guidance to specifically require the involvement of worker representatives in the negotiation of labor compliance agreements. As stated above, the FAR rule contemplates that enforcement agencies—not ALCAs or contracting officers—will negotiate labor compliance agreements with contractors. Therefore, the enforcement agencies will decide, based on their policies and procedures, if they will consult with or otherwise involve third parties during negotiations of labor compliance agreements.

The same is true of methods for third parties to submit information about adherence to a labor compliance agreement. As discussed above in section III(C) of this section-by-section analysis, enforcement agencies will determine the terms of each labor compliance agreement on a case-by-case basis, taking into consideration the totality of the circumstances. Many enhanced compliance agreements and suspension-and-debarment administrative agreements contain auditing, monitoring, and whistleblower protection mechanisms that are intended to encourage employees and others to provide information about adherence to the agreement. Enforcement agencies may include these types of mechanisms in labor compliance agreements, and may provide information about adherence to agreements to the relevant ALCAs. The final FAR rule requires an ALCA to consult with the Department as needed

when verifying whether the contractor is meeting the terms of the agreement, *see* FAR 22.2004–3(b), through which any information that enforcement agencies have received from third parties may be provided to the ALCA. Conversely, if the ALCA has received information from third parties, he or she may provide that information to the relevant enforcement agency.

### C. Anti-Retaliation and Whistleblower Protections for Reporting Information

Several employee-advocacy organizations expressed concerns that contractor employees who report Labor Law violations to ALCAs may be subject to retaliation and suggested that workers of contractors receive notice about anti-retaliation and whistleblower protections. The Northern California Basic Crafts Alliance further requested that a notice of Federal whistleblower protections be included in all documents that public officials are required to complete under the Order and its accompanying regulations. This commenter also suggested that government workers tasked with carrying out the Order be provided such notice.

The Department appreciates the serious concern raised by these commenters, but declines to make any changes to the Guidance. The Order does not provide for additional protections for whistleblowers. The Department notes, however, that Federal law already provides whistleblower protections to contractor employees who report fraud or other violations of the law related to Federal contracts. *See, e.g.*, 31 U.S.C. 3730(h) (the False Claims Act), 10 U.S.C. 2409 (protecting Department of Defense and NASA whistleblowers from retaliation). Whistleblower protection for contractor employees is also covered in FAR subpart 3.9. With regard to government employees, the Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002 (known as the No Fear Act) requires that agencies provide annual notice to Federal employees, former Federal employees, and applicants for Federal employment of the rights and protections available under Federal antidiscrimination and whistleblower protection laws.

### Guidance for Executive Order 13673, “Fair Pay Safe Workplaces”

#### Table of Contents

#### Introduction

#### I. Purpose and Summary of the Order

- A. Statutory Requirements for Contracting With Responsible Sources
- B. Legal Authority

- C. Summary of the Order’s Requirements and Interaction With Existing Requirements
- II. Preaward Disclosure Requirements
  - A. Covered Contracts
  - B. Labor Law Decisions
    1. Defining “Administrative Merits Determination”
    2. Defining “Civil Judgment”
    3. Defining “Arbitral Award or Decision”
    4. Successive Labor Law Decisions Arising From the Same Underlying Violation
  - C. Information That Must Be Disclosed
    1. Initial Representation
    2. Required Disclosures
    3. Opportunity To Provide Additional Relevant Information, Including Mitigating Factors
- III. Preaward Assessment and Advice
  - A. Classifying Labor Law Violations
    1. Serious Violations
    2. Repeated Violations
    3. Willful Violations
    4. Pervasive Violations
  - B. Weighing Labor Law Violations and Mitigating Factors
    1. Mitigating Factors That Weigh in Favor of a Satisfactory Record of Labor Law Compliance
    2. Factors That Weigh Against a Satisfactory Record of Labor Law Compliance
  - C. Advice Regarding a Contractor’s Record of Labor Law Compliance
    1. ALCA Recommendation
    2. ALCA Analysis
- IV. Postaward Disclosure Updates and Assessment of Labor Law Violations
- V. Subcontractor Responsibility
- VI. Preassessment
- VII. Paycheck Transparency
  - A. Wage Statement
  - B. Independent Contractor Notice
- VIII. Effective Date and Phase-In of Requirements
 

Appendix A: Serious Violations  
Appendix B: Repeated Violations  
Appendix C: Willful Violations  
Appendix D: Pervasive Violations  
Appendix E: Assessing Violations of the Labor Laws

#### Introduction

The Department of Labor (the Department) issues this guidance document (the Guidance) to assist the Federal Acquisition Regulatory Council (FAR Council) and Federal agencies in the implementation of Executive Order 13673, Fair Pay and Safe Workplaces (the Order), 79 FR 45309, as amended.<sup>98</sup> Among other important directives, the Order provides new instructions to Federal agency contracting officers to consider a Federal contractor’s compliance with 14 identified Federal labor laws and Executive orders and equivalent State laws (collectively, “Labor Laws”) as a part of the

determination of contractor responsibility that Federal contracting officers must undertake before awarding a contract.

The Order directed the FAR Council to issue regulations as necessary to implement the new requirements and processes. The Order also created detailed implementation roles for the Department, the Office of Management and Budget (OMB), and the General Services Administration (GSA). These agencies are implementing the Order in stages, on a prioritized basis.

The Order gives the Department several specific implementation and coordination duties. The Order directs the Secretary of Labor (the Secretary) to develop guidance to define various relevant terms, identify the State laws that are equivalent to those Federal laws covered by the Order, and specify which State wage-statement requirements are substantially similar to the Order’s wage-statement requirement. The Order also directs the Secretary to develop processes for coordination between the Department and newly-designated agency labor compliance advisors (ALCA) and processes by which contracting officers and ALCAs may give appropriate consideration to determinations and agreements made by Federal enforcement agencies.

This Guidance satisfies most of the Department’s responsibilities for issuing guidance, and the Department will publish at a later date a second guidance that satisfies its remaining responsibilities. The second guidance will be, as this Guidance was, submitted for notice and comment, published in the **Federal Register**, and accompanied by a proposed amendment to the FAR rule. The Department will likewise submit for notice and comment and publish any future updates to the Guidance that will have a significant effect beyond the operating procedures of the Department or that will have a significant cost or administrative impact on contractors or offerors. The Department will coordinate with the FAR Council in determining whether updates will have a significant cost or administrative impact.

This Guidance contains the following sections. Section I discusses the reasons for the Order and summarizes its requirements. Section II provides guidance about the Order’s preaward disclosure requirements and defines the types of information that prime contractors and subcontractors must disclose under the Order. The Guidance defines “administrative merits determinations,” “civil judgments,” and “arbitral awards or decisions” (collectively, “Labor Law decisions”).

<sup>98</sup> Executive Order 13673 was amended by Executive Order 13683, December 11, 2014 (79 FR 75041, December 16, 2014) and Executive Order \_\_\_\_ (FR \_\_\_\_, [DATE]). This document provides guidance for the Order as amended.



Section III explains how ALCAs should assess Labor Law violations and provide advice and analysis to contracting officers during the preaward process. The first part of section III deals with how ALCAs should classify violations, and it defines the classification terms “serious,” “repeated,” “willful,” and “pervasive” for purposes of the Order. The second part of section III explains how ALCAs should weigh a contractor’s violations, including any potential mitigating factors and factors that weigh against a recommendation that the contractor has a satisfactory record of Labor Law compliance. The third part explains the process in the FAR rule for the ALCA to provide advice and analysis to the contracting officer about a contractor’s record of Labor Law compliance, including whether negotiation of a labor compliance agreement is warranted.

Section IV provides guidance on the disclosure and assessment process during the postaward period. Section V summarizes the process under the Order for determining subcontractor responsibility. Section VI sets out the Department’s preassessment process to help contractors come into compliance before the contractor bids on a solicitation. Section VII provides guidance on the Order’s paycheck transparency provisions. Section VIII discusses the effective date and phase-in of the Order’s requirements, including the phase-in of the Order’s requirement for disclosure of violations of equivalent State laws.

### I. Purpose and Summary of the Order

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

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

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

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

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

By statute, contracting agencies are required to award contracts to responsible sources only. *See* 10 U.S.C. 2305(b); 41 U.S.C. 3702(b), 3703. A “responsible source” means a prospective contractor that, among other things, “has a satisfactory record of integrity and business ethics.” 41 U.S.C. 113(4). Part 9 of the Federal Acquisition Regulation (FAR) implements this statutory “responsibility” requirement. The FAR states that “[p]urchases shall be made from, and contracts shall be awarded to, responsible prospective contractors only.” FAR 9.103(a).<sup>99</sup> In accordance with the statutory definition of “responsible source,” the FAR states that “[t]o be determined responsible, a prospective contractor must . . . [h]ave a satisfactory record of integrity and business ethics . . . .” FAR 9.104–1(d). Thus, for every procurement contract, an agency contracting officer must consider whether a contractor has a satisfactory record of integrity and business ethics and then make an affirmative determination of responsibility—that the awardee is a responsible source.

#### B. Legal Authority

The President issued the Order pursuant to his authority under “the

Constitution and the laws of the United States,” expressly including the Federal Property and Administrative Services Act (the Procurement Act), 40 U.S.C. 101 *et seq.* The Procurement Act authorizes the President to “prescribe policies and directives that the President considers necessary to carry out” the statutory purposes of ensuring “economical and efficient” government procurement and administration of government property. 40 U.S.C. 101, 121(a). The Order establishes that the President considers the requirements included in the Order to be necessary to economy and efficiency in Federal contracting. *See* Order, section 1.

The Order directs the Secretary to define certain terms used in the Order and to develop guidance “to assist agencies” in implementing the Order’s requirements. Order, sections 2(a)(i), 4(b). The Guidance does not bind private parties or agency officials. Rather, the Order directs the FAR Council to issue the regulations necessary to implement the new requirements and processes. It is the Order and the FAR Council regulations that bind prospective contractors, subcontractors, contracting officers, and other agency officials—not the Guidance. The Guidance is not a regulation, and it does not amend or supersede the Order or the FAR. Where the Guidance uses mandatory language such as “shall,” “must,” “required,” or “requirement,” it does so only to describe the Department’s interpretation of the regulatory requirements in the FAR.

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

The Order builds on the pre-existing procurement system by instructing Federal agency contracting officers to consider a contractor’s Labor Law violations, if any, as a factor in determining if the contractor has a satisfactory record of integrity and business ethics and may therefore be found to be a responsible source eligible for a contract award. *See* Order, section 2(a)(ii) and (iii). The Order’s requirements are implemented through Part 22 of the FAR, which requires Federal agencies to include certain contract clauses in covered contracts.

To facilitate the responsibility determination, the Order provides that, for all covered procurement contracts (defined below in section II(A)), each agency must require that the contractor make an initial representation regarding whether there have been any Labor Law decisions rendered against the contractor within the preceding 3-year

<sup>99</sup> The FAR can be found at title 48 of the Code of Federal Regulations. Citations in this Guidance to the FAR use format FAR [section] instead of 48 CFR [section].

period for violations of the 14 identified Labor Laws. *See* Order, section 2(a)(i); Guidance, section II (Preaward disclosure requirements).

The 14 Federal labor laws or Executive orders identified in the Order are:

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

Prior to an award, as a part of the responsibility determination, contractors with Labor Law decisions to disclose must make an additional disclosure of information about each violation. *See* FAR 22.2004–1(a). In addition, contracting officers must provide contractors with an opportunity to disclose any steps taken to correct any disclosed violations or improve compliance with the Labor Laws, including any agreements entered into with an enforcement agency. *See* Order, section 2(a)(ii); Guidance, section II(C)(3). Contracting officers, in consultation with the relevant ALCA, then must consider the information in determining if a contractor is a responsible source with a satisfactory record of integrity and business ethics. *See* Order, section 2(a)(iii); Guidance, section III (Preaward assessment and advice). ALCAs provide advice and analysis to the contracting officer about the contractor's record of Labor Law compliance, including in some cases a recommendation that the contractor needs to enter into an agreement to

implement appropriate remedial measures or other actions to avoid further violations (a labor compliance agreement) or a recommendation that the agency suspending and debarring official should be notified. *See* FAR 22.2004–2(b).

Similar requirements apply to subcontractors. *See* Order, section 2(a)(iv); FAR 52.222–59(c); Guidance, section V (Subcontractor responsibility). Contractors are bound by the contract clause in their Federal award to require subcontractors on covered subcontracts to disclose any Labor Law decisions rendered against the subcontractor within the preceding 3-year period. *See* FAR 52.222–59(c)(3). A subcontractor with Labor Law decisions to disclose is required to make this disclosure to the Department, which provides the subcontractor with advice regarding its record of Labor Law compliance. *See* FAR 52.222–59(c)(3)(ii), (c)(4)(ii)(C); [Amended Order]. The subcontractor then must provide the Department's advice to the contractor, which will use that advice in determining whether the subcontractor is a responsible source. *See* FAR 52.222–59(c)(4)(ii)(C). The contractor will (in most cases, before awarding the subcontract) consider the advice from the Department in determining whether the subcontractor is a responsible source that has a satisfactory record of integrity and business ethics. *See id.* 52.222–59(c)(2).

The Order's disclosure requirement continues after an award is made. Semiannually during the performance of the contract, contractors must update the information provided about their own Labor Law violations and obtain the required information for covered subcontracts. *See* Order, section 2(b)(i); Guidance, section VI (Postaward disclosure updates and assessment of Labor Law violations). If a contractor discloses information regarding Labor Law violations during contract performance, or similar information is obtained through other sources, the contracting officer, in consultation with the ALCA, considers whether action is necessary. *See* Order, section 2(b)(ii). Such action may include requiring the contractor to enter into a labor compliance agreement, declining to exercise an option on a contract, terminating the contract in accordance with relevant FAR provisions, or referring the contractor to the agency suspending and debarring official. *See id.* If information regarding Labor Law decisions rendered against a contractor's subcontractor is brought to the attention of the contractor, then the contractor shall similarly consider whether action

is necessary with respect to the subcontractor. *See id.* section 2(b)(iii).

The Order requires each contracting agency to designate a senior agency official to be an ALCA to provide consistent guidance to contracting officers. *See* Order, section 3. In consultation with the Department and other agencies responsible for enforcing the Labor Laws, ALCAs help contracting officers to: Review information regarding Labor Law decisions disclosed by contractors; assess whether disclosed violations are serious, repeated, willful, or pervasive; review the contractor's remediation of the violation and any other mitigating factors; and determine if the violations identified warrant remedial measures, such as a labor compliance agreement. *See id.* section 3(d); FAR 22.2004–1(c)(3).

The Order also contains two paycheck transparency requirements. *See* Order, section 5; Guidance, section VII (Paycheck transparency). First, the Order requires contractors to provide all individuals performing work under the contract for whom they are required to maintain wage records under the FLSA, DBA, SCA, or equivalent State laws with a wage statement that contains information concerning that individual's hours worked, overtime hours, pay, and any additions made to or deductions made from pay. *See* Order, section 5(a). The Order instructs that the wage statement for individuals who are exempt from the overtime compensation requirements of the FLSA need not include a record of hours worked if the contractor informs the individuals of their exempt status. *See id.* Contractors can satisfy the Order's wage-statement requirement by providing a wage statement that complies with an applicable State or local wage-statement requirement that the Secretary has determined is substantially similar to the Order's wage-statement requirement. *See id.* Second, the Order provides that if a contractor is treating an individual performing work under a covered contract as an independent contractor, and not an employee, the contractor must provide a document informing the individual of this status. *See id.* section 5(b). The Order and the implementing FAR contract clause require contractors to incorporate these same two paycheck transparency requirements into covered subcontracts. *See id.* sections 5(a)–(b); FAR 52.222–60.<sup>100</sup>

<sup>100</sup>The Order further requires contracting agencies to ensure that for all contracts where the estimated value of the supplies acquired and services required exceeds \$1 million, provisions in solicitations and clauses in contracts shall provide that contractors agree that the decision to arbitrate

Finally, the Order requires that, in developing the Guidance and proposing to amend the FAR, the Secretary and the FAR Council minimize, to the extent practicable, the burden of complying with the Order for Federal contractors and subcontractors and in particular for small entities, including small businesses and small nonprofit organizations. *See* Order, section 4(e). The intent of the Order is to minimize additional compliance burdens and to increase economy and efficiency in Federal contracting by helping more contractors and subcontractors come into compliance with workplace protections, not by denying them contracts. Toward that end, the Order provides that ALCAs and the Department will be available for consultation with contractors regarding the Order's requirements, *see* Order, sections 2(a)(vi), 2(b)(iii), 3(c), and that contracting officers (and contractors for their subcontractors) will take into account any remedial actions and other mitigating factors when making a responsibility determination.

## II. Preaward Disclosure Requirements

This section of the Guidance discusses who must disclose Labor Law decisions during the preaward period, what types of Labor Law decisions must be disclosed, and what particular categories of information must be disclosed for each decision. This section of the Guidance also defines the meaning of the different types of Labor Law decisions: "administrative merits determination," "civil judgment," and "arbitral award or decision."

During the preaward process, the Order requires contracting agencies to include provisions in solicitations for all covered procurement contracts (defined below) that will require prospective contractors to disclose certain information about Labor Law violations. *See* Order, section 2(a). The solicitation provisions require all prospective contractors bidding on covered contracts to make an initial representation regarding whether there have been any Labor Law decisions rendered against them within the preceding 3 years. *See* FAR 22.2004–

claims arising under Title VII or any tort related to or arising out of sexual assault or harassment may only be made with the voluntary consent of employees or independent contractors after such disputes arise, subject to certain exceptions. *See* Order, section 6. Contracting agencies must require contractors to incorporate this same requirement into subcontracts where the estimated value of the supplies acquired and services required exceeds \$1 million, subject to certain exceptions. *See id.* This Guidance does not address this arbitration requirement.

1(a) and 22.2007(a); FAR 52.222–57; FAR 52.212–3(s) (commercial items). Later, only a subset of these prospective contractors—those for whom a responsibility determination is being performed—must make a more detailed disclosure about each Labor Law decision. *See id.* 22.2004–1(a). These disclosure requirements are phased in during the first year of the Order's effect. Section VIII below contains a description of the phases of implementation.

The Order and the final FAR rule also contain requirements for postaward disclosure, *see* Order, section 2(b); FAR 22.2004–1(a), and for disclosure by subcontractors, *see* Order, section 2(a)(iv); FAR 22.2004–1(b) and 52.222–58. These requirements are discussed below in sections IV and V, respectively.

### A. Covered Contracts

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

The Order requires prime contractors to make disclosures for procurement contracts with contracting agencies for goods and services, including construction, only where the estimated value of the supplies acquired and services required exceeds \$500,000.<sup>101</sup> *See* Order, section 2(a)(i). For purposes of this Guidance, these contracts are referred to as "covered procurement contracts." As used in this Guidance, the term "contract" has the same meaning as it has under the FAR. *See* FAR 2.101. Thus, the term "contract" means a procurement contract and does not include grants and cooperative agreements (which are not subject to the Order's requirements).

The Order and the FAR rule also apply to certain subcontracts. The definition of covered subcontracts and the specific disclosure rules associated with subcontractors are discussed in detail in section V of this Guidance. This Guidance uses the term "covered contracts" to include both covered

<sup>101</sup> *See* FAR 1.108(c) (explaining computation of dollar thresholds under the FAR).

procurement contracts and covered subcontracts.

The Order's disclosure requirements apply to contracts and subcontracts for commercial items that otherwise satisfy the Order's criteria. *See* FAR 52.212–3(s); 52.244–6. The coverage for commercially available off-the-shelf (COTS) items is more limited: Contracts for COTS items are covered procurement contracts if they otherwise satisfy the Order's criteria, but subcontracts for COTS items are not covered by the Order and therefore are not covered subcontracts. *See id.* FAR 22–2004–1(b) (exempting only subcontracts for COTS items).

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

### B. Labor Law Decisions

The Order creates disclosure requirements for contractors and subcontractors performing or bidding on covered contracts. Under the Order, contractors and subcontractors must disclose Labor Law decisions that have been "rendered against [them] within the preceding 3-year period." *See* Order, sections 2(a)(i), 2(a)(iv)(A).

#### The 3-Year Disclosure Period

The FAR provides for a phase-in of the 3-year disclosure period prior to October 25, 2018. Accordingly, the contract clauses require disclosure of Labor Law decisions rendered against the offeror "during the period beginning on October 25, 2015 to the date of the offer, or for three years preceding the date of the offer, whichever period is shorter." FAR 52.222–57(c) (covering contractor disclosures); 52.222–58(b) (covering subcontractor disclosures). The phase-in is also discussed below in section VIII of this Guidance.

The "preceding 3-year period" refers to the 3 years preceding the date of the offer (*i.e.*, the contract bid or proposal). Contractors and subcontractors must disclose Labor Law decisions rendered during this 3-year disclosure period even if the underlying conduct that violated the Labor Laws occurred more than 3 years prior to the date of the

disclosure. For example, if an employer failed to pay overtime due to workers in 2014, and the Department's Wage and Hour Division (WHD) makes a determination in 2016 that the employer violated the FLSA, then the employer must disclose the FLSA determination when bidding on a contract in 2018, even though the conduct underlying the violation occurred more than 3 years prior to the date of the employer's bid.

Additionally, contractors and subcontractors must disclose Labor Law decisions whether or not the underlying conduct occurred in the performance of work on a covered contract. Accordingly, a contractor or subcontractor must disclose a Labor Law decision even if it was not performing or bidding on a covered contract at the time. For example, if the Department's Occupational Safety and Health Administration (OSHA) determines that an employer violated a safety standard and the employer later (within 3 years of the determination) bids for the first time on a covered contract, the employer must disclose the OSHA citation even though it was not a contractor or bidding on a covered contract at the time when it received the determination.

#### Covered Labor Laws and Equivalent State Laws

Labor Law decisions that must be disclosed include those issued for violations of the 14 Federal laws and Executive orders specified in the Order. These laws are listed in section 2 of the Order and the list is included above in section I(C) of this Guidance. In addition, contractors and subcontractors must disclose violations of State laws that the Department identifies as equivalent to those 14 Federal laws. *See* Order, section 2(a)(i)(O).

The Department has determined that OSHA-approved State Plans are equivalent State laws for the purposes of the Order. The OSH Act permits certain States to administer OSHA-approved State occupational safety-and-health plans in lieu of Federal enforcement of the OSH Act. Section 18 of the OSH Act encourages States to develop and operate their own job safety-and-health programs, and OSHA approves and monitors State Plans and provides up to 50 percent of an approved plan's operating costs. OSHA-approved State Plans are described and listed in 29 CFR part 1952, and further information about such plans can be found at <https://www.osha.gov/dcsp/osp/index.html>. Labor Law decisions finding violations under an OSHA-approved State Plan are therefore subject to the Order's disclosure requirements.

In future guidance, the Department will identify additional equivalent State laws. Until this subsequent guidance and a subsequent FAR amendment are published, contractors and subcontractors are not required to disclose violations of State laws other than the OSHA-approved State Plans.

#### 1. Defining "Administrative Merits Determination"

Enforcement agencies issue notices, findings, and other documents when they determine that any of the Labor Laws have been violated. For purposes of this Guidance, "enforcement agency" means any agency that administers the Federal Labor Laws: The Department and its agencies—OSHA, WHD, and the Office of Federal Contract Compliance Programs (OFCCP); and the Occupational Safety and Health Review Commission (OSHRC).<sup>102</sup> Enforcement agencies also include the Equal Employment Opportunity Commission (EEOC) and the National Labor Relations Board (NLRB). "Enforcement agency" does not include a Federal agency that, in its capacity as a contracting agency, undertakes an investigation of a violation of the Federal Labor Laws.<sup>103</sup> For purposes of this Guidance, "enforcement agency" also includes a State agency designated to administer an OSHA-approved State Plan, but only to the extent that the State agency is acting in its capacity as administrator of such plan. And once the Department's second guidance (to be published at a later date) identifying the State laws that are equivalent to the Federal Labor Laws is finalized, and a corresponding FAR amendment is published, "enforcement agency" will also include any State agency that enforces those identified equivalent State laws.

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

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

- A WH-56 "Summary of Unpaid Wages" form;

<sup>102</sup> OSHRC is an independent Federal agency that provides administrative trial and appellate review in contests of OSH Act citations or penalties.

<sup>103</sup> For example, contracting agencies may investigate violations of the DBA relating to contracts that they administer, but that does not make them enforcement agencies for purposes of the Order.

- a letter indicating that an investigation disclosed a violation of the FLSA or a violation of the FMLA, SCA, DBA, or Executive Order 13658;

- a WH-103 "Employment of Minors Contrary to The Fair Labor Standards Act" notice;

- a letter, notice, or other document assessing civil monetary penalties;

- a letter that recites violations concerning the payment of subminimum wages to workers with disabilities under section 14(c) of the FLSA or revokes a certificate that authorized the payment of subminimum wages;

- a WH-561 "Citation and Notification of Penalty" for violations under the OSH Act's field sanitation or temporary labor camp standards;

- an order of reference filed with an administrative law judge.

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

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

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

- A show cause notice for failure to comply with the requirements of Executive Order 11246, section 503 of the Rehabilitation Act, the Vietnam Era Veterans' Readjustment Assistance Act of 1972, or the Vietnam Era Veterans' Readjustment Assistance Act of 1974;

(d) from the Equal Employment Opportunity Commission:

- A letter of determination that reasonable cause exists to believe that an unlawful employment practice has occurred or is occurring;

(e) from the National Labor Relations Board:

- A complaint issued by any Regional Director;

(f) a complaint filed by or on behalf of an enforcement agency with a Federal or State court, an administrative law judge or other administrative judge alleging that the contractor or subcontractor violated any provision of the Labor Laws; or

(g) any order or finding from any administrative law judge or other administrative judge, the Department's Administrative Review Board, the Occupational Safety and Health Review Commission or State equivalent, or the National Labor Relations Board that the contractor or subcontractor violated any provision of the Labor Laws.

The above definition provides seven categories of documents, notices, and findings from enforcement agencies that

constitute the administrative merits determinations that must be disclosed under the Order. The list is an exhaustive one, meaning that if a document does not fall within one of categories (a) through (g) above, the Department does not consider it to be an “administrative merits determination” for purposes of the Order.

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

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

Administrative merits determinations are issued following an investigation by the relevant enforcement agency. Administrative merits determinations are not limited to notices and findings issued following adversarial or adjudicative proceedings such as a hearing, nor are they limited to notices and findings that are final and unappealable. Thus, an administrative merits determination still must be disclosed under the Order even if the contractor is challenging it or can still challenge it. The Department recognizes that contractors may dispute an administrative merits determination. As set forth below, when contractors disclose administrative merits determinations, they may also submit any additional information that they believe may be helpful in assessing the violations at issue (including the fact that the determination has been challenged). Additionally, contractors have the opportunity to provide information regarding any mitigating factors. This information will be carefully considered. See below section III(B).

Certain “complaints” issued by enforcement agencies are included in the definition of “administrative merits determination.” The complaints issued by enforcement agencies included in the definition are not akin to complaints filed by private parties to initiate lawsuits in Federal or State courts. Each

complaint included in the definition represents a finding by an enforcement agency following a full investigation that a Labor Law was violated; in contrast, a complaint filed by a private party in a Federal or State court represents allegations made by that plaintiff and not any enforcement agency. Employee complaints made to enforcement agencies (such as a complaint for failure to pay overtime wages filed with WHD or a charge of discrimination filed with the EEOC) are not administrative merits determinations.

## 2. Defining “Civil Judgment”

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

A civil judgment could be the result of an action filed in court by or on behalf of an enforcement agency or, for those Labor Laws that establish a private right of action, by a private party or parties. The judgment or order in which the court determined that a violation occurred may be the result of a jury trial, a bench trial, or a motion for judgment as a matter of law, such as a summary judgment motion. Even a decision granting partial summary judgment may be a civil judgment if, for example, the decision finds a violation of the Labor Laws but leaves resolution of the amount of damages for later in the proceedings. Likewise, a preliminary injunction (but not a temporary restraining order) can be a civil judgment if the order enjoins or restrains a violation of the Labor Laws. Civil judgments include consent judgments and default judgments to the extent that there is a determination in the judgment that any of the Labor Laws have been violated, or the judgment enjoins or restrains the contractor from violating any provision of the Labor Laws. A private settlement where the lawsuit is dismissed by the court without any judgment being entered is not a civil judgment. An accepted offer of judgment pursuant to the Federal Rule of Civil Procedure 68 is also not a civil judgment for the purposes of the Order.

Civil judgments do not include judgments or orders issued by an administrative law judge or other administrative tribunals, such as those identified in the definition of

administrative merits determination. Such judgments and orders may be administrative merits determinations. If, however, a Federal or State court issues a judgment or order affirming an administrative merits determination, then the court’s decision is a civil judgment.

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

## 3. Defining “Arbitral Award or Decision”

For purposes of the Order, the term “arbitral award or decision” means any award or order by an arbitrator or arbitral panel in which the arbitrator or arbitral panel determined that the contractor violated any provision of the Labor Laws, or enjoined or restrained the contractor from violating any provision of the Labor Laws. Arbitral award or decision includes an arbitral award or decision regardless of whether it is issued by one arbitrator or a panel of arbitrators and even if the arbitral proceedings were private or confidential.

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

## 4. Successive Labor Law Decisions Arising From the Same Underlying Violation

If a contractor appeals or challenges a Labor Law decision, there may be successive decisions that arise from the same underlying violation. For example, if a contractor receives an OSHA

citation and appeals that citation, it may receive an order from an administrative law judge (ALJ) upholding or vacating that citation. Similarly, if a contractor receives an adverse decision from the Department's Administrative Review Board (ARB) and challenges the decision in Federal court, it may receive a court judgment concerning that decision.

Whether successive Labor Law decisions must be disclosed depends on the nature of the most recent decision at the time of disclosure. Where the most recent Labor Law decision finds no violation—or otherwise reverses or vacates all prior findings of a violation—then the contractor does not need to disclose any of the decisions. Where the most recent decision has reinstated an initial finding of a violation, however, then the latest decision reinstating the finding must be disclosed. Thus, in the first example above, if the ALJ reverses the OSHA citation, the contractor need not disclose either the initial citation or the ALJ's order. But if the violation is later reinstated by the full OSHRC or by a Federal court of appeals, the contractor must disclose the OSHRC or appellate court decision.

Where the most recent Labor Law decision upholds or affirms any finding of violation, the contractor should disclose only the Labor Law decision that is the most recent at the time of disclosure. Thus, in the second example above, if the Federal court affirms the ARB's decision, or modifies it but does not vacate it in its entirety, the contractor should disclose the more recent court order and need not disclose the original ARB decision.

Where the most recent Labor Law decision does not affirm or vacate the violation, but instead remands it for further proceedings, the underlying violation must still be disclosed. For example, an ALJ may grant a pre-trial motion for summary decision upholding an OSHA citation, and then OSHRC may reverse the ALJ decision and remand it because the OSHRC believes that a full trial was necessary to determine whether to uphold the citation. In that case, the OSHRC has not completely reversed or vacated the original OSHA citation, so the contractor still must disclose the original OSHA citation.

Similarly, if the contractor appeals or challenges only part of a Labor Law decision, the contractor should continue to disclose the original Labor Law decision even if a successive Labor Law decision has been issued. For example, if, within the preceding 3-year period, a district court finds a contractor liable for

Title VII and FLSA violations, and the contractor appeals only the Title VII judgment to the court of appeals, it must continue to disclose the district court decision (containing the finding of an FLSA violation) even if a subsequent court of appeals decision vacates the Title VII violation.

If the contractor disclosed a Labor Law decision before being awarded a covered contract, and a successive decision arising from the same underlying violation is rendered during the performance of the contract and affirms that the contractor committed the violation, the successive decision is a Labor Law decision within the meaning of this Guidance. Therefore, the contractor must disclose the most recent decision when it updates its disclosures during performance of the contract. *See* FAR 22.2004–3(a).

### C. Information That Must Be Disclosed

The following sections provide guidance on the information that must be disclosed during the preaward stage of the contracting process. Section 22.2004 of the FAR sets forth the specific requirements for what must be disclosed at each stage, and how such information is to be reported. The process by which subcontractors make disclosures is discussed in section V(A) below.

#### 1. Initial Representation

When a contractor bids on a solicitation for a covered procurement contract, it must disclose whether any Labor Law decisions have been rendered against it “during the period beginning on October 25, 2015 to the date of the offer, or for three years preceding the date of the offer, whichever period is shorter.” FAR 52.222–57(c). At this stage, the contractor must represent to the best of its knowledge and belief whether it has or has not had such a decision rendered against it, without providing further information. *See* FAR 52.222–57(c).

#### 2. Required Disclosures

If a contractor reaches the stage in the process at which a responsibility determination is initiated, and that contractor responded affirmatively at the initial representation stage, the contracting officer will require additional information about that contractor's Labor Law violation(s). *See* FAR 52.222–57(d)(1).<sup>104</sup> For each

<sup>104</sup> In addition to the information that the Order instructs the contracting officer to request, contracting officers also have a general duty to obtain such additional information as may be necessary to be satisfied that a prospective

contractor has a satisfactory record of integrity and business ethics. *See* FAR 9.105–1(a).

administrative merits determination, civil judgment, or arbitral award or decision that must be disclosed, the contractor must provide:

- The Labor Law that was violated;
- the case number, inspection number, charge number, docket number, or other unique identification number;
- the date that the determination, judgment, award, or decision was rendered; and
- the name of the court, arbitrator(s), agency, board, or commission that rendered it.

*See* FAR 52.222–57(d)(1)(i). The contractor must disclose this information in the System for Award Management (SAM) unless an exception from SAM registration applies. *See* FAR 22.2004–2(b)(1)(i), (iii).

With regard to the second element of information listed above, the contractor should provide the inspection number for OSH Act citations, the case number for NLRB proceedings, the charge number for EEOC proceedings, the investigation or case number for WHD investigations, the case number for investigations by OFCCP, the case number for determinations by administrative tribunals, and the case number for court proceedings.

### 3. Opportunity To Provide Additional Relevant Information, Including Mitigating Factors

The contractor may also provide additional information that it believes will demonstrate its responsibility. *See* FAR 52.222–57(d)(1)(iii). The contractor must disclose this additional information in SAM unless an exception from SAM registration applies. *See id.* 22.2004–2(b)(1)(i) and (iii), 52.222–57(d)(1)(iv). The additional information may include mitigating factors and remedial measures, such as information about steps taken to correct the violations at issue, the negotiation or execution of a settlement agreement or labor compliance agreement, or other steps taken to achieve compliance with the Labor Laws. *See id.* 22.2004–2(b)(1)(ii). The contractor may also provide any other information that they believe may be relevant, including that it is challenging or appealing an adverse Labor Law decision. The information that the contractor submits will be carefully considered during an ALCA's assessment of the contractor's record of compliance.

The additional relevant information provided by the contractor will not be made public unless the contractor determines that it wants the information

contractor has a satisfactory record of integrity and business ethics. *See* FAR 9.105–1(a).

to be made public. *Id.* 22.2004–2(b)(1)(ii). However, where a contractor enters into a labor compliance agreement, the entry will be noted in the Federal Awardee Performance and Integrity Information System (FAPIIS), available at [www.fapiis.gov/](http://www.fapiis.gov/), by the ALCA and the fact that a labor compliance agreement has been agreed to will be public information. *Id.* 22.2004–2(b)(9).

Mitigating circumstances are discussed in more depth below in section III(B)(1) and labor compliance agreements are discussed in section III(C).

#### 4. Preaward Updates to Representations

Contractors have a duty to provide an update to the contracting officer prior to the date of an award if the contractor's initial representation is no longer accurate. In some procurements, a period of time may pass between the date of the contractor's offer on the contract and the date of the award. If, during this time, a new Labor Law decision is rendered or the contractor otherwise learns that its representation is no longer accurate, the contractor must notify the contracting officer of an update to its representation. *See* FAR 52.222–57(e). This means that if the contractor made an initial representation that it had no Labor Law decisions to disclose, and since the time of the offer a new decision is rendered, the contractor must notify the contracting officer. The reverse is also true: If, for example, an offeror made an initial representation that it has a Labor Law decision to disclose, and since the time of the offer that Labor Law decision has been vacated by the enforcement agency or a court, the contractor must notify the contracting officer.

### III. Preaward Assessment and Advice

For every procurement contract, the agency's contracting officer must consider whether a contractor has a satisfactory record of integrity and business ethics and then make an affirmative determination of responsibility before making the award. The contracting officer considers relevant responsibility-related information from a number of sources, including members of the procurement team who are subject-area experts. In determining whether the contractor's history of Labor Law compliance reflects a satisfactory record of integrity and business ethics, the contracting officer considers the analysis and advice provided by the ALCA, using this section of the Guidance, as required by the Order and the implementing FAR rule. As discussed in section V(A)

below, contractors will make the same determination for each of their subcontractors performing a covered subcontract, considering analysis and advice provided by the Department regarding any Labor Law decisions disclosed by the subcontractor.

This section of the Guidance explains the three-step process by which ALCAs assess a contractor's record of Labor Law compliance and provide preaward advice to contracting officers. Section III(A) explains the first step: Classifying the Labor Law violations. At this stage, an ALCA reviews all of the contractor's violations to determine if any are "serious," "repeated," "willful," or "pervasive." Section III(B) discusses the second step: Weighing the Labor Law violations. At this point, the ALCA analyzes any serious, repeated, willful, and/or pervasive violations in light of the totality of the circumstances, including any mitigating factors that are present. Section III(C) discusses the third step: The ALCA provides advice to the contracting officer regarding the contractor's record of Labor Law compliance and whether a labor compliance agreement or other action is warranted.

In the first step of the assessment process, the "classification" step, an ALCA reviews each of the contractor's Labor Law violations to determine which, if any, are serious, repeated, willful, and/or pervasive. Section III(A) of the Guidance defines these four terms. All violations of Federal laws are a serious matter; but, for purposes of the Order, certain Labor Law violations are classified as serious, repeated, willful, and/or pervasive. As explained below, the classification of a violation as serious, repeated, willful, and/or pervasive does not automatically result in a finding that a contractor lacks integrity and business ethics. Rather, this subset of all Labor Law violations represents those that may bear on an assessment of a contractor's integrity and business ethics; violations that fall outside this subset are less likely to have a significant impact. Thus, although the Order requires contractors to disclose all Labor Law decisions from the relevant time period, only those decisions involving violations classified as serious, repeated, willful, and/or pervasive are considered as part of the weighing step and factor into the ALCA's written analysis and advice.

In the second step of the assessment process, the "weighing" step, the ALCA analyzes the contractor's serious, repeated, willful, and/or pervasive violations of Labor Laws in light of the totality of the circumstances, including, among other factors, the severity of the

violation(s), the size of the contractor, and any mitigating factors. During the assessment process, the ALCA considers whether the contractor has a satisfactory record of Labor Law compliance—in other words, whether the contractor's history of Labor Law compliance and any adoption by the contractor of preventative compliance measures indicate that the contracting officer could find the contractor to have a satisfactory record of integrity and business ethics despite the violations. The contractor's timely remediation of violations of Labor Laws is generally the most important factor weighing in favor of a conclusion that a contractor has a satisfactory record of Labor Law compliance. The ALCA also considers factors that weigh against a conclusion that the contractor has a satisfactory record. For example, as explained more fully below, pervasive violations and violations of particular gravity, among others, may support such a conclusion. *See* Section III(B).

In the third step of the assessment process, the ALCA provides written advice and analysis to the contracting officer regarding the contractor's record of Labor Law compliance. The ALCA recommends whether the contractor's record supports a finding of a satisfactory record of integrity and business ethics. In cases where the ALCA concludes that a contractor has an unsatisfactory record of Labor Law compliance, the ALCA will recommend the negotiation of a labor compliance agreement or other appropriate action such as notification of the agency suspending and debarring official. If the ALCA concludes that a labor compliance agreement is warranted, the ALCA will recommend whether the agreement should be negotiated before or after the award. The written analysis supporting the advice describes the ALCA's classification and weighing of the contractor's Labor Law violations and includes the rationale for the recommendation. *See* Section III(C).

While the ALCA provides written analysis and advice, the contracting officer has the ultimate responsibility and discretion to determine whether the contractor has a satisfactory record of integrity and business ethics and is a responsible source. *See* FAR 22.2004–2(b)(4).

#### A. Classifying Labor Law Violations

In the first step of the preaward assessment and advice process, the ALCA reviews all of the contractor's violations to determine if any should be classified as "serious," "repeated," "willful," and/or "pervasive." As part of this process, the ALCA monitors SAM

and FAPIIS for new and updated contractor disclosures of Labor Law decision information. See FAR 22.2004–1(c)(5). See also section II(C)(2), above, for a discussion of the information the contractor must disclose.

#### Criteria for Classifying Violations

The Order directs the Department to assist agencies in determining whether administrative merits determinations, arbitral awards or decisions, or civil judgments (*i.e.*, Labor Law decisions) were issued for serious, repeated, willful, or pervasive violations of the Labor Laws. Order, section 4(b)(i). It specifies that the definitions of these terms should “incorporate existing statutory standards for assessing whether a violation is serious, repeated, or willful” where they are available. *Id.* The Order also provides some guidelines for developing standards where none are provided by statute. See *id.*

The sections below list criteria under which violations of the Labor Laws are considered serious, repeated, willful, or pervasive. These criteria include, for example, whether an agency applied a particular designation (*e.g.*, “repeated” under the OSH Act) to a violation, whether particular thresholds were met (*e.g.*, \$10,000 in back wages), or whether other specific facts are present (*e.g.*, whether punitive damages were awarded). A single violation may satisfy the criteria for more than one classification; for example a single violation may be both serious and repeated. Multiple violations may together be classified as pervasive.

ALCAs classify violations based on information that is readily ascertainable from the Labor Law decisions themselves. ALCAs do not second-guess or re-litigate enforcement actions or the decisions of reviewing officials, courts, and arbitrators. While ALCAs and contracting officers may seek additional information from the enforcement agencies to provide context, they generally rely on the information contained in the Labor Law decisions to determine whether violations are serious, repeated, willful, and/or pervasive under the definitions provided in this Guidance.

#### Effect of Reversal or Vacatur of Basis for Classification

If a Labor Law decision or portion thereof that would otherwise cause a violation to be classified as serious, repeated, willful, and/or pervasive has been reversed or vacated, the violation should not be classified as such under the Order. For example, if an OSH Act violation was originally designated by

OSHA as “serious” but is later re-designated as “other-than-serious,” the violation should not be classified as a serious violation under the Order. Likewise, if a prior Labor Law decision that would otherwise cause a subsequent violation to be classified as a repeated violation is reversed or vacated, the subsequent violation should not be classified as a repeated violation.

#### 1. Serious Violations

Of the Federal Labor Laws, only the OSH Act provides a statutory standard for what constitutes a “serious” violation, and this standard also applies to OSHA-approved State Plans. The other Federal Labor Laws do not have statutory standards for what constitutes a serious violation. According to the Order, where no statutory standards exist, the Department’s Guidance for “serious” violations must take into account

the number of employees affected, the degree of risk posed or actual harm done by the violation to the health, safety, or well-being of a worker, the amount of damages incurred or fines or penalties assessed with regard to the violation, and other considerations as the Secretary finds appropriate.

Order, section 4(b)(i)(B)(1).

Accordingly, a violation is “serious” for purposes of the Order under the following circumstances:

- a. For OSH Act or OSHA-approved State Plan violations that are enforced through citations or equivalent State documents, a violation is serious if a citation, or equivalent State document, was designated as serious or an equivalent State designation.
- b. For all other violations of the Labor Laws, a violation is serious if it is readily ascertainable from the Labor Law decision that the violation involved any one of the following:
  - i. The violation affected at least 10 workers, and the affected workers made up 25 percent or more of the contractor’s workforce at the worksite or 25 percent or more of the contractor’s workforce overall;
  - ii. Fines and penalties of at least \$5,000 or back wages of at least \$10,000 were due;
  - iii. The contractor’s conduct caused or contributed to the death or serious injury of one or more workers;
  - iv. The contractor employed a minor who was too young to be legally employed or in violation of a Hazardous Occupations Order;
  - v. The contractor was issued a notice of failure to abate an OSH Act or OSHA-approved State Plan violation; or the contractor was issued an imminent

danger notice or an equivalent State notice under the OSH Act or an OSHA-approved State Plan.

- vi. The contractor retaliated against one or more workers for exercising any right protected by any of the Labor Laws;
- vii. The contractor engaged in a pattern or practice of discrimination or systemic discrimination;
- viii. The contractor interfered with the enforcement agency’s investigation; or
- ix. The contractor breached the material terms of any agreement or settlement entered into with an enforcement agency, or violated any court order, any administrative order by an enforcement agency, or any arbitral award.

This definition is an exhaustive list of the classification criteria for use in designating Labor Law violations as serious under the Order. Further guidance for applying these criteria is included below:

#### a. OSH Act and OSHA-Approved State Plan Violations Enforced Through Citations and Equivalent State Documents

Section 17(k) of the OSH Act, 29 U.S.C. 666(k), defines a violation as serious, in relevant part, “if there is a substantial probability that [the hazard created by the violation could result in] death or serious physical harm . . . unless the employer did not, and could not with the exercise of reasonable diligence know” of the existence of the violation. This standard is used by enforcement agencies to classify OSH Act and OSHA-Approved State Plan violations that are enforced through citations or equivalent State documents. In light of this clear statutory definition and the Order’s directive to incorporate statutory standards where they exist, OSH Act violations that are enforced through citations are considered serious under the Order if—and only if—the relevant enforcement agency designated the citation or equivalent State document as such.<sup>105</sup>

The OSH Act also includes prohibitions that are not enforced through citations or equivalent State documents. Under the classification process in the Order, such violations are considered “serious” if they meet any of the other criteria for serious violations listed below in subsections (b)(i) through (b)(ix) and listed above in category (b). For example, the OSH Act

<sup>105</sup> The relevant enforcement agency will either be OSHA, a State Plan agency, or WHD, which enforces violations of the OSH Act’s field sanitation and temporary labor camp standards in States that do not have a State Plan.



prohibits retaliating against workers for exercising any right under the Act. 29 U.S.C. 660(c). OSH Act retaliation violations are enforced through complaints in Federal court, not through citations; and OSHA does not make any designation for them (serious or otherwise). As with retaliation under any of the Labor Laws, such a violation should be classified as “serious,” even though OSHA has not designated it as “serious.” See Section III(A)(1)(b)(vi).

#### b. Other Violations of the Labor Laws

For violations of the Labor Laws other than OSH Act or OSHA-Approved State Plan violations that are enforced through citations and equivalent State documents, violations are serious if they meet any one of the following criteria:

##### i. Violation Affects at Least 10 Workers Comprising at Least 25 Percent of the Contractor’s Workforce at the Worksite or Overall

Consistent with the Order’s directive to consider the number of employees affected, a violation is serious if it affected at least 10 workers who together made up 25 percent or more of the contractor’s workforce at the worksite or 25 percent or more of the contractor’s workforce overall.

For purposes of this 25 percent threshold, “workforce” means all individuals on the contractor’s payroll at the time of the violation, whether full-time or part-time. It does not include workers of another entity, unless the underlying violation of the Labor Laws includes a finding that the contractor is a joint employer of the workers that the other entity employs at the worksite. For example, assuming no joint employer relationships exist, if a contractor employs 40 workers at a worksite, then a violation is serious if it affects at least 10 of the contractor’s workers at the site, even if other companies also employ an additional 40 workers at the same site.

For purposes of this 25 percent threshold, “worksite” means the physical location or group of locations where the workers affected by the violations work and where the contractor conducts its business. For example, if the contractor conducts its business at a single building, or a single office within an office building, that building or office will be the worksite. However, if the contractor conducts business activities in several offices in one building, or in several buildings in one campus or industrial park, the worksite consists of all of the offices or buildings in which the business is conducted. On the other hand, if a contractor has two office buildings in

different parts of the same city, or in different cities, then those office buildings are considered to be separate worksites. For violations that affect workers with no fixed worksite, such as construction workers, transportation workers, workers who perform services at various customers’ locations, and workers who regularly telework, the worksite is the site to which they are assigned as their home base, from which their work is assigned, or to which they report.

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

##### ii. Fines, Penalties, and Back Wages

Consistent with the Order’s directive to take into account “the amount of damages incurred or fines or penalties assessed,” a violation is serious if \$5,000 or more in fines and penalties, or \$10,000 or more in back wages, were due.

“Fines and penalties” are monetary penalties imposed by a government agency. They do not include back wages, compensatory damages, liquidated damages, or punitive damages. For purposes of determining whether the \$10,000 back wages threshold is met, compensatory damages, liquidated damages under the FLSA,<sup>106</sup> and statutory damages under MSPA should be included as back wages.

The threshold amounts for back wages, fines, and penalties are measured by the amount “due.” This will usually be the amount originally assessed by an enforcement agency or found due by a court, arbitrator, or arbitral panel. However, if the original amount is later reduced by an enforcement agency, arbitrator, arbitral panel, or court, the reduced amount is used. For example, if the Department files a civil complaint in an FLSA case seeking \$15,000 in back wages but a court awards only \$8,000, then the violation will not be serious under this criterion because the \$8,000 figure falls below the \$10,000 threshold for back wages. Similarly, if an administrative merits determination

<sup>106</sup> Liquidated damages under the FLSA are included in the calculation of back wages because they are compensatory in nature, intended to serve as a substitute for “damages too obscure and difficult of proof for estimate other than by liquidated damages.” *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 583–84 (1942).

assesses \$6,000 in civil monetary penalties against a contractor but later the enforcement agency and contractor reach a settlement for the reduced amount of \$4,000, then the underlying violation is not serious because the settlement amount fell below the \$5,000 threshold for fines and penalties. In contrast, if, for example, the contractor files for bankruptcy and cannot pay the full amount, or simply refuses to pay such that the full penalty is never collected, the original assessed amount is the amount that matters for classifying the violation under this criterion.

When considering whether these thresholds are met, the total fines and penalties or the total back wages resulting from the Labor Law violation should be considered. Thus, for example, where a wage-and-hour violation affected multiple workers, the back wages due to each worker involved in the claim must be added together to see if the cumulative amount meets the \$10,000 back-wage threshold. Similarly, in cases where multiple provisions of a Labor Law have been violated, the fines, penalties, and back wages due should not be parsed and separately attributed to each provision violated. For example, if the Department’s FLSA investigation discloses violations of the FLSA’s minimum wage and overtime provisions and back wages are due for both violations, the total back wages due determines whether the \$10,000 threshold is met. Likewise, if an investigation discloses six violations of the same MSPA provision or violations of six different MSPA provisions and each violation results in civil monetary penalties of \$1,000, the MSPA violation is serious because the penalties total \$6,000.

This criterion only applies if the Labor Law decision includes an amount of back wages or fines or penalties. Thus, for example, if an enforcement agency issues an administrative merits determination that does not include an amount of fines or penalties assessed or of back wages due, then an ALCA cannot classify the violation as serious using this criterion until the amount has been determined. For example, if the EEOC files a complaint in Federal court seeking back wages but does not specify the amount, then this criterion cannot be the basis for classifying the violation as serious, though the violation could be serious under one of the other listed criteria.

##### iii. Any Violations That Cause or Contribute to Death or Serious Injury

Consistent with the Order’s directive to consider “the degree of risk posed or

actual harm done by the violation to health, safety, or well-being of a worker," any violation of the Labor Laws that causes or contributes to the death or serious injury of one or more workers is serious under the Order. For the purpose of this classification criterion, "serious injury" means an injury that requires the care of a medical professional beyond first-aid treatment or results in more than five days of missed work.

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

Consistent with the Order's directive to consider "the degree of risk posed or actual harm done by the violation to health, safety, or well-being of a worker," any violation of the FLSA's child labor provisions where the minor is too young to be legally employed or is employed in violation of any of the Secretary's Hazardous Occupations Orders is a serious violation. Such violations do not include situations where minors are permitted to perform the work at issue but have performed the work outside the hours permitted by law. Rather, it refers to minors who, by virtue of their age, are legally prohibited from being employed or are not permitted to be employed to perform the work at all. Thus, serious violations include, for example: The employment of any minor under the age of 18 to perform a hazardous non-agricultural job, any minor under the age of 16 to perform a hazardous farm job, or any minor under the age of 14 to perform non-farm work where he or she does not meet a statutory exception otherwise permitting the work. This reflects the particularly serious dangers that can result from the prohibited employment of underage minors. Conversely, it is not a serious violation for the purposes of the Order where the contractor has employed a 14 or 15 year-old minor in excess of 3 hours outside school hours on a school day, in a non-hazardous, non-agricultural job in which the child is otherwise permitted to work—even though the work violates the FLSA's child labor provisions.

v. Notices of Failure To Abate and Imminent Danger Notices

Under the OSH Act and OSHA-approved State Plans, enforcement agencies may issue notices of failure to abate and imminent danger notices. Notices of failure to abate are issued when an employer has failed to remedy a violative condition despite having received a citation, unless that citation is being contested. See 29 CFR 1903.18.

A notice of failure to abate a violation is a serious violation because failing to correct a hazard after receiving formal notification of the need to do so represents a serious disregard of the law.

Imminent danger notices are issued when "a danger exists which could reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through the enforcement procedures otherwise provided by [the OSH Act]." 29 U.S.C. 662(a). Because such notices are issued only for violations that imminently threaten to cause death or serious physical harm, imminent danger notices are by definition issued only for serious violations of the OSH Act, and thus constitute serious violations under the Order.

vi. Retaliation

Consistent with the Order's directive to consider "the degree of risk posed or actual harm done by the violation to health, safety, or well-being of a worker," a violation involving retaliation is a serious violation. For these purposes, retaliation means that the contractor has engaged in an adverse employment action against one or more workers for exercising any right protected by the Labor Laws. An adverse employment action means conduct that may dissuade a reasonable worker from engaging in protected activity under the Labor Laws, such as a discharge, refusal to hire, suspension, demotion, unlawful harassment, or threats.<sup>107</sup>

Examples of retaliation include, but are not limited to, disciplining workers for attempting to organize a union; firing or demoting workers who take leave under the FMLA; and threatening workers with adverse consequences—such as termination or referral to immigration or criminal authorities—for reporting potential violations of Labor Laws, testifying in enforcement matters, or otherwise exercising any right protected by the Labor Laws. These are serious violations because they both reflect a disregard by the contractor for its obligations under the Labor Laws and undermine the effectiveness of the Labor Laws by making workers reluctant to exercise their rights for fear of retaliation.

<sup>107</sup> See *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006) (holding that for purposes of Title VII, retaliation requires that "a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination") (internal citations omitted).

vii. Pattern or Practice of Discrimination or Systemic Discrimination

Consistent with the Order's directive to consider "the degree of risk posed or actual harm done by the violation to health, safety, or well-being of a worker," a violation is serious if the contractor engaged in a pattern or practice of discrimination or systemic discrimination. This criterion is generally expected to apply to violations of Executive Order 11246, section 503 of the Rehabilitation Act, VEVRAA, Title VII, section 6(d) of the FLSA (the Equal Pay Act), the ADA, and the ADEA.

A pattern or practice of discrimination involves intentional discrimination against a protected group of applicants or employees that reflects the employer's standard operating procedure, the regular rather than the unusual practice,<sup>108</sup> and not discrimination that occurs in an isolated fashion.

Systemic discrimination involves a pattern or practice, policy, or class case where the discrimination has a broad impact on an industry, profession, company, or geographic area. Examples include policies and practices that effectuate discriminatory hiring barriers; restrictions on access to higher level jobs in violation of any applicable anti-discrimination law; unlawful pre-employment inquiries regarding disabilities; and discriminatory placement or assignments that are made to comply with customer preferences.

Systemic discrimination also includes policies and practices that are seemingly neutral but may cause a disparate impact on protected groups. Examples include pre-employment tests used for selection purposes; height, weight or lifting requirements or restrictions; compensation practices and policies; and performance evaluation policies and practices. Systemic discrimination cases may be, but need not be, the subject of class action litigation.

viii. Interference With Investigations

Labor Law violations in which the contractor engaged in interference with the enforcement agency's investigation also are serious under the Order. Interference can take a number of forms, but for purposes of this criterion it is limited to violations involving the following circumstances:

(1) A civil judgment was issued holding the contractor in contempt for failing to provide information or physical access to an enforcement agency in the course of an investigation; or

<sup>108</sup> See *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 336 (1977).

(2) It is readily ascertainable from the Labor Law decision that the contractor—

(a) Falsified, knowingly made a false statement in, or destroyed records to frustrate an investigation under the Labor Laws;

(b) Knowingly made false representations to an investigator; or

(c) Took or threatened to take adverse actions against workers (for example, termination, reduction in salary or benefits, or referral to immigration or criminal authorities) for cooperating with or speaking to government investigators or for otherwise complying with an agency's investigation (for example, threatening workers if they do not return back wages received as the result of an investigation).

Like retaliation, interference with investigations is intentional conduct that frustrates the enforcement of the Labor Laws and therefore is a serious violation.

#### ix. Material Breaches and Violations of Settlements, Labor Compliance Agreements, or Orders

Labor Law violations involving a breach of the material terms of any settlement, labor compliance agreement, court or administrative order, or arbitral award are serious violations under the Order. Such violations are serious because contractors are expected to comply with orders by a court or administrative agency and to adhere to the terms of any agreements or settlements into which it enters. A contractor's failure to do so may indicate that it will similarly disregard its contractual obligations to, or agreements with, a contracting agency, which could result in delays, increased costs, and other adverse consequences. A contractor will not, however, be found to have committed a serious violation if the agreement, settlement, award, or order in question has been stayed, reversed, or vacated.

#### c. Table of Examples

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

#### 2. Repeated Violations

The Order provides that the standard for repeated should "incorporate existing statutory standards" to the extent such standards exist. Order, section 4(b)(i)(A). It further provides that, where no statutory standards exist, the standards for repeated should take into account "whether the entity has had one or more additional violations of the same or a substantially similar requirement in the past 3 years." *Id.*

section 4(b)(i)(B)(2). None of the Labor Laws contains an explicit statutory definition of the term "repeated." Accordingly, a violation is "repeated" under the Order if:

a. For a violation of the OSH Act or an OSHA-approved State Plan that was enforced through a citation or an equivalent State document, the citation at issue was designated as "repeated," "repeat," or any equivalent State designation and the prior violation that formed the basis for the repeated violation became a final order of the OSHRC or equivalent State agency no more than 3 years before the repeated violation;

b. For all other Labor Law violations, the contractor has committed a violation that is the same as or substantially similar to a prior violation of the Labor Laws that was the subject of a separate investigation or proceeding arising from a separate set of facts, and became uncontested or adjudicated within the previous 3 years. The following is an exhaustive list of violations that are substantially similar to each other for these purposes:

1. For the FLSA:

i. Any two violations of the FLSA's child labor provisions; or

ii. Any two violations of the FLSA's provision requiring break time for nursing mothers.

2. For the FLSA, DBA, SCA, and Executive Order 13658:

i. Any two violations of these statutes' minimum wage, subminimum wage, overtime, or prevailing wages provisions, even if they arise under different statutes.

3. For the FMLA:

i. Any two violations of the FMLA's notice requirements; or

ii. Any two violations of the FMLA other than its notice requirements.

4. For the MSPA:

i. Any two violations of the MSPA's requirements pertaining to wages, supplies, and working arrangements;

ii. Any two violations of the MSPA's requirements related to health and safety;

iii. Any two violations of the MSPA's disclosure and recordkeeping requirements; or

iv. Any two violations related to the MSPA's registration requirements.

5. For the NLRA:

i. Any two violations of the same numbered subsection of section 8(a) of the NLRA.

6. For Title VII, section 503 of the Rehabilitation Act of 1973, the ADA, the ADEA, section 6(d) of the FLSA (known as the Equal Pay Act, 29 U.S.C. 206(d)), Executive Order 11246 of September 24, 1965, the Vietnam Era Veterans'

Readjustment Assistance Act of 1972, and the Vietnam Era Veterans' Readjustment Assistance Act of 1974:

i. Any two violations, even if they arise under different statutes, if both violations involve:

1. the same protected status, and

2. at least one of the following elements in common:

a. the same employment practice, or,

b. the same worksite.

7. For all of the Labor Laws, including those listed above, even if the violations arise under different statutes:

i. Any two violations involving retaliation;

ii. Any two failures to keep records required under the Labor Laws; or

iii. Any two failures to post notices required under the Labor Laws.

Further guidance for applying these criteria is included below:

#### a. OSH Act and OSHA-Approved State Plan Violations Enforced Through Citations or Equivalent State Documents

The terms "repeated" and "repeat" have well-established meanings under the OSH Act with regard to violations that are enforced through citations. Such violations are "repeated" "if, at the time of the alleged repeated violation, there was [an Occupational Safety and Health Review Commission] final order against the same employer for a substantially similar violation." *Potlatch Corp.*, 7 O.S.H. Cas. (BNA) 1061 (O.S.H.R.C. 1979). This term is generally defined similarly under OSHA-approved State Plans.<sup>109</sup>

As such, under the OSH Act or an OSHA-approved State Plan, if a citation or equivalent State document designates a violation as "repeated," "repeat," or any equivalent State designation, the violation will be repeated for purposes of the Order provided that the prior violation became a final order of OSHRC or the equivalent State agency within 3 years of the repeated violation. Even though, under current OSHA policy, repeated violations take into account a 5-year period, the 3-year timeframe conforms to the Order's direction that the standards for repeated violations should take into account "whether the entity has had one or more additional violations of the same or a substantially similar requirement in the past 3 years." Order, section 4(b)(i)(B)(2).

#### b. All Other Violations

For all Labor Law violations other than OSH Act and OSHA-approved State Plan violations enforced through

<sup>109</sup> See generally "What Constitutes 'Repeated' or 'Willful' Violation for Purposes of State Occupational Safety and Health Acts," 17 A.L.R.6th 715 (originally published in 2006).

citations or equivalent State documents, a violation is repeated if it is the same as, or substantially similar to, a prior violation of the Labor Laws by the contractor that was the subject of a separate investigation or proceeding arising from a separate set of facts, and became uncontested or adjudicated within the previous 3 years. These terms are explained in greater detail below.

**i. Prior Violation Must Have Been Uncontested or Adjudicated**

For a violation to be classified as “repeated,” a prior violation must be either uncontested or adjudicated. Only the prior violation need be uncontested or adjudicated when determining whether a violation is repeated. The subsequent violation—the one to be classified as “repeated”—does not need to have been uncontested or adjudicated. These terms are explained below.

An uncontested violation is a violation that is reflected in:

(2) A Labor Law decision that the contractor has not contested or challenged within the time limit provided in the Labor Law decision or otherwise required by law; or

(3) A Labor Law decision following which the contractor agrees to at least some of the relief sought by the agency in its enforcement action.

An adjudicated violation is one that is reflected in:

(1) a civil judgment;

(2) an arbitral award or decision; or

(3) an administrative merits

determination that constitutes a final agency order by an administrative adjudicative authority following a proceeding in which the contractor had an opportunity to present evidence or arguments on its behalf.

As used in the above definition of an adjudicated violation, “administrative adjudicative authority” means an administrative body empowered to hear adversary proceedings, such as the ARB, the OSHRC, or the NLRB. ALJs are also administrative adjudicative authorities; however, their decisions will only constitute adjudicated violations if they are adopted as final agency orders. This typically will occur, for example, if the party subject to an adverse decision by an ALJ does not file a timely appeal to the agency’s administrative appellate body, such as those referenced above.

For an ALCA to classify a subsequent violation as “repeated,” the prior violation must be uncontested or adjudicated before the date of the Labor Law decision for the subsequent violation.

An example illustrating the above principles follows:

When WHD sends a contractor a letter finding that the contractor violated the DBA, if the contractor wishes to contest the violation, it must request a hearing in writing within 30 days. 29 CFR 5.11(b)(2). If the contractor timely requests a hearing, then the matter may proceed to a hearing before an ALJ, *id.* 5.11(b)(3), and, if necessary, the contractor may appeal to the ARB, *id.* 6.34. While these proceedings are pending, WHD’s letter, by itself, cannot be a prior violation because it is neither uncontested nor adjudicated. Thus, if the contractor, during the pendency of those proceedings, receives a second letter from WHD finding that the contractor committed a substantially similar violation, the second violation would not be classified as repeated. However, once the ARB renders its decision, representing a final order of the Department of Labor, the first violation is considered adjudicated. If, after the ARB decision, the contractor receives a second letter about a second substantially similar violation, that second violation would be classified as a repeated violation under the Order, regardless of whether the second violation is uncontested or adjudicated.

The first letter may also become “uncontested” if the contractor agrees in a settlement to pay some or all of the back wages due. Thus, if the contractor agrees to such a settlement at any time after receiving the first letter, and the contractor subsequently receives a second letter from WHD finding that the contractor committed a second, substantially similar violation, then the second violation would be classified as repeated, regardless of whether the second violation is uncontested or adjudicated.

This framework is intended to ensure that violations will only be classified as repeated when the contractor has had the opportunity—even if not exercised—to present facts or arguments in its defense before an adjudicative authority concerning the prior violation.

**ii. 3-Year Look-Back Period**

For a violation to be classified as “repeated,” the prior violation must have become uncontested or adjudicated no more than 3 years prior to the date of the repeated violation—the 3-year look-back period. The “date” of the repeated violation is the date of the relevant civil judgment, arbitral award or decision, or administrative merits determination (*e.g.* Labor Law decision) is issued.<sup>110</sup> For example, if

the contractor’s offer is dated March 1, 2019, then the contractor must disclose all Labor Law decisions within the 3-year disclosure period prior to the date of the offer, between March 1, 2016, and March 1, 2019. However, if one of the contractor’s disclosed decisions is dated June 8, 2018, then the 3-year look-back period for determining whether that violation identified in the decision should be classified as repeated extends back to June 8, 2015.

The relevant date for determining whether a prior violation falls within the 3-year look-back period is the date that the prior violation becomes uncontested or adjudicated. A prior violation becomes uncontested either on the date on which any time period to contest the violation has expired, or on the date of the contractor’s agreement to at least some of the relief sought by the agency in its enforcement action (*e.g.*, the date a settlement agreement is signed), whichever is applicable. A prior violation becomes adjudicated on the date on which the violation first becomes a civil judgment, arbitral award or decision, or a final agency order by an administrative adjudicative authority following a proceeding in which the contractor had an opportunity to present evidence or arguments on its behalf. Thus, for a violation that is the subject of successive adjudications, the dates of subsequent appellate decisions are not relevant.

For example, if OFCCP issues a show cause notice to a contractor on January 1, 2017, and the contractor contests the violation, resulting in an ALJ determination on January 1, 2018, an ARB determination on January 1, 2019, a civil judgment by a district court on January 1, 2020, and a civil judgment by a court of appeals on January 1, 2021, then the relevant date of the prior violation would be the January 1, 2019 date of the ARB order. This date is the relevant date because this is the date on which the violation becomes a final agency order by the ARB, and therefore first becomes an adjudicated violation—even though it is later adjudicated again in the civil judgments of the district court and court of appeals. That ARB order could therefore serve as a prior violation for any subsequent substantially similar violation for which a Labor Law decision is issued after January 1, 2019 and prior to January 1, 2022.

timeframe within which all Labor Law decisions must be disclosed under the Order (the 3-year disclosure period), which is the 3 years prior to the date of the contractor’s offer.

<sup>110</sup>This means that the 3-year timeframe for determining whether a violation is repeated (the 3-year look-back period) is different from the 3-year

### iii. Separate Investigations or Proceedings

The prior violation must be the subject of a separate investigation or proceeding arising from a separate set of facts. Thus, for example, if one investigation discloses that a contractor violated the FLSA and the OSH Act, or committed multiple violations of any one of the Labor Laws, such violations would not be “repeated” simply because of the other violations found in the same investigation.

### iv. Prior Violation Must Be Committed by the Same Legal Entity

The prior violation must have been committed by the contractor, considered on a company-wide basis. Thus, a prior violation by any establishment of a multi-establishment company can render subsequent violations repeated, provided the other relevant criteria are satisfied, as long as the violation was committed by the same legal entity.<sup>111</sup> As discussed below, the relative size of the contractor as compared to the number of violations may be a mitigating factor.

### v. Substantially Similar Violations

The prior violation must be the same as or substantially similar to the violation designated as repeated. Substantially similar does not mean “exactly the same.” *United States v. Washam*, 312 F.3d 926, 930–31 (8th Cir. 2002). Rather, two things may be substantially similar where they share “essential elements in common.” *Alameda Mall, L.P. v. Shoe Show, Inc.*, 649 F.3d 389, 392–93 (5th Cir. 2011) (quoting the dictionary definition of the term).

Whether violations fall under the same Labor Law is not necessarily determinative of whether the requirements underlying those violations are substantially similar. Rather, as set forth in greater details below, whether a violation is substantially similar to a past violation turns on the nature of the violation and underlying obligation itself. The following definitions outline when, under the Order, a violation will be substantially similar to a prior violation (with the exception of OSH Act and OSHA State Plan violations enforced through a citation, which are addressed above):

<sup>111</sup> However, as noted below, as to the anti-discrimination Labor Laws specifically, whether a violation was committed at the same worksite as a prior violation is one factor that can affect whether the two violations are substantially similar to each other.

### FLSA

Any two violations of the FLSA’s child labor provisions are substantially similar to each other. This reflects the treatment of such violations as “repeated” for purposes of civil monetary penalties in 29 CFR 579.2. Additionally, any two violations of the FLSA’s provision requiring break time for nursing mothers are substantially similar to each other.

### FLSA, DBA, SCA, and Executive Order 13658

Any violations of the minimum wage, subminimum wage, overtime, or prevailing wage requirements of the FLSA, DBA, SCA, and Executive Order 13658 are substantially similar to each other, even if the violations arise under different statutes.<sup>112</sup>

### FMLA

Any two FMLA violations are substantially similar to each other under the Order, with the exception of violations of the notice requirements. Thus, denial of leave, retaliation, discrimination, failure to reinstate an employee to the same or an equivalent position, and failure to maintain group health insurance are all substantially similar, given that each violation involves either denying FMLA leave or penalizing an employee who takes leave. Conversely, any two instances of failure to provide notice—such as failure to provide general notice via a poster or a failure to notify individual employees regarding their eligibility status, rights, and responsibilities—are substantially similar to each other, but not to other violations of the FMLA.

### MSPA

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

<sup>112</sup> This treatment is consistent with the FLSA’s regulations, which treat any two minimum wage or overtime violations as “repeated.” See 29 CFR 578.3(b). This regulatory provision recognizes that two failures to pay wages mandated by law are substantially similar, even if they involve different specific obligations.

Violations of the statute’s disclosure and recordkeeping requirements are also substantially similar to each other. Finally, multiple violations related to the MSPA’s registration requirements are substantially similar to each other.

### NLRA

For NLRA violations, any two violations of the same numbered subsection of section 8(a) of the NLRA, 29 U.S.C. 158(a), are substantially similar. For example, any two violations of section 8(a)(3), which prohibits employers from discriminating against employees for engaging in or refusing to engage in union activities, are substantially similar. Likewise, any two violations of section 8(a)(2), which prohibits employers from dominating or assisting labor unions through financial support or otherwise, are substantially similar to each other.

### The Anti-Discrimination Labor Laws

For purposes of the anti-discrimination Labor Laws,<sup>113</sup> violations are substantially similar if they involve both of the following elements, even if they arise under different statutes:

- (1) the same protected status, *and*
- (2) at least one of the following elements in common:
  - a. the same employment practice, *e.g.*, hiring, firing, harassment, compensation, or,
  - b. the same worksite.

With regard to the first element, violations are considered to involve the “same” protected status as long as the same status is present in both violations, even if other protected statuses may be involved as well. For example, if the first violation involves discrimination on the basis of national origin and the second violation involves discrimination on the basis of national origin and race, the violations are substantially similar because they involve the same protected status, namely, discrimination on the basis of national origin. Additionally, in this context, violations involving discrimination on the bases of sex, pregnancy, gender identity (including transgender status), and sex stereotyping are considered to involve the “same” protected status for the purpose of determining whether violations are substantially similar under the Order.

For the purpose of determining whether violations involve the same

<sup>113</sup> Title VII, section 503 of the Rehabilitation Act of 1973, the ADA, the ADEA, section 6(d) of the FLSA (known as the Equal Pay Act, 29 U.S.C. 206(d)), Executive Order 11246 of September 24, 1965, the Vietnam Era Veterans’ Readjustment Assistance Act of 1972, and the Vietnam Era Veterans’ Readjustment Assistance Act of 1974.

worksite, the definition of “worksite” set forth in the discussion of the 25 percent criterion for a serious violation should be used, *see* Section III(A)(1)(b)(i), except that any two company-wide violations are also considered to involve the same worksite.

#### All of the Labor Laws

For all of the Labor Laws, including those referenced above, any two violations involving retaliation are substantially similar. Likewise, any two failures to keep records required under the Labor Laws are substantially similar. And, any two failures to post notices required under the Labor Laws are substantially similar.

#### c. Table of Examples

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

#### 3. Willful Violations

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

Accordingly, a violation is “willful” under the Order if:

a. For purposes of OSH Act or OSHA-approved State Plan violations that are enforced through citations or equivalent State documents, the citation or equivalent State document was designated as willful or any equivalent State designation (*e.g.*, “knowing”);

b. For purposes of the minimum wage, overtime, and child labor provisions of the FLSA, 29 U.S.C. 206–207, 212, the administrative merits determination sought or assessed back wages for greater than 2 years or sought or assessed civil monetary penalties for a willful violation, or there was a civil judgment or arbitral award or decision finding that the contractor’s violation was willful;

c. For purposes of the ADEA, the enforcement agency, court, arbitrator, or arbitral panel assessed or awarded liquidated damages;

d. For purposes of Title VII or the ADA, the enforcement agency, court, arbitrator, or arbitral panel assessed or awarded punitive damages for a violation where the contractor engaged

in a discriminatory practice with malice or reckless indifference to the federally protected rights of an aggrieved individual; or

e. For purposes of any other violations of the Labor Laws, it is readily ascertainable from the findings of the relevant enforcement agency, court, arbitrator, or arbitral panel that the contractor knew that its conduct was prohibited by any of the Labor Laws or showed reckless disregard for, or acted with plain indifference to, whether its conduct was prohibited by one or more requirements of the Labor Laws.

In the above definition, the Department incorporates existing standards, statutory or otherwise, from the Labor Laws that are indicative of willfulness as defined under the Order.

Further guidance for applying these criteria is included below:

#### a. OSH Act or OSHA-Approved State Plan Violations Enforced Through Citations or Equivalent State Documents

The term “willful” has a well-established meaning under the OSH Act that is consistent with the standard provided in the Order. Under the OSH Act, a violation that is enforced through a citation or equivalent State document will be designated as willful where an employer has demonstrated either an intentional disregard for the requirements of the OSH Act or a plain indifference to its requirements. *See A.E. Staley Mfg. Co. v. Sec’y of Labor*, 295 F.3d 1341, 1351–52 (D.C. Cir. 2002). For example, if an employer knows that specific steps must be taken to address a hazard, but substitutes its own judgment for the requirements of the legal standard, the violation will be designated as willful. OSHA-approved State Plans generally use this term in a similar way.<sup>114</sup> As such, as noted above, under the OSH Act or an OSHA-approved State Plan, if a citation or equivalent State document designates a violation as “willful” or an equivalent State designation (*e.g.*, “knowing”), the violation will be willful for purposes of the Order.

#### b. Violations of the Minimum Wage, Overtime, and Child Labor Provisions of the FLSA

The term “willful” has a well-established meaning under the FLSA that is consistent with the standard provided in the Order. Under the minimum wage, overtime, and child labor provisions of the FLSA, 29 U.S.C.

206–207, 212, a violation is willful where the employer knew that its conduct was prohibited by the FLSA or showed reckless disregard for the FLSA’s requirements. *See* 29 CFR 578.3(c)(1), 579.2; *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988). For example, an employer that requires workers to “clock out” after 40 hours in a workweek and then continue working “off the clock” or pays workers for 40 hours by check and then pays them in cash at a straight-time rate for hours worked over 40 commits a willful violation of the FLSA’s overtime requirements. These actions show knowledge of the FLSA’s requirements to pay time-and-a-half for hours worked over 40 and an attempt to evade that requirement by concealing records of the workers’ actual hours worked.

Under the minimum wage and overtime provisions of the FLSA, willful violations are grounds for administrative assessments of back wages for greater than 2 years, and for the assessment of civil monetary penalties. *See* 29 U.S.C. 216(e)(2); cf. 29 U.S.C. 255(a). Additionally, under the FLSA’s child labor provisions, willful violations are also grounds for increased civil monetary penalties. *See* 29 U.S.C. 216(e)(1)(A)(ii); 29 CFR 579.5(c). Accordingly, administrative assessments of back wages for greater than 2 years and assessments of civil monetary penalties for willful violations are understood to reflect a finding of willfulness and therefore will be considered indicative of willfulness under the Order.<sup>115</sup> Courts and arbitrators must also make findings of willfulness in order to extend the statute of limitations beyond 2 years under the FLSA’s minimum wage and overtime provisions, or to affirm assessments of civil monetary penalties of the FLSA’s minimum wage, overtime, or child labor provisions. *See* 29 U.S.C. 216(e)(1)(A)(ii), 216(e)(2), 216(e)(3)(C), 255(a). Thus, any civil judgment or arbitral award or decision finding that the contractor committed a willful FLSA violation will be classified as a willful violation under the Order.

#### c. Violations of the ADEA

The term “willful” also has a well-established meaning under the ADEA that is consistent with the standard provided in the Order. Under the ADEA,

<sup>115</sup> Civil monetary penalties may be assessed under the FLSA’s minimum wage and overtime provisions for violations that are either repeated or willful, and civil monetary penalties may be assessed for child labor violations even in the absence of a repeated or willful violation. Only civil monetary penalties involving willful violations will constitute willful violations under the Order.

<sup>114</sup> *See generally* Randy Sutton, “What Constitutes ‘Repeated’ or ‘Willful’ Violation for Purposes of State Occupational Safety and Health Acts,” 17 A.L.R.6th 715 (originally published in 2006).

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

#### d. Title VII and the ADA

Violations of Title VII or the ADA are “willful” under the Order if the enforcement agency, court, arbitrator, or arbitral panel assessed or awarded punitive damages for a violation where the contractor engaged in a discriminatory practice with malice or reckless indifference to the federally protected rights of an aggrieved individual. Punitive damages are appropriate in cases under Title VII or the ADA where the employer engaged in intentional discrimination with “malice or reckless indifference to the federally protected rights of an aggrieved individual.” 42 U.S.C. 1981a(b)(1). This standard is analogous to the standard for willful violations in the Order. An employer acts with malice or reckless indifference if a managerial agent of the employer, acting within the scope of employment, makes a decision that was in the face of a perceived risk of violating Federal law, and the employer cannot prove that the manager’s action was contrary to the employer’s good faith efforts to comply with Federal law. *See Kolstad v. American Dental Ass’n*, 527 U.S. 526, 536, 545 (1999). For example, if a manager received a complaint of sexual harassment but failed to report it or investigate it—and the employer’s anti-harassment policy was ineffective in protecting the employees’ rights or the employer did not engage in good faith efforts to educate its managerial staff about sexual harassment—then the violation would warrant punitive damages and qualify as “willful” under the Order. *See, e.g., EEOC v. Mgmt. Hospitality of Racine, Inc.*, 666 F.3d 422, 438–39 (7th Cir. 2012).

#### e. Any Other Violations of the Labor Laws

For any violations of Labor Laws other than violations discussed above in subsections (a) through (d), a violation is willful for purposes of the Order if it is readily ascertainable from the

findings of the relevant enforcement agency, court, arbitrator, or arbitral panel that the contractor knew that its conduct was prohibited by the Labor Laws or showed reckless disregard for, or acted with plain indifference to, whether its conduct was prohibited by Labor Laws.<sup>116</sup>

A contractor need not act with malice for a violation to be classified as willful; rather, the focus is on whether it is readily ascertainable from the Labor Law decision that, based on all of the facts and circumstances discussed in the findings, the contractor acted with knowledge of or reckless disregard for its legal requirements. The Labor Law decision need not include the specific words “knowledge,” “reckless disregard,” or “plain indifference”; however, it must be readily ascertainable from the factual findings or legal conclusions contained in the decision that the violation meets one of these conditions, as described further below.

#### Knowledge

The first circumstance where willfulness will be found is where it is readily ascertainable from the Labor Law decision that the contractor knew that its conduct was prohibited by law, yet engaged in the conduct anyway. Knowledge can be inferred from the factual findings or legal conclusions contained in the Labor Law decision. Thus, willfulness will typically be found where it is readily ascertainable from the Labor Law decision that a contractor was previously advised by responsible government officials that its conduct was not lawful, but engaged in the conduct anyway. Repeated violations may also be willful to the extent that the prior proceeding demonstrates that the contractor was put on notice of its legal obligations, only to later commit the same or a substantially similar violation. If it is readily ascertainable from the Labor Law decision that a contractor has a written policy or manual that describes a legal requirement, and then knowingly violates that requirement, the violation is also likely to be willful.

For example, if it is readily ascertainable from the Labor Law decision that a contractor was warned by an official from the Department that the housing it was providing to migrant agricultural workers did not comply with required safety and health standards, and that the contractor then failed to make the required repairs or corrections, such findings demonstrate

that the contractor engaged in a willful violation of MSPA. Likewise, if the Labor Law decision indicates that a contractor’s employee handbook states that it provides unpaid leave to employees with serious health conditions as required by the FMLA, but the contractor refuses to grant FMLA leave or erects unnecessary hurdles to employees requesting such leave, that violation would also likely be willful. Certain acts, by their nature, are willful, such as conduct that demonstrates an attempt to evade statutory responsibilities, including the falsification of records, fraud or intentional misrepresentation in the application for a required certificate, payment of wages “off the books,” or “kickbacks” of wages from workers back to the contractor.

#### Reckless Disregard or Plain Indifference

The second type of willful violation is where it is readily ascertainable from the Labor Law decision that a contractor acted with reckless disregard or plain indifference toward the Labor Laws’ requirements. These terms refer to circumstances where a contractor failed to make sufficient efforts to learn or understand whether it was complying with the law. Although merely inadvertent or negligent conduct would not meet this standard, ignorance of the law is not a defense to a willful violation. The adequacy of a contractor’s inquiry is evaluated in light of all of the facts and circumstances, including the complexity of the legal issue and the sophistication of the contractor. In other words, the more obvious the violation, and the longer the contractor has been in business, the more likely it will be that a violation will be found willful. Reckless disregard or plain indifference may also be shown where a contractor was aware of plainly obvious violations and failed to take an appropriate action. For example, an employer who employs a 13-year-old child in an obviously dangerous occupation, such as operating a forklift, is acting in reckless disregard for the law even if it cannot be shown that the employer actually knew that doing so was in violation of one of the Secretary’s Hazardous Occupation Orders related to child labor. Reckless disregard or plain indifference will also be found if a contractor acted with purposeful lack of attention to its legal requirements, such as if management-level officials are made aware of a health or safety requirement but make little or no effort to communicate that requirement to lower-level supervisors and employees.

<sup>116</sup> Nothing in this guidance is intended to affect the terminology or operation of FAR part 22.4.

#### f. Table of Examples

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

#### 4. Pervasive Violations

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

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

Pervasive violations differ from repeated violations in a number of ways. First, unlike repeated violations, pervasive violations need not be substantially similar, or even similar at all, as long as each violation involves one of the Labor Laws. Additionally, pervasive violations, unlike repeated violations, may arise in the same proceeding or investigation. For example, a small tools manufacturer with about 50 employees in a single location that does not have a process for identifying and eliminating serious safety-and-health hazards may be cited multiple times for serious violations under the OSH Act—once for improper storage of hazardous materials, once for failure to provide employees with protective equipment, once for inadequate safeguards on heavy machinery, once for lack of fall protection, once for insufficient ventilation, once for unsafe noise

exposure, and once for inadequate emergency exits. While these violations are sufficiently different that they would not be designated as repeated violations by OSHA and would therefore not be repeated violations under the Order, such a high number of serious workplace safety violations relative to the size of a small company with only a single location would likely demonstrate a basic disregard by the company for workers’ safety and health, particularly if the company lacked a process for identifying and eliminating serious safety-and-health hazards. As such, these violations would likely be considered pervasive.

In addition, violations across multiple Labor Laws—especially when they are serious, repeated, or willful—are an indication of pervasive violations that warrant careful examination by the ALCA. For example, a medium-sized company with about 1,000 employees that provides janitorial services at Federal facilities may be found to have violated the SCA for failure to pay workers their required wages, Title VII for discrimination in hiring on the basis of national origin, the NLRA for demoting workers who are seeking to organize a union, and the FMLA for denying workers unpaid leave for serious health conditions. While these violations are substantively different from each other, a medium-sized company that violates so many Labor Laws is demonstrating a basic disregard for its legal obligations to its workers and is likely committing pervasive violations.

Whereas a repeated violation may be found anytime a contractor commits two or more substantially similar violations, there is no specific numeric threshold for pervasive violations. The number of violations that will result in a classification of pervasive will depend on the size of the contractor, as well as the nature and severity of the violations themselves.

A series of repeated violations may, however, become pervasive, particularly if it demonstrates that a contractor, despite knowledge of its violations, fails to make efforts to change its practices and continues to violate the law. For example, if WHD issued several administrative merits determinations over the course of 3 years finding that a contractor illegally employed underage workers, and despite receiving these notices, the contractor failed to make efforts to change its child labor practices and continued to violate the FLSA’s child labor provisions, the series of violations would likely be considered pervasive.

For smaller companies, a smaller number of violations may be sufficient for a finding of pervasiveness, while for large companies, pervasive violations will typically require either a greater number of violations or violations affecting a significant number or percentage of a company’s workforce. For example, if OFCCP finds that a large contractor with 50,000 employees that provides food services at Federal agencies nationwide used pre-employment screening tests for most jobs at the company’s facilities that resulted in Hispanic workers being hired at a significantly lower rate than non-Hispanic workers over a 5-year period, and in addition, WHD finds that the company failed to comply with the SCA’s requirements to pay its workers prevailing wages at many of its locations, such violations would likely be pervasive, notwithstanding the large size of the contractor, because the contractor’s numerous serious violations spanned most of its locations and affected many of its workers. In contrast, had the company only engaged in these prohibited practices with respect to some of its hiring at only one a few of its locations, such violations might not necessarily be considered pervasive.

Similarly, if a large company with 5,000 employees that provides uniform services to Federal agencies in several States is cited 10 times for serious OSHA violations affecting most of its inspected locations over the span of a year, and a number of the citations involve the failure to abate extremely dangerous conditions—and as a result the company is placed on OSHA’s Severe Violator Enforcement Program—such violations would likely be pervasive because the sheer number of violations over such a short period of time is evidence that the company is ignoring persistent threats to workers’ safety, fails to treat safety as a serious problem, and is acting in disregard of its legal obligations. In contrast, if the violations affected only a few of the company’s facilities, or if the company had acted quickly to abate any violations, the violations might not necessarily be considered pervasive.

An additional relevant factor in determining whether violations are pervasive is the involvement of higher-level management officials. When Labor Laws are violated with either the explicit or implicit approval of higher-level management, such approval signals that future violations will be tolerated or condoned, and may dissuade workers from reporting violations or raising complaints. Thus, to the extent that higher-level management officials were involved in



violations themselves (such as discrimination in hiring by an executive, or a decision by an executive to cut back on required safety procedures that led to violations of the OSH Act) or knew of violations and failed to take appropriate actions (such as ignoring reports or complaints by workers), the violations are more likely to be deemed pervasive. By using the term “higher-level management,” the Department agrees that a violation is unlikely to be pervasive for this reason where the manager involved is a low-level manager (such as a first-line supervisor) acting contrary to a strong company policy, and the company responds with appropriate remedial action.

For example, if the vice president of a construction company directs a foreman not to hire Native American workers, and as a result the company is later found to have committed numerous Title VII violations against job applicants, such violations are likely to be pervasive. Likewise, if the chief safety officer at a chemical plant fields complaints from many workers about several unsafe working conditions but then fails to take action to remedy the unsafe conditions, such violations are also likely to be pervasive because the known dangerous working conditions were disregarded by a high-level company official despite being reported by many workers at the plant. Such behavior reflects a basic disregard for worker health and safety.

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

#### *B. Weighing Labor Law Violations and Mitigating Factors*

As discussed above, an ALCA’s assessment of a contractor’s Labor Law violations involves a three-step process: (1) Classifying violations to determine whether any are serious, repeated, willful, and/or pervasive; (2) weighing any serious, repeated, willful, and/or pervasive violations in light of the totality of the circumstances, including any mitigating factors that the contractor has identified; and then (3) providing the contracting officer with written analysis and advice regarding the contractor’s record of Labor Law compliance. In analyzing a contractor’s record during the weighing process, an ALCA does not need to give equal weight to two violations that receive the same classification. Some violations may have more significant consequences on a contractor’s workforce or more potential to disrupt contractor performance than others.

In the weighing process, the ALCA considers many factors as a part of an analysis of whether the contractor has a satisfactory record of Labor Law compliance—in other words, whether the contractor’s history of Labor Law compliance and any adoption by the contractor of preventative compliance measures indicate that the contracting officer could find the contractor to have a satisfactory record of integrity and business ethics. In considering the totality of the circumstances, the ALCA considers information about a contractor’s violations obtained from enforcement agencies, as well as potentially mitigating information about those violations that a contractor has provided for review. In addition, although ALCAs review contractors’ disclosed decisions, ALCAs will also consider Labor Law decisions that should have been disclosed by contractors under the Order, but were not. Such undisclosed decisions may be brought to the attention of an ALCA by the contracting officer, workers or their representatives, an enforcement agency, or any other source.

The weighing process is not mechanistic, and this Guidance cannot account for all of the possible circumstances or facts related to a contractor’s record of Labor Law compliance. However, there are certain factors that in many cases will help inform an ALCA’s analysis and advice. These factors, when present, will weigh for or against a conclusion that a contractor has a satisfactory record of Labor Law compliance. See Appendix E.

##### **1. Mitigating Factors That Weigh in Favor of a Satisfactory Record of Labor Law Compliance**

Mitigating factors weigh in favor of a conclusion that a contractor has a satisfactory record of Labor Law compliance. The list of factors below includes ones that an ALCA may be able to identify with information obtained from enforcement agencies. It also includes factors that an ALCA will not be able to identify unless the contractor provides the relevant information when given the opportunity to do so by the contracting officer. To ensure that all mitigating factors are considered by the ALCA, the contractor should avail itself of the opportunity to provide all the information it believes demonstrates a satisfactory record of Labor Law compliance.

Generally, the most important mitigating factor will be the extent to which the contractor has remediated the violation(s) and taken steps that will prevent recurrence in the future. Other mitigating factors include where the

contractor has only a single disclosed violation; where the number of violations is low relative to the size of the contractor; where the contractor has implemented a safety-and-health management program, a collectively-bargained grievance procedure, or other compliance program; where a violation resulted from a recent legal or regulatory change; where the findings in the relevant Labor Law decision support the contractor’s defense that it acted in good faith or had reasonable grounds for believing that it was not violating the law; and where the contractor has maintained a long period of compliance following any violations.

None of these mitigating factors are necessarily determinative. Nor is this an exhaustive list. In some cases, depending on the circumstances, several mitigating factors may need to be present in order for an ALCA to conclude that a contractor has a satisfactory record of Labor Law compliance. In other cases, the presence of only one of these factors may be sufficient to support such a conclusion.

##### **a. Remedial Measures**

As noted above, the extent to which a contractor has remediated a Labor Law violation will typically be the most important factor that can mitigate the effect of a violation. Remedial measures can include measures taken to correct an unlawful practice, make affected employees whole, or otherwise comply with a contractor’s obligations under the Labor Laws. Remedial measures also may include the implementation of new procedures and practices, or other actions, in order to promote future compliance. Contractors may take remedial measures voluntarily, through a settlement agreement with an enforcement agency or private parties, or pursuant to a court order. Remedial measures may also be taken as a result of labor compliance agreements, which are discussed in section III(C) below.

Where a contractor institutes remedial measures, this may indicate that a contractor has recognized the need to address a violation and has taken steps to bring itself into compliance with the law. The timeliness with which a contractor agrees to, initiates, or completes the implementation of remedial measures may be relevant to the weight that an ALCA gives to this factor. Similarly, failure to remediate a violation may demonstrate disregard for legal obligations, which in turn may raise concerns about a contractor’s commitment or ability to comply with the law during future contract performance.

#### b. Only One Violation

While a contracting officer is not precluded from making a determination of nonresponsibility based on a single violation in the circumstances where merited, the Order provides that, in most cases, a single violation of a Labor Law may not necessarily give rise to a determination of lack of responsibility, depending on the nature of the violation. Order, section 4(a)(i). Thus, when considering mitigating factors, an ALCA may generally consider the existence of only a single violation during the 3-year disclosure period as weighing in favor of a conclusion that the contractor has a satisfactory record of Labor Law compliance.

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

Larger contractors, by virtue of their size, are more likely to have multiple violations than smaller ones. When assessing contractors with multiple violations, the size of the contractor is considered.

#### d. Safety-and-Health Programs, Grievance Procedures, or Other Compliance Programs

Contractors can help to assure future compliance by implementing a safety-and-health management program such as OSHA's 1989 Safety and Health Program Management guidelines or any updates to those guidelines,<sup>117</sup> grievance procedures (including collectively-bargained ones), monitoring arrangements negotiated as part of either a settlement agreement or labor compliance agreement, or other similar compliance programs. Such programs and procedures can foster a corporate culture in which workers are encouraged to raise legitimate concerns about Labor Law violations without the fear of repercussions; as a result, they may also prompt workers to report violations that would, under other circumstances, go unreported. Therefore, implementation or prior existence of such a program is a mitigating factor.

#### e. Recent Legal or Regulatory Change

To the extent that the Labor Law violations can be traced to a recent legal or regulatory change, this may be a mitigating factor. This may be a case

<sup>117</sup>In addition, there are two voluntary industry consensus standards that, if implemented, should be considered as mitigating factors for violations involving workplace safety and health: The ANSI/AIHA Z10—2005 Occupational Safety and Health Management Systems (ANSI/AIHA, 2005), and the OHSAS 18001—2007 Occupational Health and Safety Management Systems (OHSAS Project Group, 2007).

where a new agency or court interpretation of an existing statute is applied retroactively and a contractor's pre-change conduct is found to be a violation. For example, where prior agency or court decisions suggested that a practice was lawful, but the Labor Law decision finds otherwise, this may be a mitigating factor.

#### f. Good Faith and Reasonable Grounds

It may be a mitigating factor where the findings in the relevant Labor Law decision support the contractor's defense that it had reasonable grounds for believing that it was not violating the law. For example, if a contractor acts in reliance on advice from a responsible official from the relevant enforcement agency, or an authoritative administrative or judicial ruling on a similar case, such reliance will typically demonstrate good faith and reasonable grounds. This mitigating factor also applies where a violation otherwise resulted from the conduct of a government official. For example, a DBA violation may be mitigated where the contracting agency failed to include the relevant contract clause and wage determination in a contract.

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

If, following one or more violations within the 3-year disclosure period, the contractor maintains a steady period of compliance with the Labor Laws, such compliance may mitigate the existence of prior violations (e.g., violations were reported from 2½ years ago and there have been none since). This is a stronger mitigating factor where the contractor has a recent Labor Law decision that it must disclose, but the underlying conduct took place significantly before the 3-year disclosure period and the contractor has had no subsequent violations.

#### 2. Factors That Weigh Against a Satisfactory Record of Labor Law Compliance

There are also factors that weigh against a conclusion that a contractor has a satisfactory record of Labor Law compliance. The list of factors below is not exhaustive. Nor are any of these factors necessarily determinative. An ALCA reviews these factors as part of an evaluation of the totality of the circumstances. In some cases, several factors may need to be present in order for an ALCA to conclude that a contractor has an unsatisfactory record of Labor Law compliance. Depending on the facts of the case, even where multiple factors are present, they may

be outweighed by mitigating circumstances.

#### a. Pervasive Violations

As described in section III(A)(4) above, pervasive violations are violations that demonstrate a basic disregard for the Labor Laws. Such disregard of legal obligations creates a heightened danger that the contractor may, in turn, disregard its contractual obligations as well. Additionally, such contractors are more likely to violate the Labor Laws in the future, and those violations—and any enforcement proceedings or litigation that may ensue—may imperil their ability to meet their obligations under a contract. Accordingly, where an ALCA has classified violations as pervasive (in the classification step described above in section III(A)), this weighs strongly against a satisfactory record of Labor Law compliance.

#### b. Violations That Meet Two or More of the Categories Discussed Above (Serious, Repeated, and Willful)

A violation that falls into two or more of the categories is also, as a general matter, more likely to be probative of the contractor's disregard for legal obligations and unsatisfactory working conditions than a violation that falls into only one of those categories. Accordingly, where an ALCA has classified a violation as both repeated and willful, for example, the violation will tend to weigh more strongly against a satisfactory record of Labor Law compliance than a similar violation that is repeated or willful, but not both.

#### c. Violations of Particular Gravity

In analyzing a contractor's record, an ALCA does not need to give equal weight to two violations that have received the same classification. Labor Law violations of particular gravity include, but are not limited to, violations related to the death of an employee; violations involving a termination of employment for exercising a right protected under the Labor Laws; violations that detrimentally impact the working conditions of all or nearly all of the workforce at a worksite; and violations where the amount of back wages, penalties, and other damages awarded is greater than \$100,000.

#### d. Violations for Which Injunctive Relief Is Granted

Both preliminary and permanent injunctions are rarely granted by courts and require a showing of compelling circumstances, including irreparable harm to workers and a threat to the

public interest. Accordingly, where a court grants injunctive relief to remedy a violation that is already classified as serious, repeated, willful, and/or pervasive, the ALCA should take this into account as a factor that increases the significance of that violation to the contractor's overall record of Labor Law compliance.

#### e. Violations That Are Reflected in Final Orders

To the extent that the judgment, determination, or order finding a Labor Law violation is final (because appeals and opportunities for further review have been exhausted or were not pursued), the violation should be given greater weight than a similar violation that is not yet final. While a violation that is not final should be given lesser weight, it will still be considered as relevant to a contractor's record of Labor Law compliance.

#### C. Advice Regarding a Contractor's Record of Labor Law Compliance

As discussed above, an ALCA's assessment of a contractor's Labor Law violations involves a three-step process: (1) Classifying violations to determine whether any are serious, repeated, willful, and/or pervasive; (2) weighing any serious, repeated, willful, and/or pervasive violations in light of the totality of the circumstances, including any mitigating factors that the contractor has identified; and then (3) providing the contracting officer with written analysis and advice regarding the contractor's record of Labor Law compliance.

The ALCA determines what advice and analysis to give to the contracting officer through the classification and weighing steps. In providing advice, the ALCA carefully considers the contractor's record of Labor Law compliance and makes a recommendation regarding whether it could support a finding, by the contracting officer, that the contractor has a satisfactory record of integrity and business ethics. See FAR 22.2004-2(b)(3)-(4). As a part of this analysis, the ALCA considers whether a labor compliance agreement is warranted to ensure the contractor's compliance with the Labor Laws during future contract performance—and, if so, the timing of the negotiations. *Id.*

Labor compliance agreements are negotiated by the contractor and the relevant enforcement agency/agencies. These agreements may include enhanced remedial measures intended to prevent future violations and increase compliance with Labor Laws. Examples of enhanced remedial measures include,

but are not limited to, specific changes in the contractor's business policies and operations, adoption of a safety-and-health management system, assessment by outside consultants, internal compliance audits or external compliance monitoring, and enterprise-wide applicability of remedial measures. A contractor may enter into a labor compliance agreement while at the same time continuing to contest an underlying Labor Law violation.

A labor compliance agreement is warranted where the contractor has serious, repeated, willful, and/or pervasive Labor Law violations that are not outweighed by mitigating factors and the ALCA identifies conduct or policies that could be addressed through preventative actions. Where this is the case, the contractor's history of Labor Law violations demonstrates a risk to the contracting agency of violations during contract performance, but these risks may be mitigated through the implementation of appropriate enhanced compliance measures. A labor compliance agreement also may be warranted where the contractor presently has a satisfactory record of Labor Law compliance, but there are also clear risk factors present, and a labor compliance agreement would reduce these risk factors and demonstrate steps to maintain Labor Law compliance during contract performance.

When an ALCA recommends a labor compliance agreement, the ALCA has three options regarding the timing of negotiations: (1) The contractor must commit, after award, to negotiate an agreement; (2) the contractor must commit, before award, to negotiate an agreement; or (3) the contractor must enter into an agreement before award. FAR 22.2004-2(b)(3)(ii)-(iv).

#### 1. ALCA Recommendation

The ALCA's advice to the contracting officer must include one of the following recommendations: The contractor's record of Labor Law compliance—

- (i) Supports a finding, by the contracting officer, of a satisfactory record of integrity and business ethics;
- (ii) Supports a finding, by the contracting officer, of a satisfactory record of integrity and business ethics, but the prospective contractor needs to commit, after award, to negotiating a labor compliance agreement or another acceptable remedial action;
- (iii) Could support a finding, by the contracting officer, of a satisfactory record of integrity and business ethics, only if the prospective contractor commits, prior to award, to negotiating

a labor compliance agreement or another acceptable remedial action;

(iv) Could support a finding, by the contracting officer, of a satisfactory record of integrity and business ethics, only if the prospective contractor enters, prior to award, into a labor compliance agreement; or

(v) Does not support a finding, by the contracting officer, of a satisfactory record of integrity and business ethics, and the agency suspending and debaring official should be notified in accordance with agency procedures.

FAR 22.2004-2(b)(3). Additional guidance regarding each recommendation is provided below.

#### a. Satisfactory Record

A contractor has a satisfactory record of Labor Law compliance where it has no Labor Law violations within the 3-year disclosure period or has no violations that meet the definitions of serious, repeated, willful, and/or pervasive. Under these circumstances an ALCA may recommend that the contractor's record supports a finding, by the contracting officer, of a satisfactory record of integrity and business ethics. This recommendation may also be appropriate where the contractor does have violations that meet the definitions of serious, repeated, willful, and/or pervasive, but under the totality of the circumstances the existence of the violations is outweighed by mitigating factors or other relevant information.

#### b. Commitment After Award

An ALCA may recommend that a contractor needs to commit, after the award, to a labor compliance agreement where the contractor presently has a satisfactory record of Labor Law compliance, but there are also clear risk factors present, and a labor compliance agreement is warranted to reduce these risk factors and demonstrate steps to maintain Labor Law compliance during contract performance. This may be the case, for example, where the contractor has serious, repeated, and/or willful violations that have not been fully remediated, and the ALCA has concerns that the problems related to these violations could affect future contract performance. This may also be the case where the ALCA is concerned that the contractor has not fully addressed managerial issues that could result in violations that would impact performance of the contract. Another example is where one or more of the contractor's violations are presently in litigation and may result in final orders against the contractor in the future. This recommendation is not appropriate

where the contractor's violations are already pervasive.

#### c. Commitment Before Award

An ALCA may recommend that a contractor needs to commit, prior to the award, to a labor compliance agreement where the contractor's labor violation history demonstrates an unsatisfactory record of integrity and business ethics unless further action is taken before the award. This recommendation may be appropriate, for example, where the contractor has previously failed to respond or provide adequate justification for not responding when notified of the need for a labor compliance agreement. It may also be appropriate where the contractor has not been previously advised of the need for a labor compliance agreement, but the labor violation history demonstrates an immediate need for a commitment to negotiate—for example, where the contractor has pervasive violations, or, in certain circumstances, multiple violations of particular gravity.

#### d. Enter Into Agreement Before Award

An ALCA may also recommend that a contractor must negotiate and enter into a labor compliance agreement prior to the award. As with the recommendation described in section (c) above, this recommendation is appropriate where the contractor's labor violation history demonstrates an unsatisfactory record of integrity and business ethics unless further action is taken before the award. Depending on the conduct of the contractor and severity of violations, the same circumstances described in section (c) may justify an increased level of concern about future contract performance. In these circumstances, the ALCA may conclude that a commitment alone prior to the award is not sufficient and that the agreement must be fully negotiated and signed before the award can take place.

#### e. Notification to Agency Suspending and Debaring Official

Although in many cases, a labor compliance agreement is warranted to address a contractor's unsatisfactory record of Labor Law compliance, there are circumstances in which negotiation of a labor compliance agreement may not be warranted. In these circumstances, an ALCA should recommend that the contractor's record does not support a finding of a satisfactory record of integrity and business ethics and that the agency suspending and debaring official should be notified. This may be the case, for example, where an agreement

cannot be reasonably expected to improve future compliance. This may also be the case where the contractor has shown a basic disregard for Labor Law, such as by previously failing to enter into a labor compliance agreement after being given a reasonable time to do so. Another example is where the contractor has breached an existing labor compliance agreement. One more example is where the contractor has previously entered into a labor compliance agreement and subsequently commits pervasive violations or multiple violations of particular gravity.

#### 2. ALCA Analysis

The ALCA's recommendation must be accompanied by a written analysis. See FAR 22.2004-2(b)(4). The written analysis must include the number of Labor Law violations; their classification as serious, repeated, willful and/or pervasive; any mitigating factors or remedial measures; and any additional information that the ALCA finds to be relevant. See *id.*

If the ALCA concludes that a labor compliance agreement is warranted, then the written analysis must include a supporting rationale for the recommendation and the name of the enforcement agency or agencies that would execute the agreement. See FAR 22.2004-2(b)(4)(v), (4)(viii). The rationale should include the ALCA's explanation for any recommendation regarding when the contractor must negotiate a labor compliance agreement, *i.e.*, before or after award. See *id.* 22.2004-2(b)(4)(v). The ALCA's explanation also should include a rationale for any recommendation that the contractor must enter into a labor compliance agreement before award. See *id.*

If the ALCA recommends that the contractor's record of Labor Law compliance does not support a finding of a satisfactory record of integrity and business ethics, the ALCA's analysis must include: The rationale for the finding, whether the ALCA supports notification to the suspending and debaring official, and whether the ALCA intends to make such notification. FAR 22.2004-2(b)(4)(vi)-(vii).

In response to the ALCA's analysis and advice, the contracting officer takes appropriate action, as described in the FAR rule. See FAR 22.2004-2(b)(5) (listing appropriate actions and procedures). If the ALCA's assessment indicates that a labor compliance agreement is warranted, the contracting officer provides written notification to the contractor prior to the award about the contractor's obligations. See *id.*

22.2004-2(b)(7). When the ALCA learns that the contractor has entered into a labor compliance agreement, the ALCA must make a notation in FAPIIS. *Id.* 22.2004-1(c)(6).

#### IV. Postaward Disclosure Updates and Assessment of Labor Law Violations

After receiving a contract award, contractors must continue to disclose any new Labor Law decisions or updates to previously disclosed decisions. See Order, section 2(b); FAR 22.2004-3(a), 52.222-59. The contractor must make the disclosures in the SAM database at [www.sam.gov](http://www.sam.gov). FAR 22.2004-3(a)(1). These disclosures must be made semiannually. *Id.*

During performance of the contract, the ALCA has the duty to monitor Labor Law decision information. The ALCA has the duty to monitor SAM and FAPIIS to review any new or updated contractor disclosures. FAR 22.2004-3(b)(1). Where a contractor previously agreed to enter into a labor compliance agreement, the ALCA also has the duty to verify whether the contractor is making progress toward reaching an agreement, or has entered into and is meeting the terms of the agreement. See *id.* The ALCA also may consider Labor Law decision information received from sources other than the procurement databases. *Id.*

If the ALCA has received information indicating that further consideration or action may be warranted, then the ALCA shall notify the contracting officer in accordance with agency procedures. FAR 22.2004-3(b)(1). When this happens, the contracting officer must afford the contractor the opportunity to provide any additional information that the contractor may wish to provide for consideration—including remedial measures or other mitigating factors related to newly-disclosed decisions, or an explanation for any delay in entering into a labor compliance agreement. *Id.* 22.2004-3(b)(2).

##### A. Semiannual Disclosure Updates

If there are new Labor Law decisions or updates to previously disclosed Labor Law decisions, the contractor is required to disclose this information during performance of the contract. See FAR 22.2004-3(a); 52.222-59(b) (contract clause). Section II(A) above describes the covered contracts for which the initial preaward disclosure is required. See also FAR 22.2004-1(a).

Contractors must make these postaward disclosures semiannually in the SAM database. FAR 22.2004-3(a)(1). The contractor has flexibility in establishing the date for the semiannual

update. The contractor may use the six-month anniversary date of contract award, or the contractor may choose a different date before that six-month anniversary date. *Id.* 22.2004–3(a)(2). In either case, the contractor must continue to update it semiannually. *Id.*

The types of Labor Law decisions that must be disclosed during the postaward period are the same as during the preaward period: Administrative merits determinations, civil judgments, and arbitral awards or decisions. *See* FAR 52.222–59(a) (defining “labor law decision”). The definition of each of these Labor Law decisions is the same as applies preaward. *See id.* *See* section II(B) above for the detailed definitions.

Postaward updates should include (a) any new Labor Law decisions rendered since the last disclosure and (b) updates to previously disclosed information. As noted above in section II(B)(4) of this Guidance, contractors must report new Labor Law decisions even if they arise from a previously-disclosed Labor Law violation. For example, if a contractor initially disclosed a Federal district court judgment finding that it violated the FLSA, it must disclose as part of the periodic updates any subsequent Federal court of appeals decision affirming that judgment. In a postaward disclosure, contractors may also submit updated information reflecting the fact that a previously disclosed Labor Law decision has been vacated, reversed, or otherwise modified.

In any postaward update, contractors must disclose the same information about any individual Labor Law decision that must be disclosed preaward: (a) The Labor Law that was violated; (b) the case number, inspection number, charge number, docket number, or other unique identification number; (c) the date the Labor Law decision was rendered; and (d) the name of the court, arbitrator(s), agency, board, or commission that rendered the decision. *See* FAR 52.222–59(b)(1). And, as with preaward disclosures, the contractor is encouraged to submit such additional information as the contractor deems necessary, including mitigating circumstances and remedial measures. *See id.* 52.222–59(b)(3).

#### B. ALCA Assessment and Advice

Once the contractor has been given an opportunity to provide additional information, the ALCA follows the same classification, weighing, and advice processes that the ALCA follows in the preaward period, which are described in section III above. The ALCA provides written analysis and advice to the contracting officer regarding appropriate actions for the contracting officer’s

consideration. This postaward analysis and advice is similar to the preaward process discussed above in section III(C). The postaward analysis and advice should include:

- (i) Whether any violations should be considered serious, repeated, willful, or pervasive;
- (ii) The number and nature of violations (depending on the nature of the labor law violation, in most cases, a single labor law violation may not necessarily warrant action);
- (iii) Whether there are any mitigating factors;
- (iv) Whether the contractor has initiated and implemented, in a timely manner—
  - i. Its own remedial measures; or
  - ii. Other remedial measures entered into through agreement with, or as a result of, the actions or orders of an enforcement agency, court, or arbitrator;
- (v) Whether a labor compliance agreement or other remedial measure is —
  - (A) Warranted and the enforcement agency or agencies that would execute such agreement with the contractor;
  - (B) Under negotiation between the contractor and the enforcement agency;
  - (C) Established, and whether it is being adhered to; or
  - (D) Not being negotiated or has not been established, even though the contractor was notified that one had been recommended, and the contractor’s rationale for not doing so.
- (vi) Whether the absence of a labor compliance agreement or other remedial measure, or noncompliance with a labor compliance agreement, demonstrates a pattern of conduct or practice that reflects disregard for the recommendation of an enforcement agency.
- (vii) Whether the labor law violation(s) merit consideration by the agency suspending and debaring official and whether the ALCA will make such a referral; and
- (viii) Any such additional information that the ALCA finds to be relevant.

FAR 22.2004–3(b)(3). In determining whether a labor compliance agreement is warranted or whether the Labor Law decisions merit consideration by the agency suspending and debaring official, the ALCA should consider the guidance provided above in section III(C).

In response to new information about Labor Law violations, the contracting officer may take no action and continue the contract, or may exercise a contract remedy as appropriate. *See* FAR 22.2004–3(b)(4) (listing appropriate actions and procedures).

#### V. Subcontractor Responsibility

In addition to contracts between contractors and contracting agencies, the Order also applies to certain subcontracts with an estimated value that exceeds \$500,000. FAR 52.222–

59(c). The subcontracts to which the Order applies are described as “covered subcontracts” in this Guidance. As noted above, covered subcontracts include subcontracts for commercial items, but do not include subcontracts for commercially available off-the-shelf (COTS) items. *See id.* 52.222–59(c)(1)(i) (excluding COTS contracts); 2.101 (defining COTS items).

Prime contractors working on contracts covered by the Order are required to consider prospective subcontractors’ records of Labor Law compliance when making responsibility determinations for prospective subcontractors. FAR 52.222–59(c). This requirement applies to subcontractors at all tiers. *Id.* 52.222–59(g).

#### A. Preaward Subcontractor Disclosures

Prospective subcontractors for a covered subcontract must (like prime contractors on a covered procurement contract) make an initial representation to the contractor about compliance with Labor Laws, followed by a more detailed disclosure. *See* FAR 52.222–59(c)(3). *See* also section II(C)(1), above, describing contractor disclosures. The prospective subcontractor must make the detailed disclosure to the Department, *id.* 52.222–59(c)(3)(ii), by following the procedure at the “Subcontractor Disclosures” tab at [www.dol.gov/fairpayandsafeworkplaces](http://www.dol.gov/fairpayandsafeworkplaces). The Department, in turn, provides advice to the subcontractor that the subcontractor then provides to the contractor to use in the responsibility determination.

##### 1. Initial Representation

In the initial representation to the contractor, prospective subcontractors must represent whether there have been any Labor Law decisions rendered against the subcontractor in the period beginning on October 25, 2015 to the date of the subcontractor’s offer, or for three years preceding the date of the subcontractor’s offer, whichever period is shorter. FAR 52.222–59(c)(3)(i).

##### 2. Detailed Disclosure to the Department

Prospective subcontractors must make a more detailed disclosure to the Department. FAR 52.222–59(c)(3)(ii). Subcontractors must disclose the same detailed information that prime contractors themselves must disclose on a covered procurement contract. *See id.*; *see also* Guidance, section II(C)(1) (describing contractor disclosures). Subcontractors must disclose all covered Labor Law decisions, and subcontractors also may provide additional information to the Department that the subcontractor

believes will demonstrate its responsibility. *Id.* 52.222–59(c)(3)(iii). This may include information on mitigating circumstances and remedial measures, such as information about steps taken to correct the violations at issue, the negotiation or execution of a settlement agreement or labor compliance agreement, or other steps taken to achieve compliance with the Labor Laws.

### 3. Providing the Department's Advice to the Contractor

When a prospective subcontractor submits Labor Law violation and other information to the Department, the Department provides the subcontractor with advice regarding its record of Labor Law compliance. FAR 52.222–59(c)(4)(ii)(C). The subcontractor then must provide the Department's advice to the contractor for the contractor's use in determining whether the subcontractor is a responsible source. *Id.*

#### B. Preaward Department of Labor Advice to the Subcontractor

After receiving a subcontractor's detailed disclosures, the Department provides advice to the subcontractor about its record of Labor Law compliance. The advice may include (1) that the subcontractor has no serious, repeated, willful, or pervasive violations; (2) that the subcontractor has serious, repeated, willful, or pervasive violations but that a labor compliance agreement is not warranted because, for example, the contractor has initiated and implemented its own remedial measures; (3) that the subcontractor has serious, repeated, willful, or pervasive violations and a labor compliance agreement is warranted; (4) that a labor compliance agreement is warranted and the subcontractor has not entered into such an agreement in a reasonable period of time; (5) that the subcontractor is not complying with a labor compliance agreement into which it previously entered; or (6) that the subcontractor is complying with a labor compliance agreement into which it previously entered. *See* FAR 52.222–59(c)(4)(ii)(C).

In assessing subcontractor Labor Law compliance, the Department applies the same guidance on classification and weighing of Labor Law violations included above in sections III(A) and III(B) of this Guidance. In carrying out the assessment, Department officials and ALCAs may receive information from an enforcement agency about the subcontractor's compliance record. This information will be evaluated objectively and without regard for the

enforcement agency's litigation interests.

#### C. Preaward Determination of Subcontractor Responsibility

The prime contractor (not the Department) has the duty to make a determination that its subcontractors are responsible sources. *See* FAR 9.104–4(a). When assessing a prospective subcontractor's responsibility, the contractor may find that the prospective subcontractor has a satisfactory record of integrity and business ethics with regard to compliance with Labor Laws under certain specified conditions. These conditions are:

##### 1. The Subcontractor Has No Covered Labor Law Decisions To Disclose

The contractor may find the subcontractor to have a satisfactory record where the subcontractor has represented that it has no covered Labor Law decisions to disclose. *See* FAR 52.222–59(c)(4)(i).

##### 2. The Department Advises That the Subcontractor Has No Serious, Repeated, Willful, or Pervasive Violations

The contractor may find the subcontractor to have a satisfactory record where the subcontractor has received advice from the Department that none of the subcontractor's violations are serious, repeated, willful, or pervasive; and the subcontractor has provided notice of this advice to the contractor. *See* FAR 52.222–59(c)(4)(ii)(C)(1).

##### 3. The Department Advises That the Subcontractor Has Taken Sufficient Action To Remediate Violations

The contractor may find the subcontractor to have a satisfactory record where the subcontractor has received advice from the Department that it has violations that are serious, repeated, willful, or pervasive; but the Department also advises that the subcontractor has taken sufficient action to remediate its violations, such as through its own remedial measures, by entering into a labor compliance agreement, or by agreeing to enter into such an agreement; and the subcontractor has provided notice of this advice to the contractor. *See* FAR 52.222–59(c)(4)(ii)(C)(2).

##### 4. The Department Has Failed To Provide Timely Advice

If the Department does not provide advice to the subcontractor within 3 business days of the subcontractor's detailed disclosure of Labor Law decision information, and the

Department did not previously advise the subcontractor that it needed to enter into a labor compliance agreement, then the contractor may proceed with making a responsibility determination using available information and business judgment. *See* FAR 52.222–59(c)(6).

##### 5. The Subcontractor Contests Negative Advice From the Department

Where the subcontractor contests negative advice from the Department, the contractor may still find the subcontractor has a satisfactory record under certain conditions. If the subcontractor disagrees with negative advice from the Department, then the subcontractor must provide the contractor with (i) information about all the Labor Law violations that have been determined by the Department to be serious, repeated, willful, and/or pervasive; (ii) such additional information that the subcontractor deems necessary to demonstrate its responsibility, including mitigating factors, remedial measures such as subcontractor actions taken to address the Labor Law violations, labor compliance agreements, and other steps taken to achieve compliance with labor laws; (iii) a description of the Department's advice or proposed labor compliance agreement; and (iv) an explanation of the basis for the subcontractor's disagreement with the Department. *See* FAR 52.222–59(c)(4)(ii)(C)(3). If the contractor determines that the subcontractor is responsible on the basis of this representation, or if the contractor determines that due to a compelling reason the contractor must proceed with the subcontract award, then the contractor must notify the contracting officer of the decision and provide the name of the subcontractor and the basis for the decision (*e.g.*, urgent and compelling circumstances). *See id.* 52.222–59(c)(5).

#### D. Semiannual Subcontractor Updates

Subcontractors must update their Labor Law decision disclosures after a subcontract award in the same manner that prime contractors must do for a prime contract award. *See* FAR 22.2004–1(b); 22.2004–4. Subcontractors must determine, semiannually, whether the Labor Law disclosures that the subcontractor previously provided to the Department are current and complete. *Id.* 52.222–59(d)(1). If the information is current and complete, no action is required. *Id.* If the information is not current and complete, subcontractors must provide revised information to the Department and then

make a new representation to the contractor. *Id.* 52.222–59(d)(1).

If a subcontractor discloses new information about Labor Law decisions to the Department, the subcontractor must provide to the contractor any new advice from the Department. *See* FAR 52.222–59(d)(1). In addition, the subcontractor must disclose to the contractor if, during the course of performance of the contract, the Department notifies the subcontractor that it has not entered into a labor compliance agreement in a reasonable period or is not meeting the terms of a labor compliance agreement. *Id.* 52.222–59(d)(2).

When a subcontractor discloses new Department advice or new information about Labor Law decisions, the contractor must determine whether action is necessary. *See* FAR 52.222–59(d)(3). If the contractor decides to continue the subcontract notwithstanding negative Department advice, the contractor must notify the contracting officer of the decision and provide the name of the subcontractor and the basis for the decision (*e.g.*, urgent and compelling circumstances). *Id.* 52.222–59(d)(4).

## VI. Preassessment

Prior to bidding on a contract, prospective contractors and subcontractors are encouraged to voluntarily contact the Department to request an assessment of their record of Labor Law compliance. The Department will assess whether any of the prospective contractor's violations are serious, repeated, willful, and/or pervasive; and whether a labor compliance agreement may be warranted. If a contractor that has been assessed by the Department subsequently submits a bid, and the contracting officer initiates a responsibility determination for the contractor, the contracting officer and the ALCA may rely on the Department's assessment that the contractor has a satisfactory record of Labor Law compliance unless additional Labor Law decisions have been disclosed.

Contact information and additional guidance regarding the preassessment program can be found at <http://www.dol.gov/fairpayandsafeworkplaces>.

## VII. Paycheck Transparency

Transparency in the relationships between employers and their workers is critical to workers' understanding of their legal rights and to the resolution of workplace disputes. When workers lack information about how their pay is calculated and their status as employees or independent contractors, workers are

less aware of their rights and employers are less likely to comply with labor laws. Providing workers with information about how their pay is calculated each pay period will enable workers to raise any concerns about pay more quickly, and will encourage proactive efforts by employers to resolve such concerns. Similarly, providing workers who are classified as independent contractors with notice of their status will enable them to better understand their legal rights, evaluate their status as independent contractors, and raise any concerns during the course of the working relationship as opposed to after it ends (which will increase the likelihood that the employer and the worker will be able to resolve any concerns more quickly and effectively).

The Order seeks to improve paycheck transparency for covered workers on Federal contracts by instructing contracting officers to insert the contract clause at FAR 52.222–60. *See* Order, section 5; FAR 22.2007(d). This clause requires contractors to provide wage statements and notice of any independent contractor relationship to their covered workers, and this clause's requirements flow down and apply to covered workers of subcontractors regardless of tier. *See* Order, section 5; FAR 52.222–60.

### A. Wage Statement

The Order requires contracting agencies to ensure that, for covered procurement contracts, provisions in solicitations and clauses in contracts require contractors to provide most workers under the contract with a "document" each pay period with "information concerning that individual's hours worked, overtime hours, pay, and any additions made to or deductions made from pay." Order, section 5(a). Contracting agencies also must ensure that contractors "incorporate this same requirement" into covered subcontracts at all tiers. *Id.*

The Order requires that the wage statement be provided to "all individuals performing work" for whom the contractor or subcontractor is required to maintain wage records under the FLSA, the DBA, or the SCA. Order, section 5(a).<sup>118</sup> This means that a wage statement must be provided to

every worker subject to any of those laws regardless of the classification of the worker as an employee or independent contractor.

The Order states that the wage statement provided to workers each pay period must be a "document." Order, section 5(a). If the contractor or subcontractor regularly provides documents to its workers by electronic means, the wage statement may be provided electronically if the worker can access it through a computer, device, system, or network provided or made available by the contractor. FAR 52.222–60.

The Order further provides that the wage statement must be issued every pay period and contain the total number of hours worked in the pay period and the number of those hours that were overtime hours. Order, section 5(a). The FAR requires that if the wage statement is not provided weekly and is instead provided bi-weekly or semi-monthly (because the pay period is bi-weekly or semi-monthly), then the hours worked and overtime hours contained in the wage statement must be broken down to correspond to the period (which will almost always be weekly) for which overtime is calculated and paid. *See* FAR 52.222–60. If the hours worked and overtime hours are aggregated in the wage statement for the entire pay period as opposed to being broken down by week, the worker may not be able to understand and evaluate how the overtime hours were calculated. For example, if the pay period is bi-weekly and the worker is entitled to overtime pay for hours worked over 40 in a week, then the wage statement must provide the hours worked and any overtime hours for the first week and the hours worked and any overtime hours for the second week.

The FAR requires that the wage statement contain the worker's rate of pay, which provides workers with vital information about how their gross pay is calculated. *See* FAR 52.222–60. The rate of pay will most often be the worker's regular hourly rate of pay. If the worker is not paid by the hour, the rate of pay information should reflect the basis of pay by indicating the monetary amount paid on a per day, per week, per piece, or other basis. The FAR also requires that the wage statement contain the gross pay and itemize or identify each addition to or deduction from gross pay. *Id.* Additions to pay may include bonuses, awards, and shift differentials. Deductions from pay include deductions required by law (such as withholding for taxes), voluntary deductions by the worker (such as contributions to health insurance

<sup>118</sup> The Order also requires the provision of a wage-statement document to all workers for whom records must be retained under any State laws "equivalent" to the FLSA, DBA, or SCA. *See* Order, section 5(a). As noted above in section II(B), this Guidance does not include a list of State laws equivalent to the FLSA, the DBA, and the SCA. The list of equivalent State laws will be included in future guidance issued by the Department.

premiums or retirement accounts), and all other deductions or reductions made from gross pay regardless of the reason. Itemizing the additions to and deductions from gross pay means that each addition and deduction must be separately listed and the specific amount added or deducted must be identified (lump sums are insufficient). Providing a worker with the gross pay and itemized additions to and deductions from gross pay allows the worker to understand the net pay received and how it was calculated.

In sum, the FAR requires that wage statements contain the following information: (1) Hours worked, (2) overtime hours, (3) rate of pay, (4) gross pay, and (5) an itemization of each addition to and deduction from gross pay. FAR 52.222–60.<sup>119</sup>

As specified in the FAR, if a significant portion of the contractor's or subcontractor's workforce is not fluent in English, the wage statement must also be in the language(s) other than English in which the significant portion(s) of the workforce is fluent. FAR 52.222–60.

The wage statement provided to workers who are exempt from overtime pay under the FLSA “need not include a record of hours worked if the contractor informs the individuals of their exempt status.” Order, section 5(a).<sup>120</sup> To sufficiently inform a worker of exempt status so that the wage statement need not include hours worked, the contractor or subcontractor must provide written notice to the worker stating that the worker is exempt from the FLSA's overtime compensation requirements; oral notice is not sufficient. See FAR 52.222–60. The notice can be a stand-alone document or can be included in the offer letter, employment contract, or position description, or wage statement—as long as the document is provided to the worker. See *id.*<sup>121</sup> The notice must be provided either before the worker starts

work on the contract or in the worker's first wage statement under the contract. See *id.* If during contract performance, the contractor or subcontractor determines that the worker's status has changed from non-exempt to exempt, it must provide notice to the worker prior to providing a wage statement without hours worked information or in the first wage statement after the change. See *id.* If the contractor or subcontractor regularly provides documents to its workers by electronic means, the document may be provided electronically if the worker can access it through a computer, device, system, or network provided or made available by the contractor or subcontractor. *Id.*

The Department and courts determine whether a worker is exempt from the FLSA's overtime requirement. The fact that a contractor or subcontractor has provided a worker with notice that he or she is exempt does not mean that the worker is correctly classified. The Department will not consider the notice when determining whether a worker is exempt. A contractor or subcontractor may not in its exempt-status notice to a worker indicate or suggest that the Department or the courts agree with the determination that the worker is exempt. FAR 52.222–60.

The wage-statement requirements “shall be deemed to be fulfilled” where a contractor “is complying with State or local requirements that the Secretary of Labor has determined are substantially similar to those required” by the Order. Order, section 5(a). The Secretary has determined that the following States and localities have “substantially similar” wage-statement requirements as the Order: Alaska, California, Connecticut, the District of Columbia, Hawaii, New York, and Oregon. The wage-statement requirements of these States and the District of Columbia are substantially similar because they require employers to provide wage statements that include at least the worker's overtime hours or overtime earnings, total hours, gross pay, and any additions or deductions from gross pay. Providing a worker in one of the Substantially Similar Wage Payment States with a wage statement that complies with the requirements of that State or locality satisfies the Order's wage-statement requirement. See FAR 52.222–60. In addition, a contractor satisfies the Order's wage-statement requirement by adopting the wage-statement requirements of any particular Substantially Similar Wage Payment State in which the contractor has workers and providing a wage statement that complies with the requirements of that State or locality to all of its workers.

The Department maintains on its Web site (<http://www.dol.gov/fairpayandsafeworkplaces>) a list of the Substantially Similar Wage Payment States. The Secretary recognizes that States and localities may change their wage-statement laws so that their requirements may or may not be substantially similar to the Order's wage-statement requirement. When the Secretary determines that a State or locality must be added to or removed from the list of Substantially Similar Wage Payment States, notice of such changes will be published on the Web site. The Department may also issue All Agency Memoranda or similar direction to contracting agencies and the public to communicate updates to the list of the Substantially Similar Wage Payment States.

#### B. Independent Contractor Notice

The Order requires contractors who treat individuals performing work for them (on covered procurement contracts) as independent contractors to provide each such worker with a document informing him or her of this independent contractor status. See Order, section 5(b). Contracting agencies must require that contractors incorporate this same requirement into covered subcontracts. See FAR 52.222–60.

The FAR requires contractors and subcontractors to provide the notice informing the worker of status as an independent contractor to each individual worker treated as an independent contractor. See FAR 52.222–60. The notice must be a “document”; oral notice of independent contractor status is not sufficient.<sup>122</sup> *Id.* The document must be separate from any independent contractor agreement entered into with the individual. *Id.* If the contractor regularly provides documents to its workers by electronic means, the document may be provided electronically if the worker can access it through a computer, device, system, or network provided or made available by the contractor. See *id.* 52.222–60.

The notice must be provided at the time that an independent contractor relationship is established with the worker or before he or she performs any work under the contract. See FAR 52.222–60. The notice must be provided each time a worker begins work on a different covered contract, regardless of

<sup>119</sup> Nothing prohibits the inclusion of more information in the wage statement (e.g., exempt status notification, overtime pay rate). Neither the Order nor the FAR preempts State laws or local ordinances that require more information to be included in the wage statement.

<sup>120</sup> Generally, non-exempt workers are entitled to overtime under the FLSA when they work over 40 hours in a week. See 29 U.S.C. 207(a). However, certain workers (such as nurses, firefighters, and police officers) may instead be entitled to overtime under terms other than the 40-hour workweek. See, e.g., 29 U.S.C. 207(j), (k). Such workers are not exempt from the FLSA's overtime requirements; wage statements provided to them must contain a record of hours worked.

<sup>121</sup> As specified in the FAR, if a significant portion of the contractor's workforce is not fluent in English, the document notifying the worker of exempt status must also be in the language(s) other than English in which the significant portion(s) of the workforce is fluent. See FAR 52.222–60(e)(1).

<sup>122</sup> As specified in the FAR, if a significant portion of the contractor's or subcontractor's workforce is not fluent in English, the document notifying the worker of independent contractor status must also be in the language(s) other than English with which the significant portion(s) of the workforce is fluent. See FAR 52.222–60(e)(1).



whether the worker already performs the same type of work on another covered contract. *See id.* If the contractor or subcontractor determines during performance of a covered contract that a worker's status has changed from employee to independent contractor, it must provide the worker with notice of independent contractor status before the worker performs any work under the contract as an independent contractor. *See id.*

Enforcement agencies and courts determine whether a worker is an independent contractor under applicable laws. A contractor may not in its notice to a worker indicate or suggest that any enforcement agency or court agrees with the contractor's determination that the worker is an independent contractor. *See FAR 52.222–60.* The fact that a contractor has provided a worker with notice that he or she is an independent contractor does not mean that the worker is correctly classified as an independent contractor. For example, the Department would not consider the notice when determining whether a worker is an independent contractor or employee during an investigation regarding the contractor's compliance with the FLSA. The determination of whether a worker is an independent contractor under a particular law remains governed by that law's definition of "employee" and that law's standards for determining which workers are independent contractors and not employees.

#### VIII. Effective Date and Phase-In of Requirements

The FAR rule is effective October 25, 2016. However, several of the requirements are not immediately applicable and are being phased in over the course of the following year. This phase in of the requirements is intended to allow the Government, contractors, subcontractors, and, particularly, small business contractors and subcontractors to prepare for and adapt to the requirements.

##### A. General Effect of Solicitation Provisions and Contract Clauses

The Order's prime-contractor disclosure, subcontractor disclosure,

and paycheck-transparency requirements are implemented through solicitation provisions and contract clauses in covered contracts. *See FAR 22.2007.* This means that contractors and subcontractors performing on contracts awarded prior to the effective date of the rule (or of specific requirements) will not be required to make the disclosures or to provide workers with wage statements and independent contractor notices—even after the effective date of the rule. In other words, the Order's requirements are not retroactive. Rather, these requirements only become effective when the solicitation provisions are included in a new solicitation and the contract clauses are included in a new contract.

##### B. Contractor Disclosure

From October 25, 2016 to April 24, 2017, the Order's prime-contractor disclosure requirements will apply only to solicitations from contracting agencies with an estimated value of \$50 million or more, and resultant contracts. FAR 22.2007(a) and (c)(1). After April 24, 2017, the requirements will apply to solicitations greater than \$500,000—which is the amount specified in the Order—and resultant contracts. *Id.* 22.2007(a) and (c)(2); Order, section 2(a). This also applies to the commercial items equivalent for prime contractors, at FAR 52.212–3(s).

##### C. Subcontractor Disclosure

The subcontractor disclosure provisions described in section V of this Guidance are not effective for the first year of operation of the FAR rule implementing the Order. Thus, while the rule overall is effective on October 25, 2016, the subcontractor disclosure provisions are not effective until October 25, 2017. *See FAR 22.2007(b)–(c), 52.222–59(c)(1).* During this first year before the effective date, prospective subcontractors are encouraged to voluntarily contact the Department to request an assessment of their record of Labor Law compliance. *See above section VI (Preassessment).*

##### D. Phase-In of 3-Year Disclosure Period

The general rule under the Order is that contractors and subcontractors must disclose Labor Law decisions that were rendered against them within the 3-year period prior to the date of the disclosure. *See Sections II(B) and V(A)(1).* This 3-year disclosure period is being phased in during the first years of the implementation of the Order, so that no contractor or subcontractor need disclose any Labor Law decisions that were rendered against them prior to October 25, 2015. As the FAR states, contractors and subcontractors must make disclosures for Labor Law decisions rendered against them during the period beginning on October 25, 2015 to the date of the offer, or for 3 years preceding the date of the offer, whichever period is shorter. *See FAR 52.222–57(c)(1)–(2); 52.222–58(b).* Thus, full implementation of the 3-year disclosure period will be reached as of October 25, 2018.

##### E. Equivalent State Laws

The Order requires disclosure of violations of the 14 Federal statutes and Executive orders, and also of violations of equivalent State laws defined in guidance issued by the Department. Order, section 2(a)(i)(O). As noted above, in section II(B) of this Guidance, the Department has determined that OSHA-approved State Plans are the only equivalent State laws for the purpose of the Order at this time.

In future guidance, published in the **Federal Register**, the Department will identify additional equivalent State laws. Until this subsequent guidance and a subsequent FAR amendment are published, contractors and subcontractors are not required by Order to disclose violations of State laws other than the OSHA-approved State Plans.

##### F. Paycheck Transparency Provisions

The paycheck transparency provisions described in section VII of this Guidance are not effective until January 1, 2017. *See FAR 22.2007(d).*

Signed this 10th day of August, 2016.  
**Christopher P. Lu,**  
*Deputy Secretary, U.S. Department of Labor.*

**Guidance for Executive Order 13673, "Fair Pay Safe Workplaces"**  
**Appendix A: Serious Violations**

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

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

**Summary of Definition of "Serious Violation"**

The full definition of a "serious violation" is set forth in section III(A)(1) of the Department of Labor's Guidance. When assessing violations, Agency Labor Compliance Advisors (ALCAs) should refer to the full definition in the Guidance.

In summary, the Guidance provides that a violation of one of the Labor Laws is serious under the following circumstances:

- a. For OSH Act or OSHA-approved State Plan violations that are enforced through citations or equivalent State documents, a violation is serious if a citation, or equivalent State document, was designated as serious or an equivalent State designation.
- b. For all other violations of the Labor Laws, a violation is serious if it is readily ascertainable from the Labor Law decision that the violation involved any one of the following:
  - i. The violation affected at least 10 workers, and the affected workers made up 25 percent or more of the contractor's workforce at the worksite or 25 percent or more of the contractor's workforce overall;
  - ii. Fines and penalties of at least \$5,000 or back wages of at least \$10,000 were due;
  - iii. The contractor's conduct caused or contributed to the death or serious injury of one or more workers;
  - iv. The contractor employed a minor who was too young to be legally employed or in violation of a Hazardous Occupations Order;

- v. The contractor was issued a notice of failure to abate an OSH Act or OSHA-approved State Plan violation; or the contractor was issued an imminent danger notice or an equivalent State notice under the OSH Act or an OSHA-approved State Plan.
- vi. The contractor retaliated against one or more workers for exercising any right protected by any of the Labor Laws;
- vii. The contractor engaged in a pattern or practice of discrimination or systemic discrimination;
- viii. The contractor interfered with the enforcement agency's investigation; or
- ix. The contractor breached the material terms of any agreement or settlement entered into with an enforcement agency, or violated any court order, any administrative order by an enforcement agency, or any arbitral award.

**When assessing Labor Law violations, ALCAs will review all of the above criteria to determine whether a violation is serious.** The examples below are intended to illustrate how these criteria may arise in different contexts, but a violation will be serious if it meets **any** of the above criteria.

ALCAs will classify violations based on information that is readily ascertainable from the Labor Law decisions themselves. They do not second-guess or re-litigate enforcement actions or the decisions of reviewing officials, courts, and arbitrators. While ALCAs and contracting officers may seek additional information from the enforcement agencies to provide context, they generally rely on the information contained in the Labor Law decisions to determine whether violations are serious, repeated, willful, or pervasive under the definitions provided in this Guidance.

Labor Laws	Examples of Serious Violations
<p><b>Fair Labor Standards Act (FLSA)</b></p>	<p>The Wage and Hour Division of DOL (WHD) found that a contractor violated the minimum wage and overtime provisions of the FLSA. It issued the contractor a Form WH-56 "Summary of Unpaid Wages," and also assessed civil monetary penalties. The back wages due totaled \$75,000, and the civil monetary penalties assessed totaled \$6,000.</p> <p><i>This is a serious violation for two reasons. First, a violation of <b>any</b> of the Labor Laws, except OSH Act and OSHA-approved State Plan violations enforced through citations or equivalent State documents ("citation OSHA violations"), is serious if fines and penalties of at least \$5,000 were due. Second, a violation of <b>any</b> of the Labor Laws, except citation OSHA violations, is serious if back wages of at least \$10,000 were due. Conversely, if the back wages due totaled less than \$10,000 <b>and</b> the civil monetary penalties assessed had totaled less than \$5,000, the violation would not be a serious violation, assuming that none of the other criteria for seriousness listed above are met.</i></p> <p>WHD finds that a meat processor employed 10 workers under the age of 18 to operate power-driven meat processing machines, such as slicers, saws, and choppers. One of these workers died in an accident involving one of the machines.</p> <p><i>This is a serious violation for two reasons. First, a violation of FLSA's child labor provisions is serious if the contractor employed a minor too young to be legally employed or in violation of a Hazardous Occupations Order. The employment of minors in the above-described occupation is prohibited under Hazardous Occupation Order No. 10. Second, a violation of <b>any</b> of the Labor Laws, except citation OSHA violations, is serious if the contractor's conduct causes or contributes to the death or serious injury of one or more workers. Conversely, the employment of, for example, a 14 or 15 year-old minor in excess of 3 hours outside school hours on a school day in a non-hazardous, non-agricultural job in which the child is otherwise permitted to work would not be a serious violation, assuming that none of the other criteria for seriousness listed above are met.</i></p>
<p><b>Occupational Safety and Health (OSH) Act</b></p>	<p>OSHA issued a citation for failing to protect against fall hazards on a construction worksite. The citation was designated as "serious."</p> <p><i>This is a serious violation because all citations or equivalent State documents designated by OSHA or an OSHA-approved State Plan as serious or an equivalent State designation are serious under the Order. Conversely, if the citation had been designated as "other-than-serious," it would not be a serious violation under the Order.</i></p> <p>A few months after OSHA issued the above citation, it inspects the worksite again and finds that the contractor failed to remedy the fall hazards as required. Accordingly, OSHA issues a notice of failure to abate and assesses additional penalties.</p> <p><i>This is a serious violation because a notice of failure to abate a violation under the OSH Act or an OSHA-approved State Plan is classified as a serious violation under the Order.</i></p>

Labor Laws	Examples of Serious Violations
<b>Migrant and Seasonal Agricultural Worker Protection Act (MSPA)</b>	<p>WHD issued a letter indicating that an investigation had disclosed a violation of MSPA that contributed to the serious injury of a worker.</p> <p><i>This is a serious violation because a violation of <b>any</b> of the Labor Laws, except citation OSHA violations, is serious if it caused or contributed to the death or serious injury of one or more workers. Conversely, if WHD found that the investigation had disclosed that 3 of the 50 MSPA workers at a job site did not receive their wages when due, and those wages totaled \$1,000 and the civil monetary penalties totaled \$500, the violation would not be serious, assuming that none of the other criteria for seriousness listed above are met.</i></p>
<b>National Labor Relations Act (NLRA)</b>	<p>The General Counsel of the National Labor Relations Board (NLRB) issued a complaint alleging that a contractor fired the employee who was the lead union adherent during the union's organizational campaign in retaliation for the employee's participation in the organizational campaign.</p> <p><i>This is a serious violation because a violation of <b>any</b> of the Labor Laws, except citation OSHA violations, is serious where the contractor retaliated against one or more workers for exercising any right protected by any of the Labor Laws. Conversely, if the NLRB's complaint had instead alleged that the contractor had, for example, denied a single employee a collectively-bargained benefit (for example, a vacation to which the employee was entitled based on her seniority), the violation would not be serious, assuming that none of the other criteria for seriousness listed above are met.</i></p>
<b>Davis-Bacon Act (DBA)</b>	<p>WHD issued a letter indicating that a contractor violated the DBA, and that back wages were due in the amount of \$12,000. The contractor had previously been investigated by WHD and, to resolve that investigation, had entered into a written agreement to pay the affected workers prevailing wages as required by the DBA.</p> <p><i>This is a serious violation for two reasons. First, a violation of <b>any</b> of the Labor Laws, except citation OSHA violations, is serious if back wages of at least \$10,000 were due. Second, a violation of <b>any</b> of the Labor Laws, except citation OSHA violations, is serious if the contractor breached the material terms of any agreement or settlement entered into with an enforcement agency. Conversely, if WHD issued a letter indicating that a contractor owed several workers a total of \$8,000, and the contractor's conduct did not constitute a breach of a prior agreement or meet any of the other criteria for seriousness listed above, the violation would not be serious.</i></p>
<b>Service Contract Act (SCA)</b>	<p>An ALJ issued an order finding that a food service company violated the SCA by failing to provide the required amount of health and welfare benefits to 35 of its 100 workers at a particular location. The order included a finding that the contractor interfered with WHD's investigation by threatening to fire workers who spoke to WHD investigators.</p> <p><i>This is a serious violation for two reasons. First, a violation of <b>any</b> of the Labor Laws, except citation OSHA violations, is serious if it affected at least 10 workers, and the affected workers made up 25 percent or more of the contractor's workforce at the worksite or 25 percent or more of the contractor's workforce overall. Second, a violation of <b>any</b> of the Labor Laws, except citation OSHA violations, is serious where the contractor interfered with the enforcement agency's investigation. Under the Guidance, interference includes, among other actions, threatening to fire workers who speak to government investigators. Conversely, if the ALJ's order had indicated that the contractor owed back wages to only 10 of the 100 SCA-covered workers at the location, and did not contain a finding of interference, the violation would not be serious, assuming that none of the other criteria for seriousness listed above are met.</i></p>

Labor Laws	Examples of Serious Violations
<b>Executive Order 11246 (Equal Employment Opportunity)</b>	<p>OFCCP issued a show cause notice indicating that an investigation had disclosed that a contractor had systemically discriminated against African-American and Hispanic job seekers in violation of EO 11246. OFCCP had determined that back wages were due to job applicants in an amount upwards of \$100,000. The contractor subsequently settled the case with OFCCP for a total of \$75,000 in back wages.</p> <p><i>This is a serious violation for two reasons. First, a violation of <b>any</b> of the Labor Laws, except citation OSHA violations, is serious if the contractor engaged in a pattern or practice of discrimination or systemic discrimination. Second, a violation of <b>any</b> of the Labor Laws, except citation OSHA violations, is serious if back wages of at least \$10,000 were due. Conversely, if OFCCP issued a show cause notice indicating that the investigation disclosed that the contractor had discriminated against only a few such job seekers, and the amount of back wages due was only \$9,000, the violation would not be serious, assuming that none of the other criteria for seriousness listed above are met.</i></p>
<b>Section 503 of the Rehabilitation Act</b>	<p>The ARB affirmed an ALJ order directing a contractor to change a practice of medical screenings that discriminated against job applicants with disabilities—and were not job-related or consistent with business necessity—in violation of section 503.</p> <p><i>This is a serious violation because a violation of <b>any</b> of the Labor Laws, except citation OSHA violations, is serious if the contractor engaged in a pattern or practice of discrimination or systemic discrimination. Conversely, if the ARB had found that the contractor's practice of medical screenings was generally not discriminatory, but that the contractor had discriminated against two specific disabled job applicants in another fashion, the violation would not be serious, assuming that none of the other criteria for seriousness listed above are met.</i></p>
<b>Vietnam Era Veterans' Readjustment Assistance Act (VEVRAA)</b>	<p>OFCCP issued a show cause notice indicating that an investigation had disclosed that a contractor had discriminated against a protected veteran job applicant, and that back wages were due to the job applicant in an amount upwards of \$10,000.</p> <p><i>This is a serious violation because a violation of <b>any</b> of the Labor Laws, except citation OSHA violations, is serious if back wages of at least \$10,000 were due. Conversely, if OFCCP had determined that the job applicant was due only \$5,000 in back wages, the violation would not be serious, assuming that none of the other criteria for seriousness listed above are met.</i></p>
<b>Family and Medical Leave Act (FMLA)</b>	<p>WHD issued a Form WH-56 indicating that a contractor had violated the FMLA and, as a result, owed \$12,000 in back wages.</p> <p><i>This is a serious violation because a violation of <b>any</b> of the Labor Laws, except citation OSHA violations, is serious if back wages of at least \$10,000 were due. Conversely, had WHD determined that the contractor owed only \$8,000 in back wages, the violation would not be serious, assuming that none of the other criteria for seriousness listed above are met.</i></p>
<b>Title VII of the Civil Rights Act of 1964</b>	<p>The EEOC filed a complaint in Federal court after an investigation found that the contractor engaged in a pattern or practice of discrimination under Title VII.</p> <p><i>This is a serious violation because a violation of <b>any</b> of the Labor Laws, except citation OSHA violations, is serious if the contractor engaged in a pattern or practice of discrimination or systemic discrimination. Conversely, had the EEOC's complaint alleged that the contractor discriminated against only a single individual, the violation would not be serious, assuming that none of the other criteria for seriousness listed above are met.</i></p>

Labor Laws	Examples of Serious Violations
<b>Americans with Disabilities Act of 1990 (ADA)</b>	<p>In a private action under the ADA brought in Federal district court, the court issued a judgment in favor of the plaintiff, relying in part on adverse inferences against the defendant because the defendant had destroyed relevant records in an attempt to undermine an EEOC investigation of the violations.</p> <p><i>This is a serious violation because a violation of <b>any</b> of the Labor Laws, except citation OSHA violations, is serious if the contractor interfered with the enforcement agency's investigation. Under the Guidance, interference includes, among other actions, the destruction of records to frustrate an investigation under the Labor Laws. Conversely, if the contractor had not interfered in this fashion, the violation would not be serious, assuming that none of the other criteria for seriousness listed above are met.</i></p>
<b>Age Discrimination in Employment Act of 1967 (ADEA)</b>	<p>In a private action brought in Federal district court, the factfinder found that the contractor unlawfully discriminated against the plaintiff on the basis of age when it discharged the plaintiff. The court awarded back wages of \$50,000 to the plaintiff.</p> <p><i>This is a serious violation because a violation of <b>any</b> of the Labor Laws, except citation OSHA violations, is serious if back wages of at least \$10,000 were due. Conversely, had the court awarded only \$8,000 in back wages, the violation would not be serious, assuming that none of the other criteria for seriousness listed above are met.</i></p>
<b>Executive Order 13658 (Minimum Wage for Contractors)</b>	<p>WHD issued an investigative findings letter indicating that an investigation disclosed a violation of Executive Order 13658 and finding that a total of \$15,000 in back wages are due.</p> <p><i>This is a serious violation because a violation of <b>any</b> of the Labor Laws, except citation OSHA violations, is serious if back wages of at least \$10,000 were due. Conversely, had WHD's investigative findings letter indicated that only \$1,500 in back wages were due, the violation would not be serious, assuming that none of the other criteria for seriousness listed above are met.</i></p>

**Guidance for Executive Order 13673, "Fair Pay Safe Workplaces"**  
**Appendix B: Repeated Violations**

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

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

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

The full definition of a "repeated violation" is set forth in section III(A)(2) of the Department of Labor's Guidance. When assessing violations, Agency Labor Compliance Advisors (ALCAs) should refer to the full definition in the Guidance.

In summary, a violation is "repeated" under the Order if:

- a. For a violation of the OSH Act or an OSHA-approved State Plan that was enforced through a citation or an equivalent State document, the citation at issue was designated as "repeated," "repeat," or any equivalent State designation and the prior violation that formed the basis for the repeated violation became a final order of the OSHRC or equivalent State agency no more than 3 years before the repeated violation;
- b. For all other Labor Law violations, the contractor has committed a violation that is the same as or substantially similar to a prior violation of the Labor Laws that was the subject of a separate investigation or proceeding arising from a separate set of facts, and became uncontested or adjudicated within the previous 3 years. The following is an exhaustive list of violations that are substantially similar to each other for these purposes:
  1. For the FLSA:
    - i. Any two violations of the FLSA's child labor provisions.
    - ii. Any two violations of the FLSA's provision requiring break time for nursing mothers.
  2. For the FLSA, DBA, SCA, and Executive Order 13658:
    - i. Any two violations of these statutes' minimum wage, subminimum wage, overtime,



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

or prevailing wages provisions, even if they arise under different statutes.

3. For the FMLA:
  - i. Any two violations of the FMLA's notice requirements.
  - ii. Any two violations of the FMLA other than its notice requirements.
4. For the MSPA:
  - i. Any two violations of the MSPA's requirements pertaining to wages, supplies, and working arrangements.
  - ii. Any two violations of the MSPA's requirements related to health and safety.
  - iii. Any two violations of the MSPA's disclosure and recordkeeping requirements.
  - iv. Any two violations related to the MSPA's registration requirements.
5. For the NLRA:
  - i. Any two violations of the same numbered subsection of section 8(a) of the NLRA.
6. For Title VII, section 503 of the Rehabilitation Act of 1973, the ADA, the ADEA, section 6(d) of the FLSA (known as the Equal Pay Act, 29 U.S.C. 206(d)), Executive Order 11246 of September 24, 1965, the Vietnam Era Veterans' Readjustment Assistance Act of 1972, and the Vietnam Era Veterans' Readjustment Assistance Act of 1974:
  - i. Any two violations, even if they arise under different statutes, if both violations involve:
    1. the same protected status, and
    2. at least one of the following elements in common:
      - a. the same employment practice, or,
      - b. the same worksite.
7. For all of the Labor Laws, including those listed above, even if the violations arise under different statutes:
  - i. Any two violations involving retaliation;
  - ii. Any two failures to keep records required under the Labor Laws; or
  - iii. Any two failures to post notices required under the Labor Laws.

The Guidance provides further detail on the meaning of "uncontested or adjudicated," how the 3-year look-back period is calculated, what constitutes a "substantially similar" violation, and other aspects of the definition.

**When assessing Labor Law violations, ALCAs will review the full definition to determine whether a violation is repeated.** The examples below are intended to illustrate how the definition may be applied in different contexts, but a violation can be deemed repeated as long as it meets the criteria set forth in the Guidance.

ALCAs will classify violations based on information that is readily ascertainable from the Labor Law decisions themselves. They do not second-guess or re-litigate enforcement actions or the decisions of reviewing officials, courts, and arbitrators. While ALCAs and contracting officers may seek additional information from the enforcement agencies to provide context, they generally rely on the information contained in the Labor Law decisions to determine whether violations are serious, repeated, willful, or pervasive under the definitions provided in this Guidance.

Labor Laws	Examples of Repeated Violations
<b>Fair Labor Standards Act (FLSA)</b>	<p>The Wage and Hour Division (WHD) found that a software company violated overtime provisions of the FLSA after misclassifying employees at one facility as independent contractors. The company did not dispute the violation and agreed to pay back wages by signing a Form WH-56. A year later, the Secretary filed a complaint in Federal court stating that an investigation of a different facility of the same company disclosed violations of the FLSA minimum wage provision.</p> <p><i>The second violation is a repeated violation because it is substantially similar to a prior violation that was the subject of a separate investigation or proceeding arising from a separate set of facts and became uncontested within the previous three years. The prior violation was uncontested because the company agreed to at least some of the relief sought by WHD in the enforcement action. Even though the first violation involved overtime and the second involved minimum wage, the violations are substantially similar because any two violations of the minimum wage, subminimum wage, overtime, or prevailing wage provisions of the FLSA, DBA, SCA, and Executive Order 13658 are substantially similar. Conversely, had one of the two violations instead involved, for example, the company's failure to follow the FLSA's requirements to provide break time for nursing mothers, the violations would not be substantially similar and the second violation therefore would not be repeated.</i></p>
<b>Occupational Safety and Health (OSH) Act</b>	<p>OSHA issued a citation to a contractor for failing to provide fall protection on a residential construction site. The citation was later affirmed by the Occupational Safety and Health Review Commission (OSHRC). Two years after OSHRC's affirmance of the citation, OSHA issued a second citation against the same contractor for failing to provide fall protection at a commercial construction site, and designated that citation as a "repeat" violation under the OSH Act.</p> <p><i>The second violation is a repeated violation because OSHA designated it as a "repeat" violation and the prior violation became a final order of the OSHRC or equivalent State agency no more than three years before the repeated violation. Conversely, if the second citation was not designated as "repeat" by OSHA, or if it occurred more than three years after the first violation became a final order of the OSHRC, it would not be a repeated violation under the Order.</i></p>
<b>Migrant and Seasonal Agricultural Worker Protection Act (MSPA)</b>	<p>A district court issued an order enjoining a farm labor contractor's practice of requiring workers to purchase goods or services solely from a particular company, in violation of MSPA. Three years later, WHD assessed civil monetary penalties after finding that the farm labor contractor failed to pay MSPA-covered workers their wages when due.</p> <p><i>The second violation is a repeated violation because it is substantially similar to a prior violation that was the subject of a separate investigation or proceeding arising from a separate set of facts and became adjudicated within the previous three years. The prior violation was adjudicated because it was reflected in a civil judgment. The violations are substantially similar because, under MSPA, multiple violations of the statute's requirements pertaining to wages, supplies, and working arrangements are substantially similar. (Likewise, under MSPA, any two violations of any of MSPA's requirements related to health and safety are substantially similar to each other. The same is true for any two violations of the statute's disclosure and recordkeeping requirements, or any two violations related to its registration requirements.) Conversely, had the contractor, for example, committed one MSPA violation for requiring workers to purchase goods or services solely from a particular company, and a second MSPA violation for failure to comply with MSPA's transportation safety standards, the violations would not be substantially similar and the second violation therefore would not be repeated.</i></p>

Labor Laws	Examples of Repeated Violations
<b>National Labor Relations Act (NLRA)</b>	<p>The National Labor Relations Board (NLRB) issued a decision finding that a contractor violated section 8(a)(3), which prohibits employers from discriminating against employees for engaging in or refusing to engage in union activities, by discharging employees who led a union organizational campaign. Two years later, a Regional Director issued a complaint under section 8(a)(3) against the same contractor at a different location for discharging two union representatives at a plant after they organized a one-day strike to protest low wages.</p> <p><i>The second violation is a repeated violation because it is substantially similar to a prior violation that was the subject of a separate investigation or proceeding arising from a separate set of facts and became adjudicated within the previous three years. The prior violation was adjudicated because it was reflected in a final agency order by an administrative adjudicative authority—the NLRB—following a proceeding in which the contractor had an opportunity to present evidence or argument on its behalf. The violations are substantially similar because both involved the same numbered subsection of section 8(a) of the NLRA, section 8(a)(3). Conversely, had one of the two violations been a violation of section 8(a)(2), which prohibits an employer from dominating or interfering with the formation or administration of a labor union through financial support or otherwise—for example, had the contractor offered assistance to one union but not to another during an organizational campaign—the two violations would not be substantially similar and the second violation would therefore not be repeated.</i></p>
<b>Davis-Bacon Act (DBA)</b>	<p>A Federal district court granted a preliminary injunction enjoining a contractor from further violations of the overtime provisions of the FLSA. Six months later, WHD sent the contractor a letter finding that the contractor violated the DBA by failing to pay workers at a different worksite their prevailing wages.</p> <p><i>The second violation is a repeated violation because it is substantially similar to a prior violation that was the subject of a separate investigation or proceeding arising from a separate set of facts and became adjudicated within the previous three years. The prior violation was adjudicated because it was reflected in a civil judgment. Even though the contractor violated two different Labor Laws, the violations are substantially similar because any two violations of the minimum wage, subminimum wage, overtime, or prevailing wage provisions of the FLSA, DBA, SCA, and Executive Order 13658 are substantially similar. Conversely, had the first violation instead involved, for example, the contractor's failure to provide a reasonable accommodation to an employee with a disability under the ADA, the two violations would not be substantially similar and the second violation would therefore not be repeated.</i></p>

Labor Laws	Examples of Repeated Violations
<b>Service Contract Act (SCA)</b>	<p>The Department's Administrative Review Board (ARB) issued an order finding that a contractor failed to pay workers covered by Executive Order 13658 the minimum wage of \$10.10 per hour. Ten months later, WHD issued a letter indicating that an investigation disclosed a violation of the SCA because the contractor failed to pay service workers their required amount of fringe benefits.</p> <p><i>The second violation is a repeated violation because it is substantially similar to a prior violation that was the subject of a separate investigation or proceeding arising from a separate set of facts and became adjudicated within the previous three years. The prior violation was adjudicated because it was reflected in a final agency order by an administrative adjudicative authority—the ARB—following a proceeding in which the contractor had an opportunity to present evidence or argument on its behalf. Even though the contractor violated two different Labor Laws, the violations are substantially similar because any two violations of the minimum wage, subminimum wage, overtime, or prevailing wage provisions of the FLSA, DBA, SCA, and Executive Order 13658 are substantially similar. Conversely, if the first violation was the subject of a determination by WHD that was pending review by the ARB, the second violation would not be a repeated violation because the first violation would not be adjudicated or uncontested.</i></p>
<b>Executive Order 11246 (Equal Employment Opportunity)</b>	<p>An arbitrator found that a contractor created a hostile work environment for African-American workers in violation of Title VII. Two years later, OFCCP issued a show cause notice finding that the same contractor failed to comply with the nondiscrimination requirements of Executive Order 11246 by failing to hire qualified Asian workers. Both violations occurred at the same worksite.</p> <p><i>The second violation is a repeated violation because it is substantially similar to a prior violation that was the subject of a separate investigation or proceeding arising from a separate set of facts and became adjudicated within the previous three years. The prior violation was adjudicated because it was reflected in an arbitral award. The violations are substantially similar because violations of Title VII, section 503, the ADA, the ADEA, the Equal Pay Act, Executive Order 11246, and VEVRAA are substantially similar when they involve the same protected status and either the same employment practice or the same worksite. In this case, both violations involved discrimination on the basis of race, and both occurred at the same worksite. Conversely, if the first violation had instead involved discrimination on the basis of gender, or if the violations did not involve the same worksite or the same employment practice, the two violations would not be substantially similar and the second violation would therefore not be repeated.</i></p>

Labor Laws	Examples of Repeated Violations
<b>Section 503 of the Rehabilitation Act</b>	<p>A Federal district court granted a private plaintiff summary judgment in a claim against a contractor under the ADA because the contractor refused to hire a disabled worker who used a wheelchair. A year later, an ALJ directed the same contractor to change a practice of medical screenings that discriminated against job applicants with disabilities in violation of section 503 of the Rehabilitation Act.</p> <p><i>The second violation is a repeated violation because it is substantially similar to a prior violation that was the subject of a separate investigation or proceeding arising from a separate set of facts and became adjudicated within the previous three years. The prior violation was adjudicated because it was reflected in a civil judgment. These violations are substantially similar because violations of Title VII, section 503, the ADA, the ADEA, the Equal Pay Act, Executive Order 11246, and VEVRAA are substantially similar when they involve the same protected status and either the same employment practice or the same worksite. In this case, both violations involved the same protected status—disability—and the same employment practice—hiring. Conversely, if the first violation had instead involved the contractor’s failure to provide a reasonable accommodation of an employee’s religious beliefs under Title VII, or if the violations did not involve the same worksite or the same employment practice, the two violations would not be substantially similar and the second violation would therefore not be repeated.</i></p>
<b>Vietnam Era Veterans’ Readjustment Assistance Act (VEVRAA)</b>	<p>The ARB issued an order finding that the contractor violated VEVRAA by discriminating against protected veterans on a company-wide basis during the hiring process. Two years later, in a separate compliance evaluation, OFCCP issued a show cause notice indicating that the same contractor failed, on a company-wide basis, to promote employees who were protected veterans to higher-level positions.</p> <p><i>The second violation is a repeated violation because it is substantially similar to a prior violation that was the subject of a separate investigation or proceeding arising from a separate set of facts and became adjudicated within the previous three years. The prior violation was adjudicated because it was reflected in a final agency order by an administrative adjudicative authority—the ARB—following a proceeding in which the contractor had an opportunity to present evidence or argument on its behalf. These violations are substantially similar because violations of Title VII, section 503, the ADA, the ADEA, the Equal Pay Act, Executive Order 11246, and VEVRAA are substantially similar when they involve the same protected status and either the same employment practice or the same worksite. In this case, both violations involved discrimination on the basis of the same protected status—protected veterans’ status—and the same worksite, because any two company-wide violations are considered to involve the same worksite. Conversely, if the first violation had instead involved discrimination on the basis of race under Executive Order 11246, or if the violations did not involve the same worksite or the same employment practice, the two violations would not be substantially similar and the second violation would therefore not be repeated.</i></p>

Labor Laws	Examples of Repeated Violations
<b>Family and Medical Leave Act (FMLA)</b>	<p>A court found that a contractor had failed to reinstate an employee to the same or an equivalent position after the employee took FMLA leave. Two years later, the Wage and Hour Division, after an investigation, filed suit against the employer challenging the employer's denial of another employee's request for FMLA leave.</p> <p><i>The second violation is repeated because it is substantially similar to a prior violation that was the subject of a separate investigation or proceeding arising from a separate set of facts and became adjudicated within the previous three years. The prior violation was adjudicated because it was reflected in a civil judgment. The violations are substantially similar because any two violations of the FMLA other than its notice requirements are substantially similar to each other. Conversely, had the first violation involved the contractor's failure to provide notice to employees of their FMLA rights and the second involved either denial of leave or failure to reinstate an employee, the two violations would not be substantially similar and the second violation would therefore not be repeated.</i></p>
<b>Title VII of the Civil Rights Act of 1964</b>	<p>OFCCP issued a show cause notice finding that the contractor violated Executive Order 11246 by systemically paying women at one of its locations less than similarly situated men. The contractor did not contest the show cause notice and agreed to remedy the pay disparities. Four months later, the EEOC issued a letter of determination that reasonable cause existed to believe that the same contractor had paid transgender individuals less than non-transgender individuals at another one of its locations.</p> <p><i>The second violation is a repeated violation because it is substantially similar to a prior violation that was the subject of a separate investigation or proceeding arising from a separate set of facts and became uncontested within the previous three years. The prior violation was uncontested because the company agreed to at least some of the relief sought by OFCCP in the enforcement action. These violations are substantially similar because violations of Title VII, section 503, the ADA, the ADEA, the Equal Pay Act, Executive Order 11246, and VEVRAA are substantially similar when they involve the same protected status and either the same employment practice or the same worksite. Both violations involved the same protected status—discrimination on the basis of gender—because violations involving discrimination on the bases of sex, pregnancy, gender identity (including transgender status), and sex stereotyping are considered to involve the “same” protected status for the purpose of determining whether violations are substantially similar under the Order. The two violations also both involved the same employment practice—pay discrimination. Conversely, if the contractor had challenged the first notice before an ALJ and if the proceeding was still pending at the time of the second violation, the second violation would not be a repeated violation because the first violation would not be adjudicated or uncontested.</i></p>

Labor Laws	Examples of Repeated Violations
<b>Americans with Disabilities Act of 1990 (ADA)</b>	<p>The ARB affirmed an ALJ order under section 503 of the Rehabilitation Act directing the contractor to grant reasonable accommodations to employees with visual impairments. Two years later, a Federal district court granted a private plaintiff summary judgment in her ADA claim against the same contractor alleging constructive discharge and the failure to provide a reasonable accommodation for employees with hearing impairments.</p> <p><i>The second violation is a repeated violation because it is substantially similar to a prior violation that was the subject of a separate investigation or proceeding arising from a separate set of facts and became adjudicated within the previous three years. The prior violation was adjudicated because it was reflected in a final agency order by an administrative adjudicative authority—the ARB—following a proceeding in which the contractor had an opportunity to present evidence or argument on its behalf. These violations are substantially similar because violations of Title VII, section 503, the ADA, the ADEA, the Equal Pay Act, Executive Order 11246, and VEVRAA are substantially similar when they involve the same protected status and either the same employment practice or the same worksite. In this case, both violations involved the same protected status—discrimination on the basis of a disability—and the same employment practice—failure to make a reasonable accommodation. Conversely, had one of the two violations involved, for example, the contractor’s failure to promote disabled employees, and the violations did not occur at the same worksite, the two violations would not be substantially similar and the second violation would therefore not be repeated.</i></p>
<b>Age Discrimination in Employment Act of 1967 (ADEA)</b>	<p>An arbitrator found that a contractor violated the ADEA by constructively discharging several employees over the age of 60. Seven months later, in an ADEA private action brought in Federal district court, the court found that the contractor, at the same worksite as the prior violation, unlawfully discriminated against the plaintiff on the basis of age when it failed to hire him.</p> <p><i>The second violation is a repeated violation because it is substantially similar to a prior violation that was the subject of a separate investigation or proceeding arising from a separate set of facts and became adjudicated within the previous three years. The prior violation was adjudicated because it was reflected in an arbitral award or decision. These violations are substantially similar because violations of Title VII, section 503, the ADA, the ADEA, the Equal Pay Act, Executive Order 11246, and VEVRAA are substantially similar when they involve the same protected status and either the same employment practice or the same worksite. In this case, both violations involved the same protected status—age—and the same worksite. Conversely, if the two violations occurred at different worksites, they would not be substantially similar and the second violation would therefore not be repeated.</i></p>

Labor Laws	Examples of Repeated Violations
<b>Executive Order 13658 (Minimum Wage for Contractors)</b>	<p>WHD sent a letter to a Federal construction contractor finding that the contractor committed violations of the DBA by failing to pay prevailing wages to its employees. As per 29 CFR 5.11, the letter specified that if the contractor desires a hearing in which to contest these findings, it must respond in writing in a letter postmarked within 30 days. The contractor did not provide any response. A year later, WHD issued an Investigative Findings Letter stating that an investigation disclosed that the same company violated Executive Order 13658 by failing to pay its workers the required minimum wage for Federal contractors.</p> <p><i>The second violation is a repeated violation because it is substantially similar to a prior violation that was the subject of a separate investigation or proceeding arising from a separate set of facts and became uncontested within the previous three years. The prior violation was uncontested because the contractor did not contest or challenge the violation within the time frame provided in the letter or otherwise required by law. Even though the contractor violated two different Labor Laws, the violations are substantially similar because any two violations of the minimum wage, subminimum wage, overtime, or prevailing wage provisions of the FLSA, DBA, SCA, and Executive Order 13658 are substantially similar. Conversely, had the first violation involved, for example, the employment of minors contrary to the FLSA's child labor provisions, the two violations would not be substantially similar and the second violation would therefore not be repeated.</i></p>



**Guidance for Executive Order 13673, "Fair Pay Safe Workplaces"**  
**Appendix C: Willful Violations**

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

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

**Summary of Definition of "Willful Violation"**

The full definition of a "willful violation" is set forth in section III(A)(3) of the Department of Labor's Guidance. When assessing violations, Agency Labor Compliance Advisors (ALCAs) should refer to the full definition in the Guidance.

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

- a. For purposes of OSH Act or OSHA-approved State Plan violations that are enforced through citations or equivalent State documents, the citation or equivalent State document at issue was designated as willful or any equivalent State designation (e.g., "knowing");
- b. For purposes of the minimum wage, overtime, and child labor provisions of the Fair Labor Standards Act, 29 U.S.C. 206–207, 212, the administrative merits determination sought or assessed back wages for greater than 2 years or sought or assessed civil monetary penalties for a willful violation, or there was a civil judgment or arbitral award or decision finding that the contractor's violation was willful;
- c. For purposes of the Age Discrimination in Employment Act, the enforcement agency, court, arbitrator, or arbitral panel assessed or awarded liquidated damages;
- d. For purposes of Title VII or the Americans with Disabilities Act, the enforcement agency, court, arbitrator, or arbitral panel assessed or awarded punitive damages for a violation where the contractor engaged in a discriminatory practice with malice or reckless indifference to the federally protected rights of an aggrieved individual; or
- e. For purposes of any other violations of the Labor Laws, it is readily ascertainable from the findings of the relevant enforcement agency, court, arbitrator or arbitral panel that the contractor knew that its conduct was prohibited by any of the Labor Laws or showed reckless disregard for, or acted with plain

indifference to, whether its conduct was prohibited by one or more requirements of the Labor Laws.

**When assessing Labor Law violations, ALCAs will review all of the above criteria to determine whether a violation is willful.** The examples below are intended to illustrate how these criteria may arise in different contexts, but a violation will be willful if it meets **any** of the above criteria.

ALCAs will classify violations based on information that is readily ascertainable from the Labor Law decisions themselves. They do not second-guess or re-litigate enforcement actions or the decisions of reviewing officials, courts, and arbitrators. While ALCAs and contracting officers may seek additional information from the enforcement agencies to provide context, they generally rely on the information contained in the Labor Law decisions to determine whether violations are serious, repeated, willful, or pervasive under the definitions provided in this Guidance.

Labor Laws	Examples of Willful Violations
<p><b>Fair Labor Standards Act (FLSA)</b></p>	<p>In a private lawsuit under the FLSA, a Federal district court issued an order requiring payment of back wages after finding that a contractor willfully violated the FLSA overtime regulations by paying workers for 40 hours by check and then paying them in cash at a straight-time rate for hours worked over 40.</p> <p><i>This is a willful violation because violations of the minimum wage, overtime, and child labor provisions of the FLSA that are reflected in civil judgments or arbitral awards or decisions are willful under the Order if the civil judgment or arbitral award or decision included a finding that the contractor's violation was willful. Conversely, if the court had not found the violation to be willful, the violation would not be willful under the Order.</i></p> <p>WHD finds that a contractor employed a 13-year-old child to operate a forklift. In recognition of the contractor's reckless disregard for its obligations under child labor laws, WHD assesses the contractor civil monetary penalties for the violation.</p> <p><i>This is a willful violation because violations of the minimum wage, overtime, and child labor provisions of the FLSA are also willful if civil monetary penalties were assessed on the grounds that the violation was willful under the FLSA. Conversely, if, for example, WHD had found that a contractor had inadvertently allowed a 15-year-old, who was about to turn 16 years old, to work as a file clerk during school hours, and WHD did not assess any civil monetary penalties for a willful violation, the violation would not be willful under the Order.</i></p>
<p><b>Occupational Safety and Health (OSH) Act</b></p>	<p>The Indiana Commissioner of Labor issued a Safety Order finding that a refinery committed a "knowing" violation of the Indiana Occupational Safety and Health Act (an OSHA State Plan) by failing to properly train truck drivers in a propane loading system, which resulted in an explosion.</p> <p><i>This is a willful violation because all citations designated as willful by OSHA—or equivalent State documents designated similarly (e.g., as "knowing") by an OSHA State Plan—are willful under the Order. Conversely, had the Safety Order not designated the violation as willful or some other equivalent State designation, the violation would not be willful under the Order.</i></p>

Labor Laws	Examples of Willful Violations
<b>Migrant and Seasonal Agricultural Worker Protection Act (MSPA)</b>	<p>An ALJ issued an order finding that the contractor was warned by an official from WHD that the housing the contractor was providing to migrant agricultural workers did not comply with required safety-and-health standards and that the contractor then failed to make the required repairs or corrections.</p> <p><i>This is a willful violation because the contractor knew, based on the warning of the WHD official, that its conduct was prohibited by law, yet continued to engage in the prohibited conduct. Conversely, if, for example, the ALJ's findings indicated that the contractor did not receive any warning from WHD and, after making a reasonable inquiry into its legal obligations, believed in good faith that its housing was fully in compliance with the relevant standards, the violation would not be willful under the Order.</i></p>
<b>National Labor Relations Act (NLRA)</b>	<p>The NLRB issued a decision finding that a unionized roofing contractor set up a non-union alter ego corporation to avoid paying its employees the wages and benefits provided in its contract with the union.</p> <p><i>This is a willful violation because the NLRB's finding that the contractor formed the alter ego corporation shows that the employer was aware of its requirements under the NLRA, yet engaged in the prohibited conduct anyway. Conversely, had the contractor, for example, inadvertently failed to pay its workers the benefits specified in its contract because a human resources specialist had incorrectly calculated the workers' seniority, the violation would not be willful.</i></p>
<b>Davis-Bacon Act (DBA)</b>	<p>An ALJ order affirming a violation of the DBA included a finding that the contractor manipulated payroll documents to make it appear as if it had paid workers the required prevailing wages.</p> <p><i>This is a willful violation because the contractor knew that its conduct was prohibited by the DBA. The ALJ's finding that documents were falsified indicates that the contractor knew that it was required to pay the workers prevailing wages, yet paid them less anyway. Conversely, had the contractor, for example, failed to pay certain workers prevailing wages because of a good-faith misunderstanding about the workers' proper classification for the purpose of DBA wage determinations, the violation would not be willful.</i></p>
<b>Service Contract Act (SCA)</b>	<p>The DOL's Administrative Review Board (ARB) affirmed WHD's determination that a contractor violated the SCA. The order included a finding that the contractor documented the wages as paid, but required the workers to kick back a portion of their wages to the contractor.</p> <p><i>This is a willful violation because the contractor knew that its conduct was prohibited by the SCA. The finding that the contractor required the workers to kick back wages paid indicates that the contractor knew that it was required to pay the workers prevailing wages, yet paid them less anyway as a result of the kickbacks. Conversely, had the ARB found, for example, that employees were not paid their required SCA wages because the contractor's payroll system, due to a systems error, failed to include the most up-to-date SCA wage determinations, the violation would not be willful.</i></p>

Labor Laws	Examples of Willful Violations
<b>Executive Order 11246 (Equal Employment Opportunity)</b>	<p>An ALJ decision found that a contractor's vice president knew that Federal law prohibits discrimination on the basis of gender, but had a policy of not promoting women to managerial positions.</p> <p><i>This is a willful violation because the contractor knew that its discrimination was prohibited by law, but engaged in the conduct anyway. Conversely, had the contractor used a neutral procedure for selecting employees for promotion and validated this procedure in accordance with OFCCP regulations, but the procedure was ultimately determined by the ALJ to be discriminatory on the basis of gender because the contractor did not fully comply with validation requirements, the violation would not be willful.</i></p>
<b>Section 503 of the Rehabilitation Act</b>	<p>An ARB decision found that a contractor refused to hire any individuals with physical disabilities, and that in doing so, the contractor made no attempt whatsoever to determine whether any of these individuals' disabilities would affect their abilities to do the jobs for which they applied.</p> <p><i>This is a willful violation because the contractor made no effort whatsoever to learn or understand whether it was complying with the law, showing that the contractor acted in reckless disregard for its obligations under section 503 of the Rehabilitation Act. Conversely, had the ARB found that the contractor made good-faith efforts to determine whether the applicants' disabilities affected their abilities to do the jobs for which they applied, but submitted insufficient evidence to support its claim that accommodations would impose an undue burden, the violation would not be willful.</i></p>
<b>Vietnam Era Veterans' Readjustment Assistance Act (VEVRAA)</b>	<p>An ALJ decision finding initial assignment and pay discrimination in violation of VEVRAA found that each time a veteran covered by VEVRAA's protections applied for a job with a contractor, the contractor only placed the veteran in one of its lowest paying custodial jobs without any regard for the veteran's qualifications or the job for which the veteran applied. The decision included a factual finding that the contractor was aware of VEVRAA's prohibition against discriminating against covered veterans, but did so anyway.</p> <p><i>This is a willful violation because the contractor knew that its conduct was prohibited by VEVRAA, yet channeled the veterans into the custodial jobs anyway. Conversely, had the contractor used a neutral procedure for selecting employees that the contractor claimed was job-related and consistent with business necessity, but the procedure was ultimately determined by the ALJ to be discriminatory against covered veterans, the violation would not be willful.</i></p>
<b>Family and Medical Leave Act (FMLA)</b>	<p>After suit in Federal district court by a private litigant, the court issued a decision that included findings that the contractor's employee handbook provided for unpaid leave to employees with serious health conditions as required by the FMLA, but that the contractor in practice erected unnecessary hurdles to employees requesting such leave.</p> <p><i>This is a willful violation because the contractor knew of its requirements under the FMLA, yet violated these requirements. Conversely, had the court's decision instead found that the contractor's actions were based on a good-faith misunderstanding of the FMLA's provisions concerning medical certification, the violation would not be willful.</i></p>

Labor Laws	Examples of Willful Violations
<b>Title VII of the Civil Rights Act of 1964</b>	<p>After a Federal district court trial finding the contractor liable for sexual harassment, the factfinder assessed punitive damages after finding that the contractor engaged in a discriminatory practice with malice or reckless indifference to the federally protected rights of an aggrieved individual. The decision included findings that the employer's anti-harassment policy was ineffective and a manager, after receiving a complaint of sexual harassment, failed to report it or investigate it.</p> <p><i>This is a willful violation because Title VII violations are willful under the Order if the enforcement agency, court, arbitrator, or arbitral panel assessed or awarded punitive damages for a violation where the contractor engaged in a discriminatory practice with malice or reckless indifference to the federally protected rights of an aggrieved individual. Conversely, had the district court not awarded any punitive damages, the violation would not be willful.</i></p>
<b>Americans with Disabilities Act of 1990 (ADA)</b>	<p>After a trial in Federal court, the factfinder assessed punitive damages after finding that the contractor engaged in an ADA-prohibited discriminatory practice with malice or reckless indifference to the federally protected rights of an aggrieved individual, and the contractor could not demonstrate good faith.</p> <p><i>This is a willful violation because ADA violations are willful under the Order if the enforcement agency, court, arbitrator, or arbitral panel assessed or awarded punitive damages for a violation where the contractor engaged in a discriminatory practice with malice or reckless indifference to the federally protected rights of an aggrieved individual. Conversely, had the factfinder not assessed punitive damages, the violation would not be willful.</i></p>
<b>Age Discrimination in Employment Act of 1967 (ADEA)</b>	<p>An arbitral award included liquidated damages for a willful violation of the ADEA.</p> <p><i>This is a willful violation because ADEA violations are willful under the Order if the enforcement agency, court, arbitrator, or arbitral panel assessed or awarded liquidated damages. Conversely, had the arbitrator not awarded any liquidated damages, the violation would not be willful.</i></p>
<b>Executive Order 13658 (Minimum Wage for Contractors)</b>	<p>An ALJ order affirming a violation of Executive Order 13658 included a finding that the employer, an experienced and sophisticated government contractor, made no effort whatsoever to determine what its minimum wage obligations were or whether its workers were employees or independent contractors, but instead chose to pay them a flat rate that fell well short of the requirements of Executive Order 13658.</p> <p><i>This is a willful violation because the contractor made no effort whatsoever to learn or understand whether it was complying with the law, showing that that the contractor was acting in reckless disregard or plain indifference of its requirements under Executive Order 13658. Conversely, if the employer in question was a small business and a new Federal contractor and the employer, after reading the regulations implementing Executive Order 13658, mistakenly concluded in good faith that it was not covered by these minimum wage requirements, the violation would not be willful.</i></p>

**Guidance for Executive Order 13673, "Fair Pay Safe Workplaces"**  
**Appendix D: Pervasive Violations**

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

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

**Summary of Definition of "Pervasive Violation"**

The full definition of a "pervasive violation" is set forth in section III(A)(4) of the Department of Labor's Guidance. When assessing violations, Agency Labor Compliance Advisors (ALCAs) should refer to the full definition in the Guidance.

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

**When assessing Labor Law violations, ALCAs will review the full definition to determine whether a violation is pervasive.** The examples below are intended to illustrate how the definition may be applied in different contexts, but a violation can be deemed pervasive as long as it meets the criteria set forth in the Guidance.

ALCAs will classify violations based on information that is readily ascertainable from the Labor Law decisions themselves. They do not second-guess or re-litigate enforcement actions or the decisions of reviewing officials, courts, and arbitrators. While ALCAs and contracting officers may seek additional information from the enforcement agencies to provide context, they generally rely on the information contained in the Labor Law decisions to determine whether violations are serious, repeated, willful, or pervasive under the

definitions provided in this Guidance.

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

A medium-sized company with about 1,000 employees that provides janitorial services at Federal facilities was found to have violated the SCA for failure to pay workers their required wages, Title VII for discrimination in hiring on the basis of national origin, the NLRA for demoting workers who are seeking to organize a union, and the FMLA for denying workers unpaid leave for serious health conditions.

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

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

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

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

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

OSHA cited a small tools manufacturer with about 50 employees in a single location multiple times for a variety of serious violations in the same investigation —once for improper storage of hazardous materials, once for failure to provide employees with protective equipment, once for inadequate safeguards on heavy machinery, once for lack of fall protection, once for insufficient ventilation, once for unsafe noise exposure, and once for inadequate emergency exits. The manufacturer does not have a process for identifying and eliminating serious safety-and-health hazards.

*These violations are pervasive because such a high number of serious workplace safety-and-health violations relative to the size of a small company with only a single location and the lack of an effective process to identify and eliminate serious violations (hazards) in its workplace constitute basic disregard by the contractor for worker safety and health. Even though these violations would not be designated as repeated violations by OSHA and would therefore not be repeated violations under the Order, they would be considered pervasive.*

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

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

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

A large company with 5,000 employees that provides uniform services to Federal agencies in several States is cited 10 times for serious OSHA violations over the span of a year. The violations affect most of its inspected locations, and a number of the citations are for high gravity serious failures to abate dangerous conditions that OSHA had cited previously. As a result, the company is placed on OSHA’s Severe Violator Enforcement Program.

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

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

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

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

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



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

The Department of Labor's Office of Federal Contract Compliance Programs finds, through enterprise-wide enforcement, that a large contractor with 50,000 employees that provides food services at Federal agencies nationwide used pre-employment screening tests for most jobs at the company's facilities that resulted in Hispanic workers being hired at a significantly lower rate than non-Hispanic workers over a 5-year period. In addition, the Wage and Hour Division finds that the company failed to comply with the Service Contract Act's requirements to pay its workers prevailing wages at many of its locations.

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

**Guidance for Executive Order 13673, "Fair Pay Safe Workplaces"**  
**Appendix E: Assessing Violations of the Labor Laws**

When preparing an assessment of a contractor's Labor Law violations, an Agency Labor Compliance Officer (ALCA) follows a three-step process to assess a contractor's record of Labor Law compliance and provide advice to contracting officers. In the first step, classifying the Labor Law violations, an ALCA reviews all of the contractor's violations to determine if any are "serious," "repeated," "willful," and/or "pervasive." Appendices A through D provide summary definitions and examples of Labor Law violations that are "serious," "repeated," "willful," and "pervasive."

In the second step an ALCA weighs the Labor Law violations to determine whether the contractor has a satisfactory record of Labor Law compliance—in other words, whether the contractor's history of Labor Law compliance and any adoption by the contractor of preventative compliance measures indicate that the contracting officer could find the contractor to have a satisfactory record of integrity and business ethics. To do so, the ALCA analyzes any serious, repeated, willful, and/or pervasive violations in light of the totality of the circumstances, including any mitigating factors. The contractor's timely remediation of violations of Labor Laws is generally the most important factor weighing in favor of a conclusion that a contractor has a satisfactory record of Labor Law compliance. The ALCA will also consider factors that weigh against a conclusion that the contractor has a satisfactory record. For example, pervasive violations and violations of particular gravity, among others, may support such an outcome.

In the third step of the assessment process, the ALCA provides written advice and analysis to the contracting officer regarding the contractor's record of Labor Law compliance. The ALCA recommends whether the contractor's record supports a finding of a satisfactory record of integrity and business ethics. In cases where the ALCA concludes that a contractor has an unsatisfactory record of Labor Law compliance, the ALCA will recommend the negotiation of a labor compliance agreement or other appropriate action such as notification of the agency suspending and debaring official. If the ALCA concludes that a labor compliance agreement is warranted, the ALCA will recommend whether the agreement should be negotiated before or after the award. The written analysis supporting the advice describes the ALCA's classification and weighing of the contractor's Labor Law violations and includes the rationale for the recommendation.

**Mitigating Factors that Weigh in Favor of a Satisfactory Record of Labor Law Compliance**

Various factors may mitigate the existence of a contractor's Labor Law violations. The Department respects the fact that most employers endeavor to comply with the Labor Laws. The Department values highly contractors' good-faith efforts to comply, and it encourages them to report these efforts, including workplace policies that foster compliance. The following are the most common factors that will mitigate the existence of one or more violations in the context of a responsibility determination. This is not an exhaustive list. None of these mitigating factors, standing alone, is necessarily determinative. Contractors are encouraged to report any information they believe demonstrates a satisfactory record of Labor Law compliance.

- **Remediation of the violation(s), including Labor Compliance Agreements:** Typically the most important factor that can mitigate the existence of a violation, remediation is an indication that a contractor has assumed responsibility for a violation and has taken steps to bring itself into compliance with the law going forward. In most cases, for remediation to be considered mitigating, it should

**Mitigating Factors that Weigh in Favor of a Satisfactory Record of Labor Law Compliance**

involve two components:

- **Correction of the violation:** The remediation should correct the violation itself, including by making any affected workers whole. For example, this could involve abating a dangerous hazard, paying workers their back wages owed, or reinstating a wrongfully discharged employee.
- **Efforts to prevent similar violations in the future:** Particular consideration will be given where the contractor has implemented remediation on an enterprise-wide level or has entered into an enhanced settlement agreement with the relevant enforcement agency or agencies that goes beyond what is minimally required under the law to address appropriate remedial or compliance measures.

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

- **Only one violation:** While a contracting officer is not precluded from making a determination of nonresponsibility based on a single violation in the circumstances where merited, in most cases a single violation of a Labor Law will not give rise to a lack of responsibility, depending on the nature of the violation.
- **Low number of violations relative to size:** Larger employers, by virtue of their size, are more likely to have multiple violations than smaller ones. When assessing contractors with multiple violations, a contracting officer and Labor Compliance Advisor should consider the size of the contractor.
- **Safety and health programs, grievance procedures, or other compliance programs:** Contractors can help to assure future compliance by implementing a safety-and-health management program such as OSHA's 1989 Safety and Health Program Management guidelines or any updates to those guidelines, grievance procedures (including collectively-bargained ones), monitoring arrangements negotiated as part of either a settlement agreement or labor compliance agreement, or other similar compliance programs. Such programs and procedures can foster a corporate culture in which workers are encouraged to raise legitimate concerns about Labor Law violations without the fear of repercussions; as a result, they may also prompt workers to report violations that would, under other circumstances, go unreported. Therefore, implementation or prior existence of such a program is a mitigating factor.
- **Recent legal or regulatory change:** To the extent that the Labor Law violations can be traced to a recent legal or regulatory change, that may be a mitigating factor. This may be case where a new interpretation of an existing statute is applied retroactively and a contractor's pre-change conduct is found to be a violation. For example, where prior agency or court decisions suggested that a practice was lawful, but the Labor Law decision finds otherwise, this may be a mitigating factor.
- **Good faith and reasonable grounds:** It may be a mitigating factor where the findings in the relevant Labor Law decision support the contractor's defense that it had reasonable grounds for believing that it was not violating the law. For example, if a contractor acts in reliance on advice from a responsible official from the relevant enforcement agency, or an administrative or authoritative judicial ruling, such reliance will typically demonstrate good faith and reasonable grounds. This mitigating factor also applies where a violation otherwise resulted from the conduct of a government official. For example, a DBA violation may be mitigated where the contracting agency failed to include the relevant contract

#### Mitigating Factors that Weigh in Favor of a Satisfactory Record of Labor Law Compliance

clause and wage determination in a contract.

- **Significant period of compliance following violations:** If, following one or more violations within the three-year reporting period, the contractor maintains a steady period of compliance with the Labor Laws, such compliance may mitigate the existence of prior violations (e.g., violations were reported from 2½ years ago and there have been none since). This is a stronger mitigating factor where the contractor has a recent Labor Law decision that it must disclose, but the underlying conduct took place significantly prior to the 3-year disclosure period and the contractor has had no subsequent violations.

#### Factors that Weigh Against a Satisfactory Record of Labor Law Compliance

The following types of violations present factors that weigh against a conclusion that a contractor has a satisfactory record of Labor Law compliance. The list of factors below is not exhaustive. Nor are any of these factors necessarily determinative. An ALCA reviews these factors as part of an evaluation of the totality of the circumstances. In some cases, several factors may need to be present in order for an ALCA to conclude that a contractor has an unsatisfactory record of Labor Law compliance. Depending on the facts of the case, even where multiple factors are present, they may be outweighed by mitigating circumstances.

- **Pervasive violations.** Pervasive violations, by definition, demonstrate a basic disregard for the Labor Laws. Such disregard of legal obligations creates a heightened danger that the contractor may, in turn, disregard its contractual obligations as well. Additionally, such contractors are more likely to violate the Labor Laws in the future, and those violations – and any enforcement proceedings or litigation that may ensue – may imperil their ability to meet their obligations under a contract. The fact that a contractor shows such disregard for the Labor Laws weighs strongly against a satisfactory record of Labor Law Compliance.
- **Violations that are serious AND repeated, serious AND willful, or willful AND repeated.** A violation that falls into two or more these categories, as a general matter, is more likely to be probative of the contractor's disregard for legal obligations and working conditions than a violation that falls into only one of those categories.
- **Violations of particular gravity.** Two violations in the same classification will not necessarily receive equal weight. Labor Law violations that are of particular gravity and should be given greater weight include (but are not limited to):
  - Violations related to the death of an employee;
  - Violations involving a termination of employment for exercising a right protected under the Labor Laws;
  - Violations that detrimentally impact the working conditions of all or nearly all of the workforce at a worksite; and
  - Violations where the amount of back wages, penalties, and other damages awarded is greater than \$100,000.
- **Violations for which a court has granted injunctive relief.** Where a court has granted injunctive relief to remedy a violation that is classified as serious, repeated, willful, or pervasive, the violation should be given greater weight.
- **Violations that are reflected in final orders.** To the extent that the judgment, determination, or order finding a Labor Law violation is final (because appeals and opportunities for further review have been

#### Factors that Weigh Against a Satisfactory Record of Labor Law Compliance

exhausted or were not pursued), the violation should be given greater weight. Likewise, where a violation has not resulted in a final judgment, determination, or order, it should be given lesser weight.