August 15, 2022

Wage and Hour Division
U.S. Department of Labor
Room S-3502
200 Constitution Avenue NW
Washington, DC 20210

Submitted via Regulations.gov

Re: Comments in Response to Proposed Rulemaking: *Nondisplacement of Qualified Workers Under Service Contracts*; RIN 1235-AA42.

The American Association of People with Disabilities, the Autistic Self Advocacy Network, Communications Workers of America, the International Brotherhood of Teamsters, the Laborers' International Union of North America, the National Employment Law Project, and the Service Employees International Union, (collectively, the Coalition) submit these comments in response to the Notice of Proposed Rulemaking by the U.S. Department of Labor's (DOL or the Department) Wage and Hour Division (WHD), Nondisplacement of Qualified Workers Under Service Contracts, 87 Fed. Reg. 42,552 (July 15, 2022) (to be codified at 29 C.F.R. pt. 9) ("the Proposed Rule").[1]

The Coalition strongly supports the Proposed Rule, which implements Executive Order 14,055, Nondisplacement of Qualified Workers Under Service Contracts ("the Order"). The Order reestablishes and strengthens the policy that, when federal service contracts change over, qualified employees working on the predecessor contract have a right of first refusal of employment under the successor contract. In so doing, the Proposed Rule will prevent knowledgeable, incumbent workers from being cast aside for lower-paid, inexperienced, or temporary workers and provide federal agencies, contracted workers, their families, and their communities stability. Experience demonstrates that job stability rules are a win-win, retaining experienced, productive workers and improving their performance under the contract by providing a stable job.[2] Focusing on this essential sector will also help correct long-standing racial and gender disparities, since women as well as Black and Latinx workers are overrepresented in many service contract industries.[3]

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[1] We appreciate the assistance of Robin Thurston, Democracy Forward Foundation, counsel for CWA for this comment.

[2] Both President Obama and President Clinton issued nondisplacement orders to support economy and efficiency in the federal contracting system. *See* Exec. Order No. 13,495, 86 Fed. Reg. 66,400 (2009-2019); Exec. Order No. 12,933, 59 Fed. Reg. 53,560 (1994-2001).

[3] Karla Walter & Anastasia Christman, *Service Contract Workers Deserve Good Jobs*, American Progress Action (Apr. 9, 2021), https://www.americanprogressaction.org/article/service-contract-workers-deserve-good-jobs/.

We applaud the Department's decision to expand the reach of the nondisplacement policy compared to previous iterations of that policy under Presidents Obama and Clinton by eliminating an exception for service contracts that change locations and affirmatively requiring contracting agencies to consider the benefits of continuing the contracted work in the same location. We also applaud the Department for treating workers with disabilities equally by eliminating the exception for service contracts awarded pursuant to the Javits-Wagner-O'Day Act (JWOD) and the Randolph-Sheppard Act. By and large, the Department's proposed procedures for implementing and enforcing the nondisplacement policy are reasonable and effective, although we make suggestions below to strengthen the policy and enhance its benefits for workers and the Federal Government.

I. The Coalition's interest in the Proposed Rule.

The American Association of People with Disabilities (AAPD) is a convener, connector, and catalyst for change, increasing the political and economic power of people with disabilities. As a national cross-disability rights organization, AAPD advocates for full civil rights for the over 60 million Americans with disabilities by promoting equal opportunity, economic power, independent living, and political participation.

The Autistic Self Advocacy Network (ASAN) is a 501(c)(3) nonprofit organization run by and for autistic people. ASAN is a national grassroots disability rights organization for the autistic community. We fight for disability rights. We work to make sure autistic people are included in policy-making, so that laws and policies meet our community's needs. We work to support all forms of self-advocacy and to change the way people think about autism. Our members and supporters include autistic adults and youth, cross-disability advocates, and non-autistic family members, professionals, educators, and friends.

The Communications Workers of America, **AFL-CIO (CWA)** is a union of hundreds of thousands of public and private sector workers in communities across the United States, Canada, Puerto Rico, and other U.S. Territories. Our members work in telecommunications and IT, the airline industry, manufacturing, news media, broadcast and cable television, education, health care, public service, and other fields. For years, CWA members have fought to improve our workplaces by bargaining to improve pay, benefits, equal treatment, and employee wellbeing while articulating a vision for a just, inclusive, and democratic society.

CWA is uniquely positioned to provide information about the Proposed Rule's effect on federal contract workers across the United States and U.S. territories. CWA and its industrial division, IUE-CWA, represent Service Contract Act (SCA) covered contract workers who service military fighter jets and other aircraft, support satellite operations, provide ID badge services, and are employed in a range of other service occupations for federal contractors. CWA also represents about 65,000 customer-service and call-center workers, and actively organizes with federally-contracted customer service representatives to form unions and otherwise improve workplace standards in the industry.

The International Brotherhood of Teamsters (IBT) is a labor union representing approximately 1.2 million public and private sector workers across the United States, Canada, and Puerto Rico. As one of the most industry-diverse unions in North America, members of the

Teamsters work every day in a wide range of occupations. Along with hundreds of thousands of members in the logistics industry, Teamster members work in the food processing, sanitation, health care, construction, trades, and administrative professional industries, among many others. Thousands of Teamsters are also employed at federal contractors covered by the SCA, working as aircraft mechanics, food service workers, truck drivers, fuelers, hairdressers, facility maintenance workers, warehouse specialists, computer operators, and janitors. Based on the IBT's diverse set of represented industries, we innately understand the disruptive effects of high worker turnover and therefore support the Proposed Rule to better protect workers on the job.

The Laborers' International Union of North America (LIUNA) is a diverse union representing over half a million construction workers, service contract workers, and public employees, many of whom rely upon employment on federal contracts subject to the SCA. LIUNA service contract members work on a wide array of contracts on federal installations and in federal buildings in states across the nation, providing janitorial, food service, and hospital cleaning services to name but a few. The SCA, Executive Order 14055, and the proposed regulations implementing it, are of vital importance to LIUNA members and their families who rely upon stable pay and benefits under the Act. These rules encourage long-term investment in job skills for a stable pool of workers, and prevent the loss of valuable employees and the cost of high turnover among union workers in services vital to the operation of the federal government.

The National Employment Law Project (NELP) is a national nonprofit advocacy organization that for more than 50 years has sought to build a just and inclusive economy where all workers have expansive rights and thrive in good jobs, especially in low-paying industries in which Black, women, and people of color are disproportionately represented. NELP works extensively with worker centers, labor unions, and other worker organizing groups to develop and advocate for worker-centered policies including worker retention ordinances in several counties and by several public authorities.

The Service Employees International Union (SEIU) is a labor union representing approximately two million working people in property services, healthcare, public employment, and other essential jobs. Thousands of these workers provide services to the federal government on contracts to clean federal buildings, secure important facilities, provide food services, and render essential assistance to our nation's veterans. Workers on federal contracts are disproportionately women and people of color. SEIU believes that workers' struggle for economic justice is intertwined with, and inseparable from, our struggle for racial justice. Neither can be won without the other. In June 2020, our International Executive Board adopted a resolution affirming SEIU's support for the Movement for Black Lives, and at our 2016 Convention, SEIU adopted Resolution 106A, in which we committed to becoming an anti-racist organization. SEIU views service worker nondisplacement protections as both smart procurement policy and an economic and racial justice imperative.

II. The Procurement Act authorizes the Proposed Rule because retaining incumbent service workers promotes economy and efficiency in federal contracting.

The Federal Property and Administrative Services Act (the Procurement Act) authorizes the President to "prescribe policies and directives that the President considers necessary," to carry out the statutory purposes of the Act "to provide the Federal Government with an

economical and efficient system for" procuring goods and services. 40 U.S.C. § 101, 121(a). President Biden issued Executive Order 14,055 under this authority, determining that:

> When a service contract expires, and a follow-on contract is awarded for the same or similar services, the Federal Government's procurement interests in economy and efficiency are best served when the successor contractor or subcontractor hires the predecessor's employees, thus avoiding displacement of these employees. Using a carryover work force reduces disruption in the delivery of services during the period of transition between contractors, maintains physical and information security, and provides the Federal Government with the benefits of an experienced and well-trained work force that is familiar with the Federal Government's personnel, facilities, and requirements. These same benefits are also often realized when a successor contractor or subcontractor performs the same or similar contract work at the same location where the predecessor contract was performed.

Exec. Order No. 14,055, 86 Fed. Reg. 66,397 (Nov. 18, 2021). At the President's direction, *id*. at Sec. 7, the Department issued the Proposed Rule to implement the Order.

Executive Order 14,055 and the Proposed Rule correctly conclude that retaining qualified federal service contract workers from one service contract to the next promotes economy and efficiency in federal contracting. As one federal service contractor working as an engineering technician said of the Order, "I'm proud to provide an essential service to the military, and this E.O. recognizes the value of my experience and knowledge." Another, working as a customer service representative, explained, "We and our families can have peace of mind about the stability of our jobs going forward and can focus on providing great customer service."

These workers' experiences are well supported by research. Studies across the service sectors show that worker turnover harms business performance and customer satisfaction. Lower turnover has been linked to better safety and security performance among airport workers.[4] Turnover among home health care workers, now at a "crisis point," is associated with lower quality of care and the high costs of replacing workers.[5] Turnover has been correlated with

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[4] Amanda Gallear, U.C. Berkeley Lab. Ctr., *The Impact Of Wages And Turnover On Security And Safety In Airports: A Review Of The Literature* 7 (2017), https://laborcenter.berkeley.edu/pdf/2017/SFO-literature-review.pdf.

[5] Sahar Banijamali et al., SEIU Healthcare 775NW, *Why They Leave: Turnover Among Washington's Home Care Workers* 4 (2012), https://seiu775.org/wp-content/uploads/2020/12/Why-They-Leave-Report1.pdf.

inefficiency in commercial banking[6] and the fast-food industry,[7] diminishing brand perception in temporary staffing,[8] poor customer service,[9] and poor organizational performance generally.[10] Recognizing the benefits of retaining employees across service contracts, several cities and states have adopted job stability provisions in their own contracting standards,[11] and have implemented them smoothly.[12] Research shows that state and local reforms to raise standards for contract workers generally decreases employee turnover and, as a result, leads to a more productive workforce, improves the quality of service provided to the public and savings in re-staffing costs.[13] We encourage the Department to incorporate this research into its final rule to further reinforce the Order's conclusion as to the need for nondisplacement requirements.

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[6] Paula Morrow & James McElroy, *Efficiency as a Mediator In Turnover—Organizational Performance Relations*, 60 Hum. Rels. 827 (2007), https://journals.sagepub.com/doi/10.1177/0018726707080078.

[7] K. Michele Kacmar et al., *Sure Everyone Can Be Replaced... but at What Cost? Turnover as a Predictor of Unit-Level Performance*, 49 Acad. of Mgmt. J. 133 (2006), https://www.jstor.org/stable/20159750.

[8] Mahesh Subramony & Brooks C. Holtom, *The Long-Term Influence of Service Employee Attrition on Customer Outcomes and Profits*, 15 J. Serv. Rsch. 460 (2012), https://journals.sagepub.com/doi/abs/10.1177/1094670512452792.

[9] Brooks C. Holtom & Tyler C. Burch, *A Model of Turnover-Based Disruption in Customer Services*, 26 Hum. Res. Mgmt. Rev. 25 (2016), https://doi.org/10.1016/j.hrmr.2015.09.004.

[10] Tae-Youn Park & Jason D. Shaw, *Turnover Rates and Organizational Performance: A Meta-Analysis*, 98 J. Applied Psych. *268* (2013), https://pubmed.ncbi.nlm.nih.gov/23244224.

[11] *See* Bergen Cnty., N.J., Ordinance No. 14-07, § 5.10(p)(3) (on file); Connecticut Gen. Stat., § 31-57f, *available at* https://www.cga.ct.gov/current/pub/chap_557.htm#sec_31-57f; L.A., Cal., Admin. Code div. 10, ch 1, art. 10 (2018), *available at* https://bca.lacity.org/Uploads/scwro/15-0817-S1_Worker%20Retention%20Ordinance.pdf ; S.F. Int'l Airport, *San Francisco International Airport Worker Retention Policy (2017)*, *available at* https://www.flysfo.com/sites/default/files/media/sfo/about-sfo/App%20D%20Worker%20Retention%20Policy%20(Approved%202_7_17).pdf ; City & Cnty. of Denver, Colo., Ordinances art. 3, § 58-31,*available at* https://library.municode.com/co/denver/codes/code_of_ordinances?nodeId=TITIIREMUCO_CH58WAWOPR_ARTIIIWORE; San Diego, Cal., Admin. Code art. 2, div. 28, § 22.2801-2806 (2022), *available at* https://docs.sandiego.gov/municode/MuniCodeChapter02/Ch02Art02Division28.pdf.

[12] Paul Salvatore & Brian Rauch, *United States: Displaced Building Service Workers Protection Act: 3½ Years and a Single Challenge Later*, Mondaq (Oct. 21, 2006), https://www.mondaq.com/unitedstates/employee-rights-labour-relations/43572/displaced-building-service-workers-protection-act-3-years-and-a-single-challenge-later.

[13] Paul Sonn & Tsedeye Gebreselassie, Nat'l Emp. L. Ctr., *The Road to Responsible Contracting: Lessons from States and Cities for Ensuring That Federal Contracting Delivers Good Jobs and Quality Services*, (2009), *available at* https://s27147.pcdn.co/wp-content/uploads/2015/03/responsiblecontracting2009.pdf; Karla Walter et al., Ctr. for Am.

The Department's conclusion that the Proposed Rule will promote physical and information security is also correct. Whether through building security, janitorial services provided in a secure facility, or CMS call center representatives addressing callers' personal health information, federal service contract workers regularly provide physical security and work with or adjacent to classified, sensitive, or private personal information. Retaining those workers across service contracts limits the need for costly training and vetting, promoting economy and efficiency.

As to operations and physical security, tenured custodians and security guards have an acute awareness of a building's activity and tenants, which allows them to recognize when an unauthorized individual is in the building or when a tenant employee is missing. Workers' familiarity with tenant employees is also valuable in emergencies. Workers are often aware if someone has a disability or condition that may require additional assistance during an evacuation or other emergency. Moreover, a seasoned facility management workforce understands the quirks and intricacies of their building, allowing for smooth operation of the building and expedited resolution of building issues.

Retaining workers also generates cost and time savings for new contractors and the federal government because of the extensive security clearance process required to enter federal buildings. Generally, service workers at federal buildings must pass the same background checks and screenings that any other federal employee would need to access the building. According to the Defense Counterintelligence and Security Agency, prices for new background investigations and clearances for fiscal year 2023 will range from $140 each at the lowest level of vetting, to $400 for a secret clearance, and then up to $5,140 for a top secret clearance.[14] In terms of time costs, obtaining security clearance can take weeks to months, depending on the level of security clearance required. According to the Government Accountability Office (GAO), in fiscal year 2020, "the fastest 90 percent of investigations for initial secret clearances…[was] 58 days." Although the GAO recommends that investigations and adjudications for initial secret clearance be completed within 40 days and 20 days, respectively, only three percent of investigations and less than half of adjudications are completed within this timeline.[15]

But even with a security clearance, strict security requirements for operations at federal buildings can also lead to work delays if workers are unfamiliar with security staff and security protocols. For custodial work, in particular, established relationships with security guards and

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Progress, Contracting that Works (2015), *available at* https://www.americanprogressaction.org/wp-content/uploads/2015/11/Contracting2.pdf.

[14] U.S. Dep't of Def., Def. Counterintel. & Sec. Agency, DCSA Products & Services Billing Rates for Fiscal Years 2023 and 2024 (June 30, 2022), available at https://www.dcsa.mil/Portals/91/Documents/pv/GovHRSec/FINs/FY22/FIN_22-01_FY23-FY24-Billing-Rates_30June2022.pdf; Lindsey Kyzer, *How Much Does It Cost to Obtain a Clearance – FY 2022/23 Costs Go Down*, ClearanceJobs (Sept. 7, 2021, available at https://news.clearancejobs.com/2021/09/07/how-much-does-it-cost-to-obtain-a-clearance-fy-2022-23-costs-go-down/.

[15] U.S. Gov't Accountability Off., Government-Wide Personnel Security Clearance Process, https://www.gao.gov/highrisk/government-wide-personnel-security-clearance-process.

knowledge of building security protocols plays an important role in maintaining a timely cleaning schedule. Although workers generally have clearance to enter buildings, certain rooms within the building may require additional security clearance that cleaners do not have. In these cases, cleaners are escorted and supervised by a security guard, oftentimes also a contracted worker, for the duration of the cleaning. When workers are required to clean rooms with a security escort present, they must wait for the escort to arrive before they may enter. When workers are familiar with security staff and the process of cleaning top secret rooms, cleaning delays can be avoided.

In addition to intense security vetting, workers on federal contracts often require additional specialized training to perform their job. For example, the Department of Homeland Security (DHS) provides security services to more than 9,000 federal buildings across the country. DHS requires its contracted security guards to complete several trainings, including firearms trainings, and obtain various licenses, including a state weapons permit. In fact, DHS best practices for armed contract security officers recommend that security guards receive 162 hours of initial training.[16] These hours of training add up quickly when considering that DHS relies on 13,000 contract guards to fulfill virtually all of its security obligations at federal sites.[17] This contracted workforce alone represents an estimated 240 years of initial training combined.

DHS is hardly alone. In 2021, government agencies with elevated security concerns[18] awarded over $3.6 billion in contracts for custodial, food, and security guard services.[19] An estimated 55,000 contract workers[20] will work in close contact with sensitive government information when providing these services. Strict security protocols for contract employees as well as staff are necessary to keep these agencies' facilities running safely and securely. Consequently, retaining a well-trained and thoroughly vetted service staff is essential to ensuring the safety and security of government employees, property, and intelligence.

Accordingly, the Order and the Proposed Rule are entirely consistent with the Procurement Act. The Act gives the President "broad-ranging" and "flexib[le]" authority to

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[16] U.S. Dep't of Homeland Sec., Armed Contract Security Officers in Federal Facilities: An Interagency Security Committee Best Practice 12-14 (2019), https://www.cisa.gov/sites/default/files/publications/Armed%20Contract%20Security%20Officers%20in%20Federal%20Facilities-An%20ISC%20Best%20Practice%202019.pdf.

[17] U.S. Dep't of Homeland Sec., Federal Protective Service Operations, https://www.dhs.gov/fps-operations.

[18] Data only includes contracts covered by the Service Contract Act for the following agencies: Department of Defense (DOD), DHS, Department of State (DOS), Department of Justice (DOJ), Department of Energy (DOE), and General Services Administration (GSA).While both cyber and physical security concerns are present in all government agencies, these agencies all have elevated security concerns. *See* Off. of the Dir. of Nat'l Intel., Members of the IC, https://www.dni.gov/index.php/what-we-do/members-of-the-ic.

[19] U.S. Gov't., USASpending.gov, https://www.usaspending.gov/.

[20] Number of workers is calculated by dividing the current value of contracts by the estimated annual worker cost of $66,000.

determine which policies are necessary to serve the government's interests in economy and efficiency; and the leading cases interpreting the President's authority recognize that the Act establishes "lenient" standards.[21] Nor does the Act anticipate that federal contracts should go to the lowest bidder, instructing that determining the "most advantageous" bid will be based on both "price *and other factors*." 40 U.S.C. § 545(a)(4) (emphasis added). Consistent with the Act, courts have long held that economy and efficiency "are not narrow terms"; they encompass factors other than price, like "quality, suitability, and availability of goods or services."[22] The en banc Court of Appeals for the D.C. Circuit upheld Presidential action under the Procurement Act even though "there may be occasional instances where a low bidder will not be awarded a contract," explaining "[n]evertheless, we find no basis for rejecting the President's conclusion that any higher costs incurred in those transactions will be more than offset by the advantages gained…."[23]And policy makers have long recognized that seeking the lowest possible wages for service contracts does not result in economy and efficiency. As early as the 1970s, members of Congress amending the Service Contract Act recognized: "Annual shifts in contractors created a lack of continuity and stability … Low wages produced no real economy for government…."[24] Even worse, workers displaced by runaway contracts "might pose a welfare burden to the community."[25] The conclusion that retaining experienced, qualified workers between contracts promotes economy and efficiency is commonsense, supported by research, and consistent with the Procurement Act.

Nor can the Department rely on voluntary compliance with a nondisplacement goal. Even though employers who take over contracted work or purchase a business often agree that workers from the prior employer are well-trained and qualified, they may refuse to hire them for unrelated reasons. For example, a large commercial laundry facility (which has federal contracts to provide laundry services) was recently found to have violated the National Labor Relations Act by firing and refusing to hire unionized employees of a laundry facility it purchased, even though it "admitted *they were qualified, indeed preferable*, to new untrained employees."[26] Not every contractor acts rationally and efficiently at all times, and some employers erroneously

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[21] *UAW-Lab. Emp. & Training Corp. v. Chao*, 325 F.3d 360, 366 (D.C. Cir. 2003) (quoting *Am. Fed'n of Lab. & Cong. of Indus. Orgs. v. Kahn*, 618 F.2d 784, 789 (D.C. Cir. 1979) (en banc) (The Procurement Act "grants the President particularly direct and broad-ranging authority over those larger administrative and management issues that involve the Government as a whole. And that direct presidential authority should be used in order to achieve a flexible management system capable of making sophisticated judgments in pursuit of economy and efficiency.")).

[22] *Kahn*, 618 F.2d at 789.

[23] *Id*. at 793.

[24] William G. Whittaker, Cong. Rsch. Serv., RL32086, Federal Contract Labor Standards Statutes: An Overview 1, 15 (2007), https://crsreports.congress.gov/product/pdf/RL/RL32086/7.

[25] *Id*.

[26] *Emerald Textiles, LLC*, N.L.R.B. No. 21–CA–233024, 29 (2021) (emphasis added), https://apps.nlrb.gov/link/document.aspx/09031d4583493fe0.

undervalue the significant benefits of an experienced workforce.[27] A clear and consistent nondisplacement requirement at the outset is necessary to promote efficiency and prevent the loss of qualified, experienced workers, even when the government's contracting partners would not voluntarily adhere to its efficiency aims on their own.

III. The Proposed Rule's scope and coverage is appropriately broad, although economy and efficiency would be further enhanced with limited changes.

The Coalition supports the Proposed Rule's broad scope and coverage. Applying nondisplacement requirements broadly promotes economy and efficiency in contracting by making requirements uniform and by obtaining the benefit of an experienced workforce in the broadest range of federal service contracts. We provide support for the scope and coverage of the Proposed Rule and suggested changes to enhance economy and efficiency below.

A. Definitions (§ 9.2).

Employee – The Proposed Rule defines employee to mean a service employee as defined in the SCA, which includes individuals identified as independent contractors on a contract as well as traditional employees. The benefits that a consistent, trained workforce provide to the contracting agency hold true whether that workforce is composed of employees or independent contractors.

Given the significant volume of work performed by independent contractors, we anticipate this definition will promote the purposes of the Order. An analysis of the most recent Department Contingent Worker Survey used a variety of data sources to estimate that between 7 and 15 percent of workers are independent contractors.[28] While the share of the labor market employed as independent contractors stayed relatively stable between 1995 and 2017, there was growth in the use of these arrangements in many industries that are frequently contracted out by federal agencies, including building services, grounds maintenance, transportation and material moving, protective services, and utilities and significant growth in this employment category for Black and Latinx workers—meaning that this Rule is likely to benefit those workers in particular, thereby promoting equity.[29] An analysis of RAND survey data in 2015 also identified

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[27] *Cf.* Zeynep Ton, *Why "Good Jobs" Are Good for Retailers*, Harv. Bus. Rev. (2012), https://hbr.org/2012/01/why-good-jobs-are-good-for-retailers.

[28] Katharine G. Abraham & Susan N. Houseman, W.E. Upjohn Inst., *What Do We Know about Alternative Work Arrangements in the United States? A Synthesis of Research Evidence from Household Surveys, Employer Surveys, and Administrative Data* 19 (2021), https://www.dol.gov/sites/dolgov/files/OASP/evaluation/pdf/Alternative_Work_Arrangements_Abraham_Houseman_Oct_2021_508c.pdf.

[29] Katharine G. Abraham & Susan N. Houseman, *Contingent and Alternative Employment: Lessons from the Contingent Worker Supplement, 1995-2017* 41, Manhattan Strategy Grp. (2020), https://www.dol.gov/sites/dolgov/files/OASP/evaluation/pdf/WHD_Contingent_Worker_Supplement_Report_Feb2021.pdf.

professional and business services and education and health services as industries with a growing share of nonstandard work arrangements.[30]

This definition also ensures that a contractor or subcontractor cannot avoid the nondisplacement requirement by misclassifying its employees as independent contractors. Given pervasive misclassification of employees, this definition is essential to maximize the benefits of the Order.[31]

Same or Similar Work – The Proposed Rule defines "same or similar work" as work that is either identical to or has primary characteristics that are alike in substance to work performed on a contract that is being replaced. The Proposed Rule's emphasis on the primary characteristics of the work performed, rather than requiring exact duplication, appropriately allows for relatively minor changes in contracted work while still maintaining the economy and efficiency benefits of a workforce familiar with the essential tasks under the contract. As discussed in detail elsewhere, we applaud the decision to omit "at the same location" from this definition, compared to the regulations issued to implement President Obama's nondisplacement policy under Executive Order 13,495, and to promote location continuity in federal service contracts, again in order to maximize the benefits from a consistent workforce.

We recommend, however, that the Department modify this definition to make clear that it applies regardless of whether the successor contract changes in size. If a contract is split or requires fewer workers, retaining the prior workforce (to the extent possible under the size of the new contract) has the same benefits as if the contract remains roughly the same size or grows. Accordingly, the final rule should clarify that the rule applies regardless of changes to the contract's size.

United States – The Proposed Rule appropriately defines the geography it covers broadly and consistently with the SCA and its implementing regulations. 41 U.S.C. § 6701(4); 29 C.F.R. § 4.112(a). The Federal Government will obtain the most economy and efficiency benefits from the Proposed Rule if it is applied broadly. As we will discuss throughout these comments, uniform coverage between the Proposed Rule and the SCA provides clarity for federal agencies, contractors, and federal service contractor workers.

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[30] Lawrence F. Katz & Alan B. Krueger, *The Rise and Nature of Alternative Work Arrangements in the United States, 1995-2015* 11, NBER Working Paper Series (2017), https://scholar.harvard.edu/files/lkatz/files/katz_krueger_cws_resubmit_clean.pdf.

[31] Nat'l Emp. L. Project, .*Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and state Treasuries* (2020), https://www.nelp.org/publication/independent-contractor-misclassification-imposes-huge-costs-workers-federal-state-treasuries-update-october-2020/; Lynn Rhinehart et al., *Misclassification, the ABC test, and employee status*, Econ. Pol'y Inst. (June 16, 2021), https://www.epi.org/publication/misclassification-the-abc-test-and-employee-status-the-california-experience-and-its-relevance-to-current-policy-debates/.

B. Coverage and Exclusions.

Coverage of Contracts **(§ 9.3).**

We support the Proposed Rule's "broadly inclusive" coverage of contracts. 87 Fed. Reg. at 42,557. As the Department notes, this coverage is consistent with the Executive Order and the SCA. *Id*. It is reasonable to align coverage with that of the SCA because doing so promotes clarity and consistency for federal contracting agencies, contractors, and employees working on federal service contracts.

Coverage of Subcontracts **(§§ 9.3(a)(2), 9.4(a)(2), 9.5(a)).**

We support the Department's proposal to cover subcontracts below the simplified acquisition threshold (even though prime contracts below that threshold are not covered) (§§ 9.3(a)(2), 9.4(a)(2)), and to prohibit exclusions for subcontracts (§ 9.5(a)). Covering all subcontracts under a covered prime contract promotes the purposes of the Order by maximizing its reach and avoids potential inefficiencies and inappropriate incentives. The simplified acquisition threshold provides for streamlined acquisition procedures, which can benefit the contracting agency when engaging the prime contractor. The benefits are reduced, however, with respect to subcontractors below the threshold because the contracting agency typically does not interact directly with the subcontractor.[32] The proposal would also prevent the fracturing of processes across prime contracts and subcontracts because the relevant protocols developed for the prime contractor would also apply to subcontractors. With only one set of protocols, the government can avoid an economy and efficiency disadvantage caused by the unnecessary complexity of custom-built protocols for what could be several subcontractors on a prime contract.

Further, permitting exceptions for subcontractors that the prime contractor does not share could create opportunities for circumvention by pushing more work to the subcontractor, thereby depriving workers and the government of the benefits of the Order. This is not hypothetical. For example, contracted services for an immigration detention facility in New Jersey were required by state law to be provided by a nonprofit. A shell nonprofit prime contractor obtained the contract and subcontracted to a for-profit entity it created, thereby effectively evading the nonprofit requirement.[33] The Department's decision to prohibit exceptions for subcontractors will avoid similar evasions here. Relatedly, and with respect to potential unintended consequences, 87 Fed. Reg. at 42,558, the proposal to cover all subcontracts regardless of size prevents any incentive for prime contractors to award so many subcontracts that the spending total falls below the threshold, thereby avoiding the requirements of the Order.

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[32] 48 C.F.R. § 44.203(b)(3) (2022) ("Contracting officers shall not consent to… [s]ubcontracts obligating the contracting officer to deal directly with the subcontractor.").

[33] Letter from Dorothy Donnelly, Dir. of the Procurement Div. of Off. of the Comptroller of N.J., to Gary M. Lanigan, Comm'r of N.J. Dep't of Corr., Off. of Cmty. Programs (June 15, 2011), https://www.nj.gov/comptroller/news/docs/doc_procurement_letter.pdf.

***Eliminating the AbilityOne Exclusion* (§ 9.4).**

Laudably, the Order and Proposed Rule do not retain Executive Order 13,495's exclusion of contracts awarded for certain services provided by workers who are blind or have severe disabilities. 87 Fed. Reg. at 42,559. Such contracts are part of the AbilityOne program, which is designed to promote employment for workers with disabilities by facilitating federal procurement of products and services from nonprofit entities employing such workers. Under the JWOD Act, which governs the program, three quarters of the labor performed on AbilityOne contracts must be performed by workers with disabilities. *See* 41 U.S.C. § 8501 (6), (7). The Coalition supports the proposal's application to AbilityOne contracts and believes such application is required by the plain text of the Order. *See* 87 Fed. Reg. at 42,559-60. Further, there is no reason to believe that the economy and efficiency benefits of a nondisplacement policy will not materialize on AbilityOne contracts as compared to contracts outside the program. On the contrary, the expected economy and efficiency benefits of retaining trained, qualified workers on AbilityOne contracts should reasonably be expected to be similar to service contracts generally.

Treating AbilityOne contracts the same under this Rule as other federal service contracts is also consistent with modern disability policy, which seeks to promote competitive, *integrated* employment in which workers with disabilities work alongside nondisabled workers and enjoy the same rights and protections.[34] The AbilityOne program has faced sustained criticism from disability and labor rights advocates because it perpetuates an outdated, segregated employment model that is out of step with contemporary disability policy, and accordingly, it should not be subject to reduced regulatory requirements compared to non-AbilityOne contracts.[35] Further, workers with disabilities on AbilityOne contracts should not be deprived of the Order's protections simply because of their disabilities. Nor should transition to an AbilityOne contract be permitted to function as a device to evade the protections of this Order for any workplace. And the Department should not inadvertently facilitate AbilityOne's segregated employment model when such a result is not legally required.

Service contracts transitioning from the general pool of Federal procurement to AbilityOne often pit one group of low-wage workers against another, in which one set of workers risks losing their employment while another, largely composed of workers with disabilities, may be denied opportunities for new employment. Very often the workers on both ends of this relationship are—given the demographics of low-wage contracted-out employment in the economy overall—largely women and people of color. In recent years this process has generally moved in one direction: that most of the currently employed workers on the contract-

[34] *Cf.* White House *FACT SHEET: The Biden-Harris Administration Marks the Anniversary of the Americans with Disabilities Act* (July 26, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/07/26/fact-sheet-the-biden-harris-administration-marks-the-anniv (describing Administration efforts to "make it easier for individuals with disabilities to successfully obtain and engage in competitive integrated employment").

[35] *See Policies from the Past in a Modern Era: The Unintended Consequences of the AbilityOne Program & Section 14(c)*, Nat'l Council on Disability (Oct. 14, 2020), https://ncd.gov/sites/default/files/NCD_AbilityOne_508.pdf.

to-be-transitioned lose their livelihoods, which may be both devastating for the worker as well as a significant loss of value to the government from those workers' experience and knowledge of the job. Limiting this loss is a primary motive for non-displacement policy in general, but there have been few formal means to achieve that goal with respect to contracts awarded by the AbilityOne Commission.

This Executive Order is meant to protect the government's interest in the economy and efficiency that flows from retaining a trained and experienced workforce, but in the past, such protections only applied in cases where contracts transitioned from one non-AbilityOne contractor to another. In the subset of cases where contracts have transitioned to or between AbilityOne contractors in the absence of non-displacement protections, there has been no process through which the government can weigh the balance of equities that are at issue. The Proposed Rule at long last offers a rule-based process for doing so.

Moreover, the Proposed Rule will for the first time apply non-displacement protections to all workers currently employed by AbilityOne service contractors when those contracts shift out of the program or to other AbilityOne service contractors. This is in itself a significant advance towards ensuring that all workers employed on AbilityOne contracts enjoy the same protections as those working on other Federal service contracts.

The Proposed Rule anticipates that an exception could be appropriate in a particular case where application of the Order is in conflict with existing law governing the AbilityOne program. 87 Fed. Reg. at 42,560. The Coalition supports the proposal's clarification that, in such cases, "a contracting agency would be obligated to follow the [exception] procedures proposed at § 9.5 to support a determination that the requirements of this part do not apply because of a direct legal conflict." *Id.* The Coalition also supports proposed § 9.5(e)'s requirement that agencies consult with DOL before granting an exemption on the basis of a legal conflict "unless the agency has regulatory authority for implementing and interpreting the statute at issue, or the Department has already issued guidance finding an exception on the basis at issue to be appropriate." *Id.* at 42,587. The rule should further require that DOL *approve* the exemption before it is made. Moreover, such approval should be contingent upon a finding by DOL that making an exemption is consistent with the federal government's interest in promoting competitive integrated employment for people with disabilities, as defined by the Workforce Innovation and Opportunity Act and applicable implementing regulations and guidance issued by the Rehabilitation Services Administration.

In addition to the changes to the overall exemption procedures we urge in the following section, the Coalition urges the Department to issue a further clarification when a JWOD Act legal conflict is alleged. The Department should require agencies proposing an exemption on that basis to require the AbilityOne contractor to offer a conditional right of refusal to the predecessor workforce in order to ascertain how many predecessor workers are actually interested in exercising such a right. The agency should then be required to identify the specific workers employed by a predecessor whose retention would conflict with the JWOD Act and produce a written staffing plan prepared by the contractor demonstrating that retention of the specific workers actually interested in a right of first refusal would make impossible (and not merely burdensome or inconvenient) compliance with the JWOD Act's staffing requirements. The Department should solicit and consider the input of covered workers, their representatives, and

disability rights advocates on each such staffing plan before making a final determination on whether to approve the exemption.

IV. The Proposed Rule provides for agency flexibility to fill service contract needs through a limited exception process (§ 9.5).

Situations in which the nondisplacement requirements do not apply should be rare because the basis for this Rule—the significant benefits that retaining a trained and experienced workforce from service contract to service contract create for the contracting agency and the workers themselves—applies to the broad spectrum of services for which federal agencies contract. The Proposed Rule permits agency flexibility to authorize exceptions under limited circumstances. The proposed process for doing so is a good start, but we suggest changes below to promote careful consideration by agencies and consistent application of the principles for when exceptions are appropriate.

Circumstances and factors that may support an exception. **(§ 9.5(a), (c), (d), (e)).**

The circumstances that may qualify a particular contract for exception listed in section 9.5(a) appropriately follow the requirements of section 6 of the Order. Excepting such circumstances creates a balance between the President's determination that a nondisplacement requirement for federal service contracts generally promotes economy and efficiency and providing for flexibility in the limited circumstances where a nondisplacement requirement would conflict with other legal requirements, prevent fulfillment of the agency's contracting needs, or otherwise impair the original goals of economy and efficiency. The Department has experience with these qualifying circumstances from Executive Order 13,495 and is well positioned to implement them effectively.

For the most part, the written analysis that agencies must provide to support an exception set forth in section § 9.5(c)) promotes the Order's purpose by focusing agencies on the general findings reflected in Section 1 of the Order regarding the economy and efficiency benefits of nondisplacement. Requiring agencies to compare in writing the anticipated outcomes of hiring the predecessor workforce against a new workforce promotes thorough and consistent analysis across agencies. So does the requirement that any reliance on cost in support of an exception justify its deviation from the Order's assessment of the benefits of nondisplacement. This requirement is also consistent with the Procurement Act's understanding that economy and efficiency are not necessarily promoted by contracting with the lowest bidder or seeking to minimize costs with a less effective workforce discussed earlier in this comment. And proposed section 9.5's requirement that agency justifications identify specific circumstances and not rely on general assertions or presumptions similarly requires rigorous analysis.

The purpose of this section could be better fulfilled and agency analysis could be made more consistent and rigorous, however, by requiring that the agency's written analysis compare "the anticipated outcomes of hiring predecessor contract employees with those of hiring a new work force, including a cost-benefit analysis in a standard format, as determined by the Secretary of Labor, that estimates the direct and indirect costs of employee turnover during the first year of the successor contract." (Suggested addition underlined).

The permitted factors in section 9.5(c)(1) generally ensure that agencies have the necessary flexibility in unusual situations (e.g. emergencies or wholesale failures by the predecessor workforce) to fulfill their contracting needs without impairing the policy behind the Order. We recommend the following changes (indicated by underlined text), which will promote consistent, objective decision-making and thorough documentation for any possible exceptions:

- Add a requirement to section 9.5(c)(1)(i) that any suggestion "that the use of a carryover workforce would greatly increase disruption to the delivery of services during the period of transition between contracts be based on documented incidents during the predecessor contract's period of performance such as at least two consecutive annual past performance ratings of 'unsatisfactory' as defined by FAR 42.1503(b)(4) to suggest a carryover workforce could not consistently deliver services during the contract transition. (e.g., the carryover workforce in its entirety would not be an experienced and trained workforce that is familiar with the Federal Government's personnel, facilities, and requirements as pertinent to the contract at issue, as documented in specific incident reports or annual performance ratings …"

- Modify section 9.5(c)(1)(iii): "Situations where the senior procurement executive reasonably believes, based on documented incidents during the predecessor contract's period of performance such as at least two consecutive annual past performance ratings of 'unsatisfactory' as defined by FAR 42.1503(b)(4)~~, the predecessor employees' past performance,~~ that the entire workforce failed…."

The prohibited factors in section 9.5(c)(2) appropriately mirror the permissible factors (e.g. prohibiting general assumptions about the carryover workforce) and promote the purposes of the Order by recognizing that poor past performance by the predecessor contractor itself does not necessarily reflect on individual employees' ability to succeed under the successor contractor nor does a reconfiguration of the contract work (since the work will still be the same or similar work as the predecessor contract, making the employees' training and experience still relevant). Section 9.5(c)(2)'s prohibition on the consideration of wage rates and fringe benefits except in exceptional circumstances is consistent with the purpose and findings of the Order and the longstanding recognition, discussed above, that economy and efficiency are not necessarily promoted by seeking the lowest possible bidder.

We recommend the following modifications, indicated by underlined text, to the description of these exceptional circumstances in section 9.5(c)(2) in line with our recommendations for section 9.5(c)(1) to promote objective analysis supported by thorough documentation:

- Add requirement to section 9.5(c)(2)(ii), "When a carryover workforce in its entirety would not constitute an experienced and trained workforce that is familiar with the Federal Government's personnel, facilities, and requirements, based on documented incidents, such as at least two consecutive annual past performance ratings of "unsatisfactory" for the predecessor contractor as defined by FAR 42.1503(b)(4), …"

- Modify section 9.5(c)(2)(iii), as follows "Other, similar circumstances, based on documented incidents, such as at least two consecutive annual past performance ratings

of "unsatisfactory" for the predecessor contractor as defined by FAR 42.1503(b)(4), in which the cost of employing a carryover workforce on the successor contract would be prohibitive."

***Agency process for authorizing an exception.* (§ 9.5(a), (b)).**

The proposed requirement that any exceptions be approved by the senior procurement executive within the agency ensures that any exceptions are subject to consistent, rigorous levels of review. The senior procurement executive is responsible "for management direction of the procurement system of the executive agency, including implementation of the unique procurement policies, regulations, and standards of the executive agency" 41 U.S.C. § 1702(c)(2), and is accordingly well positioned to assess whether the need for any particular service contract is sufficiently unusual to justify waiving the nondisplacement requirement. Assigning the responsibility to that official and not permitting delegation, per the Proposed Rule, is consistent with section 6 of the Order (requiring a "senior official" to approve waivers) and ensures that sufficient attention is paid before disregarding its policy assessment.

We recommend, however, that the Department add a consultation requirement with the agency head by modifying proposed 9.5(a) to read "A contracting agency may waive the application of some or all of the provisions of this part as to a prime contract if the senior procurement executive within the agency, in consultation with the agency head, issues a written determination …." This change would promote the purposes of the Order by ensuring consistent, senior review takes place before any exceptions are granted and is consistent with the FAR, which permits individual deviations from FAR requirements authorized by the agency head. 48 C.F.R. § 1.403.

Given the robust evidence that retaining workers across service contracts is beneficial, we anticipate that such exceptions would be few in number. We recommend that the Department provide a similar conclusion in the final rule based upon this same evidence to provide guidance to contracting agencies. Accordingly, because exceptions should be few in number, the Department can readily conclude in the final rule that the procedural requirements for granting such exceptions will not be burdensome on agencies.

We support the Proposed Rule's requirement that any exceptions granted by the agency be supported by a "specific written explanation, including the facts and reasoning supporting the determination." 87 Fed. Reg. at 42,586. These requirements will promote thorough analysis and consistent decision-making as to any potential exceptions. It is also consistent with the FAR's requirement that documentation in contract files be sufficient to constitute a complete history of the contractual action, including support for actions taken. 48 C.F.R. § 4.801(b).

We recommend modifying subsection § 9.5(b) of the Proposed Rule to require, in addition to the facts and reasoning supporting the determination, "an attestation by the contractor that no service disruption will occur due to the displacement of predecessor contract employees." This addition, which the agency could request as part of the solicitation, ensures any exceptions are consistent with the policy articulated in section 1 of the Executive Order seeking to "reduce[] disruption in the delivery of services during the period of transition between contractors." Requiring an attestation by the incoming contractor also ensures that the contractor is on notice

of the need to minimize service disruption, and accordingly would promote the economy and efficiency goals of this Rule.

***Requests for Reconsideration of Agency Exception Decisions* (§ 9.5(f)).**

The Coalition agrees that interested parties must have the right to request reconsideration of an agency's determination to grant an exception from the nondisplacement requirement (proposed § 9.5(f)); and as we discuss below, the same reconsideration process is necessary for any determination not to impose a location continuity requirement (proposed § 9.11(c)(3)). Interested parties are likely to have information on the benefits of nondisplacement for any given service contract relevant to the exception decision and are well positioned to identify any errors or omissions in the contracting agency's justification for the exception decision. The Department's observation that "interested parties" include workers and their representatives is logical because the workers themselves and their representatives are better positioned than either the predecessor or the successor contractor to understand the benefits of those workers retaining their jobs. Providing them with an opportunity to request reconsideration will promote the goals of the Order by providing an opportunity to correct erroneous exception decisions as early as possible

In response to the Department's question about whether there should be a timeframe for requesting reconsideration, 87 Fed. Reg. at 42,562-62, we propose a schedule that would enhance the reconsideration process by building into the procedures a role for workers and their representatives to provide input before an agency reaches a determination on one of these questions. The fairness of the reconsideration process should also be enhanced by directing appeals of such determinations to the Secretary, not the same agency which made the determination, and by scheduling the reconsideration process to conclude *before* bid solicitation.

The final rule should require agencies to notify workers and their representatives of a proposed exemption no later than 120 days before a bid solicitation goes out, together with the analysis by the agency of why an exemption is appropriate under the Executive Order and the evidence that the agency has to support its proposal. Interested parties then should be given 30 days to comment on the proposed exemption, and the agency should be required to respond to the interested parties' comments no less than 60 days before the bid solicitation. If the agency decides to proceed with the exemption, the interested parties should be given 15 days to file an appeal with the Secretary, who must decide the appeal within 45 days and before any bid solicitation goes out. Ensuring that disputes over the validity of an exemption are resolved before bid solicitations are issued will faithfully implement the Order by ensuring that its policies are built into solicitations and not dependent on after the fact litigation.

As to placing the adjudication of reconsideration requests with the Secretary and not with the contracting agency, this suggestion is consistent with the fundamental principle of fairness that appeals should not be directed to the original decisionmaker. The Order clearly vests *the Secretary* with the power to "implement the requirements of th[e] order" and "obtain compliance with . . . th[e] order." *See* the Order at § 7(a), § 8(a). The Order also makes clear that the Secretary's power to issue rules implementing the order applies to agency exemption determinations. *See* Order at § 7(a) (excepting from DOL's rulemaking power the publication (Order at § 6(b)) and reporting (Order at § 6(c)) of exemptions but not the underlying exception

determinations (Order at § 6(a))). And § 6(a) of the Order clearly requires agencies to show their homework when they think an exemption is appropriate. This requirement would be illusory were an agency merely showing its homework to itself for its own approval. The Secretary's responsibility to implement and obtain compliance with the Order must include oversight to ensure that, in contested cases, agency exemption determinations are adequately supported by evidence and analysis and in full compliance with the Order. Review by the Secretary independent of the contracting agency is necessary to ensure the integrity of the exemption process and protect parties' due process rights.

***Transparency requirements* (§ 9.5(g)).**

We strongly support the transparency requirements in proposed section 9.5(g). They are consistent with section 6 of the Order and promote its purposes by enabling the Department, the Office of Management and Budget, other agencies, and interested parties to assess agency compliance and the quality of exception determinations by agencies. We encourage the Department to provide guidance to agencies about the form, content, and accessibility of the required publications on agency websites and to periodically monitor their compliance. The Department could also promote the purposes of the Order and transparency into government decision-making by coordinating with the Office of Management and Budget to ensure that the quarterly reports that it receives from agencies are compiled and published on a centralized public website.

V. Location continuity (§ 9.11(c)).

We strongly support the location continuity requirements included in section 4 of the Order and implemented through section 9.11(c) of the Proposed Rule. A major shortcoming in Executive Order 13,495 and its implementing regulations was that they only applied to "a contract that succeeds a contract for performance of the same or similar services" if they are performed "*at the same location*." This loophole meant that on covered contracts without a fixed place of performance, the Federal Government risked losing the benefits of workforce continuity. While some service contracts, such as janitorial services, are necessarily tied to a physical place, a significant volume, such as call centers or remote technical support, can be performed from multiple locations. On such contracts, successors could simply relocate the work without the obligation to retain the workforce, creating instability for contracting agencies, workers, and communities relying on these federal contract jobs.

The common-sense (and research-based) understanding that experienced workers continuing in the same jobs perform better than replacement workers holds true for contracts that change locations. For example, in 2008, the State Department awarded a follow-on contract for call center work for the National Passport Information Center to a new contractor who moved the location from New Hampshire, where it had been for twelve years, to Michigan. This move reportedly resulted in significant service disruption, making the Information Center inaccessible

to callers.[36] Similar workforce disruptions have occurred when other follow-on service contracts have relocated, requiring replacement of the entire workforce.[37]

Section 4 of the Order goes further than merely eliminating the location continuity loophole, affirmatively requiring the contracting agency to consider whether the contracted work should take place in the same locality in the successor contract to ensure economical and efficient provision of services. This addition recognizes that, for the most part, workers cannot or do not wish to relocate with every new contract solicitation. Accordingly, a preference for location continuity is necessary to achieve the Order's retention benefits by preventing relocation of work when there is no operational need to do so.

The location continuity provision is essential to the success of the Order given the dramatic rise in remote work over recent years. Even industries where once face-to-face encounters were considered inevitable may now have significant portions of work taking place off-site; as an example, during the COVID-19 pandemic, the Centers for Disease Control and Prevention reports that the use of telemedicine increased from 43 percent to 95 percent.[38] The Veterans Administration reported a 321% increase in the frequency of telehealth video encounters between veterans and providers.[39] Digitally enabled services mean that contracts in industries like data processing, translations services, telephone answering and call center services, diagnostic imaging and medical recordkeeping, and payroll processing can be performed in multiple geographies. Accordingly, some bidders may believe they can service a federal contract from virtually anywhere, choosing to submit proposed costs that rest on low area wage determinations and the assumption that they can replace longer-tenured experienced

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[36] *Local AT&T Worker Claims Mich. Call Center Backed Up*, Fosters Daily Democrat (Mar. 11, 2009) https://www.fosters.com/story/news/2009/03/11/local-at-t-worker-claims/52067699007/.

[37] *See e.g.*, *Call Center to Close in Dover; 300 Jobs Cut, Associated Press* (Dec. 3, 2008 AM), https://www.seacoastonline.com/story/news/2008/12/03/call-center-to-close-in/52169521007/ (300 AT&T workers in New Hampshire displaced in 2008 after organizing a union when their call center contract moved to Michigan); Ken Alltucker, *UnitedHealthcare to Cut 381 Phoenix Jobs After Losing Military Health Contract*, Republic (Nov. 1, 2017), https://www.azcentral.com/story/news/local/phoenix/2017/11/01/unitedhealthcare-cut-381-phoenix-jobs-after-losing-military-health-contract/822798001/ (381 Defense Department contractor positions lost in Phoenix when the contract went to a St. Louis company in 2017); Jeff Clabaugh, *SAIC Contract Loss May Mean 150 Layoffs in Falls Church*, Wash. Bus. J. (Mar. 26, 2013), https://www.bizjournals.com/washington/blog/fedbiz_daily/2013/03/150-layoffs-possible-at-saic.html (150 Virginia contract workers laid off in 2013 when their contract was awarded to a New York company).

[38] Hanna B. Demeke et al., Trends in Use of Telehealth Among Health Centers During the COVID-19 Pandemic—United States, 70 Morbidity & Mortality Wkly. Rep. 240 (2021), https://www.cdc.gov/mmwr/volumes/70/wr/pdfs/mm7007a3-H.pdf.

[39] Stephen Spotswood, *VA seeks more contractors to support expanding telehealth programs*, U.S. Med. (Oct. 26, 2021), https://www.usmedicine.com/healthcare/va-seeks-more-contractors-to-support-expanding-telehealth-programs/.

workers with new lower-paid ones. Highly skilled and knowledgeable workers may lose their jobs if a successor contractor chooses a lower-wage location on which to base its bid.

Further, the industries and occupations likely to be protected by the location continuity provision are significantly staffed by women, Black workers, immigrant workers, and other workers of color.[40] By ensuring that these workers have the right of first refusal with a new contractor, Proposed Rule not only improves the economy and efficiency of federal contracting by keeping expertise and experience on the job, but also benefit populations of workers who have historically experienced bias and discrimination in hiring and promotion to achieve these positions.

The Department asks numerous questions about the location continuity provision. 87 Fed. Reg. at 42,565. Our responses, below, are guided by the understanding that location continuity is so tied to the policy goals of the Order that any exceptions to it should be considered under the same framework as agency exceptions to the nondisplacement requirement generally (with the same enhancements we suggest above). This includes the presumption in favor of nondisplacement, exceptions to which must be substantiated in writing and approved through a rigorous process (§ 9.5), should apply similarly to location continuity analysis. Doing so creates a consistent framework for agency analysis of a follow-on contract solicitation and promotes the

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[40] To identify types of work, we reviewed the USASpending database, *supra* n. 19, for the years spanning 2017-2022, using the Product Service Code Description field for all SCA-covered contracts within a given NAICS code. We then matched these descriptions as closely as possible with the occupational lists provided by the Bureau of Labor Statistics in its Current Population Survey data for 2021 in order to determine percentages of the workforce by gender and race. For example, the 2,300 contracts for data processing, hosting, and related services (NAICS Code 518210) include services in data collection, library work, data entry, help desk staffing, and administrative support services among others. Document preparation activities (NAICS Code 561410) accounts for 904 contracts and include workers doing data entry, digitizing and scanning, transcription and translation, and word processing. The 48 contracts for telemarketing and contact centers (NAICS Code 561422) call for help desk staffing, information retrieval, mailing and distribution, and telecommunications. Nearly 800 contracts with diagnostic imaging centers (NAICS Code 621512) may include equipment maintenance and testing as well as transcription services. The federal government also outsources translation services (NAICS Code 541930) through 9,823 contracts that call for help desk staffing, stenographic and transcription work, and data collection in addition to translation and interpreting.

According to the Bureau of Labor Statistics, in 2021 help desk and customer service representatives were 64.8 percent women, 18.5 percent Black, 19.7 percent Latinx, and 5.4 percent Asian. Library workers were 80 percent women, 10.7 percent Black, and 11.3 percent Latinx. File clerks were 80.1 percent women, 14.4 percent Black, 17.2 Latinx, and 4.1 percent Asian while information and record clerks were 76 percent women, 14.7 percent Black, 14.4 percent Latinx, and 6 percent Asian. And translators were 73.4 percent women, 7.9 percent Black, 38.7 percent Latinx, and 14.1 percent Asian. U.S. Bureau of Lab. Stats., Labor Force Statistics from the Current Population Survey, https://www.bls.gov/cps/cpsaat11.htm.

Order's understanding that in most cases retaining the same workforce for the same work is the best policy.

Accordingly, we encourage the Department to modify § 9.11(c) to require contracting agencies to start with a presumption in favor of location continuity. This change would provide guidance to contracting agencies and promote consistent application of the requirements of the Order and achievement of its benefits. Requiring this presumption is well within the Secretary's discretion to issue regulations implementing the Order's requirement that agencies *consider* retaining the same location (§ 7) as informed by the Order's policy statement in favor of worker nondisplacement (§ 1) and the straightforward conclusion that changing service contract localities makes wide-scale worker retention virtually impossible.

The Department should add the following factors for the location continuity analysis required by § 9.11(c) to promote consistent and rigorous analysis by agencies and the purposes of the Order:

- The size of the workforce under the new contract because the potential for service disruption increases with the size of the workforce to be replaced;

- The level of experience and training of the incumbent workforce because replacing an experienced, trained workforce following a location change is likely contrary to the purposes of the Order;

- Whether workers on the contract have access to any sensitive, privileged, or classified information, because hiring, vetting, and training all new workers to handle such information will likely be costly and disruptive; and

- Prior successful performance on the contract, which reinforces the conclusion that the current workforce should remain.

If workers under the prior contract had been primarily working remotely or via telework, location continuity may be less necessary to obtain the goals of the Order, if the option for remote work continues with the successor contractor (consistent with proposed section § 9.12(b)(5)). If the successor contractor would eliminate the option for remote work entirely, this should be treated as a change in location that is presumed to be disruptive.

To the Department's question about consideration of labor costs with respect to location continuity, 87 Fed. Reg. at 42,565, these should generally be prohibited. The policy of the Order preferences the benefits of worker nondisplacement over potential reduction in labor costs generally, *see* §§ 1, 6. If the President had intended a different analysis to apply to a potential change in location, he could have said so, but the Order provides no such exception. Accordingly, the same rationale for excluding the consideration of labor costs in most circumstances for exceptions, *see* 87 Fed. Reg. at 42,565-66, applies to the consideration of changes in labor costs with respect to the location of a successor contract. We encourage the Department to incorporate this analysis into the requirements of the final rule.

To maximize the effectiveness of the Order and promote consistent analysis of follow-on contract solicitations, the Department should require the same procedural safeguards for location

continuity as for general exceptions set forth in section 9.5 of the Proposed Rule. It proposes many of these safeguards already, including that a decision not to require location continuity be in writing by a senior procurement executive (§ 9.11(c)(3)). We support them for the same reasons we discuss above with respect to the exception analysis section 9.5. We encourage the Department to adopt the same reconsideration processes we recommend above with respect to requests for reconsideration of decisions not to require location continuity.

Adding a presumption in favor of location continuity and associated process in the final rule is entirely consistent with the Competition in Contracting Act, 41 U.S.C. § 253 (CICA), although it would be helpful for the Department to explain why this is so. While a location continuity requirement could arguably present a barrier to competition between equally qualified but disparately located firms, any such barrier would be weighed against agency needs to reduce disruption to the delivery of services during the period of transition between contractors or for an experienced and trained carryover workforce already familiar with the Federal Government's personnel, facilities, and requirements.[41] These are legitimate agency needs, and a presumption in favor of location-continuity is a rational means of satisfying them. Where the benefits of retaining the same location are outweighed by other considerations in any given contract, the final rule would permit waiver of a location continuity presumption, avoiding any potential conflict with CICA.

VI. Requirements imposed on contracting agencies, contractors, subcontractors (§§ 9.11, 9.12, 9.13).

By and large sections 9.11, 9.12, and 9.13 of the Proposed Rule effectively implement the goals of the Order by establishing requirements and prerogatives for contracting agencies and contractors with respect to nondisplacement and ensuring coverage of subcontractors. With the exception of the location continuity provisions, which we discuss above, we explain our reasons for supporting the provisions of these sections and suggest ways to enhance their efficacy below.

We recommend that the Department modify section 9.11 of the Proposed Rule to add this Rule to the existing training and contract evaluation (e.g. CPARS) responsibilities of the federal acquisition workforce. Doing so is necessary to ensure that contracting officers and contracting officer representatives are aware of the requirements of the regulation, include it in every contract, as anticipated by section 9.11(a), and ensure that contractors are complying with its terms. Specifically, we recommend that the Department add a subsection to section 9.11 that requires that contracting agencies add notices about the requirements of section 9.11 to existing acquisition training courses.

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[41] *See*, *e.g*., *WinStar Commc'ns, Inc. v. United States*, 41 Fed.Cl. 748, 763-64 (large geographic scope of contract for telecommunications services served legitimate purpose and did not violate CICA even though only one bidder had sufficient facilities to service the entire contract area); *Armstrong Elevator Co.*, B-415809, 2018 WL 1542123, *2 (Comp. Gen. Mar. 28, 2018) (upholding solicitation's past experience requirements); *Matter of: Marlen C. Robb & Son Boatyard & Marina, Inc*., B-256316, 1994 WL 258295 (Comp. Gen. June 6, 1994) (50-mile radius geographic restriction in solicitation for haul-out repairs for utility boats justified by legitimate agency need).

We also recommend that the Department modify section 9.11 to include compliance with this Rule as part of the currently required evaluations of the contractor's performance. *See* 48 C.F.R. § 42.1502. This addition is consistent with the existing CPARS guidance that performance evaluations may rate compliance with federal regulations[42], but makes clear the expectation that the agency will monitor and hold the contractor accountable to this new requirement. Relatedly, in section 9.12, the Department should require that service contractors covered by this Rule proactively report the number of employees they retained from the prior contract pursuant this Rule. To reduce administrative burden, such a report could take the form of a standardized summary of the records that the Proposed Rule, in Paragraph (g) of Appendix A, already requires the contractor to maintain. This change would promote transparency and compliance by the contract and facilitate enforcement by the Federal Government, if necessary. To that end, we suggest adding the below paragraph between Paragraph (g) and Paragraph (h) of the Contract Clause in Appendix A:

> (__) The contractor shall provide a summary of the records required by Paragraph (g) of this part to the contracting officer no later than 90 days from the start of the successor contract's period of performance. The summary shall include, at a minimum:
>
> (1) A list of all certified service employees from the predecessor workforce as required by Paragraph (f)(1) of this part;
> (2) An indication as to whether each certified service employee received a bona fide job offer;
> (3) An indication as to whether the successor contractor retained or did not retain each certified service employee; and
> (4) An explanation for why each non-retained employee was exempted or excluded from the requirements as provided in this part.

Section 9.12(a) appropriately provides safeguards to ensure that the nondisplacement goals of the Order are protected even when the predecessor contractor provides limited or incorrect employee information to the successor. These include imposing the right of first refusal requirement even when no list (or an incomplete list) of employees is provided by the predecessor (§ 9.12(a)(2)). We applaud the Department's decision to provide multiple ways for an employee to establish eligibility for the right of first refusal in section 9.12(a)(3) to safeguard against errors or omissions in the provision of employee names by the predecessor contractor. We encourage the Department to clarify that the examples it provides in the Proposed Rule are not exclusive and that any "reliable evidence" may establish an employee's entitlement to a job offer.

Section 9.12(b) sets forth the method of job offer. The decision not to permit a contractor to use unnecessary employment screening processes before making the required job offers promotes the purposes of the Order by limiting potential displacement of workers that is not

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[42] Contractor Performance Assessment Reporting Sys., G*uidance for the Contractor Performance Assessment Reporting System* at 49 (2022), https://www.cpars.gov/documents/CPARS-Guidance.pdf.

required to perform the work required by the contract.[43] These screening processes are often inherently racial biased, further supporting the Department's decision not to permit them in advance of a job offer.[44] We commend the Department for providing an employee ten business days to consider the offer (§ 9.12(b)(2)), rather than ten calendar days under Executive Order 13,495, thereby avoiding unnecessarily short periods of consideration when job offers fall over multiple weekends or during holiday periods.

The Department should modify section 9.12(b)(3) to require that job offers be in writing, not verbal. Mandating that an offer of employment be communicated in writing will eliminate confusion and disputes about whether or when an offer was communicated to the employee, the language it was communicated in, and what terms were communicated. It will facilitate clarity for all involved parties and is necessary to assess compliance accurately. It would also align with the written notice requirement imposed on the incumbent contractor by section 9.12(e)(3). We also encourage the Department to make clear that if an offer is provided both verbally and in writing that the time for acceptance runs from the date of the written communication, reducing the likelihood of disputes about when the time expires. If the Department declines to require the job offers to be made in writing, it could still reduce disputes and promote the purposes of the Order by adopting a presumption that if a job offer is only made verbally any disputes about the timing or content of the offer be resolved in the worker's favor.

We also encourage the Department to require that, when workers are not fluent in English, the successor contractor make the offer in a language the employee understands (rather

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[43] This conclusion is consistent with The Office of Personnel Management's conclusion with respect to direct federal hires that "early inquiries into an applicant's background, including his or her criminal or credit history, could have the effect of discouraging motivated, well-qualified individuals from applying for a Federal job because they have an arrest record, when the arrest did not result in a conviction or when, following a conviction, they have fully complied with the penalty and have been rehabilitated in the eyes of the law. This discouragement also could impose a cost on the hiring process, by presenting hiring officials with a less competitive candidate pool." Recruitment, Selection, and Placement (General) and Suitability, 81 Fed. Reg. 86,555 (Dec. 1, 2016). Such additional screening process before providing a job offer could similarly discourage workers under the prior service contract from pursuing employment on the successor contract.

[44] Guy Stuart, *Databases, Felons, and Voting: Errors and Bias in the Florida Felons Exclusion List in the 2000* Presidential *Elections*, HKS Fac. Rsch. Working Papers No. RWP02-041, Harv. Kennedy Sch. (2002), https://www.hks.harvard.edu/publications/databases-felons-and-voting-errors-and-bias-florida-felons-exclusion-list-2000; Michelle Rodriguez et. al., Nat'l Emp. L. Project, 65 Million 'Need Not Apply': The Case for Reforming Criminal Background Checks for Employment (2011), https://www.nelp.org/wp-content/uploads/2015/03/65_Million_Need_Not_Apply.pdf; Devah Pager, *The Mark of a Criminal Record*, 108 Am. J. Socio. 937 (2003) available at https://scholar.harvard.edu/files/pager/files/pager_ajs.pdf; and Devah Pager et al., Discrimination in a Low-Wage Labor Market: A Field Experiment, 74 Am. Socio. Rev. 777 (2009), https://scholar.harvard.edu/files/bonikowski/files/pager-western-bonikowski-discrimination-in-a-low-wage-labor-market.pdf.

than "make reasonable efforts" to do so in section 9.12(b)(3)). Doing so should not be burdensome on the employer because employers must be able to communicate in all of their workers' languages in order to direct the workforce. We are concerned that the example provided in the Rule (permitting a coworker to translate job offers made verbally) cannot guarantee accurate or consistent translation. This problem could be solved by requiring written job offers (as requested above).

The Department anticipates that employment needs may change between contracts, but should do more in sections 9.12(b)(4) and (b)(5) to promote the purposes of the Order in such circumstances. Proposed section 9.12(b)(4) provides for contracting agency flexibility by clarifying that the employment offer may be for a different job position on the service contract so long as it is one for which the employee is qualified. The final rule should clarify that information that may be relied on by the successor in any dispute about qualifications, if provided by the predecessor contractor, must be information that the predecessor kept in the regular course of business.

The Department must do more to ensure that job offers to predecessor employees are bona fide. Section 9.12(b)(5), which provides that changes in employment terms or conditions are not bona fide offers if they are offered to discourage acceptance, is a good start. Such low-ball offers would reduce worker retention between contracts and detract from the purposes of the Order. But because establishing the purpose behind a job offer is difficult and prone to disagreement, and because such low-ball offers may be the result of carelessness, not purpose, the Department should modify the proposal. The rule should establish a presumption that if positions are available under the successor contract with similar or better terms and conditions for which an employee is qualified, that giving that employee a job offer for a position with worse terms or conditions is not a bona fide job offer. Such a presumption would also put the burden of proof with the employer, not the employee, which is appropriate given that the employer will generally have more information about its own internal decisionmaking.

We strongly support proposed section 9.12(b)(5)'s remote work provision. Requiring the successor contractor to provide the option of remote work for employees of the predecessor contract if any employees in the same or similar occupational classifications working on the successor contract are working remotely will facilitate worker retention and thereby promote the goals of the Order.[45] This conclusion is especially true following the significant uptick in successful remote work during the coronavirus pandemic and the continuing reluctance or inability of many workers to safely return to in person work.

***Exceptions to general obligation to offer employment—past performance* (§ 9.12(c)(3)).**

Section 9.12(c) provides limited exceptions to the nondisplacement provisions. In general we note that the Department's decision to make the successor contractor responsible for demonstrating the applicability of any exceptions is reasonable. The default assumption that the

[45] Paul McDonald, Why Remote Work Works for Everyone, 104 Strategic Fin. 15, 16 (2022), https://www.proquest.com/docview/2679853813?pq-origsite=gscholar&fromopenview=true.

exceptions do not apply promotes the nondisplacement goals of the Order, and the successor contractor is likely best positioned to justify any exception and rectify any erroneous exceptions.

The Contract Clause required by the Order provides that contractors "are not required to offer a right of first refusal to any employee(s) of the predecessor contractor for whom the contractor or any of its subcontractors reasonably believes, based on reliable evidence of the particular employees' past performance, that there would be just cause to discharge the employee(s) if employed by the contractor or any subcontractors." This "reasonable belie[f] based on reliable evidence" standard is more stringent than the corresponding provision of Executive Order 13,495, which required only a "reasonable belie[f]" that just cause for discharge existed. This change better effectuates the purposes of the Order by ensuring that beliefs about employee performance be substantiated in addition to being reasonable and we commend the decision to include it.

Proposed § 9.12(c)(3), which would implement this provision of the Order, should be strengthened. The Coalition supports the proposed presumption that no just cause exists in a given case, which is a commonsense baseline given that the employee has remained employed. The Coalition also agrees that "conclusive evidence that an employee on the predecessor contract engaged in misconduct warranting discharge, such as sexual harassment or serious safety violations, would provide the successor contractor with a reasonable belief that there would be just cause to discharge the employee." 87 Fed. Reg. at 42,569. However, the Department offers a separate, troubling example. The Department suggests that "reliable evidence" must come from a "knowledgeable source, such as the predecessor contractor, the local supervisor, the employee, or the contracting agency" and presents as an example that "a successor contractor could demonstrate its reasonable belief that there would be just cause to discharge an employee through reliable evidence that the predecessor contractor initiated a process to terminate the employee for conduct warranting termination prior to the expiration of the contract, but the termination process was not completed before the contract expired." *Id*. The Department should clarify that the mere fact that a predecessor initiated a termination process regarding a particular employee is *not* "reliable evidence" of just cause unless the successor obtains reliable evidence that the predecessor's termination decision was itself supported by just cause. The Department should also clarify that a mere suggestion or recommendation by the predecessor that the successor terminate an employee is insufficient evidence absent reliable evidence of an objective just cause supporting the suggestion or recommendation. Otherwise, it would be too easy for resistant contractors to evade the retention benefits of the Order by simply soliciting termination suggestions from the predecessor which are unsupported by evidence.

Exceptions to general obligation to offer employment—nonfederal work **(§ 9.12(c)(4)).**

Section 5(b) of the Order excludes from its reach "employees who were hired to work under a Federal service contract and one or more nonfederal service contracts as part of a single job" but not "employees . . . deployed in a manner that was designed to avoid the purposes of this order." The Coalition supports the Proposed Rule's clarification that successor contractors bear the burden of demonstrating that the exception applies and that the employees were not deployed by the predecessor to defeat the policies of the Order. The Coalition further supports the Proposed Rule's provision that successors may only meet this burden with "reliable evidence

that has been provided by a knowledgeable source" that is specific to employees working under the "particular predecessor contract." 87 Fed. Reg. at 42,569, 42,590.

But the Department should make two further clarifications to construe this exception narrowly, as is consistent with the broad policy of the Order. First, the Department should modify proposed § 9.12(c)(4)(i) to better track the language of the Order by replacing "working" with "hired to work." And it should construe "hired to work" as referring to the predecessor's initial assignment of the employee. So, for example, a worker who is hired to work on a federal contract and does so for three years but is then assigned by the contractor to a mix of federal and nonfederal work in their fourth year of employment would not be an employee "hired to work" on both federal and nonfederal work. Second, isolated and intermittent nonfederal work assignments should not be seen as substantial enough to constitute "part of" the employee's job for purposes of the exception. Rather, to promote the purposes of the Order, the Department should make clear that this exception applies only to workers spending less than half of their time on the federal work. This change would avoid losing employees who spend most of their time performing federal service work and have the associated training and experience.

Reduced Staffing **(§ 9.12(d)).**

Section 9.12(d) provides for situations where efficient performance of the contract requires reduced staff compared to the predecessor contract. This recognition is consistent with the Order's pursuit of economy and efficiency. The Proposed Rule requires that for any changes in staffing pattern, the successor contractor scrutinize each employee's qualifications to maximize the number of offers made to predecessor employees for equivalent positions to those held under the predecessor contract. This promotes the purposes of the Order by retaining employees experienced with the job site and contracted work, even if some of their duties may change. By keeping employees with this experience, the Department promotes information and physical security across contractors.

The Order's purposes could be better served, however, by modifying this section to require that when fewer than all of the predecessor employees can be hired, the successor's offers of employment must be by seniority, consistent with the requirement to maximize the numbers of offers made to predecessor employees. Seniority should be measured by length of service under the current and previous service contracts providing the same or similar services at the same location. This requirement would promote the purposes of the Order by ensuring the most experienced workforce is retained.

Obligations near the end of a contract **(§ 9.12(e)).**

Proposed section 9.12(e)(3) requires an outgoing contractor to provide written notices to employees of their possible right to an offer of employment on the successor service contract. This requirement promotes the purposes of the Order by increasing the likelihood that experienced employees are made aware of, and if necessary advocate for, their entitlement to a job offer for the successor contract. To the Department's question about notice for non-English speakers and whether it should define "significant portion of the workforce" for the purpose of required non-English communications, we suggest that the Department impose a requirement consistent with our recommendation for section 9.12(b)(3) to provide notice in a language that

each worker understands. Consistent standards within the rule promote compliance and this requirement should be non-burdensome to the incumbent contractor who must have already developed methods to communicate with all of its employees.

***Recordkeeping* (§ 9.12(f)).**

Proposed section 9.12(f)'s recordkeeping requirements are reasonable and are not burdensome. Virtually all of the records are of the type that federal service contractors should already keep in the regular course of business (e.g. offers of employment, notices to employees, information about employees' qualifications and job duties, and compliance efforts). The Proposed Rule minimizes any burden on contractors from this recordkeeping by permitting records developed for any purposes that contain the required information to satisfy the Rule's requirements.

***Subcontractor Compliance* (§ 9.13).**

We strongly support proposed section 9.13's requirement that prime contractors be responsible for subcontractor compliance. Agencies typically have minimal direct interaction with subcontractors and limited ability for oversight. Requiring the prime contractor to ensure compliance is consistent with other requirements imposed on federal contractors and establishing the same compliance regime here will promote clarity and consistency.[46]

VII. Enforcement (§§ 9.21-9.23).

The Coalition supports much of the proposed Enforcement provisions. Section 8 of the Order gives the Department wide latitude in obtaining compliance, and it should ensure that remedies are robust. *See* Executive Order 14,055 § 8(a) ("The Secretary shall have the authority to . . . obtain compliance with[] this order . . . [and] shall have the authority to issue final orders prescribing appropriate sanctions and remedies, including, *but not limited to*, orders requiring employment and payment of wages lost.") (emphasis added). As the Order's grant of enforcement authority to the Secretary makes clear, its policy "would be nothing more than an empty shell, an abstract statement of principles, unless it is backed by adequate means of enforcement."[47] There is a clear nexus between the need for an effective enforcement regime and

[46] Scott Allen & Rhonda Burke, U.S. Department of Labor Files Suit After Investigation Finds Federal Contractor Failed to Ensure Subcontractors Paid $3.3M in Wages, Fringe Benefits, U.D. Dep't of Lab. (Jan. 21, 2022), https://www.dol.gov/newsroom/releases/whd/whd20220121 ("Vigorous enforcement of prevailing wage laws ensures that responsible contractors can participate in federal contracting, and it protects the wages of hardworking, middle-class workers… Prime contractors are responsible for their own compliance and for ensuring subcontractors also comply with federal contract labor protections.").

[47] *Uniroyal, Inc. v. Marshall*, 482 F. Supp. 364, 372, 375 (upholding OFCCP's pre-hearing discovery requirements under the relevant Executive Order and the Procurement Act).

the economy and efficiency goals of the Procurement Act, and the Proposed Rule fits easily within the Department's delegated authority.[48]

The Department should strengthen the enforcement procedures to better effectuate the purposes of the Order. First, the Department should amend proposed § 9.22 to require that investigation on an employee's or authorized representative's complaint "commence within 15 days of the [Administrator's] receipt of the complaint, and if the [Administrator] finds that such complaint was not frivolously brought, the [Administrative Review Board], on an expedited basis upon application of the [Administrator], shall order the immediate reinstatement of the [employee(s)] pending final order on the complaint." 30 U.S.C. § 815(c)(2). This suggestion is modeled on a provision of the Federal Mine Safety and Health Act ("Mine Act"). *See id.* Expeditious action on complaints and immediate reinstatement of incumbent workers pending review will signal that the Department takes compliance seriously and will encourage employees to come forward with evidence of violations. It will also ensure that the Order's purposes are not undermined by tactical litigation and delay.[49]

Additionally, the Department should preserve a role for workers and their representatives to participate in the investigations. Proposed § 9.22 empowers investigators to "inspect the relevant contractors' records; make copies and transcriptions of such records; and require the production of any documents or other evidence deemed necessary to determine whether a violation of this part . . . has occurred." In the final rule, the Department should clarify that, whenever an initial investigation under proposed § 9.22 is triggered, workers and their representatives also have the right to inspect and copy such relevant records, documents, or other evidence. The Department already facilitates such worker participation in inspections under other statutes it enforces, including the Occupational Safety and Health Act and the Mine Act. *See* 29 U.S.C. § 657(e); 30 U.S.C. § 813(f). Union involvement in inspections enhances their effectiveness, often because union representatives have less fear of employer retaliation when they assert workers' rights than workers do when asserting those rights individually. [50] And a

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[48] *Id.; see also Kahn*, 618 F.2d at 793 (explaining that procurement power is authorized when it is "exercised consistently with the structure and purposes of the statute that delegates that power.").

[49] *See* Lynn Rhinehart, *Workers at Risk: The Unfulfilled Promise of the Occupational Safety and Health Act*, 111 W. Va. L. Rev. 117, 129 (2008) ("Under the Mine Act, workers who file retaliation charges are entitled to immediate preliminary reinstatement while their cases are pending as long as the Secretary of Labor determines that the case is not frivolous. Miners do not suffer loss of pay or employment while their retaliation cases are pending. This puts workers and employers on a more equal footing during the pendency of retaliation cases, and presumably leads to quicker resolution, because employers do not have an economic incentive to drag out the case.").

[50] *See* Brooke E. Lierman, *'To Assure Safe and Healthful Working Conditions': Taking Lessons from Labor Unions to Fulfill OSHA's Promises*, 12 Loy. J. Pub. Int. L 1, 26–27 (2010) ("The intensity of the actual inspection is nearly as important as having an inspection at all, and is highly dependent on input from employees. The OSH Act gives the workers' representative the right to accompany the OSHA inspector during the inspection, which can ensure that inspections are effective, in-depth, and responsive to employees' concerns . . . ") (internal quotation marks

recent study examining local prevailing wage enforcement regimes found that "the most successful models create a role for worker organizations to help educate workers on their rights and confirm compliance" and that "co-enforcement initiatives have been effective in improving compliance and enforcement."[51]

Second, the Department should amend proposed § 9.23 to add as a remedy, in addition to backpay, liquidated damages in an amount equal to two times the amount of backpay owed. This suggestion is modeled in part on the remedies provision of the Fair Labor Standards Act (FLSA), but here it would be a contractual remedy, not a statutory remedy. *Compare with* 29 U.S.C. § 216(b) (liquidated damages recoverable for wage theft in violation of FLSA). This contractual remedy should be explicitly included in the proposed Contract Clause (see Appendix A of Proposed Rule). The possibility of treble damages will deter employer noncompliance and help cover the added expenses workers incur while employment is wrongfully withheld.

Third, the Department asks whether it should adopt specific remedies in the event that a contractor fails to provide to workers the required notice regarding a negative location continuity determination. The Coalition answers yes. The Department should adopt a remedy that mirrors its proposed remedy for agency failures to follow exemption procedures, under which the exemption determination becomes ineffective as a matter of law. A negative location continuity determination should become similarly ineffective when the notice requirements are violated.

Fourth, the Department should explicitly provide in the proposed Contract Clause that covered employees are intended third-party beneficiaries of the Clause.[52] This will empower workers to choose whether to pursue the Department's complaint process or private litigation in order to enforce their right to job security under the Order. The dedicated public servants of the Wage and Hour Division already face daunting caseloads, and lessening their burden by

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and citations omitted); *also id*. at 27 ("A past OSHA inspector has noted that [u]nion representatives often feel more free to express their opinion to OSHA inspectors than do rank-and-file members or non-unionized workers. They also feel freer to accompany the inspector on his walkaround tour, and some unions have bargained for walkaround pay or have elected to compensate members who participate in walkarounds. In companies with fewer than 100 employees, less than 3% of nonunion workers exercise the walkaround right, as opposed to 48% of unionized workers. This disparity increases with the size of the company.") (internal quotation marks and citations omitted).

[51] *See* Karla Walter*, A How-To Guide for Strengthening State and Local Prevailing Wage Laws: Raising Standards for Government-Funded Work*, Ctr. for Am. Progress, 15 (Dec. 2020), https://www.americanprogress.org/wp-content/uploads/2020/12/PrevailingWages-report.pdf.

[52] The Department appropriately understands that it may include in the Contract Clause substantive content beyond that which is provided in § 3(a) of the Order consistent with the Order's delegation of authority to the Secretary in § 7, so long as that content promotes the Policy of the Order.

providing an alternative route to enforcement is in the public interest.[53] This would be a *contractual* remedy not in conflict with the private right of action (or any intended absence thereof) in any statute. The Clause should make clear that workers who prevail in such actions may recover from the contractor the same remedies available in the administrative proceedings conducted pursuant to the regulation, in addition to reasonable attorney fees.

The Department declined to adopt this third-party beneficiary suggestion in its final rule implementing Executive Order 14,026, which increased the minimum wage for federal contract workers. It reasoned, "Section 10(c) of the [minimum wage] Executive order states that the order 'is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.' Given this language, the Department does not have the discretion to create or authorize a private right of action under Executive Order 14026 and thus declines to amend the contract clause to expressly designate workers as third party beneficiaries of the contract's minimum wage requirements." Increasing the Minimum Wage for Federal Contractors, 86 Fed. Reg. 67,126, 67,192 (Nov. 24, 2021) (citation omitted).

While § 12(c) of the Order mirrors § 10(c) of the minimum wage order, other differences between the orders support a different result here. Unlike the minimum wage order, the nondisplacement order *does*, in more specific provisions than the "General Provisions" of §12(c), explicitly create particular nondisplacement rights for workers. The Contract Clause required by § 3(a) of the order explicitly requires contractors to extend to workers "a *right* of first refusal of employment under this contract in positions for which those employees are qualified." (emphasis added). And § 3(b) explicitly acknowledges workers' "*right* to work for a successor contractor or subcontractor pursuant to the Executive order." (emphasis added). *See also* 87 Fed. Reg. at 42,568 (discussing relocation costs of workers who "exercise . . . rights under the order"). Under "the ancient interpretive principle that the specific governs the general," these more specific provisions regarding workers' right to nondisplacement should trump § 12(c)'s boilerplate language regarding the creation of rights in general. *See Nitro-Lift Techs. v. Howard*, 568 U.S. 17, 21 (2012); *see also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 183 (West Group, 1st ed. 2012) (when a specific and general provision could both speak to a question, the specific "comes closer to addressing the very problem posed by the case at hand and is thus more deserving of credence."). And, again, expressly designating workers as intended third-party beneficiaries of a federal contract creates rights grounded in that *contract*, reflecting the intent of the contracting parties. It would not create the right to enforce any statute, so it would not conflict with any statute's private right of action (or intended lack thereof) because the rights being enforced would be entirely separate and contractual.

The Coalition urges the Department to apply all of the foregoing enforcement recommendations to both workers who seek to enforce the Order's core nondisplacement

[53] *See* Nicole Hallett, *The Problem of Wage Theft*, 37 Yale L. & Pol'y Rev. 93, 138 (2018) ("Centralized enforcement must be complemented by diffuse enforcement that keeps employers accountable even when they have not come to the attention of governmental authorities.").

provisions and workers who experience retaliation for exercising any right under the rule or Order.

VIII. The Administrative Process (§§ 9.31-9.35).

The Coalition largely supports the proposed provisions relating to administrative proceedings on complaints because they set forth an efficient procedure for adjudicating cases in a fair and timely manner. We urge a few amendments, as follows:

First, the Department should amend proposed § 9.31(b) to provide that Administrator decisions to not seek debarment *are* appealable. Workers and their representatives ought to be permitted to make their case on appeal that debarment is an appropriate remedy under the rule and Order. Workers are often in the best position to educate the government regarding why contractor misconduct is likely to recur based on how the contractor has complied or not complied with other obligations, how it has responded to enforcement actions, and how its violations have harmed workers and public interests.

Second, the Department should amend § 9.32(b)(ii) to strike the word "monetary," thereby empowering workers to appeal Administrator determinations to not order nonmonetary relief. Reinstatement, for example, is a nonmonetary remedy key to enforcement of the entire scheme, which is explicitly referenced in the Order. *See* Order at § 8(a) ("the Secretary shall have the authority to issue final orders prescribing appropriate sanctions and remedies, including, but not limited to, *orders requiring employment* and payment of wages lost.") (emphasis added). Workers have just as compelling an interest in getting their job back as in getting back wages wrongfully withheld. Vindicating the Order's purposes requires both, so workers must be empowered to seek both through these proceedings.

Third, the Coalition supports the proposed recoverability of interest on backpay and "expenses reasonably incurred by the aggrieved employee(s) in the [administrative] proceeding." However, we suggest amending proposed § 9.34(j) to also make recoverable any expenses reasonably incurred by an employee's representative in connection with such a proceeding.

IX. Conclusion.

We appreciate your consideration of the above comments and encourage the Department to promulgate a robust final rule promptly.

Respectfully submitted,

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