

**DEPARTMENT OF LABOR****Office of the Secretary****29 CFR Part 13**

RIN 1235-AA13

**Establishing Paid Sick Leave for Federal Contractors**

**AGENCY:** Wage and Hour Division, Department of Labor

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** This document proposes regulations to implement Executive Order 13706, Establishing Paid Sick Leave for Federal Contractors, signed by President Barack Obama on September 7, 2015, which requires certain parties that contract with the Federal Government to provide their employees with up to 7 days of paid sick leave annually, including paid leave allowing for family care. Executive Order 13706 explains that providing access to paid sick leave will improve the health and performance of employees of Federal contractors and bring their benefits packages in line with model employers, ensuring that Federal contractors remain competitive employers and generating savings and quality improvements that will lead to improved economy and efficiency in Government procurement. The Executive Order directs the Secretary of Labor (Secretary) to issue regulations by September 30, 2016, to implement the Order's requirements. This proposed rule therefore defines terms used in the regulatory text, describes the categories of contracts and employees the Order covers and excludes from coverage, sets forth requirements and restrictions governing the accrual and use of paid sick leave, and prohibits interference with or discrimination for the exercise of rights under the Executive Order. It also describes the obligations of contracting agencies, the Department of Labor, and contractors under the Executive Order, and it establishes the standards and procedures for complaints, investigations, remedies, and administrative enforcement proceedings related to alleged violations of the Order. As required by the Order and to the extent practicable, the proposed rule incorporates existing definitions, procedures, remedies, and enforcement processes under the Fair Labor Standards Act, the Service Contract Act, the Davis-Bacon Act, the Family and Medical Leave Act, the Violence Against Women Act, and Executive Order 13658, Establishing a Minimum Wage for Contractors.

**DATES:** Comments must be received on or before March 28, 2016.

**ADDRESSES:** You may submit comments, identified by Regulatory Information Number (RIN) 1235-AA13, by either of the following methods:

*Electronic Comments:* Submit comments through the Federal e-Rulemaking Portal <http://www.regulations.gov>. Follow the instructions for submitting comments.

*Mail:* Address written submissions to Robert Waterman, Compliance Specialist, Wage and Hour Division, U.S. Department of Labor, Room S-3510, 200 Constitution Avenue NW., Washington, DC 20210.

*Instructions:* Please submit only one copy of your comments by only one method. All submissions must include the agency name and RIN, identified above, for this rulemaking. Please be advised that comments received will become a matter of public record and will be posted without change to <http://www.regulations.gov>, including any personal information provided.

Comments that are mailed must be received by the date indicated for consideration in this rulemaking. For additional information on submitting comments and the rulemaking process, see the "Public Participation" heading of the **SUPPLEMENTARY INFORMATION** section of this document. For questions concerning the interpretation and enforcement of labor standards related to government contracts, individuals may contact the Wage and Hour Division (WHD) local district offices (see contact information below).

*Docket:* For access to the docket to read background documents or comments, go to the Federal e-Rulemaking Portal at <http://www.regulations.gov>.

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

Questions of interpretation and/or enforcement of the agency's regulations may be directed to the nearest WHD district office. Locate the nearest office by calling the WHD's toll-free help line at (866) 4US-WAGE ((866) 487-9243) between 8 a.m. and 5 p.m. in your local

time zone, or log onto the WHD's Web site for a nationwide listing of WHD district and area offices at <http://www.dol.gov/whd/america2.htm>.

**SUPPLEMENTARY INFORMATION:****I. Electronic Access and Filing Comments**

*Public Participation:* This proposed rule is available through the **Federal Register** and the <http://www.regulations.gov> Web site. You may also access this document via the WHD's Web site at <http://www.dol.gov/whd/>. To comment electronically on Federal rulemakings, go to the Federal e-Rulemaking Portal at <http://www.regulations.gov>, which will allow you to find, review, and submit comments on Federal documents that are open for comment and published in the **Federal Register**. You must identify all comments submitted by including "RIN 1235-AA13" in your submission. Commenters should transmit comments early to ensure timely receipt prior to the close of the comment period (date identified above); comments received after the comment period closes will not be considered. Submit only one copy of your comments by only one method. Please be advised that all comments received will be posted without change to <http://www.regulations.gov>, including any personal information provided.

**II. Executive Order 13706 Requirements and Background**

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

Section 1 of Executive Order 13706 explains that the Order seeks to increase efficiency and cost savings in the work performed by parties that contract with the Federal Government by ensuring that employees on those contracts can earn up to 7 days or more of paid sick leave annually, including paid leave allowing for family care. 80 FR 54697. The Order states that providing access to paid sick leave will improve the health and performance of employees of Federal contractors and bring benefits packages at Federal contractors in line with model employers, ensuring that they remain competitive employers in the search for dedicated and talented employees. *Id.* The Order further states that these savings and quality improvements will lead to improved economy and efficiency in Government procurement. *Id.*

Section 2 of the Executive Order establishes paid sick leave for Federal contractors and subcontractors. 80 FR 54697. Section 2(a) provides that

executive departments and agencies (agencies) shall, to the extent permitted by law, ensure that new contracts, contract-like instruments, and solicitations (collectively referred to as “contracts”), as described in section 6 of the Order, include a clause, which the contractor and any subcontractors shall incorporate into lower-tier subcontracts, specifying, as a condition of payment, that all employees, in the performance of the contract or any subcontract thereunder, shall earn not less than 1 hour of paid sick leave for every 30 hours worked. *Id.* Section 2(b) prohibits a contractor from limiting the total accrual of paid sick leave per calendar year, or at any point, at less than 56 hours. *Id.*

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

Section 2(d) provides that paid sick leave shall carry over from one year to the next and shall be reinstated for employees rehired by a covered contractor within 12 months after a job separation. *Id.*

Under section 2(e), the use of paid sick leave cannot be made contingent on the requesting employee finding a replacement to cover any work time to be missed. 80 FR 54698. Section 2(f) provides that the paid sick leave required by the Order is in addition to a contractor’s obligations under the Service Contract Act and Davis-Bacon Act, and contractors may not receive credit toward their prevailing wage or fringe benefit obligations under those Acts for any paid sick leave provided in satisfaction of the Order’s requirements. *Id.*

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

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

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

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

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

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

Section 3(a) of the Executive Order provides that the Secretary shall issue such regulations by September 30, 2016, as are deemed necessary and appropriate to carry out the Order, to the extent permitted by law and consistent with the requirements of 40 U.S.C. 121, including providing exclusions from the requirements set forth in the Order where appropriate; defining terms used in the Order; and requiring contractors to make, keep, and preserve such employee records as the Secretary deems necessary and appropriate for the enforcement of the provisions of the Order or the regulations thereunder. 80 FR 54698. It also requires that, to the extent permitted by law, within 60 days of the Secretary issuing such regulations, the Federal Acquisition Regulatory Council (FARC) shall issue regulations in the Federal Acquisition Regulation (FAR) to provide for inclusion in Federal procurement solicitations and contracts subject to the Executive Order the contract clause described in section 2(a) of the Order. *Id.*

Additionally, section 3(b) states that within 60 days of the Secretary issuing regulations pursuant to the Order, agencies shall take steps, to the extent permitted by law, to exercise any applicable authority to ensure that contracts or contract-like instruments for concessions and contracts entered into with the Federal Government in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public, entered into after January 1, 2017, consistent with the effective date of such agency action, comply with the requirements set forth in section 2 of the Order. 80 FR 54699.

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

13658, Establishing a Minimum Wage for Contractors, 79 FR 9851 (Feb. 20, 2014) (Executive Order 13658 or Minimum Wage Executive Order). *Id.*

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

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

Section 6(a) of the Executive Order provides that nothing in the Order shall be construed to impair or otherwise affect (i) the authority granted by law to an executive department, agency, or the head thereof; or (ii) the functions of the Director of the Office of Management and Budget (OMB) relating to budgetary, administrative, or legislative proposals. 80 FR 54699. Section 6(b) states that the Order is to be implemented consistent with applicable law and subject to the availability of appropriations. *Id.* Section 6(c) explains that the Order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person. *Id.*

Section 6(d) of the Executive Order establishes that the Order shall apply only to a new contract or contract-like instrument, as defined by the Secretary in the regulations issued pursuant to section 3(a) of the Order, if: (i) (A) It is a procurement contract for services or construction; (B) it is a contract or contract-like instrument for services covered by the Service Contract Act; (C) it is a contract or contract-like instrument for concessions, including any concessions contract excluded by Department of Labor (Department) regulations at 29 CFR 4.133(b); or (D) it is a contract or contract-like instrument entered into with the Federal Government in connection with Federal property or lands and related to offering

services for Federal employees, their dependents, or the general public; and (ii) the wages of employees under such contract or contract-like instrument are governed by the DBA, SCA, or FLSA, including employees who qualify for an exemption from the FLSA's minimum wage and overtime provisions. 80 FR 54699.

Section 6(e) states that, for contracts or contract-like instruments covered by the SCA or DBA, the Order shall apply only to contracts or contract-like instruments at the thresholds specified in those statutes. 80 FR 54699–700. Additionally, Section 6(e) provides that for procurement contracts in which employees' wages are governed by the FLSA, the Order shall apply only to contracts or contract-like instruments that exceed the micro-purchase threshold, as defined in 41 U.S.C. 1902(a), unless expressly made subject to the Order pursuant to regulations or actions taken under section 3 of the Order. 80 FR 54700.

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

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

### III. Discussion of Proposed Rule

#### A. Legal Authority

The President issued Executive Order 13706 pursuant to his authority under “the Constitution and the laws of the United States of America,” expressly

including 40 U.S.C. 121, a provision of the Federal Property and Administrative Services Act (Procurement Act). 80 FR 54697. The Procurement Act authorizes the President to “prescribe policies and directives that [the President] considers necessary to carry out” the statutory purposes of ensuring “economical and efficient” government procurement and administration of government property. 40 U.S.C. 101, 121(a). Executive Order 13706 delegates to the Secretary the authority to issue regulations “deemed necessary and appropriate to carry out this order.” 80 FR 54698. The Secretary has delegated his authority to promulgate these regulations to the Administrator of the WHD. Secretary's Order 01–2014 (Dec. 19, 2014), 79 FR 77527 (published Dec. 24, 2014).

#### B. Stakeholder Engagement

As part of the development of this proposed rule, the Department has engaged stakeholders who have an interest in the Executive Order to solicit their views regarding implementation of the Order's paid sick leave requirements and important issues to address in this rulemaking. In particular, the Department held listening sessions regarding the Order with worker advocates and business representatives in October and November 2015.

#### C. Overview of the Proposed Rule

The Department's notice of proposed rulemaking (NPRM), which would amend Title 29 of the Code of Federal Regulations (CFR) by adding part 13, proposes standards and procedures for implementing and enforcing Executive Order 13706. Proposed subpart A of part 13 addresses general matters, including the purpose and scope of the rule, sets forth definitions of terms used in the proposed part, and describes the types of contracts and employees covered by the Order and part 13 and excluded from such coverage. It describes the paid sick leave requirements for contractors established by the Executive Order, including rules and restrictions regarding the accrual and use of such leave. It also prohibits interference with the accrual or use of paid sick leave provided pursuant to the Executive Order or part 13, discrimination for the exercise of rights under the Executive Order or part 13, and failure to comply with the recordkeeping requirements of part 13. Finally, proposed subpart A includes a prohibition against waiver of rights.

Proposed subpart B establishes the obligations of the Federal government (specifically, contracting agencies and the Department) under the Order, and proposed subpart C establishes the

obligations of contractors under the Order, including recordkeeping requirements. Proposed subparts D and E specify standards and procedures related to alleged violations of the Order and part 13, including complaint intake, investigations, remedies, and administrative enforcement proceedings. Proposed appendix A contains a contract clause to implement Executive Order 13706.

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

#### Subpart A—General

Proposed subpart A of part 13 describes the purpose and scope of the proposed rule, and it sets forth definitions of terms used in the proposed rule, descriptions of the types of contracts and employees covered by the Order and part 13 and excluded from such coverage, and rules and restrictions regarding the accrual and use of paid sick leave. Proposed subpart A also prohibits interference with the accrual or use of the paid sick leave required by, and discrimination for the exercise of rights under, the Executive Order or part 13, as well as violations of the recordkeeping requirements of part 13. Finally, proposed subpart A includes a prohibition against waiver of rights.

#### Section 13.1 Purpose and Scope

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

services provided to the Federal Government, the Executive Order will improve the value that taxpayers receive from the Federal Government's investment.

Proposed § 13.1(b) sets forth the general position of the Federal Government that providing access to paid sick leave on Federal contracts will increase efficiency and cost savings for the Federal Government, and it explains the general requirement established in Executive Order 13706 that new contracts with the Federal Government include a clause, which the contractor and any subcontractors shall incorporate into lower-tier subcontracts, requiring, as a condition of payment, that the contractor and any subcontractors provide paid sick leave to employees in the amount of not less than 1 hour of paid sick leave for every 30 hours worked on or in connection with covered contracts. Proposed § 13.1(b) also specifies that nothing in Executive Order 13706 or part 13 shall excuse noncompliance with or supersede any applicable Federal or State law, any applicable law or municipal ordinance, or a collective bargaining agreement requiring greater paid sick leave or leave rights than those established under the Order or part 13.

Proposed § 13.1(c) outlines the scope of this proposed rule and provides that neither Executive Order 13706 nor part 13 creates any rights under the Contract Disputes Act or creates any private right of action. The Department does not interpret the Executive Order as limiting existing rights under the Contract Disputes Act. This provision also implements the Executive Order's directive that disputes regarding whether a contractor has provided paid sick leave as prescribed by the Order, to the extent permitted by law, shall be disposed of only as provided by the Secretary in regulations issued under the Order. The provision specifies, however, that nothing in the Order or part 13 is intended to limit or preclude a civil action under the False Claims Act, 31 U.S.C. 3730, or criminal prosecution under 18 U.S.C. 1001. Finally, this paragraph specifies that neither the Order nor part 13 would preclude judicial review of final decisions by the Secretary in accordance with the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*

#### Section 13.2 Definitions

Proposed § 13.2 defines terms for purposes of part 13. Section 3(c) of the Executive Order instructs that any regulations issued pursuant to the Order should "incorporate existing definitions" under the FLSA, SCA,

DBA, FMLA, VAWA, and Executive Order 13658 "to the extent practicable and consistent with section 7 of this order." 80 FR 54699. Because of the similarities in language, structure, and intent of the Minimum Wage Executive Order and Executive Order 13706, many of the definitions provided in this proposed rule are identical to or based on definitions promulgated in the Minimum Wage Executive Order Final Rule. Pursuant to section 4(c) of the Minimum Wage Executive Order, those definitions were largely based either on the language of the Order itself or the definitions of relevant terms set forth in the statutory text or implementing regulations of the FLSA, SCA, or DBA; in addition, some definitions were based on definitions published by the FARC in section 2.101 of the FAR, 48 CFR 2.101, or definitions set forth in the Department's regulations implementing Executive Order 13495, Nondisplacement of Qualified Workers Under Service Contracts (Executive Order 13495 or Nondisplacement Executive Order), at 29 CFR 9.2. 79 FR 60637. Definitions relevant because of provisions of Executive Order 13706 that do not appear in Executive Order 13658 are largely based on definitions set forth in the statutory text or implementing regulations of the FMLA or the VAWA, as well as regulations issued by the U.S. Office of Personnel Management (OPM) at 5 CFR part 630, subparts B and D, which govern the accrual and use of sick leave by employees of the Federal government.

The definitions discussed in this proposed rule would govern the implementation and enforcement of Executive Order 13706. Nothing in the rule is intended to alter the meaning of or to be interpreted inconsistently with the definitions set forth in section 2.101 of the FAR for purposes of that regulation.

The Department proposes to define *accrual year* to mean the 12-month period during which a contractor may limit an employee's accrual of paid sick leave to no less than 56 hours.

The Department proposes to define the term *Administrative Review Board* as the Administrative Review Board within the U.S. Department of Labor.

The Department proposes to define the term *Administrator* to mean the Administrator of the Wage and Hour Division. As proposed, the term also includes any official of the Wage and Hour Division authorized to perform any of the functions of the Administrator under part 13.

The Department proposes to define *as soon as is practicable* to mean as soon as both possible and practical, taking

into account all of the facts and circumstances of the individual case. This definition is derived from the definition of “as soon as practicable” in the FMLA regulations. 29 CFR 825.302(b).

The Department proposes to define *certification issued by a health care provider* as any type of written document created or signed by a health care provider (or by a representative of the health care provider) that contains information verifying that the physical or mental illness, injury, medical condition, or need for diagnosis, care, or preventive care or other need for care referred to in proposed § 13.5(c)(1)(i), (ii), or (iii) exists. This definition allows employees to provide as certification a greater range of documents than would suffice to demonstrate that a serious health condition exists for purposes of FMLA. See 29 CFR 825.305, 825.306. For example, under this proposal, a note from a hospital nurse stating that an employee needed to have surgery and would need at least 3 days to recover before returning to work would meet the definition, as would a note from an employee’s parent’s doctor stating that the parent is in need of daily caretaking. A contractor may not require that an employee or the individual for whom the employee is caring have seen the health care provider in person in order to accept the certification.

The Department proposes to define *child* to mean (1) a biological, adopted, step, or foster son or daughter of the employee; (2) a person who is a legal ward or was a legal ward of the employee when that individual was a minor or required a legal guardian; (3) a person for whom the employee stands *in loco parentis* or stood *in loco parentis* when that individual was a minor or required someone to stand *in loco parentis*; or (4) a child, as described in paragraphs (1) through (3) of the definition, of an employee’s spouse or domestic partner. This definition is adopted from the definition of “son or daughter” in the OPM regulations governing leave for Federal employees. 5 CFR 630.201(b). The Department notes that this proposed definition is deliberately broader than the definition of “son or daughter” in the FMLA, which includes only minor children or adult children “incapable of self-care because of a mental or physical disability.” 29 CFR 825.102. It is intended that employees be permitted to use paid sick leave for a broader range of purposes than those for which they can use FMLA leave, including to care for an employee’s child of any age.

The Department proposes a definition of *concessions contract* or *contract for*

*concessions* identical to the definition of those terms in the Minimum Wage Executive Order Final Rule. See 79 FR 60722 (codified at 29 CFR 10.2). Specifically, the term is proposed to mean a contract under which the Federal Government grants a right to use Federal property, including land or facilities, for furnishing services; examples of such contracts noted in the definition are those the principal purpose of which is to furnish food, lodging, automobile fuel, souvenirs, newspaper stands, and/or recreational equipment. This proposed definition is not limited based on the beneficiary of the services; the proposed definition encompasses contracts regardless of whether they are of direct benefit to the Federal Government, its property, its civilian or military personnel, or the general public. See 29 CFR 4.133; see also 79 FR 60638. The proposed definition includes, but is not limited to, all concessions contracts excluded by Departmental regulations under the SCA at 29 CFR 4.133(b). See 79 FR 60638.

The Department proposes to define *contract* and *contract-like instrument* collectively for purposes of the Executive Order in the same manner as it did in the Minimum Wage Executive Order implementing regulations. See 79 FR 60722 (codified at 29 CFR 10.2). Specifically, a *contract* or *contract-like instrument* is defined in this proposed rule as an agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law. This definition includes, but is not limited to, a mutually binding legal relationship obligating one party to furnish services (including construction) and another party to pay for them. The proposed definition of the term *contract* broadly includes all contracts and any subcontracts of any tier thereunder, whether negotiated or advertised, including any procurement actions, lease agreements, cooperative agreements, provider agreements, intergovernmental service agreements, service agreements, licenses, permits, or any other type of agreement, regardless of nomenclature, type, or particular form, and whether entered into verbally or in writing. The proposed definition of the term *contract* would be interpreted broadly to include, but not be limited to, any contract that may be consistent with the definition provided in the FAR or applicable Federal statutes. This definition would include, but would not be limited to, any contract that may be covered under any Federal procurement statute. The Department specifically

proposes to note in this definition that contracts may be the result of competitive bidding or awarded to a single source under applicable authority to do so. The proposed definition also explains that, in addition to bilateral instruments, contracts include, but are not limited to, awards and notices of awards; job orders or task letters issued under basic ordering agreements; letter contracts; orders, such as purchase orders, under which the contract becomes effective by written acceptance or performance; and bilateral contract modifications. The proposed definition also specifies that the term *contract* includes contracts covered by the SCA, contracts covered by the DBA, concessions contracts not subject to the SCA, and contracts in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public. As explained in the Minimum Wage Executive Order rulemaking, this proposed definition of *contract* was derived from the definition of the term *contract* set forth in Black’s Law Dictionary (9th ed. 2009) and § 2.101 of the FAR (48 CFR 2.101), as well as the descriptions of the term *contract* that appear in the SCA’s regulations at 29 CFR 4.110–.111 and 4.130. See 79 FR 60638–41.

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

The Department proposes to define *contracting officer* using a definition based on that used in the Final Rule issued pursuant to the Minimum Wage Executive Order, which in turn was adopted from the definition in section 2.101 of the FAR. See 79 FR 60641 (citing 48 CFR 2.101). As proposed, the

term means a representative of an executive department or agency with the authority to enter into, administer, and/or terminate contracts and make related determinations and findings. Furthermore, the term includes certain authorized representatives of the contracting officer acting within the limits of their authority as delegated by the contracting officer.

The Department proposes to define *contractor* to mean any individual or other legal entity that is awarded a Federal Government contract or a subcontract under a Federal Government contract. The term *contractor* refers to both a prime contractor and all of its first or lower-tier subcontractors on a contract with the Federal Government. This definition includes lessors and lessees. The Department notes that the term *employer* is used interchangeably with the terms *contractor* and *subcontractor* in part 13. The proposed definition also explains that the U.S. Government, its agencies, and its instrumentalities are not considered contractors, subcontractors, employers, or joint employers for purposes of compliance with the provisions of Executive Order 13706. This proposed definition, which is derived from the definition adopted in the Minimum Wage Executive Order rulemaking, *see* 79 FR 60722 (codified at 29 CFR 10.2), incorporates relevant aspects of the definitions of the term *contractor* in section 9.403 of the FAR, *see* 48 CFR 9.403; the SCA's regulations at 29 CFR 4.1a(f); and the Department's regulations implementing the Nondisplacement Executive Order at 29 CFR 9.2. The definition differs from the Minimum Wage Executive Order only in that it does not refer to employers of employees performing on covered Federal contracts whose wages are computed pursuant to special certificates issued under 29 U.S.C. 214(c). Although such employers would be contractors for purposes of Executive Order 13706, such a reference is not called for in this definition because, unlike the Minimum Wage Executive Order, this Order does not contain any explicit reference to employees whose wages are computed pursuant to section 14(c) certificates.

The Department proposes to define the term *Davis-Bacon Act* (DBA) to mean the Davis-Bacon Act of 1931, as amended, 40 U.S.C. 3141 *et seq.*, and its implementing regulations.

The Department proposes to define the term *domestic partner* to mean an adult in a committed relationship with another adult. This definition includes both same-sex and opposite-sex relationships. The Department proposes

to further explain that a committed relationship is one in which the employee and the domestic partner of the employee are each other's sole domestic partner (and are not married to or domestic partners with anyone else) and share responsibility for a significant measure of each other's common welfare and financial obligations. This includes, but is not limited to, any relationship between two individuals of the same or opposite sex that is granted legal recognition by a State or by the District of Columbia as a marriage or analogous relationship (including, but not limited to, a civil union). This definition is adopted from the definitions of "domestic partner" and "committed relationship" in the OPM regulations regarding the use of sick leave by Federal employees. 5 CFR 630.201(b).

The Department proposes to define *domestic violence* as (1) felony or misdemeanor crimes of violence (including threats or attempts) committed: (i) By a current or former spouse, domestic partner, or intimate partner of the victim; (ii) by a person with whom the victim shares a child in common; (iii) by a person who is cohabitating with or has cohabitated with the victim as a spouse, domestic partner, or intimate partner; (iv) by a person similarly situated to a spouse of the victim under domestic or family violence laws of the jurisdiction in which the victim resides or the events occurred; or (v) by any other adult person against a victim who is protected from that person's acts under the domestic or family violence laws of the jurisdiction in which the victim resides or the events occurred. Under the proposed definition, domestic violence also includes any crime of violence considered to be an act of domestic violence according to State law. This definition is derived from the VAWA, 42 U.S.C. 13925(a)(8), and its implementing regulations, 28 CFR 90.2(a).

The Department proposes to define *employee* similarly to the way the term *worker* was used in the Minimum Wage Executive Order rulemaking, *see* 79 FR 60723, but with some differences reflecting the differences in the text of that Executive Order and Executive Order 13706. As proposed, the term would mean any person engaged in performing work on or in connection with a contract covered by the Executive Order, and whose wages under such contract are governed by the SCA, DBA, or FLSA, including employees who qualify for an exemption from the FLSA's minimum wage and overtime provisions, regardless of the contractual

relationship alleged to exist between the individual and the employer.

Furthermore, the term *employee* includes any person performing work on or in connection with a covered contract and individually registered in a bona fide apprenticeship or training program registered with the U.S. Department of Labor's Employment and Training Administration, Office of Apprenticeship, or with a State Apprenticeship Agency recognized by the Office of Apprenticeship.

Much of this definition comes directly from section 6(d)(ii) of the Executive Order, and as noted, much of it is identical to the definition of *worker* in the Minimum Wage Executive Order regulations. Most importantly, the term refers to employees whose wages are governed by the DBA, SCA, or FLSA, including employees who qualify for an exemption from the FLSA's minimum wage and overtime provisions, as directed in the Executive Order. 80 FR 54699. Furthermore, the definition emphasizes, as explained in the Minimum Wage Executive Order rulemaking, the well-established principle under the DBA, SCA, and FLSA that employee coverage does not depend upon the existence or form of any contractual relationship that may be alleged to exist between the contractor or subcontractor and such persons. *See* 79 FR 60644 (citing 29 U.S.C. 203(d), (e)(1), (g) (FLSA); 41 U.S.C. 6701(3)(B), 29 CFR 4.155 (SCA); 29 CFR 5.5(a)(1)(i) (DBA)). As reflected in the proposed definition, the Executive Order is intended to apply to a wide range of employment relationships. Neither an individual's subjective belief about his or her employment status nor the existence of a contractual relationship is determinative of whether an employee is covered by the Executive Order. In particular, whether a worker is an "employee" or an "independent contractor" as those terms are often used in other contexts is not material to whether that worker is an employee under this proposed definition; even workers who are independent contractors are covered by the SCA and DBA, and that coverage is adopted for purposes of this Order and part 13. *See, e.g.*, 29 CFR 4.155 (SCA); 29 CFR 5.5(a)(1)(i) (DBA); *In re Igwe*, ARB Case No. 07-120, 2009 WL 4324725, at \*3-4 (Nov. 25, 2009) (rejecting an argument that "the individuals working on the four contracts were not entitled to SCA prevailing wages and fringe benefits because they were independent contractors, not employees" because "the relevant inquiry is whether the persons working on the contract come

within the SCA definition of ‘service employee’” and explaining “the irrelevance of ‘contractual relationship’ to that definition”). The definition’s inclusion of any person performing work on or in connection with a covered contract and individually registered in a bona fide apprenticeship or training program registered with the Department’s Employment and Training Administration, Office of Apprenticeship, or with a State Apprenticeship Agency recognized by the Office of Apprenticeship, is similarly in keeping with the Minimum Wage Executive Order’s adoption of those provisions from the SCA and DBA regulations. See 79 FR 60644 (citing 29 CFR 4.6(p) (SCA); 29 CFR 5.2(n) (DBA)).

The most significant difference between this definition of *employee* and the Minimum Wage Executive Order rulemaking’s definition of *worker* is the inclusion of employees who qualify for an exemption from the FLSA’s minimum wage and overtime provisions. Executive Order 13706 explicitly provides that it applies to such employees. 80 FR 54699. The Executive Order’s paid sick leave requirements therefore apply, for example, to employees employed in a bona fide executive, administrative, or professional capacity, as those terms are defined in 29 CFR part 541.

Finally, the Department notes that because unlike the Minimum Wage Executive Order, Executive Order 13706 makes no reference to individuals performing work on or in connection with a covered contract whose wages are calculated pursuant to special certificates issued under 29 U.S.C. 214(c), that category of employees is not explicitly mentioned in this proposed definition. However, such individuals would plainly fall within the definition of *employee* for purposes of this rulemaking because their wages are, as described below, governed by the FLSA.

The Department proposes to define *executive departments and agencies* for purposes of this rulemaking by adopting the definition of that term used in the Minimum Wage Executive Order rulemaking, which was derived from the definition of *executive agency* provided in section 2.101 of the FAR, 48 CFR 2.101. 79 FR 60642, 60722 (codified at 29 CFR 10.2). The Department therefore interprets the Executive Order to apply to executive departments within the meaning of 5 U.S.C. 101, military departments within the meaning of 5 U.S.C. 102, independent establishments within the meaning of 5 U.S.C. 104(1), and wholly owned Government corporations within the meaning of 31 U.S.C. 9101. The Department does not

interpret this definition as including the District of Columbia or any Territory or possession of the United States.

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

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

The Department proposes to define *Fair Labor Standards Act* (FLSA) as the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. 201 *et seq.*, and its implementing regulations.

The Department proposes to define *Family and Medical Leave Act* (FMLA) as the Family and Medical Leave Act of 1993, as amended, 29 U.S.C. 2601 *et seq.*, and its implementing regulations.

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

Proposed § 13.2 defines *Federal Government* as an agency or instrumentality of the United States that enters into a contract pursuant to authority derived from the Constitution or the laws of the United States. This proposed definition is identical to that used in the regulations implementing the Minimum Wage Executive Order. 79 FR 60722 (codified at 29 CFR 10.2). That definition was based on the definition of *Federal Government* set forth in 29 CFR 9.2, but eliminated the term “procurement” from that definition because Executive Order 13658 applies—as does Executive Order 13706—to both procurement and non-procurement contracts. 79 FR 60642. Consistent with the SCA, the term *Federal Government* includes

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

The Department proposes to define *health care provider* as any practitioner who is licensed or certified under Federal or State law to provide the health-related service in question or any practitioner recognized by an employer or the employer’s group health plan. The term includes, but is not limited to, doctors of medicine or osteopathy, podiatrists, dentists, psychologists, optometrists, chiropractors, nurse practitioners, nurse-midwives, clinical social workers, physician assistants, physical therapists, and Christian Science Practitioners listed with the First Church of Christ, Scientist in Boston, Massachusetts. This definition is intended to be broad and inclusive. It is derived from the definitions of health care provider in the FMLA regulations, 29 CFR 825.125, and OPM regulations, 5 CFR 630.201 and 5 CFR 630.1202.

The Department proposes to define the term *independent agencies* as any independent regulatory agency within the meaning of 44 U.S.C. 3502(5). Section 6(g) of the Executive Order states that “[i]ndependent agencies are strongly encouraged to comply with the requirements of this order.” The Department interprets this provision, as it did an identical provision in the Minimum Wage Executive Order, to mean that independent agencies are not required to comply with this Executive Order. See 79 FR 9853; 79 FR 60643. This proposed definition is therefore based on other Executive Orders that similarly exempt independent regulatory agencies within the meaning of 44 U.S.C. 3502(5) from the definition of *agency* or include language requesting that they comply. See, e.g., Executive Order 13636, 78 FR 11739 (Feb. 12, 2013) (defining *agency* as any executive department, military department, Government corporation, Government-controlled operation, or other establishment in the executive branch of the Government but excluding independent regulatory agencies as defined in 44 U.S.C. 3502(5)); Executive Order 13610, 77 FR 28469 (May 10, 2012) (same); Executive Order 12861, 58 FR 48255 (September 11, 1993) (“Sec. 4

Independent Agencies. All independent regulatory commissions and agencies are requested to comply with the provisions of this order.”); Executive Order 12837, 58 FR 8205 (Feb. 10, 1993) (“Sec. 4. All independent regulatory commissions and agencies are requested to comply with the provisions of this order.”).

The Department proposes to include in § 13.2 a definition of *individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship*. As proposed, the term means any person with whom the employee has a significant personal bond that is or is like a family relationship, regardless of biological or legal relationship. Although this term is used in the OPM regulations, *see* 5 CFR 630.201 (defining “family member,” for purposes of Federal employees’ use of leave, to include the term), OPM has not created a regulatory definition of it; the Department’s definition is, however, derived from OPM’s discussion of the term in OPM’s 2010 Final Rule, *Absence and Leave; Definitions of Family Member, Immediate Relative, and Related Terms*, 75 FR 33491 (June 14, 2010). In particular, OPM explained that creating an exhaustive list of the relationships that meet the definition is not possible, but that OPM has “broadly interpreted the phrase to include such relationships as grandparent and grandchild, brother- and sister-in-law, fiancé and fiancée, cousin, aunt and uncle, other relatives not specified in [the list naming a spouse, child, parent, brother, or sister], and close friend, to the extent that the connection between the employee and the individual was significant enough to be regarded as having the closeness of a family relationship even though the individuals might not be related by blood or formally in law.” 75 FR 33492.

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

regarding its proposed definition of this term, in particular regarding whether additional specificity is necessary.

The Department proposes to define *intimate partner*, a term used in the definition of *domestic violence*, to mean a person who is or has been in a social relationship of a romantic or intimate nature with the victim, where the existence of such a relationship shall be determined based on a consideration of the length of the relationship; the type of relationship; and the frequency of interaction between the persons involved in the relationship. This definition is derived from the definition of “dating partner” in the VAWA. *See* 42 U.S.C. 13925(a)(9).

The Department proposes that the term *new contract* have the same meaning as in the Minimum Wage Executive Order Final Rule, but with dates altered to reflect the timing contemplated in section 7 of Executive Order 13706. *See* 79 FR 60722 (codified at 29 CFR 10.2); 80 FR 54700. Under the proposed definition, a *new contract* is a contract that results from a solicitation issued on or after January 1, 2017, or a contract that is awarded outside the solicitation process on or after January 1, 2017. This term includes both new contracts and replacements for expiring contracts. It does not apply to the unilateral exercise of a pre-negotiated option to renew an existing contract by the Federal Government. For purposes of the Executive Order, a contract that is entered into prior to January 1, 2017 will constitute a *new contract* if, through bilateral negotiation, on or after January 1, 2017: (1) The contract is renewed; (2) the contract is extended, unless the extension is made pursuant to a term in the contract as of December 31, 2016 providing for a short-term limited extension; or (3) the contract is amended pursuant to a modification that is outside the scope of the contract. The Minimum Wage Executive Order rulemaking explained that this definition was derived from section 8 of that Executive Order, 79 FR 9853, is consistent with the convention set forth in section 1.108(d) of the FAR, 48 CFR 1.108(d), and was developed in part in response to comments on the proposed definition of *new contract* that appeared in the Minimum Wage Executive Order NPRM. 79 FR 60643, 60646–49.

For purposes of the Executive Order and part 13, which use the terms in reference to domestic violence, sexual assault, or stalking, the Department proposes to define *obtain additional counseling, seek relocation, seek assistance from a victim services organization, or take related legal action* to mean to spend time arranging,

preparing for, or executing acts related to addressing physical injuries or mental or emotional impacts resulting from being a victim of domestic violence, sexual assault, or stalking. Such acts include finding and using services of a counselor or victim services organization, as that term is defined below, intended to assist a victim to respond to or prevent future incidents of domestic violence, sexual assault, or stalking; identifying and moving to a different residence to avoid being a victim of domestic violence, sexual assault, or stalking; or a victim’s pursuing any related legal action, as that term is defined below. Counseling can but need not be provided by a health care provider.

The Department proposes to define *obtaining diagnosis, care, or preventive care from a health care provider* to mean receiving services from a health care provider, whether to identify, treat, or otherwise address an existing condition or to prevent potential conditions from arising. The Department interprets this term broadly; examples include, but are not limited to, obtaining a prescription for antibiotics at a health clinic, attending an appointment with a psychologist, having an annual physical or gynecological exam, or receiving a teeth cleaning from a dentist’s assistant. The definition further provides that the term includes time spent traveling to and from the location at which such services are provided or recovering from receiving such services.

The Department proposes to define the term *Office of Administrative Law Judges* to mean the Office of Administrative Law Judges, U.S. Department of Labor.

Proposed § 13.2 defines the term *option* by adopting the definition of that term used in the Minimum Wage Executive Order rulemaking, which adopted the definition set forth in section 2.101 of the FAR, 48 CFR 2.101. 79 FR 60643, 60722 (codified at 29 CFR 10.2). Specifically, the term *option* means a unilateral right in a contract by which, for a specified time, the Federal Government may elect to purchase additional supplies or services called for by the contract, or may elect to extend the term of the contract.

The Department proposes to define *paid sick leave* to mean compensated absence from employment that is required by Executive Order 13706 and part 13. Throughout the proposed regulatory text and this discussion of that text, the Department uses “paid sick leave” to refer to the leave required by the Order and part 13 and “paid sick time” to refer more generally to any



compensated absence from work for time used for purposes similar (although not necessarily identical) to the purposes described in the Order, including as required by State and local laws or as provided pursuant to contractors' existing policies or under collective bargaining agreements.

Proposed § 13.2 defines the term *parent* to mean (1) a biological, adoptive, step, or foster parent of the employee, or a person who was a foster parent of the employee when the employee was a minor; (2) a person who is the legal guardian of the employee or was the legal guardian of the employee when the employee was a minor or required a legal guardian; (3) a person who stands *in loco parentis* to the employee or stood *in loco parentis* to the employee when the employee was a minor or required someone to stand *in loco parentis*; or (4) a parent, as described in paragraphs (1) through (3) of the definition, of an employee's spouse or domestic partner. This definition is adopted from the OPM regulations regarding leave for Federal employees. 5 CFR 630.102(b).

The Department proposes to define *physical or mental illness, injury, or medical condition* as any disease, sickness, disorder, or impairment of, or any trauma to, the body or mind. The Department understands the Executive Order to intend for this term to be understood broadly, to include any illness, injury, or medical condition, regardless of whether it requires attention from a health care provider or whether it would be a "serious health condition" that qualifies for use of leave under the Family and Medical Leave Act. See 29 U.S.C. 2611(11); 29 CFR 825.113. Examples include, but are not limited to, a common cold, ear infection, upset stomach, ulcer, flu, headache, migraine, sprained ankle, broken arm, or depressive episode.

The Department proposes to define *predecessor contract* to mean a contract that precedes a successor contract. The term *successor contract* would be defined as explained below.

The proposed regulatory text defines *procurement contract for construction* as that term was defined for purposes of the Minimum Wage Executive Order Final Rule, that is, to mean a contract for the construction, alteration, or repair (including painting and decorating) of public buildings or public works and which requires or involves the employment of mechanics or laborers, and any subcontract of any tier thereunder. 79 FR 60723 (codified at 29 CFR 10.2). That definition, which is derived from language found at 40 U.S.C. 3142(a) and 29 CFR 5.2(h),

includes any contract subject to the DBA. See 79 FR 60643.

The Department proposes to define the term *procurement contract for services* to mean a contract the principal purpose of which is to furnish services in the United States through the use of service employees, and any subcontract of any tier thereunder, and to state that the term includes any contract subject to the SCA. This proposed definition is derived, as explained in the Minimum Wage Executive Order, from language set forth in 41 U.S.C. 6702(a), 29 CFR 4.1a(e), and 29 CFR 9.2. 79 FR 60643.

For purposes of the Executive Order and part 13, which use the terms in reference to domestic violence, sexual assault, or stalking, the Department proposes to define *related legal action or related civil or criminal legal proceeding* to mean any type of legal action, in any forum, that relates to domestic violence, sexual assault, or stalking, including, but not limited to, family, tribal, territorial, immigration, employment, administrative agency, housing matters, campus administrative or protection or stay-away order proceedings, and other similar matters; and criminal justice investigations, prosecutions, and post-trial matters (including sentencing, parole, and probation) that impact the victim's safety and privacy. This definition, which the Department intends to be broad and inclusive, is derived from the definition of "legal assistance" that appears in the VAWA. See 42 U.S.C. 13925(a)(19). The Department understands this definition to encompass actions in any civil or criminal court, including a juvenile court. It also includes administrative proceedings run by institutions of higher education (college, community college, university, or trade school), such as those related to alleged violations of Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.*

Under proposed § 13.2, *Secretary* means the Secretary of Labor and includes any official of the U.S. Department of Labor authorized to perform any of the functions of the Secretary of Labor under part 13.

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

The proposed definition of *sexual assault* in § 13.2 is any nonconsensual sexual act proscribed by Federal, tribal, or State law, including when the victim lacks capacity to consent. This

definition is adopted from the VAWA. See 42 U.S.C. 13925(a)(29).

In this NPRM, the term *solicitation* is defined to have the meaning given to it in the Minimum Wage Executive Order Final Rule, *i.e.*, any request to submit offers, bids, or quotations to the Federal Government. 79 FR 60673 (codified at 29 CFR 10.2). As explained in the Minimum Wage Executive Order rulemaking, the definition is based on language from 29 CFR 9.2, and requests for information issued by Federal agencies and informal conversations with federal workers do not fall within the definition. See 79 FR 60643–44.

The Department proposes to define the term *spouse* as the other person with whom an individual entered into marriage as defined or recognized under State law for purposes of marriage in the State in which the marriage was entered into or, in the case of a marriage entered into outside of any State, if the marriage is valid in the place where entered into and could have been entered into in at least one State. This definition includes an individual in a common law marriage that was entered into in a State that recognizes such marriages or, if entered into outside of any State, is valid in the place where entered into and could have been entered into in at least one State. This definition is derived from the FMLA regulations. See 29 CFR 825.122 (as updated by Definition of Spouse Under the Family and Medical Leave Act, 80 FR 9989 (Feb. 25, 2015)). The Department's references to marriage and common law marriage include both same-sex and opposite-sex marriages or common law marriages.

Under proposed § 13.2, *stalking* means engaging in a course of conduct directed at a specific person that would cause a reasonable person to fear for his or her safety or the safety of others or suffer substantial emotional distress. This definition is adopted from the VAWA. See 42 U.S.C. 13925(a)(30).

The Department proposes to define *successor contract* to mean a contract for the same or similar services as were provided by a different predecessor contractor at the same location.

In proposed § 13.2, the Department defines the term *United States* as it did in the Minimum Wage Executive Order rulemaking, which uses the definitions of that term set forth in 29 CFR 9.2 and 48 CFR 2.101, though it does not adopt any of the exceptions to the definition of the term set forth in the FAR. See 79 FR 60645. Based on those regulations, *United States* means the United States and all executive departments, independent establishments, administrative agencies, and

instrumentalities of the United States, including corporations of which all or substantially all of the stock is owned by the United States, by the foregoing departments, establishments, agencies, and instrumentalities, including nonappropriated fund instrumentalities. When the term is used in a geographic sense, the *United States* means the 50 States and the District of Columbia.

The Department proposes to define *victim services organization* to mean a nonprofit, nongovernmental, or tribal organization or rape crisis center, including a State or tribal coalition, that assists or advocates for victims of domestic violence, sexual assault, or stalking, including domestic violence shelters, faith-based organizations, and other organizations, with a documented history of effective work concerning domestic violence, sexual assault, or stalking. This definition is based on the definition of “victim service provider” in the VAWA. See 42 U.S.C. 13925(a)(43). The Department intends this definition to include organizations that provide services to adult, teen, and/or child victims of domestic violence, sexual assault, or stalking.

The Department proposes to define *Violence Against Women Act* (VAWA) as the Violence Against Women Act of 1994, 42 U.S.C. 13925 *et seq.*, and its implementing regulations.

The Department proposes to define *Wage and Hour Division* to mean the Wage and Hour Division within the U.S. Department of Labor.

### Section 13.3 Coverage

Proposed § 13.3 addresses and implements the coverage provisions of section 6 of Executive Order 13706. 80 FR 54697–54700. Proposed § 13.3(a) would implement the provisions regarding the categories of contracts and employees covered by the Order by stating that part 13 applies to any new contract with the Federal Government, unless excluded by § 13.4, provided that: (1)(i) It is a procurement contract for construction covered by the DBA; (ii) it is a contract for services covered by the SCA; (iii) it is a contract for concessions, including any concessions contract excluded from coverage under the SCA by Department of Labor regulations at 29 CFR 4.133(b); or (iv) it is a contract in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public; and (2) the wages of employees performing on or in connection with such contract are governed by the DBA, SCA, or FLSA, including employees who qualify for an exemption from the FLSA’s

minimum wage and overtime provisions.

Proposed § 13.3(b) incorporates the monetary value thresholds referred to in section 6(e) of the Executive Order. Specifically, it would provide that for contracts covered by the SCA or the DBA, part 13 applies to prime contracts only at the thresholds specified in those statutes, and for procurement contracts where employees’ wages are governed by the FLSA (*i.e.*, procurement contracts not covered by the SCA or DBA), part 13 applies when the prime contract exceeds the micro-purchase threshold, as defined in 41 U.S.C. 1902(a). As proposed, § 13.3(b) further explains that for all other covered prime contracts and for all subcontracts awarded under covered prime contracts, part 13 applies regardless of the value of the contract. In this context, “all other prime contracts” covered by the Order and part 13 refers to non-procurement concessions contracts not covered by the SCA and non-procurement contracts with the Federal Government in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public not covered by the SCA.

Proposed § 13.3(c), which is identical to the analogous provision in the Minimum Wage Executive Order Final Rule, 29 CFR 10.3(c), states that part 13 only applies to contracts with the Federal Government requiring performance in whole or in part within the United States; it further explains that if a contract with the Federal Government is to be performed in part within and in part outside the United States and is otherwise covered by the Executive Order and part 13, the requirements of the Order and part 13 would apply with respect to that part of the contract that is performed within the United States.

Proposed § 13.3(d), adopted from the Minimum Wage Executive Order regulations, 29 CFR 10.3(d), explains that part 13 does not apply to contracts subject to the Walsh-Healey Public Contracts Act, 41 U.S.C. 6501 *et seq.*

The preamble to the Minimum Wage Executive Order Final Rule addressed several issues related to the coverage provisions of that Order in its discussion of the regulatory text that was codified at 29 CFR 10.3; because many of those issues are also relevant to Executive Order 13706, the Department addresses them here. Where the language of § 13.3 is based on text of Executive Order 13706 that is identical to the text of the Minimum Wage Executive Order, the Department interprets the text identically, although

the Department is posing one question about a contracts coverage issue, as described below. The Department’s interpretations of language from Executive Order 13706 that differs from the text of the Minimum Wage Executive Order are based on and consistent with the language of the Order being implemented here.

### Coverage of Executive Agencies and Departments

Executive Order 13706 applies to all “[e]xecutive departments and agencies.” 80 FR 54697. The Department proposes to define *executive departments and agencies* in § 13.2 as explained above.

Executive Order 13706, like the Minimum Wage Executive Order, strongly encourages but does not compel “[i]ndependent agencies” to comply with its requirements. 80 FR 54700; *see also* 79 FR 9853. The Department interprets this provision, in light of the Executive Order’s broad goal of providing paid sick leave to employees on contracts with the Federal Government, as a narrow exemption from coverage. The proposed rule would define independent agencies as explained in the discussion of § 13.2 above.

### Coverage of New Contracts With the Federal Government

Proposed § 13.3(a) provides that the requirements of the Executive Order apply to a “new contract with the Federal Government.” By applying only to “new contracts,” the Executive Order ensures that contracting agencies and contractors will have sufficient notice of any obligations under Executive Order 13706 and can take into account any potential impact of the Order prior to entering into “new contracts” on or after January 1, 2017. As discussed above, the proposed definition of the term *contract* is broadly inclusive, and the proposed definition of *new contract* is modeled on the definition of that term in the Minimum Wage Executive Order Final Rule, 29 CFR 10.2, and incorporates the provisions of section 7 of Executive Order 13706. Therefore, part 13 applies to contracts with the Federal Government, unless excluded by § 13.4, that result from solicitations issued on or after January 1, 2017, or to contracts that are awarded outside the solicitation process on or after January 1, 2017. For example, any covered contracts that are added to the GSA Schedule in response to GSA Schedule solicitations issued on or after January 1, 2017 qualify as “new contracts” subject to the Order; any covered task orders issued pursuant to those contracts also would be deemed to be “new contracts.” This would include

contracts to add new covered services as well as contracts to replace expiring contracts.

As explained in the discussion of proposed § 13.2, the proposed definition of *new contract* also provides that the term includes both new contracts and replacements for expiring contracts. However, consistent with the Minimum Wage Executive Order Final Rule, the proposed definition does not include unilateral exercise of a pre-negotiated option to renew an existing contract by the Federal Government. As discussed above, the Department proposes to define the term *option* to mean a unilateral right in a contract by which, for a specified time, the Federal Government may elect to purchase additional supplies or services called for by the contract, or may elect to extend the term of the contract. *See* 48 CFR 2.101.

The proposed definition of *new contract* also provides that for purposes of the Executive Order, a contract that is entered into prior to January 1, 2017 will constitute a *new contract* if, through bilateral negotiation, on or after January 1, 2017: (1) The contract is renewed; (2) the contract is extended, unless the extension is made pursuant to a term in the contract as of December 31, 2016 providing for a short-term limited extension; or (3) the contract is amended pursuant to a modification that is outside the scope of the contract. These statements have the same meaning in part 13 as they did in the Minimum Wage Executive Order rulemaking. *See* 79 FR 60646–49. As also noted in the Minimum Wage Executive Order rulemaking, the Department understands that contract extensions may be accomplished through options created by an agency pursuant to FAR clause 52.217–8 (which allows for an extension of time of up to 6 months for a contractor to perform services that were acquired but not provided during the contract period) or FAR clause 52.217–9 (which provides for an extension of the contract term to provide additional services for a limited term specified in the contract at previously agreed upon prices). The contracting agency's exercise of extensions under these clauses would not trigger application of the Order's paid sick leave requirements because the clauses give the contracting agency a discretionary right to unilaterally exercise the option to extend, and unilateral options are excluded from the definition of "new contract."

Specifically, and particularly in light of these clauses, a bilaterally negotiated extension of an existing contract on or after January 1, 2017 will be viewed as

a "new contract" unless the extension is made pursuant to a term in the contract as of December 31, 2016 providing for a short-term limited extension, in which case the extension will not constitute a "new contract" and will not be covered. Therefore, a short-term, bilaterally negotiated extension of contract terms (*e.g.*, an extension of 6 months or less) that was provided for by the pre-negotiated terms of the contract prior to January 1, 2017, such as a bridge to prevent a gap in service, would not constitute a new contract. *See* Interim Final Rule, Federal Acquisition Regulation; Establishing a Minimum Wage for Contractors, 79 FR 74544, 74545 (Dec. 15, 2014) (providing that contacting officers "shall include" the FAR contract clause to implement the Minimum Wage Executive Order when "bilateral modifications extending the contract . . . are individually or cumulatively longer than six months"). In addition, when a contracting agency exercises its unilateral right to extend the term of an existing service contract and simply makes pricing adjustments based on increased labor costs that result from its obligation to include a current SCA wage determination pursuant to 29 CFR 4.4 but no bilateral negotiations occur (other than any necessary to determine and effectuate those pricing adjustments), the Department would not view the exercise of that option as a "new contract" covered by the Executive Order.

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

With respect to the coverage of other contract modifications, the Department's approach in this proposal is identical to that in the Minimum Wage Executive Order Final Rule. 79 FR 60646–49. It is meant to reflect that modifications within the scope of the contract do not in fact constitute new contracts. Long-standing contracting principles recognize that an existing contract, especially a larger one, will often require modifications, which may include very modest changes (*e.g.*, a small change to a delivery schedule). Therefore, regulations such as the FAR do not require agencies to create new contracts to support these actions. Accordingly, contract modifications that are within the scope of the contract

within the meaning of the FAR, *see* 48 CFR 6.001(c) and related case law, are not "new contracts" for purposes of the Executive Order, even when undertaken after January 1, 2017.

However, if the parties bilaterally negotiate a modification that is outside the scope of the contract, the agency will be required to create a new contract, triggering solicitation and/or justification requirements, and thus such a modification after January 1, 2017 will constitute a "new contract" subject to the Executive Order's paid sick leave requirements. For example, if an existing SCA-covered contract for janitorial services at a Federal office building is modified by bilateral negotiation after January 1, 2017 to also provide for security services at that building, such a modification would likely be regarded as outside the scope of the contract and thus qualify as a "new contract" subject to the Executive Order. Similarly, if an existing DBA-covered contract for construction work at Site A was modified by bilateral negotiation after January 1, 2017 to also cover construction work at Site B, such a modification would generally be viewed as outside the scope of the contract and thus trigger coverage of the Executive Order. The Department cautions, however, that whether a modification qualifies as "within the scope" or "outside the scope" of the contract is necessarily a fact-specific determination. *See, e.g., AT&T Communications, Inc. v. Wiltel, Inc.*, 1 F.3d 1201 (Fed. Cir. 1993).

Although in-scope modifications do not create "new contracts" under part 13, the Department strongly encourages agencies to bilaterally negotiate, as part of any such modification, application of the Executive Order's paid sick leave requirements so that these contracts can take advantage of the benefits of such leave. For example, the FARC should encourage, if not require, contracting officers to modify existing indefinite-delivery, indefinite-quantity contracts in accordance with FAR section 1.108(d)(3) to include the paid sick leave requirements of Executive Order 13706 and part 13, particularly if the remaining ordering period extends at least 6 months and the amount of remaining work or number of orders expected is substantial. *See* 79 FR 74545 (providing that contracting officers "are strongly encouraged to include" the FAR contract clause to implement the Minimum Wage Executive Order in "existing indefinite-delivery indefinite-quantity contracts, if the remaining ordering period extends at least six months and the amount of remaining

work or number of orders expected is substantial”).

#### Coverage of Types of Contractual Arrangements

Proposed § 13.3(a)(1) sets forth the specific types of contractual arrangements with the Federal Government that are covered by the Executive Order. Executive Order 13706 and part 13 are intended to apply to a wide range of contracts with the Federal Government for services or construction, and proposed § 13.3(a)(1) implements the Executive Order by generally extending coverage to procurement contracts for construction covered by the DBA; service contracts covered by the SCA; concessions contracts, including any concessions contract excluded by the Department’s regulations at 29 CFR 4.133(b); and contracts in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public. Each of these categories of contractual agreements, which are treated in this proposed rulemaking as they were in the Minimum Wage Executive Order rulemaking, is discussed in greater detail below.

*Procurement Contracts for Construction:* Section 6(d)(i)(A) of the Executive Order extends coverage to any “procurement contract for . . . construction.” 80 FR 54699. As explained in the Minimum Wage Executive Order rulemaking, 79 FR 60650, this language indicates that the Executive Order and part 13 apply to contracts subject to the DBA and that they do not apply to contracts subject only to the Davis-Bacon Related Acts, including those set forth at 29 CFR 5.1(a)(2)–(60).

The DBA applies, in relevant part, to contracts to which the Federal Government is a party, for the construction, alteration, or repair, including painting and decorating, of public buildings and public works of the Federal Government and which require or involve the employment of mechanics or laborers. 40 U.S.C. 3142(a). The DBA’s regulatory definition of *construction* is expansive and includes all types of work done on a particular building or work by laborers and mechanics employed by a construction contractor or construction subcontractor. See 29 CFR 5.2(j). For purposes of the DBA and therefore the Executive Order, a contract is “for construction” if “more than an incidental amount of construction-type activity” is involved in its performance. See, e.g., *In the Matter of Crown Point, Indiana Outpatient Clinic*, WAB Case

No. 86–33, 1987 WL 247049, at \* 2 (June 26, 1987) (citing *In re: Military Housing, Fort Drum, New York*, WAB Case No. 85–16, 1985 WL 167239 (Aug. 23, 1985)), *aff’d sub nom. Building & Construction Trades Dep’t, AFL–CIO v. Turnage*, 705 F. Supp. 5 (D.D.C. 1988); Office of Legal Counsel, U.S. Department of Justice, *Reconsideration of Applicability of the Davis-Bacon Act to the Veterans Administration’s Lease of Medical Facilities* (OLC Letter), 18 Op. O.L.C. 109, 1994 WL 810699, at \* 5 (May 23, 1994). The term “contract for construction” is not limited to contracts entered into with a construction contractor; rather, a contract for construction “would seem to require only that there be a contract, and that one of the things required by that contract be construction of a public work.” OLC Letter at \* 3–4. The term “public building or public work” includes any building or work, the construction, prosecution, completion, or repair of which is carried on directly by authority of or with funds of a Federal agency to serve the interest of the general public. See 29 CFR 5.2(k).

Proposed § 13.3(b) implements section 6(e) of Executive Order 13706, 80 FR 52699–700, which provides that the Order applies only to DBA-covered prime contracts that exceed the \$2,000 value threshold specified in the DBA. See 40 U.S.C. 3142(a). Consistent with the DBA, there is no value threshold requirement for application of Executive Order 13706 and part 13 to subcontracts awarded under such prime contracts.

*Procurement Contracts for Services:* Proposed § 13.3(a)(1)(ii) provides, in language identical to that of 29 CFR 10.3(a)(1)(ii) as promulgated by the Minimum Wage Executive Order Final Rule, 79 FR 60723, that coverage of the Executive Order and part 13 encompasses any “contract for services covered by the Service Contract Act.”

This proposed provision implements section 6(d)(i)(B) of the Executive Order, which states that the Order applies to “a contract or contract-like instrument for services covered by the Service Contract Act.” 80 FR 54699. The SCA applies (subject to the exceptions discussed below) to any contract entered into by the United States that “has as its principal purpose the furnishing of services in the United States through the use of service employees.” 41 U.S.C. 6702(a)(3); see also 29 CFR 4.110. The SCA is intended to cover a wide variety of service contracts with the Federal Government, so long as the principal purpose of the contract is to provide services using service employees. See, e.g., 29 CFR 4.130(a). SCA coverage exists regardless of the direct

beneficiary of the services or the source of the funds from which the contractor is paid for the service and irrespective of whether the contractor performs the work in its own establishment, on a Government installation, or elsewhere. 29 CFR 4.133(a).

In addition to the provision in section 6(d)(i)(B) of the Executive Order extending coverage to contracts covered by the SCA, section 6(d)(i)(A) provides that the Order applies to “a procurement contract for services.” 80 FR 54699. In the Minimum Wage Executive Order rulemaking, the Department interpreted these two phrases together to mean that Executive Order 13658 applied to all procurement and non-procurement contracts covered by the SCA. The phrase “a procurement contract for services” could, however, be construed to encompass a category or categories of procurement contracts for services beyond those covered by the SCA.

The SCA does not apply to all procurement contracts with the Federal Government for services. For example, the SCA contains a list of exemptions from its coverage: It does not apply to “a contract for the carriage of freight or personnel by vessel, airplane, bus, truck, express, railway line or oil or gas pipeline where published tariff rates are in effect”; “a contract for the furnishing of services by radio, telephone, telegraph, or cable companies, subject to the Communications Act of 1934”; “a contract for public utility services, including electric light and power, water, steam, and gas”; “an employment contract providing for direct services to a Federal agency by an individual”; and “a contract with the United States Postal Service, the principal purpose of which is the operation of postal contract stations.” 41 U.S.C. 6702(b); see also 29 CFR 4.115–4.122. Additionally, 29 CFR 4.123(d) and (e) identify certain categories of contracts the Department has exempted, pursuant to authority granted by the SCA, see 41 U.S.C. 6707(b), from SCA coverage to the extent regulatory criteria for exclusion from coverage are satisfied. For example, 29 CFR 4.123(e)(1)(i)(A) exempts from SCA coverage certain contracts principally for the maintenance, calibration, or repair of automated data processing equipment and office information/word processing systems. Furthermore, the SCA does not apply to contracts for services to be performed exclusively by persons who are not service employees, *i.e.*, persons who qualify as bona fide executive, administrative, or professional employees as defined in the FLSA’s regulations at 29 CFR part 541. 29 CFR

4.113(a)(2); *see also* 41 U.S.C. 6701(a)(3)(C), 6702(a)(3); WHD Field Operations Handbook (FOH) ¶ 14c07. Similarly, a contract for services “performed essentially by bona fide executive, administrative, or professional employees, with the use of service employees being only a minor factor in contract performance,” is not covered by the SCA. 29 CFR 4.113(a)(3); FOH ¶ 14c07.

The Department seeks comment as to whether it should include within the coverage of Executive Order 13706 a wider set of procurement contracts for services than those contracts for services covered by the SCA. An interpretation treating as covered procurement contracts for services performed exclusively or essentially by employees who qualify as bona fide executive, administrative, or professional employees as defined in the FLSA’s regulations at 29 CFR part 541—a type of employee covered by section 6(d)(ii) of the Order because such employees qualify for an exemption from the FLSA’s minimum wage and overtime provisions, 80 FR 54700—would, for example, extend the Order’s paid sick leave requirements to some such employees who would otherwise not be covered by the Order. An interpretation treating as covered other types of service contracts explicitly exempted from SCA coverage under 41 U.S.C. 6702(b) and 29 CFR 4.123(d) and (e) would also extend the Order’s paid sick leave requirements to at least some employees on any such contracts; although those employees’ wages would by definition not be covered by the SCA, under such an interpretation, employees performing on or in connection with such contracts whose wages were governed by the FLSA, including employees who qualify for an exemption from its minimum wage and overtime provisions, would be entitled to paid sick leave under the Order and part 13. The Department seeks comments discussing the potential scope and implications of such coverage, including whether employees who work on or in connection with certain categories of non-SCA-covered service contracts currently typically do not have paid sick time or do not have any type of paid time off such that the protections of Executive Order 13706 would be particularly significant to them. (If in the Final Rule, the Department changes the scope of coverage of service contracts, it will make a corresponding change to proposed § 13.4(d), which—as explained below—sets forth an exclusion from the Order’s coverage for

service contracts not covered by the SCA or proposed § 13.3(a)(1)(iii) or (iv).)

The Department notes that regardless of whether it adopts a broader interpretation of the set of procurement contracts for services covered by the Order and part 13, under proposed § 13.3(a)(1)(iii) and (iv) as well as § 13.3(d), described in more detail below, the Order’s paid sick leave requirements will apply to service contracts that are concessions contracts, including all concessions contracts excluded by the SCA regulations at 29 CFR 4.133(b); will apply to service contracts that are in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public; and will not apply to contracts for the manufacturing or furnishing of materials, supplies, articles, or equipment to the Federal Government that are subject to the Walsh-Healey Public Contracts Act, 41 U.S.C. 6501 *et seq.*

Finally, proposed § 13.3(b) implements section 6(e) of the Executive Order, which provides that for SCA-covered contracts, the Executive Order applies only to those prime contracts that exceed the threshold for prevailing wage requirements specified in the SCA. 80 FR 54700. Although the SCA covers all non-exempted contracts with the Federal Government that have the “principal purpose” of furnishing services in the United States through the use of service employees regardless of the value of the contract, the prevailing wage requirements of the SCA only apply to covered contracts in excess of \$2,500. 41 U.S.C. 6702(a)(2). Consistent with the SCA, there is no value threshold requirement for application of Executive Order 13706 and part 13 to subcontracts awarded under such prime contracts.

*Contracts for Concessions:* Proposed § 13.3(a)(1)(iii) implements the Executive Order’s coverage of a “contract or contract-like instrument for concessions, including any concessions contract excluded by the Department of Labor’s regulations at 29 CFR 4.133(b),” 80 FR 54699, just as the Minimum Wage Executive Order Final Rule implemented identical language in that Order, *see* 79 FR 60638, 60652. The proposed definition of *concessions contract* is addressed in the discussion of proposed § 13.2.

The SCA generally covers contracts for concessionaire services. *See* 29 CFR 4.130(a)(11). Pursuant to the Secretary’s authority under section 4(b) of the SCA, however, the SCA’s regulations specifically exempt from coverage concession contracts “principally for

the furnishing of food, lodging, automobile fuel, souvenirs, newspaper stands, and recreational equipment to the general public.” 29 CFR 4.133(b); 48 FR 49736, 49753 (Oct. 27, 1983).<sup>1</sup> Proposed § 13.3(a)(1)(iii) extends coverage of the Executive Order and part 13 to all concession contracts with the Federal Government, including those exempted from SCA coverage. For example, the Executive Order generally covers souvenir shops at national monuments as well as boat rental facilities and fast food restaurants at National Parks. In addition, consistent with the SCA’s implementing regulations at 29 CFR 4.107(a), the Department notes that the Executive Order generally applies to concessions contracts with nonappropriated fund instrumentalities under the jurisdiction of the Armed Forces or other Federal agencies.

Proposed § 13.3(b) implements the value threshold requirements of section 6(e) of Executive Order 13706. 80 FR 54699–700. Pursuant to that section, the Executive Order applies to an SCA-covered concessions contract only if it exceeds \$2,500. *Id.*; 41 U.S.C. 6702(a)(2). Section 6(e) of the Executive Order further provides that, for procurement contracts where employees’ wages are governed by the FLSA, such as any procurement contracts for concessionaire services that are excluded from SCA coverage under 29 CFR 4.133(b), part 13 applies only to contracts that exceed the \$3,000 micro-purchase threshold, as defined in 41 U.S.C. 1902(a). There is no value threshold for application of Executive Order 13706 and part 13 to subcontracts awarded under covered prime contracts or for non-procurement concessions contracts that are not covered by the SCA.

*Contracts in Connection with Federal Property or Lands and Related to Offering Services:* Proposed § 13.3(a)(1)(iv) implements section 6(d)(i)(D) of the Executive Order, which extends coverage to contracts entered into with the Federal Government in connection with Federal property or lands and related to offering services for

<sup>1</sup> This exemption applies to certain concessions contracts that provide services to the general public, but does not apply to concessions contracts that provide services to the Federal Government or its personnel or to concessions services provided incidentally to the principal purpose of a covered SCA contract. *See, e.g.,* 29 CFR 4.130 (providing an illustrative list of SCA-covered contracts); *In the Matter of Alcatraz Cruises, LLC*, ARB Case No. 07–024, 2009 WL 250456 (ARB Jan. 23, 2009) (holding that the SCA regulatory exemption at 29 CFR 4.133(b) does not apply to National Park Service contracts for ferry transportation services to and from Alcatraz Island).

Federal employees, their dependents, or the general public. See 80 FR 54699; see also 79 FR 60655 (Minimum Wage Executive Order Final Rule preamble discussion of identical provisions in the Minimum Wage Executive Order and 29 CFR part 10). To the extent that such agreements are not otherwise covered by § 13.3(a)(1), the Department interprets this provision as generally including leases of Federal property, including space and facilities, and licenses to use such property entered into by the Federal Government for the purpose of offering services to the Federal Government, its personnel, or the general public. In other words, a private entity that leases space in a Federal building to provide services to Federal employees or the general public would be covered by the Executive Order and part 13 regardless of whether the lease is subject to the SCA. Although evidence that an agency has retained some measure of control over the terms and conditions of the lease or license to provide services is not necessary for purposes of determining applicability of this section, such a circumstance strongly indicates that the agreement involved is covered by section 6(d)(i)(D) of the Executive Order and proposed § 13.3(a)(1)(iv). Pursuant to this interpretation, a private fast food or casual dining restaurant that rents space in a Federal building and serves food to the general public would be subject to the Executive Order's paid sick leave requirements even if the contract does not constitute a concessions contract for purposes of the Order and part 13. Additional examples of agreements that would generally be covered by the Executive Order and part 13 under this approach, even if they are not subject to the SCA, include delegated leases of space in a Federal building from an agency to a contractor whereby the contractor operates a child care center, credit union, gift shop, barber shop, health clinic, or fitness center in the space to serve Federal employees and/or the general public.

Despite this broad definition, the Department notes some limits to it. Coverage under this section only extends to contracts that are in connection with Federal property or lands. The Department does not interpret section 6(d)(i)(D)'s reference to "Federal property" to encompass money; as a result, purely financial transactions with the Federal Government, *i.e.*, contracts that are not in connection with physical property or lands, would not be covered by the Executive Order or part 13. For example, if a Federal agency contracts

with an outside catering company to provide and deliver coffee for a conference, such a contract will not be considered a covered contract under section 6(d)(i)(D), although it would be a covered contract under section 6(d)(i)(B) if it is covered by the SCA. In addition, section 6(d)(i)(D) coverage only extends to contracts "related to offering services for Federal employees, their dependents, or the general public." Therefore, if a Federal agency contracts with a company to solely supply materials in connection with Federal property or lands, the Department will not consider the contract to be covered by section 6(d)(i)(D) because it is not a contract related to offering services. Likewise, because a license or permit to conduct a wedding on Federal property or lands generally would not relate to offering services for Federal employees, their dependents, or the general public, but rather would only relate to offering services to the specific individual applicant(s), the Department would not consider such a contract covered by section 6(d)(i)(D).

Pursuant to proposed § 13.3(b) and section 6(e) of Executive Order 13706, 80 FR 54700, the Order and part 13 apply only to SCA-covered prime contracts in connection with Federal property and related to offering services if such contracts exceed \$2,500. *Id.*; 41 U.S.C. 6702(a)(2). For procurement contracts in connection with Federal property and related to offering services where employees' wages are governed by the FLSA (rather than the SCA), part 13 applies only to such contracts that exceed the \$3,000 micro-purchase threshold, as defined in 41 U.S.C. 1902(a). As to subcontracts awarded under prime contracts in this category and non-procurement contracts in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public that are not SCA-covered, there is no value threshold for coverage under Executive Order 13706 and part 13.

*Contracts Subject to the Walsh-Healey Public Contracts Act:* Finally, the Department proposes to include as § 13.3(d) a statement that contracts for the manufacturing or furnishing of materials, supplies, articles, or equipment to the Federal Government, *i.e.*, those subject to the Walsh-Healey Public Contracts Act (PCA), 41 U.S.C. 6501 *et seq.*, are not covered by Executive Order 13706 or part 13. As in the Minimum Wage Executive Order rulemaking, the Department proposes to exercise its authority under the Order to "provid[e] exclusions from the requirements set forth in this order

where appropriate," 80 FR 64698, and to follow the regulations set forth in the FAR at 48 CFR 22.402(b) in addressing whether the DBA (and thus the Executive Order) applies to construction work on a PCA contract. Under this approach, where a PCA-covered contract involves a substantial and segregable amount of construction work that is subject to the DBA, employees whose wages are governed by the DBA or FLSA, including those who qualify for an exemption from the FLSA's minimum wage and overtime provisions, are covered by the Executive Order for the hours that they spend performing on or in connection with such DBA-covered construction work.

#### Coverage of Subcontracts

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

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

#### Coverage of Employees

Proposed § 13.3(a)(2) implements section 6(d)(ii) of Executive Order

13706, which provides that the paid sick leave requirements of the Order only apply if the wages of employees under a covered contract are governed by the DBA, SCA, or FLSA, including employees who qualify for an exemption from the FLSA's minimum wage and overtime provisions. 80 FR 54699. This coverage provision is distinct from that in Executive Order 13658 in that the Minimum Wage Executive Order did not cover employees who qualify for an exemption from the FLSA's minimum wage and overtime provisions, *see* 79 FR 9853; the discussion below reflects this distinction.

An employee's wages are governed by the FLSA for purposes of section 6(d)(ii) of the Executive Order and part 13 if the employee is entitled to minimum wage and/or overtime compensation under sections 6 and/or 7 of the FLSA or the employee's wages are calculated pursuant to special certificates issued under section 14 of the FLSA. *See* 29 U.S.C. 206, 207, 214. The Department interprets the Order's explicit coverage of employees who qualify for an exemption from the FLSA's minimum wage and overtime provisions to mean that the Order and part 13 apply to an employee who would be entitled to minimum wage and/or overtime compensation under the FLSA but for the application of an exemption from the FLSA's minimum wage and overtime requirements pursuant to section 13 of the Act. *See* 29 U.S.C. 213. Such employees include those employed in a bona fide executive, administrative, or professional capacity as defined in section 13(a)(1) of the FLSA, 29 U.S.C. 213(a)(1), and 29 CFR part 541.

The Department interprets the Order's reference to employees whose wages are governed by the DBA to include laborers and mechanics who are covered by the DBA, including any individual who is employed on a DBA-covered contract and individually registered in a bona fide apprenticeship program registered with the Department's Employment and Training Administration, Office of Apprenticeship, or with a State Apprenticeship Agency recognized by the Office of Apprenticeship. The Department also interprets the language in section 6(d)(ii) of Executive Order 13706 and proposed § 13.3(a)(2) to extend coverage to employees performing on or in connection with DBA-covered contracts for construction who are not laborers or mechanics but whose wages are governed by the FLSA as provided above, including those who qualify for an exemption from the FLSA's minimum wage and overtime

provisions. Although such employees are not covered by the DBA itself because they are not "laborers and mechanics," 40 U.S.C. 3142(b), such individuals are employees performing on or in connection with a contract subject to the Executive Order whose wages are governed by the FLSA, including those who qualify for an exemption from the FLSA's minimum wage and overtime provisions, and thus are covered by section 6(d) of the Order. 80 FR 54699. This coverage extends to employees whose wages are governed by the FLSA, including those who qualify for an exemption from the FLSA's minimum wage and overtime provisions, who are working on or in connection with DBA-covered contracts regardless of whether such employees are physically present on the DBA-covered construction worksite.

The Order also refers to employees whose wages are governed by the SCA. The SCA provides that "service employees" directly engaged in providing specific services called for by the SCA-covered contract are entitled to SCA prevailing wage rates. 41 U.S.C. 6701(3), 6703; 29 CFR 4.152. These employees are covered by the plain language of section 6(d) of Executive Order 13706. This category includes individuals who are employed on an SCA contract and individually registered in a bona fide apprenticeship program registered with the Department's Employment and Training Administration, Office of Apprenticeship, or with a State Apprenticeship Agency recognized by the Office of Apprenticeship.

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

Furthermore, some employees perform work on or in connection with SCA-covered contracts but are not "service employees" for purposes of the

Act because that term does not include an individual employed in a bona fide executive, administrative, or professional capacity, as those terms are defined in the FLSA regulations at 29 CFR part 541. 41 U.S.C. 6701(3)(C). As explained above, these employees are covered pursuant to section 6(d)(ii) of the Executive Order. For example, a contractor could employ a manager who meets the test for the executive employee exemption under 29 U.S.C. 213(a)(1) and 29 CFR 541.100 to supervise janitors on an SCA-covered contract for cleaning services at a Federal building. Because that manager performs work on a covered contract and qualifies for an exemption from the FLSA's minimum wage and overtime provisions, she would be entitled to the paid sick leave required by Executive Order 13706 and part 13.

The Department notes that where State or local government employees are performing on or in connection with covered contracts and their wages are governed by the SCA or the FLSA, including employees who qualify for an exemption from the FLSA's minimum wage and overtime provisions, such employees are entitled to the protections of the Executive Order and part 13. The DBA does not apply to construction performed by State or local government employees.

#### On or In Connection With

The paid sick leave requirements of Executive Order 13706 and part 13 apply to employees performing work "on or in connection with" covered contracts. As it did in the Minimum Wage Executive Order rulemaking, *see* 79 FR 60671-72, the Department interprets these terms in a manner consistent with SCA regulations, *see, e.g.,* 29 CFR 4.150-155. Specifically, the Department views employees performing "on" a covered contract as those employees directly performing the specific services called for by the contract. Whether an employee is performing "on" a covered contract will be determined, as explained in the Minimum Wage Executive Order Final Rule, 79 FR 60660, in part by the scope of work or a similar statement set forth in the covered contract that identifies the work (*e.g.,* the services or construction) to be performed under the contract. Accordingly, all laborers and mechanics engaged in the construction of a public building or public work on the site of the work will be regarded as performing "on" a DBA-covered contract, and all service employees performing the specific services called for by an SCA-covered contract will also be regarded as performing "on" a

contract covered by the Executive Order. In other words, any employee who is entitled to be paid DBA or SCA prevailing wages is necessarily performing “on” a covered contract. For purposes of concessions contracts and contracts in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public that are not covered by the SCA, the Department will regard any employee performing the specific services called for by the contract as performing “on” the covered contract in the manner described above.

The Department regards an employee performing “in connection with” a covered contract to be any employee who is performing work activities that are necessary to the performance of a covered contract but who is not directly engaged in performing the specific services called for by the contract itself. This standard, also articulated in the Minimum Wage Executive Order rulemaking, is derived from SCA regulations. *See* 79 FR 60659 (citing 29 CFR 4.150–.155).

The Department notes that the Order does not extend to employees who are not engaged in working on or in connection with a covered contract. For example, a technician who is hired to repair a DBA contractor’s electronic time system or a janitor who is hired to clean the bathrooms at the DBA contractor’s company headquarters are not covered by the Order because they are not performing the specific duties called for by the contract or other services or work necessary to the performance of the contract. Similarly, the Executive Order would not apply to a landscaper at the home office of an SCA contractor because that employee is not performing the specific duties called for by the SCA contract or other services or work necessary to the performance of the contract. And the Executive Order would not apply to an employee hired by a covered concessionaire to redesign the storefront sign for a snack shop in a National Park unless the redesign of the sign was called for by the concessions contract itself or otherwise necessary to the performance of the contract. The Department notes for clarity that because the Order and part 13 do not apply to employees of Federal contractors who do no work on or in connection with a covered contract, a contractor could be required to provide paid sick leave to some of its employees but not others; in other words, it is not the case that because a contractor has one or more Federal contracts, all of its projects becomes covered.

#### Geographic Scope

Proposed § 13.3(c), which is identical to 29 CFR 10.3(c) as promulgated in the Minimum Wage Executive Order Final Rule, *see* 79 FR 60723, provides that Executive Order 13706 and part 13 only apply to contracts with the Federal Government requiring performance in whole or in part within the United States. This interpretation is reflected in the Department’s proposed definition of the term *United States*, which provides that when used in a geographic sense, the *United States* means the 50 States and the District of Columbia. Under this approach, the requirements of the Order and part 13 would not apply to contracts with the Federal Government to be performed in their entirety outside the geographical limits of the United States as thus defined. If a contract with the Federal Government is to be performed in part within and in part outside these geographical limits and is otherwise covered by the Executive Order and part 13, however, the requirements of the Order and part 13 would apply with respect to that part of the contract that is performed within the United States, *i.e.*, employees would accrue paid sick leave based on their hours worked on or in connection with covered contracts within the United States, and could likewise use accrued paid sick leave while performing on or in connection with a covered contract within the United States. As with other instances described below in which employees perform some work covered by the Executive Order and part 13 and other work that is not, or if some employees working on or in connection with a covered contract do so in the United States and others do so outside the United States, a contractor wishing to comply with the Order’s paid sick leave requirements as to only some employees on a contract or only some of an employee’s hours worked must keep records adequately segregating non-covered work from covered work. If a contractor does not make and maintain such records, in the absence of other proof regarding the location of the work, all of the employees’ hours worked on or in connection with the covered contract and/or all of the employees working on or in connection with the covered contract will be presumed to be covered by the Order and part 13.

#### Section 13.4 Exclusions

Proposed § 13.4 sets forth exclusions from the Executive Order’s requirements, including by implementing the exclusions set forth in section 6(f) of the Order and creating other limited exclusions from coverage

as authorized by section 3(a) of the Executive Order. *See* 80 FR 54698, 54700. Specifically, proposed § 13.4(a) through (d) describes the limited categories of contractual arrangements with the Federal Government for services or construction that are excluded from the paid sick leave requirements of the Executive Order and part 13, and proposed § 13.4(e) establishes a narrow category of employees that are excluded from coverage of the Order and part 13.

Proposed § 13.4(a) implements the statement in section 6(f) of Executive Order 13706 that the Order does not apply to “grants.” 80 FR 54700. As it did in the Minimum Wage Executive Order rulemaking, *see* 79 FR 60665–66, the Department interprets this provision to mean that the paid sick leave requirements of the Executive Order and part 13 do not apply to grants as that term is used in the Federal Grant and Cooperative Agreement Act, 31 U.S.C. 6301 *et seq.* That statute defines a “grant agreement” as “the legal instrument reflecting a relationship between the United States Government and a State, a local government, or other recipient when—(1) the principal purpose of the relationship is to transfer a thing of value to the State or local government or other recipient to carry out a public purpose of support or stimulation authorized by a law of the United States instead of acquiring (by purchase, lease, or barter) property or services for the direct benefit or use of the United States Government; and (2) substantial involvement is not expected between the executive agency and the State, local government, or other recipient when carrying out the activity contemplated in the agreement.” 31 U.S.C. 6304. Section 2.101 of the FAR similarly excludes “grants,” as defined in the Federal Grant and Cooperative Agreement Act, from its coverage of contracts. 48 CFR 2.101. Several appellate courts have also adopted this construction of “grants” in defining the term for purposes of other Federal statutory schemes. *See, e.g., Chem. Service, Inc. v. Environmental Monitoring Systems Laboratory*, 12 F.3d 1256, 1258 (3rd Cir. 1993) (applying same definition of “grants” for purposes of 15 U.S.C. 3710a); *East Arkansas Legal Services v. Legal Services Corp.*, 742 F.2d 1472, 1478 (D.C. Cir. 1984) (applying same definition of “grants” in interpreting 42 U.S.C. 2996a). If a contract qualifies as a grant within the meaning of the Federal Grant and Cooperative Agreement Act, it would be excluded from coverage of Executive Order 13706 and part 13.



Proposed § 13.4(b) implements the other exclusion set forth in section 6(f) of Executive Order 13706, which states that the Order does not apply to “contracts and agreements with and grants to Indian Tribes under the Indian Self-Determination and Education Assistance Act (Pub. L. 93–638), as amended.” 80 FR 54700. This proposed provision is identical to 29 CFR 10.4(b) as promulgated by the Minimum Wage Executive Order. See 79 FR 60723.

Proposed § 13.4(c) provides that any procurement contracts for construction that are not subject to the DBA are excluded from coverage of the Executive Order and part 13. This proposed provision is identical to 29 CFR 10.4(c) as promulgated by the Minimum Wage Executive Order Final Rule. See 79 FR 60723. The Department proposes to make coverage of construction contracts under the Executive Order and part 13 consistent with coverage under the DBA in order to assist all interested parties in understanding their rights and obligations under Executive Order 13706.

Similarly, proposed § 13.4(d) incorporates the SCA’s exemption of certain service contracts into the exclusionary provisions of the Executive Order. This proposed provision excludes from coverage of the Executive Order and part 13 any contracts for services, except for those expressly covered by proposed § 13.3(a)(1)(iii) or (iv), that are exempted from coverage under the SCA, pursuant to its statutory language at 41 U.S.C. 6702(b) or its implementing regulations, including those at 29 CFR 4.115 through 4.122 and 29 CFR 4.123(d) and (e). The Department notes that this exemption would not apply if the relevant service contract is expressly included within the Executive Order’s coverage by proposed § 13.3(a)(1)(iii) or (iv). For example, certain types of concessions contracts are excluded from SCA coverage pursuant to 29 CFR 4.133(b) but are explicitly covered by section 6(d)(i)(C) of the Executive Order and part 13 under proposed § 13.3(a)(1)(iii). The Department notes that any comments addressing whether the Department should change proposed § 13.3(a)(1)(ii) to extend coverage to any categories of “procurement contracts for services” beyond those covered by the SCA would be relevant to this proposed provision as well.

Proposed § 13.4(e) provides that the accrual requirements of part 13 do not apply to employees performing in connection with covered contracts, *i.e.*, those employees who perform work duties necessary to the performance of the contract but who are not directly

engaged in performing the specific work called for by the contract, who spend less than 20 percent of their hours worked in a particular workweek performing in connection with such contracts. It further provides that this exclusion is inapplicable to employees performing on covered contracts, *i.e.*, those employees directly engaged in performing the specific work called for by the contract, at any point during the workweek. Finally, it explains that this exclusion is also inapplicable to employees performing in connection with covered contracts with respect to any workweek in which the employees spend 20 percent or more of their hours worked performing in connection with a covered contract. This provision adopts language included in the Minimum Wage Executive Order Final Rule in response to comments expressing concern about new burdens on contractors associated with employees who spend an insubstantial amount of time performing work in connection with covered contracts (in particular, DBA-covered contractors that did not previously segregate hours worked by FLSA-covered employees, including those who were not present on the site of the construction work). 79 FR 60659, 60724 (codified at 29 CFR 10.4(f)). The Department explained in that rulemaking that it expected the exclusion to significantly mitigate the recordkeeping concerns identified by commenters without substantially affecting the Executive Order’s economy and efficiency interests, and noted that it has used a 20 percent threshold for other purposes in the SCA and DBA contexts. 79 FR 60660 (citing 29 CFR 4.123(e)(2); WHD FOH ¶¶ 15e06, 15e10(b), 15e16(c), and 15e19).

As explained in the Minimum Wage Executive Order rulemaking, 79 FR 60659–62, this exclusion does not apply to any employee performing “on,” rather than “in connection with,” a covered contract at any point during the workweek. (The meaning of these terms is addressed above, in the discussion of the coverage provisions of proposed § 13.3.) If an employee spends any time performing on a covered contract and that employee’s wages are governed by the DBA, SCA, or FLSA, including employees who qualify for an exemption from the FLSA’s minimum wage and overtime provisions, the employee will be entitled to accrue and use paid sick leave pursuant to the Executive Order as to all time performing on or in connection with covered contracts in that workweek. For an employee solely performing “in connection with” a covered contract,

however, the Executive Order’s paid sick leave requirements will only apply if that employee spends 20 percent or more of her hours worked in a given workweek performing in connection with covered contracts. Therefore, in order to apply this exclusion correctly, contractors must accurately distinguish between employees performing “on” a covered contract and those employees performing “in connection with” a covered contract. As explained in the discussion of these concepts above, employees directly performing the specific services called for by the contract are performing “on” a covered contract. This category includes any employee who is entitled to be paid DBA or SCA prevailing wages; such an employee is therefore entitled to accrue and use paid sick leave as required by the Executive Order and part 13 regardless of whether such covered work constitutes less than 20 percent of the employee’s overall hours worked in a particular workweek.

This exclusion could apply, however, to any employees who are not directly engaged in performing the specific construction identified in a DBA contract (*i.e.*, they are not DBA-covered laborers or mechanics) but whose services are necessary to the performance of the DBA contract, such as employees who do not perform the construction identified in the DBA contract either due to the nature of their non-physical duties and/or because they are not present on the site of the work, but whose duties would be regarded as essential for the performance of the contract. For example, proposed § 13.4(e) could apply to a security guard patrolling or monitoring a construction worksite where DBA-covered work is being performed or a clerk who processes the payroll for DBA contracts (either on or off the site of the work). If the security guard or clerk also performed the duties of a DBA-covered laborer or mechanic (for example, by painting or moving construction materials), however, the exclusion would not apply to any hours worked on or in connection with the contract in that workweek because that employee performed “on” the covered contract at some point in the workweek.

Similarly, any employees performing work in connection with an SCA contract who are not entitled to SCA prevailing wages but are, because they perform work “in connection with” an SCA-covered contract, entitled to at least the FLSA minimum wage could fall within the scope of this exclusion provided their work falls below the 20 percent threshold. For example, the exclusion could apply to an accounting

clerk who processes a few invoices for SCA contracts out of hundreds of other invoices for non-covered contracts during the workweek or a human resources employee who assists for short periods of time in the hiring of the employees performing on the SCA-covered contract in addition to the hiring of employees on other non-covered projects.

With respect to concessions contracts and contracts in connection with Federal property or lands and related to offering services, the proposed § 13.4(e) exclusion could apply to any employees performing in connection with such contracts who are not at any time directly engaged in performing the specific services identified in the contract but whose services or work duties are necessary to the performance of the covered contract. One example of an employee who could qualify for this exclusion is a clerk who handles the payroll for a child care center that leases space in a Federal building as well as the center's other locations that are not covered by the Executive Order and thus does not spend 20 percent or more of his time handling payroll for the child care center in the Federal building.

Importantly, as in the Minimum Wage Executive Order rulemaking, 79 FR 60661–62, the Department notes that a contractor seeking to rely on this exclusion must correctly determine the hours worked, make and maintain records (or other affirmative proof) that the employee did not work “on” a covered contract, and appropriately segregate the hours worked by the employee in connection with the covered contract from other work not subject to the Executive Order. This requirement is consistent with other instances, described elsewhere in this preamble, in which employees perform some work covered by the Executive Order and part 13 and some work that is not. In the absence of records or other proof demonstrating that an employee did not work “on” a covered contract and adequately segregating non-covered work from the work performed in connection with a covered contract, the exclusion will not apply, and employees who work in connection with a covered contract will be presumed to have spent all paid time performing such work throughout the workweek.

The quantum of affirmative proof necessary to support reliance on the exclusion will vary with the circumstances. For example, it may require considerably less affirmative proof to satisfy the proposed § 13.4(e) exclusion with respect to an accounting clerk who only occasionally processes

an SCA-contract-related invoice than would be necessary to establish the exclusion with respect to a security guard who works on a DBA-covered site for at least several hours each week.

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

Finally, the Department acknowledges that the Minimum Wage Executive Order rulemaking contained additional exclusions for certain categories of employees that are not replicated in this proposed rule. Specifically, under the Minimum Wage Executive Order regulations, employees whose wages are not governed by section 206(a)(1) of the FLSA because of the applicability of exemptions under section 213(a) are not entitled to the protections of Executive Order 13658. 29 CFR 10.4(e)(3). Executive Order 13706 expressly covers employees to whom an exemption from the FLSA's minimum wage and overtime provisions applies, *see* 80 FR 54699, so no similar exclusion would be appropriate in this rulemaking. Additionally, the Minimum Wage Executive Order does not apply to employees whose wages are calculated pursuant to special certificates issued under 29 U.S.C. 214(a) or (b). 29 CFR 10.4(e)(1), (2). Because the Department interprets Executive Order 13706 to be intended to apply to a broad range of employees, the Order explicitly applies to employees whose wages are governed by the FLSA, and the Order (unlike the Minimum Wage Executive Order) contains no reference to any category of employees whose wages are calculated pursuant to special certificates, the Department proposes to interpret

Executive Order 13706 to apply to employees whose wages are calculated pursuant to special certificates under section 14 of the FLSA. It therefore does not propose to incorporate an exclusion for any such employees in this proposed rule.

#### Section 13.5 Paid Sick Leave for Federal Contractors and Subcontractors

Proposed § 13.5 implements section 2 of Executive Order 13706 by setting forth rules and restrictions regarding the accrual and use of paid sick leave.

Proposed § 13.5(a) addresses the accrual of paid sick leave. Proposed § 13.5(a)(1) provides that a contractor shall permit an employee to accrue not less than 1 hour of paid sick leave for every 30 hours worked on or in connection with a covered contract. This requirement implements section 2(a) of Executive Order 13706. 80 FR 54697. Proposed § 13.5(a) further provides that a contractor shall aggregate an employee's hours worked on or in connection with all covered contracts for that contractor for purposes of paid sick leave accrual. For example, if a subcontractor who installs windows in building construction projects sends a single employee to three separate DBA-covered projects, all the time the employee spends on all worksites—whether during the same or different workweeks—for the subcontractor must be added together to determine how much paid sick leave the employee has accrued. If in one workweek the employee spent 20 hours at Site A and 10 hours at Site B, she would have accrued 1 hour of paid sick leave at the end of that workweek; if in the next workweek the employee spent 30 hours at Site C, she would then have a total accrual of 2 hours of paid sick leave. As for an employee who falls within the 20 percent of hours worked exclusion created by proposed § 13.4(e) for some workweeks but not others, only the employee's hours worked on or in connection with covered contracts during workweeks in which the exclusion does not apply would count toward accrual of paid sick leave.

Proposed § 13.5(a)(1)(i) explains that for purposes of Executive Order 13706 and part 13, “hours worked” includes all time for which an employee is or should be paid, meaning time an employee spends working or in paid time off status, including time when the employee is using paid sick leave or any other paid time off provided by the contractor. This definition is different from the use of the term “hours worked” in other contexts and applies only for purposes of the Executive Order. It includes (but is broader than)

all time considered “hours worked” for purposes of the SCA and the FLSA, *i.e.*, all time an employee is suffered or permitted to work. 29 CFR 4.178 (explaining that “[i]n general, the hours worked by an employee include all periods in which the employee is suffered or permitted to work whether or not required to do so, and all time during which the employee is required to be on duty or to be on the employer’s premises or to be at a prescribed workplace”); 29 CFR 785.11 (“Work not requested but suffered or permitted is work time.”); *see also* 29 CFR part 785 (FLSA regulations regarding hours worked principles).

The Department’s interpretation of “hours worked” under Executive Order 13706 to additionally include paid time off, although distinct from the FLSA and SCA definitions of the term, is analogous to the accrual of vacation leave under the SCA, where absences from work (with or without pay) generally count toward satisfaction of length of service requirements for vacation benefits. 29 CFR 4.173(b)(1). And it is consistent with the OPM regulation regarding leave accrual by federal employees, which provides that an employee accrues leave each pay period based on time she is “in a pay status.” 5 CFR 630.202(a). The Department’s interpretation also reflects its view that basing paid sick leave accrual on all time an employee is in pay status, rather than merely on when the employee is suffered or permitted to work, will be administratively easier (or no more difficult) for contractors to implement. The Department further notes that this interpretation generally will have minimal impact on the rate of an employee’s accrual of paid sick leave and, with respect to many employees who work at least full time (or potentially even less) each week on or in connection with covered contracts, will have no impact on the total amount of paid sick leave accrued per year because such employees will reach the maximum 56 hours within each accrual year regardless of whether paid time off is included. The Department reiterates that this broad definition of hours worked is only for purposes of the Executive Order and part 13 and has no bearing on the definition of hours worked in other contexts, such as the definition for purposes of the FLSA and SCA, which is set forth in longstanding regulations under those statutes. *See* 29 CFR part 785 (FLSA hours worked principles); 29 CFR 4.178 (adopting FLSA hours worked principles for purposes of the SCA).

The Department reiterates that only hours worked (as that term is defined

for purposes of the Order and part 13) on or in connection with a covered contract, rather than hours worked on or in connection with a non-covered contract, count toward paid sick leave accrual. For example, if an employee works on an SCA-covered contract for security services for 30 hours each workweek and works for the same contractor on a private contract for security services an additional 30 hours each workweek, the contractor would only be required to allow that employee to accrue 1, rather than 2, hours of paid sick leave each workweek. Similarly, if an employee works for one contractor on a DBA-covered contract for construction for 2 months and then on a private contract for construction for 2 months, the contractor would only be required to allow the employee to accrue paid sick leave during the first 2 months. But the Department proposes to require contractors who wish to distinguish covered and non-covered hours worked for purposes of paid sick leave accrual to keep records that clearly reflect that distinction. Specifically, proposed § 13.5(a)(1)(i) explains that to properly exclude time spent on non-covered work from an employee’s hours worked that count toward the accrual of paid sick leave, a contractor must accurately identify in its records the employee’s covered and non-covered hours worked. In the absence of records or other proof adequately segregating the time—whether because of a contractor’s inadequate recordkeeping, because the contractor preferred permitting the employee to more rapidly accrue paid sick leave rather than keeping such records, or for another reason—the employee would be presumed to have spent all paid time performing work on or in connection with a covered contract. This policy is consistent with the treatment of hours worked on SCA- and non-SCA-covered contracts, *see* 29 CFR 4.178, 4.179, as well as the treatment of covered versus non-covered time under the Minimum Wage Executive Order rulemaking, *see* 79 FR 60660–61, 60672.

Proposed § 13.5(a)(1)(ii) provides that a contractor shall calculate an employee’s accrual of paid sick leave no less frequently than at the conclusion of each workweek, but it is not required to allow employees to accrue paid sick leave in increments smaller than 1 hour for completion of any fraction of 30 hours worked. In other words, a contractor must treat each employee’s paid sick leave as accruing no less frequently than at the end of each workweek, but an employee need only

be permitted to accrue a full hour of paid sick leave after working a full 30 hours, rather than accruing any fraction of an hour for any fraction of 30 hours worked during the workweek. The Department considers “workweek” to have the meaning explained in the FLSA regulations, *i.e.*, a fixed and regularly recurring period of 168 hours—seven consecutive 24-hour periods—that need not coincide with the calendar week but must generally remain fixed for each employee. *See* 29 CFR 778.105.

Proposed § 13.5(a)(1)(ii) further explains that any remaining fraction of 30 hours worked shall be added to hours worked for the same contractor in subsequent workweeks to reach the next 30 hours worked provided that the next workweek in which the employee performs on or in connection with a covered contract occurs within the same accrual year. (The term *accrual year* is defined in proposed § 13.2 and further explained below.) For example, assume an employee works on a covered concessions contract for 45 hours in workweek 1 and 20 hours in workweek 2. At the conclusion of workweek 1, the employee will have accrued 1 hour of paid sick leave based on her first 30 hours worked and, unless the employer chooses to allow accrual in increments smaller than 1 hour, will not have accrued additional paid sick leave based on the additional 15 hours she worked in that workweek. At the conclusion of workweek 2, the employee will have accrued an additional hour of paid sick leave based on the additional 15 hours in workweek 1 plus her first 15 hours worked in workweek 2. The employee need not have earned any paid sick leave based on the remaining 5 hours worked during workweek 2. If the employee spends several subsequent weeks working for the contractor on a private contract and then returns to working on the covered concessions contract, under this provision as proposed, those remaining 5 hours would be added to her subsequent hours worked on the concessions contract for purposes of reaching her next accrued hour of paid sick leave (provided her return to the covered concessions contract occurred within the same accrual year as workweek 2, and, as explained below, provided that the same, rather than a successor, contractor holds the concessions contract). An employer may elect to permit employees to accrue paid sick leave in fractions of an hour—because it finds the related recordkeeping less burdensome than keeping track of hours worked from previous workweeks, it allows for use of

paid sick leave in increments smaller than 1 hour, or for any other reason—provided all hours worked for the contractor on or in connection with covered contracts within the accrual year are counted toward an employee's paid sick leave accrual.

Proposed § 13.5(a)(1)(iii) addresses the accrual of paid sick leave for employees as to whom contractors are not obligated by another statute to keep records of hours worked. For most employees on covered contracts, such as service employees on SCA-covered contracts, laborers and mechanics on DBA-covered contracts, and all employees performing work on or in connection with any covered contract whose wages are governed by the FLSA, contractors are already obligated by the SCA, DBA, or FLSA to keep records of employees' hours worked as that term is defined under those statutes. 29 CFR 4.6(g)(1)(iii), 4.185 (SCA); 29 CFR 5.5(a)(3)(i) (DBA); 29 CFR 516.2(a)(7), 516.30(a) (FLSA). As to those employees, therefore, contractors are already collecting information central to calculating the accrual of paid sick leave. But for those employees who are employed in a bona fide executive, administrative, or professional capacity, as those terms are defined in 29 CFR part 541, contractors are not currently required by the SCA, DBA, or FLSA to keep such records. *See* 29 CFR 4.6(g)(1)(iii), 4.156, 4.185 (requiring that records be kept for "service employees" to whom the SCA applies and excluding from that category "persons employed in an executive, administrative, or professional capacity as those terms are defined in 29 CFR part 541"); 29 CFR 5.5(a)(3)(i), 5.2(m) (requiring that records be kept for "laborers and mechanics" to whom the DBA applies and excluding from those terms "[p]ersons employed in a bona fide executive, administrative, or professional capacity as defined in part 541 of this title"); 29 CFR 516.3 (excusing employers of "each employee in a bona fide executive, administrative, or professional capacity . . . as defined in part 541 of this chapter" from the FLSA requirement to maintain and preserve records of hours worked). In order not to impose a new recordkeeping burden on employers of such employees, proposed § 13.5(a)(1)(iii) would allow contractors to choose to continue not to keep records of such employees' hours worked, but instead to allow the employees to accrue paid sick leave as though the employees were working on or in connection with a covered contract for 40 hours per week. Contractors may,

under the proposed provision, choose to calculate paid sick leave accrual by tracking the employee's actual hours worked. Contractors who do so, however, must permit the relevant employees to accrue paid sick leave based on their actual hours worked consistently across workweeks rather than, for example, using the 40 hours assumption in workweeks during which an employee works more than 40 hours but not those in which the employee works fewer. The Department would apply these principles to any employees exempt from the FLSA's minimum wage and overtime provisions and not covered by the SCA or DBA. This approach is consistent with FMLA recordkeeping regulations, under which there is a general requirement that FMLA-covered employers keep records of hours worked by employees eligible for FMLA leave but an exception with respect to employees who are not covered by or are exempt from the FLSA; employers of those employees need not keep such records so long as the employer presumes that the employees have met the hours requirement for FMLA eligibility. *See* 29 CFR 825.500(c)(1), (f). Proposed § 13.5(a)(1)(iii) further provides that if such an employee regularly works fewer than 40 hours per week on or in connection with covered contracts, whether because the employee splits time between covered and non-covered contracts or because the employee is part-time, the contractor may allow the employee to accrue paid sick leave based on the employee's typical number of hours worked on covered contracts per workweek. Although the contractor need not keep records of the employee's hours worked each week, to use a number less than 40 for this purpose, the contractor must have probative evidence of the employee's typical number of covered hours worked, such as payroll records showing that an employee who performs on a covered contract was paid for only 20 hours per week by the contractor.

Proposed § 13.5(a)(2) would require a contractor to inform an employee, in writing, of the amount of paid sick leave that the employee has accrued but not used (i) no less than monthly, (ii) at any time when the employee makes a request to use paid sick leave, (iii) upon the employee's request for such information, but no more often than once a week, (iv) upon a separation from employment, and (v) upon reinstatement of paid sick leave pursuant to § 13.5(b)(3). Some of these requirements are based on FMLA regulations regarding notification to an

employee of how much leave will be or has been counted against her FMLA entitlement, *see* 29 CFR 825.300(d)(6), but they are modified to account for the differences between FMLA leave and paid sick leave, including in the method of accrual. The fourth and fifth requirements are meant to ensure that employees who may be and ultimately are rehired by a contractor or a successor contractor know how much paid sick leave they should and do have available upon such rehiring. The Department believes it is important that employees be able to determine whether absences will be paid (so they can, for example, schedule their own or their family members' doctors' appointments to occur after they have accrued sufficient paid sick leave), and does not believe these notification requirements will create a significant burden for contractors. The Department notes that a contractor's existing procedure for informing employees of their available paid time off, such as notification accompanying each paycheck or an online system an employee can check at any time, can be used to satisfy or partially satisfy these requirements provided it is written (including electronically) and clearly indicates the amount of paid sick leave an employee has accrued separately from indicating amounts of other types of paid time off available (except where the employer's paid time off policy satisfies the requirements of proposed § 13.5(f)(5), described below).

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

leave available for use as of the beginning of the second accrual year (because the contractor is not permitted to limit an employee's paid sick leave at any point in time as described in the discussion of proposed § 13.5(b)(3) below). Under proposed § 13.5(c)(4), described below, the contractor may not limit the employee's use of that paid sick leave in the second (or any) accrual year, but the employee's use can effectively be limited if the contractor sets, as permitted by this proposed provision, a limit on the amount of paid sick leave an employee can carry over from year to year; in the example, if the employee who had 72 hours of paid sick leave at the beginning of accrual year 2 did not use any leave in that year, she could be permitted to carry over only 56 hours into accrual year 3. The Department believes this option will be beneficial to contractors that find the tracking of hours worked and/or calculations of paid sick leave accrual to be burdensome, and it provides employees with the full amount of paid sick leave contemplated by the Executive Order at the beginning of each accrual year.

Proposed § 13.5(b) implements the Executive Order's provisions, in sections 2(b), (d), and (j), regarding maximum accrual, carryover, and reinstatement of paid sick leave as well as non-payment for unused paid sick leave. Proposed § 13.5(b)(1) provides that a contractor may limit the amount of paid sick leave an employee is permitted to accrue at not less than 56 hours in each accrual year. Proposed § 13.5(b)(1) would also provide detail regarding an *accrual year*, a term defined in proposed § 13.2. The Department proposes to explain that an accrual year is a 12-month period beginning on the date an employee's work on or in connection with a covered contract began or any other fixed date chosen by the contractor, such as the date a covered contract began, the date the contractor's fiscal year begins, a date relevant under State law, or the date a contractor uses for determining employees' leave entitlements under the FMLA pursuant to 29 CFR 825.200. Under this proposal, a contractor may choose its accrual year but must use a consistent option for all employees and may not select or change its accrual year in order to avoid the paid sick leave requirements of Executive Order 13706 and part 13. As under the FMLA, if a contractor does not select an accrual year, the option that provides the most beneficial outcome to the employee will be used. See 29 CFR 825.200(e).

Proposed § 13.5(b)(2) provides that paid sick leave shall carry over from one

accrual year to the next. This proposed language would mean that upon the date a contractor has selected as the beginning of the accrual year, an employee would continue to have available for use as much paid sick leave as the employee had accrued but not used as of the end of the previous accrual year. Proposed § 13.5(b)(2) further provides that paid sick leave carried over from the previous accrual year shall not count toward any limit the contractor sets on the annual accrual of paid sick leave. For example, if an employee carries over 30 unused hours of paid sick leave from accrual year 1 to accrual year 2, she must still be permitted to accrue up to 56 additional hours of paid sick leave in accrual year 2 rather than only 26 (because 30 plus 26 is 56), subject to the limitations described below.

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

of paid sick leave (32 previously available hours plus 16 newly accrued hours) available for use and could be limited to that amount until the next accrual year.

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

Proposed § 13.5(b)(4) further explains that the reinstatement requirement also applies if an employee takes a job on or in connection with a covered successor contract after working for a different contractor on or in connection with the predecessor contract, including when an employee is entitled to a right of first refusal of employment from a successor contractor under Executive Order 13495. (The terms "successor contract" and "predecessor contract" are defined in proposed § 13.2, and the requirements that a predecessor contractor submit to a contracting agency, and a contracting agency provide to a successor contractor, a certified list of relevant employees' accrued, unused paid sick leave appear in proposed §§ 13.26 and 13.11(f), respectively.) For example, if an employee performing work on a contract

to sell food to the public in a National Park has accrued 16 hours of paid sick leave, the contract ends, a different contractor takes over the food stand, and that employee is rehired by the successor contractor, he would begin the new job with 16 hours of paid sick leave. Because the successor contractor is not the same contractor for which the employee previously worked, proposed § 13.5(a)(2) does not require that the successor contractor count any fraction of 30 hours worked for the predecessor contractor toward the accrual of the employee's next hour of paid sick leave. (This means that predecessor and successor contractors will not have to submit and receive, respectively, information about any such fraction of 30 hours worked for each employee.) The successor contractor must, however, treat any of the previously accrued paid sick leave as carried over from a prior accrual year, *i.e.*, under proposed § 13.5(b)(2), the previously accrued paid sick leave does not count toward any annual accrual limit in the accrual year designated by the successor contractor.

The Department invites comments on its interpretation of section 2(d) of the Executive Order to mean that the reinstatement requirement applies if an employee is rehired by a different contractor on or in connection with a covered successor contract after working on or in connection with the predecessor contract. The Department believes that the Executive Order's requirement to carry over previously accrued paid sick leave for employees "rehired by a covered contractor" should be interpreted to include different successor contractors who rehire employees from the predecessor contract. SCA-covered successor contractors generally are required by the Nondisplacement Executive Order to provide a right of first refusal of employment to employees on the predecessor contract in positions for which they are qualified. As a result, many covered successor contractors effectively "rehire" these employees, and thus, it is reasonable to interpret Executive Order 13706, particularly given its purpose of ensuring that employees have access to paid sick leave, to provide that such employees' accrued paid sick leave balances would carry over as well. Such an interpretation also ensures that the carryover of accrued, unused leave does not depend on whether the successor contract is awarded to the same contractor that performed on the predecessor contract (in which case the

Executive Order clearly mandates carryover of unused paid sick leave).

The Department recognizes that the government must ensure that it spends money wisely, and it is imperative that contract actions result in the best value for the taxpayer. The Government understands contractors may include the costs of benefits in overhead and may not (except in cost-type contracts) pay contractors based on their actual costs. The Department therefore invites comments regarding the extent to which its interpretation of the reinstatement requirement may affect pricing and cost accounting, if at all, for covered contractors and contracting agencies, including any potential for paying twice for the same benefit—once to a predecessor contractor charging the Government for predicted use of paid sick leave during its contract term, and a second time to a successor contractor who would be obligated to pay for unused sick leave later used by its employees during the successor's contract, with the Government potentially bearing the added costs through higher contract prices. In one potential scenario, a contractor on a covered contract may have included in its bid the full cost of providing 56 hours of paid sick leave to every employee performing on or in connection with the contract, and the contracting agency may treat the full amount of such leave as an allowable cost. At the end of the contract term, some employees will likely have balances of accrued but unused paid sick which could be carried over to a successor contractor. The Department seeks comment on how the current contractor and any different contractors bidding for the successor contract would account for this situation in their bid pricing. The Department also invites comment as to the extent to which any potential impacts on pricing or cost accounting may be mitigated, including ways to mitigate any potential impact on subcontractors, small businesses, and prime contractors with covered supply chains. In providing comments on the feasibility of mitigation steps, commenters should consider that the requirement for paid sick leave flows down to all subcontract tiers and that in other than cost type contracts, the Government may not have insight into and does not pay contractors based on their actual costs.

Proposed § 13.5(b)(5) implements section 2(j) of the Executive Order by providing that nothing in the Order or part 13 shall require a contractor to make a financial payment to an employee for accrued paid sick leave that has not been used upon a

separation from employment. Although the Executive Order does not prohibit a contractor from making such payments should the contractor so choose, under the regulatory text as proposed, doing so (whether voluntarily or pursuant to a collective bargaining agreement) does not affect that contractor's, or a successor contractor's, obligation to reinstate any accrued paid sick leave upon rehiring the employee within 12 months of the separation pursuant to proposed § 13.5(b)(4). In other words, under proposed § 13.5(b)(5), a contractor cannot avoid the requirement to reinstate paid sick leave when it rehires an employee by cashing out the leave at the time of the original separation from employment. This interpretation is consistent with the Department's understanding that the Executive Order is meant to ensure that employees of Federal contractors have access to paid sick leave rather than its cash equivalent. The Department requests comments, however, regarding the impact of this proposed provision on contractors and employees, as well as the incidence of cash-out for paid time off or paid sick time under contractors' current policies or relevant collective bargaining agreements.

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

Proposed § 13.5(c)(1) provides that subject to the conditions described in proposed § 13.5(d) and (e) and the amount of paid sick leave the employee has available for use, a contractor must permit an employee to use paid sick leave to be absent from work for that contractor on or in connection with a covered contract for four reasons.

First, under proposed § 13.5(c)(1)(i), an employee may use paid sick leave if she is absent because of her own physical or mental illness, injury, or medical condition. These terms are defined in proposed § 13.2 and, as explained above, are meant to be understood broadly.

Second, under proposed § 13.5(c)(1)(ii), an employee may use paid sick leave if she is absent because she is obtaining diagnosis, care, or preventive care from a health care provider. *Obtaining diagnosis, care, or preventive care from a health care provider and health care provider* are also defined in proposed § 13.2, and the Department also interprets those terms broadly.

Third, under proposed § 13.5(c)(1)(iii), an employee may use paid sick leave if she is absent because

she is caring for her child, parent, spouse, domestic partner, or any other individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship who has any of the conditions or needs for diagnosis, care, or preventive care described in proposed § 13.5(c)(1)(i) or (ii) or is otherwise in need of care. The terms *child, parent, spouse, domestic partner, and individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship* are defined in proposed § 13.2. As explained, the Department understands the use of these terms in the Executive Order to be an indication that the category of individuals for whom an employee can use paid sick leave to care is expansive. Furthermore, the individual for whom the employee is caring may have any of the broadly understood conditions or needs referred to in proposed § 13.5(c)(1)(i) or (ii). For example, an employee may use paid sick leave to be with a child home from school with a cold or to accompany his spouse to an appointment at a fertility clinic. Proposed § 13.5(c)(1)(iii) also refers to an individual who is “otherwise in need of care,” language that appears in section 2(c) of the Executive Order. The Department interprets this phrase to refer to non-medical caregiving for an individual who has a general need for assistance related to the individual’s underlying health condition. For example, an employee may use paid sick leave to provide his grandfather, who has dementia, unpaid assistance with bathing, dressing, and eating if the grandfather’s usual paid personal care attendant is unable to keep her regular schedule.

Fourth, under proposed § 13.5(c)(1)(iv), an employee may use paid sick leave if the absence is because of domestic violence, sexual assault, or stalking, if the time absent from work is for the purposes otherwise described in proposed § 13.5(c)(1)(i) or (ii) or to obtain additional counseling, seek relocation, seek assistance from a victim services organization, take related legal action, including preparation for or participation in any related civil or criminal legal proceeding, or assist an individual related to the employee as described in proposed § 13.5(c)(1)(iii) in engaging in any of these activities. The terms used in proposed § 13.5(c)(1)(iv) (*domestic violence*, which includes the terms *spouse, domestic partner, intimate partner, and family violence; sexual assault; stalking; obtain additional counseling, seek relocation,*

*seek assistance from a victim services organization, or take related legal action; victim services organization; and related legal action or related civil or criminal legal proceeding*) are defined in proposed § 13.2. The Department reiterates that it interprets these terms broadly in keeping with the purpose of ensuring that victims of domestic violence, sexual assault, or stalking are able to obtain the care, safety, and legal protections they need without losing wages or their jobs and that employees can assist such victims who are family members or like family in doing so. For example, an employee who is a victim of domestic violence could use a day of paid sick leave to prepare for a meeting with an attorney, travel to the attorney’s office, have the meeting to discuss her legal options, and travel home; a victim could use a day of paid sick leave to go to a courthouse to determine the process for filing a petition for a civil protection order, complete any necessary paperwork, and file that paperwork with the court, and another full day to attend proceedings at the court in support of that application, including mandatory mediation. For this purpose, assisting another individual who is a victim of domestic violence, sexual assault, or stalking includes, but is not limited to, accompanying the victim to see a health care provider, attorney, social worker, victim advocate, or other individual who provides services the victim needs as a result of the domestic violence, sexual assault, or stalking. If the individual the employee is assisting is a minor victim of domestic violence or child sexual abuse, the employee could use paid sick leave to, for example, seek legal protections for the victim (including filing a police report and/or seeking a civil protection order), medical treatment for the victim, or emergency relocation services.

Just as with the accrual of paid sick leave, use of paid sick leave is contractor, rather than contract, specific, meaning that an employee who has accrued paid sick leave working on or in connection with one covered contract may use the paid sick leave for time she would otherwise have been working on or in connection with another covered contract for the same contractor. For example, if an employee had accrued 2 hours of paid sick leave over the course of several workweeks during which she worked for a single contractor in connection with one covered contract for 30 hours and another two covered contracts for 15 hours each, she could use her accrued paid sick leave during time she was scheduled to perform work in connection with any of the three

contracts, or any other covered contract, on behalf of the same contractor.

Additionally, the Department notes that under proposed § 13.5(c)(1), an employee need only be permitted to use paid sick leave during time the employee would otherwise have spent working on or in connection with a covered contract rather than time spent performing other work (such as on a private contract), even if that work is for the same contractor. As explained elsewhere in this preamble, it is the contractor’s responsibility to keep adequate records distinguishing between an employee’s covered and non-covered work, and any denial of a request to use paid sick leave because the leave would occur while an employee is performing work that is not covered by Executive Order 13706 or part 13 must be supported by records or other proof demonstrating that fact. As for an employee who falls within the 20 percent of hours worked exclusion created by proposed § 13.4(e) for some workweeks but not others, the employee must be permitted to use paid sick leave at any time the employee would be working on or in connection with covered contracts, regardless of whether they fall during workweeks in which the exclusion applies. This approach is designed to avoid complications that would otherwise arise in responding to requests to use paid sick leave accrued by such employees. Specifically, an employee could request to use paid sick leave during a week in which it was not clear at the time of the request (because it would not be known until the end of the week) whether the employee met the 20 percent threshold; under this approach, in such circumstances, the contractor must permit the use of paid sick leave (assuming all relevant requirements for use are met) rather than deny the request or provide an uncertain response to the employee.

Proposed § 13.5(c)(2) provides that a contractor shall account for an employee’s use of paid sick leave in increments of no greater than 1 hour. In other words, although a contractor may choose to allow employees to use paid sick leave in increments of smaller than 1 hour (such as half an hour or 15 minutes), it may not require employees to use paid sick leave in increments of any more than 1 hour. For example, if an employee needs to be an hour late for work because she accompanied her sister to a chemotherapy appointment that morning, her employer must permit her to use 1 hour of paid sick leave (rather than, for instance, requiring her to take a full day off or use a full day’s leave).

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

Proposed § 13.5(c)(2)(i) further explains that a contractor may not reduce an employee’s accrued paid sick leave by more than the amount of leave the employee actually takes, and a contractor may not require an employee to take more leave than is necessary to address the circumstances that precipitated the need for the leave, provided that the leave is counted using an increment of no greater than 1 hour. This language is based on FMLA regulations regarding the use of FMLA leave. *See* 29 CFR 825.205(a). It means that if an employer chooses to waive its increment of leave policy in order to return an employee to work—for example, if an employee arrives a half hour late to work because she was at an appointment with a psychologist and the employer waives its normal one-hour increment of leave and puts the employee to work immediately—the contractor must treat the employee as having used no more than the amount of leave the employee actually used, half an hour. *See* The Family and Medical Leave Act; Final Rule, 78 FR 8867 (Feb. 6, 2013) (discussing relevant language codified in 20 CFR 825.205(a)). Under no circumstances may a contractor treat an employee as having used paid sick leave for any time that employee was working.

Proposed § 13.5(c)(2)(ii) explains that the amount of paid sick leave used may not exceed the hours an employee would have worked if the need for leave

had not arisen. If, for example, an employee is scheduled to work from 9am to 3pm, and she is absent from work from 10:30am to 12:30pm to take her father to a doctor’s appointment, a contractor may deduct no more than 2 hours of paid sick leave from her accrued paid sick leave. If the employee is scheduled to work from 9am to 3pm and she is absent from work for the entire day to care for her sick child, a contractor may deduct no more than 6 hours of paid sick leave from her accrued paid sick leave. If an employee is out on paid sick leave at a time when she could have worked beyond her scheduled hours but would not have been required to do so, the contractor may not treat the employee as having used paid sick leave for those optional hours. For example, if an employee scheduled to work from 9am to 3pm could have chosen to stay until 7pm that night to earn overtime, but she was absent for the entire day, a contractor may not deduct more than 6 hours of paid sick leave from her accrued paid sick leave. This provision is consistent with the FMLA regulation at 29 CFR 925.205(e) (“Voluntary overtime hours that an employee does not work due to an FMLA-qualifying reason may not be counted against the employee’s FMLA leave entitlement.”).

Proposed § 13.5(c)(3) provides that a contractor shall provide to an employee using paid sick leave the same pay and benefits the employee would have received had the employee not used paid sick leave. In other words, while on paid sick leave, employees paid on a salary basis may not face any deduction in pay, and employees paid hourly must receive the same hourly rate of pay they would have earned had they been present at work. Furthermore, for time employees are using paid sick leave, contractors must continue to make contributions to any fringe benefit plan (for example, a health insurance or pension plan) and count time toward the earning of other benefits (for example, the accrual of vacation time) as they would were the employees working. In particular, employees whose wages are governed by the SCA or DBA must receive the same wages required under those statutes, including health and welfare and other fringe benefits or the cash equivalent thereof, as they would have earned had they been present at work instead of using paid sick leave. As discussed above, contractors must count employees’ time using paid sick leave toward the accrual of paid sick leave. Under this proposal, employees who receive different pay and benefits for different portions of

their work (for example, an employee who works as a carpenter on one DBA-covered contract and a skilled laborer on another DBA-covered contract on which she works for the same contractor), the pay and benefits due while the employee uses paid sick leave is to be determined based on which work she would have been doing at the time she uses the leave.

The Department proposes to include as § 13.5(c)(4) a restriction on limits to an employee’s use of paid sick leave. Specifically, as proposed, § 13.5(c)(4) would provide that a contractor may not limit the amount of paid sick leave an employee may use per year or at once. In other words, although a contractor may limit an employee’s accrual of paid sick leave to 56 hours per year, a contractor may not prohibit the employee from, for example, using 16 hours carried over from the previous accrual year, accruing 56 additional hours, and then using all 56 accrued hours even though her total use in the current accrual year would exceed 56 hours. Under the proposed text, an employer also cannot limit the amount of paid sick leave an employee may use at one time. For example, an employer cannot establish a policy prohibiting employees from using any particular number of hours of paid sick leave in a single workweek. Similarly, an employer may not deny an employee’s request to use paid sick leave for 2 full days in a row based on the length of time requested (as long as the employee has accrued sufficient paid sick leave to cover the time).

Proposed § 13.5(c)(5) provides that a contractor may not make an employee’s use of paid sick leave contingent on the employee’s finding a replacement worker to cover any work time to be missed or the fulfillment of the contractor’s operational needs. This language implements section 2(e) of the Executive Order and makes explicit the important point that the intent of the Executive Order can only be fulfilled if employees are entitled to use paid sick leave even if the need for such leave arises at a time that is inconvenient for a contractor.

Proposed § 13.5(d) implements section 2(h) of Executive Order 13706. Proposed § 13.5(d)(1) provides that a contractor shall permit an employee to use any or all of the employee’s available paid sick leave upon the oral or written request of an employee that includes information sufficient to inform the contractor that the employee is seeking to be absent from work for a purpose described in proposed § 13.5(c)(1) and, to the extent reasonably feasible, the anticipated duration of the



leave. Proposed § 13.5(d)(1) further provides that the request shall be directed to the appropriate personnel pursuant to a contractor's policy or, in the absence of a formal policy, any personnel who typically receive requests for other types of leave or otherwise address scheduling issues on behalf of the contractor.

Under this proposed text, employees may request paid sick leave by any oral or written method, including in person, by phone, via email, or with a note reasonably calculated to provide timely notice of the employee's intent to take leave. Additionally, although the request must contain sufficient information for a contractor to determine whether it is a proper use of paid sick leave, and the contractor may ask questions tailored to making that determination, the request need not contain extensive or detailed information about the reason for the leave and a contractor may not require such information. Because the employee only needs to provide information sufficient to inform the contractor that she wishes to miss work for a reason that is a permissible use of paid sick leave, the employee need not specify all symptoms or details of the need for leave, nor need she specifically request to use paid sick leave required by the Executive Order or part 13 or even use the words "sick leave" or "paid sick leave." The employee could simply state, for example, that the employee has a cold, a dentist appointment, or an appointment with an attorney regarding a domestic violence matter. In such cases, a contractor could not ask, for purposes of approving or rejecting the request to use paid sick leave, when the cold began or how severe it is, what type of doctor the employee is seeing or for what purpose, or for any detail regarding the circumstances of the domestic violence.

The request similarly need not provide extensive details regarding the employee's relationship with an individual for whom the employee is caring or will care; it need only inform the contractor that the employee has a family or family-like relationship with the individual. Simply stating, for example, that the employee's son has a stomach bug, the employee's wife was injured in a car accident, or the employee's father needs assistance going to a doctor's appointment is sufficient. If the employee's request for paid sick leave involves providing care for an individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship, the employee need only assert that a family or family-like

relationship exists, such as by stating that the employee needs to care for her ill grandmother or needs to accompany a man who is like a brother to him to a doctor's appointment. Although a contractor may ask questions to determine if the use of paid sick leave is justified, such as inquiring of an employee who asks to take leave to care for a close friend who was in a car accident whether that friend is someone whom the employee considers to be like family, the contractor may not demand intimate details upon receiving a positive response to such an inquiry. Although the Department recognizes that paid sick leave is available for only particular uses, it interprets Executive Order 13706 as intending to provide paid sick leave in a manner that is not burdensome for employees and does not allow significant intrusion into their personal lives by their employers.

To the extent reasonably feasible, the request should provide an estimate of the timing and amount of such leave needed; this requirement is satisfied by stating that the sick employee hopes only to be out for 1 day, that the child's dentist appointment is on a particular date at 10:00 a.m. and is not anticipated to take more than an hour, or that the appointment with the attorney is on a particular date at 2:00 p.m. and will likely continue for the remainder of the work day. The contractor may not hold an employee to the estimate provided in the request; for example, the sick employee could return to work in the afternoon if she recovers more quickly than she expected, and an employee can use more than an hour of paid sick leave (provided she has more than 1 hour available for use) if the dentist appointment runs longer than anticipated.

A request to use paid sick leave is acceptable if the employee directs it to the appropriate personnel pursuant to a contractor's policy or, in the absence of a formal policy, any personnel who typically receive requests for other types of leave on behalf of the contractor, such as a supervisor or human resources department staff. The Department notes that as explained elsewhere and required by §§ 13.5(e)(1)(ii) and 13.25(d), when an employee requests leave for the purposes described in proposed § 13.5(c)(1)(iv), *i.e.*, for absences related to being a victim of domestic violence, sexual assault, or stalking, the contractor shall maintain confidentiality about the domestic abuse, sexual assault, or stalking, unless the employee consents or when disclosure is required by law.

Proposed § 13.5(d)(2) provides that if the need to use paid sick leave is

foreseeable, the employee's request shall be made at least 7 calendar days in advance, whereas if the employee is unable to request leave at least 7 calendar days in advance, the request shall be made as soon as is practicable. The term *as soon as is practicable* is defined in proposed § 13.2. Proposed § 13.5(d)(2) further provides that when an employee becomes aware of a need to take paid sick leave less than 7 calendar days in advance, it should typically be practicable for the employee to make a request for leave either the day the employee becomes aware of the need to take paid sick leave or the next business day, but notes that in all cases, the determination of when an employee could practicably make a request must take into account the individual facts and circumstances. The Department would consider any request made on the day the employee becomes aware of the need to take paid sick leave or the following business day to have been made as soon as was practicable. Although the Department will not presume that requests made beyond that time frame were made as soon as practicable, the facts and circumstances of the specific situation could be such that despite the longer delay, the employee did in fact notify the employer as soon as was possible and practical. For example, if an employee makes an appointment for his daughter to have an annual exam with her doctor 2 weeks in the future, the employee should ask to use paid sick leave to take the daughter to the appointment at least 7 calendar days before the date of the appointment. If instead the nurse at the employee's daughter's school called one afternoon to say the daughter had a high fever and he needed to take her out of school right away, he could plainly not have requested leave 7 days in advance, and he should instead request leave as soon as is practicable. Depending on the circumstances, such as how much attention the daughter needed, whether the employee had access to a phone or computer, and/or whether the person to whom the request would be directed was available, in this situation, as soon as practicable could be as the employee was preparing to leave work to get his daughter, when he got home with his daughter, later that evening (perhaps after she was asleep), or the next morning (assuming the next day was a business day). If, on the other hand, the employee himself was in a serious car accident, was taken to the hospital, and had surgery the next day, he could not practicably request leave the day of the accident or of the surgery (*i.e.*, the day

he became aware of the need for leave or the next day).

If an employee has not complied with the requirements of proposed § 13.5(d)(2), a contractor may properly deny the employee's request to use paid sick leave. For example, if an employee arranges a doctor's appointment for his son 3 weeks in advance but does not submit a request to use paid sick leave until 2 days before the appointment, the contractor may properly deny that request. Denial of the request would not be proper, however, if the need for leave was not foreseeable and the employee made the request as soon as was practicable, such as if upon making the request 2 days in advance, the employee explained that his husband had planned to take their son to the appointment, but the husband learned on the morning the employee submitted the request that the husband would be unavailable at the time of the appointment, and the couple decided that the employee would have to take the son instead.

Proposed § 13.5(d)(3) addresses a contractor's response to an employee's request to use paid sick leave. Proposed § 13.5(d)(3)(i) provides that a contractor may communicate its grant of a request to use paid sick leave either orally or in writing provided that the contractor also complies with the requirement in § 13.5(a)(2) to inform the employee in writing of the amount of paid sick leave the employee has available for use.

Proposed § 13.5(d)(3)(ii) provides that a contractor shall communicate any denial of a request to use paid sick leave in writing, with an explanation for the denial. It further provides that denial is appropriate if, for example, the employee did not provide sufficient information about the need for paid sick leave; the reason given is not consistent with the uses of paid sick leave described in proposed § 13.5(c)(1); the employee did not indicate when the need would arise; the employee has not accrued, and will not have accrued by the date of leave anticipated in the request, a sufficient amount of paid sick leave to cover the request (in which case, if the employee will have any paid sick leave available for use, only a partial denial is appropriate); or the request is to use paid sick leave during time the employee is scheduled to be performing non-covered work. The proposed text also explains that if the denial is based on insufficient information provided in the request, such as if the employee did not state the time of an appointment with a health care provider, the contractor must permit the employee to submit a new, corrected request. It further notes that if the denial is based on an employee's

request to use paid sick leave during time she is scheduled to be performing non-covered work, the denial must be supported by records adequately segregating the employee's time spent on covered and non-covered contracts.

Proposed § 13.5(d)(3)(iii) provides that a contractor shall respond to any request to use paid sick leave as soon as is practicable after the request is made. As proposed, it further explains that although the determination of when it is practicable for a contractor to provide a response will take into account the individual facts and circumstances, it should in many circumstances be practicable for the contractor to respond to a request immediately or within a few hours. The proposed provision further explains that in some instances, such as if it is unclear at the time of the request whether the employee will be working on or in connection with a covered or non-covered contract at the time for which paid sick leave is requested, as soon as practicable could mean within a day or no longer than within a few days.

Proposed § 13.5(e) implements section 2(i) of the Executive Order, which addresses certification and documentation for leave of 3 or more consecutive workdays. Under proposed § 13.5(e)(1)(i), a contractor may require certification issued by a health care provider to verify the need for paid sick leave used for the purposes listed in proposed § 13.5(c)(1)(i), (ii), or (iii) only if the employee is absent for 3 or more consecutive full workdays. Under this provision, a contractor may not require certification to justify the use of paid sick leave for any amount of time shorter than 3 consecutive full workdays. For instance, if an employee is scheduled to work from 9am to 5pm on Monday, Tuesday, and Wednesday, and he is unable to come to work at all during those times because he is hospitalized due to a severe infection, his employer may require that he provide certification to show that he was in the hospital. If the employee instead uses 4 hours of paid sick leave on Monday because his daughter's school nurse calls in the early afternoon to say his daughter has a fever and must be taken home, all 8 hours on Tuesday because he stays home with his ill daughter, and another 2 hours on Wednesday because his daughter isn't well enough to go to school on time, his employer may not require certification because he has not used paid sick leave for all of his scheduled time on 3 consecutive full workdays. A proposed definition of *certification issued by a health care provider* appears in proposed § 13.2. Proposed § 13.5(e)(1)(i)

further notes that the contractor must protect the confidentiality of any certification as required by proposed § 13.25(d).

Proposed § 13.5(e)(1)(ii) addresses documentation to verify the use of paid sick leave for the purposes listed in proposed § 13.5(c)(1)(iv), *i.e.*, for absences related to domestic violence, sexual assault, or stalking. Specifically, only if an employee uses paid sick leave on 3 or more consecutive full workdays for such purposes may a contractor require documentation from an appropriate individual or organization to verify the need for such leave. Such documentation may come from any person involved in providing or assisting with the care, counseling, relocation, assistance of a victim services organization, or related legal action, such as, but not limited to, a health care provider, counselor, employee of the victim services organization, or attorney.

Proposed § 13.5(e)(1)(ii) also provides that the contractor may only require that such documentation contain the minimum necessary information establishing the need for the employee to be absent from work. For example, the documentation could consist of a note from a social worker at a victim services organization stating that the employee received services from the organization related to being a victim of domestic violence and moved to a new home for reasons related to the domestic violence, as well as a receipt from a moving company or a note from a landlord that indicates the date(s) of the move; it need not name the perpetrator of the domestic violence, the nature of the acts that constitute domestic violence, the addresses of the old or new homes, or any other details beyond those sufficient to make clear that the time was used for a purpose that justifies the use of paid sick leave. As another example, documentation could consist of a letter from a legal services attorney or sexual assault victim advocate who is assisting an employee who is a victim of sexual assault in completing the paperwork and filing for a civil protection order or restraining order, explaining that the employee spent time (consisting of most business hours over 3 consecutive days) with the attorney or advocate preparing for the hearing, including completing the petition for the court's order and obtaining a time for the hearing, and attending the hearing, including waiting at the court house and attending the proceedings; the letter would not need to explain the circumstances of the sexual assault, name the person(s) accused of the sexual assault, or

otherwise provide any details beyond those sufficient to justify the need to use paid sick leave. Similarly, if the employee used 3 or more consecutive full workdays of paid sick leave to fly across the country to be with her daughter who is a victim of sexual assault to provide support related to an administrative hearing at the university the daughter attends, documentation could consist of the boarding passes from the employee's plane flights and emails from a university official to the daughter setting the date of the hearing, without providing details about the specific subject matter of the hearing.

Proposed § 13.5(e)(1)(ii) further provides that the contractor shall not disclose any verification information and shall maintain confidentiality about the domestic abuse, sexual assault, or stalking as required by § 13.25(d).

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

Proposed § 13.5(e)(3) address timing with respect to certification and documentation. Proposed § 13.5(e)(3)(i) provides that a contractor may only require certification or documentation if the contractor informs an employee before the employee returns to work that

certification or documentation will be required to verify the use of paid sick leave if the employee is absent for 3 or more consecutive full workdays. This time limit is necessary because without notice at the time the employee or individual cared for by the employee has the condition or need justifying the use of paid sick leave, it could become difficult or even impossible for the employee to obtain certification. For example, if an employee has the flu for 4 days, without knowing that the contractor wishes her to provide certification from a health care provider verifying that she was sick, she might well recover fully without contacting a doctor. A contractor's general policy, if made clear to employees (such as in an employee handbook), requiring certification of the use of paid sick leave for absences of 3 or more consecutive full workdays suffices to meet this requirement.

Proposed § 13.5(e)(3)(ii) further provides that a contractor may require the employee to provide certification or documentation within 30 days of the first day of the 3 or more consecutive full workdays of paid sick leave but may not set a shorter deadline for its submission. This requirement is set forth in section 2(i) of the Executive Order. 80 FR 54698.

The Department proposes to provide in § 13.5(e)(3)(iii) that while a contractor is waiting for or reviewing certification or documentation, it must treat the employee's otherwise proper request for 3 or more consecutive full workdays of paid sick leave as valid. Additionally, the proposed provision explains that if the contractor ultimately does not receive certification or documentation, or if the certification or documentation the employee provides is insufficient to verify the employee's need for paid sick leave, the contractor may, within 10 calendar days of the deadline for receiving the certification or documentation or within 10 calendar days of the receipt of the insufficient certification or documentation, whichever occurs first, retroactively deny the employee's request to use paid sick leave. Certification or documentation could be insufficient, for example, because it does not describe a need for leave consistent with the permitted reasons for using paid sick leave or because, if the reason for leave was for a purpose other than that described in proposed § 13.5(c)(1)(iv), it was not created or signed by a health care provider or a health care provider's representative. Proposed § 13.5(e)(3)(iii) further provides that if the contractor retroactively rejects the employee's request, the contractor may recover the

value of the pay and benefits the employee received but to which the employee was not entitled, including through deduction from any sums due to the employee (e.g., unpaid wages, vacation pay, profit sharing, etc.), provided such deductions do not otherwise violate applicable Federal or State wage payment or other laws. This language is derived from the FMLA regulations regarding the consequences of an employee's failure to return to work after an employer paid for health or non-health benefit premiums while an employee was on FMLA leave. *See* 29 CFR 825.213(f). If a contractor retroactively denies an employee's request to use paid sick leave as contemplated here, the amount of paid sick leave the employee was treated as having used must be reinstated to the employee.

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

Proposed § 13.5(e)(4) further provides that to make contact with the health care provider or other individual who created or signed the certification or documentation, the contractor must use a human resources professional, a leave administrator, or a management official. This requirement is derived from a regulatory provision under the FMLA. *See* 29 CFR 825.307(a). The proposed text goes on to note that the employee's direct supervisor may not contact the employee's health care provider unless there is no other appropriate individual who can do so. This requirement is also based on a similar provision in the FMLA regulations, 29 CFR 825.307(a), but unlike that provision, it does not contain a complete prohibition on an employee's direct supervisor contacting the health care provider. Although the Department seeks to protect the privacy of employees who may not wish to share personal medical or other information with a supervisor to the extent possible, it recognizes that the Executive Order applies to contractors that are not covered by the FMLA because their businesses are not of the requisite size, so it believes the limited proposed exception is necessary.

Proposed § 13.5(e)(4) also addresses the Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule, Pub. L. 104–191, 110 Stat. 1936 (1996), which governs the privacy of individually identifiable health information created or held by HIPAA-covered entities and the requirements of which are set forth at 45 CFR parts 160 and 164. Specifically, it provides that the HIPAA Privacy Rule requirements must be satisfied when individually identifiable health information of an employee is shared with a contractor by a HIPAA-covered health care provider. As is true for purposes of the FMLA, if an employee's certification is unclear and the employee chooses not to provide the contractor with authorization allowing the contractor to clarify the certification with the health care provider (and does not otherwise clarify the certification), the contractor may deny an employee's request to use paid sick leave. *See* 29 CFR 825.307(a).

Proposed § 13.5(f) addresses the interaction between the paid sick leave required by Executive Order 13706 and part 13 with other laws as well as other paid time off policies. Proposed § 13.5(f)(1) implements section 2(l) of the Executive Order by providing that nothing in the Order or part 13 shall excuse noncompliance with or supersede any applicable Federal or State law, any applicable law or municipal ordinance, or a collective bargaining agreement requiring greater

paid sick leave or leave rights than those established under the Executive Order and part 13.

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

Proposed § 13.5(f)(2)(ii) provides that a contractor may count the value of any paid sick time provided in excess of the requirements of Executive Order 13706 and part 13 (and any other law) toward its obligations under the SCA or DBA in keeping with the requirements of those Acts. In particular, a contractor may take credit for such paid sick time provided in compliance with the SCA requirements regarding fringe benefits as described in 29 CFR 4.170 through 4.177 or with the DBA requirements regarding fringe benefits as described in 29 CFR 5.20 through 5.32.

Proposed § 13.5(f)(3) addresses the interaction of paid sick leave required by Executive Order 13706 and part 13 with the FMLA. It provides that a contractor's obligations under the Executive Order and part 13 have no effect on its obligations to comply with, or ability to act pursuant to, the FMLA.

It further provides that paid sick leave may be substituted for (that is, may run concurrently with) unpaid FMLA leave under the same conditions as other paid time off pursuant to 29 CFR 825.207. It also explains that as to time off that is designated as FMLA leave and for which an employee uses paid sick leave, all notices and certifications that satisfy the FMLA requirements set forth at 29 CFR 825.300 through 825.308 will satisfy the request for leave and certification requirements of proposed §§ 13.5(d) and (e). For example, although under the Executive Order and part 13 an employee's request to use paid sick leave need only be made at least 7 days in advance if the need for leave is foreseeable, under the FMLA, such notice must be made at least 30 days in advance pursuant to 29 CFR 825.302(a). If an employee seeks to use paid sick leave for an FMLA-qualifying reason (and thus both types of leave will run concurrently), such as if she needs surgery, the contractor may require that she comply with the FMLA's notice requirements, which will satisfy the requirements of the Executive Order and part 13; specifically, when she notifies the contractor of the date of her surgery (that is 30 days in the future) and likely recovery period, she will have complied with the requirements of § 13.5(d) to provide oral or written notice of a need for leave that justifies the use of paid sick leave, and the expected duration of the leave, at least 7 days in advance. Similarly, although under the Executive Order and part 13, a contractor may not require certification of the need to use paid sick leave unless the employee uses more than 3 consecutive full workdays of paid sick leave, a contractor is permitted to require certification from an employee for a shorter period of FMLA-designated leave as provided in 29 CFR 825.305. If an employee is concurrently using paid sick leave and FMLA leave, a contractor may require certification as permitted under the FMLA even if certification for paid sick leave would not be permitted under Executive Order 13706 and part 13 (such as, for example, if the employee only needed to use 1 day of leave). If that certification supported the use of FMLA leave for an employee's serious health condition, it would be more than sufficient to serve as the certification issued by a health care provider for use of 3 consecutive full workdays of paid sick leave should such certification become necessary. Even if the certification was insufficient to demonstrate that an employee was entitled to use FMLA leave (such as because although the employee is ill,

the illness did not meet the definition of a serious health condition), it could nevertheless be sufficient to meet the requirements of the Executive Order and part 13.

Proposed § 13.5(f)(4) addresses the interaction of paid sick leave required by Executive Order 13706 and part 13 with paid sick time required by State or local law. As proposed, it explains that a contractor's compliance with a State or local law requiring that employees be provided with paid sick time does not excuse the contractor from compliance with its obligations under the Executive Order 13706 or part 13. It further provides that a contractor may, however, satisfy its obligations under the Order and part 13 by providing paid sick time that fulfills the requirements of a State or local law provided that the paid sick time is accrued and may be used in a manner that meets or exceeds the requirements of the Order and part 13. In other words, a contractor whose employees perform work on or in connection with covered contracts in States, counties, or municipalities that have statutes or ordinances requiring that employees be provided with paid sick time must comply with both those laws and the Executive Order. But that contractor is permitted, at least for purposes of the Executive Order and part 13, to fulfill both obligations simultaneously. If, for example, a State law requires that employees receive up to 40 hours of paid sick time, a contractor is not necessarily required to provide employees performing on or in connection with covered contracts in that State an additional 56 hours of paid sick leave; if the contractor provides paid sick time in compliance with both the State law and the Executive Order and part 13, the contractor need only provide up to 56 hours total of paid sick leave. Because the requirements of State and local laws and the Order and part 13 will rarely be identical, to satisfy both, a contractor will likely need to comply with the requirements that are more generous to employees. For example, a contractor could satisfy both a county law that requires employees to earn at least 1 hour of paid sick time for every 40 hours worked and the Executive Order by allowing employees to earn 1 hour of paid sick leave for every 30 hours worked. Or a contractor could satisfy both a State statute that allows employers to limit employees' use of paid sick time to 40 hours per year and the Executive Order by not limiting use per year (although accrual and carryover limits, which would effectively limit use, might still apply). Similarly, a contractor could satisfy

both a municipal ordinance that does not permit an employer to require certification of the reason for using paid sick time under any circumstances and the Executive Order and part 13 by choosing not to require certification for the use of paid sick time even if an employee uses such leave for more than 3 consecutive days.

Proposed § 13.5(f)(5) addresses the interaction between the paid sick leave requirements of Executive Order 13706 and part 13 and an employer's paid time off policies, explaining that the Order and part 13 need not have any effect on a contractor's voluntary paid time off policy, whether provided pursuant to a collective bargaining agreement or otherwise. Whether as a practical matter the requirement to provide paid sick leave under the Order and part 13 affects the amount or types of other leave a contractor provides or a union negotiates is not an issue within the Department's rulemaking authority.

Proposed § 13.5(f)(5) also provides that a contractor's existing paid time off policy (if provided in addition to the fulfillment of SCA or DBA obligations, if applicable) will satisfy the requirements of the Executive Order and part 13 if various conditions are met. First, the paid time off must be made available to all employees described in proposed § 13.3(a)(2) (other than those excluded by proposed § 13.4(e)). Second, employees must be permitted to use the paid time off for at least all of the purposes described in proposed § 13.5(c)(1). Third, the paid time off must be provided in a manner and an amount sufficient to comply with the rules and restrictions regarding the accrual of paid sick leave set forth in proposed § 13.5(a) and regarding maximum accrual, carryover, reinstatement, and payment for unused leave set forth in proposed § 13.5(b). Fourth, the paid time off must be provided pursuant to policies sufficient to comply with the rules and restrictions regarding use of paid sick leave set forth in proposed § 13.5(c), requests for leave set forth in proposed § 13.5(d), and certification and documentation set forth in proposed § 13.5(e), at least with respect to any paid time off used for the purposes described in proposed § 13.5(c)(1). Finally, the paid time off must be protected by the prohibitions against interference, discrimination, and recordkeeping violations described in proposed § 13.6 and the prohibition against waiver of rights described in proposed § 13.7, at least with respect to any paid time off used for the purposes described in proposed § 13.5(c)(1).

In other words, a contractor may use its paid time off policy to satisfy its obligations under the Order and part 13, but only if the policy complies with all of the accrual-related requirements of the Executive Order and part 13—including, but not limited to, allowing employees to accrue at least 1 hour of leave for every 30 hours worked as that term is defined for purposes of part 13, not limiting annual accrual at any less than 56 hours, allowing carryover of leave from the previous accrual year that does not count toward any limit on annual accrual in the new accrual year, and reinstating leave for an employee rehired by the same or a successor contractor within 12 months of a job separation. And a contractor may only use its paid time off policy to satisfy its obligations under the Order and part 13 if when an employee seeks to use or does use leave for the purposes described in proposed § 13.5(c)(1), all of which must be permissible uses of the paid leave, the request, any required certification, and use of the leave comply with all of the specifications of this proposed part. This requirement includes, but is not limited to, allowing employees to take leave in increments of no greater than 1 hour, not setting limits on the amount of leave that may be used per year or at once, not making the use of leave contingent on finding a replacement worker or fulfilling operational needs, requiring employees to make requests for leave no longer than 7 days in advance of the need or as soon as is practicable if the need for leave is not foreseeable, denying requests for leave in writing with an explanation for the denial that is in accordance with the permissible reasons for denial under this proposed rule, and requiring certification or documentation of the leave only if the employee uses leave for more than 3 or more consecutive full workdays and only requiring the minimum information necessary to verify the leave. Furthermore, a contractor may only use its paid time off policy to satisfy its obligations under the Order and part 13 if when an employee seeks to use or does use leave for the purposes described in proposed § 13.5(c)(1), that leave is treated as protected by the prohibitions on interference and discrimination in this proposed part (described below), meaning that, for example, the request for or use of leave cannot be used as a negative factor in any hiring or promotion decision and cannot be the basis for discipline, including by being counted in a no fault attendance policy.

The Department notes that if, for example, a contractor does not permit an employee to use the paid time off for the purposes described in proposed § 13.5(c)(1)(iv) related to domestic violence, sexual assault, or stalking, its paid time off policy would not satisfy its obligations under the Executive Order and part 13. Accordingly, the contractor could choose to amend its paid time off policy to address the omission or could provide paid sick leave in addition to paid time off. Similarly, if a contractor's policy allowed the contractor to deny an employee's request for leave to be used for one of the purposes described in proposed § 13.5(c)(1) based on operational needs, that policy would not satisfy the contractor's obligations under the Executive Order and part 13.

Although under this proposed provision, a contractor need not treat vacation or other uses of leave under its paid time off policy identically to the way it treats paid sick leave, the Department will consider any aspects of a paid time off policy that create significant barriers to an employee's using the time as paid sick leave as interference with the employee's accrual or use under the Order or part 13 in violation of proposed § 13.6(a) or, if appropriate, as discrimination in violation of proposed § 13.6(b). For example, although a contractor need not allow vacation time to be taken in no greater than 1-hour increments, it would constitute a violation of proposed § 13.6(a) if a contractor were to require employees to use all of the time provided in its paid time off policy at once should the employee ask to take vacation, such that any employee who took any vacation in an accrual year would automatically have no paid time off remaining for the purposes described in proposed § 13.5(c)(1). Similarly, it would constitute a violation of proposed § 13.6(a) if a contractor required employees to request leave for vacation 1 month in advance and would not allow an employee who had scheduled such leave and who became, or had a family member who became, unexpectedly ill to instead use paid time off for that purpose (and cancel the other upcoming leave, or take it as unpaid leave).

#### Section 13.6 Prohibited Acts

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

Proposed § 13.6(a)(1) provides that a contractor may not in any manner interfere with an employee's accrual or use of paid sick leave as required by Executive Order 13706 or part 13.

Proposed § 13.6(a)(2) includes a non-exclusive list of examples of interference. Interference includes miscalculating the amount of paid sick leave an employee has accrued, such as if a contractor does not include all of an employee's hours worked in calculating accrual. Interference also includes denying or unreasonably delaying a response to a proper request to use paid sick leave, such as if a contractor denies a request to use paid sick leave for a dentist's appointment because the contractor does not believe a dentist is a health care provider, a contractor denies a request to use paid sick leave to accompany the employee's sister to a court proceeding regarding stalking because the contractor does not believe an employee can use paid sick leave for a family member's legal proceeding related to stalking, or if a contractor does not respond to an employee's timely request for paid sick leave until after the need for leave has passed (provided the request was made sufficiently in advance of the need). In addition, interference includes discouraging an employee from using paid sick leave or reducing an employee's accrued paid sick leave by more than the amount of such leave used. Transferring the employee to work on non-covered contracts to prevent the accrual or use of paid sick leave, including scheduling an employee's non-covered work to fall at the time for which the employee has requested to use paid sick leave for the purpose of avoiding approving the request (rather than for a lawful reason, such as for a legitimate business purpose), also constitutes interference. Interference also includes disclosing confidential information provided in certification or other documentation provided to verify the need to use paid sick leave or making the use of paid sick leave contingent on the employee's finding a replacement worker or the fulfillment of the contractor's operational needs.

Proposed § 13.6(b) is an anti-discrimination provision implementing section 2(k) of Executive Order 13706. Proposed § 13.6(b)(1) provides that a contractor may not discriminate against an employee for: (i) Using, or attempting to use, paid sick leave as provided for under Executive Order 13706 and part 13; (ii) filing any complaint, initiating any proceeding, or otherwise asserting any right or claim under Executive Order 13706 and part 13; (iii) cooperating in any investigation or testifying in any proceeding under Executive Order 13706 and part 13; or (iv) informing any other person about

his or her rights under Executive Order 13706 and part 13. Proposed § 13.6(b)(2) addresses what constitutes discrimination, a term the Department intends to be understood broadly, by noting that discrimination includes, but is not limited to, a contractor's considering any of the actions described in proposed § 13.6(b)(1) as a negative factor in employment actions, such as hiring, promotions, or disciplinary actions, or a contractor's counting paid sick leave under a no fault attendance policy. See 29 CFR 825.220(c) (analogous provision under FMLA regulations). Under this provision, a contractor may not, for example, reassign an employee to fewer or less preferable shifts, to a less well paid position, or to a non-covered contract because she used paid sick leave. This proposed provision would also prohibit a contractor, in deciding whether or not to hire an employee to work on or in connection with a covered contract, to consider as a factor that the contractor would be required to reinstate the employee's unused paid sick leave from prior covered work pursuant to proposed § 13.5(b)(3).

This provision will serve the important purpose of ensuring effective enforcement of the Executive Order, which will depend on complaints from employees. The Department wishes to note several interpretations of the provision, all of which it also noted in the Minimum Wage Executive Order rulemaking in connection with a comparable antidiscrimination provision. 79 FR 60666–67. First, consistent with the Supreme Court's interpretation of the FLSA's antiretaliation provision, proposed § 13.6(b) would protect employees who file oral as well as written complaints. See *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1336 (2011). Furthermore, as under the FLSA, the proposed anti-discrimination provision under part 13 would protect employees who complain to the Department as well as those who complain internally to their employers about alleged violations of the Order or part 13. See, e.g., *Minor v. Bostwick Laboratories*, 669 F.3d 428, 438 (4th Cir. 2012); *Hagan v. Echostar Satellite, LLC*, 529 F.3d 617, 626 (5th Cir. 2008); *Lambert v. Ackerley*, 180 F.3d 997, 1008 (9th Cir. 1999) (en banc); *Valerio v. Putnam Associates*, 173 F.3d 35, 43 (1st Cir. 1999); *EEOC v. Romeo Community Sch.*, 976 F.2d 985, 989 (6th Cir. 1992).

In addition, the anti-discrimination provision would apply in situations where there is no current employment relationship between the parties; for example, it would protect from

retaliation by a prospective or former employer that is a covered contractor. This position is consistent with the Department's interpretation of the FLSA's antiretaliation provision, which it considers to extend to job applicants. As explained in the Minimum Wage Executive Order, however, the Department recognizes that the U.S. Court of Appeals for the Fourth Circuit has disagreed with its interpretation with respect to the coverage of job applicants, *see Dellinger v. Science Applications Int'l Corp.*, 649 F.3d 226 (4th Cir. 2011), and the Department therefore would not enforce its interpretation on this issue in that circuit. *See* 79 FR 60667. To the extent that application of the FLSA's antiretaliation provision to job applicants or internal complaints is definitively resolved through the judicial process by the Supreme Court or otherwise, the Department would interpret the antiretaliation provision under the Executive Order in accordance with such precedent. *Id.*

Proposed § 13.6(c) provides that a contractor's failure to make and maintain or to make available to WHD records for inspection, copying, and transcription as required by proposed § 13.25, or any other failure to comply with the requirements of that proposed provision, constitutes a violation of Executive Order 13706, part 13, and the underlying contract. This proposed provision is derived from paragraph (g)(3) of the contract clause included in the Minimum Wage Executive Order Final Rule as well as analogous provisions in the SCA and DBA. 29 CFR 4.6(g)(3) (SCA); 29 CFR 5.5(a)(3)(iii) (DBA).

#### Section 13.7 Waiver of Rights

Proposed § 13.7 provides that employees cannot waive, nor may contractors induce employees to waive, their rights under Executive Order 13706 or part 13. The Department included a provision prohibiting the waiver of rights in the regulations implementing the Minimum Wage Executive Order and believes it is appropriate to adopt the same policy here.

In the Minimum Wage Executive Order rulemaking, the Department noted that an employee's rights and remedies under the FLSA, including payment of minimum wage and back wages, cannot be waived or abridged by contract. 79 FR 60667 (citing *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 302 (1985); *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 740 (1981); *D.A. Schulte, Inc. v. Gangi*, 328 U.S. 108, 112–16 (1946);

*Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 706–07 (1945)). The Supreme Court has explained that “FLSA rights cannot be abridged by contract or otherwise waived because this would ‘nullify the purposes’ of the statute and thwart the legislative policies it was designed to effectuate,” *Barrentine*, 450 U.S. at 740 (quoting *Brooklyn Sav. Bank*, 324 U.S. at 707), and that FLSA rights are not subject to waiver because they serve an important public interest by protecting employers against unfair methods of competition in the national economy, *see Tony & Susan Alamo Found.*, 471 U.S. at 302. Similarly, under the SCA regulations, releases and waivers executed by employees for unpaid SCA wages (and fringe benefits) are without legal effect. 29 CFR 4.187(d). Because the public policy interests underlying the issuance of Executive Order 13706 would be similarly thwarted by permitting employees to waive, or contractors to induce employees to waive, their rights under the Executive Order or part 13, proposed § 13.7 makes clear that such waiver of rights is impermissible.

#### Subpart B—Federal Government Requirements

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

#### Section 13.11 Contracting Agency Requirements

Proposed § 13.11(a) implements section 2(a) of Executive Order 13706 by directing that the contracting agency shall include the Executive Order paid sick leave contract clause set forth in appendix A of part 13 in all covered contracts and solicitations for such contracts, as described in proposed § 13.3, except for procurement contracts subject to the FAR. Proposed § 13.11(a) further provides that the required contract clause directs, as a condition of payment, that all employees performing work on or in connection with covered contracts must be permitted to accrue and use paid sick leave as required by Executive Order 13706 and part 13. It also provides that for procurement contracts subject to the FAR, contracting agencies shall use the clause that will be set forth in the FAR to implement part 13, and that the FAR clause will

accomplish the same purposes as the clause set forth in appendix A and be consistent with the requirements set forth in part 13.

Proposed § 13.11(a) is effectively identical to 29 CFR 10.11(a), the analogous provision in the Minimum Wage Executive Order Final Rule. As explained in that rulemaking, *see* 79 FR 60668, inserting the full contract clause in a covered contract is an effective and practical means of ensuring that contractors receive notice of their obligations under the Executive Order and part 13, and the Department therefore prefers that covered contracts include the contract clause in full. The Department is aware, however, that there will be instances in which a contracting agency or contractor does not include the entire contract clause in a covered contract; in such cases, the facts and circumstances may establish that the contracting agency or contractor sufficiently apprised the prime or lower-tier contractor that the Executive Order applies to the contract. *See Nat'l Electro-Coatings, Inc. v. Brock*, No. C86–2188, 1988 WL 125784 (N.D. Ohio July 13, 1988); *In the Matter of Progressive Design & Build, Inc.*, WAB Case No. 87–31, 1990 WL 484308 (WAB Feb. 21, 1990). For example, the full contract clause will be deemed incorporated by reference in a covered contract if the contract provides that “Executive Order 13706—Establishing Paid Sick Leave for Federal Contractors, and its implementing regulations, including the applicable contract clause, are incorporated by reference into this contract” and includes a citation to a Web page that contains the contract clause in full, to the provision of the Code of Federal Regulations containing the contract clause set forth at appendix A of part 13, or to the provision of the FAR containing the contract clause promulgated by the FAR to implement part 13.

Proposed § 13.11(b) explains a contracting agency's obligations in the event that it fails to include the contract clause in a covered contract. Proposed § 13.11(b) first provides that where the Department of Labor or the contracting agency discovers or determines, whether before or subsequent to a contract award, that a contracting agency made an erroneous determination that Executive Order 13706 and part 13 did not apply to a particular contract and/or failed to include the applicable contract clause in a contract to which the Executive Order and part 13 apply, the contracting agency, on its own initiative or within 15 calendar days of notification by an

authorized representative of the Department of Labor, shall incorporate the clause in the contract retroactive to commencement of performance under the contract through the exercise of any and all authority that may be needed (including, where necessary, its authority to negotiate or amend, its authority to pay any necessary additional costs, and its authority under any contract provision authorizing changes, cancellation, and termination). The Administrator possesses analogous authority under the DBA, *see* 29 CFR 1.6(f), and Executive Order 13658, *see* 29 CFR 10.11(b), and it believes a similar mechanism for addressing an agency's failure to include the contract clause in a contract subject to Executive Order 13706 would enhance its ability to obtain compliance with the Order.

Proposed § 13.11(c) provides that a contracting officer shall, upon his or her own action or upon written request of the Administrator, withhold or cause to be withheld from the prime contractor under the contract or any other Federal contract with the same prime contractor, so much of the accrued payments or advances as may be necessary to pay employees the full amount owed to compensate for any violation of Executive Order 13706 or part 13. It further provides that in the event of any such violation, the agency may, after authorization or by direction of the Administrator and written notification to the contractor, take action to cause suspension of any further payment or advance of funds until such violations have ceased. Such amounts would be based on the estimated monetary relief, including any pay and/or benefits denied or lost by reason of the violation or other monetary losses sustained as a direct result of the violation, described in proposed § 13.44. The SCA, DBA, and the Minimum Wage Executive Order's implementing regulations provide for withholding to ensure the availability of monies for payment to covered workers when a contractor or subcontractor has failed to comply with its obligations to pay required wages (including fringe benefits) under those authorities. 29 CFR 4.6(i); 29 CFR 5.5(a)(2); 29 CFR 10.11(c). Withholding likewise is an appropriate remedy under this Executive Order for all covered contracts because the Order directs the Department to adopt SCA, DBA, and Minimum Wage Executive Order enforcement processes to the extent practicable and to exercise authority to obtain compliance with the Order. 80 FR 54699. Consistent with withholding procedures under the SCA and DBA, which were also adopted in the

Minimum Wage Executive Order rulemaking, proposed § 13.11(c) allows the contracting agency and the Department to withhold or cause to be withheld funds from the prime contractor not only under the contract on which violations of the paid sick leave requirements of Executive Order 13706 and part 13 occurred, but also under any other contract that the prime contractor has entered into with the Federal Government. 29 CFR 4.6(i); 29 CFR 5.5(a)(2); 29 CFR 10.11(c). Finally, a withholding remedy is consistent with the requirement in section 2(a) of the Executive Order that compliance with the specified obligations is an express "condition of payment" to a contractor or subcontractor. 80 FR 54699.

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

Proposed § 13.11(d) describes a contracting agency's responsibility to suspend further payment or advance of funds to a contractor that fails to make available for inspection, copying, and transcription any of the records identified in proposed § 13.25. The proposal requires contracting agencies to take action to suspend payment or advance of funds under these circumstances upon their own action, or upon the direction of the Administrator and notification of the contractor. Proposed § 13.11(d) is derived from paragraph (g)(3) of the Minimum Wage Executive Order contract clause, 79 FR 60731, and is consistent with the analogous provisions of the SCA and DBA regulations, 29 CFR 4.6(g)(3); 29 CFR 5.5(a)(3)(iii).

Proposed § 13.11(e) describes a contracting agency's responsibility to forward to the WHD any complaint alleging a contractor's non-compliance with Executive Order 13706 or part 13, as well as any information related to the complaint. Although the Department proposes in § 13.41 that complaints be filed with the WHD rather than with contracting agencies, the Department recognizes that some employees or other interested parties nonetheless may file formal or informal complaints concerning alleged violations of the

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

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

Proposed § 13.11(e) is nearly identical to 29 CFR 10.11(d) as promulgated by the Minimum Wage Executive Order Final Rule, which was derived from analogous provisions in the Department's regulations implementing the Nondisplacement Executive Order. 79 FR 60669 (citing 29 CFR 9.11(d)). As in the Minimum Wage Executive Order rulemaking, the Department believes proposed § 13.11(e), which includes an obligation to send such complaint-related information to WHD even absent a specific request (e.g., when a complaint is filed with a contracting agency rather than with the WHD), is appropriate because prompt receipt of such information from the relevant contracting agency will allow the Department to fulfill its charge under the Order to implement enforcement mechanisms for obtaining compliance with the Order. 80 FR 54699.

Proposed § 13.11(f) would provide that a contracting officer shall provide to a successor contractor any predecessor contractor's certified list, provided to the contracting officer pursuant to proposed § 13.26, of the amounts of unused paid sick leave that employees have accrued. This requirement would facilitate compliance by successor contractors with proposed § 13.5(b)(3), which requires that paid sick leave be reinstated for employees rehired by a



successor contractor within 12 months of the job separation from the predecessor contractor. The terms predecessor contract and successor contract are defined in proposed § 13.2.

#### Section 13.12 Department of Labor Requirements

Proposed § 13.12 addresses the Department's obligations under the Executive Order. Specifically, proposed § 13.12(a)(1) states that the Administrator will publish and maintain on Wage Determinations OnLine (WDOL), <http://www.wdol.gov>, or any successor Web site, a notice that Executive Order 13706 creates a requirement to allow employees performing work on or in connection with contracts covered by Executive Order 13706 and part 13 to accrue and use paid sick leave, as well as an indication of where to find more complete information about that requirement.

Proposed § 13.12(a)(2) provides that the Administrator will also publish a notice on all wage determinations issued under the DBA and SCA that Executive Order 13706 creates a requirement to allow employees performing work on or in connection with contracts covered by Executive Order 13706 and part 13 to accrue and use paid sick leave, as well as an indication of where to find more complete information about that requirement.

Proposed § 13.12(b), which is modeled on 29 CFR 10.12(d), addresses the Department's obligation to notify a contractor of a request to the contracting agency for the withholding of funds or a request for the suspension of payment or advance of funds. Under proposed § 13.11(c), the Administrator may direct that payments due on the covered contract or any other contract between the contractor and the Federal Government be withheld as may be considered necessary to provide for monetary relief for violations of Executive Order 13706 or part 13. Under proposed § 13.11(d), the Administrator may direct that the contracting agency suspend payment or advance of funds. If the Administrator makes the requests contemplated by proposed § 13.11(c) or (d), proposed § 13.12(b) would require the Administrator and/or the contracting agency to notify the affected prime contractor of the Administrator's withholding request to the contracting agency. Although it is only necessary that one party—either the Administrator or the contracting agency—provide the notice, the other may choose in its discretion to provide notice as well.

#### Subpart C—Contractor Requirements

Proposed subpart C describes the requirements with which contractors must comply under Executive Order 13706 and part 13. It sets forth the obligation to include the applicable Executive Order paid sick leave contract clause in subcontracts and lower-tier contracts to comply with the contract clause. Proposed subpart C also sets forth contractor requirements pertaining to deductions, kickbacks, recordkeeping, a list of employees' accrued paid sick leave at the time a contract concludes, notice, and timing of pay.

#### Section 13.21 Contract Clause

Proposed § 13.21(a), which is adopted from 29 CFR 10.21 as promulgated by the Minimum Wage Executive Order Final Rule, requires the contractor, as a condition of payment, to abide by the terms of the applicable Executive Order paid sick leave contract clause referred to in proposed § 13.11(a). The applicable contract clause will contain the obligations with which the contractor must comply on the covered contract and will reflect the contractor's obligations as described in part 13.

Proposed § 13.21(b) states that contractors must include the applicable contract clause in any covered subcontracts and shall require, as a condition of payment, that subcontractors include the clause in all lower-tier subcontracts. Under the proposal, the prime contractor and upper-tier contractors will be responsible for compliance by any subcontractor or lower-tier subcontractor with Executive Order 13706 and part 13, regardless of whether the contract clause was included in the subcontract. This responsibility on the part of prime and upper-tier contractors for subcontractor compliance parallels that of the SCA and DBA. *See* 29 CFR 4.114(b) (SCA); 29 CFR 5.5(a)(6) (DBA).

#### Section 13.22 Paid Sick Leave

Proposed § 13.22 requires contractors to allow all employees performing work on or in connection with a covered contract to accrue and use paid sick leave as required by the Executive Order and part 13. Although contractors must comply with the Order and part 13 in its entirety, the Department notes that contractors' paid sick leave obligations are described in detail in proposed subpart A (particularly proposed § 13.5, which addresses the accrual and use of paid sick leave, and proposed § 13.6, which describes prohibited acts).

#### Section 13.23 Deductions

Proposed § 13.23 states that contractors may only make deductions from the pay and benefits of an employee who is using paid sick leave under the limited circumstances set forth in the proposed provision. The reference to "pay and benefits" in proposed § 13.23 has the same meaning as the reference to pay and benefits in proposed § 13.5(c)(3), discussed above.

Proposed § 13.23 permits deductions required by Federal, State, or local law, including Federal or State withholding of income taxes. *See* 29 CFR 531.38 (FLSA); 29 CFR 4.168(a) (SCA); 29 CFR 5.5(a)(1) (DBA); 29 CFR 10.23(a) (Executive Order 13658). This proposed provision would also permit deductions for payments made to third parties pursuant to court orders. *See* 29 CFR 531.39 (FLSA); 29 CFR 4.168(a) (SCA); 29 CFR 5.5(a)(1) (DBA); 29 CFR 10.23(b) (Executive Order 13658). Permissible deductions made pursuant to a court order may include such deductions as those made for child support. The proposed section also permits deductions directed by a voluntary assignment of the employee or his or her authorized representative. *See* 29 CFR 531.40 (FLSA); 29 CFR 4.168(a) (SCA); 29 CFR 5.5(a)(1) (DBA); 29 CFR 10.23(c) (Executive Order 13658). Deductions directed by a voluntary assignment include, but are not limited to, deductions for the purchase of U.S. savings bonds, donations to charitable organizations, and the payment of union dues. Deductions made for voluntary assignments must be made for the employee's account and benefit pursuant to the request of the employee or his or her authorized representative. *See* 29 CFR 531.40 (FLSA); 29 CFR 4.168(a) (SCA); 29 CFR 5.5(a)(1) (DBA). Finally, the Department proposes to permit deductions made for the reasonable cost or fair value of board, lodging, and other facilities. *See* 29 CFR part 531 (FLSA); 29 CFR 4.168(a) (SCA); 29 CFR 5.5(a)(1) (DBA); 29 CFR 10.23(d) (Executive Order 13658). Deductions made for the reasonable cost or fair value of board, lodging and other facilities must be in compliance with the regulations in 29 CFR part 531. The Department notes that a contractor may take credit for the reasonable cost or fair value of board, lodging, or other facilities against an employee's wages, rather than taking a deduction for the reasonable cost or fair value of these items. *See* 29 CFR part 531.

#### Section 13.24 Anti-Kickback

Proposed § 13.24 requires that all paid sick leave used by employees

performing on or in connection with covered contracts must be paid free and clear and without subsequent deduction (unless as set forth in proposed § 13.23), rebate, or kickback on any account. It further provides that kickbacks directly or indirectly to the contractor or to another person for the benefit of the contractor for the whole or part of the paid sick leave are also prohibited. This anti-kickback proposal, which the Department derived from the Executive Order 13658 implementing regulations at 29 CFR 10.27, aims to ensure that employees actually receive the full pay and benefits to which they are entitled under the Executive Order and part 13 when they use paid sick leave.

#### Section 13.25 Records To Be Kept by Contractors

Proposed § 13.25 explains the recordkeeping and related requirements for contractors. The obligations set forth in proposed § 13.25 are derived from the FLSA, SCA, DBA, FMLA and Executive Order 13658. *See* 29 CFR part 516 (FLSA); 29 CFR 4.6(g) (SCA); 29 CFR 5.5(a)(3) (DBA); 29 CFR 825.500(c) (FMLA); 29 CFR 10.26 (Executive Order 13658). Proposed § 13.25(a) states that contractors and subcontractors shall make and maintain during the course of the covered contract, and preserve for no less than 3 years thereafter, records containing the information enumerated in proposed § 13.25(a)(1)–(15) for each employee. It also requires contractors to make such records available to the WHD for inspection, copying and transcription.

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

proposed § 13.25(a)(1)–(6) and those set forth in proposed § 13.25(a)(7)–(15) below, the recordkeeping requirements set forth in this section are necessary and appropriate for the enforcement of Executive Order 13706 and part 13 because they require the maintenance and preservation of records necessary to investigate potential violations of and obtain compliance with the Order, consistent with sections 3(a) and 4(a) of the Order.

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

Proposed § 13.25(a)(9) requires contractors to make and maintain records of the dates and amounts of paid sick leave used by employees and further specifies that unless a contractor's paid time off policy satisfies the requirements of Executive Order 13706 and part 13 as described in proposed § 13.5(f)(5), contractors must designate the leave in their records as paid sick leave pursuant to Executive Order 13706. Proposed § 13.25(a)(10) requires contractors to make and maintain copies of any written denials of employees' requests to use paid sick leave, including explanations for such denials, as required under proposed § 13.5(d)(3). Proposed § 13.25(a)(11) requires contractors to make and maintain records relating to the certification and documentation a contractor may require an employee to provide under proposed § 13.5(e), including copies of any certification or documentation provided by an employee. Proposed § 13.25(a)(12) requires contractors to make and maintain any other records showing any tracking of or calculations related to an employee's accrual and/or use of paid sick leave.

Proposed § 13.25(a)(13) requires contractors to make and maintain copies of any certified list of employees' accrued, unused paid sick leave provided to a contracting officer in compliance with proposed § 13.26. Proposed § 13.25(a)(14) requires contractors to maintain any certified list of employees' accrued, unused paid sick leave received from the contracting agency in compliance with proposed § 13.11(f). Finally, proposed § 13.25(a)(15) requires contractors to maintain a copy of the relevant covered contract.

Proposed § 13.25(b) relates to the segregation of employees' covered and non-covered work for a single contractor. It provides that if a contractor wishes to distinguish between an employee's covered and non-covered work (such as time spent performing work on or in connection with a covered contract versus time spent performing work on or in connection with non-covered contracts or time spent performing work on or in connection with a covered contract in the United States versus time spent performing work outside the United States, or to establish that time spent performing solely in connection with covered contracts constituted less than 20 percent of an employee's hours worked during a particular workweek), the contractor must keep records or other proof reflecting such distinctions. It further provides that only if the contractor adequately segregates the employee's time will time spent on non-covered contracts be excluded from hours worked counted toward the accrual of paid sick leave, and that similarly, only if that contractor adequately segregates the employee's time may a contractor properly deny an employee's request to take leave under proposed § 13.5(d) on the ground that the employee was scheduled to perform non-covered work during the time she asked to use paid sick leave. This language reflects the policies described in the discussions of §§ 13.3(c), 13.4(e), 13.5(a)(1)(i), 13.5(c)(1), and 13.5(d)(3)(ii) with regard to a contractor's segregation of hours worked for purposes of coverage as well as accrual and use of paid sick leave. As explained with regard to those sections, requiring contractors who wish to distinguish between covered and non-covered time to keep adequate records reflecting that distinction is consistent with the treatment of hours worked on SCA- and non-SCA-covered contracts, *see* 29 CFR 4.178, 4.179, as well as the treatment of covered versus non-covered time under the Minimum Wage Executive Order rulemaking, *see* 79 FR 60659, 60660–61, 60672.

Proposed § 13.25(c) excuses a contractor from maintaining records of the employee's number of daily and weekly hours worked as otherwise required under proposed § 13.25(a)(4), if the SCA, DBA, and FLSA do not require the contractor to keep records of the employee's hours worked, such as because the employee is employed in a bona fide executive, administrative, or professional capacity as those terms are defined in 29 CFR part 541, and the

contractor elects to use the assumption permitted by proposed § 13.5(a)(1)(iii).

Proposed § 13.25(d) addresses requirements related to the confidentiality of records. Proposed § 13.25(d)(1) requires a contractor to maintain as confidential in separate files/records from the usual personnel files any records relating to medical histories or domestic violence, sexual assault, or stalking created by or provided to a contractor for purposes of Executive Order 13706, whether of an employee or an employee's child, parent, spouse, domestic partner, or other individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship. Proposed § 13.25(d)(2) requires records or documents created to comply with the recordkeeping requirements in part 13 that are subject to the confidentiality requirements of the Genetic Information Nondiscrimination Act of 2008 (GINA), Pub. L. 110-233, 122 Stat. 881 (2008), and/or Americans with Disabilities Act (ADA), 42 U.S.C. 12101 *et seq.*, to be maintained in compliance with the confidentiality requirements of those statutes as described in 29 CFR 1635.9 and 29 CFR 1630.14(c)(1), respectively.

Proposed § 13.25(d)(3) prohibits the disclosure of any documentation used to verify the need to use 3 or more consecutive days of paid sick leave for the purposes listed in proposed § 13.5(c)(1)(iv), and requires the contractor to maintain confidentiality about any domestic violence, sexual assault, or stalking, unless the employee consents or the disclosure is required by law.

Proposed § 13.25(e) requires contractors to permit authorized representatives of WHD to conduct interviews with employees at the worksite during normal working hours. This provision is derived from similar provisions under the SCA and DBA, 29 CFR 4.6(g)(4) (SCA); 29 CFR 5.5(a)(3)(iii), and will facilitate WHD's ability to enforce the Order and part 13.

Proposed § 13.25(f) states that nothing in part 13 limits or otherwise modifies the contractor's recordkeeping obligations, if any, under the DBA, SCA, FLSA, FMLA, Executive Order 13658, their implementing regulations, or other applicable law.

#### Section 13.26 Certified List of Employees' Accrued Paid Sick Leave

Proposed § 13.26 provides that upon completion of a covered contract, a predecessor prime contractor shall provide to the contracting officer a certified list of the names of all employees entitled to paid sick leave

under Executive Order 13706 and part 13 who worked on or in connection with the covered contract or any covered subcontract(s) at any point during the 12 months preceding the date of completion of the contract, the date each such employee separated from the contract or any covered subcontract(s) if prior to the date of the completion of the contract, and the amount of paid sick leave each such employee had available for use as of the date of completion of the contract or the date each such employee separated from the contract or subcontract. This requirement would (in conjunction with proposed § 13.11(f)) facilitate compliance by successor contractors with proposed § 13.5(b)(3), which requires that paid sick leave be reinstated for employees rehired by a successor contractor within 12 months of the job separation from the predecessor contractor. The terms predecessor contract and successor contract are defined in proposed § 13.2.

#### Section 13.27 Notice

Proposed § 13.27 addresses the obligations of contractors with respect to notice to employees of their rights under Executive Order 13706 and part 13. Proposed § 13.27(a) requires that contractors notify all employees performing work on or in connection with a covered contract of the paid sick leave requirements of Executive Order 13706 and part 13 by posting a notice provided by the Department of Labor in a prominent and accessible place at the worksite so it may be readily seen by employees. The Department derived this proposal from the Executive Order 13658 implementing regulations at 29 CFR 10.29(b); *see also* 79 FR 60670 (describing the Department's decision to create a notice poster for the Minimum Wage Executive Order). This proposal differs from the Minimum Wage Executive Order regulations, however, in that it requires all covered contractors, including those whose contracts are DBA- or SCA-covered, to display the poster rather than allowing DBA and SCA contractors to provide notice solely on wage determinations. The Department believes that because the Order's paid sick leave requirements, in particular the rules and restrictions regarding accrual and use, require lengthier explanation than the minimum wage requirements of Executive Order 13658, and because those requirements are sufficiently detailed that the Department is not proposing under § 13.12(a) to describe them in full on wage determinations, employees working on or in connection with DBA- and SCA-covered contracts will be more adequately informed about

the paid sick leave requirements by a poster. The Department will make a poster, which it will model on the Minimum Wage Executive Order poster, available on the WHD Web site.

Proposed § 13.27(b), derived from the Executive Order 13658 implementing regulations at 29 CFR 10.29(c), permits contractors that customarily post notices to employees electronically to post the notice electronically, provided such electronic posting is displayed prominently on any Web site that is maintained by the contractor, whether external or internal, and customarily used for notices to employees about terms and conditions of employment.

#### Section 13.28 Timing of Pay

Proposed § 13.28 describes the time by which a contractor must compensate employees for hours during which they used paid sick leave. Under the proposed provision, a contractor shall provide such compensation no later than one pay period following the end of the regular pay period in which the paid sick leave was used. The timing of the payment obligation imposed is consistent with both the SCA's and Executive Order 13658's implementing regulations, *see* 29 CFR 4.165(a) (SCA); 29 CFR 10.25 (Executive Order 13658).

#### Subpart D—Enforcement

Proposed subpart D implements section 4 of Executive Order 13706, which grants the Secretary "authority for investigating potential violations of and obtaining compliance with" the Order and complies with section 3(c) of the Order, which directs that the regulations the Secretary issues should, to the extent practicable, incorporate existing procedures, remedies, and enforcement processes under the FLSA, SCA, DBA, FMLA, VAWA, and Executive Order 13658. 79 FR 54699. Proposed subpart D is substantially similar to subpart D of 29 CFR part 10, which sets forth the remedies, procedures, and enforcement processes under the Minimum Wage Executive Order.

Specifically, proposed subpart D incorporates many of the provisions of the Minimum Wage Executive Order regulations, which in turn incorporate FLSA, SCA, and DBA remedies, procedures, and enforcement processes, as well as certain enforcement procedures set forth in the Department's regulations implementing the Nondisplacement Executive Order. Proposed subpart D differs in some respects from the analogous provisions under the Minimum Wage Executive Order rulemaking because of the differences between minimum wage

requirements and paid sick leave requirements as well as because Executive Order 13706 contemplates that the Department would incorporate remedies, procedures, and enforcement processes from the FMLA to the extent practicable. The Department believes proposed subpart D will facilitate investigations of potential violations of the Order, allow for violations of the Order to be addressed and remedied, and promote compliance with the Order.

#### Section 13.41 Complaints

The Department proposes a procedure for filing complaints in § 13.41 identical to that which appears in 29 CFR 10.41, the section of the Minimum Wage Executive Order regulations that addresses complaints. Proposed § 13.41(a) provides that any employee, contractor, labor organization, trade organization, contracting agency, or other person or entity that believes a violation of the Executive Order or part 13 has occurred may file a complaint with any office of the WHD. It also provides that no particular form of complaint is required; a complaint may be filed orally or in writing, and the WHD will accept a complaint in any language if the complainant is unable to file in English. Proposed § 13.41(b) states the well-established policy of the Department with respect to confidential sources. *See* 29 CFR 4.191(a); 29 CFR 5.6(a)(5). Specifically, it would provide that it is the Department's policy to protect the identity of its confidential sources and to prevent an unwarranted invasion of personal privacy, and accordingly, the identity of any individual who makes a written or oral statement as a complaint or in the course of an investigation, as well as portions of the statement which would reveal the individual's identity, shall not be disclosed in any manner to anyone other than Federal officials without the prior consent of the individual. The proposed provision further provides that disclosure of such statements shall be governed by the provisions of the Freedom of Information Act (5 U.S.C. 552, *see* 29 CFR part 70) and the Privacy Act of 1974 (5 U.S.C. 552a).

#### Section 13.42 Wage and Hour Division Conciliation

Proposed § 13.42, which is identical to 29 CFR 10.42, establishes an informal complaint resolution process for complaints filed with the WHD. The provision allows WHD, after obtaining the necessary information from the complainant regarding the alleged violations, to contact the party against

whom the complaint is lodged and attempt to reach an acceptable resolution through conciliation.

#### Section 13.43 Wage and Hour Division Investigation

Proposed § 13.43, which outlines WHD's investigative authority, is identical to 29 CFR 10.43. That section of the Minimum Wage Executive Order regulations was derived primarily from regulations implementing the SCA and DBA. *See* 79 FR 60679 (citing 29 CFR 4.6(g)(4), 29 CFR 5.6(b)). Proposed § 13.43 permits the Administrator to initiate an investigation either as the result of a complaint or at any time on his or her own initiative. As part of the investigation, the Administrator is entitled to conduct interviews with the contractor, as well as the contractor's employees at the worksite during normal work hours; inspect the relevant contractor's records (including contract documents and payrolls, if applicable); make copies and transcriptions of such records; and require the production of any documentary or other evidence the Administrator deems necessary to determine whether a violation, including conduct warranting imposition of debarment, has occurred. The section would also require Federal agencies and contractors to cooperate with authorized representatives of the Department in the inspection of records, in interviews with employees, and in all aspects of investigations.

#### Section 13.44 Remedies and Sanctions

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

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

Under the proposed regulatory text, an example of a possible remedy includes payment for time for which a contractor improperly denied a request to use paid sick leave such that the employee took unpaid leave that should have been treated as paid sick leave; in that case, the damages would be the pay and benefits the employee would have received for that time pursuant to proposed § 13.5(c)(3), and the award would include an equal amount of liquidated damages unless the violation was made in good faith and the contractor had reasonable grounds for believing it had not violated the Order or part 13. As another example, if a contractor improperly denied a request to use paid sick leave such that an employee came to work and hired a babysitter to care for a sick child with whom the employee wished to stay home, the remedy would be the amount the employee spent on the child care, and the award would include an equal amount of liquidated damages unless the violation was made in good faith and the contractor had reasonable grounds for believing it had not violated the Order or part 13. In this example, relief would not include lost pay or benefits because the employee did not lose pay or benefits due to the violation. Equitable relief for violations of proposed § 13.6(a) could include, but would not be limited to, requiring the contractor to allow for accrual and use

of paid sick leave by an employee it erroneously treated as not covered by the Executive Order or requiring the contractor to restore paid sick leave it improperly deducted from an employee's accrued paid sick leave.

Proposed § 13.44(a) also provides that the Administrator may direct that payments due on the contract or any other contract between the contractor and the Federal Government be withheld as may be necessary to provide any appropriate monetary relief, and that, upon the final order of the Secretary that the monetary relief is due, the Administrator may direct the relevant contracting agency to transfer the withheld funds to the Department for disbursement. These portions of the proposed provision are identical to language in the Minimum Wage Executive Order final rule. *See* 29 CFR 10.44(a).

Proposed § 13.44(b) sets out remedies for violations of the prohibition on discrimination in proposed § 13.6(b). It provides that when the Administrator determines that a contractor has discriminated against an employee in violation of proposed § 13.6(b), the Administrator will notify the contractor and the relevant contracting agency of the discrimination and request that the contractor remedy the violation. If the contractor does not remedy the violation, the Administrator shall direct the contractor to provide any appropriate relief, including but not limited to employment, reinstatement, promotion, restoration of leave, or lost pay and/or benefits, in the Administrator's investigation findings letter issued pursuant to proposed § 13.51. As proposed, § 13.44(a) also provides that an amount equaling any monetary relief may be awarded as liquidated damages unless such amount is reduced by the Administrator because the violation was in good faith and the contractor had reasonable grounds for believing the contractor had not violated the Order or part 13. This language is derived from the FMLA remedies at 29 U.S.C. 2617(a)(1) and 29 CFR 825.400(c); *see also* 29 U.S.C. 2617(b)(2). It is similar to the analogous provision in the Minimum Wage Executive Order rulemaking, 79 FR 60728 (codified at 29 CFR 10.44(b)), which was derived from the remedies provided for under the FLSA's antiretaliation provision, *see* 29 U.S.C. 216(b), except that it allows for liquidated damages, a remedy available under the FMLA and the FLSA, *see* 29 U.S.C. 2617(a)(1); 29 U.S.C. 216(b), 260. Proposed § 13.44(b) further notes that the Administrator may additionally direct that payments due on the contract

or any other contract between the contractor and the Federal Government be withheld as may be necessary to provide any appropriate monetary relief and that upon the final order of the Secretary that monetary relief is due, the Administrator may direct the relevant contracting agency to transfer the withheld funds to the Department of Labor for disbursement.

Proposed § 13.44(c) addresses the remedies for violations of the recordkeeping requirements in proposed subpart C. It provides that when a contractor fails to comply with the requirements of proposed § 13.25 in violation of proposed § 13.6(c), the Administrator will request that the contractor remedy the violation. Proposed § 13.44(c) further provides that if a contractor fails to produce required records upon request, the contracting officer, upon direction of an authorized representative of the Department of Labor, or under its own action, shall take such action as may be necessary to cause suspension of any further payment or advance of funds on the contract until such time as the violations are discontinued. Proposed § 13.44(c) is derived from paragraph (g)(3) of the Minimum Wage Executive Order contract clause, the analogous provision of the SCA regulations, 29 CFR 4.6(g)(3), and the analogous provision of the DBA regulations, 29 CFR 5.5(a)(3)(iii).

Proposed § 13.44(d), which is effectively identical to the corresponding provision in the Minimum Wage Executive Order rulemaking, 29 CFR 10.44(c), allows for the remedy of debarment. Specifically, it provides that whenever a contractor is found by the Secretary to have disregarded its obligations under Executive Order 13706 or part 13, such contractor and its responsible officers, and any firm, corporation, partnership, or association in which the contractor or responsible officers have an interest, shall be ineligible to be awarded any contract or subcontract subject to the Executive Order for a period of up to three years from the date of publication of the name of the contractor or responsible officer on the excluded parties list currently maintained on the System for Award Management Web site, <http://www.SAM.gov>. The "disregarded its obligations" standard, which also is used in the Minimum Wage Executive Order rulemaking, is derived from the DBA implementing regulations at 29 CFR 5.12(a)(2). *See* 79 FR 60680. Proposed § 10.44(d) further provides that neither an order of debarment of any contractor or its responsible officers from further

Government contracts nor the inclusion of a contractor or its responsible officers on a published list of noncomplying contractors under this section would be carried out without affording the contractor or responsible officers an opportunity for a hearing before an Administrative Law Judge.

Debarment is a long-established remedy for a contractor's failure to fulfill its labor standards obligations under the SCA and the DBA, *see* 41 U.S.C. 6706(b); 40 U.S.C. 3144(b); 29 CFR 4.188(a); 29 CFR 5.5(a)(7); 29 CFR 5.12(a)(2), and one that, as noted, was adopted in the Minimum Wage Executive Order rulemaking, *see* 79 FR 60728 (codified at 29 CFR 10.44(c)). The possibility that a contractor will be unable to obtain Government contracts for a fixed period of time due to debarment promotes contractor compliance with the SCA, DBA, and Minimum Wage Executive Order, and the Department intends inclusion of the remedy in this rulemaking to incentivize compliance with Executive Order 13706 as well.

Proposed § 13.44(e) allows for initiation of an action, following a final order of the Secretary, against a contractor in any court of competent jurisdiction to collect underpayments when the amounts withheld under proposed § 13.11(c) are insufficient to reimburse all monetary relief due. Proposed § 13.44(e) also authorizes initiation of an action, following the final order of the Secretary, in any court of competent jurisdiction when there are no payments available to withhold. Such circumstances could arise, for example, if at the time the Administrator discovers a contractor owes pay and/or benefits to employees, no payments remain owing under the contract or another contract between the same contractor and the Federal Government, or if the covered contract is a concessions contract under which the contractor does not receive payments from the Federal Government. Proposed § 13.44(e) additionally provides that any sums the Department recovers shall be paid to affected employees to the extent possible, but that sums not paid to employees because of an inability to do so within three years would be transferred into the Treasury of the United States. Proposed § 13.44(e) is derived from the analogous provision of the Minimum Wage Executive Order rulemaking, 29 CFR 10.44(d), which in turn was derived from the SCA, 41 U.S.C. 6705(b)(2).

In proposed § 13.44(f), the Department addresses what remedy is available when a contracting agency fails to include the contract clause in a contract

subject to the Executive Order. It would provide that the contracting agency, on its own initiative or within 15 calendar days of notification by the Department, shall incorporate the clause in the contract retroactive to commencement of performance under the contract through the exercise of any and all authority that may be needed (including, where necessary, its authority to negotiate or amend, its authority to pay any necessary additional costs, and its authority under any contract provision authorizing changes, cancellation, and termination). This provision is identical to 29 CFR 10.44(e); in promulgating that provision during the Minimum Wage Executive Order rulemaking, the Department explained that this clause would provide the Administrator authority to collect underpayments on behalf of affected employees on the applicable contract retroactive to commencement of performance under the contract. 79 FR 60681. The Department also noted in that rulemaking that the Administrator possesses comparable authority under the DBA, 29 CFR 1.6(f). *Id.* The Department believes here, as it did with respect to the Minimum Wage Executive Order, that a mechanism for addressing a failure to include the contract clause in a contract subject to Executive Order 13706 will further the interest in both remedying violations and obtaining compliance with the Order. Furthermore, as also noted in the Minimum Wage Executive Order rulemaking, the provision includes language reflecting the Department's belief that a contractor is entitled to an adjustment where necessary to pay any necessary additional costs when a contracting agency initially omits and then subsequently includes the contract clause in a covered contract. *Id.* (citing 29 CFR 4.5(c), the SCA regulation with which this position is consistent).

#### Subpart E—Administrative Proceedings

Pursuant to section 4 of Executive Order 13706, proposed subpart E establishes and describes the administrative proceedings to be conducted under the Order. In compliance with section 3(c) of the Order, subpart E incorporates, to the extent practicable, the DBA, SCA and Executive Order 13658 administrative procedures necessary to remedy potential violations and ensure compliance with the Executive Order. Indeed, the Department has substantially modeled this subpart E on subpart E of the Minimum Wage Executive Order regulations, which was primarily derived from the rules governing administrative proceedings

conducted under the DBA and SCA. 79 FR 60682. The administrative procedures included in this subpart also closely adhere to existing procedures of the Department's Office of Administrative Law Judges and Administrative Review Board (ARB).

#### Section 13.51 Disputes Concerning Contractor Compliance

Proposed § 13.51, which the Department derived primarily from the DBA's implementing regulations at 29 CFR 5.11, addresses how the Administrator will process disputes regarding a contractor's compliance with part 13. Proposed § 13.51(a) provides that the Administrator or a contractor may initiate a proceeding. Proposed § 13.51(b)(1) provides that when it appears that relevant facts are at issue in a dispute covered by proposed § 13.51(a), the Administrator will notify the affected contractor(s) and the prime contractor, if different, of the investigative findings by certified mail to the last known address. If the Administrator determines there are reasonable grounds to believe the contractor(s) should be subject to debarment, the investigative findings letter would so indicate.

Proposed § 13.51(b)(2) requires a contractor desiring a hearing concerning the investigative findings letter to request a hearing by letter postmarked within 30 calendar days of the date of the Administrator's letter. It further requires the request to set forth those findings that are in dispute with respect to the violation(s) and/or debarment, as appropriate, and to explain how such findings are in dispute, including by reference to any applicable affirmative defenses.

Proposed § 13.51(b)(3) requires the Administrator, upon receipt of a timely request for hearing, to refer the matter to the Chief Administrative Law Judge by Order of Reference for designation of an Administrative Law Judge (ALJ) to conduct such hearings as may be necessary to resolve the disputed matter in accordance with the procedures set forth in 29 CFR part 6. It also requires the Administrator to attach a copy of the Administrator's letter, and the response thereto, to the Order of Reference that the Administrator sends to the Chief Administrative Law Judge.

Proposed § 13.51(c)(1) applies when it appears there are no relevant facts at issue and there is not at that time reasonable cause to institute debarment proceedings. It requires the Administrator to notify the contractor, by certified mail to the contractor's last known address, of the investigative findings and to issue a ruling on any

issues of law known to be in dispute. Proposed § 13.51(c)(2)(i) applies when a contractor disagrees with the Administrator's factual findings or believes there are relevant facts in dispute. It allows the contractor to advise the Administrator of such disagreement by letter postmarked within 30 calendar days of the date of the Administrator's letter. The response must explain in detail the facts alleged to be in dispute and attach any supporting documentation.

Proposed § 13.51(c)(2)(ii) requires that the information submitted in the response alleging the existence of a factual dispute must be timely in order for the Administrator to examine such information. Where the Administrator determines there is a relevant issue of fact, the Administrator will refer the case to the Chief Administrative Law Judge as under proposed § 13.51(b)(3). If the Administrator determines there is no relevant issue of fact, the Administrator will so rule and advise the contractor accordingly.

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

Proposed § 13.51(d) provides that the Administrator's investigative findings letter will become the final order of the Secretary if a timely response to the letter is not made or a timely petition for review is not filed. It additionally provides that if a timely response or a timely petition for review is filed, the investigative findings letter will be inoperative unless and until the decision is upheld by an ALJ or the ARB, or the letter otherwise becomes a final order of the Secretary.

#### Section 13.52 Debarment Proceedings

Proposed § 13.52, which is identical to the analogous provision in the Minimum Wage Executive Order regulations, 29 CFR 10.52, which the Department primarily derived from the DBA implementing regulations at 29 CFR 5.12, 79 FR 60683, addresses debarment proceedings. Proposed § 13.52(a)(1) provides that whenever any contractor is found by the Secretary of Labor to have disregarded its obligations to employees or subcontractors under Executive Order or part 13, such contractor and its responsible officers,

and any firm, corporation, partnership, or association in which such contractor or responsible officers have an interest, will be ineligible for a period of up to three years to receive any contracts or subcontracts subject to the Executive Order from the date of publication of the name or names of the contractor or persons on the excluded parties list currently maintained on the System for Award Management Web site, <http://www.SAM.gov>.

Proposed § 13.52(b)(1) provides that where the Administrator finds reasonable cause to believe a contractor has committed a violation of the Executive Order or part 13 that constitutes a disregard of its obligations to its employees or subcontractors, the Administrator will notify by certified mail to the last known address, the contractor and its responsible officers (and any firms, corporations, partnerships, or associations in which the contractor or responsible officers are known to have an interest) of the finding. Pursuant to proposed § 13.52(b)(1), the Administrator would additionally furnish those notified a summary of the investigative findings and afford them an opportunity for a hearing regarding the debarment issue. Those notified would have to request a hearing on the debarment issue, if desired, by letter to the Administrator postmarked within 30 calendar days of the date of the letter from the Administrator. The letter requesting a hearing would need to set forth any findings that are in dispute and the reasons therefore, including any affirmative defenses to be raised. Proposed § 13.52(b)(1) also requires the Administrator, upon receipt of a timely request for hearing, to refer the matter to the Chief Administrative Law Judge by Order of Reference, to which would be attached a copy of the Administrator's investigative findings letter and the response thereto, for designation to an ALJ to conduct such hearings as may be necessary to determine the matters in dispute. Proposed § 13.52(b)(2) provides that hearings under § 13.52 will be conducted in accordance with 29 CFR part 6. If no timely request for hearing is received, the Administrator's findings will become the final order of the Secretary.

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

Proposed § 13.53, as well as proposed §§ 13.54–13.57, are largely identical to the corresponding provisions in the Minimum Wage Executive Order rulemaking, 29 CFR 10.53–.57, and are

derived from the SCA and DBA rules of practice for administrative proceedings contained in 29 CFR part 6. Proposed § 13.53(a) provides that upon receipt of a timely request for a hearing under proposed § 13.51 (where the Administrator has determined that relevant facts are in dispute) or proposed § 13.52 (debarment), the Administrator will refer the case to the Chief Administrative Law Judge by Order of Reference, to which would be attached a copy of the investigative findings letter from the Administrator and the response thereto, for designation of an ALJ to conduct such hearings as may be necessary to decide the disputed matters. It further provides that a copy of the Order of Reference and attachments thereto will be served upon the respondent and that the investigative findings letter and the response thereto will be given the effect of a complaint and answer, respectively, for purposes of the administrative proceeding.

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

#### Section 13.54 Consent Findings and Order

Proposed § 13.54(c) provides that parties may at any time prior to the ALJ's receipt of evidence or, at the ALJ's

discretion, at any time prior to issuance of a decision, agree to dispose of the matter, or any part thereof, by entering into consent findings and an order disposing of the proceeding. Proposed § 13.54(b) provides that any agreement containing consent findings and an order disposing of a proceeding in whole or in part shall also provide: (1) That the order shall have the same force and effect as an order made after full hearing; (2) that the entire record on which any order may be based shall consist solely of the Administrator's findings letter and the agreement; (3) a waiver of any further procedural steps before the ALJ and the ARB regarding those matters which are the subject of the agreement; and (4) a waiver of any right to challenge or contest the validity of the findings and order entered into in accordance with the agreement. Proposed § 13.54(c) provides that within 30 calendar days of receipt of any proposed consent findings and order, the ALJ will accept the agreement by issuing a decision based on the agreed findings and order, provided the ALJ is satisfied with the proposed agreement's form and substance. It further provides that if the agreement disposes of only a part of the disputed matter, a hearing shall be conducted on the matters remaining in dispute.

#### Section 13.55 Proceedings of the Administrative Law Judge

Proposed § 13.55 addresses the ALJ's proceedings and decision. Proposed § 13.55(a) provides that the Office of Administrative Law Judges has jurisdiction to hear and decide appeals concerning questions of law and fact from the Administrator's investigative findings letters issued under proposed § 13.51 and/or proposed § 13.52.

Proposed § 13.55(b) provides that each party may file with the ALJ proposed findings of fact, conclusions of law, and a proposed order, together with a supporting brief expressing the reasons for such proposals, within 20 calendar days of filing of the transcript (or a longer period if the ALJ permits). It also provides that each party will serve such documents on all other parties.

Proposed § 13.55(c)(1) requires an ALJ to issue a decision within a reasonable period of time after receipt of the proposed findings of fact, conclusions of law, and order, or within 30 calendar days after receipt of an agreement containing consent findings and an order disposing of the matter in whole. It further provides that the decision will contain appropriate findings, conclusions of law, and an order and be served upon all parties to the

proceeding. Proposed § 13.55(c)(2) provides that if the Administrator requests debarment, and the ALJ concludes the contractor has violated the Executive Order or part 13, the ALJ will issue an order regarding whether the contractor is subject to the excluded parties list that will include any findings related to the contractor's disregard of its obligations to employees or subcontractors under the Executive Order or part 13.

Proposed § 13.55(d) provides that the Equal Access to Justice Act (EAJA), as amended, 5 U.S.C. 504, does not apply to proceedings under part 13. The proceedings proposed are not required by an underlying statute to be determined on the record after an opportunity for an agency hearing. Therefore, an ALJ has no authority to award attorney's fees and/or other litigation expenses pursuant to the provisions of the EAJA for any proceeding under part 13.

Proposed § 13.55(e) provides that if an ALJ concludes that a violation of the Executive Order or part 13 occurred, the final order shall mandate action to remedy the violation, including any monetary or equitable relief described in proposed § 13.44. It also requires an ALJ to determine whether an order imposing debarment is appropriate, if the Administrator has sought debarment.

Proposed § 13.55(f) provides that the ALJ's decision will become the final order of the Secretary, provided a party does not timely appeal the matter to the ARB.

#### Section 13.56 Petition for Review

The Department proposes § 13.56 as the process to apply to petitions for review to the ARB from ALJ decisions. Proposed § 13.56(a) provides that within 30 calendar days after the date of the decision of the ALJ, or such additional time as the ARB grants, any party aggrieved thereby who desires review must file a petition for review with supporting reasons in writing to the ARB with a copy thereof to the Chief Administrative Law Judge. It further requires the petition to refer to the specific findings of fact, conclusions of law, and order at issue and that a petition concerning a debarment decision state the disregard of obligations to employees and subcontractors, or lack thereof, as appropriate. It additionally requires a party to serve the petition for review, and all supporting briefs, on all parties and on the Chief Administrative Law Judge. It also states that a party must timely serve copies of the petition and all supporting briefs on the Administrator and the Associate

Solicitor, Division of Fair Labor Standards, Office of the Solicitor, U.S. Department of Labor.

Proposed § 13.56(b) provides that if a party files a timely petition for review, the ALJ's decision will be inoperative unless and until the ARB issues an order affirming the decision, or the decision otherwise becomes a final order of the Secretary. It further provides that if a petition for review concerns only the imposition of debarment, the remainder of the ALJ's decision will be effective immediately. It additionally states that judicial review will not be available unless a timely petition for review to the ARB is first filed. Failure of the aggrieved party to file a petition for review with the ARB within 30 calendar days of the ALJ decision will render the decision final, without further opportunity for appeal.

#### Section 13.57 Administrative Review Board Proceedings

Proposed § 13.57 outlines the ARB proceedings under the Executive Order. Proposed § 13.57(a)(1) states the ARB has jurisdiction to hear and decide in its discretion appeals from the Administrator's investigative findings letters issued under proposed § 13.51(c)(1) or the final sentence of proposed § 13.51(c)(2)(ii), Administrator's rulings issued under proposed § 13.58, and from ALJ decisions issued under proposed § 13.55. It further provides that in considering the matters within its jurisdiction, the ARB will be the Secretary's authorized representative and will act fully and finally on behalf of the Secretary. Proposed § 13.57(a)(2)(i) identifies the limitations on the ARB's scope of review, including a restriction on passing on the validity of any provision of part 13 and a general prohibition on receiving new evidence in the record, because the ARB is an appellate body and must decide cases before it based on substantial evidence in the existing record. Proposed § 13.57(a)(2)(ii) prohibits the ARB from granting attorney's fees or other litigation expenses under the EAJA.

Proposed § 13.57(b) requires the ARB to issue a final decision within a reasonable period of time following receipt of the petition for review and to serve the decision by mail on all parties at their last known address, and on the Chief ALJ, if the case involved an appeal from an ALJ's decision. Proposed § 13.57(c) directs the ARB's order to mandate action to remedy a violation, including any monetary or equitable relief described in proposed § 13.44, if the ARB concludes a violation occurred. If the Administrator has sought

debarment, the ARB will determine whether a debarment remedy is appropriate.

Finally, proposed § 13.57(d) provides that the ARB's decision will become the Secretary's final order in the matter.

#### Section 13.58 Administrator Ruling

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

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

#### Appendix A (Contract Clause)

Because Executive Order 13706 requires inclusion of a contract clause in covered contracts, the Department has set forth the text of a proposed contract clause in appendix A to part 13. As required by the Order, the proposed contract clause specifies employees must earn not less than 1 hour of paid sick leave for every 30 hours worked. Consistent with the Secretary's authority to obtain compliance with the Order, as well as the Secretary's responsibility to issue regulations implementing the requirements of the Order that incorporate, to the extent practicable, existing procedures, remedies, and enforcement processes under the FLSA, SCA, DBA, FMLA, VAWA and Executive Order 13658, the additional provisions of the contract clause are based on the statutory text or implementing regulations of these five statutes and Executive Order 13658 and are intended to obtain compliance with the Order.

The introduction to the contract clause provides that the proposed clause must be included by the contracting agency in all contracts, contract-like instruments, and solicitations to which Executive Order 13706 applies, except for procurement contracts subject to the Federal Acquisition Regulation (FAR). For procurement contracts subject to the FAR, contracting agencies shall use the



clause set forth in the FAR developed to implement part 13. Such clause shall accomplish the same purposes as the clause set forth in appendix A and shall be consistent with the requirements set forth in the Secretary's regulations.

Proposed paragraph (a) of the contract clause set forth in appendix A provides that the contract in which the clause is included is subject to Executive Order 13706, the regulations issued by the Secretary of Labor at 29 CFR part 13 to implement the Order's requirements, and all the provisions of the contract clause.

Proposed paragraph (b) identifies the contractor's general paid sick leave obligations. Paragraph (b)(1) stipulates that contractors must permit each employee engaged in the performance of the contract by the prime contractor or any subcontractor, regardless of any contractual relationship that may be alleged to exist between the contractor and the employee, to earn not less than 1 hour of paid sick leave for every 30 hours worked. It further provides that the contractor must allow accrual and use of paid sick leave as required by the Executive Order and 29 CFR part 13, particularly the accrual, use, and other requirements set forth in 29 CFR 13.5 and 13.6, which are incorporated by reference in the contract.

The first sentence of proposed paragraph (b)(2), which reflects requirements in proposed §§ 13.23 and 13.24 and was derived from the contract clauses applicable to contracts subject to the SCA, DBA and Executive Order 13706, *see* 29 CFR 4.6(h) (SCA); 29 CFR 5.5(a)(1) (DBA); 79 FR 60731 (Executive Order 13658), aims to ensure that employees actually receive the full pay and benefits to which they are entitled under the Executive Order and 29 CFR part 13 when they use paid sick leave. It requires a contractor to provide paid sick leave to all employees when due free and clear and without subsequent deduction (except as otherwise provided by 29 CFR 13.24), rebate, or kickback on any account. Proposed paragraph (b)(2)'s second sentence clarifies that employees that have used paid sick leave must receive the full pay and benefits to which they are entitled for the period of leave used no later than one pay period following the end of the regular pay period in which the employee used the sick leave. This requirement appears in proposed § 13.28.

Proposed paragraph (b)(3) provides that the prime contractor and any upper-tier subcontractor shall be responsible for the compliance by any subcontractor or lower-tier subcontractor with the requirements of

Executive Order 13706, 29 CFR part 13, and this clause. This responsibility on the part of prime and upper-tier contractors for subcontractor compliance parallels that of the SCA, DBA and Executive Order 13658. *See* 29 CFR 4.114(b) (SCA); 29 CFR 5.5(a)(6) (DBA); 29 CFR 10.21(b) (Executive Order 13658). It also appears in proposed § 13.21(b).

Proposed paragraphs (c) and (d) of the contract clause are derived primarily from the contract clauses applicable to contracts subject to the SCA, DBA and Executive Order 13658, *see* 29 CFR 4.6(i) (SCA); 29 CFR 5.5(a)(2), (7) (DBA); 79 FR 60731 (Executive Order 13658). Paragraph (c) provides that the contracting officer shall, upon its own action or upon written request of an authorized representative of the Department of Labor, withhold or cause to be withheld from the prime contractor under the contract or any other Federal contract with the same prime contractor, so much of the accrued payments or advances as may be considered necessary to pay employees the full amount owed to compensate for any violation of the requirements of Executive Order 13706, 29 CFR part 13, or this clause, including any pay and/or benefits denied or lost by reason of its violation; other actual monetary losses sustained as a direct result of the violation; and liquidated damages. Consistent with withholding procedures under the SCA, DBA and Executive Order 13658, paragraph (c) would allow the contracting agency and the Department to effect withholding of funds from the prime contractor on not only the contract covered by the Executive Order but also on any other contract that the prime contractor has entered into with the Federal Government.

Proposed paragraph (d) states the circumstances under which the contracting agency and/or the Department may suspend or terminate a contract, or debar a contractor, for violations of the Executive Order. It provides that in the event of a failure to comply with any term or condition of the Executive Order, 29 CFR part 13, or the clause, the contracting agency may on its own action, or after authorization or by direction of the Department and written notification to the contractor, take action to cause suspension of any further payment, advance or guarantee of funds until such violations have ceased. Paragraph (d) additionally provides that any failure to comply with the contract clause may constitute grounds for termination of the right to proceed with the contract work and, in such event, for the Federal Government

to enter into other contracts or arrangements for completion of the work, charging the contractor in default with any additional cost. Paragraph (d) also provides that a breach of the contract clauses may be grounds to debar the contractor as provided in proposed 29 CFR part 13.52.

Proposed paragraph (e), which implements section 2(f) of the Executive Order, provides that the paid sick leave required by the Executive Order, 29 CFR part 13, and the clause is in addition to a contractor's obligations under the SCA and DBA, and that a contractor may not receive credit toward its prevailing wage or fringe benefit obligations under those Acts for any paid sick leave provided in satisfaction of the requirements of the Executive Order and 29 CFR part 13.

Proposed paragraph (f), which implements section 2(l) of the Executive Order, provides that nothing in Executive Order 13658 or 29 CFR part 13 shall excuse noncompliance with or supersede any applicable Federal or State law, any applicable law or municipal ordinance, or a collective bargaining agreement requiring greater paid sick leave or leave rights than those established under Executive Order 13760 and 29 CFR part 13. Proposed § 13.5(f)(2)(i) and proposed § 13.1(b) also implement sections 2(f) and 2(l) of the Executive Order, and the preamble discussions related to proposed § 13.5(f)(2)(i) and proposed § 13.1(b) accordingly describe the operation of paragraphs (e) and (f) in greater detail.

Proposed paragraph (g) sets forth recordkeeping and related obligations that are consistent with the Secretary's authority under section 4 of the Order to obtain compliance with the Order, and that the Department views as essential to determining whether the contractor has satisfied its obligations under the Executive Order. The Department derived the obligations set forth in paragraph (g) from the FLSA, SCA, DBA, FMLA and Executive Order 13658. The recordkeeping obligations proposed in paragraph (g) duplicate those in proposed § 13.25; a description of those obligations accordingly appears in the preamble related to § 13.25.

Proposed paragraph (h) requires the contractor to both insert the contract clause in all its covered subcontracts and to require its subcontractors to include the clause in any covered lower-tier subcontracts.

Proposed paragraph (i), which is derived from the SCA contract clause, 29 CFR 4.6(n), and the Executive Order 13658 contract clause, 79 FR 60731, sets forth the certifications of eligibility the contractor makes by entering into the contract. Paragraph (i)(1) stipulates that

by entering into the contract, the contractor and its officials certify that neither the contractor nor any person or firm with an interest in the contractor's firm is a person or firm ineligible to be awarded Government contracts by virtue of the sanctions imposed pursuant to section 5 of the SCA, section 3(a) of the DBA, or 29 CFR 5.12(a)(1). Paragraph (i)(2) constitutes a certification that no part of the contract shall be subcontracted to any person or firm on the list of persons or firms ineligible to receive Federal contracts currently maintained on the System for Award Management Web site, <http://www.SAM.gov>. Paragraph (i)(3) contains an acknowledgement by the contractor that the penalty for making false statements is prescribed in the U.S. Criminal Code at 18 U.S.C. 1001.

Proposed paragraph (j) implements section 2(k) of the Executive Order. The text of paragraph (j) mirrors the proposed regulatory text at proposed §§ 13.6(a) and § 13.6(b). A full description of the operation of the proposed contractor obligations not to interfere with or discriminate against employees with respect to the accrual or use of paid sick leave accordingly appears in the preamble related to proposed §§ 13.6(a) and § 13.6(b).

Proposed paragraph (k) provides that employees cannot waive, nor may contractors induce employees to waive, their rights under Executive Order 13706, 29 CFR part 13, or the clause. As discussed in greater detail in the preamble related to proposed § 13.7, the Department included a provision prohibiting the waiver of rights in the regulations implementing the Minimum Wage Executive Order and believes it is appropriate to adopt the same policy here.

Proposed paragraph (l) requires that contractors notify all employees performing work on or in connection with a covered contract of the paid sick leave requirements of Executive Order 13706, 29 CFR part 13, and the clause by posting a notice provided by the Department of Labor in a prominent and accessible place at the worksite so it may be readily seen by employees. It additionally permits contractors that customarily post notices to employees electronically to post the notice electronically, provided such electronic posting is displayed prominently on any Web site that is maintained by the contractor, whether external or internal, and customarily used for notices to employees about terms and conditions of employment. The notice obligations contained in paragraph (l) mirror those contained in proposed § 13.27(a)–(b), which the Department derived from the

Minimum Wage Executive Order implementing regulations at 29 CFR 10.29(b)–(c). The preamble related to those sections contains a discussion of the Department's rationale for including the particular notice obligation it is proposing. Proposed paragraph (m) is based on section 5(b) of the Executive Order and provides that disputes related to the application of the Executive Order to the contract shall not be subject to the contract's general disputes clause. Instead, such disputes shall be resolved in accordance with the dispute resolution process set forth in 29 CFR part 10. Paragraph (m) also provides that disputes within the meaning of the clause include disputes between the contractor (or any of its subcontractors) and the contracting agency, the U.S. Department of Labor, or the workers or their representatives.

#### IV. Paperwork Reduction Act

As part of its continuing effort to reduce paperwork and respondent burden, the Department conducts a preclearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3506(c)(2)(A). This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. The PRA typically requires an agency to provide notice and seek public comments on any proposed collection of information contained in a proposed rule. *See* 44 U.S.C. 3506(c)(2)(B); 5 CFR 1320.8. Persons are not required to respond to the information collection requirements until they are approved by OMB under the PRA at the final rule stage.

*Purpose and use:* This NPRM, which implements the paid sick leave requirements of Executive Order 13706, contains provisions that are considered collections of information under the PRA. Pursuant to proposed § 13.21, the contractor and any subcontractors shall include in any covered subcontracts the applicable Executive Order paid sick leave contract clause referred to in proposed § 13.11(a) and shall require, as a condition of payment, that the subcontractor include the contract clause in any lower-tier subcontracts. Pursuant to proposed § 13.25, contractors and each subcontractor performing work subject to Executive Order 13706 and these proposed

regulations shall make and maintain during the course of the covered contract, and preserve for no less than three years thereafter, records containing the information specified in paragraphs (a)(1) through (15) of proposed § 13.25 for each employee and shall make them available for inspection, copying, and transcription by authorized representatives of the Wage and Hour Division. These include: (1) Name, address, and Social Security number of each employee; (2) The employee's occupation(s) or classification(s); (3) The rate or rates of wages paid; (4) The number of daily and weekly hours worked; (5) Any deductions made; (6) The total wages paid each pay period; (7) A copy of notifications to employees of the amount of paid sick leave the employees have accrued as required under § 13.5(a)(2); (8) A copy of employees' requests to use paid sick leave, if in writing, or, if not in writing, any other records reflecting such employee requests; (9) Dates and amounts of paid sick leave used by employees; (10) A copy of any written denials of employees' requests to use paid sick leave, including explanations for such denials, as required under § 13.5(d)(3); (11) Any records reflecting the certification and documentation a contractor may require an employee to provide under § 13.5(e), including copies of any certification or documentation provided by an employee; (12) Any other records showing any tracking of or calculations related to an employee's accrual or use of paid sick leave; (13) A copy of any certified list of employees' accrued, unused paid sick leave provided to a contracting officer in compliance with § 13.26; (14) Any certified list of employees' accrued, unused paid sick leave received from the contracting agency in compliance with § 13.11(f); and (15) The relevant covered contract.

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

The Department notes that many of the proposed recordkeeping requirements in this NPRM related to paid sick leave are new requirements. As a result, the Department will create a new information collection titled "Government Contractor Paid Sick Leave" and submit it to OMB for approval under OMB control number 1235-ONEW. A new information collection request (ICR) has been submitted to the OMB that would provide PRA authorization for control

number 1235-ONEW to incorporate the recordkeeping provisions in this proposed rule and to incorporate burdens associated with the new recordkeeping requirements.

Additionally, the Department will submit to OMB for approval a revision to ICR 1235-0018 incorporating certain recordkeeping provisions in this proposed rule even though the proposed rule does not increase a paperwork burden on the regulated community of the information collection provisions contained in ICR 1235-0018. The ICR under OMB control number 1235-0018 contains the general FLSA recordkeeping requirements and burdens. Overlapping recordkeeping requirements are located in proposed § 13.25(a)(1)-(6) (including an overlapping exemption located in proposed § 13.25(c)). Such burden is already captured in the ICR for all employers.

The WHD obtains PRA clearance under control number 1235-0021 for an information collection covering complaints alleging violations of various labor standards that the agency administers and enforces. An ICR has been submitted to revise the approval to incorporate the provisions in this proposed rule applicable to complaints and adjust burden estimates to reflect any increase in the number of complaints filed against contractors who fail to comply with the paid sick leave requirements of Executive Order 13706 and 29 CFR part 13.

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

Information and technology: There is no particular order or form of records prescribed by the proposed regulations. A contractor may meet the requirements of this proposed rule using paper or electronic means. The WHD, in order to reduce burden caused by the filing of complaints that are not actionable by the agency, uses a complaint filing

process that has complainants discuss their concerns with WHD professional staff. This process allows agency staff to refer complainants raising concerns that are not actionable under wage and hour laws and regulations to an agency that may be able to offer assistance.

Public comments: The Department seeks comments on its analysis that this NPRM creates a slight paperwork burden associated with ICR 1235-0021 but does not create a paperwork burden on the regulated community of the information collection provisions contained in ICR 1235-0018. Additionally, the Department seeks comments on its analysis that this NPRM creates a new paperwork burden on the regulated community as described in the new information collection provisions contained in ICR 1235-0NEW. Commenters may send their views to the Department in the same way as all other comments (e.g., through the <http://www.regulations.gov> Web site). While much of the information provided to OMB in support of the information collection request appears in the preamble, interested parties may obtain a copy of the full recordkeeping and complaint process supporting statements by sending a written request to the mail address shown in the ADDRESSES section at the beginning of this preamble. In addition to having an opportunity to file comments with the Department, comments about the paperwork implications of the proposed regulations may be addressed to the OMB. Comments to the OMB should be directed to: Office of Information and Regulatory Affairs, Attention OMB Desk Officer for the Wage and Hour Division, Office of Management and Budget, Room 10235, Washington, DC 20503; Telephone: 202-395-7316/Fax: 202-395-6974 (these are not toll-free numbers). The OMB will consider all written comments that agency receives within 30 days of publication of this proposed rule. As previously indicated, written comments directed to the Department may be submitted within 30 days of publication of this proposed rule.

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

- Evaluate whether the proposed collections of information are necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information,

including the validity of the methodology and assumptions used;

- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

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

*Type of Review:* Revision to currently approved information collections.

*Agency:* Wage and Hour Division, Department of Labor.

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

*OMB Control Number:* 1235-0018.

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

*Estimated Number of Respondents:* 3,911,600 (unaffected by this rulemaking).

*Estimated Number of Responses:* 40,998,533 (unaffected by this rulemaking).

*Estimated Burden Hours:* 1,250,164 (unaffected by this rulemaking).

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

*Frequency:* Various (unaffected by this rulemaking).

*Other Burden Cost:* 0.

*Title:* Employment Information Form.

*OMB Control Number:* 1235-0021.

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

*Total Respondents:* 35,511 (161 from this rulemaking).

*Estimated Number of Responses:* 35,511 (161 from this rulemaking).

*Estimated Burden Hours:* 11,837 (54 from this rulemaking).

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

*Frequency:* once.

*Other Burden Cost:* 0.

*Type of Review:* Approval of New Information Collection.

*Agency:* Wage and Hour Division, Department of Labor.

*Title:* Government Contractor Paid Sick Leave.

*OMB Control Number:* 1235-ONEW.

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

*Total Respondents:* 322,067.

*Estimated Number of Responses:* 6,326,198.

*Estimated Burden Hours:* 134,263.

*Estimated Time per Response:* various.  
*Frequency:* on occasion.  
*Other Burden Cost:* \$246,713 (maintenance and operations).

**V. Executive Orders 12866 and 13563**

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

Under Executive Order 12866, the Office of Management and Budget (OMB) must determine whether a regulatory action is a “significant regulatory action,” which includes an action that has an annual effect of \$100 million or more on the economy. Significant regulatory actions are subject to review by OMB. As described below, this proposed rule is economically significant. Therefore, the Department has prepared a Preliminary Regulatory Impact Analysis (PRIA) in connection with this proposed rule as required under section 6(a)(3) of Executive Order 12866, and OMB has reviewed the proposed rule.

*A. Introduction*

i. Background and Need for Rulemaking

Executive Order 13706 (EO) provides that employees can earn up to seven

days of paid sick leave annually on specified categories of contracts with the Federal Government where either the solicitation has been issued, or the contract has been awarded outside the solicitation process, on or after January 1, 2017. The Executive Order states that the Federal Government’s procurement interests in economy and efficiency are promoted when the Federal Government contracts with sources that allow their employees to earn paid sick leave.<sup>2</sup> This rulemaking implements the Executive Order, consistent with the authorization in section 3 of the Order.

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

The Department estimated the number of employees who would as a result of the Executive Order and this proposed rule receive some amount of paid sick leave, *i.e.*, “affected employees.” There are accordingly two categories of affected employees: Those covered employees who currently receive no paid sick leave, and those covered employees who currently receive paid sick leave in an amount less than they would be entitled to receive under the Executive Order (up to 7 days annually). As discussed in detail below, because the proposed rule only applies to “new contracts,” and the Department has estimated it will take five years for the universe of possibly covered contracts to become “new,” the full impact of the rulemaking will not likely occur before Year 5. In Year 5, the Department estimates there will be 828,200 affected employees (Table 1).<sup>3</sup> This includes approximately 436,700 employees who currently receive no

paid sick leave and 391,400 employees who receive some paid sick leave but would be entitled to receive additional paid sick leave under the proposed rulemaking.

The Department also estimated costs and transfer payments associated with this rulemaking. During the first 10 years the rule is in effect, average annualized direct employer costs are estimated to be \$18.4 million. (This estimation assumes a 7 percent real discount rate; hereafter, unless otherwise specified, average annualized values will be presented using a 7 percent real discount rate.) This estimated annualized cost includes \$6.0 million for regulatory familiarization, \$5.6 million for initial implementation costs, \$2.5 million for recurring implementation costs, and \$4.3 million for administrative costs. For a discussion of how the Department estimated these numbers, please see Section C.ii.

Transfer payments are transfers of income from employers to employees. Estimated average annualized transfer payments are \$250.1 million per year over 10 years. Lastly, the Department estimated deadweight loss (DWL). DWL occurs when a market operates at less than optimal equilibrium output, which happens anytime the conditions for a perfectly competitive market are not met, including due to a labor market intervention. The Department estimated that average annualized DWL will be \$526,000 per year during the first ten years of the rule. This will be primarily due to a decrease in employment that may be caused by the proposed rule.

TABLE 1—SUMMARY OF AFFECTED EMPLOYEES, REGULATORY COSTS, AND TRANSFERS

	Year 1 (1,000s)	Future years (1,000s)			Average annualized value (1,000s)	
		Year 2	Year 5	Year 10	3% Real rate	7% Real rate
Affected employees .....	153.8	322.0	828.2	909.1	.....	.....
Direct employer costs (2014\$) .....	\$92,148	\$6,398	\$9,960	\$6,205	\$16,674	\$18,362
Regulatory familiarization .....	\$45,132	\$0	\$0	\$0	\$5,137	\$6,005
Initial implementation .....	\$41,765	\$0	\$0	\$0	\$4,754	\$5,557
Recurring implementation .....	\$4,201	\$4,201	\$4,201	\$0	\$2,255	\$2,452
Administrative .....	\$1,050	\$2,198	\$5,759	\$6,205	\$4,528	\$4,347
Transfers (2014\$) .....	\$58,897	\$123,977	\$323,299	\$364,109	\$260,761	\$250,051
DWL (2014\$) .....	\$127	\$266	\$684	\$751	\$548	\$526

iii. Terminology and Abbreviations

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

ATUS: American Time Use Survey.

BLS: Bureau of Labor Statistics.

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

CPS: Current Population Survey.

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

<sup>2</sup> The phrase “economy and efficiency” is used here only in the sense implied by the Federal Property and Administrative Services Act.

<sup>3</sup> This includes projected net job growth and so is somewhat larger than five times the number of affected employees in Year 1. Net job growth takes

into account both workers entering government contracting and workers leaving government contracting.

ECEC: Employer Costs for Employee Compensation.

FY: Fiscal year. The Federal fiscal year is from October 1 through September 30.

NCS: National Compensation Survey.

OES: Occupational Employment Statistics.

PTO: Paid time-off.

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

Real dollars (2014\$): Dollars adjusted using the CPI-U to reflect their purchasing power in 2014.

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

SAM: System for Award Management

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

### *B. Methodology To Determine the Number of Affected Employees*

#### *i. Overview and Data*

This section explains the methodology the Department used to estimate the number of affected employees. The first step in estimating the number of affected employees is determining the total number of employees working on Federal contracts (“Federal contract employees”). However, there are no data on the number of Federal contract employees. To estimate the number of Federal contract employees, the Department employed the approach used in the Department’s final rule implementing Executive Order 13658.<sup>4</sup>

After determining the total number of Federal contract employees, the Department estimated the share who will receive additional days of paid sick leave due to the rulemaking. The 2015 NCS provides data on the percentage of employees with paid sick leave and the annual number of days of leave that each employee receives. This distribution allowed the Department to estimate the number of employees who receive less than the amount of paid

sick leave required under the proposed rule. Note that the Executive Order generally measures paid sick leave in hours but because the NCS tabulates paid sick leave in days, the Department converted sick leave hours to days to use the NCS. The Department assumes 8 hours worked per day, so the Executive Order provides a maximum accrual of 7 days of paid sick leave annually. The 2015 NCS does not provide data for the agriculture industry. Therefore, the Department supplemented the 2015 NCS data on paid sick leave with data from the 2011 ATUS Leave Module.

#### *ii. Number of Affected Employees*

First, the Department estimated the number of employees who work on federal contracts that will be covered by the Executive Order. This represents the number of “potentially affected workers.” Then the Department estimated the share of potentially affected workers who will receive new or additional paid sick leave as a result of the EO. These workers are referred to as “affected.”

The Department estimated the number of potentially affected employees by taking the ratio of Federal contracting expenditure to total output, by industry, and applying this ratio to total employment in that industry (Table 2). This analysis was conducted at the 2-digit NAICS level. The Department derived total Federal contracting expenditure from USASpending.gov data, which tabulates data on Federal contracting through the Federal Procurement Data System—Next Generation (FPDS-NG). The Congressional Budget Office (CBO) has stated that this is the “only comprehensive source of information about federal spending on contracts.”<sup>5</sup> According to data from USASpending.gov, the government spent \$619 billion on procurement contracts in FY2014. The Department excluded expenditures to state and local governments both because government employees generally receive at least

seven days of paid sick leave and because the DBA does not apply to construction performed by state or local government employees. The Department also excluded contracts performed outside the U.S. because the proposed rule only covers contracts to the extent they are performed in the U.S. These two adjustments reduce the relevant Federal government’s expenditures to \$407 billion. Next, the Department excluded expenditures on goods purchased by the Federal government because the proposed rule does not apply to contracts subject to the Walsh-Healey Public Contracts Act (PCA) and hence would not apply to contracts for the manufacturing and furnishing of materials and supplies.<sup>6</sup> Subtracting Federal expenditures on goods purchased, the Department found that the Federal government spent \$230.2 billion on services (including construction) provided by government contractors in FY2014.<sup>7</sup> To determine the share of all output associated with government contracts the Department divided industry level contracting expenditures by that industry’s gross output.<sup>8</sup> For example, in the information industry, \$6.6 billion in contracting expenditures was divided by \$1.5 trillion in total output, resulting in an estimate that covered government contracts compose 0.43 percent of every dollar of total output in the information industry.

The Department multiplied the ratio of covered-to-gross output by private sector employment at the industry level to estimate the share of employees working on covered contracts. The Department combined these ratios and employment figures from the 2014 OES for each 2-digit NAICS industry.<sup>9</sup> For example, in the information industry, there were approximately 2.7 million private sector employees in 2014. The Department multiplied 2.7 million by 0.43 percent to estimate that 12,000 employees in the information industry will be potentially affected by the EO.<sup>10 11</sup>

<sup>4</sup> See 79 FR 60634, 60692–60720.

<sup>5</sup> Congressional Budget Office. (2015). Federal Contracts and the Contracted Workforce. P. 3. Available at: <https://www.cbo.gov/publication/49931>.

<sup>6</sup> For example, the government purchases pencils; however, a contract solely to purchase pencils would be subject to the PCA and accordingly would not be covered by the Executive Order.

<sup>7</sup> USASpending.gov does not capture certain types of concessions contracts and contracts in connection with Federal property or lands and related to offering services for Federal employees, their dependents or the general public that will be covered by this proposed rule. However, a portion

of contracts in some product service codes will not be covered by this proposed rule. Therefore, while the Department’s estimate of the number of affected workers may be somewhat imprecise, the overinclusion of contracts from the applicable product service codes and the exclusion of some concessions contracts and contracts in connection with Federal property or lands related to offering services will offset each other to some degree in calculating the total number of affected workers.

<sup>8</sup> Bureau of Economic Analysis, National Income and Product Accounts (NIPA) Tables, Gross output, 2014.

<sup>9</sup> Bureau of Labor Statistics, Occupational Employment Statistics, May 2014. Available at: <http://www.bls.gov/oes/>.

<sup>10</sup> The North American Industry Classification System is a method by which Federal statistical agencies classify business establishments in order to collect, analyze, and publish data about certain industries. Each industry is categorized by a 2–6 digit number. United States Census Bureau. “North American Industry Classification System: Introduction to NAICS.” U.S. Department of Commerce. <http://www.census.gov/eos/www/naics/>.

<sup>11</sup> Note that number of employees aggregated across industry analysis does not match the total number of employees derived using totals due to the order of multiplying and summing.

TABLE 2—NUMBER OF POTENTIALLY AFFECTED EMPLOYEES

Industry	NAICS	Private employees (1,000s) <sup>a</sup>	Total output (billions) <sup>b</sup>	Covered contracting output (millions) <sup>c</sup>	Share output from covered contracting (percent)	Total contract employees (1,000s) <sup>d</sup>	Potentially affected in first year (1,000s) <sup>e</sup>
Agriculture, forestry, fishing and .....	11	410	\$463	\$242	0.05	0	0
Mining .....	21	824	687	82	0.01	0	0
Utilities .....	22	548	413	2,993	0.73	4	1
Construction .....	23	6,094	1,217	22,263	1.83	111	22
Manufacturing .....	31–33	12,101	6,144	18,965	0.31	37	7
Wholesale trade .....	42	5,780	1,590	237	0.01	1	0
Retail trade .....	44–45	15,473	1,553	2,189	0.14	22	4
Transportation and warehousing .....	48–49	4,590	1,057	8,733	0.83	38	8
Information .....	51	2,736	1,517	6,590	0.43	12	2
Finance and insurance .....	52	5,619	2,152	17,651	0.82	46	9
Real estate and rental and leasing .....	53	2,018	3,142	952	0.03	1	0
Professional, scientific, and .....	54	8,232	1,888	106,347	5.63	464	93
Management of companies and .....	55	2,207	601	1	0.00	0	0
Administrative and waste services .....	56	8,627	820	27,884	3.40	293	59
Educational services .....	61	2,728	335	2,500	0.75	20	4
Health care and social assistance .....	62	17,370	2,131	9,576	0.45	78	16
Arts, entertainment, and recreation .....	71	2,199	295	52	0.02	0	0
Accommodation and food services .....	72	12,549	891	1,307	0.15	18	4
Other services .....	81	3,938	619	1,592	0.26	10	2
Total private .....	.....	114,039	27,514	230,155	0.84	1,157	231

<sup>a</sup> Source: OES May 2014.

<sup>b</sup> Source: Bureau of Economic Analysis, NIPA Tables, Gross output, 2014.

<sup>c</sup> Source: USASpending.gov. Contracting expenditures for covered contracts in FY2014.

<sup>d</sup> Assumes share of expenditure on contracting is same as share of employment. Assumes all employees work exclusively on Federal contracts. Thus this may be an underestimate if some employees are not working entirely on Federal contracts.

<sup>e</sup> 20 percent of employees on Federal contracts are considered new in Year 1.

Because the EO only applies to “new contracts,” coverage of the estimated total number of potentially affected employees (1.2 million) will occur on a staggered year-by-year basis. The Department accordingly needed to devise a method to estimate at what rate the staggered coverage would occur. The Executive Order defines a new contract to be either one for which a solicitation has been issued, or for which the contract has been awarded outside the solicitation process, on or after January 1, 2017. Consistent with the Department’s approach in the rulemaking implementing Executive Order 13658, *see* 79 FR 34568, 34596; 79 FR 60693, the Department estimated that twenty percent of contracts will qualify as “new” in Year 1. If approximately twenty percent of

contracts are new each year, then almost all contracts should qualify as new for purposes of the Executive Order by Year 5.<sup>12</sup> The Department assumed employee coverage would also occur on a uniform twenty percent year-by-year basis. The Department accordingly multiplied the 1.2 million total potentially affected employees by 0.2 to estimate that 231,300 employees may be impacted in Year 1.

Next the Department used the 2015 NCS to determine how many of the potentially affected employees already receive paid sick leave. The 2015 NCS estimates that nationally 61 percent of all private sector employees currently receive some paid sick leave.<sup>13 14</sup> However, this average can vary substantially by industry and hours worked. To account for these differences

the Department performed its analysis by industry and full-time/part-time status.<sup>15</sup> In general, the BLS reports the share of employees who receive paid leave disaggregated by industry (Table 3). The NCS does not publish data by industry and full-time status; however, for this proposed rulemaking BLS provided this breakdown using the NCS microdata for industries with sufficient observations to meet their publication criteria. For industries not available from the NCS by part-time status, the Department estimated the rates.<sup>16</sup> The NCS does not include employees in the agriculture, forestry, fishing and hunting industries; therefore, the Department estimated the share of employees with access to paid sick leave in those industries based on the 2011 ATUS Leave Module.<sup>17</sup>

<sup>12</sup> If some contracts last longer than 5 years, then not all contracts will be covered by Year 5.

<sup>13</sup> National Compensation Survey, March 2015, “Table 32. Leave benefits: Access, private industry employees”.

<sup>14</sup> Data on paid sick leave are not available specifically for Federal contractors. The Department assumes rates of paid sick leave for Federal contractors are similar to all private sector workers.

<sup>15</sup> The Department’s analysis categorizes as full-time those individuals who work 32 hours or more per workweek, and as part-time those individuals who work less than 32 hours per workweek (rounded to the nearest integer). This represents the line of demarcation between workers who would

and would not accrue 56 hours of paid sick leave a year if they work a full year. The Department’s designation herein of certain individuals as “full-time” and other individuals as “part-time” based on their usual hours worked is solely for purposes of facilitating the economic analysis in this rulemaking.

<sup>16</sup> The Department used the share of employees with sick leave, for all employees and full-time employees, and the ratio of full-time to part-time employees in each industry to estimate the shares for part-time employees in those industries without part-time employees’ shares. The Department used data from the CPS to calculate the ratio of full- to part-time employees.

<sup>17</sup> The 2011 ATUS Leave Module is a special supplement to the annual ATUS survey sponsored by the BLS and conducted by the U.S. Census Bureau. It surveys employees nationally on use of leave. The Department estimated the number of hours of leave taken the previous week by employees in the agriculture, forestry, fishing and hunting industries who (1) receive paid sick leave and (2) took leave for “own illness or medical care” or “illness or medical care of another family member”. The weekly number of hours was multiplied by 52 weeks to estimate annual number of hours of sick leave taken.

TABLE 3—SHARE OF EMPLOYEES WITH PAID SICK LEAVE BY INDUSTRY AND FULL-TIME STATUS

Industry	NAICS	% With Some Paid Sick Leave		
		Total <sup>a</sup>	Full-Time <sup>b</sup>	Part-Time <sup>b</sup>
Agriculture, forestry, fishing and hunting <sup>c</sup>	11	26	30	10.
Mining	21	64	65	<sup>d</sup> 23.
Utilities	22	89	89	<sup>d</sup> 89.
Construction	23	41	42	25.
Manufacturing	31–33	65	67	<sup>d</sup> 21.
Wholesale trade	42	77	80	<sup>d</sup> 35.
Retail trade	44–45	50	73	27.
Transportation and warehousing	48–49	74	75	73.
Information	51	92	95	51.
Finance and insurance	52	90	93	57.
Real estate and rental and leasing	53	72	80	<sup>d</sup> 36.
Professional, scientific, and technical services	54	78	85	<sup>d</sup> 25.
Management of companies and enterprises	55	90	91	<sup>d</sup> 85.
Administrative and waste services	56	44	53	15.
Educational services	61	73	90	24.
Health care and social assistance	62	72	85	36.
Arts, entertainment, and recreation	71	48	71	29.
Accommodation and food services	72	25	46	11.
Other services	81	57	73	24.
Total private		61	73	25.

<sup>a</sup> **Source:** National Compensation Survey, March 2015, “Table 32. Leave benefits: Access, private industry workers” (unless otherwise noted). Assumes distribution of paid leave is similar for Federal contractors and other private employees.

<sup>b</sup> The NCS does not publish data by industry and full-time status; however, for this proposed rulemaking the BLS provided this breakdown using the NCS microdata for industries with sufficient observations to meet their publication criteria. Full-time is defined as 32 or more hours per week, as explained above.

<sup>c</sup> NCS does not include information for this industry. Used 2011 ATUS Leave Module to estimate share of employees in this industry with paid sick leave. Assumes distribution of paid leave is similar for Federal contractors and other private sector employees.

<sup>d</sup> NCS does not include information for this industry and part-time status. The Department estimated these rates.

The Department separated the 231,300 employees potentially impacted in Year 1 into approximately 198,200 full-time employees and 33,100 part-time employees.<sup>18</sup> For full-time employees, across all industries, 73 percent receive some paid sick leave and 27 percent currently receive no paid sick leave. For part-time employees, 25 percent receive some paid sick leave and 75 percent receive no paid leave. All employees with no paid sick leave will be affected regardless of how many hours per week they work (assuming they work a sufficient number of hours to accrue paid sick leave).

Additionally, some employees who currently receive paid sick leave will also be affected by the proposed rule if they receive less than the required number of days. To determine how many of these employees are affected the Department used NCS data on the distribution of days of leave. The 2015 NCS provides the share of employees with a range of days of paid sick leave (e.g., 5 to 9 days per year).<sup>19</sup> The NCS

publishes these data aggregated across all industries. However, since this analysis is conducted by industry, the BLS provided the Department these ranges of days disaggregated by industry based on the NCS (see Appendix A). The Department then used the categorical distribution of days for all workers and full-time workers to approximate these values for both full-time and part-time workers.<sup>20</sup> This results in a distribution by categories of days of sick leave by industry and full-time status.

The Department distributed the share of employees within each NCS category (e.g., 5 to 9 days per year) of paid sick leave days across the individual number of days in that category (e.g., 5, 6, 7, 8, 9) using a Poisson distribution that approximates the entire distribution of days of paid sick leave provided to workers with this benefit.<sup>21</sup> For

2015. Available at: <http://www.bls.gov/ncs/ews/benefits/2015/ownership/private/table35a.htm>.

<sup>20</sup> The distribution is available for all workers and full-time workers but not part-time workers. Combining these data with the share of workers who are full-time allowed the Department to approximate the distribution for part-time workers.

<sup>21</sup> The Poisson distribution is frequently used for discrete count data. The data were consistent with a Poisson distribution. The distribution of days of sick leave is continuous but was approximated using integers to allow use of the Poisson distribution and to simplify the analysis. Aggregate findings would be highly comparable if a continuous distribution had been used instead.

example, using the NCS data the Department estimates that 53 percent of full-time employees with paid sick leave receive 5 to 9 days of leave. Applying the Poisson distribution, the Department estimated 10 percent of employees with paid sick leave currently receive 5 sick days, 13 percent currently receive 6 sick days, etc.<sup>22</sup> The percent distributions of days of paid sick leave are presented in Appendix A.

To estimate the number of affected employees the Department summed the number of employees with less than 7 days of paid sick leave (7 days with 8 hours of paid leave per day is equal to the maximum of 56 hours of paid sick leave). The Department estimates 72,700 contract employees have access to paid sick leave but receive fewer than 7 days of paid sick leave (48.4 percent of workers with some paid sick leave) and are thus classified as affected employees. Next, the Department estimated the number of additional paid sick leave days these employees would need to receive to meet Executive Order 13706. This was done somewhat differently for full-time and part-time employees. For full-time employees with no paid sick leave the Department estimated they will receive 7 additional

<sup>22</sup> Some additional manipulations were made to the data in cases where the Poisson distribution resulted in numbers contradictory to the reported medians (see Appendix A).

<sup>18</sup> These estimates were calculated based on NCS data when possible. Otherwise, the Department used 2014 CPS data. The estimates assume the share of government contractors that are full-time is similar to private industry overall. As noted, full-time is defined for purposes of this analysis as 32 or more hours per week.

<sup>19</sup> Table 35. Paid sick leave: Number of annual days by service requirement, private industry workers, National Compensation Survey, March

days of paid sick leave. For full-time employees with between 1 and 6 days of leave the Department estimated the number of additional days they would need to receive to reach 7 days of paid leave (e.g., if currently receive 1 day then will receive an additional 6 days).

To estimate the additional number of paid sick days per year that would accrue to part-time employees as a result of the rule, the Department first had to estimate hours of paid sick leave per year currently available to these workers.

To estimate paid sick leave hours currently available to part-time employees required additional calculations because the NCS reports days of paid sick leave per year, not hours. Therefore the Department adjusted part-time employees' days of paid sick leave by assuming that the number of hours of paid sick leave associated with "one day" of leave is

equivalent to average hours worked in a day. For example, if a part-time worker averages 6 hours of work per day, then one day of paid sick leave will also be equal to 6 hours. To do this, the Department divided part-time workers' average hours worked per week by 5 to calculate their average hours worked per day by industry. The Department then multiplied average work hours per day by NCS reported paid days of sick leave per year to estimate part-time employees' hours of paid sick leave currently available per year.

Next, the Department calculated the total hours of paid sick leave per year that might accrue to a part-time worker as a result of this EO. Because paid sick leave is accrued at a rate of 1 hour per every 30 hours worked, the Department divided mean annual hours worked for part-time workers in an industry by 30 to estimate the number of hours of paid sick leave required under the EO. The

difference between hours of paid sick leave currently available per year and hours of paid sick leave per year required under the EO results in the additional hours that accrue to part-time workers. This was then divided by 8 to express the additional paid sick hours in terms of standardized 8-hour days. Table 6 presents the adjusted numbers for part-time employees.

A total of 153,800 employees were estimated to be affected in Year 1 (Table 4). The total number of additional days of paid sick leave is then calculated by multiplying the number of employees affected by the number of additional days of paid sick leave provided by the proposed rulemaking (Table 5 and Table 6). The Department estimated that the proposed rulemaking will result in a total of 681,700 additional days of paid sick leave provided (563,000 days for full-time workers and 118,700 days for part-time workers).<sup>23</sup>

TABLE 4—NUMBER OF AFFECTED EMPLOYEES IN YEAR 1

Industry	Affected Employees				
	Total	Full-time <sup>a</sup>	Part-time <sup>a</sup>	With no paid sick leave	With some paid sick leave
Agriculture, forestry, fishing and hunting .....	37	29	9	32	5
Mining .....	13	13	0	7	6
Utilities .....	101	98	2	87	13
Construction .....	19,071	17,332	1,739	13,255	5,816
Manufacturing .....	5,538	5,238	300	2,615	2,923
Wholesale trade .....	122	112	10	40	82
Retail trade .....	3,051	1,993	1,059	1,741	1,311
Transportation and warehousing .....	4,022	3,545	476	1,914	2,108
Information .....	918	715	203	254	663
Finance and insurance .....	2,465	2,158	307	845	1,620
Real estate and rental and leasing .....	78	60	18	34	44
Professional, scientific, and technical services .....	56,571	47,074	9,497	20,403	36,168
Management of companies and enterprises .....	0	0	0	0	0
Administrative and waste services .....	47,336	36,748	10,588	31,861	15,475
Educational services .....	1,360	700	661	954	407
Health care and social assistance .....	8,415	6,196	2,219	3,724	4,691
Arts, entertainment, and recreation .....	56	33	23	34	22
Accommodation and food services .....	3,270	1,827	1,443	2,514	756
Other services .....	1,421	934	487	818	603
<b>Total private .....</b>	<b>153,846</b>	<b>124,803</b>	<b>29,042</b>	<b>81,132</b>	<b>72,713</b>

<sup>a</sup> Part-time is defined as working less than 32 hours per week.

TABLE 5—CURRENT DISTRIBUTION OF DAYS OF PAID LEAVE, ADDITIONAL DAYS OF LEAVE, AND AFFECTED EMPLOYEES IN YEAR 1, FULL-TIME EMPLOYEES

Industry	Number of full-time potentially affected employees accruing annually the following number of days of sick leave								Affected employees	Days additional sick leave available
	0	1	2	3	4	5	6	7+		
Agriculture, forestry, fishing .....	24	0	0	1	2	1	1	5	29	180
Mining .....	7	0	0	0	0	1	5	6	13	54
Utilities .....	85	0	0	0	0	3	10	678	98	614
Construction .....	11,826	144	445	918	1,419	1,356	1,224	3,058	17,332	97,737

<sup>23</sup> The following estimate is based on the marginal number of paid sick days employers would have to provide due to this regulation. To the extent employers that currently provide paid sick leave do not modify their existing paid sick leave policies in accordance with section 2(g) of the Executive Order

and proposed section 13.5(f), and to the extent SCA- or DBA-covered employers provide paid sick leave as an SCA or DBA fringe benefit, this estimate may not entirely reflect the total marginal number of days employers would have to provide. However, the Department assumes firms will be able to and

will choose to apply the currently provided days of paid sick leave toward the requirements of the Executive Order and this rule, and the Department similarly understands that contractors generally do not provide paid sick leave as an SCA or DBA fringe benefit.



TABLE 5—CURRENT DISTRIBUTION OF DAYS OF PAID LEAVE, ADDITIONAL DAYS OF LEAVE, AND AFFECTED EMPLOYEES IN YEAR 1, FULL-TIME EMPLOYEES—Continued

Industry	Number of full-time potentially affected employees accruing annually the following number of days of sick leave								Affected employees	Days additional sick leave available
	0	1	2	3	4	5	6	7+		
Manufacturing .....	2,358	48	197	542	1,119	487	487	1,907	5,238	24,764
Wholesale trade .....	32	1	5	14	28	16	15	49	112	444
Retail trade .....	847	21	64	133	205	356	367	1,145	1,993	8,601
Transportation and warehousing .....	1,680	20	92	283	657	319	494	3,176	3,545	16,575
Information .....	103	3	13	41	94	181	280	1,353	715	1,893
Finance and insurance .....	606	7	41	168	520	267	550	6,504	2,158	7,801
Real estate and rental and leasing .....	20	1	3	6	9	11	11	40	60	242
Professional, scientific, and management of companies .....	12,280	307	1,266	3,481	7,181	9,498	13,060	34,794	47,074	161,657
Administrative and waste services .....	0	0	0	0	0	0	0	0	0	1
Educational services .....	22,266	271	1,119	3,077	6,347	1,739	1,927	10,627	36,748	199,845
Health care and social assistance .....	324	2	13	49	140	59	112	2,538	700	3,194
Arts, entertainment, and recreation .....	1,918	65	267	735	1,516	714	981	6,591	6,196	25,047
Accommodation and food services .....	15	0	1	3	5	4	4	18	33	151
Other services .....	1,179	18	55	113	175	142	146	356	1,827	10,036
Total private .....	397	8	32	88	182	96	132	537	934	4,207
Total private .....	55,968	915	3,614	9,652	19,598	15,250	19,806	73,382	124,803	563,043

Note: Numbers do not always add to total due to rounding.

TABLE 6—CURRENT DISTRIBUTION OF DAYS OF PAID LEAVE, ADDITIONAL DAYS OF LEAVE, AND AFFECTED EMPLOYEES IN YEAR 1, PART-TIME EMPLOYEES

Industry	Number of part-time potentially affected employees accruing annually the following number of days of sick leave								Affected employees	Days additional sick leave available <sup>a</sup>
	0	1	2	3	4	5	6	7+		
Agriculture, forestry, fishing and hunting .....	8	0	0	0	0	0	0	0	9	34
Mining .....	0	0	0	0	0	0	0	0	0	2
Utilities .....	2	0	0	0	0	0	0	16	2	8
Construction .....	1,429	10	28	52	70	78	72	166	1,739	7,453
Manufacturing .....	257	1	3	8	15	8	8	27	300	1,269
Wholesale trade .....	7	0	0	0	1	1	1	1	10	35
Retail trade .....	894	4	11	20	27	54	49	165	1,059	4,373
Transportation and warehousing .....	234	3	14	38	78	46	63	390	476	1,552
Information .....	151	0	1	4	7	17	23	105	203	719
Finance and insurance .....	239	0	2	8	21	14	24	248	307	1,265
Real estate and rental and leasing .....	14	0	0	1	1	1	1	4	18	69
Professional, scientific, and technical .....	8,123	16	58	141	256	409	494	1,375	9,497	36,921
Management of companies and administrative and waste services .....	0	0	0	0	0	0	0	0	0	0
Educational services .....	9,595	25	89	215	389	129	146	700	10,588	45,055
Health care and social assistance .....	630	0	1	4	10	5	9	169	661	2,631
Arts, entertainment, and recreation .....	1,806	8	30	74	133	76	92	603	2,219	8,977
Accommodation and food services .....	19	0	0	1	1	1	1	4	23	83
Other services .....	1,336	4	10	19	25	24	25	57	1,443	6,353
Total private .....	421	1	5	11	20	13	16	66	487	1,894
Total private .....	25,164	74	255	594	1,054	876	1,025	4,097	29,042	118,693

Note: Numbers do not always add to total due to rounding.

<sup>a</sup>This is expressed in terms of standardized 8-hour days, as described in the text.

To estimate the number of affected employees in later years, the Department calculated the average annual geometric growth rate in employment based on the ten-year employment projection for 2012 to 2022

from BLS' Employment Projections program. Table 7 shows the number of affected employees in Years 1 through 10, along with the number of employees with no paid sick leave, with some paid sick leave, and by full-time/part-time

status. The share of employees working full-time in 2014 and the share of employees with no paid sick leave were applied to projected years.

TABLE 7—AFFECTED EMPLOYEES IN YEARS 1 THROUGH 10

Year	Affected employees (1,000s)				
	Total	Full-time	Part-time	With no paid sick leave	With some paid sick leave
Year 1 .....	153.8	124.8	29.0	81.1	72.7
Year 2 .....	322.0	261.2	60.8	169.8	152.2
Year 3 .....	490.4	397.8	92.6	258.6	231.8
Year 4 .....	659.1	534.7	124.4	347.6	311.5
Year 5 .....	828.2	671.8	156.3	436.7	391.4
Year 6 .....	843.7	684.4	159.3	444.9	398.8

TABLE 7—AFFECTED EMPLOYEES IN YEARS 1 THROUGH 10—Continued

Year	Affected employees (1,000s)				
	Total	Full-time	Part-time	With no paid sick leave	With some paid sick leave
Year 7 .....	859.5	697.3	162.3	453.3	406.3
Year 8 .....	875.7	710.4	165.3	461.8	413.9
Year 9 .....	892.2	723.8	168.4	470.5	421.7
Year 10 .....	909.1	737.5	171.6	479.4	429.7

### C. Impacts of Proposed Rule

#### i. Overview

This section presents direct employer costs, transfer payments and DWL associated with the proposed rulemaking. These impacts were projected for 10 years. The Department estimated average annualized direct employer costs of \$18.4 million, transfer payments of \$250.1 million and DWL of \$526,000. As these numbers demonstrate, the largest impact of the proposed rulemaking will be the transfer of income from employers to employees.

#### ii. Costs

The Department quantified three direct employer costs: (1) Regulatory familiarization costs; (2) implementation costs; and (3) recurring administrative costs. Other employer costs are considered qualitatively. Certain key inputs to the cost calculations, such as the amount of time required for regulatory familiarization and other compliance-related activities, are uncertain due to lack of data, and we therefore request comment and data that would allow for refinement of these estimates.

##### 1. Regulatory Familiarization Costs

The proposed rulemaking would impose regulatory familiarization costs on contractors that have or expect to have EO-covered contracts because such contractors will need to determine whether they are in compliance with the paid sick leave requirements. According to the General Services Administration's (GSA) System for Award Management (SAM) in August 2015 there were 543,900 Federal contracting firms.<sup>24</sup> The Department understands that many entities listed in SAM provide not only prime contracting, but also subcontracting, services on (distinct) Federal government contracts. However, we were unable to determine the prevalence of subcontractors in the SAM database because SAM only includes information on prime

contractor awards. Therefore, the Department examined five years of USASpending data<sup>25</sup> and found 20,600 first-tier subcontractors who do not hold contracts as primes (and thus may not be included in SAM), and added these firms to the total from SAM to obtain a total estimate of 564,400 contracting firms. The Department believes this is an overestimate of the number of covered contracting firms because it includes contractors that strictly provide materials and supplies to the government (and other firms with no Federal contracts covered by the Executive Order). However, information was not available to eliminate these firms.<sup>26</sup>

The Department drafted this proposed rule consistent with the directive in section 3(c) of the Executive Order that any regulations issued pursuant to the Order should, to the extent practicable, incorporate existing definitions and procedures from the FLSA, SCA, DBA, FMLA, VAWA and Executive Order 13658. As a result, contractors will likely already be familiar with many of the requirements the proposed rule imposes. For example, the Department expects that most, if not all, contractors that Executive Order 13706 will cover are either parties to contracts that Executive Order 13658 already covers, or will be parties to contracts Executive Order 13658 covers by the time the contractor enters into a contract that Executive Order 13706 covers. Contract, and employee, coverage under Executive Order 13658 and Executive Order 13706 are virtually identical, and the difference in coverage in Executive

Order 13706, *i.e.*, inclusion of employees who qualify for an exemption from the FLSA's minimum wage and overtime provisions, should cause no additional familiarization costs because covered contractors already need to differentiate between FLSA-exempt employees and employees not exempt from the FLSA. Furthermore, covered contractors will need to familiarize themselves with the application of the proposed rule's requirements to employees whose wages are governed by the FLSA, SCA or DBA, and these requirements apply essentially identically to employees who qualify for an exemption from the FLSA's minimum wage and overtime provisions. Thus, costs with respect to familiarization with the Executive Order's coverage requirements should be minimal.

In addition, the proposed rule's fundamental obligations are to allow covered employees to accrue an hour of paid sick leave for every thirty hours worked on covered contracts, and to use such accrued sick leave for the reasons specified in section 2(c) of Executive Order 13706. Once contract coverage is established, familiarization with these obligations is not overly complicated. The Department accordingly believes, as it similarly believed in the Executive Order 13658 proposed rulemaking, that to understand Executive Order's 13706 basic obligations, contractors will generally only need to review the contract clause, which the Department expects will constitute approximately two pages in the **Federal Register**.

The Department understands that the proposed rule imposes requirements beyond the fundamental obligations described above, and that contractors should seek to familiarize themselves with these requirements. However, the contract clause specifically describes some of these other obligations, including recordkeeping and notice requirements, the obligation not to interfere with an employee's use or accrual of paid sick leave, and the obligation not to discriminate against an employee for exercising certain rights. Moreover, to the extent contractors seek

<sup>24</sup> Data released in monthly files. Available at: <https://www.sam.gov/portal/SAM/#1>.

<sup>25</sup> The Department identified subawardees from the USASpending.gov data between FY 2010 and FY 2014 who did not perform work as a prime during those years.

<sup>26</sup> This may also be an overestimate because some firms in the SAM database do not currently have contracts with the Federal government, and the Department did not exclude firms that might be registered on SAM solely to apply for grants. Conversely, some covered firms may be excluded from this estimate. For example, the SAM database may not include some concessions contractors, and some contractors offering services for Federal employees, their dependents or the general public in connection with Federal property or lands. We invite comments and data that would facilitate refinement our estimates of affected entities.

additional guidance on the contract clause's operation or on a subject the contract clause may not directly address, they are likely to consult the compliance assistance materials the Department will produce in conjunction with this rulemaking, which will be available on the Department's Web site. Because the Department will design the compliance materials to succinctly and clearly address what it expects to be the most common contractor inquiries, the Department expects that contractors will not spend a considerable amount of time in those instances when they consult the compliance materials for information related to the Executive Order and the Department's rulemaking.

For these reasons, the Department estimated that contractors will, on average, use one hour of a human resources manager's time for regulatory familiarization purposes.<sup>27</sup> The Department further estimated the cost of this time to be the mean wage for a human resource manager of \$79.96 per hour.<sup>28</sup> The Department understands, however, that public stakeholders may believe that regulatory familiarization costs will differ from the Department's estimate. The Department accordingly invites any comments related to its estimate of regulatory familiarization costs.

Using the estimate of one hour of a human resources manager's time for

regulatory familiarization purposes, the Department estimated regulatory familiarization costs to be \$45.1 million (\$79.96 per hour x 1 hour x 564,400 contractors) (Table 8). A contractor likely would only familiarize itself with the rule once it is poised to have a covered contract (*i.e.*, a new contract within one of the 4 covered categories). However, since many contractors will have at least one new contract in Year 1, and the Department has no data on when contractors will first be affected, the Department has modeled these costs as if each contractor will have at least one covered "new contract" in 2017. Therefore, all regulatory familiarization costs occur in Year 1.<sup>29</sup>

TABLE 8—YEAR 1 COSTS

Variable	Regulatory familiarization costs	Initial implementation costs (no current policy)	Initial implementation costs (current policy)	Recurring implementation costs	Recurring administrative costs
Hours per affected firm .....	1	10	1	N/A	N/A
Hours per employee .....	N/A	N/A	N/A	1	0.25
Affected firms <sup>a</sup> .....	564,440	107,244	457,197	N/A	N/A
Newly affected employees .....	N/A	N/A	N/A	153,846	N/A
Total affected employees .....	N/A	N/A	N/A	N/A	153,846
Loaded wage rate .....	\$79.96	\$27.30	\$27.30	\$27.30	\$27.30
Base wage <sup>b</sup> .....	\$54.88	\$18.74	\$18.74	\$18.74	\$18.74
Benefits adj. factor <sup>c</sup> .....	1.46	1.46	1.46	1.46	1.46
Cost (\$1,000s) .....	\$45,132	\$29,282	\$12,483	\$4,201	\$1,050

<sup>a</sup> Total number of firms from the GSA's System for Award Management (SAM) August 2014 and subcontractors from USASpending.gov. Split between firms with and without a sick leave policy based on results from SHRM survey.

<sup>b</sup> Regulatory familiarization uses OES mean wage for human resource managers in 2014. Available at: <http://www.bls.gov/oes/current/oes113121.htm>. Other costs use OES mean wage for human resources assistants, except payroll and timekeeping in 2014. Available at: <http://www.bls.gov/oes/current/oes434161.htm>.

<sup>c</sup> Ratio of loaded wage to unloaded wage. Source: 2014 Employer Costs for Employee Compensation (ECEC).

2. Implementation Costs

Firms will incur implementation costs. The Department believes some of these costs may be incurred in Year 1 but others will be incurred as workers become covered. Therefore, the Department modeled this in two parts. First, firms will incur upfront implementation costs (*e.g.*, costs associated with adjusting accounting and payroll software). Second, because this proposed rule will only apply to employees on new contracts, the Department estimates it will take approximately five years to phase in the coverage over nearly all affected

employees. Therefore, implementation costs will generally be spread over the first five years that the regulation is in effect. As each contract becomes affected, the covered contractors will need to spend some time updating the accounting systems used to track paid sick leave and training managers responsible for implementing the requirements of the E.O. and this rule. Therefore, the Department modeled implementation costs as a function of newly affected employees for the first five years.

Thus, implementation costs comprise both a fixed cost (*i.e.*, the initial

implementation costs) and a second component that is a function of the number of affected employees within a contracting firm (*i.e.*, recurring implementation costs). Therefore, costs are partially related to the size of the firm, but a firm twice as large as another firm will have costs somewhat less than twice the other's costs.

As noted above, the Department estimated there are 564,400 Federal contracting firms. The Department estimated initial implementation costs separately for firms with a paid sick leave policy in place and firms who would need to create a policy.

<sup>27</sup> As discussed below, the Department is calculating the costs attendant to accounting for the accrual and use of paid sick leave in its costs of implementation. The Department is also including as implementation costs the ten hours it estimates covered contractors will need to develop a sick leave policy that complies with the Executive Order, if such contractors currently have no paid sick leave policy. Therefore, the one hour the Department expects contractors' human resources managers will spend familiarizing themselves with the rule does not include time related to adjusting

payroll systems to account for accrual and use of EO-required paid sick leave, or to creating paid sick leave policies.

<sup>28</sup> This includes the mean base wage of \$54.88 from the Occupational Employment Statistics (OES) plus benefits paid at a rate of 46 percent of the base wage, as estimated from the BLS's Employer Costs for Employee Compensation (ECEC) data. OES data available at: <http://www.bls.gov/oes/current/oes113121.htm>. The inclusion of only fringe benefits, rather than both fringe benefits and overhead costs, in the loaded wage would have a

relatively small impact on the overall cost estimate for this proposed rule. However, the Department invites comment on both the propriety of including overhead costs in this particular regulatory impact analysis and the appropriate quantitative adjustment to base wages to account for overhead.

<sup>29</sup> The Department has not estimated the additional marginal cost for new entrants to familiarize themselves with this requirement because the Department believes this cost to be small. We invite comment on this assumption.

According to a survey conducted by the Survey of Human Resource Management, 81 percent of companies provided some form of paid sick leave.<sup>30</sup> Therefore, the Department estimated 107,200 firms will need to create a sick leave policy (19 percent of 564,400 firms). The Department assumed these firms will spend on average 10 hours of time developing this policy. For the remaining 457,200 firms, the Department assumed on average one hour of a human resources worker's time will be spent implementing the necessary changes per affected firm.<sup>31</sup> The cost of this time is the mean wage for a human resource worker of \$27.30 per hour.<sup>32</sup> Initial implementation costs in Year 1 were estimated to be \$41.8 million (\$27.30 per hour × 10 hours × 107,200 contractors plus \$27.30 per hour × 1 hour × 457,200 contractors) (Table 8). The Department assumes recurring implementation costs will use one hour of a human resource worker's time per newly affected employee. As stated above, the Department found that the average wage with benefits for a human resources worker is \$27.30 per hour. The estimated number of newly affected employees in Year 1 is 153,800 (Table 8). Therefore, total Year 1

recurring implementation costs were estimated to equal \$4.2 million (\$27.30 × 1 hour × 153,800 employees).

### 3. Recurring Administrative Costs

Firms may incur recurring administrative costs associated with maintaining records of paid sick leave and adjusting scheduling. The Department assumed an HR worker will spend on average an additional fifteen minutes per affected employee annually on ongoing administrative costs. We believe these costs will be negligible because employers already have systems in place and already incur many of these costs for employees who take sick leave (both paid or unpaid). For example, managers may need to adjust scheduling when workers take time off due to illness regardless of whether that sick leave is paid or unpaid. Under these assumptions, administrative costs in Year 1 will total \$1.1 million (\$27.30 × (15 minutes/60 minutes) × 153,800 employees). Although these costs are relatively small in Year 1, they will occur annually and thus be a significant share of costs in the long run.

### 4. Projected Costs

Table 9 shows estimated costs for each of the first 10 years as well as

average annualized costs over the same period. Regulatory familiarization and initial implementation costs will only accrue in Year 1 but recurring implementation costs and recurring administrative costs will accrue in multiple years. Recurring implementation costs are incurred over the first 5 years since the Department has estimated it will take five years for the universe of covered contracts to become "new."

When estimating projected costs the Department used the same method used for Year 1 but used projected wages and numbers of affected employees. The Department calculated the average annual geometric growth rate in median nominal wages from CPS data between 2005 and 2014. The geometric growth rate is the constant annual growth rate that when compounded yields the last historical year's wage. The CPI-U was then used to convert this nominal growth rate to a real growth rate. The employment growth rate was calculated as the geometric annual growth rate based on the ten-year employment projection for 2012 to 2022 from BLS' Employment Projections program.

TABLE 9—DIRECT EMPLOYER COSTS IN YEARS 1 THROUGH 10  
[Millions of 2014\$]

Year/Discount rate	Regulatory familiarization costs	Initial implementation costs	Recurring implementation costs <sup>a</sup>	Recurring administrative costs	Total
<b>Years 1 Through 10</b>					
Year 1 .....	\$45.1	\$41.8	\$4.2	\$1.1	\$92.1
Year 2 .....	0.0	0.0	4.2	2.2	6.4
Year 3 .....	0.0	0.0	4.2	3.3	7.5
Year 4 .....	0.0	0.0	4.2	4.5	8.7
Year 5 .....	0.0	0.0	4.2	5.7	9.9
Year 6 .....	0.0	0.0	0.0	5.8	5.8
Year 7 .....	0.0	0.0	0.0	5.9	5.9
Year 8 .....	0.0	0.0	0.0	6.0	6.0
Year 9 .....	0.0	0.0	0.0	6.1	6.1
Year 10 .....	0.0	0.0	0.0	6.2	6.2
<b>Average Annualized Amounts</b>					
3% discount rate .....	5.1	4.8	2.3	4.5	16.7
7% discount rate .....	6.0	5.6	2.5	4.3	18.4

<sup>a</sup> Recurring implementation costs are incurred for the first 5 years as since the Department has estimated it will take five years for the universe of possibly covered contracts to become "new."

<sup>30</sup> Available at: [https://www.shrm.org/Research/SurveyFindings/Articles/Documents/09-0228\\_Paid\\_Leave\\_SR\\_FNL.pdf](https://www.shrm.org/Research/SurveyFindings/Articles/Documents/09-0228_Paid_Leave_SR_FNL.pdf).

<sup>31</sup> The Department identified little applicable data from which to estimate the amount of time required to make these adjustments. One source, based on a small sample, finds the average one-time

implementation costs of 0.125 percent of revenue. See Romich, J., et al. (2014). Implementation and Early Outcomes of the City of Seattle Paid Sick and Safe Time Ordinance.

<sup>32</sup> This includes the mean base wage of \$18.74 from the Occupational Employment Statistics (OES) plus benefits paid at a rate of 46 percent of the base

wage, as estimated from the BLS's Employer Costs for Employee Compensation (ECEC) data. OES data available at: <http://www.bls.gov/oes/current/oes113121.htm>.

## 5. Other Potential Costs

In addition to the costs discussed above, there may be additional costs that have not been quantified. These include potential costs to consumers and reduced production. However, based on similar rules in states and municipalities, the Department expects these costs to be small.<sup>33</sup>

**Consumer costs:** The relevant consumer is the Federal government. If, as expected, contractors pass along part or all of the increased cost to the government, in the form of higher contract prices, then government expenditures may rise (though, as discussed later, benefits of the Executive Order are expected to accompany any such increase in expenditures). Because direct costs to employers and transfers are relatively small compared to Federal covered contract expenditures, the Department believes that any potential increase in contract prices will be negligible. In 2014 Federal expenditures for covered contracting service firms were \$230.2 billion. Employer costs and transfers (estimated below) in Year 5 (the year when all employees are affected) are estimated to be \$333.3 million. Therefore, employer costs are 0.14 percent of contracting revenue (assuming no growth in contracting expenditures and without accounting for the benefits of the proposed rule).

**Production costs:** If the number of days of sick leave taken remains unchanged by the proposed rulemaking, then production should not be affected by the rule (unless productivity changes which will be discussed below and in the section on benefits). However, employees may take more sick days if the number of compensated sick days available to them increases; it is via this path that the rule might result in production costs to employers.<sup>34</sup> If these hours are not transferred to another worker then the employer (or the consumer) incurs costs associated with this lost production and the employee receives benefits associated with the paid sick leave. Conversely, if employers hire workers to cover these lost hours of production, then the additional cost of hiring a worker is offset by the increased production attributed to this worker. This results in a zero net additional cost to the

employer (because the cost of providing the paid sick leave has already been quantified). In both cases, costs and benefits should offset each other to the extent that workers are paid according to their marginal productivity, and the productivity of the replacement worker matches that of the original worker. Although these assumptions are not likely to be exactly met, conceptually small deviations from the assumptions should result in only small deviations of net costs or benefits. In addition, there are no data available on which to estimate these net costs or benefits.

**Replacement costs:** As demonstrated above, if the worker who takes sick leave is temporarily replaced by another worker, the marginal cost of hiring the additional worker is offset by the productivity of the replacement worker. Therefore, the Department estimates there will be very few additional costs associated with hiring workers to cover work normally performed by workers on sick leave (in addition to the cost of paying the sick worker). If workers are more likely to take off when sick days are paid, and replacement workers must be hired, and can only be hired at their overtime wage rate, then there may be some additional cost associated with hiring the other worker. A 2010 survey of employers providing paid sick days in San Francisco found 8.4 percent reported “always” or “frequently” hiring a replacement for a sick worker and 23.6 percent saying they “rarely” hire replacement workers.<sup>35</sup>

### iii. Transfer Payments

#### 1. Calculating Transfer Payments

To calculate transfer payments, the Department has assumed solely for purposes of discussion and ease of presentation that no offsetting cost- and productivity-related benefits will be realized as a result of the Executive Order and this proposed rule. As discussed in Section C.v, however, numerous benefits of providing paid sick leave under in the Executive Order can be expected, and such benefits can be expected to accompany the transfer payments and other costs discussed above and below.

The most important factor in determining transfer payments is the number of additional days of paid sick leave for which employees will be compensated. In order to estimate transfer payments the Department needed to:

- Assign a monetary value to these days of paid sick leave taken.
- Determine what share of the additional 681,700 days of paid sick leave accrued (calculated above in Section B.ii) will be taken.

The proposed rule requires contractors to provide an employee the same pay and benefits for hours of paid sick leave used that the employee would have received had he been working. Thus, the Department needed to estimate both a base hourly wage for affected employees and a base hourly benefit rate. The Department assumed an eight hour work day to place a monetary value on the transfer payment associated with a day of paid sick leave used. The Department used data from the 2014 CPS to estimate base hourly wage rates by industry and full-time status. The Department is not aware of a data source to precisely determine an average base hourly benefit rate of affected employees. The SCA nationwide fringe benefit rate, which applies to most contracts covered by the SCA, currently is \$4.27 per hour. Because many of the contracts covered by the Executive Order will be subject to the SCA, and many employees performing on or in connection with contracts covered by the Executive Order but not covered by the SCA will nonetheless be performing service-related work similar in character to work performed by SCA-covered service employees, the Department estimated that most affected employees will average a base hourly benefit rate of \$4.27.<sup>36</sup> The exception is the construction industry, for which the Department used the benefits to wage ratio from the ECEC because employees in the construction industry will be performing on or in connection with DBA contracts rather than SCA contracts.

Although the Executive Order will allow employees to accrue up to 56 hours of paid sick leave annually, many employees will not use all paid sick leave that they accrue (and many others will not work a sufficient number of hours on covered contracts to accrue 56 hours of paid sick leave in an accrual year). If employees take less than the full amount of paid sick leave accrued, then transfer payments must be adjusted to include only some of the additional days accrued. The Department expects employees on average to use fewer days than allocated. To estimate the share of accrued days employees will use, the

<sup>33</sup> See: <http://www.dol.gov/featured/PaidLeave/get-the-facts-sicktime.pdf>.

<sup>34</sup> There is some evidence that workers take more sick leave when it is paid. Using the ATUS 2011 Leave Module, the Department estimated workers with paid sick leave take on average an additional 9 hours of paid sick leave annually. Using the National Health Interview Survey (NHIS) the Department found workers with paid sick leave took on average 0.77 more days of sick leave.

<sup>35</sup> Drago, R. and Lovell, V. (2011). San Francisco's Paid Sick Leave Ordinance: Outcomes for Employers and Employees. Institute for Women's Policy Research.

<sup>36</sup> The rate in Year 1 is for 2015. This analysis generally uses data from 2014 for year 1 because it is often the most recently available data. However, Year 1 will likely occur in 2017. Therefore, the most recent data available is most appropriate.

Department used data from the 2015 NCS and ECEC by industry (provided by the BLS and reported in Table 10). While the numbers vary by industry, over all industries, these data show that employees with paid sick leave take an average of 4 days of sick leave annually.<sup>37</sup> Employees with access to a

fixed number of paid sick leave days per year accrued an average of 8 days annually. Dividing the average hours of paid sick leave taken by the average hours of paid sick leave accrued annually, the Department estimated that employees use on average 50 percent of days allotted.<sup>38</sup> This may be an

overestimate in Year 1 when workers may have fewer days available since they will not start to accrue paid sick leave until they commence work on a covered contract, nor carry over any days from the previous year.<sup>39</sup>

TABLE 10—RATIO OF DAYS OF SICK LEAVE AVAILABLE THAT ARE TAKEN

Industry	Average number of days <sup>a</sup>		Ratio of days available taken	Total additional days of paid sick leave <sup>c</sup>	
	Available	Taken		Available	Taken
Agriculture, forestry, fishing <sup>b</sup> .....			0.50	214	107
Mining .....	27	2	0.07	56	4
Utilities .....	21	6	0.29	622	178
Construction .....	6	2	0.33	105,190	35,063
Manufacturing .....	8	3	0.38	26,033	9,762
Wholesale trade .....	8	3	0.38	480	180
Retail trade .....	6	2	0.33	12,974	4,325
Transportation and warehousing .....	9	4	0.44	18,127	8,056
Information .....	9	4	0.44	2,612	1,161
Finance and insurance .....	12	5	0.42	9,066	3,778
Real estate and rental and leasing .....	6	4	0.67	310	207
Professional, scientific, and .....	8	4	0.50	198,578	99,289
Management of companies and .....	12	4	0.33	1	0
Administrative and waste services .....	8	2	0.25	244,900	61,225
Educational services .....	11	5	0.45	5,825	2,648
Health care and social assistance .....	8	4	0.50	34,024	17,012
Arts, entertainment, and recreation .....	6	3	0.50	235	117
Accommodation and food services .....	6	2	0.33	16,389	5,463
Other services .....	8	3	0.38	6,101	2,288
Total private .....	8	4	0.50	681,736	250,863

<sup>a</sup> For this proposed rulemaking the BLS provided this breakdown using NCS and ECEC data for industries with sufficient observations to meet their publication criteria.

<sup>b</sup> NCS does not include information for this industry. Used average across all private employees.

<sup>c</sup> Total additional days of paid sick leave taken is not equal to the number of paid sick leave days available multiplied by the share of 50 percent. This is because the analysis was conducted at the industry level and days were aggregated to estimate the total. Due to rounding by the BLS of the number of days, the aggregated total number of days taken and the total using aggregated number of days available and taken differ.

Therefore, of the 681,700 days of additional paid sick leave accrued, 250,900 days are estimated to be taken and result in transfer payments. Using wage data by industry results in Year 1 transfer payments of \$58.9 million

(Table 11). This is 0.03 percent of revenue from federal contracts for these firms (since many covered contractors garner revenue from private work, the transfer payment estimate is almost certainly a lower percentage of their

total revenues). If all days of paid sick leave were used, transfers would be \$151.5 million in Year 1 or 0.07 percent of federal contracting revenues.

TABLE 11—TRANSFER PAYMENTS IN YEAR 1

Industry	NAICS	Adjusted transfer (\$1,000s)	Covered contracting revenue (Millions) <sup>a</sup>	Transfer as share of contracting revenue (percent)
Agriculture, forestry, fishing and hunting .....	11	\$16	\$242	0.01
Mining .....	21	1	82	0.00
Utilities .....	22	46	2,993	0.00
Construction .....	23	8,837	22,263	0.04
Manufacturing .....	31–33	2,142	18,965	0.01
Wholesale trade .....	42	40	237	0.02
Retail trade .....	44–45	699	2,189	0.03
Transportation and warehousing .....	48–49	1,631	8,733	0.02
Information .....	51	274	6,590	0.00

<sup>37</sup> BLS calculated this using the ECEC data based on workers in paid sick leave plans where a cost was incurred by the employer in the reference period.

<sup>38</sup> Although it seems likely that a higher percentage would be used at the low end of the accrual distribution, we have limited data with which to estimate the distribution and therefore invite comment and data that would allow for refinement of this aspect of the analysis.

<sup>39</sup> This assumes employees with sick leave in the NCS are allowed to carry over sick days. The larger the share of these employees without carryover privileges, the more appropriate the number is for Year 1 and the less appropriate it is for future years.

TABLE 11—TRANSFER PAYMENTS IN YEAR 1—Continued

Industry	NAICS	Adjusted transfer (\$1,000s)	Covered contracting revenue (Millions) <sup>a</sup>	Transfer as share of contracting revenue (percent)
Finance and insurance .....	52	955	17,651	0.01
Real estate and rental and leasing .....	53	44	952	0.00
Professional, scientific, and technical .....	54	28,543	106,347	0.03
Management of companies and .....	55	0	1	0.01
Administrative and waste services .....	56	10,336	27,884	0.04
Educational services .....	61	574	2,500	0.02
Health care and social assistance .....	62	3,554	9,576	0.04
Arts, entertainment, and recreation .....	71	21	52	0.04
Accommodation and food services .....	72	764	1,307	0.06
Other services .....	81	419	1,592	0.03
Total private .....		58,897	230,155	0.03

<sup>a</sup> Source: USASpending.gov. Contracting expenditures for covered contracts.

To project transfers, the Department projected wage growth (as discussed in Section C.ii.4) and employment growth (as discussed in Section B.ii). The real growth rate for benefit payments was calculated using the geometric growth rate in nominal SCA benefit rates between 2006 and 2015 and converted to a real rate using the CPI-U.<sup>40</sup> For projected transfers the Department used the same method used for Year 1 but used the projected number of employees and wages. Table 12 shows projected transfers through Year 10. It also contains average annualized transfers using both 3 percent and 7 percent discount rates.

TABLE 12—TRANSFERS IN YEARS 1 THROUGH 10

Year/Discount rate	Transfers millions of 2014\$)
<b>Years 1 through 10</b>	
Year 1 .....	\$58.9
Year 2 .....	124.0
Year 3 .....	189.7
Year 4 .....	256.2
Year 5 .....	323.3
Year 6 .....	331.0
Year 7 .....	338.9
Year 8 .....	347.1
Year 9 .....	355.5
Year 10 .....	364.1
<b>Average Annualized Amounts</b>	
3% discount rate .....	260.8
7% discount rate .....	250.1

<sup>40</sup> Growth rate based on 10 previous years. Generally data for 2014 was used for year 1 because it is often the most recently available data; projections are then based on 2005–2014. However, the SCA benefit rate in 2015 was available and used; projections are then based on 2006–2015.

2. Additional Considerations

The Department based its method of calculating transfers on the number of full-time-equivalent (FTE) employees working on Federal contracts. To the extent that Federal contract work is conducted by part-time employees or split between employees, these transfer estimates may be overestimates. The current method attributes the full-time hours worked on a Federal contract to one employee. For example, if that employee currently receives five paid sick leave days per year, he or she would receive a transfer of two additional days of paid sick leave. If instead half this work was completed by one employee and half by another employee, the Executive Order would require that each receive 3.5 sick days per year; however, since each employee already receives 5 days of paid sick leave, there would be no incremental transfer. The Department estimated that the maximum size of the overestimate due to the assumption of FTE employees is \$18.1 million in Year 1 (30.7 percent of the \$58.9 million in total transfers).<sup>41</sup>

Another consideration is that some of the transfers may be reduced by employer responses to the rule. Employers may reduce vacation time, reduce wages, or increase health insurance premiums in order to diminish some of their increased costs. (These outcomes may be unlikely in the short run due to stickiness of wages.) Employers may also reallocate days of leave to keep benefits the same. For example, an employer who used to provide 5 sick days and 5 vacation days could now provide 5 sick days, 3

<sup>41</sup> The maximum possible overestimate was calculated by eliminating transfers associated with employees who currently receive any paid sick leave.

vacation days, and 2 days that can be used for any purpose. This would leave exactly zero employer-employee transfers because an employee could take 7 days paid sick leave if necessary but could still only take a maximum of 5 days of vacation. (Provided the policy met the requirements of section 2 of the Order and this proposed rule and employees could use paid sick leave accrued for the same purposes and under the same conditions as described in the Order and this proposed rule, the employer would be in compliance and transfers would be zero). We invite comment that would allow for these potential employer responses to be incorporated into our quantitative estimates of the rule's impact.

Finally the Department notes that regardless of the direct impact on contract costs, there are other important channels through which the proposed rule might affect government expenditures. The transfer of income resulting from this proposed rulemaking may result in the reduction of social assistance, and thus decreased government expenditures, although the effects are likely to be small. Studies have shown that the more paid family leave an employee receives, the less likely he/she is to utilize various social assistance programs. For example, a 2012 study by Rutgers University's Center for Women and Work showed that women who received paid maternity leave reported spending \$413 less in public assistance in the year after their child was born than women who took no leave after childbirth.<sup>42</sup> Similarly, providing access to paid sick leave to these employees may reduce eligibility for government social assistance programs, leading to lower government expenditures.

iv. Deadweight Loss

Deadweight loss (DWL) occurs when a market operates at less than optimal equilibrium output. This typically results from an intervention that sets, in the case of a labor market, compensation above their equilibrium level.<sup>43</sup> The higher cost of labor leads to a decrease in the total number of labor hours that are purchased on the market. DWL is a function of the difference between the compensation the employers were willing to pay for the hours lost and the compensation employees were willing to take for those hours. In other words, DWL represents the total loss in economic surplus resulting from a “wedge” between the employer’s willingness to pay and the employee’s willingness to accept work arising from the proposed change. DWL may vary in magnitude depending on market

parameters, but it is typically small when wage changes are small or when labor supply and labor demand are relatively inelastic with respect to compensation.

The DWL resulting from this proposed rulemaking was estimated based on the average decrease in hours worked and increase in average hourly compensation (again, without accounting for offsetting benefits of the Executive Order and the proposed rule). As the cost of labor rises due to the requirement to pay sick leave, the demand for labor decreases, which results in fewer hours worked. To calculate the DWL, the annual increase in compensation (*i.e.*, transfers per worker) was divided by the total number of hours worked to estimate the average hourly increase in compensation.<sup>44</sup> Using the estimated

percent change in compensation and the elasticity of labor demand with respect to wage (as a proxy for compensation), the Department estimated the percent decrease in average hours per employee.<sup>45</sup> To estimate the percent decrease in average hourly wages associated with labor supply, the Department used the decrease in average hours per employee and the elasticity of labor supply with respect to wage (again, as a proxy for compensation).<sup>46</sup>

Using these values the Department calculated DWL per affected employee (Table 13). This was multiplied by the number of affected employees to estimate total DWL; \$126,900 in Year 1. Projected DWL is shown in Table 14. Average annualized DWL during the first ten years the rule is in effect is estimated to be \$526,000.

TABLE 13—DEADWEIGHT LOSS CALCULATION

Industry	Average base hourly wage	Percent change in age from base <sup>a</sup>		Average annual hours per employee	Percent change in hours	DWL per affected employee	Affected employees	Total DWL
		Change in Ld wage	Change in Ls wage					
Ag., forestry, fish. and hunting .....	\$14.37	1.47	-1.96	2,146	-0.29	\$1.56	37	\$58
Mining .....	27.35	0.12	-0.16	2,530	-0.02	0.02	13	0
Utilities .....	28.38	0.75	-1.00	2,168	-0.15	0.81	101	82
Construction .....	21.66	1.01	-1.35	2,124	-0.20	1.10	19,071	21,009
Manufacturing .....	23.12	0.78	-1.04	2,157	-0.16	0.71	5,538	3,939
Wholesale trade .....	23.34	0.68	-0.90	2,152	-0.14	0.54	122	65
Retail trade .....	15.86	0.83	-1.11	1,805	-0.17	0.46	3,051	1,406
Transportation and warehousing .....	20.92	0.91	-1.21	2,156	-0.18	0.87	4,022	3,494
Information .....	25.83	0.63	-0.85	1,972	-0.13	0.48	918	439
Finance and insurance ...	27.46	0.70	-0.94	2,082	-0.14	0.66	2,465	1,617
Real estate and rental and leasing .....	22.26	1.38	-1.84	1,954	-0.28	1.94	78	152
Professional, sci., and tech. services .....	31.70	0.85	-1.14	2,055	-0.17	1.10	56,571	62,486
Management of cos. and enterprises .....	24.85	0.48	-0.64	2,037	-0.10	0.27	0	0
Administrative and waste services .....	16.68	0.70	-0.93	1,925	-0.14	0.37	47,336	17,316
Educational services .....	22.70	1.28	-1.70	1,601	-0.26	1.38	1,360	1,884
Health care and social assistance .....	21.85	1.11	-1.48	1,864	-0.22	1.17	8,415	9,842
Arts, entertainment, and recreation .....	17.84	1.35	-1.80	1,672	-0.27	1.27	56	71
Accommodation and food services .....	13.00	1.10	-1.46	1,696	-0.22	0.62	3,270	2,028
Other services .....	18.53	0.96	-1.28	1,805	-0.19	0.72	1,421	1,028
<b>Total private .....</b>							<b>153,846</b>	<b>126,917</b>

<sup>a</sup> This is the change in the wage rate associated with the labor supply (Ls) or labor demand (Ld) curve and the new level of hours.

<sup>43</sup> The estimate of DWL assumes the market meets the theoretical conditions for an efficient market in the absence of this intervention (*e.g.*, all conditions of a perfectly competitive market hold: Full information, no barriers to entry, etc.). Since labor markets are generally not perfectly competitive, this is likely an overestimate of the DWL.

<sup>44</sup> For the purposes of the DWL calculation, we treat the increase in employee benefits resulting from the paid leave requirement as if it were

equivalent to an increase in employees’ hourly wage. This is necessary because the parameters needed to evaluate the DWL (*i.e.*, the wage elasticities) are expressed strictly in terms of wages. However, to the extent that employers may replace (“crowd out”) some of their employees’ wages with the required paid sick benefit, this will result in an overestimate of DWL.

<sup>45</sup> An elasticity of -0.2 was used based on the Department’s analysis of Lichter, A., Peichl, A. &

Siegloch, A. (2014). The Own-Wage Elasticity of Labor Demand: A Meta-Regression Analysis. IZA DP No. 7958.

<sup>46</sup> An elasticity of 0.15 was used based on a literature review and specifically results from Bargain, O., Orsini, K., Peichl, A. (2011). Labor Supply Elasticities in Europe and the US. IZA DP No. 5820.



TABLE 14—DWL IN YEARS 1 THROUGH 10

Year/Discount rate	DWL (Millions of 2014\$)
<b>Years 1 through 10</b>	
Year 1 .....	0.1
Year 2 .....	0.3
Year 3 .....	0.4
Year 4 .....	0.5
Year 5 .....	0.7
Year 6 .....	0.7
Year 7 .....	0.7
Year 8 .....	0.7
Year 9 .....	0.7
Year 10 .....	0.8
<b>Average Annualized Amounts</b>	
3% discount rate .....	0.5
7% discount rate .....	0.5

v. Benefits

There are a variety of benefits associated with this rule; however, due to data limitations these are not monetized. The following benefits are discussed qualitatively: Improved employee health, improved health of dependents, increased productivity, improved firm profits, reduced hiring costs, decreased healthcare expenditures, and job growth.

Improved Employee Health

Multiple studies have shown that paid sick leave greatly reduces the chance of employee injury and/or exposure. When sick employees attend their jobs, they engage in a practice known as “presenteeism.” Understandably, presenteeism is detrimental to productivity, and increases the probability of workplace injury and illness, resulting in greater employer and employee costs. In one study from the American Journal of Public Health, researchers used data from multiple industries (construction, retail, manufacturing, health care, etc.) to show that employees with access to paid sick leave were 28 percent less likely to incur a non-fatal work injury than their counterparts without paid sick leave.<sup>47</sup> In a similar study, data from the outbreak of the 2009 H1N1 pandemic showed that individuals who did not receive pay if they did not attend work had a 4.4 percentage point greater change of contracting an influenza-type illness than those with sick leave pay (9.2 percent versus 13.6 percent; only the rate for workers without paid leave is statistically

significant at the 10 percent level).<sup>48</sup> Diminishing the practice of presenteeism by providing paid sick leave can be expected to have positive impacts on employee health, as it would reduce the possibility that sick employees could potentially expose their colleagues to infection or disease. Other studies have also linked the incidence of presenteeism to a lack of paid sick leave. For instance, a 2010 survey found that 37 percent of the working respondents who had paid sick leave, had attended work with a contagious illness.<sup>49</sup> Meanwhile, 55 percent of employees with no paid sick leave had attended work with a contagious illness.<sup>50</sup>

Improved Health of Dependents

A potential positive externality of the sick-day proposed rulemaking is its indirect effect on the health of an employee’s dependents (*i.e.*, children). Paid leave has a substantial impact on parents’ ability to care for sick children. One study, using the Baltimore Parenthood Study and multivariate analysis found parents with paid sick leave or vacation leave were 5.2 times more likely to remain home to care for their sick child.<sup>51</sup> According to a study in San Francisco by the Institute for Women’s Policy Research, parents that did not have sick pay were more than 20 percentage points more likely to send their children to school with a contagious disease (75.9 compared with 53.8).<sup>52</sup> This “child presenteeism” is problematic because these pupils have the potential to expose other students and teachers to the disease, decreasing others’ health.

Improved Firm Profits/Earnings

Some studies have suggested there may be a positive relationship between paid sick leave and profits. In one such study from 2001, researchers discovered that having a paid sick leave policy had

a positive effect on firms’ profits.<sup>53</sup> The authors note, however, that efficiency wage theory underpins their empirical result and thus requires compensation to increase which is not guaranteed to result from this rule because employers may respond to the paid sick leave requirement by reducing other fringe benefits, such as paid vacation, or by decreasing base wages, as permitted by law; therefore, it may not be valid to assume that Meyer et al.’s results would be comparable.

Increased Productivity

The Department expects the costs to employers of paying for sick time will be partially offset by increased employee productivity. This increased productivity will occur through numerous channels, such as improved health, retention, and effort. When workers attend work sick they tend to have diminished productivity. Goetzel et al. (2004) found that on-the-job productivity loss due to sickness represented 18 percent to 60 percent of employer costs associated with 10 health conditions.<sup>54</sup>

A strand of economic research, commonly referred to as “efficiency wage” theory, considers how an increase in compensation may be met with greater productivity.<sup>55</sup> To the degree that the proposed rule increases employee compensation (an outcome that, as we note elsewhere in this analysis, is not guaranteed because employers may respond to the paid sick leave requirement by reducing other fringe benefits, such as paid vacation, or by decreasing base wages), it could yield some of the benefits associated with efficiency wages. Efficiency wages reduce employer costs first by reducing turnover, allowing for workers to gain more firm-specific human capital that enhances their productivity and reducing the cost of replacing workers. Second, efficiency wages may elicit greater effort on the part of workers, making them more effective on the job.<sup>56</sup> A higher wage implies a larger cost of losing one’s job; employees will put in more effort in order to reduce the

<sup>47</sup> Asfaw et al. (2012). Paid Sick Leave and Nonfatal Occupational Injuries. *American Journal of Public Health*, 102(9), e59–e64.

<sup>48</sup> Kumar et al. (2011) The Impact of Workplace Policies and Other Social Factors on Self-Reported Influenza-like Illness Incidence During the 2009 H1N1 Pandemic. *American Journal of Public Health*, 102(1), 134–140.

<sup>49</sup> Smith, T.W. and Kim, J. (2010). Paid Sick Days: Attitude and Experiences. Public Welfare Foundation.

<sup>50</sup> These proportions are suggestive of a difference between employees with and without paid sick leave, but no standard errors or sample sizes were provided to determine if these are statistically significantly different proportions.

<sup>51</sup> Heymann, S.J., et al. (1999) Working Parents: What Factors are Involved in Their Ability to Take Time off from Work When Their Children Are Sick? *Archives of Pediatrics and Adolescent Medicine*, 153(8): 870–874.

<sup>52</sup> Drago, R. & Lovell, V. (2011). San Francisco’s Paid Sick Leave Ordinance: Outcomes for Employees and Employers. Institute for Women’s Policy Research.

<sup>53</sup> Meyer, C.S., Mukerjee, S., and Sestero, A. (2001). Work-family Benefits: Which Ones Maximize Profits? *Journal of Managerial Issues*, 13(1), 28–44.

<sup>54</sup> Goetzel, R.Z., et al. (2004). Health, Absence, Disability, and Presenteeism Cost Estimates of Certain Physical and Mental Health Conditions Affecting U.S. Employers. *JOEM*, 46(4), 398–412.

<sup>55</sup> Akerlof, G. A. (1982). Labor Contracts as Partial Gift Exchange. *The Quarterly Journal of Economics*, 97(4), 543–569.

<sup>56</sup> Another model of efficiency wages, which is less applicable here, is the adverse selection model in which higher wages raise the quality of the pool of applicants.

risk of losing the job. This is commonly referred to as the shirking model.<sup>57</sup>

Providing paid sick leave to employees has been associated with decreased job separations. In one 2013 study, the author showed that paid sick leave is associated with a decrease in the probability of job separation of 25 percent.<sup>58</sup> Such a reduction in job separation would increase marginal productivity because new employees have less firm-specific capital (*i.e.*, skills and knowledge that have productive value in their particular company) and thus require additional supervision and training to become productive.<sup>59</sup> Other research supports the hypothesis that paid leave encourages employees to remain at their respective companies. In a survey of two hundred human resource managers, two-thirds cited family-supportive policies as the single most important factor in attracting and retaining employees.<sup>60</sup> By providing paid leave, companies may be able to reduce the firm's turnover rate and increase productivity (and therefore reduce hiring costs, *see* the section on reduced hiring costs below).

#### Reduced Hiring Costs

By providing paid sick leave, employers may experience lower job turnover, resulting in higher productivity and lower hiring costs, which both would positively impact profits (the benefit of increased productivity was discussed above). Multiple studies demonstrate an inverse relationship between sick leave pay and employee turnover. One 2003 study from the University of Michigan found that when employers in upstate New York implemented a paid sick leave policy, they experienced modest reductions in employee turnover.<sup>61</sup> Reduced employee turnover reduces

hiring costs, boosting profitability. Various research shows that firms incur a substantial cost for hiring new employees. A review of 27 case studies found that the median cost of replacing an employee was 21 percent of the employee's annual salary.<sup>62</sup> These costs might be diminished by incorporating paid sick leave into family friendly policies. Even though marginal labor costs may rise when employers provide paid sick leave, the new, higher wages will be offset by increased productivity, and reduced hiring and training costs for firms.

The potential reduction in turnover is a function of several variables: the current wage, hours worked, turnover rate, industry, and occupation. Additionally, the estimated cost of replacing a separated employee, and providing paid sick leave to an employee, vary significantly based on factors such as industry and geographic region.<sup>63</sup> Therefore, quantifying the potential benefits associated with a decrease in turnover attributed to this proposed rule requires many sources of data and assumptions.

#### Government Expenditures

As noted earlier, contractors may pass along part or all of the increased cost to the government in the form of higher contract prices. If the benefits from increased productivity and reduced turnover occur, then government expenditures will not rise by the full monetized value of the newly taken sick leave.

#### Decreased Healthcare Expenditures

One positive externality of mandating paid sick leave benefits would be that employees could mitigate future health costs by more frequently investing in preventive care. For example, employees would likely use paid sick leave to visit a physician, who could diagnose illnesses and other ailments before they become more serious and more costly to patients. Studies analyzing data from the 2008 National Health Interview Survey show that, if provided paid sick leave, employees were 12 percent more likely to have

visited a doctor in the past year.<sup>64</sup> Additionally, there was generally a greater probability that patients with sick pay would have received preventive procedures such as an endoscopy (9.6 percent) or mammogram (7.8 percent).<sup>65</sup> Researchers at the Institute for Women's Policy Research used data from the National Health Interview Survey (NHIS) on emergency room visits by workers with and without sick leave to project that requiring all employers to provide paid sick leave would prevent roughly 1.3 million hospital emergency department visits nationally each year, resulting in \$1.1 billion in medical savings annually.<sup>66</sup>

#### Job Growth

One critique of the proposal to mandate paid leave has been that the transfer of income from employers to employees might result in increased unemployment. However, various studies have argued the opposite, claiming that paid sick leave might yield greater job growth. Recently, it has been shown that counties in which a city has implemented paid sick leave have experienced greater job growth than neighboring counties with no cities with paid leave laws. San Francisco County, for example, saw a 3.5 percent increase in employment between the years of 2006 (when a paid sick leave law was implemented) and 2010, while the five counties surrounding it experienced an employment decrease of 3.4 percent on average (the analysis did not control for other characteristics that may affect employment or assess statistical significance).<sup>67</sup> Additionally, King County, the county in which Seattle (which instituted a similar paid sick leave policy to San Francisco in 2011) is located, found that the rate of annual job growth in the food and retail industries increased much faster than within the state of Washington as a whole between 2011 and 2013.<sup>68</sup> We note, however, that these results might also be associated with other economic factors, such as labor migration as a

<sup>64</sup> Peipins et al. (2012). The lack of paid sick leave as a barrier to cancer screening and medical care seeking. *BMC Public Health*, 12(250), 1–9.

<sup>65</sup> *Ibid.*

<sup>66</sup> Miller, K., Williams, C., and Youngmin Yi. (2011). Paid Sick Days and Health: Cost Savings from Reduced Emergency Department Visits. Institute for Women's Policy Research, 1–33.

<sup>67</sup> Petro, J. (2010). Paid Sick Leave Does Not Harm Business Growth or Job Growth. Drum Major Institute for Public Policy.

<sup>68</sup> Paid Sick Days and the Seattle Economy: Job Growth and Business Formation at the 1-year Anniversary of Seattle's Paid Sick and Safe Leave Law. The Main Street Alliance of Washington. September 2013.

<sup>57</sup> Shapiro, C., & Stiglitz, J. E. (1984). Equilibrium Unemployment as a Worker Discipline Device. *The American Economic Review*, 74(3), 433–444.

<sup>58</sup> Hill, H. (2013). Paid Sick Leave and Job Stability. *Work and Occupations*, 40(2), 10.

<sup>59</sup> Argote, L., Insko, C. A., Yovetich, N., and Romero, A. A. (1995). Group Learning Curves: The Effects of Turnover and Task Complexity on Group Performance. *Journal of Applied Social Psychology*, 25(6), 512–529.

<sup>60</sup> Shaw, J. D. (2011). Turnover Rates and Organizational Performance: Review, Critique, and Research Agenda. *Organizational Psychology Review*, 1(3), 187–213.

<sup>61</sup> Dube, A., Lester, T.W., & Reich, M. 2013. Minimum Wage Shocks, Employment Flows and Labor Market Frictions. IRL Working Paper #149–13.

<sup>62</sup> Williams, J. (2001). Unbending Gender: Why Work and Family Conflict and What to Do About It. Oxford University Press.

<sup>63</sup> Baughman, R., Holtz-Eakin, D. and DiNardi, D. (2002). Productivity and Wage Effects of "Family-Friendly" Fringe Benefits. *International Journal of Manpower*, 24(3), 247–259.

<sup>62</sup> Boushey, H. and Glynn, S. (2012). There are Significant Business Costs to Replacing Employees. Center for American Progress.

<sup>63</sup> One 2008 study conducted by professors at San Francisco State University showed that in California providing sick leave to employees in the construction, retail, restaurant, and hotel industries could increase employer's payroll costs from \$299 to \$862 per employee. Potepan, M.J. (2008). Paid Sick Leave: Access, Costs and Feasibility of Implementation at the State Level. Sacramento State: Center for California Studies.

result of the Great Recession, and historically greater employment trends in the urban areas of San Francisco and Seattle in comparison to neighboring regions.

vi. Regulatory Alternatives

The Department notes that Executive Order 13706 delegates to the Secretary the authority only to issue regulations to “implement the requirements of this order.” Because the Executive Order itself establishes the basic paid sick leave requirements that the Department is responsible for implementing, many potential regulatory alternatives would be beyond the scope of the Department’s authority in issuing this proposed rule. The Department considered a range of alternatives to determine the correct balance between providing benefits to employees and imposing compliance costs on covered contractors. For

illustrative purposes only, this section presents an alternative to the provisions set forth in this proposed rule. The Department notes, however, that it considers this alternative to be beyond the scope of the Department’s authority under the Executive Order.

This alternative considers how transfer payments would be affected if employees could accrue an unlimited number of hours of paid sick leave as long as they kept a maximum balance of 56 hours. For example, if paid sick leave is used periodically throughout the year, an employee who works 80 hours per week could accrue and use 138.7 hours of paid sick leave (80 hours × 52 weeks × accrual rate of one hour per 30 hours worked (1/30)). To calculate transfers associated with this alternative, employees may accrue more than 7 days of paid sick leave annually. The number

of days of leave accrued is based on the mean number of hours worked among full-time employees in an industry. For example, in administrative and waste services full-time employees work on average 41.7 hours per week. With no cap on paid leave accrual, this would result in 9.0 days of leave accrued annually for employees in this industry. Using this alternative across all industries, the Department estimated 870,200 additional days of paid sick leave would be accrued by full-time employees in Year 1. If only a share are taken (as assumed earlier in the analysis and shown in Table 10) then 328,700 days will be taken by full-time employees and total transfer payments would be \$89.5 million. This is 52 percent higher than the current transfer estimate of \$58.9 million.

Appendix A

TABLE 15—PERCENT OF WORKERS WITH FIXED NUMBER OF PAID SICK LEAVE PLANS, BY NUMBER OF DAYS OFFERED, PRIVATE INDUSTRY WORKERS, MARCH 2015

Industry	Less than 5 days	5 to 9 days	10 to 14 days	15 to 29 days	Greater than 29 days	Mean number of days	Median number of days
Agriculture, forestry, fishing and hunting	—	—	—	—	—	—	—
Mining and logging	—	42	15	—	—	27	6
Utilities	—	34	38	—	—	21	10
Construction	31	57	11	—	—	6	5
Manufacturing	30	53	12	—	—	8	5
Wholesale trade	26	61	8	—	—	8	5
Retail trade	21	70	7	—	—	6	6
Transportation and warehousing	16	44	34	—	—	9	7
Information	6	65	26	—	—	9	7
Finance and insurance	7	49	39	—	—	12	8
Real estate and rental and leasing	—	65	—	—	—	6	6
Professional, scientific, and technical services	11	59	22	—	—	8	6
Management of companies and enterprises	14	66	—	—	—	12	6
Administrative and waste services	36	40	22	—	—	8	5
Educational services	8	35	52	—	—	11	10
Health care and social assistance	22	42	34	—	—	8	7
Arts, entertainment, and recreation	—	47	—	—	—	6	6
Accommodation and food services	37	58	—	—	—	6	5
Other services	22	47	21	—	—	8	6
Total private	21	53	21	3	2	8	6

Source: Bureau of Labor Statistics, National Compensation Survey; Unpublished data.  
 Note: Dashes indicate data not available or do not meet publication criteria.

**Table 16: DOL Calculated Percent of Full-Time Workers with Fixed Number of Paid Sick Leave Plans, by Number of Days Offered**

Industry	Number of Days [a]									
	1	2	3	4	5	6	7	8	9	10
Agriculture, forestry, fishing and hunting	1%	3%	8%	16%	10%	13%	12%	12%	11%	8%
Mining and logging	0%	0%	0%	0%	9%	41%	3%	9%	29%	0%
Utilities	0%	0%	0%	0%	0%	1%	4%	12%	29%	3%
Construction	2%	5%	11%	17%	16%	14%	13%	10%	7%	6%
Manufacturing	1%	4%	11%	23%	10%	10%	12%	12%	11%	5%
Wholesale trade	1%	4%	11%	22%	13%	12%	14%	14%	13%	3%
Retail trade	1%	3%	6%	9%	16%	16%	16%	12%	8%	4%
Transportation and warehousing	0%	2%	6%	13%	6%	10%	13%	11%	12%	11%
Information	0%	1%	2%	5%	9%	14%	19%	16%	17%	8%
Finance and insurance	0%	1%	2%	6%	3%	7%	12%	19%	19%	8%
Real estate and rental and leasing	1%	4%	7%	11%	13%	14%	14%	11%	8%	3%
Professional, scientific, and technical services	0%	2%	5%	10%	14%	19%	13%	14%	13%	8%
Management of companies and enterprises	0%	2%	7%	20%	7%	14%	12%	19%	26%	0%
Administrative and waste services	1%	4%	12%	25%	7%	8%	9%	9%	9%	8%
Educational services	0%	0%	2%	5%	2%	4%	6%	9%	11%	11%
Health care and social assistance	1%	2%	7%	14%	7%	9%	11%	10%	9%	13%
Arts, entertainment, and recreation	1%	4%	9%	13%	11%	12%	10%	8%	6%	12%
Accommodation and food services	2%	5%	11%	17%	14%	15%	13%	10%	7%	2%
Other services	1%	3%	8%	17%	9%	12%	11%	11%	10%	8%
Total private	1%	3%	8%	16%	10%	13%	12%	12%	11%	8%

[a] Workers may receive more than 10 days of sick leave but since these data are not used in the analysis the Department does not present shares above 10 days.

**Table 17: DOL Calculated Percent of Part-Time Workers with Fixed Number of Paid Sick Leave Plans, by Number of Days Offered**

Industry	Number of Days [a]									
	1	2	3	4	5	6	7	8	9	10
Agriculture, forestry, fishing and hunting	1%	3%	8%	14%	11%	13%	12%	11%	9%	8%
Mining and logging	0%	0%	0%	0%	10%	40%	3%	10%	27%	0%
Utilities	0%	0%	0%	0%	1%	2%	5%	13%	27%	3%
Construction	2%	6%	11%	15%	16%	15%	12%	8%	5%	5%
Manufacturing	1%	5%	12%	21%	11%	11%	12%	11%	9%	4%
Wholesale trade	1%	4%	11%	20%	14%	13%	14%	12%	10%	3%
Retail trade	1%	3%	6%	8%	16%	15%	14%	10%	6%	3%
Transportation and warehousing	1%	2%	6%	12%	7%	10%	12%	10%	9%	11%
Information	0%	1%	2%	5%	11%	15%	17%	15%	13%	8%
Finance and insurance	0%	1%	2%	6%	4%	8%	12%	16%	16%	8%
Real estate and rental and leasing	2%	4%	7%	10%	14%	13%	13%	9%	5%	3%
Professional, scientific, and technical services	1%	2%	5%	9%	15%	18%	13%	12%	10%	8%
Management of companies and enterprises	0%	2%	7%	18%	8%	15%	13%	18%	21%	0%
Administrative and waste services	1%	5%	13%	23%	8%	9%	9%	8%	7%	8%
Educational services	0%	1%	2%	5%	3%	5%	7%	8%	9%	11%
Health care and social assistance	1%	3%	7%	13%	7%	9%	9%	9%	7%	12%
Arts, entertainment, and recreation	2%	5%	9%	12%	12%	11%	10%	7%	4%	11%
Accommodation and food services	2%	6%	11%	15%	15%	15%	12%	8%	5%	2%
Other services	1%	4%	8%	15%	10%	12%	11%	10%	8%	8%
Total private	1%	3%	8%	14%	11%	13%	12%	11%	9%	8%

[a] Workers may receive more than 10 days of sick leave but since these data are not used in the analysis the Department does not present shares above 10 days.

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## VI. Initial Regulatory Flexibility Analysis (IRFA)

The Regulatory Flexibility Act of 1980 (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), hereafter jointly referred to as the RFA, requires agencies to prepare regulatory flexibility analyses and make them available for public comment when they propose regulations that will have a significant economic impact on a substantial number of small entities. See 5 U.S.C. 603. The Department is publishing this initial regulatory flexibility analysis to aid stakeholders in understanding the small entity impacts of the proposed rule and to obtain additional information on the small entity impacts. The Department invites interested persons to submit comments on the following estimates, including the number of small entities affected by the Executive Order paid sick leave requirements, the compliance cost estimates, and whether alternatives exist that will reduce the burden on small entities while still remaining consistent with the objectives of Executive Order 13706. The Chief Counsel for Advocacy of the Small Business Administration (SBA) was notified of this rule upon submission of the rule to OMB under E.O. 12866.

The RFA defines a “small entity” as a (1) small not-for-profit organization, (2) small governmental jurisdiction, or (3) small business. The Department used SBA’s entity size standards to classify entities as small for the purpose of this analysis. SBA establishes separate standards for each 6-digit NAICS

industry code, and standard cutoffs are typically based on either the average annual number of employees or average annual receipts. For example, the SBA has two widely used size standards: 500 employees for manufacturing, and \$7 million in annual receipts for nonmanufacturing services.<sup>69</sup>

### A. Number of Small Entities and Employees to Which the Proposed Rule Will Apply

The number of contracting entities was estimated based on the GSA’s System for Award Management (SAM) for August 2015 (543,900).<sup>70</sup> The Department understands that many entities listed in SAM provide not only prime contracting, but also subcontracting, services on (distinct) Federal government contracts. However, we were unable to determine the prevalence of subcontractors in the SAM database. Therefore, the Department examined five years of USASpending data<sup>71</sup> and found 20,600 first-tier subcontractors who do not hold contracts as primes (and thus may not be included in SAM), and added these firms to the total from SAM to obtain a total estimate of 564,400 contracting firms. The Department believes this is an overestimate of the number of covered contracting firms because it includes contractors that strictly provide materials and supplies to the government (and other firms with no Federal contracts covered by the Executive Order). However, information was not available to eliminate these firms.<sup>72</sup> Of these 564,400 firms, an estimated 422,400 are considered small contracting firms.<sup>73</sup> The Department

assumed all firms will accrue regulatory familiarization costs and therefore will be affected.

The number of employees in small contracting firms is unknown. The Department estimated the share of total Federal contracting expenditures in the USASpending data associated with firms labeled as small, by industry. The Department then applied these shares to all affected employees to estimate the share of affected employees in small firms. However, based on 2015 NCS data, smaller firms are less likely to offer sick leave pay, and therefore employees in small firms are more likely to be affected. The Department adjusted for this using data from the 2015 NCS on the distribution of employees with paid sick leave by employer size. For these purposes, small businesses were approximated as those having less than 500 employees. The Department found that employees in firms with less than 500 employees were 1.1 times more likely to not have paid sick leave than employees in all firms. Therefore, the Department multiplied the estimated share of affected employees working for small firms (e.g., 22.1 percent in the information industry) by 1.1 to estimate the percent of affected employees in small businesses in each industry (e.g., 24.7 percent in the information industry). The Department then multiplied the percent affected that are in small businesses by the total number of affected employees by industry then summed over all industries to find that 46,300 employees employed by small contractors in Year 1 would be affected by the rule.

TABLE 18—SMALL FEDERAL CONTRACTING FIRMS AND THEIR EMPLOYEES

Industry	NAICS	Firms <sup>a</sup>		% Employees in small firms <sup>c</sup>	% Employees in small firms and affected <sup>d</sup>	Affected Employees In Year 1	
		Total	Small <sup>b</sup>			Total	Small
Agriculture, forestry, fishing and hunting	11	11,060	5,523	84.9	95.0	37	36
Mining .....	21	2,094	1,732	52.8	59.1	13	8
Utilities .....	22	4,217	2,910	9.7	10.9	101	11
Construction .....	23	76,286	65,514	54.4	60.9	19,071	11,606
Manufacturing .....	31–33	88,963	75,185	10.2	11.4	5,538	630
Wholesale trade .....	42	37,379	31,587	45.7	51.2	122	62
Retail trade .....	44–45	16,333	12,955	30.7	34.4	3,051	1,049
Transportation and warehousing .....	48–49	15,646	11,470	23.5	26.3	4,022	1,058

<sup>69</sup> Some exceptions exist. For example, depository institutions (including credit unions, commercial banks, and non-commercial banks) are classified by total assets. Small governmental jurisdictions are another noteworthy exception; they are defined as the governments of cities, counties, towns, townships, villages, school districts, or special districts with population of less than 50,000 people. See <http://www.sba.gov/advocacy/regulatory-flexibility-act>.

<sup>70</sup> Data are released in monthly files.

<sup>71</sup> The Department identified subawardees from the USASpending.gov data between FY2010 and FY2014 who did not perform work as a prime during those years.

<sup>72</sup> This may also be an overestimate because some firms in the SAM database do not currently have contracts with the Federal government, and the Department did not exclude firms that might be registered on SAM solely to apply for grants. Conversely, some covered firms may be excluded from this estimate. For example, the SAM database

may not include some concessions contractors, and some contractors offering services for Federal employees, their dependents or the general public in connection with Federal property or lands, including some businesses with leases in federal buildings.

<sup>73</sup> SAM data for August 2015 and USASpending for FY2010 through FY2014. All subcontractors as considered small due to lack of data.

TABLE 18—SMALL FEDERAL CONTRACTING FIRMS AND THEIR EMPLOYEES—Continued

Industry	NAICS	Firms <sup>a</sup>		% Employ-ees in small firms <sup>c</sup>	% Employ-ees in small firms and affected <sup>d</sup>	Affected Employees In Year 1	
		Total	Small <sup>b</sup>			Total	Small
Information .....	51	18,002	14,450	22.1	24.7	918	227
Finance and insurance .....	52	3,543	2,169	0.8	0.9	2,465	23
Real estate and rental and leasing .....	53	27,109	20,493	20.6	23.0	78	18
Professional, scientific, and technical services .....	54	128,650	88,155	26.1	29.2	56,571	16,509
Management of companies and enterprises .....	55	346	217	22.0	24.7	0	0
Administrative and waste services .....	56	41,329	34,445	20.9	23.4	47,336	11,083
Educational services .....	61	17,527	11,778	13.5	15.1	1,360	206
Health care and social assistance .....	62	35,723	16,125	26.7	29.8	8,415	2,510
Arts, entertainment, and recreation .....	71	5,322	3,970	66.5	74.5	56	41
Accommodation and food services .....	72	11,658	9,131	22.6	25.3	3,270	826
Other services .....	81	23,254	14,639	27.2	30.5	1,421	433
Total private .....	—	564,440	422,447	24.4	27.3	153,846	46,336

<sup>a</sup>Source: GSA's System for Award Management (SAM) for August 2015. Companies without a primary NAICS code are distributed proportionately amongst all industries. All firms are assumed to be affected. Includes 20,600 additional first-tier subcontractors identified in USASpending.gov.

<sup>b</sup>SAM for August 2015. Companies without a primary NAICS code are distributed proportionately amongst all industries. All small firms are assumed to be affected. Assume all 20,600 additional subcontractors identified in USASpending.gov are small.

<sup>c</sup>Source: USASpending.gov. Percentage of contracting expenditures for covered contracts in small businesses in FY2012–FY2014.

<sup>d</sup>Employees in firms with less than 500 employees were 1.1 times more likely to have no paid sick leave than employees in all firms. The Department adjusted upward the number of affected employees by 1.1.

*B. Small Entity Costs of the Proposed Rule*

Employers would need to keep additional records for affected employees if the NPRM were to be made final without change. As indicated in this analysis, the NPRM would require the accrual of paid sick leave. This would result in an increase in employer burden, which was estimated in the PRA portion (section VI.) of this NPRM. Note that the burdens reported for the PRA section of this NPRM include the entire information collection and not merely the additional burden estimated as a result of this NPRM.

Small entities will also have regulatory familiarization, implementation, administrative, and payroll costs (i.e., transfers). These are discussed in Section C. Total direct costs (i.e., excluding transfers) to small firms in Year 1 were estimated to be \$66.6 million (Table 19). This is 72 percent of total direct costs in Year 1. Calculation of these costs are discussed in the following paragraphs.

Estimated regulatory familiarization costs and initial implementation costs in Year 1 apply to nearly all small Federal contractors. Regulatory familiarization costs were assumed to take 1 hour of time in Year 1, on average across firms of all sizes. An hour of a human resource manager's time was valued at \$79.96 per hour.<sup>74</sup> <sup>75</sup> Initial

implementation costs, the upfront cost that is thought to be comparable across firms of all sizes, and thus is a fraction of the total implementation costs, were estimated as taking 1 hour of a human resource worker's time (or 10 hours depending on whether a firm has a paid leave system in place), valued at \$27.30 per hour.<sup>76</sup>

In addition to upfront implementation costs, firms will experience recurring implementation costs as employees gradually become covered. As each employee is affected, the firm will need to spend some time updating the accounting systems used to track paid sick leave. Therefore, implementation costs are modeled as a function of newly affected employees for the first five years.<sup>77</sup> Because of this component,

plus benefits paid at a rate of 46 percent of the base wage, as estimated from the BLS's Employer Costs for Employee Compensation (ECEC) data. OES data available at: <http://www.bls.gov/oes/current/oes113121.htm>.

<sup>75</sup> Time and wage estimates for small establishments are the same as used in the analysis for all firms. We have not tailored these to small businesses due to lack of data. The Department requests relevant data from commenters.

<sup>76</sup> This includes the mean base wage of \$18.74 from the Occupational Employment Statistics (OES) plus benefits paid at a rate of 46 percent of the base wage, as estimated from the BLS's Employer Costs for Employee Compensation (ECEC) data. OES data available at: <http://www.bls.gov/oes/current/oes113121.htm>.

<sup>77</sup> The proposed rule will only apply to employees on new contracts. The Department estimates it will take five years for all employees to be affected. Therefore, adjustment costs will accrue over the first five years.

costs vary with firm size. The Department estimated one hour of time per newly affected employee will be spent by a human resources worker on implementation costs. Firms may also incur recurring administrative costs associated with maintaining records of paid sick leave and adjusting scheduling. The Department assumed a human resource worker will spend an additional fifteen minutes per affected employee annually on ongoing administrative costs.

To calculate payroll costs, the Department began with total transfers estimated in Section V.C.iii, then multiplied the ratio of affected employees in small firms to all affected employees by total transfers. This yields the share of transfers occurring in small Federal contractor firms, \$18.7 million in Year 1 (Table 19). This is 32 percent of total transfers, for all contracting firms, in Year 1. As noted in V.C.iii, total transfers may be an overestimate if contractors tend to perform work for multiple clients, rather than working exclusively on Federal contracts. This may be especially pertinent for small business since according to a report by American Express Open, Federal contracting comprises 19 percent of revenues for small contracting firms.<sup>78</sup> Table 20 contains the average costs and transfers per small firm by industry.

<sup>78</sup> American Express OPEN. (2013). Trends in Federal Contracting for Small Businesses: A Research Summary for the American Express OPEN for Government Contracts Program.

<sup>74</sup> This includes the mean base wage of \$54.88 from the Occupational Employment Statistics (OES)

Average Year 1 costs and transfers per small firm with affected employees range from \$155 to \$658.

To estimate whether these costs and transfers will have a detrimental impact to small entities they are compared to total revenues. Based on Survey of United States Businesses (SUSB) data, small Federal contractors had total annual revenues of \$1.4 trillion in 2014 from all sources (Table 21).<sup>79</sup> Transfers

from small firms and costs to small firms in Year 1 (\$85.3 million) are less than 0.01 percent of revenues on average and no more than 0.11 percent in any industry. Therefore, the Department believes this proposed rulemaking will not have a significant impact on small businesses.

To estimate average annualized costs to small contracting firms the Department projected small business

costs and transfers forward 9 years. To do this the Department calculated the ratio of affected employees in small firms to all affected employees in Year 1, then multiplied this ratio by the 10-year projections of national costs and transfers (see Section V.C.vii). This yields the share of projected costs and transfers attributable to small businesses (Table 22).

TABLE 19—COSTS AND TRANSFERS TO SMALL FIRMS IN YEAR 1

Industry	NAICS	Direct employer costs (\$1,000s)					Transfers (\$1,000s)
		Regulatory familiarization	Initial implementation	Recurring implementation	Recurring administrative	Total	
Agriculture, forestry, fishing and . . . . .	11	\$442	\$409	\$1	\$0	\$852	\$15
Mining .....	21	138	128	0	0	267	1
Utilities .....	22	233	215	0	0	448	5
Construction .....	23	5,238	4,848	317	79	10,482	5,377
Manufacturing .....	31–33	6,012	5,563	17	4	11,596	244
Wholesale trade .....	42	2,526	2,337	2	0	4,865	20
Retail trade .....	44–45	1,036	959	29	7	2,030	240
Transportation and warehousing .....	48–49	917	849	29	7	1,802	429
Information .....	51	1,155	1,069	6	2	2,232	68
Finance and insurance .....	52	173	161	1	0	335	9
Real estate and rental and leasing .....	53	1,639	1,516	0	0	3,156	10
Professional, scientific, and . . . . .	54	7,049	6,523	451	113	14,135	8,329
Management of companies and . . . . .	55	17	16	0	0	33	0
Administrative and waste services .....	56	2,754	2,549	303	76	5,681	2,420
Educational services .....	61	942	872	6	1	1,820	87
Health care and social assistance .....	62	1,289	1,193	69	17	2,568	1,060
Arts, entertainment, and recreation .....	71	317	294	1	0	613	16
Accommodation and food services .....	72	730	676	23	6	1,434	193
Other services .....	81	1,170	1,083	12	3	2,268	128
Total private .....		33,779	31,258	1,265	316	66,618	18,652

TABLE 20—AVERAGE COSTS AND TRANSFERS PER SMALL FIRM WITH AFFECTED EMPLOYEES IN YEAR 1

Industry	NAICS	Direct employer costs per small firm	Transfers per small firm	Total costs and transfers per small firm
Agriculture, forestry, fishing and hunting .....	11	\$155.05	\$13.77	\$168.82
Mining .....	21	154.73	1.79	156.52
Utilities .....	22	154.60	8.71	163.30
Construction .....	23	184.18	410.40	594.59
Manufacturing .....	31–33	155.38	16.21	171.60
Wholesale trade .....	42	154.29	3.22	157.51
Retail trade .....	44–45	167.77	92.73	260.50
Transportation and warehousing .....	48–49	169.70	187.05	356.75
Information .....	51	156.63	23.45	180.09
Finance and insurance .....	52	155.73	20.15	175.87
Real estate and rental and leasing .....	53	154.10	2.47	156.58
Professional, scientific, and technical services .....	54	185.91	472.43	658.34
Management of companies and enterprises .....	55	154.03	0.52	154.54
Administrative and waste services .....	56	208.86	351.29	560.15
Educational services .....	61	156.94	36.94	193.88
Health care and social assistance .....	62	180.52	328.77	509.29
Arts, entertainment, and recreation .....	71	155.73	19.71	175.44
Accommodation and food services .....	72	169.40	105.68	275.08
Other services .....	81	159.00	43.60	202.60
Total private .....		172.67	220.76	393.43

<sup>79</sup> Based on 2012 SUSB data inflated to 2014\$.



TABLE 21—COSTS AND TRANSFERS AS SHARE OF REVENUE IN SMALL CONTRACTING FIRMS IN YEAR 1

Industry	NAICS	Total transfers & costs (\$1,000s)	Small firm revenues (billions) <sup>a</sup>	Total as share of revenues (%)
Agriculture, forestry, fishing and hunting .....	11	\$867	\$5.5	0.016
Mining .....	21	268	9.6	0.003
Utilities .....	22	453	3.2	0.014
Construction .....	23	15,860	262.9	0.006
Manufacturing .....	31–33	11,840	487.2	0.002
Wholesale trade .....	42	4,885	209.7	0.002
Retail trade .....	44–45	2,271	25.6	0.009
Transportation and warehousing .....	48–49	2,231	15.3	0.015
Information .....	51	2,300	254.7	0.001
Finance and insurance .....	52	344	5.5	0.006
Real estate and rental and leasing .....	53	3,166	22.3	0.014
Professional, scientific, and technical services .....	54	22,465	60.8	0.037
Management of companies and enterprises .....	55	33	0.2	0.020
Administrative and waste services .....	56	8,101	25.8	0.031
Educational services .....	61	1,907	10.6	0.018
Health care and social assistance .....	62	3,628	14.9	0.024
Arts, entertainment, and recreation .....	71	628	3.0	0.021
Accommodation and food services .....	72	1,627	1.6	0.102
Other services .....	81	2,396	7.7	0.031
Total private .....		85,270	1,426.1	0.006

<sup>a</sup>Source: Total revenue for small firms from 2012 SUSB; inflated to 2014\$ using the CPI–U. Adjusted with ratio of small contracting firms to all small firms.

TABLE 22—PROJECTED COSTS TO SMALL BUSINESSES  
[Millions of 2014\$]

Year/discount rate	Direct employer costs	Transfers	Total
<b>Years 1 Through 10</b>			
Year 1 .....	\$66.6	\$18.7	\$85.3
Year 2 .....	1.93	39.3	41.2
Year 3 .....	2.3	60.1	62.4
Year 4 .....	2.6	81.1	83.7
Year 5 .....	3.0	102.4	105.4
Year 6 .....	1.7	104.8	106.6
Year 7 .....	1.8	107.3	109.1
Year 8 .....	1.8	109.9	111.7
Year 9 .....	1.8	112.6	114.4
Year 10 .....	1.9	115.3	117.2
<b>Average Annualized Amounts</b>			
3% discount rate .....	9.4	82.6	92.0
7% discount rate .....	10.7	79.2	89.9

*C. Differing Compliance and Reporting Requirements for Small Entities*

This NPRM provides no differing compliance and reporting requirements for small entities.

*D. Least Burdensome Option or Explanation Required*

The Department believes it has chosen the most effective option that implements the EO, and results in the least burden. Taking no regulatory action does not address the Department’s concerns discussed above (see Need for Regulation section) and would contravene the Executive Order. The Department also found the option

to allow unlimited accrual (Section V.C.vi) to be overly burdensome on business as well as beyond the scope of the Executive Order.

Pursuant to section 603(c) of the RFA, the following alternatives are to be addressed:

i. Differing compliance or reporting requirements for small entities. To establish differing compliance or reporting requirements for small businesses would undermine the impact of the rule. The Department makes available a variety of resources to employers for understanding their obligations and achieving compliance. Therefore the Department has not

proposed differing compliance or reporting requirements for small businesses.

ii. The clarification, consolidation, or simplification of compliance and reporting requirements for small entities. The Department makes available a variety of resources to employers for understanding their obligations and achieving compliance. As such, the Department has not proposed clarification, consolidation, or simplification of the rule.

iii. The use of performance rather than design standards. The Department makes available a variety of resources to employers for understanding their

obligations and achieving compliance. Therefore, the Department has not proposed relying upon performance to determine compliancy.

iv. An exemption from coverage of the rule, or any part thereof, for such small entities.

To exempt small businesses from the proposed rulemaking would undermine the impact of the rule. The Department makes available a variety of resources to employers for understanding their obligations and achieving compliance. Therefore, the Department has not proposed a “small business” exemption.

*E. Identification, to the Extent Practicable, of all Relevant Federal Rules That May Duplicate, Overlap, or Conflict With the Proposed Rule*

The Department is not aware of any federal rules that duplicate, overlap, or conflict with this NPRM.

**VII. Unfunded Mandates Reform Act**

The Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1532, requires that agencies prepare a written statement, which includes an assessment of anticipated costs and benefits, before proposing any Federal mandate that may result in excess of \$100 million (adjusted annually for inflation) in expenditures in any one year by State, local, and tribal governments in the aggregate or by the private sector. The current (2015) threshold after adjustment for inflation is approximately \$157,000,000.

As explained in the economic analysis set forth in the section discussing Executive Orders 12866 and 13563 above, the Department estimates that the proposed rule may result in transfers of up to \$315 million per year (beginning in 2021), with steady increases up to that level over the intervening years). Because this proposed rule applies only to contracts for which the solicitation will be issued on or after January 1, 2017, contractors would have the information necessary to factor into their bids the labor costs resulting from the paid sick leave requirement, and thus it may be likely that the Federal Government would bear the burden of the transfers. However, most contracts covered by this proposed rule are paid through appropriated funds, and how Congress and agencies respond to rising bids is subject to political processes whose unpredictability limits the Department’s ability to project rule-induced outcomes. The Department therefore acknowledges that this proposed rule may yield effects that make it subject to UMRA requirements. The Department carried out the requisite cost-benefit

analysis in preceding sections of this document.

**VIII. Executive Order 13132, Federalism**

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

**IX. Executive Order 13175, Indian Tribal Governments**

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

**X. Effects on Families**

The undersigned hereby certifies that the proposed rule would not adversely affect the well-being of families, as discussed under section 654 of the Treasury and General Government Appropriations Act, 1999.

**XI. Executive Order 13045, Protection of Children**

This proposed rule would have no environmental health risk or safety risk that may disproportionately affect children.

**XII. Environmental Impact Assessment**

A review of this proposed rule in accordance with the requirements of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*; the regulations of the Council on Environmental Quality, 40 CFR 1500 *et seq.*; and the Departmental NEPA procedures, 29 CFR part 11, indicates that the rule would not have a significant impact on the quality of the human environment. There is, thus, no corresponding environmental assessment or an environmental impact statement.

**XIII. Executive Order 13211, Energy Supply**

This proposed rule is not subject to Executive Order 13211. It will not have a significant adverse effect on the supply, distribution, or use of energy.

**XIV. Executive Order 12630, Constitutionally Protected Property Rights**

This proposed rule is not subject to Executive Order 12630 because it does not involve implementation of a policy that has takings implications or that could impose limitations on private property use.

**XV. Executive Order 12988, Civil Justice Reform Analysis**

This proposed rule was drafted and reviewed in accordance with Executive Order 12988 and will not unduly burden the Federal court system. The proposed rule was: (1) Reviewed to eliminate drafting errors and ambiguities; (2) written to minimize litigation; and (3) written to provide a clear legal standard for affected conduct and to promote burden reduction.

**List of Subjects in 29 CFR Part 13**

Administrative practice and procedure, Construction, Government contracts, Law enforcement, Paid sick leave, Reporting and recordkeeping requirements.

David Weil,

*Administrator, Wage and Hour Division.*

For the reasons set out in the preamble, the Department of Labor proposes to amend Title 29 part 13 of the Code of Federal Regulations by adding part 13 to read as follows:

**PART 13—ESTABLISHING PAID SICK LEAVE FOR FEDERAL CONTRACTORS**

**Subpart A—General**

Sec.

- 13.1 Purpose and scope.
- 13.2 Definitions.
- 13.3 Coverage.
- 13.4 Exclusions.
- 13.5 Paid sick leave for Federal contractors and subcontractors.
- 13.6 Prohibited acts.
- 13.7 Waiver of rights.

**Subpart B—Federal Government Requirements**

- 13.11 Contracting agency requirements.
- 13.12 Department of Labor requirements.

**Subpart C—Contractor Requirements**

- 13.21 Contract clause.
- 13.22 Paid sick leave.
- 13.23 Deductions.
- 13.24 Anti-kickback.
- 13.25 Records to be kept by contractors.
- 13.26 Certified list of employees’ accrued paid sick leave.
- 13.27 Notice.
- 13.28 Timing of pay.

**Subpart D—Enforcement**

- 13.41 Complaints.

- 13.42 Wage and Hour Division conciliation.  
 13.43 Wage and Hour Division investigation.  
 13.44 Remedies.

#### Subpart E—Administrative Proceedings

- 13.51 Disputes concerning contractor compliance.  
 13.52 Debarment proceedings.  
 13.53 Referral to Chief Administrative Law Judge; amendment of pleadings.  
 13.54 Consent findings and order.  
 13.55 Administrative Law Judge proceedings.  
 13.56 Petition for review.  
 13.57 Administrative Review Board proceedings.  
 13.58 Administrator ruling.

#### Appendix A to Part 13—Contract Clause

**Authority:** 4 U.S.C. 301; Executive Order 13706, 80 FR 54697; Secretary's Order 01–2014, 79 FR 77527.

#### Subpart A—General

##### § 13.1 Purpose and scope.

(a) *Purpose.* This part contains the Department of Labor's rules relating to the administration and enforcement of Executive Order 13706 (Executive Order or the Order), "Establishing Paid Sick Leave for Federal Contractors." The Order states that providing paid sick leave to employees will improve the health and performance of employees of Federal contractors and will bring benefits packages offered by Federal contractors in line with model employers, ensuring they remain competitive in the search for dedicated and talented employees. The Executive Order concludes that providing paid sick leave will result in savings and quality improvements in the work performed by parties who contract with the Federal Government that will in turn lead to improved economy and efficiency in Government procurement.

(b) *Policy.* Executive Order 13706 sets forth the general position of the Federal Government that providing access to paid sick leave on Federal contracts will increase efficiency and cost savings for the Federal Government. The Order therefore provides that executive departments and agencies shall, to the extent permitted by law, ensure that new covered contracts, contract-like instruments, and solicitations (collectively referred to as "contracts") include a clause, which the contractor and any subcontractors shall incorporate into lower-tier subcontracts, specifying, as a condition of payment, that employees will earn not less than 1 hour of paid sick leave for every 30 hours worked on or in connection with covered contracts. Nothing in Executive

Order 13706 or this part shall excuse noncompliance with or supersede any applicable Federal or State law, any applicable municipal law or ordinance, or a collective bargaining agreement requiring greater paid sick leave or leave rights than those established under the Order or this part.

(c) *Scope.* Neither Executive Order 13706 nor this part creates or changes any rights under the Contract Disputes Act or creates any private right of action. The Executive Order provides that disputes regarding whether a contractor has provided paid sick leave as prescribed by the Order, to the extent permitted by law, shall be disposed of only as provided in this part. However, nothing in the Order or this part is intended to limit or preclude a civil action under the False Claims Act, 31 U.S.C. 3730, or criminal prosecution under 18 U.S.C. 1001. The Order and this part similarly do not preclude judicial review of final decisions by the Secretary of Labor in accordance with the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*

##### § 13.2 Definitions.

For purposes of this part:

*Accrual year* means the 12-month period during which a contractor may limit an employee's accrual of paid sick leave to no less than 56 hours.

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

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

*As soon as is practicable* means as soon as both possible and practical, taking into account all of the facts and circumstances of the individual case.

*Certification issued by a health care provider* means any type of written document created or signed by a health care provider (or by a representative of the health care provider) that contains information verifying that the physical or mental illness, injury, medical condition, or need for diagnosis, care, or preventive care or other need for care referred to in § 13.5(c)(1)(i), (ii), or (iii) exists.

*Child* means:

(1) A biological, adopted, step, or foster son or daughter of the employee;

(2) A person who is a legal ward or was a legal ward of the employee when that individual was a minor or required a legal guardian;

(3) A person for whom the employee stands *in loco parentis* or stood *in loco*

*parentis* when that individual was a minor or required someone to stand *in loco parentis*; or

(4) A child, as described in paragraphs (1) through (3) of this definition, of an employee's spouse or domestic partner.

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

*Contract* or *contract-like instrument* means an agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law. This definition includes, but is not limited to, a mutually binding legal relationship obligating one party to furnish services (including construction) and another party to pay for them. The term *contract* includes all contracts and any subcontracts of any tier thereunder, whether negotiated or advertised, including any procurement actions, lease agreements, cooperative agreements, provider agreements, intergovernmental service agreements, service agreements, licenses, permits, or any other type of agreement, regardless of nomenclature, type, or particular form, and whether entered into verbally or in writing. The term *contract* shall be interpreted broadly to include, but not be limited to, any contract that may be consistent with the definition provided in the Federal Acquisition Regulation (FAR) or applicable Federal statutes. This definition includes, but is not limited to, any contract that may be covered under any Federal procurement statute. Contracts may be the result of competitive bidding or awarded to a single source under applicable authority to do so. In addition to bilateral instruments, contracts include, but are not limited to, awards and notices of awards; job orders or task letters issued under basic ordering agreements; letter contracts; orders, such as purchase orders, under which the contract becomes effective by written acceptance or performance; and bilateral contract modifications. The term *contract* includes contracts covered by the Service Contract Act, contracts covered by the Davis-Bacon Act, concessions contracts not subject to the Service Contract Act, and contracts in

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

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

*Contractor* means any individual or other legal entity that is awarded a Federal Government contract or subcontract under a Federal Government contract. The term *contractor* refers to both a prime contractor and all of its subcontractors of any tier on a contract with the Federal Government. The term *contractor* includes lessors and lessees. The term *employer* is used interchangeably with the terms *contractor* and *subcontractor* in various sections of this part. The U.S. Government, its agencies, and instrumentalities are not contractors, subcontractors, employers, or joint employers for purposes of compliance with the provisions of the Executive Order.

*Davis-Bacon Act* (DBA) means the Davis-Bacon Act of 1931, as amended, 40 U.S.C. 3141 *et seq.*, and its implementing regulations.

*Domestic partner* means an adult in a committed relationship with another adult. A committed relationship is one in which the employee and the domestic partner of the employee are each other's sole domestic partner (and are not married to or domestic partners with anyone else) and share responsibility for a significant measure of each other's common welfare and financial obligations. This includes, but is not limited to, any relationship between two individuals of the same or opposite sex that is granted legal recognition by a State or by the District of Columbia as a marriage or analogous relationship (including, but not limited to, a civil union).

*Domestic violence* means:

(1) Felony or misdemeanor crimes of violence (including threats or attempts) committed:

(i) By a current or former spouse, domestic partner, or intimate partner of the victim;

(ii) By a person with whom the victim shares a child in common;

(iii) By a person who is cohabitating with or has cohabitated with the victim

as a spouse, domestic partner, or intimate partner;

(iv) By a person similarly situated to a spouse of the victim under domestic or family violence laws of the jurisdiction in which the victim resides or the events occurred; or

(v) By any other adult person against a victim who is protected from that person's acts under the domestic or family violence laws of the jurisdiction in which the victim resides or the events occurred.

(2) Domestic violence also includes any crime of violence considered to be an act of domestic violence according to State law.

*Employee* means any person engaged in performing work on or in connection with a contract covered by the Executive Order, and whose wages under such contract are governed by the Service Contract Act, the Davis-Bacon Act, or the Fair Labor Standards Act, including employees who qualify for an exemption from the Fair Labor Standards Act's minimum wage and overtime provisions, regardless of the contractual relationship alleged to exist between the individual and the employer. The term *employee* includes any person performing work on or in connection with a covered contract and individually registered in a bona fide apprenticeship or training program registered with the U.S. Department of Labor's Employment and Training Administration, Office of Apprenticeship, or with a State Apprenticeship Agency recognized by the Office of Apprenticeship.

*Executive departments and agencies* means executive departments, military departments, or any independent establishments within the meaning of 5 U.S.C. 101, 102, and 104(1), respectively, and any wholly owned Government corporation within the meaning of 31 U.S.C. 9101.

*Executive Order 13495* or *Nondisplacement Executive Order* means Executive Order 13495 of January 30, 2009, Nondisplacement of Qualified Workers Under Service Contracts, 74 FR 6103 (Feb. 4, 2009), and its implementing regulations at 29 CFR part 9.

*Executive Order 13658* or *Minimum Wage Executive Order* means Executive Order 13658 of February 12, 2014, Establishing a Minimum Wage for Contractors, 79 FR 9851 (Feb. 20, 2014), and its implementing regulations at 29 CFR part 10.

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

*Family and Medical Leave Act* (FMLA) means the Family and Medical Leave Act of 1993, as amended, 29 U.S.C. 2601 *et seq.*, and its implementing regulations.

*Family violence* means any act or threatened act of violence, including any forceful detention of an individual that results or threatens to result in physical injury and is committed by a person against another individual (including an elderly individual) to or with whom such person is related by blood, is or was related by marriage or is or was otherwise legally related, or is or was lawfully residing.

*Federal Government* means an agency or instrumentality of the United States that enters into a contract pursuant to authority derived from the Constitution or the laws of the United States. For purposes of the Executive Order and this part, this definition does not include the District of Columbia, any Territory or possession of the United States, or any independent regulatory agency within the meaning of 44 U.S.C. 3502(5).

*Health care provider* means any practitioner who is licensed or certified under Federal or State law to provide the health-related service in question or any practitioner recognized by an employer or the employer's group health plan. The term includes, but is not limited to, doctors of medicine or osteopathy, podiatrists, dentists, psychologists, optometrists, chiropractors, nurse practitioners, nurse-midwives, clinical social workers, physician assistants, physical therapists, and Christian Science Practitioners listed with the First Church of Christ, Scientist in Boston, Massachusetts.

*Independent agencies* means independent regulatory agencies within the meaning of 44 U.S.C. 3502(5).

*Individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship* means any person with whom the employee has a significant personal bond that is or is like a family relationship, regardless of biological or legal relationship.

*Intimate partner* means a person who is or has been in a social relationship of a romantic or intimate nature with the victim, where the existence of such a relationship shall be determined based on a consideration of the length of the relationship; the type of relationship; and the frequency of interaction between the persons involved in the relationship.

*New contract* means a contract that results from a solicitation issued on or after January 1, 2017, or a contract that is awarded outside the solicitation

process on or after January 1, 2017. This term includes both new contracts and replacements for expiring contracts. It does not apply to the unilateral exercise of a pre-negotiated option to renew an existing contract by the Federal Government. For purposes of the Executive Order, a contract that is entered into prior to January 1, 2017 will constitute a *new contract* if, through bilateral negotiation, on or after January 1, 2017:

- (1) The contract is renewed;
- (2) The contract is extended, unless the extension is made pursuant to a term in the contract as of December 31, 2016 providing for a short-term limited extension; or
- (3) The contract is amended pursuant to a modification that is outside the scope of the contract.

*Obtain additional counseling, seek relocation, seek assistance from a victim services organization, or take related legal action*, used in reference to domestic violence, sexual assault, or stalking, means to spend time arranging, preparing for, or executing acts related to addressing physical injuries or mental or emotional impacts resulting from being a victim of domestic violence, sexual assault, or stalking. Such acts include finding and using services of a counselor or victim services organization intended to assist a victim to respond to or prevent future incidents of domestic violence, sexual assault, or stalking; identifying and moving to a different residence to avoid being a victim of domestic violence, sexual assault, or stalking; or a victim's pursuing any related legal action.

*Obtaining diagnosis, care, or preventive care from a health care provider* means receiving services from a health care provider, whether to identify, treat, or otherwise address an existing condition or to prevent potential conditions from arising. The term includes time spent traveling to and from the location at which such services are provided or recovering from receiving such services.

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

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

*Paid sick leave* means compensated absence from employment that is required by Executive Order 13706 and this part.

*Parent* means:

- (1) A biological, adoptive, step, or foster parent of the employee, or a

person who was a foster parent of the employee when the employee was a minor;

(2) A person who is the legal guardian of the employee or was the legal guardian of the employee when the employee was a minor or required a legal guardian;

(3) A person who stands *in loco parentis* to the employee or stood *in loco parentis* to the employee when the employee was a minor or required someone to stand *in loco parentis*; or

(4) A parent, as described in paragraphs (1) through (3) of this definition, of an employee's spouse or domestic partner.

*Physical or mental illness, injury, or medical condition* means any disease, sickness, disorder, or impairment of, or any trauma to, the body or mind.

*Predecessor contract* means a contract that precedes a successor contract.

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

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

*Related legal action or related civil or criminal legal proceeding*, used in reference to domestic violence, sexual assault, or stalking, means any type of legal action, in any forum, that relates to the domestic violence, sexual assault, or stalking, including, but not limited to, family, tribal, territorial, immigration, employment, administrative agency, housing matters, campus administrative or protection or stay-away order proceedings, and other similar matters; and criminal justice investigations, prosecutions, and post-trial matters (including sentencing, parole, and probation) that impact the victim's safety and privacy.

*Secretary* means the Secretary of Labor and includes any official of the U.S. Department of Labor authorized to perform any of the functions of the Secretary of Labor under this part.

*Service Contract Act (SCA)* means the McNamara-O'Hara Service Contract Act of 1965, as amended, 41 U.S.C. 6701 *et seq.*, and its implementing regulations.

*Sexual assault* means any nonconsensual sexual act proscribed by Federal, tribal, or State law, including when the victim lacks capacity to consent.

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

*Spouse* means the other person with whom an individual entered into marriage as defined or recognized under State law for purposes of marriage in the State in which the marriage was entered into or, in the case of a marriage entered into outside of any State, if the marriage is valid in the place where entered into and could have been entered into in at least one State. This definition includes an individual in a common law marriage that was entered into in a State that recognizes such marriages or, if entered into outside of any State, is valid in the place where entered into and could have been entered into in at least one State.

*Stalking* means engaging in a course of conduct directed at a specific person that would cause a reasonable person to fear for his or her safety or the safety of others or suffer substantial emotional distress.

*Successor contract* means a contract for the same or similar services as were provided by a different predecessor contractor at the same location.

*United States* means the United States and all executive departments, independent establishments, administrative agencies, and instrumentalities of the United States, including corporations of which all or substantially all of the stock is owned by the United States, by the foregoing departments, establishments, agencies, and instrumentalities, including nonappropriated fund instrumentalities. When used in a geographic sense, the *United States* means the 50 States and the District of Columbia.

*Victim services organization* means a nonprofit, nongovernmental, or tribal organization or rape crisis center, including a State or tribal coalition, that assists or advocates for victims of domestic violence, sexual assault, or stalking, including domestic violence shelters, faith-based organizations, and other organizations, with a documented history of effective work concerning domestic violence, sexual assault, or stalking.

*Violence Against Women Act (VAWA)* means the Violence Against Women Act of 1994, 42 U.S.C. 13925 *et seq.*, and its implementing regulations.

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

**§ 13.3 Coverage.**

(a) This part applies to any new contract with the Federal Government, unless excluded by § 13.4, provided that:

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

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

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

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

(2) The wages of employees performing on or in connection with such contract are governed by the Davis-Bacon Act, the Service Contract Act, or the Fair Labor Standards Act, including employees who qualify for an exemption from the Fair Labor Standards Act's minimum wage and overtime provisions.

(b) For contracts covered by the Service Contract Act or the Davis-Bacon Act, this part applies to prime contracts only at the thresholds specified in those statutes. For procurement contracts where employees' wages are governed by the Fair Labor Standards Act, this part applies when the prime contract exceeds the micro-purchase threshold, as defined in 41 U.S.C. 1902(a). For all other prime contracts covered by Executive Order 13706 and this part and for all subcontracts awarded under prime contracts covered by Executive Order 13706 and this part, this part applies regardless of the value of the contract.

(c) This part only applies to contracts with the Federal Government requiring performance in whole or in part within the United States. If a contract with the Federal Government is to be performed in part within and in part outside the United States and is otherwise covered by the Executive Order and this part, the requirements of the Order and this part would apply with respect to that part of the contract that is performed within the United States.

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

**§ 13.4 Exclusions.**

(a) *Grants.* The requirements of this part do not apply to grants within the

meaning of the Federal Grant and Cooperative Agreement Act, as amended, 31 U.S.C. 6301 *et seq.*

(b) *Contracts and agreements with and grants to Indian Tribes.* This part does not apply to contracts and agreements with and grants to Indian Tribes under the Indian Self-Determination and Education Assistance Act, as amended, 25 U.S.C. 450 *et seq.*

(c) *Procurement contracts for construction that are excluded from coverage of the Davis-Bacon Act.*

Procurement contracts for construction that are not covered by the Davis-Bacon Act are not subject to this part.

(d) *Contracts for services that are exempted from coverage under the Service Contract Act.* Service contracts, except for those expressly covered by § 13.3(a)(1)(iii) or (iv), that are exempt from coverage of the Service Contract Act pursuant to its statutory language at 41 U.S.C. 6702(b) or its implementing regulations, including those at 29 CFR 4.115 through 4.122 and 29 CFR 4.123(d) and (e), are not subject to this part.

(e) *Employees performing in connection with covered contracts for less than 20 percent of their work hours in a given workweek.* The accrual requirements of this part do not apply to employees performing in connection with covered contracts, *i.e.*, those employees who perform work duties necessary to the performance of the contract but who are not directly engaged in performing the specific work called for by the contract, who spend less than 20 percent of their hours worked in a particular workweek performing in connection with such contracts. This exclusion is inapplicable to employees performing on covered contracts, *i.e.*, those employees directly engaged in performing the specific work called for by the contract, at any point during the workweek. This exclusion is also inapplicable to employees performing in connection with covered contracts with respect to any workweek in which the employees spend 20 percent or more of their hours worked performing in connection with a covered contract.

**§ 13.5 Paid sick leave for Federal contractors and subcontractors.**

(a) *Accrual.* (1) A contractor shall permit an employee to accrue not less than 1 hour of paid sick leave for every 30 hours worked on or in connection with a covered contract. A contractor shall aggregate an employee's hours worked on or in connection with all covered contracts for that contractor for purposes of paid sick leave accrual.

(i) For purposes of Executive Order 13706 and this part, hours worked includes all time for which an employee is or should be paid, meaning time an employee spends working or in paid time off status, including time when the employee is using paid sick leave or any other paid time off provided by the contractor. To properly exclude time spent on non-covered work from an employee's hours worked that count toward the accrual of paid sick leave, a contractor must accurately identify in its records the employee's covered and non-covered hours worked.

(ii) A contractor shall calculate an employee's accrual of paid sick leave no less frequently than at the conclusion of each workweek. A contractor need not allow an employee to accrue paid sick leave in increments smaller than 1 hour for completion of any fraction of 30 hours worked. Any such fraction of hours worked shall be added to hours worked for the same contractor in subsequent workweeks to reach the next 30 hours worked provided that the next workweek in which the employee performs on or in connection with a covered contract occurs within the same accrual year.

(iii) If a contractor is not obligated by the Service Contract Act, Davis-Bacon Act, or Fair Labor Standards Act to keep records of an employee's hours worked, such as because the employee is employed in a bona fide executive, administrative, or professional capacity as those terms are defined in 29 CFR part 541, the contractor may, as to that employee, calculate paid sick leave accrual by tracking the employee's actual hours worked or by using the assumption that the employee works 40 hours on or in connection with a covered contract in each workweek. If such an employee regularly works fewer than 40 hours per week on or in connection with covered contracts, whether because the employee splits time between covered and non-covered contracts or because the employee is part-time, the contractor may allow the employee to accrue paid sick leave based on the employee's typical number of hours worked on covered contracts per workweek.

(2) A contractor shall inform an employee, in writing, of the amount of paid sick leave that the employee has accrued but not used:

(i) No less than monthly;

(ii) At any time when the employee makes a request to use paid sick leave;

(iii) Upon the employee's request for such information, but no more often than once a week;

(iv) Upon a separation from employment; and

(v) Upon reinstatement of paid sick leave pursuant to paragraph (b)(3) of this section.

(3) A contractor may choose to provide an employee with at least 56 hours of paid sick leave at the beginning of each accrual year rather than allowing the employee to accrue such leave based on hours worked over time. In such circumstances, the contractor need not comply with the accrual requirements described in paragraph (a)(1) of this section. The contractor must, however, allow carryover of paid sick leave as required by paragraph (b)(2) of this section, and although the contractor may limit the amount of paid sick leave an employee may carry over to no less than 56 hours, the contractor may not limit the amount of paid sick leave an employee has available for use at any point as is otherwise permitted by paragraph (b)(3) of this section.

(b) *Maximum accrual, carryover, reinstatement, and payment for unused leave.* (1) A contractor may limit the amount of paid sick leave an employee is permitted to accrue to not less than 56 hours in each accrual year. An accrual year is a 12-month period beginning on the date an employee's work on or in connection with a covered contract began or any other fixed date chosen by the contractor, such as the date a covered contract began, the date the contractor's fiscal year begins, a date relevant under State law, or the date a contractor uses for determining employees' leave entitlements under the FMLA pursuant to 29 CFR 825.200. A contractor may choose its accrual year but must use a consistent option for all employees and may not select or change its accrual year in order to avoid the paid sick leave requirements of Executive Order 13706 and this part.

(2) Paid sick leave shall carry over from one accrual year to the next. Paid sick leave carried over from the previous accrual year shall not count toward any limit the contractor sets on annual accrual.

(3) A contractor may limit the amount of paid sick leave an employee is permitted to have available for use at any point to not less than 56 hours. Accordingly, even if an employee has accrued fewer than 56 hours of paid sick leave since the beginning of the accrual year, the employee need only be permitted to accrue additional paid sick leave if the employee has fewer than 56 hours available for use.

(4) Paid sick leave shall be reinstated for employees rehired by the same contractor or a successor contractor within 12 months after a job separation. This reinstatement requirement applies whether the employee leaves and

returns to a job on or in connection with a single covered contract or works for a single contractor on or in connection with more than one covered contract, regardless of whether the employee remains employed by the contractor in between periods of working on covered contracts. It also applies if an employee takes a job on or in connection with a covered successor contract after working for a different contractor on or in connection with the predecessor contract, including when an employee is entitled to a right of first refusal of employment from the successor contractor under Executive Order 13495.

(5) Nothing in Executive Order 13706 or this part shall require a contractor to make a financial payment to an employee for accrued paid sick leave that has not been used upon a separation from employment. If a contractor nevertheless makes such a payment, whether voluntarily or pursuant to a collective bargaining agreement, that payment shall have no effect on the contractor's, or a successor contractor's, obligation to reinstate an employee's accrued paid sick leave upon rehiring the employee within 12 months of the separation pursuant to paragraph (b)(4) of this section.

(c) *Use.* (1) Subject to the conditions described in paragraphs (d) and (e) of this section and the amount of paid sick leave the employee has available for use, a contractor must permit an employee to use paid sick leave to be absent from work for that contractor on or in connection with a covered contract because of:

(i) Physical or mental illness, injury, or medical condition of the employee;

(ii) Obtaining diagnosis, care, or preventive care from a health care provider by the employee;

(iii) Caring for the employee's child, parent, spouse, domestic partner, or any other individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship who has any of the conditions or needs for diagnosis, care, or preventive care described in paragraphs (c)(1)(i) or (ii) of this section or is otherwise in need of care; or

(iv) Domestic violence, sexual assault, or stalking, if the time absent from work is for the purposes otherwise described in paragraphs (c)(1)(i) or (ii) of this section or to obtain additional counseling, seek relocation, seek assistance from a victim services organization, take related legal action, including preparation for or participation in any related civil or criminal legal proceeding, or assist an individual related to the employee as

described in paragraph (c)(1)(iii) of this section in engaging in any of these activities.

(2) A contractor shall account for an employee's use of paid sick leave in increments of no greater than 1 hour.

(i) A contractor may not reduce an employee's accrued paid sick leave by more than the amount of leave the employee actually takes, and a contractor may not require an employee to take more leave than is necessary to address the circumstances that precipitated the need for the leave, provided that the leave is counted using an increment of no greater than 1 hour.

(ii) The amount of paid sick leave used may not exceed the hours an employee would have worked if the need for leave had not arisen.

(3) A contractor shall provide to an employee using paid sick leave the same pay and benefits the employee would have received had the employee not used paid sick leave.

(4) A contractor may not limit the amount of paid sick leave an employee may use per year or at once.

(5) A contractor may not make an employee's use of paid sick leave contingent on the employee's finding a replacement worker to cover any work time to be missed or on the fulfillment of the contractor's operational needs.

(d) *Request for leave.* (1) A contractor shall permit an employee to use any or all of the employee's available paid sick leave upon the oral or written request of an employee that includes information sufficient to inform the contractor that the employee is seeking to be absent from work for a purpose described in paragraph (c)(1) of this section and, to the extent reasonably feasible, the anticipated duration of the leave. The employee's request shall be directed to the appropriate personnel pursuant to a contractor's policy or, in the absence of a formal policy, any personnel who typically receive requests for other types of leave or otherwise address scheduling issues on behalf of the contractor.

(2) If the need for leave is foreseeable, the employee's request shall be made at least 7 calendar days in advance. If the employee is unable to request leave at least 7 calendar days in advance, the request shall be made as soon as is practicable. When an employee becomes aware of a need to take paid sick leave less than 7 calendar days in advance, it should typically be practicable for the employee to make a request for leave either the day the employee becomes aware of the need to take paid sick leave or the next business day. In all cases, however, the determination of when an employee could practicably make a

request must take into account the individual facts and circumstances.

(3)(i) A contractor may communicate its grant of a request to use paid sick leave either orally or in writing provided that the contractor also complies with the requirement in paragraph (a)(2) of this section to inform the employee in writing of the amount of paid sick leave the employee has available for use.

(ii) A contractor shall communicate any denial of a request to use paid sick leave in writing, with an explanation for the denial. Denial is appropriate if, for example, the employee did not provide sufficient information about the need for paid sick leave; the reason given is not consistent with the uses of paid sick leave described in paragraph (c)(1) of this section; the employee did not indicate when the need would arise; the employee has not accrued, and will not have accrued by the date of leave anticipated in the request, a sufficient amount of paid sick leave to cover the request (in which case, if the employee will have any paid sick leave available for use, only a partial denial is appropriate); or the request is to use paid sick leave during time the employee is scheduled to be performing non-covered work. If the denial is based on insufficient information provided in the request, such as if the employee did not state the time of an appointment with a health care provider, the contractor must permit the employee to submit a new, corrected request. If the denial is based on an employee's request to use paid sick leave during time she is scheduled to be performing non-covered work, the denial must be supported by records adequately segregating the employee's time spent on covered and non-covered contracts.

(iii) A contractor shall respond to any request to use paid sick leave as soon as is practicable after the request is made. Although the determination of when it is practicable for a contractor to provide a response will take into account the individual facts and circumstances, it should in many circumstances be practicable for the contractor to respond to a request immediately or within a few hours. In some instances, however, such as if it is unclear at the time of the request whether the employee will be working on or in connection with a covered or non-covered contract at the time for which paid sick leave is requested, as soon as practicable could mean within a day or no longer than within a few days.

(e) *Certification or documentation for leave of 3 or more consecutive full workdays.* (1)(i) A contractor may require certification issued by a health

care provider to verify the need for paid sick leave used for the purposes described in paragraphs (c)(1)(i), (ii), or (iii) of this section only if the employee is absent for 3 or more consecutive full workdays. The contractor shall protect the confidentiality of any certification as required by § 13.25(d).

(ii) A contractor may only require documentation from an appropriate individual or organization to verify the need for paid sick leave used for the purposes described in paragraph (c)(1)(iv) of this section only if the employee is absent for 3 or more consecutive full workdays. The contractor may only require that such documentation contain the minimum necessary information establishing a need for the employee to be absent from work. The contractor shall not disclose any verification information and shall maintain confidentiality about the domestic abuse, sexual assault, or stalking, as required by § 13.25(d).

(2) If certification or documentation is to verify the illness, injury, or condition, need for diagnosis, care, or preventive care, or activity related to domestic violence, sexual assault, or stalking of an individual related to the employee as described in paragraph (c)(1)(iii) of this section, a contractor may also require the employee to provide reasonable documentation or a statement of the family or family-like relationship. This documentation may take the form of a simple written statement from the employee or could be a legal or other document proving the relationship, such as a birth certificate or court order.

(3)(i) A contractor may only require certification or documentation if the contractor informs an employee before the employee returns to work that certification or documentation will be required to verify the use of paid sick leave if the employee is absent for 3 or more consecutive full workdays.

(ii) A contractor may require the employee to provide certification or documentation within 30 days of the first day of the 3 or more consecutive full workdays of paid sick leave but may not set a shorter deadline for its submission.

(iii) While a contractor is waiting for or reviewing certification or documentation, it must treat the employee's otherwise proper request for 3 or more consecutive full workdays of paid sick leave as valid. If the contractor ultimately does not receive certification or documentation, or if the certification or documentation the employee provides is insufficient to verify the employee's need for paid sick leave, the contractor may, within 10 calendar days of the deadline for receiving the

certification or documentation or within 10 calendar days of the receipt of the insufficient certification or documentation, whichever occurs first, retroactively deny the employee's request to use paid sick leave. In such circumstances, the contractor may recover the value of the pay and benefits the employee received but to which the employee was not entitled, including through deduction from any sums due to the employee (e.g., unpaid wages, vacation pay, profit sharing, etc.), provided such deductions do not otherwise violate applicable Federal or State wage payment or other laws.

(4) A contractor may contact the health care provider or other individual who created or signed the certification or documentation only for purposes of authenticating the document or clarifying its contents. The contractor may not request additional details about the medical or other condition referenced, seek a second opinion, or otherwise question the substance of the certification. To make such contact, the contractor must use a human resources professional, a leave administrator, or a management official. The employee's direct supervisor may not contact the employee's health care provider unless there is no other appropriate individual who can do so. The requirements of the Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule, set forth at 45 CFR parts 160 and 164, must be satisfied when individually identifiable health information of an employee is shared with a contractor by a HIPAA-covered health care provider.

(f) *Interaction with other laws and paid time off policies.* (1) *General.* Nothing in Executive Order 13706 or this part shall excuse noncompliance with or supersede any applicable Federal or State law, any applicable law or municipal ordinance, or a collective bargaining agreement requiring greater paid sick leave or leave rights than those established under the Executive Order and this part.

(2) *SCA and DBA requirements.* (i) Paid sick leave required by Executive Order 13706 and this part is in addition to a contractor's obligations under the Service Contract Act and Davis-Bacon Act. A contractor may not receive credit toward its prevailing wage or fringe benefit obligations under those Acts for any paid sick leave provided in satisfaction of the requirements of Executive Order 13706 and this part.

(ii) A contractor may count the value of any paid sick time provided in excess of the requirements of Executive Order 13706 and this part (and any other law) toward its obligations under the Service



Contract Act or Davis-Bacon Act in keeping with the requirements of those Acts.

(3) *FMLA*. A contractor's obligations under the Executive Order and this part have no effect on its obligations to comply with, or ability to act pursuant to, the Family and Medical Leave Act. Paid sick leave may be substituted for (that is, may run concurrently with) unpaid FMLA leave under the same conditions as other paid time off pursuant to 29 CFR 825.207. As to time off that is designated as FMLA leave and for which an employee uses paid sick leave, all notices and certifications that satisfy the FMLA requirements set forth at 29 CFR 825.300 through 300.308 will satisfy the request for leave and certification requirements of paragraphs (d) and (e) of this section.

(4) *State and local paid sick time laws*. A contractor's compliance with a State or local law requiring that employees be provided with paid sick time does not excuse the contractor from compliance with its obligations under the Executive Order 13706 or this part. A contractor may, however, satisfy its obligations under the Order and this part by providing paid sick time that fulfills the requirements of a State or local law provided that the paid sick time is accrued and may be used in a manner that meets or exceeds the requirements of the Order and this part.

(5) *Other paid time off policies*. The paid sick leave requirements of Executive Order 13706 and this part need not have any effect on a contractor's voluntary paid time off policy, whether provided pursuant to a collective bargaining agreement or otherwise. A contractor's existing paid time off policy (if provided in addition to the fulfillment of Service Contract Act or Davis-Bacon Act obligations, if applicable) will satisfy the requirements of the Executive Order and this part if the paid time off is made available to all employees described in § 13.3(a)(2) (other than those excluded by § 13.4(e)); may be used for at least all of the purposes described in paragraph (c)(1) of this section; is provided in a manner and an amount sufficient to comply with the rules and restrictions regarding the accrual of paid sick leave set forth in paragraph (a) of this section and regarding maximum accrual, carryover, reinstatement, and payment for unused leave set forth in paragraph (b) of this section; is provided pursuant to policies sufficient to comply with the rules and restrictions regarding use of paid sick leave set forth in paragraph (c) of this section, regarding requests for leave set forth in paragraph (d) of this section, and regarding certification and

documentation set forth in paragraph (e) of this section, at least with respect to any paid time off used for the purposes described in paragraph (c)(1) of this section; and is protected by the prohibitions against interference, discrimination, and recordkeeping violations described in § 13.6 and the prohibition against waiver of rights described in § 13.7, at least with respect to any paid time off used for the purposes described in paragraph (c)(1) of this section.

#### § 13.6 Prohibited acts.

(a) *Interference*. (1) A contractor may not in any manner interfere with an employee's accrual or use of paid sick leave as required by Executive Order 13706 or this part.

(2) Interference includes, but is not limited to, miscalculating the amount of paid sick leave an employee has accrued, denying or unreasonably delaying a response to a proper request to use paid sick leave, discouraging an employee from using paid sick leave, reducing an employee's accrued paid sick leave by more than the amount of such leave used, transferring the employee to work on non-covered contracts to prevent the accrual or use of paid sick leave, disclosing confidential information provided in certification or other documentation provided to verify the need to use paid sick leave, or making the use of paid sick leave contingent on the employee's finding a replacement worker or the fulfillment of the contractor's operational needs.

(b) *Discrimination*. (1) A contractor may not discharge or in any other manner discriminate against any employee for:

(i) Using, or attempting to use, paid sick leave as provided for under Executive Order 13706 and this part;

(ii) Filing any complaint, initiating any proceeding, or otherwise asserting any right or claim under Executive Order 13706 or this part;

(iii) Cooperating in any investigation or testifying in any proceeding under Executive Order 13706 or this part;

(iv) Informing any other person about his or her rights under Executive Order 13706 or this part.

(2) Discrimination includes, but is not limited to, a contractor's considering any of the actions described in paragraph (b)(1) of this section as a negative factor in employment actions, such as hiring, promotions, or disciplinary actions, or a contractor's counting paid sick leave under a no fault attendance policy.

(c) *Recordkeeping*. A contractor's failure to make and maintain or to make

available to authorized representatives of the Wage and Hour Division records for inspection, copying, and transcription as required by § 13.25, or any other failure to comply with the requirements of § 13.25, constitutes a violation of Executive Order 13706, this part, and the underlying contract.

#### § 13.7 Waiver of rights.

Employees cannot waive, nor may contractors induce employees to waive, their rights under Executive Order 13706 or this part.

### Subpart B—Federal Government Requirements

#### § 13.11 Contracting agency requirements.

(a) *Contract clause*. The contracting agency shall include the Executive Order paid sick leave contract clause set forth in appendix A of this part in all covered contracts and solicitations for such contracts, as described in § 13.3, except for procurement contracts subject to the Federal Acquisition Regulations (FAR) in title 48 of the Code of Federal Regulations. The required contract clause directs, as a condition of payment, that all employees performing work on or in connection with covered contracts shall be permitted to accrue and use paid sick leave as required by Executive Order 13706 and this part. For procurement contracts subject to the FAR, contracting agencies must use the clause set forth in the FAR developed to implement part 13. Such clause will accomplish the same purposes as the clause set forth in appendix A and be consistent with the requirements set forth in part 13.

(b) *Failure to include the contract clause*. Where the Department of Labor or the contracting agency discovers or determines, whether before or subsequent to a contract award, that a contracting agency made an erroneous determination that Executive Order 13706 and this part did not apply to a particular contract and/or failed to include the applicable contract clause in a contract to which the Executive Order and this part apply, the contracting agency, on its own initiative or within 15 calendar days of notification by an authorized representative of the Department of Labor, shall incorporate the contract clause in the contract retroactive to commencement of performance under the contract through the exercise of any and all authority that may be needed (including, where necessary, its authority to negotiate or amend, its authority to pay any necessary additional costs, and its authority under any contract provision

authorizing changes, cancellation, and termination).

(c) *Withholding.* A contracting officer shall, upon his or her own action or upon written request of the Administrator, withhold or cause to be withheld from the prime contractor under the covered contract or any other Federal contract with the same prime contractor, so much of the accrued payments or advances as may be considered necessary to pay employees the full amount owed to compensate for any violation of Executive Order 13706 or this part. In the event of any such violation, the agency may, after authorization or by direction of the Administrator and written notification to the contractor, take action to cause suspension of any further payment or advance of funds until such violations have ceased. Additionally, any failure to comply with the requirements of Executive Order 13706 or this part may be grounds for termination of the right to proceed with the contract work. In such event, the contracting agency may enter into other contracts or arrangements for completion of the work, charging the contractor in default with any additional cost.

(d) *Suspending payment.* A contracting officer shall, upon his or her own action or upon the direction of the Administrator and notification of the contractor, take action to cause suspension of any further payment or advance of funds to a contractor that has failed to make available for inspection, copying, and transcription any of the records identified in § 13.25.

(e) *Actions on complaints.* (1) *Reporting time frame.* The contracting agency shall forward all information listed in paragraph (e)(2) of this section to the Office of Government Contracts Enforcement, Wage and Hour Division, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210 within 14 calendar days of receipt of a complaint alleging contractor noncompliance with Executive Order 13706 or this part or within 14 calendar days of being contacted by the Wage and Hour Division regarding any such complaint.

(2) *Report contents.* The contracting agency shall forward to the Office of Government Contracts Enforcement, Wage and Hour Division, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210 any:

- (i) Complaint of contractor noncompliance with Executive Order 13706 or this part;
- (ii) Available statements by the worker, contractor, or any other person regarding the alleged violation;

(iii) Evidence that the Executive Order paid sick leave contract clause was included in the contract;

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

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

(f) *Certified list of employees' accrued paid sick leave.* The contracting officer shall provide to a successor contractor any predecessor contractor's certified list, provided to the contracting officer pursuant to § 13.26, of the amounts of unused paid sick leave that employees have accrued.

#### § 13.12 Department of Labor requirements.

(a) *Notice—(1) Wage Determinations OnLine Web site.* The Administrator will publish and maintain on Wage Determinations OnLine (WDOL), <http://www.wdol.gov>, or any successor site, a notice that Executive Order 13706 creates a requirement to allow employees performing work on or in connection with contracts covered by Executive Order 13706 and this part to accrue and use paid sick leave, as well as an indication of where to find more complete information about that requirement.

(2) *Wage determinations.* The Administrator will publish on all wage determinations issued under the Davis-Bacon Act and the Service Contract Act a notice that Executive Order 13706 creates a requirement to allow employees performing work on or in connection with contracts covered by Executive Order 13706 and this part to accrue and use paid sick leave, as well as an indication of where to find more complete information about that requirement.

(b) *Notification to a contractor of the withholding of funds.* If the Administrator requests that a contracting agency withhold funds from a contractor pursuant to § 13.11(c), or suspend payment or advance of funds pursuant to § 13.11(d), the Administrator and/or contracting agency shall notify the affected prime contractor of the Administrator's request to the contracting agency.

#### Subpart C—Contractor Requirements

##### § 13.21 Contract clause.

(a) The contractor, as a condition of payment, shall abide by the terms of the applicable Executive Order paid sick leave contract clause referred to in § 13.11(a).

(b) The contractor shall include in any covered subcontracts the applicable

Executive Order paid sick leave contract clause referred to in § 13.11(a) and shall require, as a condition of payment, that the subcontractor include the contract clause in any lower-tier subcontracts. The prime contractor and any upper-tier contractor shall be responsible for the compliance by any subcontractor or lower-tier subcontractor with the requirements of Executive Order 13706 and this part, whether or not the contract clause was included in the subcontract.

##### § 13.22 Paid sick leave.

The contractor shall allow all employees performing work on or in connection with a covered contract to accrue and use paid sick leave as required by Executive Order 13706 and this part.

##### § 13.23 Deductions.

The contractor may make deductions from the pay and benefits of an employee who is using paid sick leave only if such deduction qualifies as a:

- (a) Deduction required by Federal, State, or local law, such as Federal or State withholding of income taxes;
- (b) Deduction for payments made to third parties pursuant to court order;
- (c) Deduction directed by a voluntary assignment of the employee or his or her authorized representative; or
- (d) Deduction for the reasonable cost or fair value, as determined by the Administrator, of furnishing such employee with "board, lodging, or other facilities," as defined in 29 U.S.C. 203(m) and part 531 of this title.

##### § 13.24 Anti-kickback.

All paid sick leave used by employees performing on or in connection with covered contracts must be paid free and clear and without subsequent deduction (except as set forth in § 13.23), rebate, or kickback on any account. Kickbacks directly or indirectly to the contractor or to another person for the contractor's benefit for the whole or part of the paid sick leave are prohibited.

##### § 13.25 Records to be kept by contractors.

(a) The contractor and each subcontractor performing work subject to Executive Order 13706 and this part shall make and maintain during the course of the covered contract, and preserve for no less than three years thereafter, records containing the information specified in paragraphs (a)(1) through (15) of this section for each employee and shall make them available for inspection, copying, and transcription by authorized representatives of the Wage and Hour Division of the U.S. Department of Labor:

(1) Name, address, and Social Security number of each employee;

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

(3) The rate or rates of wages paid;

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

(5) Any deductions made;

(6) The total wages paid each pay period;

(7) A copy of notifications to employees of the amount of paid sick leave the employees have accrued as required under § 13.5(a)(2);

(8) A copy of employees' requests to use paid sick leave, if in writing, or, if not in writing, any other records reflecting such employee requests;

(9) Dates and amounts of paid sick leave used by employees (unless a contractor's paid time off policy satisfies the requirements of Executive Order 13706 and part 13 as described in § 13.5(f)(5), leave must be designated in records as paid sick leave pursuant to Executive Order 13706);

(10) A copy of any written denials of employees' requests to use paid sick leave, including explanations for such denials, as required under § 13.5(d)(3);

(11) Any records relating to the certification and documentation a contractor may require an employee to provide under § 13.5(e), including copies of any certification or documentation provided by an employee;

(12) Any other records showing any tracking of or calculations related to an employee's accrual and/or use of paid sick leave;

(13) A copy of any certified list of employees' unused paid sick leave provided to a contracting officer in compliance with § 13.26;

(14) Any certified list of employees' unused paid sick leave received from the contracting agency in compliance with § 13.11(f); and

(15) The relevant covered contract.

(b) If a contractor wishes to distinguish between an employee's covered and non-covered work (such as time spent performing work on or in connection with a covered contract versus time spent performing work on or in connection with non-covered contracts or time spent performing work on or in connection with a covered contract in the United States versus time spent performing work outside the United States, or to establish that time spent performing solely in connection with covered contracts constituted less than 20 percent of an employee's hours worked during a particular workweek), the contractor must keep records or other proof reflecting such distinctions. Only if the contractor adequately

segregates the employee's time will time spent on non-covered contracts be excluded from hours worked counted toward the accrual of paid sick leave. Similarly, only if that contractor adequately segregates the employee's time may a contractor properly deny an employee's request to take leave under § 13.5(d) on the ground that the employee was scheduled to perform non-covered work during the time she asked to use paid sick leave.

(c) If a contractor is not obligated by the Service Contract Act, Davis-Bacon Act, or Fair Labor Standards Act to keep records of an employee's hours worked, such as because the employee is employed in a bona fide executive, administrative, or professional capacity as those terms are defined in 29 CFR part 541, and the contractor chooses to use the assumption permitted by § 13.5(a)(1)(iii), the contractor is excused from the requirement in paragraph (a)(4) of this section to keep records of the employee's number of daily and weekly hours worked.

(d)(1) Records relating to medical histories or domestic violence, sexual assault, or stalking, created by or provided to a contractor for purposes of Executive Order 13706, whether of an employee or an employee's child, parent, spouse, domestic partner, or other individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship, shall be maintained as confidential records in separate files/records from the usual personnel files.

(2) If the confidentiality requirements of the Genetic Information Nondiscrimination Act of 2008 (GINA) and/or the Americans with Disabilities Act (ADA) apply to records or documents created to comply with the recordkeeping requirements in this part, the records and documents must also be maintained in compliance with the confidentiality requirements of the GINA and/or ADA as described in 29 CFR 1635.9 and 29 CFR 1630.14(c)(1), respectively.

(3) The contractor shall not disclose any documentation used to verify the need to use 3 or more consecutive days of paid sick leave for the purposes listed in § 13.5(c)(1)(iv) (as described in § 13.5(d)(2)) and shall maintain confidentiality about any domestic abuse, sexual assault, or stalking, unless the employee consents or when disclosure is required by law.

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

(f) Nothing in this part limits or otherwise modifies the contractor's recordkeeping obligations, if any, under the Davis-Bacon Act, the Service Contract Act, the Fair Labor Standards Act, the Family and Medical Leave Act, Executive Order 13658, their implementing regulations, or other applicable law.

#### **§ 13.26 Certified list of employees' accrued paid sick leave.**

Upon completion of a covered contract, a predecessor prime contractor shall provide to the contracting officer a certified list of the names of all employees entitled to paid sick leave under Executive Order 13706 and this part who worked on or in connection with the covered contract or any covered subcontract(s) at any point during the 12 months preceding the date of completion of the contract, the date each such employee separated from the contract or covered subcontract(s) if prior to the date of the completion of the contract, and the amount of paid sick leave each such employee had available for use as of the date of completion of the contract or the date each such employee separated from the contract or subcontract.

#### **§ 13.27 Notice.**

(a) The contractor must notify all employees performing work on or in connection with a covered contract of the paid sick leave requirements of Executive Order 13706 and this part by posting a notice provided by the Department of Labor in a prominent and accessible place at the worksite so it may be readily seen by employees.

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

#### **§ 13.28 Timing of pay.**

The contractor shall compensate an employee for time during which the employee used paid sick leave no later than one pay period following the end of the regular pay period in which the paid sick leave was used.

### **Subpart D—Enforcement**

#### **§ 13.41 Complaints.**

(a) Any employee, contractor, labor organization, trade organization, contracting agency, or other person or entity that believes a violation of the Executive Order or this part has occurred may file a complaint with any

office of the Wage and Hour Division. No particular form of complaint is required. A complaint may be filed orally or in writing. If the complainant is unable to file the complaint in English, the Wage and Hour Division will accept the complaint in any language.

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

#### **§ 13.42 Wage and Hour Division conciliation.**

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

#### **§ 13.43 Wage and Hour Division investigation.**

The Administrator may investigate possible violations of the Executive Order or this part either as the result of a complaint or at any time on his or her own initiative. As part of the investigation, the Administrator may conduct interviews with the relevant contractor, as well as the contractor's employees at the worksite during normal work hours; inspect the relevant contractor's records (including contract documents and payrolls, if applicable); make copies and transcriptions of such records; and require the production of any documentary or other evidence the Administrator deems necessary to determine whether a violation, including conduct warranting imposition of debarment, has occurred. Federal agencies and contractors shall cooperate with any authorized representative of the Department of Labor in the inspection of records, in interviews with employees, and in all aspects of investigations.

#### **§ 13.44 Remedies and sanctions.**

(a) *Interference.* When the Administrator determines that a contractor has interfered with an employee's accrual or use of paid sick leave in violation of § 13.6(a), the Administrator will notify the contractor

and the relevant contracting agency of the interference and request that the contractor remedy the violation. If the contractor does not remedy the violation, the Administrator shall direct the contractor to provide any appropriate relief to the affected employee(s) in the investigative findings letter issued pursuant to § 13.51. Such relief may include the any pay and/or benefits denied or lost by reason of the violation; other actual monetary losses sustained as a direct result of the violation; or appropriate equitable or other relief. Payment of liquidated damages in an amount equaling any monetary relief may also be directed unless such amount is reduced by the Administrator because the violation was in good faith and the contractor had reasonable grounds for believing it had not violated the Order or this part. The Administrator may additionally direct that payments due on the contract or any other contract between the contractor and the Federal Government be withheld as may be necessary to provide any appropriate monetary relief. Upon the final order of the Secretary that monetary relief is due, the Administrator may direct the relevant contracting agency to transfer the withheld funds to the Department of Labor for disbursement.

(b) *Discrimination.* When the Administrator determines that a contractor has discriminated against an employee in violation of § 13.6(b), the Administrator will notify the contractor and the relevant contracting agency of the discrimination and request that the contractor remedy the violation. If the contractor does not remedy the violation, the Administrator shall direct the contractor to provide appropriate relief to the affected employee(s) in the investigative findings letter issued pursuant to § 13.51. Such relief may include, but is not limited to, employment, reinstatement, promotion, restoration of leave, or lost pay and/or benefits. Payment of liquidated damages in an amount equaling any monetary relief may also be directed unless such amount is reduced by the Administrator because the violation was in good faith and the contractor had reasonable grounds for believing the contractor had not violated the Order or this part. The Administrator may additionally direct that payments due on the contract or any other contract between the contractor and the Federal Government be withheld as may be necessary to provide any appropriate monetary relief. Upon the final order of the Secretary that monetary relief is due, the Administrator may direct the relevant

contracting agency to transfer the withheld funds to the Department of Labor for disbursement.

(c) *Recordkeeping.* When a contractor fails to comply with the requirements of § 13.25 in violation of § 13.6(c), the Administrator will request that the contractor remedy the violation. If the contractor fails to produce required records upon request, the contracting officer, upon direction of an authorized representative of the Department of Labor, or under its own action, shall take such action as may be necessary to cause suspension of any further payment or advance of funds on the contract until such time as the violations are discontinued.

(d) *Debarment.* Whenever a contractor is found by the Secretary to have disregarded its obligations under the Executive Order or this part, such contractor and its responsible officers, and any firm, corporation, partnership, or association in which the contractor or responsible officers have an interest, shall be ineligible to be awarded any contract or subcontract subject to the Executive Order for a period of up to three years from the date of publication of the name of the contractor or responsible officer on the excluded parties list currently maintained on the System for Award Management Web site, <http://www.SAM.gov>. Neither an order of debarment of any contractor or its responsible officers from further Government contracts nor the inclusion of a contractor or its responsible officers on a published list of noncomplying contractors under this section shall be carried out without affording the contractor or responsible officers an opportunity for a hearing before an Administrative Law Judge.

(e) *Civil actions to recover greater underpayments than those withheld.* If the payments withheld under § 13.11(c) are insufficient to reimburse all monetary relief due, or if there are no payments to withhold, the Department of Labor, following a final order of the Secretary, may bring an action against the contractor in any court of competent jurisdiction to recover the remaining amount. The Department of Labor shall, to the extent possible, pay any sums it recovers in this manner directly to the employees who suffered the violation(s) of § 13.6(a) or (b). Any sum not paid to an employee because of inability to do so within three years shall be transferred into the Treasury of the United States as miscellaneous receipts.

(f) *Retroactive inclusion of contract clause.* If a contracting agency fails to include the applicable contract clause in a contract to which the Executive Order applies, the contracting agency, on its

own initiative or within 15 calendar days of notification by an authorized representative of the Department of Labor, shall incorporate the contract clause in the contract retroactive to commencement of performance under the contract through the exercise of any and all authority that may be needed (including, where necessary, its authority to negotiate or amend, its authority to pay any necessary additional costs, and its authority under any contract provision authorizing changes, cancellation, and termination).

### Subpart E—Administrative Proceedings

#### § 13.51 Disputes concerning contractor compliance.

(a) This section sets forth the procedures for resolution of disputes of fact or law concerning a contractor's compliance with this part. The procedures in this section may be initiated upon the Administrator's own motion or upon request of the contractor.

(b)(1) In the event of a dispute described in paragraph (a) of this section in which it appears that relevant facts are at issue, the Administrator will notify the affected contractor(s) and the prime contractor (if different) of the investigative findings by certified mail to the last known address.

(2) A contractor desiring a hearing concerning the Administrator's investigative findings letter shall request such a hearing by letter postmarked within 30 calendar days of the date of the Administrator's letter. The request shall set forth those findings that are in dispute with respect to the violations and/or debarment, as appropriate, explain how the findings are in dispute including by making reference to any affirmative defenses.

(3) Upon receipt of a timely request for a hearing, the Administrator shall refer the case to the Chief Administrative Law Judge by Order of Reference, to which shall be attached a copy of the investigative findings letter from the Administrator and response thereto, for designation to an Administrative Law Judge to conduct such hearings as may be necessary to resolve the disputed matters. The hearing shall be conducted in accordance with the procedures set forth in 29 CFR part 6.

(c)(1) In the event of a dispute described in paragraph (a) of this section in which it appears that there are no relevant facts at issue, and where there is not at that time reasonable cause to institute debarment proceedings under § 13.52, the Administrator shall

notify the contractor(s) of the investigative findings by certified mail to the last known address, and shall issue a ruling in the investigative findings letter on any issues of law known to be in dispute.

(2)(i) If the contractor disagrees with the factual findings of the Administrator or believes that there are relevant facts in dispute, the contractor shall so advise the Administrator by letter postmarked within 30 calendar days of the date of the Administrator's letter. In the response, the contractor shall explain in detail the facts alleged to be in dispute and attach any supporting documentation.

(ii) Upon receipt of a timely response under paragraph (c)(2)(i) of this section alleging the existence of a factual dispute, the Administrator shall examine the information submitted. If the Administrator determines that there is a relevant issue of fact, the Administrator shall refer the case to the Chief Administrative Law Judge in accordance with paragraph (b)(3) of this section. If the Administrator determines that there is no relevant issue of fact, the Administrator shall so rule and advise the contractor accordingly.

(3) If the contractor desires review of the ruling issued by the Administrator under paragraph (c)(1) or the final sentence of (c)(2)(ii) of this section, the contractor shall file a petition for review thereof with the Administrative Review Board postmarked within 30 calendar days of the date of the ruling, with a copy thereof to the Administrator. The petition for review shall be filed in accordance with the procedures set forth in 29 CFR part 7.

(d) If a timely response to the Administrator's investigative findings letter is not made or a timely petition for review is not filed, the Administrator's investigative findings letter shall become the final order of the Secretary. If a timely response or petition for review is filed, the Administrator's letter shall be inoperative unless and until the decision is upheld by an Administrative Law Judge or the Administrative Review Board or otherwise becomes a final order of the Secretary.

#### § 13.52 Debarment proceedings.

(a) Whenever any contractor is found by the Secretary of Labor to have disregarded its obligations to employees or subcontractors under Executive Order 13706 or this part, such contractor and its responsible officers, and any firm, corporation, partnership, or association in which such contractor or responsible officers have an interest, shall be ineligible for a period up to three years

to receive any contracts or subcontracts subject to Executive Order 13706 from the date of publication of the name or names of the contractor or persons on the excluded parties list currently maintained on the System for Award Management Web site, <http://www.SAM.gov>.

(b)(1) Whenever the Administrator finds reasonable cause to believe that a contractor has committed a violation of Executive Order 13706 or this part which constitutes a disregard of its obligations to employees or subcontractors, the Administrator shall notify by certified mail to the last known address or by personal delivery, the contractor and its responsible officers (and any firms, corporations, partnerships, or associations in which the contractor or responsible officers are known to have an interest), of the finding. The Administrator shall afford such contractor and any other parties notified an opportunity for a hearing as to whether debarment action should be taken under Executive Order 13706 or this part. The Administrator shall furnish to those notified a summary of the investigative findings. If the contractor or any other parties notified wish to request a hearing as to whether debarment action should be taken, such a request shall be made by letter to the Administrator postmarked within 30 calendar days of the date of the investigative findings letter from the Administrator, and shall set forth any findings which are in dispute and the reasons therefor, including any affirmative defenses to be raised. Upon receipt of such timely request for a hearing, the Administrator shall refer the case to the Chief Administrative Law Judge by Order of Reference, to which shall be attached a copy of the investigative findings letter from the Administrator and the response thereto, for designation of an Administrative Law Judge to conduct such hearings as may be necessary to determine the matters in dispute.

(2) Hearings under this section shall be conducted in accordance with the procedures set forth in 29 CFR part 6. If no hearing is requested within 30 calendar days of the letter from the Administrator, the Administrator's findings shall become the final order of the Secretary.

#### § 13.53 Referral to Chief Administrative Law Judge; amendment of pleadings.

(a) Upon receipt of a timely request for a hearing under § 13.51 (where the Administrator has determined that relevant facts are in dispute) or § 13.52 (debarment), the Administrator shall refer the case to the Chief

Administrative Law Judge by Order of Reference, to which shall be attached a copy of the investigative findings letter from the Administrator and response thereto, for designation of an Administrative Law Judge to conduct such hearings as may be necessary to decide the disputed matters. A copy of the Order of Reference and attachments thereto shall be served upon the respondent. The investigative findings letter from the Administrator and response thereto shall be given the effect of a complaint and answer, respectively, for purposes of the administrative proceedings.

(b) At any time prior to the closing of the hearing record, the complaint (investigative findings letter) or answer (response) may be amended with the permission of the Administrative Law Judge and upon such terms as the Administrative Law Judge may approve. For proceedings pursuant to § 13.51, such an amendment may include a statement that debarment action is warranted under § 13.52. Such amendments shall be allowed when justice and the presentation of the merits are served thereby, provided there is no prejudice to the objecting party's presentation on the merits. When issues not raised by the pleadings are reasonably within the scope of the original complaint and are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings, and such amendments may be made as necessary to make them conform to the evidence. The presiding Administrative Law Judge may, upon reasonable notice and upon such terms as are just, permit supplemental pleadings setting forth transactions, occurrences, or events that have happened since the date of the pleadings and that are relevant to any of the issues involved. A continuance in the hearing may be granted or the record left open to enable the new allegations to be addressed.

#### § 13.54 Consent findings and order.

(a) At any time prior to the receipt of evidence or, at the Administrative Law Judge's discretion prior to the issuance of the Administrative Law Judge's decision, the parties may enter into consent findings and an order disposing of the proceeding in whole or in part.

(b) Any agreement containing consent findings and an order disposing of a proceeding in whole or in part shall also provide:

(1) That the order shall have the same force and effect as an order made after full hearing;

(2) That the entire record on which any order may be based shall consist solely of the Administrator's findings letter and the agreement;

(3) A waiver of any further procedural steps before the Administrative Law Judge and the Administrative Review Board regarding those matters which are the subject of the agreement; and

(4) A waiver of any right to challenge or contest the validity of the findings and order entered into in accordance with the agreement.

(c) Within 30 calendar days after receipt of an agreement containing consent findings and an order disposing of the disputed matter in whole, the Administrative Law Judge shall, if satisfied with its form and substance, accept such agreement by issuing a decision based upon the agreed findings and order. If such agreement disposes of only a part of the disputed matter, a hearing shall be conducted on the matters remaining in dispute.

#### § 13.55 Administrative Law Judge proceedings.

(a) *Jurisdiction.* The Office of Administrative Law Judges has jurisdiction to hear and decide appeals concerning questions of law and fact from the Administrator's investigative findings letters issued under §§ 13.51 and 13.52.

(b) *Proposed findings of fact, conclusions, and order.* Within 20 calendar days of filing of the transcript of the testimony or such additional time as the Administrative Law Judge may allow, each party may file with the Administrative Law Judge proposed findings of fact, conclusions of law, and a proposed order, together with a supporting brief expressing the reasons for such proposals. Each party shall serve such proposals and brief on all other parties.

(c) *Decision.* (1) Within a reasonable period of time after the time allowed for filing of proposed findings of fact, conclusions of law, and order, or within 30 calendar days of receipt of an agreement containing consent findings and order disposing of the disputed matter in whole, the Administrative Law Judge shall issue a decision. The decision shall contain appropriate findings, conclusions, and an order, and be served upon all parties to the proceeding.

(2) If the respondent is found to have violated Executive Order 13706 or this part, and if the Administrator requested debarment, the Administrative Law Judge shall issue an order as to whether the respondent is to be subject to the excluded parties list, including findings that the contractor disregarded its

obligations to employees or subcontractors under the Executive Order or this part.

(d) *Limit on scope of review.* The Equal Access to Justice Act, as amended, does not apply to proceedings under this part. Accordingly, Administrative Law Judges shall have no authority to award attorney's fees and/or other litigation expenses pursuant to the provisions of the Equal Access to Justice Act for any proceeding under this part.

(e) *Orders.* If the Administrative Law Judge concludes a violation occurred, the final order shall mandate action to remedy the violation, including any monetary or equitable relief described in § 13.44. Where the Administrator has sought imposition of debarment, the Administrative Law Judge shall determine whether an order imposing debarment is appropriate.

(f) *Finality.* The Administrative Law Judge's decision shall become the final order of the Secretary, unless a timely petition for review is filed with the Administrative Review Board.

#### § 13.56 Petition for review.

(a) *Filing.* Within 30 calendar days after the date of the decision of the Administrative Law Judge (or such additional time as is granted by the Administrative Review Board), any party aggrieved thereby who desires review thereof shall file a petition for review of the decision with supporting reasons. Such party shall transmit the petition in writing to the Administrative Review Board with a copy thereof to the Chief Administrative Law Judge. The petition shall refer to the specific findings of fact, conclusions of law, or order at issue. A petition concerning the decision on debarment shall also state the disregard of obligations to employees and/or subcontractors, or lack thereof, as appropriate. A party must serve the petition for review, and all briefs, on all parties and the Chief Administrative Law Judge. It must also timely serve copies of the petition and all briefs on the Administrator, Wage and Hour Division, and on the Associate Solicitor, Division of Fair Labor Standards, Office of the Solicitor, U.S. Department of Labor, Washington, DC 20210.

(b) *Effect of filing.* If a party files a timely petition for review, the Administrative Law Judge's decision shall be inoperative unless and until the Administrative Review Board issues an order affirming the decision, or the decision otherwise becomes a final order of the Secretary. If a petition for review concerns only the imposition of debarment, however, the remainder of

the decision shall be effective immediately. No judicial review shall be available unless a timely petition for review to the Administrative Review Board is first filed.

**§ 13.57 Administrative Review Board proceedings.**

(a) *Authority.* (1) *General.* The Administrative Review Board has jurisdiction to hear and decide in its discretion appeals concerning questions of law and fact from investigative findings letters of the Administrator issued under § 13.51(c)(1) or the final sentence of § 13.51(c)(2)(ii), Administrator's rulings issued under § 13.58, and decisions of Administrative Law Judges issued under § 13.55. In considering the matters within the scope of its jurisdiction, the Administrative Review Board shall act as the authorized representative of the Secretary and shall act fully and finally on behalf of the Secretary concerning such matters.

(2) *Limit on scope of review.* (i) The Administrative Review Board shall not have jurisdiction to pass on the validity of any provision of this part. The Administrative Review Board is an appellate body and shall decide cases properly before it on the basis of substantial evidence contained in the entire record before it. The Administrative Review Board shall not receive new evidence into the record.

(ii) The Equal Access to Justice Act, as amended, does not apply to proceedings under this part. Accordingly, the Administrative Review Board shall have no authority to award attorney's fees and/or other litigation expenses pursuant to the provisions of the Equal Access to Justice Act for any proceeding under this part.

(b) *Decisions.* The Administrative Review Board's final decision shall be issued within a reasonable period of time following receipt of the petition for review and shall be served upon all parties by mail to the last known address and on the Chief Administrative Law Judge (in cases involving an appeal from an Administrative Law Judge's decision).

(c) *Orders.* If the Administrative Review Board concludes a violation occurred, the final order shall mandate action to remedy the violation, including, but not limited to, any monetary or equitable relief described in § 13.44. Where the Administrator has sought imposition of debarment, the Administrative Review Board shall determine whether an order imposing debarment is appropriate.

(d) *Finality.* The decision of the Administrative Review Board shall become the final order of the Secretary.

**§ 13.58 Administrator ruling.**

(a) Questions regarding the application and interpretation of the rules contained in this part may be referred to the Administrator, who shall issue an appropriate ruling. Requests for such rulings should be addressed to the Administrator, Wage and Hour Division, U.S. Department of Labor, Washington, DC 20210.

(b) Any interested party may appeal to the Administrative Review Board for review of a final ruling of the Administrator issued under paragraph (a) of this section. The petition for review shall be filed with the Administrative Review Board within 30 calendar days of the date of the ruling.

*Appendix A to Part 13—Contract Clause*

The following clause shall be included by the contracting agency in every contract, contract-like instrument, and solicitation to which Executive Order 13706 applies, except for procurement contracts subject to the Federal Acquisition Regulation (FAR):

(a) *Executive Order 13706.* This contract is subject to Executive Order 13706, the regulations issued by the Secretary of Labor in 29 CFR part 13 pursuant to the Executive Order, and the following provisions.

(b) *Paid Sick Leave.* (1) The contractor shall permit each employee (as defined in 29 CFR 13.2) engaged in the performance of this contract by the prime contractor or any subcontractor, regardless of any contractual relationship which may be alleged to exist between the contractor and employee, to earn not less than 1 hour of paid sick leave for every 30 hours worked. The contractor shall additionally allow accrual and use of paid sick leave as required by Executive Order 13706 and 29 CFR part 13. The contractor shall in particular comply with the accrual, use, and other requirements set forth in 29 CFR 13.5 and 13.6, which are incorporated by reference in this contract.

(2) The contractor shall provide paid sick leave to all employees when due free and clear and without subsequent deduction (except as otherwise provided by 29 CFR 13.24), rebate, or kickback on any account. The contractor shall provide pay and benefits for paid sick leave used no later than one pay period following the end of the regular pay period in which the paid sick leave was taken.

(3) The prime contractor and any upper-tier subcontractor shall be responsible for the compliance by any subcontractor or lower-tier subcontractor with the requirements of Executive Order 13706, 29 CFR part 13, and this clause.

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

accrued payments or advances as may be considered necessary to pay employees the full amount owed to compensate for any violation of the requirements of Executive Order 13706, 29 CFR part 13, or this clause, including any pay and/or benefits denied or lost by reason of the violation; other actual monetary losses sustained as a direct result of the violation, and liquidated damages.

(d) *Contract Suspension/Contract Termination/Contractor Debarment.* In the event of a failure to comply with Executive Order 13706, 29 CFR part 13, or this clause, the contracting agency may on its own action or after authorization or by direction of the Department of Labor and written notification to the contractor, take action to cause suspension of any further payment, advance or guarantee of funds until such violations have ceased. Additionally, any failure to comply with the requirements of this clause may be grounds for termination of the right to proceed with the contract work. In such event, the Government may enter into other contracts or arrangements for completion of the work, charging the contractor in default with any additional cost. A breach of the contract clause may be grounds for debarment as a contractor and subcontractor as provided in 29 CFR 13.52.

(e) The paid sick leave required by Executive Order 13706, 29 CFR part 13, and this clause is in addition to a contractor's obligations under the Service Contract Act and Davis-Bacon Act, and a contractor may not receive credit toward its prevailing wage or fringe benefit obligations under those Acts for any paid sick leave provided in satisfaction of the requirements of Executive Order 13706 and 29 CFR part 13.

(f) Nothing in Executive Order 13706 or 29 CFR part 13 shall excuse noncompliance with or supersede any applicable Federal or State law, any applicable law or municipal ordinance, or a collective bargaining agreement requiring greater paid sick leave or leave rights than those established under Executive Order 13706 and 29 CFR part 13.

(g) *Recordkeeping.* (1) Any contractor performing work subject to Executive Order 13706 and 29 CFR part 13 must make and maintain, for no less than three years from the completion of the work on the contract, records containing the information specified in paragraphs (i) through (xv) of this section for each employee and shall make them available for inspection, copying, and transcription by authorized representatives of the Wage and Hour Division of the U.S. Department of Labor:

(i) Name, address, and Social Security number of each employee;

(ii) The employee's occupation(s) or classification(s);

(iii) The rate or rates of wages paid;

(iv) The number of daily and weekly hours worked;

(v) Any deductions made;

(vi) The total wages paid each pay period;

(vii) A copy of notifications to employees of the amount of paid sick leave the employee has accrued, as required under 29 CFR 13.5(a)(4);

(viii) A copy of employees' requests to use paid sick leave, if in writing, or, if not in writing, any other records reflecting such employee requests;

(ix) Dates and amounts of paid sick leave taken by employees (unless a contractor's paid time off policy satisfies the requirements of Executive Order 13706 and part 13 as described in § 13.5(f)(5), leave must be designated in records as paid sick leave pursuant to Executive Order 13706);

(x) A copy of any written denials of employees' requests to use paid sick leave, including explanations for such denials, as required under 29 CFR 13.5(d)(3);

(xi) Any records reflecting the certification and documentation a contractor may require an employee to provide under 29 CFR 13.5(e), including copies of any certification or documentation provided by an employee;

(xii) Any other records showing any tracking of or calculations related to an employee's accrual or use of paid sick leave;

(xiii) A copy of any certified list of employees' accrued, unused paid sick leave provided to a contracting officer in compliance with 29 CFR 13.26;

(xiv) Any certified list of employees' accrued, unused paid sick leave received from the contracting agency in compliance with 29 CFR 13.11(f); and

(xv) A copy of the relevant covered contract.

(2) If a contractor wishes to distinguish between an employee's covered and non-covered work, the contractor must keep records or other proof reflecting such distinctions. Only if the contractor adequately segregates the employee's time will time spent on non-covered contracts be excluded from hours worked counted toward the accrual of paid sick leave. Similarly, only if that contractor adequately segregates the employee's time may a contractor properly refuse an employee's request to use paid sick leave on the ground that the employee was scheduled to perform non-covered work during the time she asked to use paid sick leave.

(3) In the event a contractor is not obligated by the Service Contract Act, the Davis-Bacon Act, or the Fair Labor Standards Act to keep records of an employee's hours worked, such as because the employee is exempt from the FLSA's minimum wage and overtime requirements, and the contractor chooses to use the assumption permitted by 29 CFR 13.5(a)(1)(iii), the contractor is excused from the requirement in paragraph (1)(d) of this section to keep records of the employee's number of daily and weekly hours worked.

(4)(i) Records relating to medical histories or domestic violence, sexual assault, or stalking, created for purposes of Executive Order 13706, whether of an employee or an employee's child, parent, spouse, domestic partner, or other individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship, shall be maintained as confidential records in separate files/records from the usual personnel files.

(ii) If the confidentiality requirements of the Genetic Information Nondiscrimination Act of 2008 (GINA) and/or the Americans with Disabilities Act (ADA) apply to records or documents created to comply with the recordkeeping requirements in this contract clause, the records and documents must also be maintained in compliance with the confidentiality requirements of the GINA and/or ADA as described in 29 CFR 1635.9 and 29 CFR 1630.14(c)(1), respectively.

(iii) The contractor shall not disclose any documentation used to verify the need to use 3 or more consecutive days of paid sick leave for the purposes listed in 29 CFR 13.5(c)(1)(iv) (as described in 29 CFR 13.5(e)(1)(ii)) and shall maintain confidentiality about any domestic abuse, sexual assault, or stalking, unless the employee consents or when disclosure is required by law.

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

(6) Nothing in this contract clause limits or otherwise modifies the contractor's recordkeeping obligations, if any, under the Davis-Bacon Act, the Service Contract Act, the Fair Labor Standards Act, the Family and Medical Leave Act, Executive Order 13658, their respective implementing regulations, or any other applicable law.

(h) The contractor (as defined in 29 CFR 13.2) shall insert this clause in all of its covered subcontracts and shall require its subcontractors to include this clause in any covered lower-tier subcontracts.

(i) *Certification of Eligibility.* (1) By entering into this contract, the contractor (and officials thereof) certifies that neither it (nor he or she) nor any person or firm who has an interest in the contractor's firm is a person or firm ineligible to be awarded Government contracts by virtue of the sanctions imposed pursuant to section 5 of the Service Contract Act, section 3(a) of the Davis-Bacon Act, or 29 CFR 5.12(a)(1).

(2) No part of this contract shall be subcontracted to any person or firm whose name appears on the list of persons or firms ineligible to receive Federal contracts currently maintained on the System for Award Management Web site, <http://www.SAM.gov>.

(3) The penalty for making false statements is prescribed in the U.S. Criminal Code, 18 U.S.C. 1001.

(j) *Interference/Discrimination.* (1) A contractor may not in any manner interfere with an employee's accrual or use of paid sick leave as required by Executive Order 13706 or 29 CFR part 13. Interference includes, but is not limited to, miscalculating the amount of paid sick leave an employee has accrued, denying or unreasonably

delaying a response to a proper request to use paid sick leave, discouraging an employee from using paid sick leave, reducing an employee's accrued paid sick leave by more than the amount of such leave used, disclosing confidential information provided in certification or other documentation provided to verify the need to use paid sick leave, or making the use of paid sick leave contingent on the employee's finding a replacement worker or fulfilling the contractor's operational needs.

(2) A contractor may not discharge or in any other manner discriminate against any employee for:

(i) Using, or attempting to use, paid sick leave as provided for under Executive Order 13706 and 29 CFR part 13;

(ii) Filing any complaint, initiating any proceeding, or otherwise asserting any right or claim under Executive Order 13706 or 29 CFR part 13;

(iii) Cooperating in any investigation or testifying in any proceeding under Executive Order 13706 or 29 CFR part 13; or

(iv) Informing any other person about his or her rights under Executive Order 13706 or 29 CFR part 13.

(k) *Waiver.* Employees cannot waive, nor may contractors induce employees to waive, their rights under Executive Order 13706, 29 CFR part 13, or this clause.

(l) *Notice.* The contractor must notify all employees performing work on or in connection with a covered contract of the paid sick leave requirements of Executive Order 13706, 29 CFR part 13, and this clause by posting a notice provided by the Department of Labor in a prominent and accessible place at the worksite so it may be readily seen by employees. Contractors that customarily post notices to employees electronically may post the notice electronically, provided such electronic posting is displayed prominently on any Web site that is maintained by the contractor, whether external or internal, and customarily used for notices to employees about terms and conditions of employment.

(m) *Disputes concerning labor standards.* Disputes related to the application of Executive Order 13706 to this contract shall not be subject to the general disputes clause of the contract. Such disputes shall be resolved in accordance with the procedures of the Department of Labor set forth in 29 CFR part 13. Disputes within the meaning of this contract clause include disputes between the contractor (or any of its subcontractors) and the contracting agency, the U.S. Department of Labor, or the employees or their representatives.

[FR Doc. 2016-03722 Filed 2-24-16; 8:45 am]

**BILLING CODE 4510-27-P**