or other representative in any proceeding before the Board.

§ 8.14 Consolidations.

Upon its own initative or upon motion of any interested party, the Board may consolidate any proceeding or concurrently consider two or more appeals which involve substantially the same parties, or issues which are the same or closely related, if it finds that such consolidation or concurrent review will contribute to a proper dispatch of its business and to the ends of justice, and it will not unduly delay consideration of any such appeals.

§ 8.15 Motions; extensions of time.

(a) Except as otherwise provided in this part, any application for an order or other relief shall be made by motion. Except when made orally before the Board, motions shall be in writing and shall be accompanied by proof of service on all other parties. If a motion is supported by briefs, affidavits, or other papers, they shall be served and filed with the motion. Any party may respond to the motion within such time as may be provided by the Board.

(b) Requests for extension of time as to the filing of papers or oral presentation shall be in the form of a motion under paragraph (a) of this section.

§ 8.16 Oral proceedings.

(a) With respect to any proceedings before it, the Board may upon its own initative or upon request of any interested party direct the interested parties to appear before the Board or its designee at a specified time and place in order to simplify the issues persented or to take up any other matters which may tend to expedite or facilitate the disposition of the proceeding.

(b) In its discretion, the Board or a single presiding member may permit oral argument in any proceeding. The Board or the presiding member shall prescribe the time and place for argument and the time allocated for argument. A petitioner wishing to make oral argument should make the request therefore in the petition.

§ 8.17 Decision of the Board.

(a) Unless the petitioner consents to disposition by a single member, decisions of the Board shall be by majority vote.

(b) Where petitioner consents to disposition by a single member, other interested parties shall have an opportunity to oppose such disposition, and such opposition shall be taken into consideration by the Board in determining whether the decision shall be by a single member or majority vote.

§ 8.18 Public information.

Subject to the provisions of part 70 of this title, all papers and documents made a part of the official record in the proceedings of the Board and decisions of the Board shall be made available for public inspection during usual business hours at the Office of the Administrative Review Board, U.S. Department of Labor, Washington, DC 20210.

§ 8.19 Equal Access to Justice Act.

Proceedings under the Service Contract Act and the Contract Work Hours and Safety Standards Act are not subject to the Equal Access to Justice Act (Pub. L. 96–481). Accordingly, in any proceeding conducted pursuant to the provisions of this part 8, the Board shall have no power or authority to award attorney fees and/or other litigation expenses pursuant to the Equal Access to Justice Act.

PART 9—NONDISPLACEMENT OF QUALIFIED WORKERS UNDER SERVICE CONTRACTS

Subpart A—General

Sec.

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APPENDIX A TO PART 9—CONTRACT CLAUSE
APPENDIX B TO PART 9—NOTICE TO SERVICE CONTRACT EMPLOYEES

AUTHORITY: 5 U.S.C. 301; section 6, E.O. 14055, 86 FR 66397; Secretary of Labor's Order 01–2014 (Dec. 19, 2014), 79 FR 77527 (Dec. 24, 2014).

SOURCE: 88 FR 86792, Dec. 14, 2023, unless otherwise noted.

Subpart A—General

§9.1 Purpose and scope.

(a) *Purpose.* This part contains the Department of Labor's (Department) rules relating to the administration of Executive Order 14055 (Executive order or the order), ''Nondisplacement of Qualified Workers Under Service Contracts,'' and implements the enforcement provisions of the Executive order. The Executive order assigns enforcement responsibility for the nondisplacement requirements to the Department.

(b) *Policy.* (1) The Executive order states that the Federal Government's procurement interests in economy and efficiency are served when the successor contractor or subcontractor hires the predecessor's employees. A carryover workforce minimizes disruption in the delivery of services during a period of transition between contractors, maintains physical and information security, and provides the Federal Government the benefit of an experienced and well-trained workforce that is familiar with the Federal Government's personnel, facilities, and requirements. Accordingly, Executive Order 14055 sets forth a general position of the Federal Government that requiring successor service contractors and subcontractors performing on Federal contracts to offer a right of first refusal to suitable employment (*i.e.*, a job for which the employee is qualified) under the contract to those employees under the predecessor contract and its subcontracts whose employment will be terminated as a result of the award of the successor contract will lead to improved economy and efficiency in Federal procurement.

(2) The Executive order provides that executive departments and agencies, including independent establishments subject to the Federal Property and Administrative Services Act, must, to the extent permitted by law, ensure that service contracts and subcontracts that succeed a contract for performance of the same or similar work, and solicitations for such contracts and subcontracts, include a clause that requires the contractor and its subcontractors to offer a right of first refusal of employment to service employees employed under the predecessor contract and its subcontracts whose employment would be terminated as a result of the award of the successor contract in positions for which the employees are qualified. Nothing in Executive Order 14055 or this part will be construed to permit a contractor or subcontractor to fail to comply with any provision of any other Executive order, regulation, or law of the United States.

(c) *Scope.* Neither Executive Order 14055 nor this part creates or changes any rights under the Contract Disputes Act, 41 U.S.C. 7101 *et seq.*, or any private right of action that may exist under other applicable laws. The Executive order provides that disputes regarding the requirement of the contract clause prescribed by section 3 of the order, to the extent permitted by law, must be disposed of only as provided by the Secretary of Labor in regulations issued under the order. The order, however, does not preclude review of final decisions by the Secretary in accordance with the judicial review provisions of the Administrative Procedure Act, 5 U.S.C. 701 *et seq.* Additionally, the Executive order also provides that it is to be implemented consistent with applicable law and subject to the availability of appropriations.

§ 9.2 Definitions.

For purposes of this part:

Administrative Review Board (ARB) means the Administrative Review Board, U.S. Department of Labor.

Administrator means the Administrator of the Wage and Hour Division and includes any official of the Wage and Hour Division authorized to perform any of the functions of the Administrator under this part.

Agency means an executive department or agency, including an independent establishment subject to the Federal Property and Administrative Services Act.

Associate Solicitor means the Associate Solicitor for Fair Labor Standards, Office of the Solicitor, U.S. Department of Labor, Washington, DC 20210.

Business day means Monday through Friday, except the legal public holidays specified in 5 U.S.C. 6103, any day declared to be a holiday by Federal statute or executive order, or any day with respect to which the U.S. Office of Personnel Management has announced that Federal agencies in the Washington, DC, area are closed.

Contract or service contract means any contract, contract-like instrument, or subcontract for services entered into by the Federal Government or its contractors that is covered by the Service Contract Act (SCA). 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 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, cooperative agreements, provider agreements, intergovernmental service agreements, service agreements, temporary interim contracts, licenses, permits, or any other type of agreement, regardless of nomenclature, type, or particular form, and whether entered into verbally or in writing, to the extent such contracts and subcontracts are subject to the SCA. 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.

Contracting officer means an agency official 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 service contract or subcontract under a Federal Government service contract. Unless the context of the provision reflects otherwise, the term ''contractor'' refers collectively to a prime contractor and all of its subcontractors of any tier on a service contract with the Federal Government. 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.

Employee means a service employee as defined in the Service Contract Act, 41 U.S.C. 6701(3), and its implementing regulations.

Employment opening means any vacancy in a position on the contract, including any vacancy caused by replacing an employee from the predecessor contract with a different employee.

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. This definition does not include the District of Columbia or any Territory or possession of the United States.

Month means a period of 30 consecutive calendar days, regardless of the

day of the calendar month on which it begins.

Office of Administrative Law Judges means the Office of Administrative Law Judges, U.S. Department of Labor.

Same or similar work means work that is either identical to or has primary characteristics that are alike in substance to work performed on another service contract.

Secretary means the U.S. Secretary of Labor or an authorized representative of the Secretary.

Service Contract Act means the McNamara-O'Hara Service Contract Act of 1965, as amended, 41 U.S.C. 6701 *et seq.*, and the implementing regulations in this subtitle.

Solicitation means any request to submit offers, bids, or quotations to the Federal Government.

United States means the United States and all executive departments, independent establishments, administrative agencies, and instrumentalities of the United States, including corporations of which all or substantially all of the stock is owned by the United States, by the foregoing departments, establishments, agencies, instrumentalities, and including non-appropriated fund instrumentalities. When used in a geographic sense, the United States means the 50 States, the District of Columbia, Puerto Rico, the Virgin Islands, Outer Continental Shelf lands as defined in the Outer Continental Shelf Lands Act, American Samoa, Guam, the Commonwealth of the Northern Mariana Islands, Wake Island, and Johnston Island.

Wage and Hour Division means the Wage and Hour Division, U.S. Department of Labor.

§9.3 Coverage.

(a) This part applies to any contract or solicitation for a contract with an agency issued or entered on or after the applicability date of this part, provided that:

(1) It is a contract for services covered by the Service Contract Act; and

(2) The prime contract is equal to or exceeds the simplified acquisition threshold as defined in 41 U.S.C. 134.

(b) Contracts and solicitations that satisfy the requirements of paragraph (a) of this section, and that succeed a contract for performance of the same or similar work, must contain the contract clause described in §9.11(a), and contractors on such contracts must comply with all the requirements of §9.12 unless the contract is excluded or excepted under this part.

(c) Contracts and solicitations that satisfy the requirements of paragraph (a) of this section, but do not succeed a contract for performance of the same or similar work, must contain the contract clause described in §9.11(a), and all contractors on such contracts must comply with the requirements of §9.12(a)(4), (e), (f), and (g), unless the contract is excluded or excepted under this part.

§9.4 Exclusions.

(a) *Small contracts*—(1) *General.* The requirements of this part do not apply to prime contracts under the simplified acquisition threshold set by the Office of Federal Procurement Policy Act, as amended (41 U.S.C. 134), and any subcontracts of any tier under such prime contracts.

(2) *Application to subcontracts.* The amount of the prime contract determines whether a subcontract is excluded from the requirements of this part. If a prime contract is under the simplified acquisition threshold, then each subcontract under that prime contract will also be excluded from the requirements of this part. If a prime contract meets or exceeds the simplified acquisition threshold and meets the other coverage requirements of §9.3, then each subcontract for services under that prime contract will also be subject to the requirements of this part, even if the value of an individual subcontract is under the simplified acquisition threshold.

(b) *Federal service work constituting only part of employee's job.* This part does not apply to employees who were hired to work under a Federal service contract and one or more nonfederal service contracts as part of a single job, provided that the employees were not deployed in a manner that was designed to avoid the purposes of Executive Order 14055.

§ 9.5 Exceptions authorized by Federal agencies.

(a) A contracting agency may waive the application of some or all of the provisions of this part as to a prime contract, if the senior procurement executive within the agency issues a written determination that at least one of the following circumstances exists with respect to that contract:

(1) Adhering to the requirements of Executive Order 14055 or this part would not advance the Federal Government's interest in achieving economy and efficiency in Federal procurement;

(2) Based on a market analysis, adhering to the requirements of the order or this part would:

(i) Substantially reduce the number of potential bidders so as to frustrate full and open competition, and

(ii) Not be reasonably tailored to the agency's needs for the contract; or

(3) Adhering to the requirements of the order or this part would otherwise be inconsistent with statutes, regulations, Executive Orders, or Presidential Memoranda.

(b) Any agency determination to exercise its exception authority under section 6 of the Executive order and paragraph (c)(1) of this section must include a specific written explanation, including the facts and reasoning supporting the determination, and must be issued no later than the solicitation date. Any agency determination to exercise its exception authority under section 6 of the Executive order and paragraph (c)(1) of this section made after the solicitation date or without a specific written explanation will be inoperative. In such a circumstance, the agency must take action, consistent with § 9.11(f), to incorporate the contract clause set forth in Appendix A of this part into the relevant solicitation or contract. Where an agency determines that a prime contract is excepted under this section, the nondisplacement requirements will also not apply to any subcontracts under the excepted prime contract. For indefinite-delivery-indefinite-quantity (IDIQ) contracts, an exception must be granted prior to the solicitation date if the basis for the exception cited would apply to all orders. Otherwise, exceptions must be granted for each order by the time of the notice of the intent to place an order.

(c) In exercising the authority to grant an exception for a contract because adhering to the requirements of the order or this part would not advance economy and efficiency, the agency's written analysis must, among other things, compare the anticipated outcomes of hiring predecessor contract employees with those of hiring a new workforce. The consideration of cost and other factors in exercising the agency's exception authority must reflect the general findings in section 1 of the Executive order that the Federal Government's procurement interests in economy and efficiency are normally served when the successor contractor hires the predecessor's employees and must specify how the particular circumstances support a contrary conclusion. General assertions or presumptions of an inability to procure services on an economical and efficient basis using a carryover workforce are insufficient.

(1) Factors that the agency may consider include, but are not limited to, the following:

(i) Whether factors specific to the contract at issue suggest that the use of a carryover workforce would greatly increase disruption to the delivery of services during the period of transition between contracts (e.g., the carryover workforce in its entirety would not be an experienced and trained workforce that is familiar with the Federal Government's personnel, facilities, and requirements as pertinent to the contract at issue and would require extensive training to learn new technology or processes that would not be required of a new workforce).

(ii) Emergency situations, such as a natural disaster or an act of war, that physically displace incumbent employees from the location of the service contract work and make it impossible or impracticable to extend offers to hire as required by the Executive order.

(iii) Situations where the senior procurement executive reasonably believes, based on the predecessor employees' past performance, that the entire predecessor workforce failed, individually as well as collectively to perform suitably on the job and that it is not in the interest of economy and efficiency to provide supplemental training to the predecessor's workers.

(2) Factors the senior procurement executive may not consider in making an exception determination related to economy and efficiency include any general assumption that the use of carryover workforces usually or always greatly increase disruption to the delivery of services during the period of transition between contracts; the job performance of the predecessor contractor (unless a determination has been made that the entire predecessor workforce failed, individually as well as collectively); the seniority of the workforce; and the reconfiguration of the contract work by a successor contractor. The agency also may not consider wage rates and fringe benefits of service employees in making an exception determination except in the following exceptional circumstances:

(i) In emergency situations, such as a natural disaster or an act of war, that physically displace incumbent employees from the locations of the service contract work and make it impossible or impracticable to extend offers to hire as required by the Executive order;

(ii) When a carryover workforce in its entirety would not constitute an experienced and trained workforce that is familiar with the Federal Government's personnel, facilities, and requirements but rather would require extensive training to learn new technology or processes that would not be required of a new workforce; or

(iii) Other, similar circumstances in which the cost of employing a carryover workforce on the successor contract would be prohibitive.

(d) In exercising the authority to grant an exception to a contract because adhering to the requirements of the order or this part would substantially reduce the number of potential bidders so as to frustrate full and open competition, the contracting agency must carry out a market analysis. Where an incumbent contractor's employees are covered by a collective bargaining agreement, the contracting agency must, to the extent consistent with mission security, include the employees' representative in any market-research-related exchanges with industry that are specific to the nondisplacement requirement. A likely reduction in the number of potential offerors indicated by market analysis is not, by itself, sufficient to except a contract from coverage under this authority unless it is coupled with the finding that the reduction would not allow for adequate competition at a fair and reasonable price and adhering to the requirements of the order would not be reasonably tailored to the agency's needs. When determining whether a fair and reasonable price can be achieved, the agency must consider current market conditions and the extent to which price fluctuations may be attributable to factors other than the nondisplacement requirements (e.g., costs of labor or materials, supply chain costs). In finding that inclusion of the contract clause would not be reasonably tailored to the agency's needs, the agency must specify how it intends to more effectively achieve the benefits that would have been provided by a carryover workforce, including physical and information security and a reduction in disruption of services.

(e) Before exercising the authority to grant an exception to a contract because adhering to the requirements of the order or this part would otherwise be inconsistent with statutes, regulations, Executive orders, or Presidential Memoranda, the contracting agency must consult with the Department of Labor, unless the agency has regulatory authority for implementing and interpreting the statute at issue, or the Department has already issued guidance finding an exception on the basis at issue to be appropriate.

(f) Section 6 of Executive Order 14055 requires that, to the extent permitted by law and consistent with national security and executive branch confidentiality interests, each agency must publish, on a centralized public website, descriptions of the exceptions it has granted under this section. Each

agency must also ensure that the contractor notifies affected workers and their collective bargaining representatives, if any, in writing of the agency's determination to grant an exception. Each agency also must, on a quarterly basis, report to the Office of Management and Budget descriptions of the exceptions granted under this section.

Subpart B—Requirements

§ 9.11 Contracting agency requirements.

(a) *Contract clause.* The contract clause set forth in Appendix A of this part must be included in covered service contracts, and solicitations for such contracts, that succeed contracts for performance of the same or similar work, except for procurement contracts subject to the Federal Acquisition Regulation (FAR). The contract clause in Appendix A affords employees who worked on the prior contract a right of first refusal pursuant to Executive Order 14055. For procurement contracts subject to the FAR, contracting agencies must use the clause set forth in the FAR developed to implement this section. Such clause will accomplish the same purposes as the clause set forth in appendix A of this part and be consistent with the requirements set forth in this section.

(b) *Notices.* Where a contract will be awarded to a successor for the same or similar work, the contracting officer must take steps to ensure that the predecessor contractor provides written notice to service employees employed under the predecessor contract of their possible right to an offer of employment, consistent with the requirements in §9.12(e)(3), and, where relevant, notice to employees' representatives consistent with the provisions of §9.11(c)(4) (relating to the location continuity analysis), and §9.5(f) (relating to agency exceptions).

(c) *Location continuity.* (1) When an agency prepares a solicitation for a service contract that succeeds a contract for performance of the same or similar work, the agency must consider whether performance of the work in the same locality or localities in which the contract is currently being performed is reasonably necessary to ensure economical and efficient provision of services.

(2) If an agency determines that performance of the contract in the same locality or localities is reasonably necessary to ensure economical and efficient provision of services, then the agency must, to the extent consistent with law, include a requirement or preference in the solicitation for the successor contract that it be performed in the same locality or localities.

(3) When there is a possibility that the successor contract could be performed in a locality other than where the predecessor contract has been performed, and a location change is under consideration, an agency's location-continuity analysis should generally include, but not be limited to, the following considerations:

(i) Whether factors specific to the contract at issue suggest that the employment of a new workforce at a new location would increase the potential for disruption to the delivery of services during the period of transition between contracts (e.g., the large size of workforce to be replaced or the relatively significant level of experience or training of the predecessor workforce);

(ii) Whether factors specific to the contract at issue suggest that the employment of a new workforce at a new location would unnecessarily increase physical or informational security risks on the contract (e.g., whether workers on the contract have had and will have access to sensitive, privileged, or classified information);

(iii) Whether the workforce on the predecessor contract has demonstrated prior successful performance of contract objectives so as to warrant a preference to retain as much of the current workforce as possible; and

(iv) Whether program-specific statutory or regulatory requirements govern the method through which the location of contract performance must be determined or evaluated, or other contract-specific factors favor the performance of the contract in a particular location.

(4) Agencies must complete the location-continuity analysis required under paragraph (c)(1) of this section prior to the date of issuance of the solicitation.

Where an incumbent contractor's employees are covered by a collective bargaining agreement and a contract location change is possible and under consideration, the agency must, to the extent consistent with mission security, provide the employees with an opportunity prior to the issuance of the solicitation to submit information relevant to this analysis. Under such circumstances, the agency must, at the earliest reasonable time in the acquisition planning process, direct the incumbent contractor to notify the collective bargaining representative(s) for the affected employees of the appropriate method to communicate such information.

(i) *Method of notice.* Agencies must direct the incumbent contractor to provide notice in the manner set forth in this paragraph. The contractor must provide written notice directly to the employees' representative in the same manner customarily used by the contractor to communicate with the representative.

(ii) *Model notice.* Agencies may use the following sample language as a basis in preparing their own notices regarding location continuity: Notice to Employees Regarding Location Continuity of Federal Contract Services. The contract for [insert type of service] services currently performed by [insert name of incumbent contractor] is scheduled to expire on [insert date]. [Insert name of contracting agency] is currently preparing a [insert type of solicitation] for a new contract for the provision of these services. As part of the acquisition planning process, [insert name of contracting agency] is considering whether to require or include a preference that these services continue to be performed in the same locality. If you have information regarding the provision of these services that would be relevant to this location continuity analysis, please contact [insert name of contracting agency contact] at [insert email address]. Before completion of the [insert name of incumbent contractor] contract, a subsequent notice will be provided to employees regarding the rights of certain service employees on the current contract to an offer of employment on any successor contract that is awarded. For additional information, contact the Wage and Hour Division of the United States Department of Labor at 1–866–4US–WAGE (1–866–487–9243), *https://www.dol.gov/agencies/whd.* If you are deaf, hard of hearing, or have a speech disability, please dial 7–1–1 to access telecommunications relay services.

(5) If the successor contract will be performed in a new locality, nothing in this part requires the contracting agency or the successor contractor to pay the relocation costs of employees who exercise their right to work for the successor contractor or subcontractor under the contract clause.

(d) *Disclosures.* The contracting officer must provide the incumbent contractor's list of employees referenced in §9.12(e) to the successor contractor no later than 21 calendar days prior to the start of performance on the successor's contract and, on request, the predecessor contractor must provide the employee list to employees or their representatives, consistent with the Privacy Act, 5 U.S.C. 552a, and other applicable law. When the incumbent contractor provides the contracting agency with an updated employee list pursuant to §9.12(e)(2), the contracting agency will provide the updated list to the successor contractor no later than 7 calendar days prior to the start of performance on the successor contract. However, if the contract is awarded less than 30 days before the beginning of performance, then the predecessor contractor and the contracting agency must transmit the list as soon as practicable.

(e) *Actions on complaints*—(1) *Reporting*—(i) *Reporting time frame.* Within 15 calendar days of receiving a complaint or being contacted by the Wage and Hour Division with a request for the information in paragraph (e)(1)(ii) of this section, the contracting officer will forward all information listed in paragraph (e)(1)(ii) of this section to the local Wage and Hour office.

(ii) *Report contents:* The contracting officer will forward to the Wage and Hour Division any:

(A) Complaint of contractor noncompliance with this part;

(B) Available statements by the employee or the contractor regarding the alleged violation;

(C) Evidence that a seniority list was issued by the predecessor and provided to the successor;

(D) A copy of the seniority list;

(E) Evidence that the nondisplacement contract clause was included in the contract or that the contract was excepted by the contracting agency;

(F) Information concerning known settlement negotiations between the parties, if applicable;

(G) Any other relevant facts known to the contracting officer or other information requested by the Wage and Hour Division.

(2) [Reserved]

(f) *Incorporation of omitted contract clause.* Where the Department or the contracting agency discovers or determines, whether before or subsequent to a contract award, that a contracting agency made an erroneous determination that Executive Order 14055 or this part did not apply to a particular contract and/or failed to include the applicable contract clause in a contract to which the Executive order applies, the contracting agency will incorporate the contract clause in 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). Such incorporation must happen either on the initiative of the contracting agency or within 15 calendar days of notification by an authorized representative of the Department of Labor. Where the circumstances so warrant, the Administrator may require retroactive application of the contract clause to the commencement of performance under the contract or other date the Administrator determines to be appropriate. In determining whether retroactive application is appropriate, the Administrator will consider, among other factors, whether retroactive application would result in an overly onerous administrative or economic burden on the contracting agency that may constitute a severe disruption in the agency's procurement practices.

§ 9.12 Contractor requirements and prerogatives.

(a) *General*—(1) *No filling of employment openings prior to right of first refusal.* Except as provided under the exclusion listed in § 9.4(b) or the exceptions listed in paragraph (c) of this section, a successor contractor or subcontractor must not fill any employment openings for positions subject to the SCA under the contract prior to making good faith offers of employment (*i.e.*, a right of first refusal to employment on the contract), in positions for which the employees are qualified, to those employees employed under the predecessor contract whose employment will be terminated as a result of award of the successor contract or the expiration of the contract under which the employees were hired. To the extent necessary to meet its anticipated staffing pattern and in accordance with the requirements described in this part, the contractor and its subcontractors must make a bona fide, express offer of employment to each employee to a position for which the employee is qualified and must state the time within which the employee must accept such offer. In no case may the contractor or subcontractor give an employee fewer than 10 business days to consider and accept the offer of employment.

(2) *Right of first refusal exists when no seniority list is available.* The successor contractor's obligation to offer a right of first refusal exists even if the successor contractor has not been provided a list of the predecessor contractor's and subcontractor(s)' employees or if the list does not contain the names of all persons employed during the final month of contract performance.

(3) *Determining eligibility.* While a person's entitlement to a job offer under this part usually will be based on whether the person is named on the certified list of all service employees working under the predecessor's contract or subcontracts during the last month of contract performance, a contractor must also accept other reliable evidence of an employee's entitlement to a job offer under this part. For example, even if a person's name does not appear on the list of employees on the

predecessor contract, an employee's assertion of an assignment to work on the predecessor contract during the predecessor's last month of performance, coupled with contracting agency staff verification, could constitute reliable evidence of an employee's entitlement to a job offer under this part. Similarly, an employee could demonstrate eligibility by producing a paycheck stub identifying the work location and dates worked or otherwise reflecting that the employee worked on the predecessor contract during the last month of performance.

(4) *Obligation to ensure proper placement of contract clause.* A contractor or subcontractor has an affirmative obligation to ensure its covered contract contains the contract clause. The contractor or subcontractor must notify the contracting officer as soon as possible if the contracting officer did not incorporate the required contract clause into a contract.

(b) *Method of job offer*—(1) *Bona-fide offers to qualified employees.* Except as otherwise provided in this part, a contractor must make a bona fide, express offer of employment to each qualified employee on the predecessor contract before offering employment on the contract to any other service employee. In determining whether an employee is entitled to a bona fide, express offer of employment, a contractor may consider the exceptions set forth in paragraph (c) of this section and the conditions detailed in paragraph (d) of this section. A contractor may only use employment screening processes (e.g., drug tests, background checks, security clearance checks, and similar preemployment screening mechanisms) when such processes are provided for by the contracting agency, are conditions of the service contract, and are consistent with the Executive order. While the results of such screenings may show that an employee is unqualified for a position and thus not entitled to an offer of employment, a contractor may not use the requirement of an employment screening process to conclude an employee is unqualified solely because, despite an employee's reasonable efforts to do so, they have not yet completed that screening process.

(2) *Establishing time limit for employee response.* The contractor must state the time within which an employee must accept an employment offer. In no case may the period in which the employee has to accept the offer be less than 10 business days. The obligation to offer employment under this part will cease upon the employee's first refusal of a bona fide offer of employment on the contract.

(3) *Process.* The successor contractor must, in writing, offer employment to each employee. See also paragraph (f) of this section, Recordkeeping. Where written offers are not delivered in person, the offers should be sent by registered or certified mail to the employees' last known address or by any other means normally ensuring delivery. Examples of such other means include, but are not limited to, email to the last known email address, delivery to the last known address by commercial courier or express delivery services, or by personal service to the last known address.

(4) *Different job position.* As a general matter, an offer of employment on the successor's contract will be presumed to be a bona fide offer of employment, even if it is not for a position similar to the one the employee previously held, so long as it is one for which the employee is qualified. If a question arises concerning an employee's qualifications, that question must be decided based upon the employee's education and employment history, with particular emphasis on the employee's experience on the predecessor contract. A contractor must base its decision regarding an employee's qualifications on credible information provided by a knowledgeable source, such as the predecessor contractor, the local supervisor, the employee, or the contracting agency.

(5) *Different employment terms and conditions.* An offer of employment to a position on the contract under different employment terms and conditions than the employee held with the predecessor contractor is permitted provided that the offer is still bona fide, *i.e.*, the different employment terms and conditions are not offered to discourage the employee from accepting the offer. This would include offers with changes

to pay, benefits, or terms and conditions such as the option of remote work, provided that these changes were not made to discourage acceptance of the offer. Where the successor contractor has or will have any employees in the same or similar occupational classifications during the course of the contract who work or will work entirely in a remote capacity, the successor contractor generally must offer employees of the predecessor contractor the option of remote work under reasonably similar terms and conditions.

(6) *Relocation costs.* If the successor contract will be performed in a new locality, nothing in this part requires or recommends that contractors or subcontractors pay the relocation costs of employees who exercise their right to work for the successor contractor or subcontractor under this part.

(7) *Termination after contract commencement.* Where an employee is terminated by the successor contractor under circumstances suggesting the offer of employment may not have been bona fide, the facts and circumstances of the offer and the termination will be closely examined during any compliance action to determine whether the offer was bona fide.

(8) *Post-award incorporation of omitted contract clause modifies contractor's obligations.* Pursuant to §9.11(f), in a situation where the contracting agency retroactively incorporates the contract clause, if the successor contractor already hired employees to perform on the contract at the time the clause was retroactively incorporated, the successor contractor will be required to offer a right of first refusal of employment to the predecessor's employees in accordance with the requirements of Executive Order 14055 and this part. Where, pursuant to §9.11(f), the Administrator has required only prospective incorporation of the contract clause from the date of incorporation, the successor contractor must provide the employees on the predecessor contract a right of first refusal for any positions that remain open. In the event of an employment opening within 90 calendar days of the first date of contract performance, the successor contractor must provide the employees of the predecessor contractor the right of first refusal as well, regardless of whether incorporation of the contract clause is retroactive or prospective.

(c) *Exceptions.* The successor contractor is responsible for demonstrating the applicability of the following exceptions to the nondisplacement provisions in this part.

(1) *Nondisplaced employees.* (i) A successor contractor or subcontractor is not required to offer employment to any employee of the predecessor contractor who will be retained by the predecessor contractor.

(ii) The successor contractor must presume that all employees working under a predecessor's Federal service contract will be terminated as a result of the award of the successor contract, unless it can demonstrate a reasonable belief to the contrary based upon reliable information provided by a knowledgeable source, such as the predecessor contractor, the employee, or the contracting agency.

(2) *Predecessor contract's non-service workers.* (i) A successor contractor or subcontractor is not required to offer employment to any person working on the predecessor contract who is not a service employee as defined in §9.2 of this part.

(ii) The successor contractor must presume that all employees working under a predecessor's Federal service contract are service employees, unless it can demonstrate a reasonable belief to the contrary based upon reliable information provided by a knowledgeable source, such as the predecessor contractor, the employee, or the contracting agency. Information regarding the general business practices of the predecessor contractor or the industry is not sufficient to claim this exception.

(3) *Employee's past performance.* (i) A successor contractor or subcontractor is not required to offer employment to an employee of the predecessor contractor if the successor contractor or any of its subcontractors reasonably believes, based on reliable evidence of the particular employee's past performance, that there would be just cause to discharge the employee if employed by the successor contractor or any subcontractor.

(ii) A successor contractor must presume that there would be no just cause to discharge any employees working under the predecessor contract in the last month of performance, unless it can demonstrate a reasonable belief to the contrary that is based upon reliable evidence provided by a knowledgeable source, such as the predecessor contractor and its subcontractors, the local supervisor, the employee, or the contracting agency. This determination must be made on an individual basis for each employee. Information regarding the general performance of the predecessor contractor is not sufficient to claim this exception.

(A) For example, a successor contractor may demonstrate its reasonable belief that there would be just cause to discharge an employee through reliable written evidence that the predecessor contractor initiated a process to terminate the employee for conduct clearly warranting termination prior to the expiration of the contract, but the termination process was not completed before the contract expired. Written evidence related to disciplinary action taken without a recommendation of termination may constitute reliable evidence of just cause to discharge the employee, depending on the specific facts and circumstances.

(B) [Reserved]

(4) *Nonfederal work.* (i) A successor contractor or subcontractor is not required to offer employment to any employee hired to work under a predecessor's Federal service contract and one or more nonfederal service contracts as part of a single job, provided that the employee was not deployed in a manner that was designed to avoid the purposes of this part.

(ii) The successor contractor must presume that no employees who worked under a predecessor's Federal service contract also worked on one or more nonfederal service contracts as part of a single job, unless the successor can demonstrate a reasonable belief based on reliable evidence to the contrary. The successor contractor must demonstrate that its belief is reasonable and is based upon reliable evidence provided by a knowledgeable source, such as the predecessor contractor, the local supervisor, the employee, or the contracting agency. Information regarding the general business practices of the predecessor contractor or the industry is not sufficient.

(iii) A successor contractor that makes a reasonable determination that a predecessor contractor's employee also performed work on one or more nonfederal service contracts as part of a single job must also make a reasonable determination that the employee was not deployed in a manner that was designed to avoid the purposes of this part. The successor contractor must demonstrate that its belief is reasonable and is based upon reliable evidence that has been provided by a knowledgeable source, such as the employee or the contracting agency.

(d) *Reduced staffing*—(1) *Contractor determines how many employees.* (i) A successor contractor or subcontractor will determine the number of employees necessary for efficient performance of the contract or subcontract and, for bona fide staffing or work assignment reasons, may elect to employ fewer employees than the predecessor contractor employed in connection with performance of the work. Thus, the successor contractor need not offer employment on the contract to all employees on the predecessor contract, but must offer employment only to the number of eligible employees the successor contractor believes necessary to meet its anticipated staffing pattern, except that:

(ii) Where, in accordance with this authority to employ fewer employees, a successor contractor does not offer employment to all the predecessor contract employees, the obligation to offer employment will continue for 90 calendar days after the successor contractor's first date of performance on the contract. The contractor's obligation under this part will end when all of the predecessor contract employees have received a bona fide job offer, as described in §9.12(b), or when the 90-day window of obligation has expired. The following three examples demonstrate the principle.

(A) A contractor with 18 employment openings and a list of 20 employees from the predecessor contract must

continue to offer employment to individuals on the list until 18 of the employees accept the contractor's employment offer or until the remaining employees have rejected the offer. If an employee quits or is terminated from the successor contract within 90 calendar days of the first date of contract performance, the contractor must first offer that employment opening to any remaining eligible employees of the predecessor contract.

(B) A successor contractor originally offers 20 jobs to predecessor contract employees on a contract that had 30 positions under the predecessor contractor. The first 20 predecessor contract employees the successor contractor approaches accept the employment offer. Within a month of commencing work on the contract, the successor determines that it must hire seven additional employees to perform the contract requirements. The first three predecessor contract employees to whom the successor offers employment decline the offer; however, the next four predecessor contract employees accept the offers. In accordance with the provisions of this section, the successor contractor offers employment on the contract to the three remaining predecessor contract employees who all accept; however, two employees on the contract quit 5 weeks later. The successor contractor has no further obligation under this part to make a second employment offer to the persons who previously declined an offer of employment on the contract.

(C) A successor contractor reduces staff on a successor contract by two positions from the predecessor contract's staffing pattern. Each predecessor contract employee the successor approaches accepts the employment offer; therefore, employment offers are not made to two predecessor contract employees. The successor contractor terminates an employee five months later. The successor contractor has no obligation to offer employment to the two remaining employees from the predecessor contract because more than 90 calendar days have passed since the successor contractor's first date of performance on the contract.

(2) *Changes to staffing pattern.* Where a contractor reduces the number of employees in any occupation on a contract with multiple occupations, resulting in some displacement, the contractor must scrutinize each employee's qualifications in order to offer the greatest possible number of predecessor contract employees positions equivalent to those they held under the predecessor contract. Example: A successor contract is awarded for a food preparation and services contract with Cook II, Cook I, and dishwasher positions. The Cook II position requires a higher level of skill than the Cook I position. The successor contractor reconfigures the staffing pattern on the contract by increasing the number of persons employed as Cook IIs and Dishwashers and reducing the number of Cook I employees. The successor contractor must examine the qualifications of each Cook I to determine whether they are qualified for either a Cook II or Dishwasher position. Conversely, were the contractor to increase the number of Cook I employees, decrease the number of Cook II employees, and keep the same number of Dishwashers, the contractor would generally be able to offer Cook I positions to some Cook II employees, because the Cook II performs a higher-level occupation.

(3) *Contractor determines which employees.* The contractor, subject to provisions of this part and other applicable restrictions (including non-discrimination laws and regulations), will determine to which employees it will offer employment. See §9.1(b) regarding compliance with requirements of other Executive orders, regulations, or Federal, state, or local laws.

(e) *Contractor obligations near end of contract performance*—(1) *Certified list of employees provided 30 calendar days before contract completion.* The contractor will, not less than 30 calendar days before completion of the contractor's performance of services on a contract, furnish the contracting officer with a list of the names, mailing addresses, and if known, phone numbers and email addresses of all service employees working under the contract and its subcontracts at the time the list is submitted. The list must also contain anniversary dates of employment of each service employee on the contract and its predecessor contracts with either

the current or predecessor contractors or their subcontractors. Assuming there are no changes to the workforce before the contract is completed, the contractor may use the list submitted, or to be submitted, to satisfy the requirements of the contract clause specified at 29 CFR 4.6(l)(2) to meet this provision but must also include the mailing address, and if known, phone numbers and email addresses of the workers.

(2) *Certified list of employees provided 10 business days before contract completion.* Where changes to the workforce are made after the submission of the certified list described in paragraph (e)(1) of this section, the contractor will, not less than 10 business days before completion of the contractor's performance of services on a contract, furnish the contracting officer with a certified list of the names, mailing addresses, and if known, phone numbers and email addresses of all service employees employed within the last month of contract performance. The list must also contain anniversary dates of employment of each service employee on the contract and its predecessor contracts with either the current or predecessor contractors or their subcontractors. The contractor may use the list submitted to satisfy the requirements of the contract clause specified at 29 CFR 4.6(l)(2) to meet this provision but must also include the mailing addresses, and if known, phone numbers and email addresses of the workers.

(3) *Notices to employees of possible right to offers of employment on successor contract.* Before contract completion, the contractor must provide written notice to service employees employed under the contract of their possible right to an offer of employment on the successor contract. Such notice will be either posted in a conspicuous place at the worksite or delivered to the employees individually. Where the workforce on the predecessor contract is comprised of a significant portion of workers who are not fluent in English, the notice will be provided in both English and a language in which the employees are fluent. Multiple language notices are required where significant portions of the workforce speak different languages and there is no common language. Contractors may provide the notice set forth in Appendix B to this part in either a physical posting at the job site, or in another manner that effectively provides individual notice such as individual paper notices or effective email notification to the affected employees. Another form with the same information can be used. To be effective, email notification must result in an electronic delivery receipt or some other reliable confirmation that the intended recipient received the notice. Any particular determination of the adequacy of a notification, regardless of the method used, will be fact-dependent and made on a case-by-case basis. These notice requirements are in addition to the notice provisions listed at §9.5(f) (relating to agency exceptions) and §9.11(c) (relating to location continuity).

(f) *Recordkeeping*—(1) *Form of records.* This part prescribes no particular order or form of records for contractors. A contractor may use records developed for any purpose to satisfy the requirements of this part, provided the records otherwise meet the requirements and purposes of this part and are fully accessible. The requirements of this part will apply to all records regardless of their format (e.g., paper or electronic).

(2) *Records to be retained.* (i) The contractor must maintain copies of any written offers of employment, including the date of the offer.

(ii) The contractor must maintain a copy of any record that forms the basis for any exclusion or exception claimed under this part.

(iii) The contractor must maintain a copy of any employee list received from the contracting agency and any employee list provided to the contracting agency. See paragraph (e) of this section, contractor obligations near end of contract performance.

(iv) Every contractor that makes retroactive payment of wages or compensation under the supervision of the Administrator pursuant to §9.23(b), must:

(A) Record and preserve, as an entry on the pay records, the amount of such payment to each employee, the period covered by such payment, and the date of payment.

(B) Prepare a report of each such payment on a receipt form provided by or authorized by the Wage and Hour Division, and

(1) Preserve a copy as part of the records,

(2) Deliver a copy to the employee, and

(3) File the original, as evidence of payment by the contractor and receipt by the employee, with the Administrator within 10 business days after payment is made.

(v) The contractor must maintain evidence of any notices that they have provided to workers, or workers' collective bargaining representatives, to satisfy the requirements of the order or these regulations, including notices of the possibility of employment on the successor contract as required under §9.12(e)(3); notices of agency exceptions that a contracting agency requires a contractor to provide under §9.5(f) and section 6(b) of the order; and notices to workers and their representatives of the opportunity to provide information relevant to the contracting agency's location-continuity determination in the solicitation for a successor contract pursuant to §9.11(c)(4).

(3) *Records retention period.* The contractor must retain records prescribed by §9.12(f)(2) of this part for not less than a period of 3 years from the date the records were created.

(4) *Disclosure.* The contractor must provide copies of such documentation upon request of any authorized representative of the contracting agency or Department of Labor.

(g) *Investigations.* The contractor must cooperate in any review or investigation conducted pursuant to this part and must not interfere with the investigation or intimidate, blacklist, discharge, or in any other manner discriminate against any person because such person has cooperated in an investigation or proceeding under this part or has attempted to exercise any rights afforded under this part. This obligation to cooperate with investigations is not limited to investigations of the contractor's own actions, and also includes investigations related to other contractors (e.g., predecessor and successor contractors) and subcontractors.

§9.13 Subcontracts.

(a) *Subcontractor liability.* The contractor or subcontractor must insert in any subcontracts the nondisplacement contract clause contained in Appendix A or the FAR, as appropriate. The contractor or subcontractor must also insert a clause in any subcontracts to require the subcontractor to include the Appendix A or FAR contract clause in any lower-tier subcontracts. The prime contractor is responsible for the compliance of any subcontractor or lower-tier subcontractor with the contract clause. In the event of any violations of the contract clause, the prime contractor and any subcontractor(s) responsible will be jointly and severally liable for any unpaid wages and prejudgment and post-judgment interest, and may be subject to debarment, as appropriate.

(b) *Discontinuation of subcontractor services.* When a prime contractor that is subject to the nondisplacement requirements of this part discontinues the services of a subcontractor at any time during the contract and performs those services itself, the prime contractor must offer employment on the contract to the subcontractor's employees who would otherwise be displaced and would otherwise be qualified in accordance with this part.

Subpart C—Enforcement

§9.21 Complaints.

(a) *Filing a complaint.* Any employee of the predecessor contractor who believes the successor contractor has violated this part, or their authorized representative, may file a complaint with the Wage and Hour Division (WHD) within 120 days from the first date of contract performance. The employee or authorized representative may file a complaint directly with any office of the WHD. No particular form of complaint is required. A complaint may be filed orally or in writing. The WHD will accept the complaint in any language.

(b) *Confidentiality.* It is the policy of the Department of Labor to protect the identity of its confidential sources and to prevent an unwarranted invasion of personal privacy. Accordingly, the identity of any individual who makes a

written or oral statement as a complaint or in the course of an investigation, as well as portions of the statement which would tend to reveal the individual's identity, will not be disclosed in any manner to anyone other than Federal officials without the prior consent of the individual. Disclosure of such statements will 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).

§9.22 Wage and Hour Division investigation.

(a) *Initial investigation*. The Administrator may initiate an investigation under this part either as the result of a complaint or at any time on the Administrator's own initiative. The Administrator may investigate potential violations of, and obtain compliance with, the Executive Order. As part of the investigation, the Administrator may conduct interviews with the predecessor and successor contractors, as well as confidential interviews with the relevant contractors' workers at the worksite during normal work hours; inspect the relevant contractors' records; make copies and transcriptions of such records; and require the production of any documents or other evidence deemed necessary to determine whether a violation of this part, including conduct warranting imposition of debarment pursuant to §9.23(d), has occurred. Federal agencies and contractors must cooperate with any authorized representative of the Department of Labor in the inspection of records, in interviews with workers, and in all aspects of investigations.

(b) *Subsequent investigations*. The Administrator may conduct a new investigation or issue a new determination if the Administrator concludes circumstances warrant, such as where the proceedings before an Administrative Law Judge reveal that there may have been violations with respect to other employees of the contractor, where imposition of debarment is appropriate, or where the contractor has failed to comply with an order of the Secretary.

§9.23 Remedies and Sanctions for Violations of This Part.

(a) *Authority*. Executive Order 14055 provides that the Secretary will have the authority to issue final orders prescribing appropriate sanctions and remedies, including but not limited to requiring the contractor to offer employment, in positions for which the employees are qualified, to employees from the predecessor contract and the payment of wages lost.

(b) *Unpaid wages or other relief due*. In addition to satisfying any costs imposed under §§9.34(j) or 9.35(d) of this part, a contractor that violates any provision of this part must take appropriate action to abate the violation, which may include hiring each affected employee in a position on the contract for which the employee is qualified, together with compensation (including lost wages) and other terms, conditions, and privileges of that employment. The contractor will pay interest on any underpayment of wages and on any other monetary relief due under this part. Interest on any back wages or monetary relief provided for in this part will be calculated using the percentage established for the underpayment of taxes under 26 U.S.C. 6621 and will be compounded daily.

(c) *Withholding of funds*—(1) *Unpaid wages or other relief*. The Administrator may additionally direct that payments due on the contract or any other contract between the contractor and the Federal Government be withheld in such amounts as may be necessary to pay unpaid wages or to provide other appropriate relief due under this part. Upon the final order of the Secretary that such monies are due, the Administrator may direct the relevant contracting agency to transfer the withheld funds to the Department of Labor for disbursement.

(2) *List of employees*. If the contracting officer or the Administrator finds that the predecessor contractor has failed to provide a list of the names of service employees working under the contract and its subcontracts during the last month of contract performance in accordance with §9.12(e), the contracting officer may, at their discretion, and must upon request by the Administrator, take such action as may

be necessary to cause the suspension of the payment of contract funds until such time as the list is provided to the contracting officer.

(3) *Notification to a contractor of the withholding of funds.* If the Administrator directs a contracting agency to withhold funds from a contractor pursuant to §9.23(c)(1), the Administrator or contracting agency must notify the affected contractor.

(d) *Debarment.* Where the Secretary finds that a contractor has failed to comply with any order of the Secretary or has committed willful violations of Executive Order 14055 or this part, the Secretary may order that the contractor and its responsible officers, and any firm in which the contractor has a substantial interest, will be ineligible to be awarded any contract or subcontract of the United States for a period of up to 3 years. Neither an order for debarment of any contractor or subcontractor from further government contracts under this section nor the inclusion of a contractor or subcontractor on a published list of noncomplying contractors will be carried out without affording the contractor or subcontractor an opportunity for a hearing.

(e) *Antiretaliation.* When the Administrator finds that a contractor has interfered with an investigation of the Administrator under this part or has in any manner discriminated against any person because such person has cooperated in such an investigation or has attempted to exercise any rights afforded under this part, the Administrator may require the contractor to provide any relief to the affected person as may be appropriate, including employment, reinstatement, promotion, and the payment of lost wages, including interest.

Subpart D—Administrator's Determination, Mediation, and Administrative Proceedings

§9.31 Determination of the Administrator.

(a) *Written determination.* Upon completion of an investigation under §9.22, the Administrator will issue a written determination of whether a violation has occurred. The determination will contain a statement of the investigation findings and conclusions. A determination that a violation occurred will address appropriate relief and the issue of debarment where appropriate. The Administrator will notify any complainant(s); employee representative(s); contractors, including the prime contractor if a subcontractor is implicated; contractor representative(s); and the contracting officer by registered or certified mail to the last known address or by any other means normally ensuring delivery, of the investigation findings.

(b) *Notice to parties and effect*—(1) *Relevant facts in dispute.* If the Administrator concludes that relevant facts are in dispute, the Administrator's determination will so advise the parties and their representatives, if any. It will further advise that the notice of determination will become the final order of the Secretary and will not be appealable in any administrative or judicial proceeding unless an interested party requests a hearing within 20 calendar days of the date of the Administrator's determination, in accordance with §9.32(b)(1). Such a request may be sent by mail or by any other means normally ensuring delivery to the Chief Administrative Law Judge of the Office of the Administrative Law Judges. A detailed statement of the reasons why the Administrator's determination is in error, including facts alleged to be in dispute, if any, must be submitted with the request for a hearing. The Administrator's determination not to seek debarment will not be appealable.

(2) *Relevant facts not in dispute.* If the Administrator concludes that no relevant facts are in dispute, the parties and their representatives, if any, will be so advised. They will also be advised that the determination will become the final order of the Secretary and will not be appealable in any administrative or judicial proceeding unless an interested party files a petition for review with the Administrative Review Board pursuant to §9.32(b)(2) within 20 calendar days of the date of the determination of the Administrator. The determination will further advise that if an aggrieved party disagrees with the factual findings or believes there are relevant facts in dispute, the aggrieved party may advise the Administrator of

the disputed facts and request a hearing by mail or by any other means normally ensuring delivery. The request must be sent within 20 calendar days of the date of the determination. The Administrator will either refer the request for a hearing to the Chief Administrative Law Judge or notify the parties and their representatives, if any, of the determination of the Administrator that there is no relevant issue of fact and that a petition for review may be filed with the Administrative Review Board within 20 calendar days of the date of the notice, in accordance with the procedures at §9.32(b)(2).

§9.32 Requesting appeals.

(a) *General.* If any party desires review of the determination of the Administrator, including judicial review, a request for an Administrative Law Judge hearing or petition for review by the Administrative Review Board must first be filed in accordance with §9.31(b).

(b) *Process*—(1) *For Administrative Law Judge hearing*—(i) *General.* Any aggrieved party may request a hearing by an Administrative Law Judge by sending a request to the Chief Administrative Law Judge of the Office of the Administrative Law Judges within 20 days of the determination of the Administrator. The request for a hearing may be sent by mail or by any other means normally ensuring delivery and must be accompanied by a copy of the determination of the Administrator. At the same time, a copy of any request for a hearing will be sent to the complainant(s) or successor contractor, and their representatives, if any, as appropriate; the Administrator of the Wage and Hour Division; and the Associate Solicitor, Division of Fair Labor Standards, Office of the Solicitor, U.S. Department of Labor, 200 Constitution Avenue NW, Washington, DC 20210.

(ii) *By the complainant.* The complainant or any other interested party may request a hearing where the Administrator determines, after investigation, that the employer has not committed violation(s), or where the complainant or other interested party believes that the Administrator has ordered inadequate monetary relief. In such a proceeding, the party requesting the hearing will be the prosecuting party and the employer will be the respondent; the Administrator may intervene as a party or appear as amicus curiae at any time in the proceeding, at the Administrator's discretion.

(iii) *By the contractor.* The employer or any other interested party may request a hearing where the Administrator determines, after investigation, that the employer has committed violation(s). In such a proceeding, the Administrator will be the prosecuting party and the employer will be the respondent.

(2) *For Administrative Review Board review*—(i) *General.* Any aggrieved party desiring review of a determination of the Administrator in which there were no relevant facts in dispute, or of an Administrative Law Judge's decision, must file a petition for review with the Administrative Review Board within 20 calendar days of the date of the determination or decision. The petition must be served on all parties and, where the case involves an appeal from an Administrative Law Judge's decision, the Chief Administrative Law Judge. See also §9.32(b)(1).

(ii) *Contents and service*—(A) *Contents.* A petition for review must refer to the specific findings of fact, conclusions of law, or order at issue.

(B) *Service.* Copies of the petition and all briefs must be served 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, 200 Constitution Avenue NW, Washington, DC 20210.

(C) *Effect of filing.* If a timely request for hearing or petition for review is filed, the determination of the Administrator or the decision of the Administrative Law Judge will be inoperative unless and until the Administrative Review Board issues an order affirming the determination or decision, or the determination or decision otherwise becomes a final order of the Secretary. If a petition for review concerns only the imposition of ineligibility sanctions, however, the remainder of the decision will be effective immediately. No judicial review will be available unless a timely petition for review to the

Administrative Review Board is first filed.

§ 9.33 Mediation.

The parties are encouraged to resolve disputes by using settlement judges to mediate settlement negotiations pursuant to the procedures and requirements of 29 CFR 18.13 or any successor to the regulation. Any settlement agreement reached must be approved by the assigned Administrative Law Judge consistent with the procedures and requirements of 29 CFR 18.71.

§ 9.34 Administrative Law Judge hearings.

(a) *Authority*—(1) General. The Office of Administrative Law Judges has jurisdiction to hear and decide appeals pursuant to § 9.31(b)(1) concerning questions of law and fact from determinations of the Administrator issued under § 9.31. In considering the matters within the scope of its jurisdiction, the Administrative Law Judge will act as the authorized representative of the Secretary and will act fully and, subject to an appeal filed under § 9.32(b)(2), finally on behalf of the Secretary concerning such matters.

(2) *Limit on scope of review.* (i) The Administrative Law Judge will not have jurisdiction to pass on the validity of any provision of this part.

(ii) The Equal Access to Justice Act, as amended, does not apply to hearings under this part. Accordingly, an Administrative Law Judge will have no authority to award attorney fees and/or other litigation expenses pursuant to the provisions of the Equal Access to Justice Act for any proceeding under this part.

(b) *Scheduling.* If the case is not stayed to attempt settlement in accordance with § 9.33(a), the Administrative Law Judge to whom the case is assigned will, within 15 calendar days following receipt of the request for hearing, notify the parties and any representatives, of the day, time, and place for hearing. The date of the hearing will not be more than 60 days from the date of receipt of the request for hearing.

(c) *Dismissing challenges for failure to participate.* The Administrative Law Judge may, at the request of a party or on their own motion, dismiss a challenge to a determination of the Administrator upon the failure of the party requesting a hearing or their representative to attend a hearing without good cause; or upon the failure of the party to comply with a lawful order of the Administrative Law Judge.

(d) *Administrator's participation.* At the Administrator's discretion, the Administrator has the right to participate as a party or as amicus curiae at any time in the proceedings, including the right to petition for review of a decision of an Administrative Law Judge in which the Administrator has not previously participated. The Administrator will participate as a party in any proceeding in which the Administrator has found any violation of this part, except where the complainant or other interested party challenges only the amount of monetary relief. See also § 9.32(b)(2)(i)(C).

(e) *Agency participation.* A Federal agency that is interested in a proceeding may participate as amicus curiae at any time in the proceedings. At the request of such Federal agency, copies of all pleadings in a case must be served on the Federal agency, whether or not the agency is participating in the proceeding.

(f) *Hearing documents.* Copies of the request for hearing under this part and documents filed in all cases, whether or not the Administrator is participating in the proceeding, must be sent to the Administrator, Wage and Hour Division, and to the Associate Solicitor.

(g) *Rules of practice.* The rules of practice and procedure for administrative hearings before the Office of Administrative Law Judges at 29 CFR part 18, subpart A, will be applicable to the proceedings provided by this section. This part is controlling to the extent it provides any rules of special application that may be inconsistent with the rules in 29 CFR part 18, subpart A. The Rules of Evidence at 29 CFR 18, subpart B, will not apply. Rules or principles designed to ensure production of the most probative evidence available will be applied. The Administrative Law Judge may exclude evidence that is immaterial, irrelevant, or unduly repetitive.

(h) *Decisions.* The Administrative Law Judge will issue a decision within 60 days after completion of the proceeding. The decision will contain appropriate findings, conclusions, and an order and be served upon all parties to the proceeding.

(i) *Orders.* Upon the conclusion of the hearing and the issuance of a decision that a violation has occurred, the Administrative Law Judge will issue an order that the successor contractor take appropriate action to remedy the violation. This may include hiring the affected employee(s) in a position on the contract for which the employee is qualified, together with compensation (including lost wages), terms, conditions, and privileges of that employment. Where the Administrator has sought debarment, the order must also address whether such sanctions are appropriate.

(j) *Costs.* If an order finding the successor contractor violated this part is issued, the Administrative Law Judge may assess against the contractor a sum equal to the aggregate amount of all costs (not including attorney fees) and expenses reasonably incurred by the aggrieved employee(s) in the proceeding. This amount will be awarded in addition to any unpaid wages or other relief due under §9.23(b).

(k) *Finality.* The decision of the Administrative Law Judge will become the final order of the Secretary, unless a petition for review is timely filed with the Administrative Review Board as set forth in §9.32(b)(2).

§9.35 Administrative Review Board proceedings.

(a) *Authority*—(1) *General.* The ARB has jurisdiction to hear and decide in its discretion appeals pursuant to §9.31(b)(2) concerning questions of law and fact from determinations of the Administrator issued under §9.31 and from decisions of Administrative Law Judges issued under §9.34. In considering the matters within the scope of its jurisdiction, the ARB acts as the authorized representative of the Secretary and acts fully on behalf of the Secretary concerning such matters.

(2) *Limit on scope of review.* (i) The ARB will not have jurisdiction to pass on the validity of any provision of this part. The ARB is an appellate body and will decide cases properly before it on the basis of substantial evidence contained in the entire record before it. The ARB will 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, for any proceeding under this part, the Administrative Review Board will have no authority to award attorney fees and/or other litigation expenses pursuant to the provisions of the Equal Access to Justice Act.

(b) *Decisions.* The ARB's final decision will be issued within 90 days of the receipt of the petition for review and will 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 ARB concludes that the contractor has violated this part, the final order will order action to remedy the violation, which may include hiring each affected employee in a position on the contract for which the employee is qualified, together with compensation (including lost wages), terms, conditions, and privileges of that employment. Where the Administrator has sought imposition of debarment, the ARB will determine whether an order imposing debarment is appropriate. The ARB's order under this section is subject to discretionary review by the Secretary as provided in Secretary's Order 01–2020 (or any successor to that order).

(d) *Costs.* If a final order finding the successor contractor violated this part is issued, the ARB may assess against the contractor a sum equal to the aggregate amount of all costs (not including attorney fees) and expenses reasonably incurred by the aggrieved employee(s) in the proceeding. This amount will be awarded in addition to any unpaid wages or other relief due under §9.23(b).

(e) *Finality.* The decision of the Administrative Review Board will become the final order of the Secretary in accordance with Secretary's Order 01–2020 (or any successor to that order), which provides for discretionary review of such orders by the Secretary.

§ 9.36 Severability.

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

APPENDIX A TO PART 9—CONTRACT CLAUSE

The following clause must be included by the contracting agency in every contract and solicitation to which Executive Order 14055 applies, except for procurement contracts subject to the Federal Acquisition Regulation (FAR):

NONDISPLACEMENT OF QUALIFIED WORKERS

(a) The contractor and its subcontractors shall, except as otherwise provided herein, in good faith offer service employees (as defined in the Service Contract Act of 1965, as amended, 41 U.S.C. 6701(3)) employed under the predecessor contract and its subcontracts whose employment would be terminated as a result of the award of this contract or the expiration of the contract under which the employees were hired, a right of first refusal of employment under this contract in positions for which those employees are qualified. The contractor and its subcontractors shall determine the number of employees necessary for efficient performance of this contract and may elect to employ more or fewer employees than the predecessor contractor employed in connection with performance of the work solely on the basis of that determination. Except as provided in paragraph (b) of this clause, there shall be no employment opening under this contract or subcontract, and the contractor and any subcontractors shall not offer employment under this contract to any person prior to having complied fully with the obligations described in this clause. The contractor and its subcontractors shall make an express offer of employment to each employee as provided herein and shall state the time within which the employee must accept such offer, but in no case shall the period within which the employee must accept the offer of employment be less than 10 business days.

(b) Notwithstanding the obligation under paragraph (a) of this clause, the contractor and any subcontractors:

(1) Are not required to offer a right of first refusal to any employee(s) of the predecessor contractor who are not service employees within the meaning of the Service Contract Act of 1965, as amended, 41 U.S.C. 6701(3); and

(2) Are not required to offer a right of first refusal to any employee(s) of the predecessor contractor for whom the contractor or any of its subcontractors reasonably believes, based on reliable evidence of the particular employees' past performance, that there would be just cause to discharge the employee(s) if employed by the contractor or any subcontractors.

(c) The contractor shall, not less than 10 business days before the earlier of the completion of this contract or of its work on this contract, furnish the contracting officer a certified list of the names, mailing addresses, and if known, phone numbers and email addresses of all service employees working under this contract and its subcontracts during the last month of contract performance. The list shall also contain anniversary dates of employment of each service employee under this contract and its predecessor contracts either with the current or predecessor contractors or their subcontractors. The contracting officer shall provide the list to the successor contractor, and the list shall be provided on request to employees or their representatives, consistent with the Privacy Act, 5 U.S.C. 552(a), and other applicable law.

(d) If it is determined, pursuant to regulations issued by the Secretary of Labor (Secretary), that the contractor or its subcontractors are not in compliance with the requirements of this clause or any regulation or order of the Secretary, the Secretary may impose appropriate sanctions against the contractor or its subcontractors, as provided in Executive Order 14055, the regulations implementing that order, and relevant orders of the Secretary, or as otherwise provided by law.

(e) In every subcontract entered into in order to perform services under this contract, the contractor shall include provisions that ensure that each subcontractor shall honor the requirements of paragraphs (a) and (b) of this clause with respect to the employees of a predecessor subcontractor or subcontractors working under this contract, as well as of a predecessor contractor and its subcontractors. The subcontract shall also include provisions to ensure that the subcontractor shall provide the contractor with the information about the employees of the subcontractor needed by the contractor to comply with paragraph (c) of this clause. The contractor shall take such action with respect to any such subcontract as may be directed by the Secretary as a means of enforcing such provisions, including the imposition of sanctions for noncompliance: provided, however, that if the contractor, as a result of

such direction, becomes involved in litigation with a subcontractor, or is threatened with such involvement, the contractor may request that the United States enter into such litigation to protect the interests of the United States.

(f)(1) The contractor must, not less than 30 calendar days before completion of the contractor's performance of services on a contract, furnish the contracting officer with a certified list of the names, mailing addresses, and if known, phone numbers and email addresses of all service employees working under the contract and its subcontracts at the time the list is submitted. The list must also contain anniversary dates of employment of each service employee under the contract and its predecessor contracts with either the current or predecessor contractors or their subcontractors. Where changes to the workforce are made after the submission of the certified list described in this paragraph (f)(1) of this clause, the contractor must, in accordance with paragraph (c) of this clause, not less than 10 business days before completion of the contractor's performance of services on a contract, furnish the contracting officer with an updated certified list of the names, mailing addresses, and if known, phone numbers and email addresses of all service employees employed within the last month of contract performance. The updated list must also contain anniversary dates of employment of each service employee under the contract and its predecessor contracts with either the current or predecessor contractors or their subcontractors. Only contractors experiencing a change in their workforce between the 30- and 10-day periods will have to submit a list in accordance with paragraph (c) of this clause.

(2) The contracting officer must upon their own action or upon written request of the Administrator withhold or cause to be withheld as much of the accrued payments due on either the contract or any other contract between the contractor and the Government that the Department of Labor representative requests or that the contracting officer decides may be necessary to pay unpaid wages or to provide other appropriate relief due under 29 CFR part 9. Upon the final order of the Secretary that such moneys are due, the Administrator may direct the relevant contracting agency to transfer the withheld funds to the Department of Labor for disbursement. If the contracting officer or the Administrator finds that the predecessor contractor has failed to provide a list of the names and mailing addresses of service employees working under the contract and its subcontracts during the last month of contract performance in accordance with 29 CFR part 9, the contracting officer may, at their discretion, and must upon request by the Administrator, take such action as may be necessary to cause the suspension of the payment of contract funds until such time as the list is provided to the contracting officer.

(3) Before contract completion, the contractor must provide written notice to service employees employed under the contract of their possible right to an offer of employment on the successor contract. Such notice will be either posted in a conspicuous place at the worksite or delivered to the employees individually. Where the workforce on the predecessor contract is comprised of a significant portion of workers who are not fluent in English, the notice will be provided in both English and a language in which the employees are fluent. The contractor further agrees to provide notifications to employees under the contract, and their representatives, if any, in the timeframes and methods requested by the contracting agency, to notify employees of any agency determination to except a successor contract from the nondisplacement requirements of 29 CFR part 9, and to notify them of the opportunity to provide information relevant to the contracting agency's location-continuity determination in the solicitation for a successor contract.

(g) The contractor and subcontractors must maintain records of their compliance with this clause for not less than a period of 3 years from the date the records were created. These records may be maintained in any format, paper or electronic, provided the records meet the requirements and purposes of 29 CFR part 9 and are fully accessible. The records maintained must include the following:

(1) Copies of any written offers of employment.

(2) A copy of any record that forms the basis for any exclusion or exception claimed under this part.

(3) A copy of the employee list(s) provided to or received from the contracting agency.

(4) An entry on the pay records of the amount of any retroactive payment of wages or compensation under the supervision of the Administrator of the Wage and Hour Division to each employee, the period covered by such payment, and the date of payment, and a copy of any receipt form provided by or authorized by the Wage and Hour Division. The contractor must also deliver a copy of the receipt to the employee and file the original, as evidence of payment by the contractor and receipt by the employee, with the Administrator within 10 days after payment is made.

(h) The contractor must cooperate in any review or investigation by the contracting agency or the Department of Labor into possible violations of the provisions of this clause and must make records requested by such official(s) available for inspection, copying, or transcription upon request.

(i) Disputes concerning the requirements of this clause will not be subject to the general

disputes clause of this contract. Such disputes will be resolved in accordance with the procedures of the Department of Labor set forth in 29 CFR part 9. Disputes within the meaning of this clause include disputes between or among any of the following: the contractor, the contracting agency, the U.S. Department of Labor, and the employees under the contract or its predecessor contract.

(j) Nothing in this clause will relieve a contractor or subcontractor of any obligation under the HUBZone program statute, 15 U.S.C. 657a, the Javits-Wagner-O'Day Act, 41 U.S.C. 8501–8506, the Randolph-Sheppard Act, 20 U.S.C. 107. The provisions of those laws must be satisfied in tandem with and, if necessary, prior to, the requirements of Executive Order 14055, 29 CFR part 9, and this clause. Thus, any contractor or subcontractor operating under a contract awarded on the basis of a HUBZone preference, 41 U.S.C. 657a(c); operating pursuant to the Javits-Wagner-O'Day Act, 41 U.S.C. 8501–8506; or operating pursuant to agreements for vending facilities entered into pursuant to the regulations establishing a priority for individuals who are blind issued under the Randolph-Sheppard Act, 20 U.S.C. 107, must ensure that it complies with the statutory and regulatory requirements of the relevant program. Such contractor or subcontractor must, whenever possible, also comply with requirements of this clause, Executive Order 14055, and 29 CFR part 9, to the extent that such compliance would not result in a violation of the requirements of the relevant program.

APPENDIX B TO PART 9—NOTICE TO SERVICE CONTRACT EMPLOYEES

Service contract employees entitled to nondisplacement: The contract for [insert type of service] services currently performed by [insert name of predecessor contractor] has been awarded to a new (successor) contractor [insert name of successor contractor]. The new contractor's first date of performance on the contract will be [insert first date of successor contractor's performance]. The new contractor is generally required to offer employment, in writing, to the employees who worked on the contract during the last 30 calendar days of the current contract, except as follows:

Employees who will not be laid off or discharged as a result of the end of this contract are not entitled to an offer of employment.

Managerial, supervisory, or non-service employees on the current contract are not entitled to an offer of employment.

The new contractor is permitted to reduce the size of the current workforce; in such circumstances, only a portion of the existing workforce may receive employment offers. However, the new contractor must offer employment to the displaced employees in positions for which they are qualified if any openings occur during the first 90 calendar days of performance on the new contract.

A successor contractor or subcontractor is not required to offer employment to an employee of the predecessor contractor if the successor contractor or any of its subcontractors reasonably believes, based on reliable evidence of the particular employee's past performance, that there would be just cause to discharge the employee.

An employee hired to work under the current federal service contract and one or more nonfederal service contracts as part of a single job is not entitled to an offer of employment on the new contract, provided that the existing contractor did not deploy the employee in a manner that was designed to avoid the purposes of this part.

Time limit to accept offer: If you are offered employment on the new contract, you must be given at least 10 business days to accept the offer.

Complaints: Any employee(s) or authorized employee representative(s) of the predecessor contractor who believes that they are entitled to an offer of employment with the new contractor and who has not received an offer, may file a complaint, within 120 calendar days from the first date of contract performance, with the local Wage and Hour office.

For additional information: 1–866–4US–WAGE (1–866–487–9243), *https://www.dol.gov/agencies/whd*. If you are deaf, hard of hearing, or have a speech disability, please dial 7–1–1 to access telecommunications relay services.

PART 10—ESTABLISHING A MINIMUM WAGE FOR CONTRACTORS

Subpart A—General

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