Federal Acquisition Regulation (FAR) Case 2014-025, Fair Pay and Safe Workplaces

Regulatory Impact Analysis Pursuant to Executive Orders 12866 and 13563

Executive Order 13563 directs agencies to propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs; tailor the regulation to impose the least burden on society, consistent with achieving the regulatory objectives; and in choosing among alternative regulatory approaches, select those approaches that maximize net benefits. Executive Order 13563 recognizes that some benefits are difficult to quantify and provides that, where appropriate and permitted by law, agencies may consider and discuss qualitatively values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts.

Under Executive Order 12866, the Office of Management and Budget (OMB) must determine whether a regulatory action is significant and therefore subject to the requirements of that Executive Order and to review by OMB. 58 FR 51735. Section 3(f) of Executive Order 12866 defines a "significant regulatory action" as an action that is likely to result in a rule that: (1) has an annual effect on the economy of $100 million or more, or adversely affects in a material way a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities (also referred to as economically significant); (2) creates serious inconsistency or otherwise interferes with an action taken or planned by another agency; (3) materially alters the budgetary impacts of entitlement grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or (4) raises novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in Executive Order 12866. Id.

OMB has determined that this proposed rule is a "significant regulatory action" under section 3(f) of Executive Order 12866.

Executive Order 13673, Fair Pay and Safe Workplaces, (the Order) contains two distinct requirements for contractors and subcontractors seeking or performing covered contracts to provide information. First, contractors will disclose to contracting agencies (and subcontractors will disclose to contractors) certain violations of any of the 14 federal labor laws identified in the Order or any equivalent State laws (the Labor Laws), as well as additional information regarding the disclosed violations.[1] Second, they will disclose certain information to their workers performing work under covered contracts to provide the workers greater transparency regarding compensation and employment status. Each requirement will cause contractors and subcontractors to incur a cost of compliance. The Order also contains a provision that prohibits contractors and subcontractors with federal contracts exceeding $1 million from requiring employees to arbitrate certain discrimination and harassment claims. The costs and transfer impacts of each of these provisions are discussed in the analysis below. This analysis was developed by the FAR Council Agencies[2] and Department of Labor (DOL), the lead program agency for implementing the Executive Order.

[1] The proposed rule does not implement the equivalent state laws component of the Order, except for OSHA-approved State Plans. The Department of Labor (DOL) will publish in the Federal Register at a later date a second proposed guidance addressing which State laws are equivalent to the 14 federal labor laws and executive orders identified in the Order for which contractors and subcontractors must report violations, and the Department of Defense (DOD), General Services Administration (GSA) and National Aeronautics and Space Administration (NASA) will issue a second proposed rule implementing the Order's requirements with respect to those State laws.
[2] FAR Council Agencies consist of DoD, GSA, and NASA. These agencies are responsible for approving and signing regulatory changes to the FAR. DoD and NASA represent the Defense Acquisition Regulatory Council (a council that represents DoD services and NASA). GSA

A. Time to Review the Proposed Rule

During the first year that the Order is in effect, contractors and subcontractors will need to learn about the provisions and its requirements. The Department of Defense (DOD), General Services Administration (GSA) and National Aeronautics and Space Administration (NASA) (collectively referred to here as the Signatory Agencies) in consultation with DOL[3] estimate this cost by multiplying the time required to review the regulations and guidance implementing the Order by the estimated compensation of a general manager.[4] In the first year the Signatory Agencies and DOL estimate that the average contractor will spend approximately eight hours to familiarize itself with the rule and DOL guidance. Therefore, the Signatory Agencies calculated the total estimated cost to contractors and subcontractors of reviewing the rule and DOL guidance as **$12,990,600** (= 8 hours × $63 × 25,775).[5]

B. Costs of the Disclosure Requirements

1. Cost methodology

The Order's disclosure requirements are designed to improve the ability of contracting officers and contractors to make informed and appropriate responsibility determinations. The

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represents the Civilian Agency Acquisition Council (a council that includes 14 civilians agencies including DOL).

[3] Many of the estimates and much of the analysis contained in this Regulatory Impact Analysis were developed in cooperation with the Department of Labor (DOL) and rely to a significant extent on input provided by DOL.

[4] The wage for general managers was estimated using the mid-point (step 5) of the last General Schedule (GS)-equivalent hourly salary for GS-14, plus overhead/burden at the 36.25% Civilian Position Full Fringe Benefit Cost Factor for 2013 per OMB Memo M-08-13 dated March 11, 2008. GS-14, Step 5 $46.45/hour × 1.3625 = $63.29 burdened hourly rate. The hourly rate was rounded down to the nearest whole dollar, or $63.

[5] As described in more detail below, the Signatory Agencies estimate that 22,153 contractors and 3,622 subcontractors will be affected by the Order.

Order requires each Agency to designate a senior agency official to be a Labor Compliance Advisor who will provide assistance, in consultation with DOL, to contracting officers and other agency officials in evaluating disclosed information and determining appropriate responses. DOL is available to contracting agencies and contractors to assist in evaluating and considering disclosed information.

The Order will require contractors and subcontractors seeking covered contracts to disclose administrative merits determinations, arbitral awards or decisions, and civil judgments reflecting violations of any of the Labor Laws prior to a contracting officer's or contractor's responsibility determination. For procurement contracts for goods and services, including construction, where the estimated value of the supplies acquired and services required exceeds $500,000, offerors must represent whether there has been any such determination of violation rendered against them within the three-year period preceding the date of the offer. If the offeror has indicated that it had such violations and the contracting officer has initiated a responsibility determination, the offeror will provide the following information regarding each administrative merits determination, arbitral award or decision, and civil judgment: the date it was rendered; the name of the court, arbitrator(s), agency, board, or commission that rendered it; which labor law was violated; and the case number, inspection number, charge number, docket number, or other unique identification number. The offeror will have the opportunity to provide all other information that the offeror deems necessary to demonstrate its responsibility to the contracting officer, such as mitigating circumstances, remedial measures, and other steps, such as entering into labor compliance agreements to achieve compliance with the Labor Laws. For subcontracts where the estimated value of the supplies acquired and services rendered exceeds $500,000 (other than for commercially available off-the-shelf items), the contractor shall require all

prospective subcontractors to disclose whether they have or have not had an administrative merits determination, civil judgment, or arbitral award or decision rendered against them in the three years preceding the offer, and if the contractor initiates a responsibility determination, to provide relevant documentation and any additional information the subcontractor deems necessary to demonstrate its responsibility.

The Order will also require contractors and subcontractors to determine whether they have updated information to disclose semi-annually during the performance of covered contracts, and if so, to provide that information. The Department will be available for consultation with contractors and subcontractors regarding the Order's requirements.

To determine the Order's impact, the Signatory Agencies, working with DOL, took the following steps. First, they estimated the population of affected contractors and subcontractors. Second, they estimated the number of initial responses disclosing information related to Labor Laws violations, and supporting documentation. Third, they estimated the number of hours and the associated costs of completing those responses. Fourth, they estimated the number of status notices that are required during performance of a covered contract, along with the number of hours and the associated costs of completing the recurring status notices. Fifth, they estimated the cost of producing and disseminating wage statements required by the Order. Finally, they considered the potential cost of increased litigation due to the Order's provision prohibiting certain contractors from requiring their workers to sign mandatory-arbitration agreements.

The estimated costs include the time and effort it will take federal contractors and subcontractors to review the requirements, search for relevant documents, review and approve the release of the information, and disclose the information. The estimates assume that not all

efforts (e.g., retrieving and keeping records) are attributed solely to the purpose of complying with the disclosure requirements of the Order; only those actions that are not customary to normal business operations are attributed to this estimate. The estimated costs also include time for prospective contractors to review, evaluate, consider and retain subcontractor information when making responsibility determinations for subcontractors that have disclosed information.

2. Population of contractors and subcontractors affected

To estimate the burden to federal contractors associated with complying with the Order, the percentage of federal contractors that will have Labor Law violations subject to disclosure under the Order must be estimated. This was done by first identifying the number of federal contractors (both prime contractors and subcontractors) with awards over $500,000 to determine the number of existing and potential contractors that may be affected by the Order, and then comparing this number to data from the DOL enforcement databases to estimate the percentage of federal contractors with awards over $500,000 that have had any Labor Laws violations in the last three years.

It is not possible to directly match federal contractors from the System for Award Management (SAM) and Federal Procurement Data System (FPDS) databases with the firms in the DOL enforcement databases because the DOL enforcement databases do not currently use the same unique identifiers as SAM and FPDS. The DOL enforcement data was therefore used as a proxy for estimating the percentage of contractors affected by the Order's disclosure requirements. This method assumes that the percentage of federal contractors with awards over $500,000 that have had Labor Laws violations covered by the Order in the last three years is similar to the percentage of all firms in the United States with such violations.

Each enforcement agency[6] was asked to estimate the number of firms with violations of the Labor Laws subject to disclosure (i.e., resulting in administrative merits determinations, civil judgments, or arbitral awards or decisions) in the last three years. Each agency provided the relevant universe of employer firms[7] that are subject to the applicable Labor Laws, and the total number of violations of the kind that would be subject to disclosure under the Order. These estimates were used to arrive at an estimate of the percentage of firms with violations that would be subject to disclosure. These estimates do not include civil judgments or arbitral awards or decisions resulting from claims brought by private parties without involvement by an enforcement agency, for which the enforcement agencies do not have reliable data. These calculations therefore likely underestimate the percentage of firms with covered violations. In order to mitigate this underestimation, this cost analysis used upper bound estimates whenever applicable. However, we specifically request comment regarding the best methods for estimating the number of civil judgments and arbitral awards or decisions that are subject to disclosure under the Order and that result from claims brought by private parties without the involvement of enforcement agencies.

[6] The relevant enforcement agencies under the Order are the National Labor Relations Board (NLRB), the Equal Employment Opportunity Commission (EEOC), and DOL's Office of Federal Contract Compliance Programs (OFCCP), Wage and Hour Division (WHD), and Occupational Safety and Health Administration (OSHA), and state administrators of OSHA-approved state plans.

[7] The universe for OSHA is larger than the others because OSHA tracks violations by establishment, rather than by firm. For OFCCP, the universe is the total number of federal contractors that currently have active contracts, with the following jurisdictional thresholds: under Executive Order 11246, covered entities are those federal contractors, subcontractors and federally-assisted construction contractors that have a government contract, or aggregate contracts, exceeding $10,000; under Section 503 of the Rehabilitation Act, covered entities are those federal contractors and subcontractors that have a government contract exceeding $15,000; and under VEVRAA, covered entities are those federal contractors and subcontractors that have a government contract exceeding $100,000.

For the Wage and Hour Division (WHD), the total number of firms subject to the Labor Laws that it enforces is 5,682,424, according to Census data from 2011.[8] Of these firms, 69,296 had violations in the last three years of the kind that would be subject to disclosure, (see Table 1). Therefore, the percentage of firms with violations that would be subject to disclosure is 1.22 percent (=69,296/5,682,424). The same methodologies were applied to the National Labor Relations Board (NLRB) and the Equal Employment Opportunity Commission (EEOC). (See Table 1 below for their percentage calculations.)

The Occupational Safety and Health Administration (OSHA) tracks violations by establishment, rather than by firm. Out of 7,354,043 establishments subject to the Labor Laws that it enforces, 187,801 had violations in the last three years of the kind that would be subject to disclosure. As a result, the percentage of establishments with violations subject to disclosure is 2.55 percent (=187,801/7,354,043).[9]

The universe of federal contractors that currently have active contracts is 364,239 contractor firms.[10] OFCCP reported 296 violations of the kind that would be subject to disclosure; therefore, the percentage of firms with violations subject to disclosure is 0.08 percent (=296/364,239).

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[8] U.S. Census Bureau, Statistics of U.S. Businesses, www.census.gov/econ/susb.

[9] Given that this proposed rule applies to firms, and firms in many cases have more than one establishment subject to OSHA requirements, it is possible that the percentage of firms with violations is more or less than 2.55%. For instance, if the establishment violations are concentrated among certain firms, then the violation rate per firm would be lower. In contrast, if the establishment violations are more dispersed among many more firms, then the violation rate per firm would be higher.

[10] This may be an overestimate of the number of firms subject to OFCCP's jurisdiction, given the jurisdictional thresholds outlined in footnote 5 above.

The next step was to consolidate the violation rates calculated for each enforcement agency to derive the overall percentage of firms that have had violations of the Labor Laws in the last three years. Information about how many firms that have violations overlap across enforcement agencies is not available. Therefore, upper- and lower-bound estimates have been applied to this analysis. The true values of the overall percentages will likely fall within this range. The upper bound assumes no overlap of violating firms across enforcement agencies, and the lower bound assumes complete overlap. It is estimated that between 2.55 percent and 4.05 percent of firms had violations that would require disclosure under the Order (see Table 1).

To estimate the Order's impact, it is assumed that the percentages of federal contractors with awards over $500,000 that have had violations of the Labor Laws in the last three years are similar to the percentages of all firms with such violations (as derived from the enforcement agency databases). Therefore, the percentage estimates of firms with violations of the kind that would be subject to disclosure under the proposed rule were applied to the number of federal contractors estimated to receive awards over $500,000 in order to estimate the population of federal contractors affected by the Order.

Table 1: Percentage of firms/establishments with violations of the covered Labor Laws by agency

Agency	**EEOC**	**NRLB**	**OFCCP**	**OSHA**	**WHD**	**Upper Bound (Sum of Agency Percentages)**	**Lower Bound (Agency with Highest Percentage)**
Universe (employer firms)/federal contractors (or establishments) based on 2011 Census	5,682,424	5,682,424	364,239	7,354,043	5,682,424		
Firms with violation(s)	7,263	3,735	296	187,801	69,296		
% of firms with violation(s) subject to disclosure	0.13%	0.07%	0.08%	2.55%	1.22%	4.05%	2.55%

3. Cost of representation regarding compliance with Labor Laws

Any contractor that responds to a solicitation for a covered procurement contract must represent whether it has any Labor Laws violations reportable under the Order. If the contractor represents that it has received reportable documentation of a violation, and if a contracting officer undertakes a responsibility determination regarding the contractor, the contractor must provide additional information about the violations and may provide additional information regarding any steps taken to correct the reported violation or improve compliance with the Labor Laws, including any agreements entered into with an enforcement agency. The cost of representation regarding violations of the Labor Laws will involve the time spent to review files containing compliance and litigation history (in order to determine whether the contractor has within the preceding three-year period received an administrative merits determination, a civil judgment, or an arbitral award or decision rendered against it, for violations subject to disclosure); to identify any relevant supporting documentation; and to submit the firm's disclosures. The Signatory Agencies and DOL assume that these tasks will be performed by general managers and technical staff or equivalent persons whose loaded hourly wages (wages plus benefits) equal $63 and $37 per hour respectively.[11]

[11] Wages for general managers and technical staff were estimated using the mid-point (step 5) of the last General Schedule (GS)-equivalent hourly salary for GS-14 and GS-11 respectively, plus overhead/burden at the 36.25% Civilian Position Full Fringe Benefit Cost Factor for 2013 per OMB Memo M-08-13 dated March 11, 2008. GS-14, Step 5 $46.45/hour × 1.3625 = $63.29 burdened hourly rate. GS-11, Step 5 $27.58/hour × 1.3625 = $37.58. The hourly rates were rounded down to the nearest whole dollar, or $63 and $37.

The Signatory Agencies estimate that 22,153 contractors will be subject to the rule.[12] The rule's representation requirements regarding labor violations will apply to solicitations for contracts and purchase orders; the requirements will not apply to actions that are not subject to responsibility determination, such as task and delivery orders and calls. Because some contractors receive multiple awards, there are 25,079 awards, as reflected in the FPDS for FY13. The average number of offers submitted per solicitation is 5, so the expected number of responses is 125,395 (= 25,079 awards × 5 offers). Of the 22,153 contractors that would be subject to the rule, the Signatory Agencies and DOL estimate that 1,625 contractors[13] will report violations at the initial representation stage.

The amount of time required for personnel to research files containing compliance and litigation history information, determine whether to report that it has or has not had a covered violation at the initial representation stage, and to identify any additional information that may be submitted if in fact it has a covered violation will vary depending on the complexity of any given case. The Signatory Agencies and DOL acknowledge that in some instances, where the violation history of a particular case is more elaborate, compiling supporting documentation to demonstrate mitigating factors may require significant resources and time. In other cases, where

[12] FY13 FPDS awards to unique vendors that would be subject to the rule (20,139) is adjusted upward 10% to account for respondents that did not receive an award in FY13.

[13] Calculated by using the number of FY13 awards (25,079) and estimating a number of responsibility determinations initiated (one offeror for 70% of awards = 17,555) and three offerors for 30% of awards (7,524 × 3 = 22,571). Multiply the result (40,126) by an estimated percentage of offerors that will respond affirmatively to the provision. Percentage of affirmative responses is estimated from enforcement agency data, which provided an upper and lower bound percentage. The upper bound percentage of 4.05% was applied in order to arrive at a conservative estimate, which resulted in 1,625 offerors that will report violations and undergo responsibility determinations by contracting officers. Using this figure may result in an overestimate of the burden on contractors for the additional reason that some contractors perform multiple contracts but will not need to retrieve the same information about their violations multiple times.

one or few violation(s) are reported or where there is little to no supporting information to show mitigating factors, this step could take virtually no time. In addition, the determination will require more time for the first response, where potential sources for researching violation histories must be located, and less time for every subsequent response, given that the information sources will have already been identified for future reference. Therefore, on average, it is estimated based on program experience that determining the initial representation and identifying any supporting information that may be submitted will take 6.72 hours.[14] It is further estimated that the inputting and transmittal of supporting information will take an average of 2.8 hours.[15]

The Signatory Agencies and DOL estimate the total costs of this provision for contractors to be the cost for the initial representation, plus the cost of providing additional required and discretionary information. As explained above, it is estimated that there will be a total of 125,395 responses, and that approximately 6.72 hours would be needed to provide each initial determination, for a total of 842,654.4 hours (= 125,395.0 responses × 6.72 hours). The total cost for the initial representation of violations is therefore **$53,087,227** (= 842,654.4 hours × $63 per hour).

Where a prospective contractor represents in the initial representation that it has a covered violation, and the contracting officer conducts a responsibility determination, a

[14] Calculated by assuming a greater number of hours (20) for the first response and a reduced number of hours (4) for subsequent responses. Reduced time is estimated for subsequent responses because at this stage identifying information would be part of an established process and for a reduced timeframe look-back versus 3 years. Response time considers that the time needed for a simple disclosure and complex disclosure will vary and that across the population, a greater proportion are simple.

[15] Time to determine any reportable violation information is accomplished in the initial representation. Hours for this step are for input and transmission of the information. Assumes small businesses (60%) have less volume of information (2 hours) and other than small businesses (40%) have greater volume (4 hours). (2 hours × 60%) + (4 hours × 40%) = 2.8 hours.

contractor will need to provide additional required and discretionary information. As explained above, the Signatory Agencies and DOL estimate that 1,625 contractors may fall under this scenario, with each response requiring approximately 2.8 hours to complete, for a total of 4,550.0 hours (= 1,625.0 responses × 2.8 hours). The total cost of providing additional information is therefore **$168,350** (= 4,550.0 hours × $37 per hour).

4. Cost of subcontractor representation regarding compliance with Labor Laws

Contracting officers will require contractors, at the time of execution of the covered contract, to represent that they will require subcontractors performing covered subcontracts to disclose administrative merits determinations, civil judgments, or arbitral awards or decisions rendered against the subcontractor within the preceding three-year period for violations of any of the Labor Laws. See Order, § 2(a)(iv). The Order provides that contractors will require subcontractors bidding on subcontracts (where the estimated value of the supplies acquired and services required exceeds $500,000 other than for commercially available off-the-shelf items) to report administrative merits determinations, civil judgments, or arbitral awards or decisions rendered against them within the preceding three-year period for violations of any of the Labor Laws. See Order, §§ 2(b)(iv)-(v). The subcontractor must make such reports to the contractor prior to being awarded a covered subcontract whenever possible, and otherwise within 30 days of subcontract award, and semi-annually during performance of a covered subcontract. Id. The contractor will (in most cases, before awarding the subcontract) consider the information submitted by the subcontractor in determining whether the subcontractor is a responsible source that has a satisfactory record of integrity and business ethics. Id. The DOL will be available to assist contractors in making this determination. The DOL is also available to subcontractors to assist in determining whether violations are reportable.

The cost to subcontractors of representation regarding violations of the Labor Laws will involve the time spent by human resources staff to review files containing compliance and litigation history to: determine whether the subcontractor has within the preceding three-year period had an administrative merits determination, civil judgment, or arbitral award or decision rendered against it for violations subject to disclosure; identify any relevant supporting documentation; and submit the firm's disclosures. Following the same method that was applied to contractors in the preceding section, it is assumed that these tasks will be performed by general managers and technical staff or equivalent persons whose loaded hourly wages (wages plus benefits) equal $63 and $37 per hour respectively.

The Signatory Agencies estimate that 3,622 subcontractor awards[16] will be subject to the rule, 14 responses will be generated per award, and there will be a total of 50,365 responses.[17] These estimates are based on program experience that approximately 5.12 hours[18] would be

[16] FY13 FFATA Subaward Reporting System (FSRS) awards to unique vendors (2,697) that would be subject to the rule adjusted upward 10% (2,967) to account for respondents that did not receive an award in FY13. Include increases to account for lower tiers; 20% at second tier, 10% at third tier, and 5% at fourth tier (3,622). The proposed FAR rule at paragraph (b) of clause 52.222-AB, Subcontractor Responsibility Matters Regarding Compliance with Labor Laws, requires contractors to require prospective contractors with contracts valued at great than $500,000 to represent whether there have been any administrative merits determinations, arbitral awards or decisions, or civil judgments rendered against them for violations of the covered labor laws within the preceding three years. Tiers refer to the number of levels or layers of subcontractors below the contractor. First tier subcontracts are the first level or layer below the contractor. Second tier subcontracts flow down from the first tier subcontractor, and so forth. There are likely a smaller number of covered subcontracts, those exceeding $500,000, at the lower tiers.

[17] First tier FY13 FSRS awards subject to the requirement (8,250) including increases to account for lower tiers; 20% at second tier, 10% at third tier, and 5% at fourth tier (10,073) times an estimated average number of offers (5) equals 50,365 responses.

[18] Calculated by assuming a greater number of hours (20) for the first response and a reduced number (4) for subsequent responses. Response time considers that the time needed for a simple disclosure and complex disclosure will vary and that across the population, a greater proportion are simple.

needed to provide each initial determination, for a total of 257,868.8 hours (= 50,365 responses × 5.12 hours). The total cost for the initial representation of violations is therefore **$16,245,734** (=257,868.8 hours × $63 per hour).

Where a prospective subcontractor responds in the initial representation that it has a covered violation, and a contractor conducts a responsibility determination, a subcontractor will need to provide additional required and discretionary information. The Signatory Agencies and DOL estimate that 653 subcontractor awards[19] may fall under this scenario, with each response requiring approximately 4.0 hours[20] to complete, for a total of 2,612.0 hours (= 653 responses × 4.0 hours). The total cost for a subcontractor to provide additional information is therefore **$96,644** (= 2,612 hours × $37). As described above, this estimate does not include civil judgments or arbitral awards or decisions resulting from claims brought by private parties without the involvement of an enforcement agency. The Signatory Agencies and DOL specifically request public comment regarding the best methods for estimating the number of such violations subject to disclosure under the proposed rule.

[19] Calculated by first estimating the number of responsibility determinations initiated per subcontract award including increases to account for lower tiers (10,073). Then apply increases to account for responsibility determinations initiated that don't result in award; (one offeror for 70% of awards = 7,051) and three offerors for 30% of awards (3,022 × 3 = 9,066). Multiply the result (16,117) by an estimated percentage of offerors that will respond affirmatively to the provision. Percentage of affirmative responses is estimated from enforcement agency data, which provided an upper and lower bound percentage. The upper bound percentage of 4.05% was applied in order to arrive at a conservative estimate, which resulted in 653 violators undergoing responsibility determinations by prospective contractors.

[20] Effort to determine any reportable violation information is accomplished in the initial representation. Hours for this step are for input and transmission of the information. Assumes small businesses (60%) have less volume of information (2 hours) and other than small businesses (40%) have greater volume (4 hours), with an upward adjustment to account for those prospective subcontractors that have an additional requirement to provide notices received from DOL that they have not entered into a labor compliance agreement within a reasonable period or are not meeting the terms of the agreement.

In addition to the costs borne by subcontractors, the costs to contractors related to subcontractors' disclosure responsibilities will involve evaluating the information submitted by a prospective subcontractor. Where a prospective subcontractor responded that it has a covered violation and a contractor performs a responsibility determination, the contractor will expend time considering and weighing the information. It is estimated that this can take up to 20.6 hours[21] per response, for a total of 13,451.8 hours (= 653 responses × 20.6 hours). Therefore, the cost to contractors of weighing this information is **$847,463** (= 13,451.8 hours × $63 per hour).

5. Cost of updates to representation regarding compliance with labor laws

The Order's reporting requirements continue after an award is made. Semi-annually during the performance of the contract, contracting agencies shall require contractors to update the information pertaining to Labor Laws violations and to obtain the required information from covered subcontractors. See Order, § 2(b)(i). If a contractor reports information regarding Labor Laws violations to a contracting officer during contract performance, or similar information is obtained through other sources, a contracting officer, in consultation with the LCA as appropriate, shall consider whether action is necessary. See Order, § 2(b)(ii). Such action may include entering into agreements requiring appropriate remedial measures and measures to avoid further violations, as well as declining to exercise an option on a contract,

[21] Estimation of time to consider DOL guidance and consulting with DOL as needed in reviewing violation information. This is the same number of hours used to estimate contracting agency evaluations of prospective contractor information, with an upward adjustment to account for added reporting when contractors or prospective contractors find prospective subcontractors responsible after having been informed that DOL has advised that the subcontractor has not entered into a labor compliance agreement within a reasonable period or is not meeting the terms of the agreement.

contract termination if the updated information relates directly to and jeopardizes satisfactory performance and completion of the contract being considered for termination, or referral to the agency's suspending and debarring official. Id. If information regarding Labor Law violations by a contractor's subcontractor is brought to the attention of the contractor, then the contractor shall similarly consider whether action is necessary. See Order, § 2(b)(iii).

The Signatory Agencies estimate that 20,139 awards[22] will be covered contracts for which contractors will have to determine whether updated information needs to be provided, and 1.4 responses[23] will be received per award, generating a total of 28,194.6 responses. It is estimated that this will take 4 hours[24] per response for a total of 112,778.4 hours (= 28,194.6 responses × 4 hours). Therefore, the total annual cost for a contractor to determine whether updated information needs to be provided is **$7,105,039** (= 112,778.4 hours × $63 per hour).

Of the 20,139 awards, the Signatory Agencies and DOL estimate 815.63 awards[25] will have new information that will require updates, as well as the generation and transmittal of the additional information. Approximately 1.4 responses will be received per award, generating a total of 1,141.88 responses (= 815.63 × 1.4). It is estimated that each response will take 2

[22] FPDS awards to unique DUNS that would be subject to the rule.
[23] Used a factor of 1.4 to account for multiple reporting for contracts with performance beyond one year. This factor accounts for semi-annual reporting given the varying duration of federal contracts.
[24] Identifying information at this stage would be part of an established process and is for a greatly reduced timeframe, semi-annual look-back versus 36 months, therefore 4 hours is estimated.
[25] Calculated by multiplying contract awards (20,139) by the estimated percentage of contractors that have an update (i.e., that have new information regarding violations). Percentage of contractors that have violations is estimated from enforcement agency data, which provided an upper and lower bound percentage. The upper-bound percentage of 4.05% was applied in order to arrive at a conservative estimate, which resulted in 816 violators.

hours,[26] for a total of 2,283.76 hours (= 1,141.88 responses × 2 hours). Therefore, the total annual cost is **$84,499 (=** 2,283.76 hours × $37 per hour).

Subcontractors are required to update disclosures to contractors annually as well. The Signatory Agencies estimate that 3,293 subcontractors[27] would be subject to this provision, and 1.4 responses would be received per award for a total of 4,610.2 responses. It is estimated that complying with this provision will take 4.15 hours[28] per award for a total of 19,132.3 hours (= 4,610,2 responses × 4.15 hours). Therefore, the total annual cost is **$1,205,337** (= 19,132.3 hours × $63 per hour).

Lastly, contractors will review and analyze the updated information submitted by subcontractors to determine whether any additional action is required. The Signatory Agencies and DOL estimate that 408 awards[29] will require this analysis, and 1.4 responses will be generated per award for a total of 571.2 responses. It is estimated that completing the analysis

[26] This step accounts for input and transmission of the information. Identifying information is accomplished in the prior step.
[27] First tier FY13 FSRS subcontractors subject to the requirement (2,697) including increases to account for lower tiers; 20% at second tier, 10% at third tier, and 5% at fourth tier (3,293).
[28] Accounts for review of information and providing updates, with an upward adjustment to account for those prospective subcontractors that have an additional requirement to provide notices received from DOL that they have not entered into a labor compliance agreement within a reasonable period or are not meeting the terms of the agreement.
[29] Calculated by multiplying subcontract awards (10,073) by estimated percentage of subcontractors that have an update (e.g. have violations). Percentage of contractors that have violations is estimated from enforcement agency data, which provided an upper- and lower-bound percentage. The upper-bound percentage of 4.05% was applied in order to arrive at a conservative estimate, which resulted in 408 violators.

will take 3.6 hours[30] per response for a total of 2,056.3 hours (= 571.2 responses × 3.6 hours). Therefore, the total annual cost is **$129,548** (= 2,056.3 hours × $63 per hour).

6. **Government Costs**

There are four categories of costs to the federal government directly related to the implementation of the Order: (1) new staff at DOL; (2) new Labor Compliance Advisors (LCAs) at other agencies; (3) contracting agency evaluation costs; and (4) information technology costs to support implementation of the Order.

In order to achieve the Order's objectives, DOL plans to establish a Bureau of Labor Compliance, which will be staffed by 15 employees (including LCAs) at a cost of $2.62 million. DOL's compliance assistance efforts will focus on ensuring contractors and subcontractors have the support they need to understand their obligations under the Order. DOL will also support procurement officials across the government so they can make efficient, accurate, and consistent decisions about contractors' responsibility and business integrity. DOL will be available to consult with contractors and subcontractors and will coordinate assistance with the relevant enforcement agencies.

It is estimated that approximately 30 new LCAs will be hired at a GS-15 level by other federal agencies at a cost of $4,692,245. This cost is derived by using the annual salary for a GS-15, Step 5, at $114,795, plus overhead/burden of 36.25% as explained in footnote 4 above, to equal $156,408 (= $114,795 × 1.3625). The burdened annual salary per LCA of $156,408 is

[30] Estimation of time to consider DOL guidance and consulting with DOL as needed in reviewing violation information. This is the same number of hours that was used to estimate contracting agency evaluations of prospective contractor information, with an upward adjustment to account for added reporting when contractors determine to continue the subcontracts of subcontractors after having been informed that DOL has advised that the subcontractor has not entered into a labor compliance agreement within a reasonable period or is not meeting the terms of the agreement.

multiplied by 30 new LCAs to equal $4,692,245. These LCAs will play an integral role in implementing the Order as they will assist contracting officers in assessing reported violations as part of the determination of whether a contractor has a satisfactory record of integrity and business ethics.

Under the Order, the contracting agency will need to evaluate the information disclosed by prospective contractors and determine the appropriate response. Also, the contracting agency will need to evaluate updated information submitted by the contractor semi-annually during the performance of covered contracts.

As described above, the Signatory Agencies and DOL estimate that 1,625 contractors will report violations at the initial representation stage and undergo responsibility determinations by contracting officers. It is estimated that it would take 2 hours per response for the contracting officers to evaluate prospective-contractor information, given that LCAs will perform the primary work of assessing the nature of reported violations as part of the responsibility determination process. Using the burdened hourly rate of a GS-14, step 5, which is $63, the contracting officer evaluation costs at the responsibility determination stage are estimated at $204,750 (= 1,625 contractors × 2 hours of review time × $63 per hour).

It is further estimated that about 816 contractors (calculated by multiplying contract awards (20,139) by 4.05%, the percentage of contractors that have violations) would have updated information that will need to be submitted semi-annually and reviewed by the contracting agency. It is estimated that review of this information by contracting officers will take 1 hour on average. Therefore, the semi-annual cost of reviewing updated information from contractors are estimated at $51,408 (= 816 contractors × 1 hour of review time × $63 per hour). The annual cost is $102,816 (= $51,408 × 2). The total evaluation costs for review of

information by contracting officers at the responsibility determination stage and any information provided semi-annually by contractors amount to $307,566 (= $204,750 + $102,816).[31]

Information technology (IT) costs involve needed GSA modifications to its IT systems to implement the Order, and also OMB modifications to the MAX Information System that would allow optimal communication and coordination across agencies. These IT costs are not yet estimated.

The total annual Government cost, excluding IT costs, is $7,599,811 (= $2.62 million (DOL Bureau of Labor Compliance) + $4,692,245 (30 new LCAs) + $307,566 (cost of evaluation by contracting officers)).

B. Costs of the Paycheck Transparency Provision

1. Cost methodology

Currently, employers must determine whether each of their workers is an employee or not (the worker's employment status) in order to determine their obligations, if any, under applicable employment and tax laws. In addition, covered employers must keep detailed records of wages and hours for each worker determined to be an employee under the Fair Labor Standards Act (FLSA) and for each worker who is performing work on a contract subject to the Davis-Bacon Act (DBA) or the Service Contract Act (SCA).

The Order's paycheck transparency provisions will result in contractors and subcontractors with covered contracts being required to provide two documents to workers on

[31] This cost relates only to the time spent by contracting officers to review disclosures and related information. Contracting officers' review will be done in concert with LCAs, who will conduct a significant portion of the review and analysis. As stated earlier, approximately 30 new LCAs will be hired at a GS-15 level by other federal agencies at an estimated total cost of $4,692,245.

such contracts for whom they are required to maintain wage records under the FLSA, the DBA, the SCA, or equivalent state laws. First, contractors and subcontractors will provide a notice to each worker whom they treat as an independent contractor informing the worker of his/her independent contractor status. Second, contractors and subcontractors will provide a wage statement to each worker in each pay period. The wage statement need not contain a record of hours worked if the contractor or subcontractor has informed the worker that he/she is exempt from the FLSA's overtime requirements, so contractors and subcontractors may elect to provide additional notices to their exempt employees informing them of their FLSA exempt status. In calculating the costs of this provision, the Signatory Agencies and DOL included the cost of contractors and subcontractors notifying employees of their FLSA exempt status on a separate document, thereby leading to an overestimate of the costs of this provision, given that providing a separate document is not required and most contractors and subcontractors may opt to provide this notice on the wage statement itself.

To comply with the paycheck transparency provisions, contractors and subcontractors with covered contracts will likely incur costs to generate notices for their workers who are treated as independent contractors, and may incur costs to upgrade their payroll systems to generate the required wage statements and to notify employees of their FLSA exempt status. This cost analysis assumes that all contractors and subcontractors subject to the FLSA, DBA, and/or SCA already make a determination for each of their workers whether or not the worker is an employee (or instead, for example, an independent contractor), as they currently must do so to comply with applicable employment and tax laws. The paycheck transparency provisions do not impose an additional cost to make that determination, but rather simply require contractors and subcontractors to make a record of that determination and provide the record to those workers

who are treated as independent contractors. This cost analysis further assumes that all contractors and subcontractors subject to the FLSA already make a determination for each of their employees whether the employee is exempt from the FLSA's overtime requirements because they must do so to comply with their obligations under the FLSA.[32] Similarly, this cost analysis also assumes that all contractors and subcontractors subject to the FLSA, DBA, or SCA keep the payroll records required by those laws and their regulations, and the wage statement required by the Order generally contains only payroll information that contractors and subcontractors subject to those laws are already required to keep.[33]

2. Number of status notices

a. Number of independent contractor status notices

Currently, employers determine employment status at the time the worker is hired; specifically, the employer must determine the worker's status as an employee or not (i.e., an independent contractor). The Order will result in contractors and subcontractors with covered

[32] Although employers must determine whether their workers are employees to comply with legal obligations, some employers may not have spent sufficient time to conduct a full and accurate determination for each worker. Likewise, although employers covered by the FLSA must determine their employees' status as exempt or not in order to comply with the FLSA, some employers may not have spent sufficient time to conduct a full and accurate determination for each employee. These employers may incur costs for the additional time needed to conduct full and accurate determinations. These costs (and benefits) are not quantifiable because there are no data on the number of employers who have not conducted a full and accurate determination for each employee; therefore, this cost analysis does not account for any additional time needed to properly determine workers' or employees' status.

[33] Where a significant portion of a contractor's or subcontractor's workforce is not fluent in English and therefore certain documents required by the paycheck transparency provision must be in the language other than English in which the significant portion of the workforce is fluent, the contractor or subcontractor may incur costs associated with translation. This cost has not been included in this analysis due to data limitations on the language fluencies of this population of workers.

contracts being required to provide written notice to each worker on such contracts whom they treat as an independent contractor informing the worker of his/her independent contractor status.

The Signatory Agencies estimate that there are 20,139 contractors and 3,293 subcontractors with contracts covered by the Order, employing 797,590 workers[34] who could be potentially impacted by the paycheck transparency provisions. The Signatory Agencies and DOL estimate that, among those workers, there are 57,249 independent contractors who will be affected by the Order's independent contractor status notice requirement.[35] Because independent

[34] The Signatory Agencies' estimate that there are 20,139 contractors and 3,293 subcontractors with covered contracts (i.e., with at least one active federal contract over $500,000 and covered by the Order) derives from the FY 2013 data from SAM, FPDS, and FSRS. The data represents the number of awards to unique contractor and subcontractor DUNS numbers of more than $500,000 in FY 2013, with a flowdown to four tiers on the subcontractor figure. Estimating the number of affected workers for contractors and subcontractors with covered contracts proceeded in steps. The first step was to estimate the number of workers performing on federal contracts and subcontracts. Based on the number of jobs supported by Federal contract spending by industry, found in USAspending.gov and the Current Population Survey (CPS), in the final rule establishing standards and procedures to implement Executive Order 13658,"Establishing a Minimum Wage for Contractors" (79 Fed. Reg. 60634, 60694), the Signatory Agencies and DOL estimated the number of workers performing on all federal contracts covered by that executive order to be 868,834. As the coverage criteria under Executive Order 13658 are slightly different from those applicable here, this figure is used as an approximation, using the most relevant available data. The second step was to estimate the number of workers working for federal contractors or subcontractors with contracts valued at more than $500,000. Because the federal government does not collect data that precisely quantifies this number, the Signatory Agencies and DOL estimated that about 91.8 percent of workers are employed by firms with annual revenue of more than $500,000 based on data from the Statistics of U.S. Businesses Historical Data (http://www.census.gov/econ/smallbus.html). This 91.8 percent figure was applied to the earlier estimate of the total number of workers performing on federal contracts (868,834) to estimate that the number of workers working for federal contractors or subcontractors with contracts valued at more than $500,000 is 797,590 (91.8 percent of 868,834 is 797,590). However, this estimate of the number of workers working for federal contractors or subcontractors with contracts valued at more than $500,000 may be an overestimate because some contractors and subcontractors with total revenues slightly over $500,000 may not have a single federal contract or subcontract valued at more than $500,000.

[35] To determine the total number of independent contractors subject to the Order, the Signatory Agencies and DOL first utilized data from the U.S. Census Bureau estimating that there were 10.3 million individuals working as independent contractors in 2005, the last year for which

contractors generally work for more than one company, they may receive more than one notice. To account for this, it is assumed that the estimated 57,249 independent contractors will require 236,438 notices (= 57,249 × 4.13 notices).[36]

b. Number of FLSA status notices

If a worker is an employee, the employer has an existing obligation to determine the individual's status as exempt from or subject to the FLSA's overtime requirements. Although the Order will not require contractors and subcontractors to provide their employees with notices informing them that they are exempt from the FLSA's overtime requirements, contractors and subcontractors may nonetheless provide such notices to employees whom they determine to be

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these data are available, which was 7.18 percent of the total U.S. workforce that year of 143.5 million(https://www.census.gov/newsroom/releases/archives/facts_for_features_special_editions/cb10-ff15.html). Next, as noted above, they estimated that the number of workers working for federal contractors and subcontractors with contracts valued at more than $500,000 is 797,590. To estimate the number of independent contractors working for contractors with contracts valued at more than $500,000, they multiplied 797,590 by the percentage of the total workforce that works as independent contractors (approximately 7.18 percent). Therefore, they estimate that there are 57,249 independent contractors that are working for contractors or subcontractors with contracts valued at more than $500,000.

[36] To estimate the total number of independent contractor status notices, the Signatory Agencies and DOL relied on the total number of workers working as independent contractors (10.3 million). Independent contractors receive an IRS Form 1099 (for nonemployee compensation) from each company who pays them more than $600. In 2006, the total number of IRS Form 1099s filed was 85 million, for which over half were estimated to be for transactions other than nonemployee compensation. (http://www.ncsl.org/documents/health/Analysis1099_12111.pdf), p. 2. The Signatory Agencies and DOL estimated that 50% of the 85 million, or 42.5 million forms, were for nonemployee compensation to independent contractors. An independent contractor receives an average of 4.13 (= 42,500,000 / 10,300,000) Form 1099s, indicating work for 4.13 companies on average. Applying this calculation to the 57,249 independent contractors that are esimated to be working for contractors with contracts valued at more than $500,000, those independent contractors work for 236,438 companies. (4.13 × 57,249 = 236,438). This estimate of the average number of companies each independent contractor works for annually was calculated using data from all types of independent contractors in the economy and may therefore be an overestimate with respect to independent contractors working on federal contracts.

exempt from the FLSA's overtime requirements so that the wage statements provided to those employees need not contain a record of hours worked. For purposes of this cost analysis, it is assumed that all contractors and subcontractors with covered contracts will provide notices to their employees whom they determine to be exempt from the FLSA's overtime requirements informing them of their FLSA exempt status; the cost estimate provided here may therefore be an overestimate. The Signatory Agencies and DOL estimate that, of the 797,590 workers working for federal contractors and subcontractors with contracts valued at more than $500,000, there are 342,964 employees exempt from the FLSA's overtime provisions (= 797,590 × 43%)[37] who will be covered by the Order's exempt status notice requirement.

c. Total number of status notices

The Signatory Agencies and DOL estimate a total of 579,402 worker status notices (= 236,438 independent contractor status notices + 342,964 FLSA overtime-exempt employee status notices) will be provided when the Order's paycheck transparency provisions become effective (i.e., in the first year).

3. Cost of implementation of status notices

The key costs of these status notice provisions are as follows: human resources implementation of the status notice requirements; generation of first-time notices to independent

[37] The Signatory Agencies and DOL estimate that the percentage of workers who are exempt from the FLSA's overtime requirements is 43 percent, based on the recently published study by DOL ("The Social and Economic Effects of Wage Violations: Estimates from California and New York," Final Report, December 2014, http://www.dol.gov/asp/evaluation/completed-studies/WageViolationsReportDecember2014.pdf). This study utilized the Current Population Survey (CPS) and the Survey of Income and Program Participation (SIPP) in 2011 to estimate that the percentage of workers who are exempt from the FLSA's overtime provision is 43 percent in California. In the absence of nationwide data, the Signatory Agencies and DOL assume California can be used as a representative proxy.

contractors working on covered contracts as of the effective date of the provision; generation of first-time notices to FLSA exempt employees working on covered contracts as of the effective date of the provision; and generation of subsequent notices after the effective date to independent contractors and FLSA exempt employees newly hired to work on covered contracts, existing independent contractors engaged to work on different covered contracts (the notice to an independent contractor informs him/her of his/her status while working on a specific covered contract), and existing employees working on covered contracts whose duties change such that they become FLSA exempt employees. These tasks will be performed by administrative staff or an equivalent person whose loaded hourly wage (wages plus benefits) equals $25 per hour,[38] or $0.42 per minute (=$25/60).

The implementation cost is a cost accruing to each contractor and subcontractor for a staff person to prepare to complete the status notices by assembling necessary resources and checking workers' files and other materials for special cases and recent status changes. The cost is calculated as the loaded hourly wage of the staff person performing the task multiplied by the time required per worker multiplied by the number of worker status notices. It is assumed that this task will be performed by a junior level HR staff person and will require five minutes *on average per worker status notice*,[39] at a total cost of **$1,216,744** (= $0.42 × 5 minutes × 579,402 worker status notices). Large employers are expected to require less time per worker to complete

[38] The wage for administrative staff was estimated using the mid-point (step 5) of the last General Schedule (GS)-equivalent hourly salary for GS-7, plus overhead/burden at the 36.25% Civilian Position Full Fringe Benefit Cost Factor for 2013 per OMB Memo M-08-13 dated March 11, 2008. GS-7, Step 5 $18.64/hour × 1.3625 = $25.40 burdened hourly rate. That hourly rate was rounded down to the nearest whole dollar, or $25.

[39] The estimate of five minutes is taken as an average amount of time needed per worker; this will take minimal time for most workers, while it is expected to take longer than five minutes for other workers.

this task because they typically employ many workers in well-defined categories. This is especially true of employers operating under collective bargaining agreements that typically establish such categories for all workers covered by such agreements. However, the above implementation cost estimate does not adjust for any cost savings by large employers.

4. Cost of status notices in year one

This is a one-time cost for each contractor and subcontractor to generate and distribute status notices for each independent contractor and each FLSA exempt employee engaged to perform work when the paycheck transparency provision takes effect, plus the cost for each contractor and subcontractor to generate and distribute recurring notices for any newly hired workers, or workers who change status within the first year. The cost to generate notices in the first year is calculated as the loaded hourly wage of the staff person performing the task multiplied by the time needed per status notice multiplied by the number of status notices, plus the cost of supplies multiplied by the number of status notices, plus the recurring cost of status notices for year one (see Section 5 below). It is assumed that this task will be performed by a junior HR staff person and will require an average of three and a half minutes to generate and distribute each status notice. The cost includes one sheet of paper at $0.008 for each notice provided, at a total cost of $**1,727,058** (= ($0.42 × 3.5 minutes × 579,402 status notices) + ($0.008 × 579,402 status notices) + $870,702[40] cost of recurring status notices in the first year).[41]

[40] The methodology for the cost of recurring status notices is explained in the following section.
[41] The time needed per status notice includes half a minute to deliver these notices to workers.

Some employers may realize cost savings by providing the notice electronically.[42] For example, an American Payroll Association (APA) survey of payroll professionals found that payroll departments already provide approximately 30 percent of their wage statements through online posting, and deliver an average of 80 percent of their payroll through direct deposit.[43] Therefore, the Signatory Agencies and DOL note that the cost estimate provided here is likely to be an overestimate.

5. Cost of recurring status notices

There is a recurring cost accruing to each contractor and subcontractor annually after year one in order to generate and distribute status notices to each independent contractor and FLSA exempt employee newly hired to work on covered contracts, existing independent contractors engaged to work on different covered contracts (the notice to an independent contractor informs him/her of his/her status while working on a specific covered contract), and existing employees working on covered contracts whose duties change such that they become FLSA exempt employees. This cost is calculated as the costs of implementation (see Cost of Implementation of Status Notices),[44] plus issuing a notice (see Cost of First Status Notices) multiplied by the estimated worker turnover. Based on a BLS study conducted in 2007, DOL estimates worker

[42] If the contractor or subcontractor regularly provides documents to its workers by electronic means, the notices may be provided electronically if the worker can access it through a computer, device, system, or network provided or made available by the contractor or subcontractor.

[43] American Payroll Association, "2009 Survey of Salaries and the Payroll Profession," pp 45, 47.

[44] The Signatory Agencies and DOL believe that the implementation cost – the cost of getting ready to generate a status notice – will need to be done each year on recurring notices just as it is done for all first notices in year one, due to the fact that there will be new contracts affected each year.

turnover to occur at an annual rate of 42 percent.[45] Therefore, the annual cost of recurring notices is estimated to be **$870,702** (= ($1,216,744 cost of implementation + $856,356[46] cost of generating first notice) × .42).

6. Generation and distribution of wage statements

Each contractor and subcontractor will be required to distribute a wage statement to each worker performing work on covered contracts for whom the contractor or subcontractor is required to maintain wage records under the FLSA, DBA, SCA, or equivalent state laws. These wage statements will provide workers information about their hours worked, overtime hours, pay, and any additions made to or deductions made from their pay.[47] This provision applies to contractors and subcontractors who enter into new contracts on or after the effective date of the Signatory Agencies' rule. The Signatory Agencies estimate that 20,139 contractors and 3,293 subcontractors will be impacted, for a total of 23,432 per year.

The Order provides that the wage statement requirement "shall be deemed to be fulfilled" where a contractor or subcontractor "is complying with State or local requirements that the Secretary of Labor has determined are substantially similar to those required" by the Order. See § 5(a). The DOL's guidance implementing the Order, when final, will therefore include a list of the State and local jurisdictions with wage statement requirements determined by the Secretary of Labor to be substantially similar to the Order's requirement. Providing a worker in one of

[45] .http://www.bls.gov/opub/mlr/2008/05/art2full.pdf, p. 20, Table 1.
This percentage accounts for new hires only, therefore the total percentage that accounts for status changes as well would be higher than 42 percent.
[46] As illustrated on the previous page, the cost of generating the first notice is as follows: ($0.42 × 3.5 minutes × 579,402 status notices) + ($0.008 × 579,402 status notices) = $856,356.
[47] See Order § 5(a).

these States with a wage statement that complies with the requirements of that State would satisfy the Order's wage statement requirement. The DOL's proposed guidance presents two options for determining whether State or local requirements are substantially similar, and seeks comment regarding the two options. For purposes of this cost analysis, the Signatory Agencies and DOL assume that the less inclusive option will be chosen; this would mean that the wage statement requirements of seven states—Alaska, California, Connecticut, Washington, D.C., Hawaii, New York, and Oregon—would be substantially similar to the Order's wage statement requirement for purposes of complying with the Order's requirement. Because the existing practices of contractors and subcontractors in these states are in compliance with the Order's wage statement requirement, the estimate for the number of contractors, subcontractors, and workers impacted by the requirement is reduced.[48] Accordingly, contractors and subcontractors in these states will incur no new burden to comply with the Order's wage statement provision given their existing state law obligations. Therefore, the Signatory Agencies and DOL estimate the affected population of the Order's wage statement requirement to be 18,027 contractors and subcontractors[49] and 613,666 workers[50].

[48] To estimate how many contractors are already under an obligation to comply with substantially similar state laws, the Signatory Agencies and DOL used the number of contractors located in each of the relevant states.

[49] The distribution of contractors by state was used to estimate the percentage of contractors that will incur no new burden, which was estimated to be 23.06% of all contractors and subcontractors. Of 23,432 contractors and subcontractors, 5,405 or 23.06% will incur no new burden. Therefore, in the first year, the number of affected contractors and subcontractors is 18,027 (= 23,432 – 5,405).

[50] As explained in footnote 34, the estimated number of workers on contracts valued at more than $500,000 is 797,590. Given that 23.06% of contractors and subcontractors will incur no new burden, the number of effected workers is estimated to be 613,666 (= 797,590 × .7694).

The anticipated costs of the Order's wage statement provision include the cost of modifying payroll systems to generate the required wage statements and the cost of distributing wage statements.

In calculating the cost of providing wage statements to contractors and subcontractors that do not currently provide them, the Signatory Agencies and DOL assume that: (1) these contractors and subcontractors already calculate deductions and overtime pay (as applicable) and maintain these records, and (2) these contractors and subcontractors already use a licensed software program or payroll processing service to maintain records. The Signatory Agencies and DOL believe that contractors and subcontractors with contracts valued at more than $500,000 are likely to have operations of sufficient magnitude to require some form of a payroll program to maintain records, and that the number of such contractors that are not distributing wage statements electronically and would need to prepare statements by hand each pay period is expected to be very small.

Some contractors and subcontractors that already provide wage statements may need to modify their systems to comply with the wage statement requirement. A cost will accrue to each contractor and subcontractor to update, upgrade or modify the payroll system to generate wage statements consistent with the Order's requirements. The Signatory Agencies assume that a contractor or subcontractor will use a licensed payroll software package or service provider unless it is less expensive to develop or modify a system that is developed in-house.

This assumption is supported by a survey for the American Payroll Association, in which nearly 90 percent of respondents indicated that their organization uses a U.S. service provider (35 percent), a licensed system (47 percent), or a combination of the two systems (8 percent) to

handle payroll processing.[51] The Signatory Agencies also assume that commercially developed payroll processing systems will incorporate these requirements into available products as a part of the regular software upgrades in order to remain competitive. Several of the larger payroll service providers may have already incurred a portion of this cost in order to upgrade their products to comply with California's wage statement requirements.

The Signatory Agencies expect that the cost to upgrade or modify a payroll system will vary by the size of a contractor or subcontractor and that the likely choices of payroll systems range from $100 to $700.

Contractors and subcontractors with fewer than 100 employees who prefer to use an inexpensive software system to manage payroll processing could purchase new software or upgrade to a more advanced software package for $100 to $300.[52] For purposes of this cost analysis, the Signatory Agencies use the average cost of $200 for contractors and subcontractors with fewer than 100 employees.

Larger contractors and subcontractors using service providers generally face proportionally higher costs for payroll services. For example, a contractor or subcontractor with 100 to 499 employees might spend approximately $43,000 per year for a payroll service provider. The cost of service generally increases 3 to 5 percent per year (about $1,300 to $2,000). For purposes of this cost analysis, the Signatory Agencies use the average cost of $1650 for contractors and subcontractors of this size.

[51] American Payroll Association. 2009 Survey of Salaries and the Payroll Profession, p. 100.
[52] For example, according to http://quickbooks.intuit.com, software with payroll processing capabilities starts at $99.95 and increases to $199.95 and $299.95.

These figures may be overestimates because many firms may have software that already offers the required features, even if firms are not currently using them. The Signatory Agencies therefore specifically request public comment on the extent to which firms' existing payroll systems allow for compliance with the Order.

The Signatory Agencies estimated that about 95 percent of all companies with annual revenue over $500,000 employ fewer than 100 employees.[53] The Signatory Agencies applied this percentage to estimate that the average additional cost to contractors and subcontractors to purchase or upgrade their payroll systems will be $273 (= ($200 × 95 percent) + ($1,650 × 5 percent)). Thus, the Signatory Agencies estimate that each year, contractors and subcontractors with new contracts valued at more than $500,000 will incur one-time expenses for purchasing or modifying their payroll systems totaling **$4,921,371** (= $273 × 18,027 contractors and subcontractors).

Distribution of wage statements to workers is a recurring cost for each contractor and subcontractor. The cost to distribute wage statements to workers is calculated as the staff time required to issue wage statements each pay period. The staff time associated with this task is assumed to be negligible considering that distribution of a wage statement each pay period will be almost entirely automated once the payroll system is modified. Nevertheless, the cost associated with wage statement distribution is the cost of supplies multiplied by the number of wage statements, plus the loaded hourly wage of the staff person to deliver the wage statements multiplied by time needed per statement multiplied by the number of wage statements. The

[53] Statistics of U.S. Businesses Historical Data (source: http://www.census.gov/econ/smallbus.html). As stated earlier, using data for all companies with annual revenue over $500,000 is a proxy for companies with one or more contracts in excess of $500,000 and covered by the Order.

Signatory Agencies estimate an average of 39 wage statements per worker, per year[54] will need to be produced at a cost of $0.008 per statement and a junior HR staff person will require an average of half a minute to deliver each wage statement. Therefore, the cost of wage statement distribution peryear is **$5,217,388** (= ($0.008 × 39 wage statements per worker × 613,666 workers) + ($0.42 × 30 seconds × 39 wage statements per worker × 613,666 workers)).

Given the high percentage of employers that already have systems in place to handle payroll processing (discussed above), it is likely that many employers are already providing wage statements to their workers as a part of their customary business practices, and thus the cost for wage statement distribution would not be a new expense for them. The Signatory Agencies' cost estimate does not account for the large percentage of employers that, although maybe not in full compliance with the Order's wage statement requirement, are likely already providing some form of a wage statement to their workers. In addition, the Signatory Agencies' cost estimate does not account for employers that elect to provide the wage statement electronically, and thus incur no paper printing cost. As such, the Signatory Agencies' cost estimate of the wage statement requirement is likely to be an overestimate.

7. Recordkeeping Costs

The Signatory Agencies estimate that 653 subcontractors may need to provide additional required and discretionary information under the disclosure provision.[55] For the recordkeeping

[54] Assuming half of all workers are paid weekly, and half are paid bi-weekly, the average number of payments is 39 per year, meaning an average of 39 wage statements per year (52 weekly payments + 26 bi-weekly payments = 78, 78 / 2 = 39).

[55] As discussed above, this estimate does not include civil judgments and arbitral awards resulting from cases initiated by private parties without the involvement of an enforcement agency. See section B.2 above.

burden, the Signatory Agencies used an estimate of 52 hours annually for a contractor to retain the information disclosed by a subcontractor, which totals 33,956 hours per year (= 653 subcontractors × 52 hours per year). The annual estimate of 33,956 hours accounts for the recordkeeping of additional information that will be provided to contactors by subcontractors as a result of the provision. The estimate assumes that most contractors already have an established system for maintaining records of subcontract award and performance.

To estimate the total annual recordkeeping cost, the Signatory Agencies used a fully-loaded hourly rate equivalent to a GS-12, which is $45. Therefore, the total annual recordkeeping burden is **$1,528,020** (= 33,956 hours × $45 per hour).

This recordkeeping burden does not currently include hours for prospective contractors or prospective subcontractors to retain records of their own labor law violations. These labor law violations are significant enough that it is reasonable to assume that a prudent business would retain such determination or decision documents as a normal business practice. However, contractors and subcontractors may choose to set up internal databases to track violations subject to disclosure in a more readily retrievable manner—particularly firms that are larger and more geographically or organizationally dispersed—and may incur associated one-time setup costs. Public comment and information are sought on the need for and cost of setting up these systems, how such costs depend on contractors' size and organizational structure, and the extent to which setting up such systems would reduce recurring disclosure costs in the following years.

C. Total Quantifiable Costs

The Signatory Agencies estimate below the total costs of the Order's disclosure and paycheck transparency provisions to contractors and subcontractors. The Signatory Agencies also estimated the total government costs.

	Year 1	Year 2 and after
Time to review the Order	$12,990,600	$0
Offeror initial representation	$53,087,227	$53,087,227
Offeror additional info	$168,350	$168,350
Prospective subcontractor initial representation	$16,245,734	$16,245,734
Prospective subcontractor additional info	$96,644	$96,644
Contractor conducts determination	$847,463	$847,463
Contractor determines if update needed	$7,105,039	$7,105,039
Contractor provides updates	$84,499	$84,499
Subcontractors determine if update needed and provide updates	$1,205,337	$1,205,337
Contractor considers subcontractors' updated info	$129,548	$129,548
Status Notice Implementation	$1,216,744	$0
First Status Notices and Recurring Status Notices	$1,727,058	$870,702
Wage Statement Generation	$4,921,371	$4,921,371
Wage Statement Distribution	$5,217,388	$5,217,388
Recordkeeping Costs	$1,528,020	$1,528,020

Total Costs	$106,571,022	$91,507,322
Government Costs	$7,599,811	$7,599,811

D. Cost of Complaint and Dispute Transparency Provision

The Order prohibits contractors and subcontractors with federal contracts exceeding $1 million from requiring employees to arbitrate certain discrimination and harassment claims. Specifically, the Order provides that the decision to arbitrate claims under Title VII of the Civil Rights Act of 1964 and sexual harassment or sexual assault tort claims may only be made with the voluntary consent of the employee or independent contractor after such a dispute arises.

It is presumed that as a result of this provision more workers will seek to litigate such claims in court as opposed to raising them through arbitration. In order to estimate the costs associated with that potential shift, the Signatory Agencies first attempted to ascertain the costs associated with adjudicating claims in litigation and arbitration; the probability of winning an employment related case in arbitration compared to one that is litigated in court; and the difference in payout awards between litigation and arbitration. This information would provide an estimate of the increased cost associated with each covered employment dispute that would now be litigated in court. The Signatory Agencies then attempted to apply that estimate to the number of Title VII and sexual harassment or sexual assault cases that would be litigated as a result of this rule. Although current research was utilized to form a plausible range of the increased costs associated with each litigated case, no studies were found quantifying the potential number of claimants who would elect to litigate their claims in court as opposed to

arbitration as a result of this provision. The Signatory Agencies therefore request additional information and feedback from the public.

In any event, the provision's impact on the federal contracting community is mitigated by the fact that this limitation on arbitration is already applicable to Department of Defense (DOD) contracts valued at over $1 million except for commercial items.[56] DOD is responsible for the majority of federal procurement contracts. The following analysis explains the Signatory Agencies' attempt to ascertain the increased costs associated with additional workers pursuing these claims through court litigation as opposed to arbitration. The prevalence of mandatory arbitration agreements between employers and workers stems from employers' view that arbitration resolves employment disputes more quickly and more cost effectively. Confirming this sentiment, Colvin (2011) analyzed cases reported by the American Arbitration Association and found that the mean time to disposition for an employment arbitration case that resulted in an award was 361.5 days – about half as long as ligation.[57] Supporting that finding, Eisneberg and Hill (2004) found that the mean litigation time in both federal and state court employment discrimination trials exceeds 20 months (709 days in federal court and 818 days in state court).[58] A study by Cohen and Smith (2004) of verdicts from state courts found that among all trials, the average case processing time from filing of the complaint to verdict or judgment was 24.2

[56] Department of Defense Appropriations Act of 2010, Pub. L. No. 111-118, § 8116, 123 Stat. 3409 (2010).
[57] Colvin, Alexander, "An Empirical Study of Employment Arbitration: Case Outcomes and Processes." *Journal of Empirical Legal Studies*, Vol 8, No. 1, pp 1-23, 2011.
[58] Eisenberg, Theodore, and Elizabeth Hill, "Arbitration and Litigation of Employment Claims: An Empirical Comparison." *Dispute Resolution Journal*, Vol. 58, No. 4, pp 44, 2004.

months, with half of the civil trials taking a minimum of 20.2 months to dispose. Contract cases reached a verdict or judgment in an average of 21.5 months.[59]

Because arbitration proceedings may be informal and quicker as compared to litigation in court, they may require less lawyer time and resources. Therefore, the associated cost of arbitration has also been found to be less expensive. According to Howard (1995), the average cost of defending an employment arbitration was $20,000 ($31,068 in 2014 dollars); whereas, the cost of defending an employment case in court through trial was found to be $96,000 ($149,128 in 2014 dollars).[60] And Blasi (2010) found that the median cost of defending an employment discrimination case by private counsel through trial was $150,000 ($164,954 in 2014 dollars).[61]

In arbitration cases where an employee received some amount of monetary damages, Colvin (2011) found that the median amount awarded was $36,500 ($44,247 in 2014 dollars), around 5-10 times less than median awards in court litigation, and the mean award was $109,858 ($133,176 in 2014 dollars). Supporting this estimate, Eisneberg and Hill (2004), who examined employment litigation outcomes, found that the median award of federal employment discrimination trials was $150,500 ($206,894 in 2014 dollars) and the mean award was $336,291 ($462,302 in 2014 dollars). Further, Cohen and Smith (2004) found that employment discrimination trials litigated at state courts had a median award amount of $166,000 ($221,950

[59] Cohen, Thomas H., and Steven K. Smith, "Civil Trial Cases and Verdicts in Large Counties, 2001" U.S. Department of Justice, Office of Justice Programs No. NCJ 202803, 2004.
[60] Howard, William, "Mandatory Arbitration of Employment Discrimination Disputes: Can Justice Be Served?" Arizona State University, 1995.
[61] Blasi, Gary, and Joseph Doherty, "California Employment Discrimination Law and Its Enforcement: The Fair Employment and Housing Act at 50." UCLA-RAND Center for Law and Public Policy, 2010.

in 2014 dollars), with 39.4 percent of final awards being over $250,000 and 14.4 percent over $1 million. Estreicher (2001) examined different studies of employment arbitration cases from 1997 through 2000 and found that median awards through arbitration ranged from $34,733 to $82,100 ($47,748 to $112,864 in 2014 dollars), whereas median awards through court litigation ranged from $125,000 to $289,000 ($171,839 to $397,291 in 2014 dollars).[62] It should be noted that Estreicher (2001) cautioned against comparing cases that are arbitrated with those that go to trial. Specifically, although lower median awards through arbitration may reflect disadvantages that claimants face in arbitration that they would not confront in court, lower awards may also reflect a greater reluctance on the part of claimants to settle marginally weaker claims when a low-cost arbitration option is available. Lower award amounts may also reflect the fact that average claimants enjoy greater access to arbitration.

Studies also suggest that employees win fewer awards in arbitration than in court. Colvin (2011) looked at the number of cases in which employees received an award—even if only partial—and found that employees won a lower percentage of cases in arbitration than in court. This may be due to differences in the types of cases that end up in arbitration vs. court litigation, however, as discussed above. In summary, litigating employment disputes as compared to utilizing arbitration may suggest longer times to reach disposition, more costly proceedings, greater monetary awards, and more verdicts in favor of the employee. Given these findings, the increased number of litigated cases that may result from the Order's Complaint and Dispute Transparency provision suggests that, as compared to arbitration, a higher percentage of claims

[62] Estreicher, Samuel, "Saturns for Rickshaws: The Stakes in the Debate Over Pre-Dispute Employment Arbitration Agreements" *Ohio State Journal on Dispute Resolution*, Vol. 16, No. 559, 2011.

will be resolved in the employee's favor, the average damages awarded will be greater, and additional costs will be incurred.

While the increased costs stemming from litigation's costlier proceedings represent a real economic cost, the potential increase in monetary awards to employees bringing such claims represents a transfer payment. The provision's implied rise in award amounts are monetary payments from one group (employers) to another group (employees) and do not affect the total resources available to society.

Nevertheless, the Signatory Agencies are unable to quantify the provision's overall cost because the potential increase in the number of claimants that would elect to go to trial as a result of this provision is unknown.

Although the Signatory Agencies was not able to quantify the provision's economic costs, the impact of this provision is expected to be limited for two primary reasons. First, the provision's impact on the federal contracting community is limited due to the fact that it is already applicable to federal contracts emanating from the DOD, which is responsible for the majority of federal contracts. And second, the increase in the size of judgments awarded to employees stemming from a shift toward more cases being litigated in court is considered a transfer payment, not affecting the total resources of the economy.

E. Benefits, Transfer Impacts and Accompanying Costs of Disclosing Labor Law Violations

Labor laws are designed to promote safe, healthy, fair, and efficient workplaces. The Order's objective is to increase the government's ability to contract with companies that are compliant with labor laws, thereby increasing the likelihood of timely, predictable, and

satisfactory deliver of goods and services. By making contracting officers aware of previous violations by potential contractors, the Order will help the government identify and work with responsible companies. As former U.S. Supreme Court Justice Louis Brandeis pointed out, "Sunlight is said to be the best of disinfectants."

Contracting officers are already required to assess a contractor's business integrity before awarding a contract—and contractors are required to assess the business integrity of their subcontractors. The Order simply makes clear that breaking labor laws is not consistent with business integrity. Similarly, contractors are already required to disclose when they break the law, but current disclosures do not give a full picture of contractors' labor compliance track records. The Order sets up a process that makes complete information regarding prospective contractors' labor compliance histories available to contracting officers through firms' disclosures; allows this information to be considered in a timely and accurate manner with expert assistance from LCAs; and provides a roadmap for how firms' records of labor compliance can be evaluated in a consistent, efficient manner. The Order will also make more assistance available to contractors with existing labor violations to help them come into compliance. The process established by the Order will allow contracting officers to better ascertain which contractors have a satisfactory record of performance, integrity, and business ethics, thereby increasing the likelihood that responsible offerors will be awarded a contract, and will facilitate compliance by contractors that have had labor violations in the past.

As Archon Fung, Mary Graham and David Weil describe in their 2007 book, *Full Disclosure: The Perils and Promise of Transparency*, disclosure policies are effective in changing behavior when they provide information at a time and in a manner that enables

decision makers to act on the information. [63] The Order's disclosure requirements are carefully tailored to provide contracting officers and contractors with timely information that will help them consider prospective contractors' records of labor compliance when making responsibility determinations. Contracting officers' increased awareness of labor violations will allow them to make better responsibility determinations and is expected to lead to more responsible behavior by contractors and subcontractors.

By encouraging and facilitating responsible behavior by contractors and subcontractors, and by helping the federal government identify and contract with responsible firms, the Order's disclosure requirements are expected to have the following benefits: (1) improved contractor performance; (2) safer workplaces with fewer injuries, illnesses, and fatalities; (3) reduced employment discrimination; and (4) fairer wages, which can lead to less absenteeism, reduced turnover, higher productivity, and better quality workers who produce higher quality goods and services. For these reasons, it is expected that the rule would lead to improved economy and efficiency in government procurement.[64] These effects will be accompanied by a combination of cost increases associated with improving compliance with existing legal obligations contained in the covered Labor Laws (not assessed in other sections of this regulatory impact analysis) and cost savings for contractors and society.

1. Improved contractor performance.

[63] Fung, Archon, Mary Graham, and David Weil, *Full Disclosure: The Perils and Promise of Transparency*, New York: Cambridge University Press, 2007.
[64] The phrase "economy and efficiency" is used here only in the sense implied by the Federal Property and Administrative Services Act.

The disclosure of violations is expected to encourage responsible behavior by contractors, thereby leading to improved performance. Several studies suggest a strong relationship between labor law violations and performance problems. A report by the U.S. Department of Housing and Urban Development's Office of Inspector General (1983) found a "direct correlation between labor law violations and poor quality construction" on HUD projects, and revealed that poor quality work contributed to excessive maintenance costs.[65] Similarly, a Fiscal Policy Institute report (2003), which analyzed a random sample of 30 New York City construction contractors, concluded that a contractor with labor law violations is more than five times as likely to receive a low performance rating than a contractor with no labor law violations.[66] Likewise, a Center for American Progress report (2008) found a correlation between a contractor's record of labor abuse and wasteful practices.[67] Another Center for American Progress report (2013) showed that 7 out of 28 companies with top workplace violations between FY 2005 and FY 2009 eventually had significant performance problems.[68] Because companies with labor law violations are also likely to have performance problems, the disclosure requirements of the Order are expected to lead to better performance in the federal contracting sector by increasing contractors' compliance with the Labor Laws and helping the federal government identify and buy from responsible contractors.

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[65] U.S. Department of Housing and Urban Development, Office of Inspector General, "Audit Report on Monitoring and Enforcing Labor Standards," 1983.
[66] Adler, Moshe, "Prequalification of Contractors: The Importance of Responsible Contracting on Public Works
Projects," Fiscal Policy Institute, May 2003.
[67] Madland, David and Michael Paarlberg, "Making Contracting Work for the United States: Government
Spending Must Lead to Good Jobs," Center for American Progress, December 2008.
[68] Walter, Karla and David Madland, "At Our Expense: Federal Contractors that Harm Workers also Shortchange Taxpayers," Center for American Progress Action Fund, December 2013.

2. Safer workplaces.

By increasing compliance with health and safety laws, the Order's disclosure requirements may improve workplace safety, reducing injuries, illnesses, and fatalities. When employers comply with health and safety requirements and address workplace hazards, they decrease the incidence of workplace injuries and illnesses. This effect is illustrated by numerous studies examining the usefulness of injury and illness prevention programs, finding that such programs are effective in reducing injuries, illnesses, and fatalities; lowering workers' compensation and other costs; and improving morale and communication (Bunn et al. 2001; Huang et al. 2009; Lewchuk, Robb, and Walters 1996; Smitha et al. 2001; Torp, Riise, and Moen 2000; Whiting and Bennett 2003; Yassi 1998).[69]

In addition to the tragic impact workplace injuries, illnesses and deaths have on workers' lives, they also have substantial cost impacts for insurers and employers. According to the Liberty Mutual Research Institute for Safety (2014), the ten most disabling workplace injuries

[69] Bunn, William et al., "Health, Safety, and Productivity in a Manufacturing Environment," *Journal of Occupational and Environmental Medicine*, Vol. 43, No. 1, pp 47-55, January 2001.
Huang, Yueng-Hsiang et al., "Financial Decision Makers' Views on Safety: What SH&E Professionals Should Know," *Professional Safety*, pp 36-42, April 2009.
Lewchuk, Wayne, A. Leslie Robb, and Vivienne Walters, "The Effectiveness of Bill 70 and Joint Health and Safety Committees in Reducing Injuries in the Workplace: The Case of Ontario," *Canadian Public Policy*, Vol. 22, No. 3, pp 225-243, September 1996.
Smitha, Matt et al., "Effect of State Workplace Safety Laws on Occupational Injury Rates," *Journal of Occupational and Environmental Medicine*, Vol. 43, No. 12, pp 1001-1010, December 2001.
Torp, S., T. Riise, and B.E. Moen, "Systematic Health, Environment and Safety Activities: Do They Influence Occupational Environment, Behavior and Health?" *Occupational Medicine*, Vol. 50, No. 5, pp 326-333, July 2000.
Whiting, Meredith and Charles J. Bennett. "Driving Toward '0': Best Practices in Corporate Safety and Health," The Conference Board, November 2003.
Yassi, A., "Utilizing Data Systems to Develop and Monitor Occupational Health Programs in a Large Canadian Hospital," *Methods of Information in Medicine*, Vol. 37, No. 2, pp 125-129, 1998.

and illnesses in 2012 amounted to nearly $60 billion in direct workers' compensation costs.[70] The National Academy of Social Insurance (2014) calculated that the total amount paid for workers' compensation benefits was $61.9 billion in 2012, while employer costs for workers' compensation totaled $83.2 billion in 2012.[71]

Other costs of occupational injuries, illnesses, and deaths can also be substantial. These costs include wages paid to injured workers for absences not covered by workers' compensation; employee training and replacement costs; lost productivity related to new employee learning curves and accommodation of injured employees; and replacement costs of damaged material, machinery and property. A Stanford University study (1981) found that indirect costs can range from 1.1 to 5.1 times the direct costs. [72]

Society as a whole also suffers from workplace injuries and fatalities, in addition to the effects on individual companies and the emotional anguish and financial hardship for family members. A study by Viscusi and Aldy (2003) provided estimates of the monetary value of each life lost.[73] Updating this estimate (to account for inflation) to 2013 dollars yields a value of $9.1

[70] Liberty Mutual Research Institute for Safety, "2014 Liberty Mutual Workplace Safety Index," 2014.
[71] National Academy of Social Insurance, "Workers' Compensation: Benefits, Coverage, and Costs, 2012," August 2014.
[72] Levitt, Raymond E., Henry W. Parker, and Nancy M. Samelson, "Improving Construction Safety Performance: The User's Role," Stanford University, Department of Civil Engineering, Technical Report No. 260, August 1981. Reprinted in summarized form as "Improving Construction Safety Performance: A Construction Industry Cost Effectiveness Project Report," Business Roundtable, Report A-3, New York, NY, January 1982.
[73] Viscusi, W. Kip and Joseph E. Aldy, "The Value of a Statistical Life: A Critical Review of Market Estimates throughout the World," *Journal of Risk and Uncertainty*, Vol. 27, No. 1, pp 5-76, August 2003.

million for each life lost.[74] Multiplying this value by the 4,405 workplace deaths reported by the Bureau of Labor Statistics for 2013,[75] the annual cost of known workplace fatalities is estimated at $40 billion. This estimate does not include the cost of nonfatal injuries or of occupational illnesses like cancer and lung disease. A study by Leigh (2011) estimated that the number of nonfatal occupational injuries was nearly 8,559,000 in 2007. The number of fatalities from diseases was estimated at 53,000 in 2007, while the number of non-fatalities from diseases was nearly 463,000. For fatal and nonfatal occupational injuries and diseases combined, medical costs were $67 billion and indirect costs were almost $183 billion in 2007, totaling approximately $250 billion. According to Leigh, "Workers' compensation covers less than 25 percent of these costs, so all members of society share the burden."[76] The Order may reduce the enormous human and economic costs of labor law violations by increasing the likelihood that the government will select responsible contractors during the procurement process and that more companies will be encouraged to act responsibly.

Reductions in occupational illness and injury, including any brought about by this rule, are accomplished through safer work practices, which can entail costs. Any costs—net of certain offsetting effects, such as reduced workers' compensation payments—will be borne by employers (to the extent such costs reduce profits) or taxpayers (in the event contractor fees were to increase due to costs associated with safer workplaces).

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[74] Viscusi and Aldy (2003) concluded that the value of a statistical life for prime-aged workers had a median value of about $7 million in 2000 dollars. Using the GDP implicit price deflator, this $7 million base number in 2000 dollars yields an estimate of $9.1 million in 2013 dollars ($7 million × 1.3 = $9.1 million).

[75] U.S. Department of Labor, Bureau of Labor Statistics, "National Census of Fatal Occupational Injuries in 2013," News Release, September 11, 2014.

[76] Leigh, J. Paul, "*Economic Burden of Occupational Injury and Illness in the United States,*" *Milbank Quarterly*, Vol. 89, No. 4, pp 728-772, December 2011.

3. Reduced employment discrimination.

The Order's disclosure requirements may also be expected to improve contractors' compliance with anti-discrimination laws, thereby reducing employment discrimination in the federal contracting sector. Employment discrimination harms not only qualified applicants and workers, but companies and the economy by causing an inefficient allocation of resources. Discrimination artificially restricts the pool of available talent, dilutes the critical reward structure that relates compensation to job performance, and adds unnecessary costs. For example, employers may prefer to select certain categories of workers based on bias and end up with less qualified or able employees.

One of the covered Labor Laws, E.O. 11246, requires federal contractors to take steps to ensure that all individuals have an equal opportunity for employment, without regard to race, color, religion, sex, sexual orientation, gender identity, and national origin. Studies have shown that the steps required by E.O. 11246 have had a positive effect on African-American employment, for example (Ashenfelter and Heckman 1976; Goldstein and Smith 1976; Smith and Welch 1984; Leonard 1986).[77] Holzer and Neumark (2000) found that establishments that

[77] Ashenfelter, Orley and James Heckman, "Measuring the Effect of an Anti-discrimination Program," *Evaluating the Labor Market Effects of Social Programs*, Princeton, NJ: Princeton University, Industrial Relation Section, 1976.

Goldstein, Morris and Robert S. Smith, "The Estimated Impact of the Anti-discrimination Program Aimed at Federal Contractors," *Industrial and Labor Relations Review*, Vol. 29, No. 4, pp 524-543, July 1976.

Smith, James and Finis Welch, "Affirmative Action and Labor Markets," *Journal of Labor Economics*, Vol. 2, No. 2, pp 269-301, April 1984.

Leonard, Jonathan, "The Effectiveness of Equal Employment Law and Affirmative Action Regulation," *Research in Labor Economics*, Vol. 8, pp 318-350, 1986.

These studies examined gains in the late 1960s and 1970s. African-American employment gains decelerated substantially in the 1980s, coincident with the declines in funding for federal agencies that enforce employment discrimination laws. Leonard, Jonathan, "The Impact of

take the steps required by E.O. 11246(a) recruit applicants much more extensively and screen them more intensively; (b) are more willing to hire stigmatized applicants; (c) receive more applications from women and minorities; (d) are more likely to provide training to new employees; and (e) are more likely to formally evaluate employees.[78]

The disclosure requirements are also expected to increase compliance with Title VII's prohibitions on employment discrimination, which play a central role in reducing discrimination in the workplace. For example, Kalev and Dobbin (2006) explored the effects of discrimination lawsuits as well as reviews of compliance with E.O. 11246 on the entrance of women and minorities into management positions between 1971 and 2002.[79] The authors found "clear evidence that compliance reviews and Title VII lawsuits have had a significant impact on the careers of women and minorities." By bringing Title VII violations to contracting agencies' attention and encouraging compliance with Title VII, the Order is expected to increase the likelihood that the government will contract with responsible contractors that do not discriminate, resulting in fairer employment practices and greater efficiency throughout the federal contracting sector.

4. Fairer wages.

The Order's disclosure requirements may also be expected to improve compliance with wage laws, such as the FLSA, DBA and SCA, increasing the likelihood that workers will be paid

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Affirmative Action Regulation and Equal Employment Opportunity Law on Black Employment," *Journal of Economic Perspectives,* Vol. 4, No. 4, pp 47-63, Fall 1990.

[78] Holzer, Harry and David Neumark, "What Does Affirmative Action Do?" *Industrial and Labor Relations Review,* Vol. 53, No. 2, pp. 240-271, January 2000.

[79] Kalev, Alexandra and Frank Dobbin, "Enforcement of Civil Rights Law in Private Workplaces: The Effects of Compliance Reviews and Lawsuits Over Time," *Law & Social Inquiry,* Vol. 31, No. 4, pp 855–903, Fall 2006.

the wages they have earned. The Signatory Agencies expect that more fairly compensated workforces may generate several important benefits, including reduced absenteeism, lower turnover, and improved employee morale and productivity. Furthermore, the quality of government services may improve as contractors paying fairer wages attract better quality workers, thereby improving the quality of goods produced by government contractors and improving the experience of citizens who use government services.

Research shows that absenteeism is negatively correlated with wages, meaning that better-paid workers are absent less frequently (Dionne and Dostie 2007; Pfeifer 2010).[80] Pfeifer (2010) finds that a one-percent increase in wages is associated with a reduction in absenteeism of about one percent. According to a study by Fairris, Runstein, Briones, and Goodheart (2005), managers reported that absenteeism decreased following the passage of a living wage ordinance in Los Angeles because employees had more to lose if they did not show up for work, and employees placed greater value on their jobs.[81] It is also clear that reduced absenteeism is associated with higher productivity, as demonstrated in studies by Allen (1983), Mefford (1986), Zhang, Sun, Woodcock, and Anis (2013).[82]

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[80] Dionne, Georges and Benoit Dostie, "New Evidence on the Determinants of Absenteeism Using Linked Employer-Employee Data," Industrial and Labor Relations Review, Vol. 61, No. 1, 2007.

Pfeifer, Christian, "Impact of Wages and Job Levels on Worker Absenteeism," *International Journal of Manpower*, Vol. 31, No. 1, pp 59-72, 2010.

[81] Fairris, David, David Runstein, Carolina Briones, and Jessica Goodheart, "Examining the Evidence: The Impact of the Los Angeles Living Wage Ordinance on Workers and Businesses," LAANE, 2005.

[82] Allen, Steven, "How Much Does Absenteeism Cost?" *Journal of Human Resources*, Vol. 18, No. 3, pp 379-393, 1983.

Mefford, Robert, "The Effects of Unions on Productivity in a Multinational Manufacturing Firm," *Industrial and Labor Relations Review*, Vol. 40, No. 1, pp 105-114, 1986.

Studies have also shown that better paid workforces are also associated with reduced worker turnover (Reich, Hall, and Jacobs 2003; Fairris, Runstein, Briones, and Goodheart 2005; Dube, Lester, and Reich 2013; Brochu and Green 2013).[83] In a study of homecare workers in San Francisco, Howes (2005) found that the turnover rate fell by 57 percent following implementation of a living wage policy. Furthermore, Howes found that a $1.00 per hour raise from an $8.00 hourly wage increased the probability of a new worker remaining with his or her employer for one year by 17 percentage points.[84] In their study of the effects of the living wage in Baltimore, Niedt, Ruiters, Wise, and Schoenberger (1999) found that most workers who received a pay raise expressed an improved attitude toward their job, including greater pride in their work and an intention to stay on the job longer.[85]

Reduced worker turnover is associated with cost savings for employers because recruiting and training new workers is costly. Holzer (1990) finds that high-wage firms can partially offset their higher wage costs through improved productivity and lower hiring and turnover costs. More specifically, Holzer finds that firms with higher wages spend fewer hours

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Zhang, Wei, Huiying Sun, Simon Woodcock, and Aslam Anis, "Valuing Productivity Loss Due to Absenteeism: Firm-level Evidence from a Canadian Linked Employer-Employee Data," Canadian Health Economists' Study Group, The 12th Annual CHESG Meeting, Manitoba, Canada, May 2013.

[83] Reich, Michael, Peter Hall, and Ken Jacobs, "Living Wages and Economic Performance: The San Francisco Airport Model," Institute of Industrial Relations, University of California, Berkeley, March 2003.

Dube, Arindrajit, T. William Lester, and Michael Reich, "Minimum Wage Shocks, Employment Flows and Labor Market Frictions," UC Berkeley Institute for Research on Labor and Employment, Working Paper, July 20, 2013.

Brochu, Pierre and David Green, "The Impact of Minimum Wages on Labor Market Transitions," *The Economic Journal*, Vol. 123, No. 573, pp 1203-1235, December 2013.

[84] Howes, Candace, "Living Wages and Retention of Homecare Workers in San Francisco," *Industrial Relations*, Vol. 44, No. 1, pp 139-163, 2005.

[85] Niedt, Christopher, Greg Ruiters, Dana Wise, and Erica Schoenberger, "The Effect of the Living Wage in Baltimore," Working Paper No. 119, Department of Geography and Environmental Engineering, Johns Hopkins University, 1999.

on informal training, have longer job tenure, more years of previous job experience, higher performance ratings, lower vacancy rates, and greater perceived ease in hiring. [86]

Higher wages can also boost employee morale, thereby leading to increased effort and greater productivity (Akerlof (1982, 1984).[87] In fact, higher productivity can have a positive spillover effect, boosting the productivity of co-workers (Mas and Moretti 2009).[88]

In some cases, coming into compliance with wage laws may allow contractors to attract better quality workers who are able to provide better quality services. For example, a study by Reich, Hall, and Jacobs (2003) found that increased wages paid to workers at the San Francisco airport increased productivity and shortened airport lines. In contrast, a study by Philips, Mangum, Waitzman, and Yeagle (1995) found that nine states' repeals of prevailing wage laws between 1979 and 1988 led to a less-skilled and less-productive construction workforce, as well as a greater frequency of cost overruns.[89]

In addition to the potential absenteeism, turnover, morale and productivity effects discussed above, any increase in wages would itself be an impact attributable to the proposed rule. From a societal perspective, increased wages are not a benefit but a transfer, in this case to

[86] Holzer, Harry, "Wages, Employer Costs, and Employee Performance in the Firm," *Industrial and Labor Relations Review*, Vol. 43, No. 3, pp 147-164, 1990.
[87] Akerlof, George, "Labor Contracts as Partial Gift Exchange," *The Quarterly Journal of Economics*, Vol. 97, No. 4, pp 543-569, 1982.
Akerlof, George, "Gift Exchange and Efficiency-Wage Theory: Four Views," *The American Economic Review*, Vol. 74, No. 2, pp 79-83, 1984.
[88] Mas, Alexandre and Enrico Moretti, "Peers at Work," *American Economic Review*, Vol. 99, No. 1, pp 112-45, 2009.
[89] Philips, Peter, Garth Mangum, Norm Waitzman, and Anne Yeagle, "Losing Ground: Lessons from the Repeal of Nine 'Little Davis-Bacon' Acts," Working Paper, University of Utah Economics Department, February 1995.

workers from employers (if additional wages are paid out of profits) or from taxpayers (if contractor fees increase due to the need to pay higher wages to employees).

5. Enforcement-cost savings and transfer impacts for the government, contractors, and society.

The disclosure of violations may encourage responsible behavior by contractors, thereby potentially reducing the need to spend government resources on enforcement. Reducing violations of Labor Laws is also expected to reduce the amount firms pay in fees, penalties, and awards, which can have a significant impact on their bottom lines; this impact is categorized as a transfer, rather than a cost savings or benefit.

F. Transfer Impacts of the Paycheck Transparency Provision

The Order's paycheck transparency provision would likely lead to transfers of value between members of society due to improved compliance with a variety of federal, state, and local tax and employment laws. This analysis focuses primarily on estimating the transfers associated with reducing the misclassification of employees as independent contractors—one small subset of the likely transfer impacts of paycheck transparency—broken down in terms of (a) federal tax revenues, and (b) minimum wage and overtime premium pay required under the FLSA.

First, because employers have different tax obligations depending on a worker's status as an employee or independent contractor, the determination of whether a worker is an employee or an independent contractor has significant tax implications for the worker; the employer; and federal, state, and local governments. Determining the correct worker classification affects who

is responsible for paying the social security, Medicare, and federal unemployment taxes. In addition, it determines whether federal income tax withholding is necessary.

One major incentive for employers to misclassify workers is to avoid paying employment taxes such as those mentioned above. A report from the Treasury Inspector General for Tax Administration (TIGTA) estimated that an employer can save an average of $3,710 per employee earning an annual income of $43,007 when the employer misclassifies the employee as an independent contractor.[90] A 2009 report by the U.S. Government Accountability Office (GAO) estimated that U.S. employers misclassified 3.4 million workers leading to tax avoidance of $3.53 billion (in 2013 dollars), with an average of $1,038 per misclassified worker.[91]

Second, the FLSA sets national standards for minimum wage and overtime pay, and failure to comply with this law entitles employees to their back wages plus potentially an equal amount in liquidated damages. The DOL's Wage and Hour Division (WHD)'s enforcement data show that, on average during FY 2009-2013, 266,223 employees recovered a total of $156.88 million per year in back wages for FLSA violations.[92] Therefore, assuming that WHD's average recovery is comparable between its minimum wage and overtime cases generally and its misclassification cases specifically,[93] the annual average minimum wage and overtime pay due a

[90] Treasury Inspector General for Tax Administration, "Employers Do Not Always Follow Internal Revenue Service Worker Determination Rulings," www.treasury.gov, June 14, 2014, http://www.treasury.gov/tigta/auditreports/2013reports/201330058fr.pdf. See more at: http://dpeaflcio.org/programs-publications/issue-fact-sheets/misclassification-of-employees-as-independent-contractors/#sthash.NXCMu2wp.dpuf.
[91] U.S. General Accounting Office, "Employee Misclassification: Improved Coordination, Outreach, and Targeting Could Better Ensure Detection and Prevention,", August 10, 2009, http://www.gao.gov/products/GAO-09-717.
[92] Fiscal Year Statistics for WHD, http://www.dol.gov/whd/statistics/#lowwage.
[93]Cases involving misclassification tend also to involve more overtime violations on average than those without misclassification, and the compensation owed to workers tends to be higher.

misclassified worker in FY 2009-2013 under the FLSA would be $589 ($156.88 million recovered ÷ 266,223 employees).

To estimate the transfer impacts of correcting, as a result of the Order's paycheck transparency provision, current misclassification of employees as independent contractors, the Signatory Agencies used the following data and assumptions:

- The number of contractors and subcontractors with covered contracts (i.e., awards of more than $500,000 and covered by the Order) is 117,160, as described above in the analysis of the paycheck transparency provision's costs.

- The total number of workers working for federal contractors and subcontractors with covered contracts is 797,590, as described above in the analysis of the paycheck transparency provision's costs.

- The number of misclassified workers in the United States is 3.4 million (GAO 2009), and thus the percentage of misclassified workers is 33 percent (= 3.4 million ÷ 10.3 million independent contractors).[94]

- The average loss of federal revenue per misclassified worker (including federal income tax, social security and Medicare taxes, and federal unemployment tax) ranges from $1,038 (GAO 2009) to $3,710 (TIGTA 2014).

Another reason why this figure is likely to be an underestimate is that private actions in which the government is not a party are likely to have higher per-worker recoveries than WHD cases.

[94] U.S. Census Bureau, "Profile America Facts for Features," July 7, 2010. https://www.census.gov/newsroom/releases/archives/facts_for_features_special_editions/cb10-ff15.html.

- The annual average back wages recovered for FLSA minimum wage and overtime pay violations is $589 per misclassified employee.

- The tax and wage impacts associated with reclassifying each misclassified employee is the sum of recovered federal revenue ($1,038 to $3,710) and the average back wages recovered for FLSA minimum wage and overtime pay violations ($589), which ranges from $1,627 to $4,299. The Signatory Agencies used the average estimate, $2,963, in calculating the benefit of correcting employee misclassification as a result of the Order's paycheck transparency provision.

- The Signatory Agencies estimate that there are 57,249 independent contractors who are working for contractors and subcontractors with covered contracts, as described above in the analysis of the paycheck transparency provision's costs.

In the Signatory Agencies' judgment, it is very likely that at least 20 percent of the misclassification among workers impacted by the paycheck transparency provision would be corrected; the actual percentage is likely to be much higher. Risk-neutral, profit-seeking employers choose whether to comply with legal requirements—such as existing worker-classification requirements—by comparing the costs of compliance with the cost of noncompliance. The cost of noncompliance is a function of the probability of detection multiplied by the actual costs the employer would face if caught misclassifying workers.[95] By increasing transparency, the Order increases the likelihood that misclassification will be detected

[95] See, e.g., Morris M. Kleiner and David Weil."Evaluating the Effectiveness of National Labor Relations Act Remedies: Analysis and Comparison with Other Workplace Penalty Policies," in *Research Handbook: Economics of Labor Law*, edited by Cynthia L. Estlund and Michael L. Wachter. Massachusetts: Edward Elgar, October 2012.

as a result of the information that disclosure makes available to workers and in turn to the WHD, the Internal Revenue Service, state enforcement agencies, and the private plaintiffs' bar.

As a result of improved transparency, employees and the federal government alike will receive money that would otherwise not be earned or collected due to misclassification.[96] In this analysis, the number of affected workers who are likely misclassified currently is 18,892 (33% × 57,249), and at least 20 percent of 18,892, or 3,778, misclassifications will be corrected. The annual impact of correcting 3,778 cases of misclassification is estimated to be at least $11.19 million ($2,963 × 3,778), an amount that will be transferred from employers (and potentially from taxpayers if increased employers' costs are passed through in the form of higher bids for federal contracts) and will accrue in part to employees and in part to federal revenues..

The quantitative estimates included here depend on the assumptions and data used in the analysis. In particular, studies show that the rate of misclassification could vary. The 2009 GAO study estimated that 15 percent of employers misclassified 3.4 million workers, which is approximately 33 percent of 10.3 million independent contractors.[97] Other studies estimated the percentages of employers who misclassified workers, without estimating the number of workers affected. For example, a 2000 study by Silva, et al. found that between 10 percent and 30 percent of audited employers misclassified workers.[98] Studies by states showed that employers who

[96] Misclassification undermines full compensation for workers' social contributions in the labor market, and misclassification by employers flouting the law results in cross-subsidization of unemployment-insurance and workers'-compensation costs by responsible employers that classify workers correctly. Reducing misclassification reverses these costs.
[97] U.S. Census Bureau, "Profile America Facts for Features," July 7, 2010, https://www.census.gov/newsroom/releases/archives/facts_for_features_special_editions/cb10-ff15.html.
[98] Lalith De Silva, *et al., Independent Contractors: Prevalence and Implications for Unemployment Insurance Programs,* Planmatics, Inc., Prepared for the U.S. Department of

misclassified their workers ranged from 11 percent to 30 percent.[99] Because large employers are more likely to have misclassified workers, the percentage of employers who misclassified workers tends to be lower than the percentage of workers who are misclassified; it is also probable that federal contractors and subcontractors with awards over $500,000 are larger on average than the average employer nationwide. However, it is possible that the true percentage of workers who are misclassified is lower than 33 percent, which would mean that the Signatory Agencies' $11.19 million calculation is an overestimate of the annual impact of correcting misclassifications.

The average loss of federal revenue and the average recovered wage from minimum wage and overtime pay violations were estimated based on data representing all employees in the United States, not just employees of federal contractors and subcontractors with contracts valued at more than $500,000 and covered by the Order. Implicit in the Signatory Agencies' use of this type of data is its assumption that the distribution of average federal revenue losses and back wages owed to employees for federal contractors and subcontractors is comparable to that in the rest of the U.S. economy, and that the average back wages owed to misclassified workers is at least as high as the average back wages owed to workers who face wage violations more generally.

Finally, the most critical factor that determines the size of the transfer estimate is the percentage of misclassifications that will be corrected by the Order's paycheck transparency

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Labor Employment and Training Administration, 2000, http://wdr.doleta.gov/owsdrr/00-5/00-5.pdf.

[99] National Employment Law Project (NELP), "Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries," August 2012, http://www.nelp.org/page/-/Justice/2010/IndependentContractorCosts.pdf?nocdn=1.

provision. For its $11.19 million calculation, the Signatory Agencies estimated that 20 percent of misclassifications will be corrected. As explained, the actual percentage is likely to be much higher than 20 percent, meaning that the $11.19 million figure is likely to be an underestimate of the true annual impact of correcting misclassifications.

G. Non-Quantified Impacts of the Paycheck Transparency Provision

The impacts estimated in the previous section represent only a fraction of the paycheck transparency provision's total effects. Correcting employee misclassification has additional impacts that are more difficult to quantify, such as the increased unemployment benefits that these workers will receive, when appropriate, after they are no longer misclassified. Many employees who are misclassified as independent contractors are denied unemployment benefits as a result of their purported status. Reclassifying these workers as employees will facilitate their receipt of unemployment benefits.

Other difficult-to-quantify benefits, costs and transfer impacts of correcting misclassification are associated with, among other things, increases in state and local tax revenue; increased compliance with workers' compensation premium requirements; increases in workers' coverage by and access to the Family and Medical Leave Act, the Occupational Safety and Health Act, the National Labor Relations Act, the Employee Retirement Income Security Act of 1974, and other statutes under which coverage is determined by employment status; and increased access to employee benefit programs such as retirement and pension programs, to the extent that contractors and subcontractors offer such programs.

The paycheck transparency provision may also have benefits and transfer impacts unrelated to correcting the misclassification of employees as independent contractors, including

but not limited to increased compliance with laws prohibiting employment discrimination as a result of increased transparency in rates of pay, which may promote labor market efficiency, and greater protection of employees from minimum wage and overtime violations among those who have not been misclassified. Worker misclassification and failure to pay appropriate wages are most likely to occur when there is asymmetrical information between employers and workers. The paycheck transparency provision will likely reduce information asymmetries, potentially allowing workers to understand their compensation more clearly, ensure that their pay is calculated correctly, and determine their employment status more easily.

By establishing minimum transparency requirements for all covered contractors and subcontractors, the Order is expected to reduce the likelihood that contractors not currently in compliance with wage and classification requirements can compete unfairly and make it easier for contractors that comply with compensation and classification laws to compete on the merits of their performance. This is especially true in competitive industries with significant labor costs, such as construction and landscaping.

Moreover, greater transparency may allow disputes between employers and workers to be addressed more quickly and efficiently, reducing the need to resort to the legal system or government enforcement to resolve disputes. If it reduces the number and complexity of legal and regulatory disputes, the paycheck transparency provision will reduce socially wasteful legal expenses.

H. Benefits and Transfer Impacts of Complaint and Dispute Transparency Provision

As described above, the Order also prohibits companies with covered federal contracts in excess of $1 million from requiring their workers to enter into predispute arbitration agreements for disputes arising out of Title VII of the Civil Rights Act or from torts related to sexual assault or harassment.[100] This provision builds on a policy already passed by Congress that has been in place at DoD, the largest federal contracting agency, since 2010.[101] This provision of the Order does not prevent employers and workers from voluntarily entering into agreements to arbitrate once a dispute has arisen.

Directing contractors not to require their workers to enter into agreements at the outset of their employment—or, as is often the case, as a condition of employment—giving up their right to go to court when discrimination claims arise is expected to improve contractors' compliance with existing laws prohibiting discrimination. It is also an important step in preserving workers' access to justice in discrimination cases.

While arbitration can provide a relatively low-cost dispute resolution option for employers and workers—and while there are many highly qualified, highly respected arbitrators—forcing workers to go to arbitration deprives them of the transparency, procedural safeguards and appeal rights they are afforded in the civil justice system. Among the rights routinely denied to workers who must sign mandatory-arbitration agreements is the right to join together and bring a class action complaint.[102]

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[100] *See* Section 6 of the Order.
[101] Department of Defense Appropriations Act of 2010, Pub. L. No. 111-118, § 8116, 123 Stat. 3409 (2010); Fed. Reg. Vol. 75, No. 235 (Dec. 8, 2010).
[102] *See, e.g.*, Sternlight, Jean R.,"Creeping Mandatory Arbitration: Is It Just?" *Stan. L. Rev.* Vol. 57, pp 1631, 1648-53, 2005.

Although data are not available for most arbitration cases, which are usually conducted in private, studies have shown that workers' recoveries in arbitration are substantially lower on average than they are in court.[103] This effect appears to be heightened among individuals whose employers require them to arbitrate their claims and whose employers are repeat users of private arbitration services.[104]

The primary net economic benefit to the public that will derive from the Order's mandatory-arbitration prohibition is reduced discrimination as a result of an increased incentive for employers to avoid it. Increased risk of public exposure, class-action suits and higher damages awards provides an incentive for employers to comply with anti-discrimination laws that arbitration cannot match.[105]

As described above, it is generally accepted that discrimination on the basis of race, gender and other prohibited bases results in economic inefficiencies, and reducing such discrimination provides a net economic benefit to the public.[106] The Signatory Agencies have not found sufficient data to quantify the expected reduction in discrimination as a result of the Order's mandatory-arbitration prohibition and request public comment on potential methods and sources of data for reaching such an estimate.

I. Discussion of Regulatory Alternatives

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[103] *See, e.g.*, Colvin, A.J.S.,"An Empirical Study of Employment Arbitration: Case Outcomes and Processes." *Journal of Empirical Legal Studies*, Vol. 8, No. 1, pp1-23, 2011.
[104] *See* Colvin, A.J.S., and Kelly Pike,"The Impact of Case and Arbitrator Characteristics on Employment Arbitration Outcomes." Presented at the Annual Meeting of the National Academy of Arbitrators, Minneapolis, MN, June 2012.
[105] *See, e.g.*, Moohr, Geraldine Szott "Arbitration and the Goals of Employment Discrimination Law." *Wash. & Lee L. Rev.* Vol. 56, pp 395, 420-32, 1999.
[106] See section E.3, above.

While the vast majority of federal contractors play by the rules, every year tens of thousands of American workers are denied overtime wages, not hired or paid fairly because of their gender or age, or have their health and safety put at risk by federal contractors that cut corners. Studies indicate that these violations of core labor protections are also connected with performance problems on federal contracts. The Order and the proposed rule are designed to address this problem, reducing the likelihood that taxpayers will be subject to poor performance on federal contracts and preventing taxpayer dollars from rewarding corporations that break the law. This section presents a series of alternative approaches to this problem. Quantification of cost, benefit and transfer impacts of the various alternatives has not yet been possible, so we invite detailed comment and data that would allow for more thorough estimation at the finalization stage of the rulemaking process.

With regard to prospective contractors' disclosure of labor violations, the following alternatives are discussed:

Disclosure of Violations

1. One alternative to the Order as implemented by the proposed rule would be to require contracting officers to consider prospective contractors' labor compliance records without the assistance of LCAs, and without disclosure by contractors of their labor violations. This alternative would avoid any burden on contractors associated with disclosure. It would also eliminate the hiring of LCAs by contracting agencies. However, the Order and the proposed rule provide for contractor disclosure and for LCAs to assist contracting officers because these tools are deemed necessary in order for contracting officers to effectively consider firms' labor compliance records. Without timely information regarding firms' labor

violations, and without the support and expert advice of LCAs, it would not be feasible to expect contracting officers to consider labor violations in an expeditious way, nor would it be possible to achieve consistency across the government in their consideration of contractors' labor compliance records.

Moreover, even in the absence of disclosure requirements, many contractors may create systems to track their labor violations, in light of the Order's guidance on considering such violations when awarding federal contracts—in order to recognize problems early and be able to take steps to mitigate them. To the extent this would occur, it would limit the burden reduction associated with not requiring contractors to disclose their labor violations.

2. A related alternative would be to remove the requirement that prospective contractors disclose their labor violations while leaving the rest of the Order and proposed rule intact. In some senses, this is an attractive alternative. In an ideal scenario, a contracting agency's LCA would be connected to a database that would provide instant access to all of a prospective contractor's labor violations. However, such a system is not feasible in the near future in light of budget and other constraints. Moreover, even if such a system had efficient access to all information housed within any agency of the government and all publicly available information, it would still not have access to privately conducted arbitration decisions, actions arising from state laws deemed equivalent to federal statutes enumerated in the Order, or all civil judgments. The system of disclosure created under the Order makes information about labor violations available in the near term. OMB, GSA and other federal agencies are working on systems that will improve the availability of relevant data in the longer term.

3. Having determined that disclosure of information by contractors and subcontractors is necessary, however, the disclosure provisions contained in the Order and the proposed rule are designed to limit the burden on them. For example, one alternative to the approach taken in the proposed rule would be to require all contractors for which a responsibility determination is undertaken to provide the following nine categories of information regarding their labor violations:
    - the date that the violation was rendered;
    - the name of the court, arbitrator(s), agency, board, or commission that rendered it;
    - the Labor Law that was violated;
    - the name of the case, arbitration, or proceeding, if applicable;
    - the street address of the worksite where the violation took place (or if the violation took place in multiple worksites, then the address of each worksite);
    - the case number, inspection number, charge number, docket number, or other unique identification number;
    - whether the proceeding was ongoing or closed;
    - whether there was a settlement, compliance, or remediation agreement related to the violation; and
    - the amount(s) of any penalties or fines assessed and any back wages due as a result of the violation.

This approach would make the process of considering labor violations more efficient from the perspective of contracting agencies because more information would immediately be available to LCAs and contracting officers without the necessity of gathering it. However, this list was

narrowed to the following four categories of information in order to reduce the burden on contractors while still providing the minimally necessary information:

- the Labor Law that was violated;
- the case number, inspection number, charge number, docket number, or other unique identification number;
- the date that the determination, judgment, award, or decision was rendered; and
- the name of the court, arbitrator(s), agency, board, or commission that rendered it.

4. Another alternative would be to have all prospective contractors bidding on contracts valued at greater than $500,000—not just those for which a contracting officer undertakes a responsibility determination—disclose the information provided above. This would make the procurement process simpler and more expeditious from the perspective of contracting agencies. However, this alternative would increase the burden on contractors relative to the requirement contained in the proposed rule, and it was determined that the proposed rule's more narrowly tailored requirement would retain its effectiveness while minimizing the burden on contractors. A similar—and yet more burdensome—alternative would be to have all contractors and subcontractors disclose details about their labor violations and any mitigating factors at the time of registration. This alternative was also rejected as unnecessarily burdensome relative to the proposed rule's more narrowly tailored requirement.

Subcontractor Flow-down/Reporting

5. With regard to the Order's and proposed rule's provisions regarding subcontractors, one alternative would be to simply exempt subcontractors from any obligations under the Order and focus only on prime contractors' records of labor compliance. This alternative would

eliminate any burden on subcontractors. It would also reduce the burden on contractors associated with evaluating their prospective subcontractors' labor compliance histories. However, contractors are already required to evaluate their prospective subcontractors' integrity and business ethics, and disregarding subcontractors' labor compliance records in the course of making that determination would undermine the core goals of the Order. A significant portion of the work performed on federal contracts is performed by subcontractors, and ensuring their integrity and business ethics is a crucial part of ensuring that taxpayer's money is spent on firms that will do reliable work for the federal government and not on rewarding corporations that break the law.

6. Similarly, the Order's requirements could be limited to first-tier subcontractors. However, for the same reasons as the previous alternative, this alternative would also undermine the core goals of the Order, given that a significant portion of the work on federal contracts is performed by subcontractors below the first tier.