

SUPPORTING STATEMENT
NONDISPLACEMENT OF QUALIFIED WORKERS UNDER SERVICE CONTRACTS
REGULATIONS, 29 C.F.R. PART 9

A. Justification

1. Circumstances Necessitating Information Collection

On January 30, 2009, President Obama signed Executive Order (E.O.) 13495, “Nondisplacement of Qualified Workers Under Service Contracts.” 74 Fed. Reg. 6103. The E.O. generally requires Federal service contracts and their solicitations to include a clause requiring the successor contractor, and its subcontractors, under a contract that succeeds a contract for performance of the same or similar services at the same location, to offer suitable employment (i.e., positions for which the employees are qualified) on the contract to those predecessor employees whose employment will be terminated as a result of the award of the successor contract. *Id.* The E.O. contains a number of exclusions, including exempting contracts under the simplified acquisition threshold and certain contracts awarded for services produced or provided by persons who are blind or have severe disabilities. The Secretary of Labor is responsible for investigating and obtaining compliance with the E.O.

This ICR seeks renewal/extension.

A. Employment Offers

The employee nondisplacement contract clause specified by section 5 of the E.O. and 29 C.F.R. § 9.12(a) and (b), with certain exceptions, requires the successor contractor and its subcontractors to make good faith employment offers to those employees who performed work on the predecessor contract and whose employment will be terminated as a result of award of the contract or the expiration of the contract under which the employees were hired.

Regulations 29 C.F.R. § 9.12(b) generally requires the contractor, before offering employment on the successor contract to any other person, to make a bona-fide express written or oral offer of employment on the contract to each employee who has performed work during the last thirty days of the predecessor’s contract performance at the same location. Sections 9.12(f)(2)-(3) also require the successor service contractor to maintain for three years copies of certain records that are subject to Office of Management and Budget (OMB) clearance under the Paperwork Reduction Act; including 1) any written offers of employment or a contemporaneous written record of any oral offers of employment, including the date, location, and attendance roster of any employee meeting(s) at which the offers were extended; a summary of each meeting; a copy of any written notice that may have been distributed, and the names of the employees from the predecessor contract to whom

an offer was made; and 2) any record that forms the basis for any exclusion or exemption claimed from the nondisplacement requirements. *See* 44 U.S.C. §§ 3502(3), 3518(c)(1); 5 C.F.R. §§ 1320.3(c), -4(a)(2), -4(c).

B. Certified List of Service Employees

Section 5 of the E.O. requires covered contractors and subcontractors, not less than 10 days before completion of the contract, to furnish the Contracting Officer (CO) a certified list of the names of all service employees working under the contract and its subcontracts during the last month of contract performance. Regulations 29 C.F.R. § 9.11(c) requires the CO to provide the list to the successor contractor and, on request, to employees or their representatives. To implement this requirement, § 9.12(e)(1) the rule provides that the predecessor contractor must submit the list no less than 30 days before contract completion. Regulations §§ 9.12(f)(2)(iii), (f)(3) then require the successor service contractor to maintain copies of the employee list provided to or received from the contracting agency for three years. The DOL already clears this list for determining when vacation benefits accrue under the McNamara-O'Hara Service Contract Act (SCA), 41 U.S.C. § 351 *et seq.* and regulations 29 C.F.R. § 4.6(l)(2) (*see* OMB Control Number 1235-0007); therefore, the DOL mentions the requirement in this Supporting Statement only to ensure reviewers of the regulation understand the burden is addressed. By allowing the list to serve two purposes, the agency has not imposed a duplicative burden. *See* Item 4 of this Supporting Statement.

Section 9.12(e)(2) of the rule requires a predecessor contractor to provide a certified list of the names of all service employees working under that contract (and its subcontracts) during the last month of contract performance to the contracting agency no later than 10 days before completion of the contractor's performance of services on a contract where changes to the workforce have been made after the submission of the certified list described in § 9.12(e)(1). This requirement imposes a minimal additional burden for PRA purposes. The Department anticipates that a large portion of contractors will not make changes to their workforce in the final month of contract performance and will therefore not be required to submit a second certified list; in those cases where the submission of a second list is necessary, the Department anticipates that differences between the two certified lists will usually be minimal.

C. Complaints

Section 6 of the E.O gives enforcement responsibility for the requirements of the Order, including investigating and obtaining compliance, to the Secretary of Labor. 74 Fed. Reg. 6105. Regulations 29 C.F.R § 9.21 provides a predecessor employee or a representative who believes that the successor contractor has violated the requirements of the Order the opportunity to file a complaint with the Wage and Hour Division of the Department of Labor within 120 days of the alleged violation. The

complainant may file the complaint directly with the Branch of Government Contracts Enforcement of the DOL's Wage and Hour Division (WHD). Regulations 29 C.F.R. § 9.12(f) requires every contractor who makes retroactive payment of wages or compensation after a complaint investigation pursuant to § 9.24(b) of this part, to record and preserve the amount of such payment to each employee on a receipt form provided by or authorized by the Wage and Hour Division, deliver a copy to the employee, and file the original with the Administrator or an authorized representative within 10 days after payment is made.

2. Use

Employees will use the job offers to decide whether to accept a position with the new contractor. The WHD will use the records identified in these information collections to determine compliance with the E.O. and the regulations. Any information provided in support of a complaint will be used to determine whether the WHD should initiate a compliance action. The list of employees on the contract will allow the government and the new contractor to know which employees may be entitled to a job offer under the E.O.

3. Technology

Section § 9.12(f)(1) of the rule specifies that there is no particular order or form of records prescribed by the regulations. A contractor may meet the requirements of this rule using paper or electronic means, provided the required information is maintained and adequate facilities are available for inspection and copying and transcription of the records. *Id.*

4. Minimizing Duplication

Section § 9.12(e) of the rule requires incumbent contractors to furnish the contracting agency with a certified list of the names of all service employees working under the predecessor contract and its subcontracts during the last month of contract performance. The existing contract clause specified at 29 C.F.R. §§ 4.6(l) and 4.173 and repeated in the Federal Acquisition Regulation at 52.222-41(n), applicable to contracts subject to the SCA already provides for the transfer of a vacation benefit seniority list of anniversary dates of employment of all predecessor service employees to the successor contractor through the contracting agency. The OMB approves the corresponding SCA information collection under Control Number 1235-0007. Contract clause paragraph (c) in section 5 of the E.O. specifically requires the same list to meet the nondisplacement requirements. The nondisplacement requirements apply to a subset of all SCA contractors, and regulations 29 C.F.R. § 9.12(e) allows contractors to use the same list to meet the requirements of both regulations; therefore, the SCA vacation benefit seniority list will satisfy the certified list of service employee requirement under the E.O. In the event that a contractor experiences a change in workforce between 30 and 10 days prior to completion of the contract, he will have to submit a revised list, the associated burdens for which are included below.

5. Minimizing Small Entity Burden

The job offer requirements in the nondisplacement regulations follow a common business practice. E.O. 13495; 29 C.F.R. § 9.1(a). In order to minimize burden, § 9.12(f)(1) specifies that the nondisplacement regulations prescribe no particular order or form of records and that contractors may use records developed for any purpose to meet nondisplacement requirements, provided the records otherwise meet the regulatory requirements and are fully accessible. In addition, § 9.12(e) specifically allows contractors to use the SCA vacation benefit seniority list required by 29 C.F.R. § 4.6(l)(2) to satisfy the certified list of service employees requirement under the E.O. The DOL has determined that the information collections will not have a significant economic impact on a substantial number of small entities.

6. Consequence of Failing to Collect and Obstacles to Reducing Burden

The E.O. requires the third-party disclosures and the seniority list. Moreover, determining compliance with the E.O. and the regulations would be extremely difficult, if not impossible, were the DOL not to require the records specified in the rule. Complainants would have no means of seeking redress of alleged violations, were the DOL not to sponsor a method of filing complaints.

7. Special Circumstances

There are no special circumstances associated with the conduct of these information collections.

8. Public Comments

A 60-day notice to renew the information collections that are part of this ICR was published in the Federal Register on April 24, 2017. *See* 82 Fed. Reg. 18935. No comments were received on this notice.

9. Payment or Gifts to Respondents

The DOL offers no payments or gifts to respondents.

10. Assurances of Confidentiality

The DOL makes no assurances of confidentiality to respondents.

11. Sensitive Questions

The DOL does not request sensitive information in these information collections.

12. Estimated Annual Respondent Burden Hours

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According to the Federal Procurement Data System's (FPDS) 2007 Federal Procurement Report, the most recent available (see <https://www.fpds.gov/fpdsng/cms/index.php/en/reports.html>), slightly less than 115,000 (114,039) Federal government contract actions were subject to the SCA during that reporting period. The DOL assumes that about 23,000 contract actions per year (about 20 percent of all SCA covered contract actions in 2007) would be successor contracts subject to the nondisplacement provisions. Subcontracts are not reported in the FPDS, and the DOL has not found a reliable source on which to estimate the number of subcontracts per SCA prime contract. Based on consultations with Federal procurement officials when the Nondisplacement rule was promulgated, the DOL assumes that a typical SCA contract has one prime contractor and three subcontractors; therefore, the DOL estimates the information collection requirements of part 9 would apply to approximately 92,000 contracts. 23,000 covered contract actions x 4 contractors = 92,000 contracts.

Further review of FPDS data suggests that, while about 115,000 contractors performed work on Federal service contracts in fiscal year (FY) 2007, only 44,749 contractors performed work on service contracts in excess of \$25,000. See David Berteau, et al., Structure and Dynamics of the U.S. Federal Professional Services Industrial Base 1995–2007, Center for Strategic and International Studies, February 2009, at 26, http://www.csis.org/media/csis/pubs/090212_fps_report_2009.pdf. Because a lesser number of contractors would perform work on contracts subject to the nondisplacement requirements, the DOL estimates each year about 40,000 contractors and subcontractors will be subject to these information collections.

A. Express Offers of Employment

Based on agency enforcement experience under the SCA, the DOL estimates that each service contract involves an average of approximately 15 employees. Typically, employers would make oral offers of employment at all-employee meetings where the employer need only make notations on a copy of the employee roster of the offer of employment. Otherwise, the employer would likely make offers of employment individually by mail or electronic means. Beyond making the offer of employment, the employer would also be responsible for maintaining copies of any written offers of employment, or contemporaneous written records of any oral offers of employment, and copies of any records that formed the basis for any exclusion or exemption claimed under the Final Rule. As job offers will typically be made in a bulk fashion, the DOL estimates it would take an employer an average of approximately one and one-half minutes per employee to make an offer, whether oral or written, and another 1/2 minute to file the associated paperwork for each employee, including any paperwork forming the basis for any exclusion or exemption from the obligation to offer employment to a particular employee. Therefore, the DOL estimates an annual disclosure and recordkeeping burden of 30 minutes per contract for a total annual burden of 46,000 hours. 92,000 contracts x 15 third-party disclosures x 2 minutes = 46,000 hours.

B. Certified List

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The information collection requirement for contractors specified in proposed §9.12(e)(1)—the certified list of employees provided 30 days before contract completion—is cleared under the SCA regulation, 29 CFR 4.6(1)(2), OMB control number 1235-0007, which requires a certified list be provided no later than 10 days before contract completion, and that burden is not duplicated in these estimates. However, contractors experiencing a change in their workforce between the 30 and 10 day periods will have to submit an additional list. Since a certified list would have already been compiled 30 days before completion of the contract, the list produced 10 days before contract completion would only require updating the initial list, if necessary. Therefore, the Department estimates the additional burden to be minimal.

For the purpose of estimating burden associated with this requirement, the Department estimates that approximately 50% of contracts will experience a change in workforce between 30 and 10 days of completion of the contract, requiring an updated list. The Department recognizes that the actual number of contractors having to produce two lists is likely to be less, but uses 50% as an upper bound estimate. The Department estimates it would take a predecessor contractor an average of approximately one minute to update the employment status of each employee on a certified list. Therefore, the Department estimates the total burden for creating an updated certified list to be 11,500 hours (92,000 contracts x 0.5 (50 percent of contracts) x 15 employees x 1 minute).

C. Complaints

Based on enforcement data of actual complaints received last year as of January 2017, the Department estimates that it will receive 10 complaints per year.

The DOL estimates that each complaint filing will take about 20 minutes; therefore, the DOL estimates the total burden for filing complaints to be about 6 hours. 10 responses x 20 minutes = 3 hours (rounded).

The Department acknowledges that for each complaint that is not settled, and therefore subject to unpaid wages and other relief, § 9.12(f)(2)(iv) imposes a recordkeeping requirement for the contractor to preserve a report of such payment to each employee on a receipt form provided by the Wage and Hour Division, deliver a copy to the employee, and file the original with the Administrator or an authorized representative within 10 days after payment is made. The Department estimates that approximately 20 percent of all complaints will result in payment of back wages and/or restitution, and it will take approximately one minute to record. The Department therefore estimates the total burden to contractors for keeping a record of retroactive payments to be about 3 minutes. (10 complaints x .20 x 1 minute).

Burden Summary

Activity	Respondents	Annual Responses per Respondent	Total Annual Responses	Time per Response (Hours)	Total Annual Burden Hours
Employment Offer	40,000	34.5	1,380,000	0.033333	46,000
Certified List	20,000	34.5	690,000	0.016667	11,500
Complaints	10	1	10	0.33333	3
<i>Unduplicated Totals</i>	<i>40,010</i>	<i>NA</i>	<i>2,070,010</i>	<i>Ns</i>	<i>57,503</i>

Absent specific wage data regarding the respondents, the DOL has used the April 2017 annual average hourly earnings of \$31.49 for professional and business services industry employees and increased it by 40 percent to account for fringe benefits (a total of \$44.09 per hour) in order to estimate respondent costs. See *The Employment Situation: June 2017*, at 33, Table B-3, Bureau of Labor Statistics, (https://www.bls.gov/news.release/archives/empsit_07072017.pdf, uploaded as a supplementary document. Estimated total annual costs for the value of respondents' time are \$2,535,307.27. (\$44.09 x 57,503 hours = \$2,535,307).

13. Estimated Annual Respondent Capital/Start-Up/Operation/Maintenance Costs

The DOL associates no respondent costs with the subject information collections, other than the value of time.

14. Estimated Annual Federal Costs

The WHD accepts complaints from predecessor employees or their authorized representatives within 120 days of the alleged violation. Within 14 days of being contacted by the WHD, the CO shall forward all information to the WHD. 29 C.F.R. § 9.11(d). The Federal costs associated with this requirement include the time it takes to gather the documents related to the complaint and to photocopy them for both the complainant and the contractor and the reproduction and mailing cost to forward the copies. Federal costs will also include the cost for the WHD to review the complaint to determine what further action might be appropriate.

The DOL estimates the WHD will receive 10 nondisplacement complaints per year. The DOL has used the 2017 Rest of United States salary table to estimate salary expenses for the contracting agency to compile the complaint documents and to photocopy them. .

GS-13 Step 4 to review complaint at the WHD and determine whether to schedule compliance action.

10 complaints x 10 minutes review time =	2 hours (rounded)
2 hours x \$45.23 =	\$90.00 (rounded)

GS-11 Step 4 to compile and review the complaint and supplemental documents for forwarding:

10 complaints x 20 minutes =	3 hours (rounded)
3 hours x \$31.73 =	\$95 (rounded)

GS-3 Step 4 to photocopy & assemble complaint documents:

10 complaints x 10 minutes =	2 hours (rounded)
2 hours x \$13.78 =	\$28 (rounded)

Printing costs

10 complaints x 4 pages x 3 copies x \$0.05 per page =	\$6
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Postage:

10 complaints x 3 mailings (DOL, contractor, and complainant) x \$0.52 (\$0.49 each + \$0.03 per envelope) =	\$16 (rounded)
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TOTAL ANNUAL FEDERAL COST =	\$235
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15. Reasons for Program Changes or Adjustments Affecting Public Burdens

The total annual federal cost in this ICR decreased slightly to account for the decrease in the actual number of complaints received. Based on enforcement data of actual complaints received since the effective date of the regulation in January 2017, the Department now estimates that it will receive 10 complaints per year.

16. Publishing Data From Information Collection

The DOL will not publish the results of these information collections.

17. Display of OMB Approval Expiration

The DOL does not seek an exception to the requirement to display the expiration date for OMB approval of these information collections.

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18. Exceptions to Certification Statement

The DOL is not requesting an exception to any of the certification requirements for these information collections. This request complies with 5 C.F.R. § 1320.9.

B. Employing Statistical Methods:

Not applicable.