

Title: Employment Information Form
OMB Control Number 1235-0021
OMB Expiration Date: November 30, 2024

SUPPORTING STATEMENT FOR EMPLOYMENT INFORMATION FORM

OMB CONTROL NO. 1235-0021 (Forms WH-3 and WH-3 Sp)

On November 18, 2021, President Biden signed Executive Order (E.O.) 14055, “Nondisplacement of Qualified Workers Under Service Contracts.” 86 FR 66397. The E.O. generally requires Federal service contracts, subcontracts, 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. According to section 8 of the order, the Secretary of Labor is responsible for investigating and obtaining compliance with the E.O.

The Department published a proposed rule on July 15, 2022 (87 FR 42552) and submitted this collection to add the burden associated with the rulemaking. On August 18, 2022, OMB issued a Notice of Action (NOA) continuing the collection and directed that the Department should resubmit the Information Collection Request (ICR) with the final rule and address any comments received. This ICR is being submitted for revision to add the burdens from new 29 CFR part 9 to the information collection and to add the reference to the new part 9.

A. Justification

1.Explain the circumstances that make the collection of information necessary. Identify any legal or administrative requirements that necessitate the collection.

This information collection provides a method for WHD to obtain information from complainants regarding alleged violations of the labor standards the agency administers and enforces. The law of most general application regarding wages and hours of work is the Fair Labor Standards Act (FLSA), 29 U.S.C. 201 *et. seq.* FLSA section 11(a) provides that the Secretary of Labor may investigate and gather data regarding the wages, hours, or other conditions and practices of employment in any industry subject to the FLSA, and may enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices, or matters deemed necessary or appropriate to determine whether any person has violated any provision of the FLSA. 29 U.S.C. 211(a).

Other Federal laws WHD administers provide similar authority. These Acts include the Walsh-Healey Public Contracts Act (41 U.S.C. 38); McNamara-O’Hara Service Contract Act (41 U.S.C. 353(a)); Davis-Bacon Act (40 U.S.C. 3141 *et seq.*, pursuant to Reorganization Plan No. 14 of 1950, and Related Acts); Consumer Credit Protection Act (15 U.S.C. 1676); Migrant and Seasonal Agricultural Worker Protection Act (29 U.S.C. 1862(a)); Employee Polygraph Protection Act (29 U.S.C. 2004(a)(3)); Family and Medical Leave Act (29 U.S.C. 2616(a)); Immigration and Nationality Act H-2A program (8 U.S.C. 1188(g)); the Immigration and Nationality Act H-2B program (8 U.S.C. 1184(c)(14)(B) and the Immigration and Nationality Act

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H-1C program (8 U.S.C. 1182(m)(2)(E)(ii)). The regulatory provisions authorizing the filing of complaints under these laws and how the agency acts upon the concerns can be found at 29 CFR 4.191, 5.6, 10.41, 500.1(e), 501.1(c), 501.5, 801.7(a)(3), 825.401; 41 CFR 50-201.1202; and 20 CFR 655.1200(b). The Department also takes complaints and enforces regulations promulgated in relation to Executive Order 13658, Establishing a Minimum Wage for Federal Contractors (see 29 CFR part 10) and Executive Order 13706, Establishing Paid Sick Leave for Federal Contractors (see 29 CFR part 13). The Department also takes complaints and enforces regulations promulgated in relation to Executive Order 14026 “Increasing the Minimum Wage for Federal Contractors.” (See 29 CFR part 23).

On November 18, 2021, President Biden signed Executive Order (E.O.) 14055, “Nondisplacement of Qualified Workers Under Service Contracts.” 86 FR 66397. The E.O. generally requires Federal service contracts, subcontracts, 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. According to section 8 of the order, the Secretary of Labor is responsible for investigating and obtaining compliance with the E.O. Section 9.21 of the final rule associated with this revision states any employee or authorized representative of the predecessor contractor who believes the successor contractor has violated the E.O. may file a complaint with WHD within 120 days from the first date of contract performance.

The Department takes complaints as part of conducting an administrative action or investigation specific to individuals or entities as part of its enforcement mission with respect to the laws cited. Such actions meet the Paperwork Reduction Act (PRA) exemption found in 5 CFR 1320.4. However, the Department submits this collection in response to circumstances similar to Hurricane Katrina, when cell phone service and computer connections were disrupted. A paper WH-3 form allows the agency to perform its mission without respect to power outages and/or disruptions in a particular part of the United States.

2. Indicate how, by whom, how frequently, and for what purpose the information is to be used. For revisions, extensions, and reinstatements of a currently approved collection, indicate the actual use the agency has made of the information received from the current collection.

WHD staff use Form WH-3 as a guide for obtaining optional information from complainants (e.g., current and former employees, unions, and competitor employers) about alleged employer violations of the labor standards provisions of the above-cited Acts. Complainants generally provide the optional information requested on the form to WHD staff over the telephone or in-person. Where the information provided does not support a potential WHD enforcement action, complainants are advised and referred to the appropriate agency, if any, for further assistance. When WHD schedules a complaint-based investigation, the agency makes the completed Form WH-3 part of the investigation case file. The form is printed in both English and Spanish.

3. Describe whether, and to what extent, the collection of information involves the use of automated, electronic, mechanical, or other technological collection techniques or

other forms of information technology, e.g., permitting electronic submission of responses, and the basis for the decision for adopting this means of collection. Also describe any consideration of using information technology to reduce burden.

The Department has considered developing an automated complaint system or making Form WH-3 available on the Internet and has determined it would have a negative effect on the ability of WHD to provide quality, timely service to potential complainants and would be impractical to implement. The ability to screen complaints during the intake process is critical to effectively meeting the potential complainants' needs. Experience shows that well over half of the potential complainants contacting WHD complain of problems that WHD cannot resolve for a variety of reasons. These reasons include lack of a Federal Wage Hour law covering the complaint, an employer not covered by Federal Wage Hour laws, an employee exempt from otherwise applicable Wage Hour law provisions, violation(s) past the statute of limitations for WHD action, or because the issues involved are better serviced by another Federal or state agency.

Making the Form WH-3 available on the Internet and allowing submission of forms completed without WHD consultation would generate tens of thousands of complaints filed in the erroneous belief that WHD can help with a problem outside of WHD jurisdiction. These non-actionable complaints would require extensive WHD follow-up to secure additional information, or notification of complainants that they should have contacted another Federal or State agency, or that WHD is otherwise unable to assist them with the stated problem. These individuals are better and more timely served through an initial, personal (by phone or in-person) consultation with WHD. Potential complainants are encouraged to call WHD using a toll-free number, to visit the nearest WHD office, or to consult virtually all WHD compliance assistance materials, website programs, and guides.

Implementation of an automated complaint system using the Form WH-3 would be impractical given available technology and agency resources. An automated system would greatly decrease the quality of customer service provided to potential complainants while increasing the burden on the public (i.e., providing information when the WHD can provide no assistance).

4. Describe efforts to identify duplication. Show specifically why any similar information already available cannot be used or modified for use for the purpose(s) described in Item 2 above.

This information collection does not duplicate existing WHD requirements. No similar information is available from any other source since WHD has enforcement authority over the various labor standards laws previously identified. A separate statutorily mandated information collection, OMB Control No. 1205-0310, covers the filing of complaints under the H-1B program of the Immigration and Nationality Act, and this information collection does not duplicate that data.

5. If the collection of information has a significant impact on a substantial number of small businesses or other small entities describe the methods used to minimize burden.

While this information collection does not have a significant economic impact on a substantial number of small entities, it infrequently involves small businesses, as in the case of competitor complaints. Form WH-3 provides an easy way for WHD to obtain the information necessary to

determine whether it is likely that a violation of the law has occurred and to schedule an investigation.

6. Describe the consequence to Federal program or policy activities if the collection is not conducted or is conducted less frequently, as well as any technical or legal obstacles to reducing burden.

Respondents are asked to provide information relevant to this information collection only when they seek WHD assistance in addressing one or more alleged violation(s) of labor standards. Consequently, there is no way to request the information less frequently and still collect it. Complaints provide the basis for the overwhelming majority of WHD compliance actions, and the agency would lose an efficient and reliable tool for assessing violations were there no means to obtain information from complainants.

7. Explain any special circumstances that would cause an information collection to be conducted in a manner:

- **Requiring respondents to report information to the agency more often than quarterly;**
- **Requiring respondents to prepare a written response to a collection of information in fewer than 30 days after receipt of it;**
- **Requiring respondents to submit more than an original and two copies of any document;**
- **Requiring respondents to retain records, other than health, medical, government contract, grant-in-aid, or tax records, for more than three years;**
- **In connection with a statistical survey, that is not designed to produce valid and reliable results that can be generalized to the universe of study;**
- **Requiring the use of a statistical data classification that has not been reviewed and approved by OMB;**
- **That includes a pledge of confidentiality that is not supported by authority established in statute or regulation, that is not supported by disclosure and data security policies that are consistent with the pledge, or which unnecessarily impedes sharing of data with other agencies for compatible confidential use; or**
- **Requiring respondents to submit proprietary trade secrets, or other confidential information unless the agency can demonstrate that it has instituted procedures to protect the information's confidentiality to the extent permitted by law.**

There are no special circumstances involved in this information collection with respect to the Employment Information Form, WH-3.

8. If applicable, provide a copy and identify the date and page number of publication in the Federal Register of the agency's notice, required by 5 CFR 1320.8(d), soliciting comments on the information collection prior to submission to OMB. Summarize public comments received in response to that notice and describe actions taken by the agency in response to these comments. Specifically address comments received on cost and hour burden.

Describe efforts to consult with persons outside the agency to obtain their views on the availability of data, frequency of collection, the clarity of instructions and

record-keeping, disclosure, or reporting format (of any), and on the data elements to be recorded, disclosed, or reported.

Consultation with representatives of those from whom information is to be obtained or those who must compile records should occur at least once every 3 years – even if the collection of information activity is the same as in prior periods. There may be circumstances that may preclude consultation in a specific situation. These circumstances should be explained.

As part of the NPRM implementing Executive Order 14055, the Department published in the Federal Register a 60-day notice to invite public comments about the NPRM and its associated information collection requirements. The NPRM concurrently sought comments about the rulemaking's effect on information collections and invited comments to both the OMB and the Department. Few comments were received related to complaints under § 9.21. One commenter, the Coalition, indicated support for the proposed enforcement provisions in the NPRM. Another commenter, the National Air Traffic Controllers Association (NATCA), commented that the NPRM did not account for employees of a predecessor contractor who are represented by a union and covered by a collective bargaining agreement that contains grievance and arbitration provisions. Specifically, NATCA requested that the Department amend § 9.21 to include a new provision that would allow an employee of a predecessor contractor who was covered by a collective bargaining agreement and who was not offered employment by the successor contractor pursuant to § 9.12(c)(3) to raise the matter pursuant to the complaint process under § 9.21(a) or under the predecessor contractor's collective bargaining agreement's negotiated alternative dispute resolution procedure.

There is no indication in the Executive order of an intent to require an extension of a predecessor contractor's grievance arbitration procedures to a successor contractor in the event that an employee of a predecessor contractor is not offered employment by the successor contractor for "just cause" pursuant to § 9.12(c)(3). In addition, the Department finds that the enforcement procedures outlined in subpart C provide sufficient, effective, and consistent means of enforcing the requirements of Executive Order 14055, including for those employees covered by collective bargaining agreements. Thus, with respect to the NATCA's suggestion to add text allowing employees to use a predecessor contractor's alternative dispute resolution procedure in lieu of the enforcement procedures in subpart C, the Department finds no authority within the text of the Executive order and will not incorporate the additional text into the final rule.

After review of the comments, the final rule adopts § 9.21 as proposed.

No comments were received related to the Department's estimate about the number of potential new complaints or the estimated time burden to process a complaint.

9.Explain any decision to provide any payment or gift to respondents, other than remuneration of contractors or grantees.

The Department offers no payments or gifts to respondents.

10.Describe any assurance of confidentiality provided to respondents and the basis for the assurance in statute, regulation, or agency policy.

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The Department gives an assurance of confidentiality on the form, which provides that the agency will keep the respondent's identity confidential to the maximum extent possible under existing law. Information gathered during the course of an investigation of a complaint is disclosed only in accordance with the provisions of the Freedom of Information Act (FOIA), 5 U.S.C. 552; the Privacy Act, 5 U.S.C. 552a; and attendant regulations, 29 CFR parts 70 and 71. The FOIA provides an exemption from its disclosure requirements for records or information compiled for law enforcement purposes to the extent that release of the information could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution that furnished information on a confidential basis. 5 U.S.C. 552(b)(7)(D).

11. Provide additional justification for any questions of a sensitive nature, such as sexual behavior and attitudes, religious beliefs, and other matters that are commonly considered private. This justification should include the reasons why the agency considers the questions necessary, the specific uses to be made of the information, the explanation to be given to persons from whom the information is requested, and any steps to be taken to obtain their consent.

These information collections ask no sensitive questions.

12. Provide estimates of hour burden of the collection. The statement should:

Indicate the number of respondents, frequency of response, annual hour burden, and an explanation of how the burden was estimated. Unless directed to do so, agencies should not conduct special surveys to obtain information on which to base hour burden estimates. Consultation with a sample (fewer than 10) of potential respondents is desirable. If the hour burden on respondents is expected to vary widely because of differences in activity, size, or complexity, show the range of estimated hour burden, and explain the reasons for the variance. Generally, estimates should not include burden hours for customary and usual business practices.

If this request for approval covers more than one form, provide separate hour burden estimates for each form and aggregate the hour burdens in Item 13.

The WHD received 27,000 complaints in FY22 via the WH-3 form.

As a consequence of this final rule, the Department estimates that WHD may receive an additional 10 complaints per year via the WH-3 form. This figure comes directly from actual data associated with previous similar E.O. 13495.

27,000 currently approved complaints + 10 estimated new complaints from final rule = 27,010 Respondents.

Each respondent files a complaint one time for 27,010 responses.

The estimated time for filing a complaint with WHD is 20 minutes.

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$27,010 \times 20 \text{ minutes} \div 60 \text{ minutes per hour} = 540,200 \text{ minutes.}$

$540,200 \text{ minutes} / 60 \text{ min. per hour} = 9,003 \text{ burden hours}$

Of this amount, the 10 new complaints would add approximately 3 hours of additional burden (10 complaints \times 20 minutes \div 60 minutes per hour = 3 burden hours (rounded)).

This is the new burden associated with the final rule.

Total Respondents and Responses: 27,010

Total burden hours: 9,003

13. Provide an estimate for the total annual cost burden to respondents or record-keepers resulting from the collection of information (Do not include the cost of any hour burden shown in Items 12 and 14).

- **The cost estimate should be split into two components: (a) a total capital and start-up cost component (annualized over its expected useful life) and (b) a total operation and maintenance and purchase of services component. The estimates should take into account costs associated with generating, maintaining, and disclosing or providing the information. Include descriptions of methods used to estimate major cost factors including system and technology acquisition, expected useful life of capital equipment, the discount rate(s), and the time period over which costs will be incurred. Capital and start-up costs include, among other items, preparations for collecting information such as purchasing computers and software; monitoring, sampling, drilling and testing equipment; and record storage facilities.**
- **If cost estimates are expected to vary widely, agencies should present ranges of cost burdens and explain the reasons for the variance. The cost of purchasing or contracting out information collections services should be a part of this cost burden estimate. In developing cost burden estimates, agencies may consult with a sample of respondents (fewer than 10), utilize the 60-day pre-OMB submission public comment process and use existing economic or regulatory impact analysis associated with the rulemaking containing the information collection, as appropriate.**
- **Generally, estimates should not include purchases of equipment or services, or portions thereof, made: (1) prior to October 1, 1995, (2) to achieve regulatory compliance with requirements not associated with the information collection, (3) for reasons other than to provide information or keep records for the government, or (4) as part of customary and usual business or private practices.**

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Because WHD orally obtains the relevant information from the complainant and fills out the Form WH-3, complainants incur no costs, other than the value of their time, in filing a complaint. See Item 12.

14. Provide estimates of annualized costs to the Federal Government. Also, provide a description of the method used to estimate cost, which should include quantification of hours, operational expenses (such as equipment, overhead, printing, and support staff), and any other expense that would not have been incurred without this collection of information. Agencies may also aggregate cost estimates from Items 12, 13, and 14 in a single table.

The Department associates no Federal costs with this collection.

15. Reasons for Program Changes or Adjustments Affecting Public Burdens the reasons for any program changes or adjustments reported in Items 13 or 14.

The Department estimates a slight increase in burden of three hours associated with the final rule. However, the overall burden for the collection has dropped as fewer complaints were taken in FY22.

Based on enforcement data of actual complaints received annually as part of E.O. 13495 (the former, similar E.O.), the Department estimates that it will receive 10 complaints per year.

The Department estimates that each complaint filing will take about 20 minutes. Therefore, the Department estimates the total burden related to this final rule for filing complaints to be about 3 hours.

$10 \text{ responses} \times 20 \text{ minutes} \div 60 \text{ minutes per hour} = 3 \text{ hours (rounded)}$.

16. For collections of information whose results are planned to be published, outline plans for tabulation and publication. Address any complex analytical techniques that will be used. Provide the time schedule for the entire project, including beginning and ending dates of the collection of information, completion of report, publication dates, and other actions.

The Department does not publish the results of this information collection.

17. If seeking approval to not display the expiration date for OMB approval of the information collection, explain the reasons that display would be inappropriate.

The Department does not seek an exception to the requirement to display the expiration date on this information collection.

18. Explain each exception to the certification statement, "Certification for Paperwork Reduction Act Submissions."

The Department is not requesting an exception to any of the certification requirements for this information collection.

B. Employing Statistical Methods

Statistical methods are not used in this collection of information.

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