

Congressionally Mandated Study on Contractor Debarments for Violations of U.S. Labor Laws

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Introduction

The Acquisition Innovation Research Center (“AIRC”) submits this congressionally mandated study and report (“Report”) focusing on the issue of labor law compliance among federal contractors and the use of statutory and discretionary debarment as tools to protect the government’s interests.¹ Legislation introduced in the current Congress would ban (debar) vendors that have engaged in violations of certain labor laws from participating in federal contracts, grants or cooperative agreements.² This Report will assess the practical ramifications of debarring additional categories of labor law violators in light of existing statutes that address debarring violators. As part of that assessment, this Report examines likely impacts automatic debarment or listing³ of labor law violators would have on the Defense Industrial Base (“DIB”). This Report will assess increased reliance on existing statutory debarment frameworks (or the creation of new statutory frameworks) relating to labor law violations upon the Department of Defense (“DOD”) supply chain.⁴ Finally, this Report will present certain options, as well as make certain observations regarding the use of debarment as a mechanism, to bring those federal contractors in violation of labor laws into compliance.

This Report does not represent the opinion of the Department of Defense, nor does it make any recommendations concerning appropriate measures to be taken with regard to vendors that, through a formal adjudication process, have been found to engage in willful or repeated violations of federal labor laws. This Report instead focuses on the role that debarment of labor law violators plays, under current law, in ensuring the integrity of

¹ This Report will refer to “debarment,” which (except as noted) denotes an exclusion of a vendor, other entity or individual from federal contracting, grants or cooperative agreements, generally for a term of years. “Suspension” is a temporary exclusion, typically imposed while a longer debarment is under consideration. The federal regulations which govern background on the federal debarment system are gathered by the Interagency Suspension and Debarment Committee at <https://www.acquisition.gov/isdc-debarment-regulations>. For general background on federal debarment, see John Pachter, Christopher Yukins & Jessica Tillipman, *U.S. Debarment: An Introduction (discussion draft)*, in *Cambridge Handbook of Compliance* (Cambridge University Press, Daniel Sokol & Benjamin van Rooij eds., 2021).

² National Defense Authorization Act for Fiscal Year 2023, H.R. 7900, 117th Cong. §5817 (2022); see also, Higher Wages for American Workers Act of 2021, S. 478, 117th Cong. §§ 5-8 (employers repeatedly failing to use E-Verify to examine identifying documents may be debarred from receiving federal contracts, grants, or cooperative agreements); End Human Trafficking in Government Contracts Act of 2022, S. 3470, 117th Cong. § 2 (requiring inspectors general to refer cases to the agency suspension and debarment office upon receipt of a report substantiating an allegation that the recipient of a contract, grant, or cooperative agreement (or any subgrantee, subcontractor, or agent of the recipient) engaged in human trafficking); S. Rep. 117-116, 117th Cong., 2d Sess. (May 24, 2022) (Senate Homeland Security and Governmental Affairs Committee report).

³ “Effect of listing” requires the listing of firms proposed for debarment which effectively prevents the government from awarding contracts to those firms until the debarment proceeding is concluded. FAR 9.405.

⁴ The DOD relies on the Defense Industrial Base—companies that develop and manufacture technologies and weapon systems for DOD—to fulfill its obligation “to ensure that the Nation is prepared to—with all possible speed—manufacture and deliver defense platforms and weapons systems to the armed forces.” Department of Defense, *Securing Defense-Critical Supply Chains: An action plan developed in response to President Biden’s Executive Order 14017 (2022)*; U.S. Gov’t Accountability Off., GAO-22-104154, *Defense Industrial Base: DOD Should Take Actions to Strengthen Its Risk Mitigation Approach (2022)*.

the government's acquisition system and on the potential impact of broadening statutory grounds for debarment.

This Report contains seven parts:

- Part I will provide a brief background regarding AIRC, as well as the original congressional commission for this Report.
- Part II will provide an overview of “responsibility” as that term is utilized in federal procurement, an explanation of the purpose and use of statutory (sometimes called “mandatory”) and discretionary debarments in federal contracting, and the risk of debarment to the DIB.
- Part III will briefly examine various labor laws generally applicable to federal contractors.
- Part IV will analyze statutory and discretionary debarments in relation to three labor law statutes:
 - 1) McNamara-O’Hara Service Contract Act (“SCA”);
 - 2) Occupational Health and Safety Act (“OSH Act”); and
 - 3) Fair Labor Standards Act (“FLSA”).
- Part V will examine the current use of statutory and discretionary debarment tools to protect the government’s interests, as well as supply chain considerations associated with increased use of debarment for labor law violations.
- Part VI will address the specific questions Congress raised in the commissioning this Report.
- Part VII will offer conclusions and potential next steps for review.

This Report will address four different approaches that are currently used—or could be used more broadly—to address vendor qualification and contractor debarment with regard to violations of federal labor laws.

- A. **Department of Labor Debarments:** The Department of Labor (“DOL”), which has primary responsibility for enforcing federal labor laws, debars some contractors for violations of laws with statutory debarment provisions, such as the SCA. The DOL, like other federal agencies, also has authority to pursue discretionary debarments against contractors that engage in serious violations of other federal labor laws.
- B. **Contracting Agencies’ Discretionary Debarments:** While DOL is responsible for citing and enforcing violations of U.S. labor laws, other contracting agencies’ suspending and debarring officials (“SDOs”) have authority pursuant to the Federal Acquisition Regulation (“FAR”) to pursue discretionary debarments when, for example, vendors engage in willful or repeated violations of federal labor laws. This is because FAR Subpart 9.4 gives SDOs

discretionary authority to suspend or debar contractors “based on any . . . cause of so serious or compelling a nature that it affects the present responsibility of the contractor or subcontractor.”

- C. **Contracting Officers’ Responsibility Determinations:** Pursuant to FAR Subpart 9.1, before awarding a contract to a vendor, a Contracting Officer must determine that the vendor is “responsible,” *i.e.*, qualified. Among other things, this means that the vendor has a satisfactory record of integrity and business ethics. In principle, this means that Contracting Officers could find non-responsible those vendors that have engaged in willful or repeated violations of federal labor laws. As the discussion below reflects, however, Contracting Officers often lack sufficient experience, knowledge, and training in labor laws to make such determinations.
- D. **Vendors’ Reporting:** The FAR requires vendors to make representations and certifications about their qualifications through the government’s online acquisition management program, System for Award Management (“SAM”, www.sam.gov). Contracting Officers rely upon those submissions in making responsibility determinations. Contractors must report convictions of federal criminal laws during the previous 24 months, per FAR 52.209-11, but have no obligation to report finally adjudicated violations of statutes such as the FLSA. Adopting a requirement that contractors report repeated or willful violations of labor laws would ensure that Contracting Officers have sufficient data to make their determination of present responsibility prior to awarding contracts. FAR 52.209-5 and FAR 52.209-7 already require contractor disclosures, under certain circumstances, of convictions and fines of certain other laws.

As the discussion below also reflects, greater transparency in accordance with established government principles of open data could enhance all of these means of encouraging compliance with federal labor laws.

I. Background and Origin of This Report

A. The Acquisition Innovation Research Center

The DOD established AIRC in September 2020 to infuse innovation and alternative methods needed to better respond to the rapid increase of technological advancements critical to today's warfighter.⁵ AIRC's objectives include:

- Researching acquisition policies and practices and the application of new technologies and analytical capabilities to enhance strategic decision making.
- Developing pilot programs to prototype and demonstrate new acquisition insights and practices for potential transition to broader use.
- Enhancing education efforts to support the defense acquisition workforce.
- Cultivating research efforts of emerging best practices that span across the DOD's acquisition functions.
- Broadening its network of acquisition leaders and professionals across government, industry and academia.

B. NDAA Conference Report for Fiscal Year 2021

The conference report⁶ which accompanied the William M. (Mac) Thornberry National Defense Authorization Act ("NDAA") for Fiscal Year ("FY") 2021⁷ ("2021 NDAA Conference Report") directed the DOD to enter into an agreement with AIRC to undertake a report which would:

- (1) Assess and distinguish the extent to which statutory and discretionary debarment procedures address the Department of Defense's interests in being protected from those entities whose conduct poses business integrity risk to the government.
- (2) Identify any gaps in the current requirements for statutory debarment as a result of labor law violations.
- (3) Provide recommendations as to whether the mission of the Interagency Suspension and Debarment Committee, an interagency body of which DOD is a member and which reports to the Congress annually on the status and improvements made to the federal suspension and debarment system (pursuant to Section 873 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 (Public Law 110-417)), should be expanded to include not just discretionary but also statutory suspension and debarment.

⁵ Acquisition Innovation Research Center, <https://acqirc.org/> (last visited Sept. 15, 2022).

⁶ House Rep. No. 116-617, 116th Cong., 2d Sess. (Dec. 3, 2021).

⁷ Pub. L. No. 116-283.

(4) Provide any other recommendations AIRC finds relevant.⁸

The conferees explained the basis for the requested report from AIRC:

The conferees note that the Department of Defense continues to award contracts to companies cited for willful or repeated fair labor standards violations under the Fair Labor Standards Act of 1938 (FLSA). The conferees note the National Defense Authorization Act for 2020 (Public Law 116-92) established section 2509 of title 10, United States Code, pertaining to the integrity of the defense industrial base, which included directing attention to contractor behavior that constitutes violations of the law, fraud, and associated remedies, including suspension and debarment.

The conferees further note that a July 2020 Government Accountability Office (GAO) report, titled “Defense Contractors: Information on Violations of Safety, Health, and Fair Labor Standards” (GAO-20-587R), mandated by the National Defense Authorization Act for Fiscal Year 2020, reviewing data from 2015-2019, determined that 417 companies had been cited for willful or repeated violations of FLSA pertaining to minimum wage, overtime, or child labor. Specifically, GAO found almost 5,200 such violations, most frequently, failures to pay minimum wage, overtime, and to keep accurate records. The conferees note that these companies, representing less than half of one percent of the companies the Department does business with, could potentially be replaced by more responsible contractors in order to improve the integrity of the industrial base, and potentially reward companies with better records of performance in these matters.⁹

C. The Joint Explanatory Statement NDAA FY 2022

The Joint Explanatory Statement accompanying the NDAA for FY 2022 (the “2022 NDAA Joint Explanatory Statement”) provided additional focus areas for AIRC to examine in this Report:

[T]he AIRC study is ongoing and we encourage the academic researchers to refine the focus of their efforts to study and make recommendations related to: (1) The impact of labor violations on the supply chain, balanced with the need to consider participation by small businesses, which tend to be more adversely impacted by debarment; (2) The availability of Fair Labor Standards Act (FLSA) records to Department of Defense contracting officers and the need for increased transparency and workforce training on labor laws and

⁸ *Id.* at 1718.

⁹ *Id.*

FLSA enforcement; and (3) The extent to which the current discretionary model of debarment best serves the government's interest, or whether an adjudicatory model should be considered.¹⁰

D. Methodology Used in Preparing This Report

The authors based this Report on (1) a review of relevant labor law and debarment requirements; (2) background interviews with members of industry, auditing officials, and government officials involved in labor law enforcement and debarment; (3) an analysis of Department of Labor (“DOL”) enforcement data; and (4) an analysis of General Services Administration procurement data. The research was conducted by principal investigators David Drabkin and Professor Christopher Yukins, joined by research scientists Jonathan O’Connell and William Dawson, data analyst Sharjeel Chaudhry, and research assistant Brandon Hancock.

II. Responsibility Determinations and Debarment in Federal Contracting

In the federal system, there are two types of debarments SDOs and other agency enforcement officials may undertake: *discretionary* debarments and *statutory* debarments (often under a statutory mandate to debar those contractors that breach the law). When an SDO debars on a discretionary basis under FAR Subpart 9.4, based on a vendor’s lack of “present responsibility”. That determination is analogous to a Contracting Officer’s responsibility determination disqualifying the vendor from award of a specific contract. The SDO’s debarment decision, however, is made after a more detailed deliberative process that affords the vendor an opportunity to be heard and typically applies for a term of years across all federal contracts, grants and cooperative agreements.¹¹ While the two decisions—responsibility (by the Contracting Officer) and debarment (by the SDO)—share a common foundation regarding responsibility, the decision-makers in each case use fundamentally different processes to reach their decisions.

¹⁰ Unlike the discretionary debarment system authorized under FAR Subpart 9.4, other debarment systems (such as the World Bank’s Sanctions System) impose debarment through a highly structured, adjudicatory system. The World Bank, for example, applies specific sanctions (debarments) for specific types of violations (such as fraud or corruption) by contractors on World Bank-financed projects. See, e.g., World Bank Group, *WBG Policy: Sanctions for Fraud and Corruption*, Catalog No. EXC6.03-POL.105 (June 13, 2016), available at <https://www.worldbank.org/en/about/unit/sanctions-system#3>. The World Bank process is more adjudicative in nature than the flexible U.S. debarment system. Complaints regarding contractor misconduct are investigated, and a report on proposed sanctions is presented to the cognizant debarring official, who endorses, amends or rejects the proposed sanctions. If sanctions are entered, the affected contractor may appeal to the World Bank’s Sanctions Board. See *generally* World Bank Group Sanctions Board, *Law Digest 2019*, at 6-8 (2019) (describing process). Common concerns are that this system lacks the flexibility needed for debarring officials to engage with contractors regarding compliance and other mitigation measures, and that smaller contractors may lack the resources to pursue appeals through this highly structured process.

¹¹ State and local governments, private sector companies, banks, and international organizations all use the listing of debarred and suspended contractors on sam.gov. Contracting Officer decisions are neither tracked nor shared.

A. Responsibility

Federal procurement statutes and implementing regulations set forth the federal government's policy of doing business only with "responsible" federal contractors. This is part of the contractor qualification requirement set forth in FAR Part 9. Specifically, FAR 9.103(a) provides that "[p]urchases shall be made from, and contracts shall be awarded to, responsible prospective contractors only." The FAR goes on to set forth the standards for determining "responsibility":

To be determined responsible, a prospective contractor must-

- (a) Have adequate financial resources to perform the contract, or the ability to obtain them (see 9.104-3(a));
- (b) Be able to comply with the required or proposed delivery or performance schedule, taking into consideration all existing commercial and governmental business commitments;
- (c) Have a satisfactory performance record (see 9.104-3(b) and subpart 42.15). A prospective contractor shall not be determined responsible or nonresponsible solely on the basis of a lack of relevant performance history, except as provided in 9.104-2;
- (d) Have a satisfactory record of integrity and business ethics (for example, see subpart 42.15);
- (e) Have the necessary organization, experience, accounting and operational controls, and technical skills, or the ability to obtain them (including, as appropriate, such elements as production control procedures, property control systems, quality assurance measures, and safety programs applicable to materials to be produced or services to be performed by the prospective contractor and subcontractors). (See 9.104-3(a).)
- (f) Have the necessary production, construction, and technical equipment and facilities, or the ability to obtain them (see 9.104-3(a)); and
- (g) Be otherwise qualified and eligible to receive an award under applicable laws and regulations (see also inverted domestic corporation prohibition at 9.108).¹²

Implicit within the FAR is the expectation that the federal government must only do business with those contractors that have demonstrated a commitment (whether presently or via remedial measures) to comply with laws protecting fair pay and a safe working environment.

¹² FAR 9.104-1.

As noted, prior to awarding a federal contract, Contracting Officers are obligated to determine that the offeror is “responsible”.¹³ This determination is generally made immediately prior to award based on the Contracting Officer’s assessment as to whether the offeror satisfies the responsibility requirement at that particular moment in time.¹⁴ While the FAR empowers Contracting Officers to make inquiries of prospective awardees regarding issues impacting the responsibility determination, such a responsibility review and determination¹⁵ does not include the full panoply of what might otherwise constitute administrative due process.¹⁶ An unsuccessful offeror may challenge the Contracting Officer’s determination that the awardee was not presently responsible through the bid protest process after award.¹⁷

Contracting Officers’ responsibility determinations—made hundreds of thousands of times a year, across a federal procurement system covering over \$600 billion in purchases annually¹⁸—must be put into context. Contracting Officers are tasked with a myriad of responsibilities throughout the acquisition lifecycle.¹⁹ Significantly, labor law compliance implicates a variety of federal statutes and executive orders, each with corresponding implementing regulations, guidance documents, and case law. In making their responsibility determinations, Contracting Officers often do not have the necessary information or knowledgebase to make informed decisions regarding the relevance and weight of various labor law violations.

SDOs are typically involved in making discretionary debarment decisions based upon a contractor’s present responsibility. Debarment inquiries are often based upon referrals of contractors from, among other sources, Contracting Officers, law enforcement officials, and Inspectors General. Subsequent to an SDO’s initiation of discretionary debarment proceedings, contractors receive a Notice of Proposed Debarment and an opportunity to be heard procedures which involve an in-depth analysis of the vendor’s corporate behavior and responsibility and satisfy requirements for administrative due process²⁰. Given their focus on potential debarment, greater access to resources, and more detailed processes, SDOs are better equipped to develop a level of understanding and application of debarment in the context of labor law violations than are Contracting Officers.

¹³ FAR 9.103.

¹⁴ See, e.g., FAR 9.104-6(a)(4) (some older information available online may not be relevant to the contractor’s present responsibility).

¹⁵ See FAR 9.105 (describing procedures for a Contracting Officer’s responsibility determination).

¹⁶ “Where a person’s good name, reputation, honor, or integrity is at stake because of what the government is doing to him,” due process, at a minimum, provides the affected entity with notice of the government’s action and an opportunity to challenge it. *Bd. of Regents v. Roth*, 408 U.S. 564, 573 (1972) (quotation and citations omitted).

¹⁷ See, e.g., *Impresa Construzioni Geom. Domenico Garufi v. United States*, 238 F.3d 1324 (Fed. Cir. 2001).

¹⁸ Fedmine, https://govspend.com/govspend/wp-content/uploads/2022/01/Top_ExpAgg_Co_FY_2021_-_1641248322_212.pdf (last accessed Sept. 15, 2022).

¹⁹ See FAR 1.602-2.

²⁰ See Robert F. Meunier & Trevor B. A. Nelson, *Proposed Unified Suspension and Debarment Rule for Procurement and Nonprocurement Activities*, 49 Pub. Cont. L.J. 243 (Winter, 2020).

B. Debarment

1. *A Prefatory Word About Debarment*

Debarment—whether statutory or discretionary—is a safeguard that prevents the government from forming contracts with contractors in violation of federal labor laws while still facilitating full and open competition in the contracting process. It is well established and important to bear in mind that debarment in government contracts is not—and has never been—designed as a punitive tool to sanction federal contractors that have previously violated federal laws. FAR 9.402(b) states explicitly that the “serious nature of debarment and suspension requires that these sanctions be imposed only in the public interest for the government’s protection and not for purposes of punishment. Agencies shall impose debarment or suspension to protect the government’s interest and only for the causes and in accordance with the procedures set forth in this subpart.” In practice, the same limiting principle applies to contractors subject to statutory debarment for violations of U.S. labor laws: only a small portion of violators are actually debarred, and statutory debarment will turn in part upon the violating contractor’s failure to undertake remedial measures to comply with applicable labor laws.²¹

Thus, from the perspective of the federal acquisition system, debarment is a prophylactic measure designed to protect the government from doing business with contractors that pose unacceptable risk to the integrity of the government’s acquisition system. As a result, even in instances of “repeated” or “willful” non-compliance, the

²¹ The Labor Department’s regulations explain, for example, the circumstances under which a firm can petition to remove itself from the statutory debarment list for violations of certain labor laws, based upon restitution to employees and compliance measures:

Any person or firm debarred under paragraph (a)(1) of this section may in writing request removal from the debarment list after six months from the date of publication by the Comptroller General of such person or firm's name on the ineligible list. Such a request . . . shall contain a full explanation of the reasons why such person or firm should be removed from the ineligible list. In cases where the contractor or subcontractor failed to make full restitution to all underpaid employees, a request for removal will not be considered until such underpayments are made. In all other cases, the Administrator will examine the facts and circumstances surrounding the violative practices which caused the debarment, and issue a decision as to whether or not such person or firm has demonstrated a **current responsibility** to comply with the labor standards provisions of the [relevant] statutes . . . and therefore should be removed from the ineligible list. Among the factors to be considered in reaching such a decision are the severity of the violations, the contractor or subcontractor's attitude towards compliance, and the past compliance history of the firm. In no case will such removal be effected unless the Administrator determines after an investigation that such person or firm is in compliance with the labor standards provisions applicable to Federal contracts and Federally assisted construction work subject to any of the applicable statutes listed . . . and other labor statutes providing wage protection, such as the Service Contract Act, the Walsh-Healey Public Contracts Act, and the Fair Labor Standards Act.

29 C.F.R. § 5.12, Debarment Proceedings (emphasis added). The Labor Department thus allows contractors debarred because of certain types of labor violations to “reenter” the federal market, by showing that they have undertaken compliance and remedial measures. This approach—grounded in responsibility, risk mitigation and, where appropriate, restitution—echoes the risk-based approach to discretionary debarments called for under FAR 9.406-1.

analysis of whether debarment (or continued debarment) is an appropriate course of action is, in a broader sense, focused upon whether the contractor has demonstrated *present* compliance with all of the requirements for doing business with the federal government. Encompassed within this prophylactic and rehabilitative approach when assessing debarment, are the government's policy objectives of promoting a broad and diverse federal contractor base, maximizing competition, and promoting opportunities for small businesses. This approach also reflects the fact that the labor laws at issue have their own mechanisms to achieve relief on behalf of aggrieved employees, including, for example, the payment of back pay and liquidated damages.

2. *Discretionary Debarment*

Discretionary debarment, by its very nature, is a step that may be taken at the discretion of the debarment official in order to protect the government's interest. Factors that a debarment official may consider whether to pursue debarment include the seriousness of the conduct at issue and any remedial measures the contractor has undertaken. In this regard, FAR 9.406-1(a) states (with emphasis added):

It is the debarring official's responsibility to determine whether debarment is in the Government's interest. The debarring official may, in the public interest, debar a contractor for any of the causes in 9.406-2, using the procedures in 9.406-3. The existence of a cause for debarment, however, does not necessarily require that the contractor be debarred; the seriousness of the contractor's acts or omissions and any remedial measures or mitigating factors should be considered in making any debarment decision.

Discretionary debarment is the mechanism by which contracting agencies and relevant enforcement agencies protect the government's interests by precluding contractors who are not presently responsible from holding federal contracts. The discretionary debarment process is utilized in appropriate circumstances that may not otherwise implicate the use of statutory debarment. For instance, neither the FLSA nor the OSH Act contain statutory debarment language, thus making violations associated with such statutes subject only to the discretionary debarment process. Because of established principles of due process, federal contractors are entitled to notice and an opportunity to be heard in connection with potential discretionary debarment.²²

Regarding labor law violations specifically, the use of discretionary debarment is used sparingly. Contracting officials and SDOs have confirmed that contracting agencies rarely have the expertise and background information to initiate discretionary debarment actions based on labor law violations. Further, while DOL does have discretionary debarment authority, research indicates that DOL reserves its use of discretionary debarment to address labor law violations for instances in which there is an associated

²² See, e.g., John Pachter *et al.*, *supra*, at 7-8 (discussing authorities).

criminal indictment.²³ This limitation is explained by the fact that, as noted above, discretionary debarment necessitates the provision of due process procedures. Accordingly, given limitations associated with DOL's resources, scenarios in which there are criminal indictments associated with labor law violations eliminate the need for DOL to provide due process protections, per FAR 9.406-2(a).

3. *Statutory Debarment*

In contrast to discretionary debarments, statutory debarments are based upon language within underlying statutes that, at least facially, requires the consideration of debarment for a requisite time period based on a finally adjudicated determination of a violation. Examples of statutes with statutory debarment language include the SCA and the Davis-Bacon Act.²⁴ However, an important feature of laws with statutory debarment provisions is that they contain exceptions. The most notable example here, the SCA, contains language which states, “[u]nless the Secretary [of Labor] recommends otherwise because of unusual circumstances, a Federal Government contract may not be awarded to a person or firm . . . or to an entity in which the person or firm has a substantial interest” who is found to have violated the SCA.²⁵

Research confirms that, in practice, DOL does not impose statutory debarment upon federal contractors in the vast majority of cases of non-compliance with statutes that mandate debarment. Because of its importance in ensuring wage levels on federal contracts and the central role that service contracting plays in federal procurement, the SCA is a significant example of how statutory debarment is applied in practice. In those cases, in which statutory debarment is not imposed, contractors must satisfy DOL of a commitment to future compliance, as well as the payment of back pay to aggrieved employees.

The policy reasons for DOL's limited utilization of statutory debarment under the SCA are understandable. In formulating DOL Wage and Hour Division's ("DOL-WHD") statutory debarment decision-making, an important consideration is ensuring that workers ultimately receive back pay and retain employment. Such important policy considerations do not necessarily align, and may often conflict, with a rigid application of the SCA's statutory debarment authority. Indeed, the oft-used term of a “death sentence” to describe debarment explains why debarring an SCA noncompliant federal contractor—potentially forcing that firm out of business—may not be in the best interests of workers from the Labor Department's perspective, much as it may not be in the interests of the overall

²³ It should also be noted that the DOL has undertaken pilot efforts to reduce the processing time for discretionary suspension and debarment actions based on indictments or convictions. See U.S. Department of Labor, *U.S. Department of Labor Announces New Pilot Program for Discretionary Suspensions and Debarments to Ensure Accountability* (Jan. 20, 2021), <https://www.dol.gov/newsroom/releases/osec/osec20190402>.

²⁴ For a discussion of how the debarment provisions under the Davis-Bacon Act are administered, and relevant administrative decisions, see U.S. Department of Labor, *DBA Benchmark*, at 41-53 (updated Jan. 15, 2021), available at www.dol.gov/sites/dolgov/files/OALJ/PUBLIC/DBA_SCA/REFERENCES/REFERENCE_WORKS/DBA_Benchmark_Final_1.2021.pdf.

²⁵ 41 U.S.C. 6706(b).

supply chain from the federal government’s perspective. As a result, despite many thousands of cited violations, as the chart below shows, in recent years, there have been relatively few reported debarments under two statutes which call for debarment, the Davis-Bacon Act (which applies to wages paid in construction) and the SCA (which applies more generally to service contracts).

Number of Federal Contractors Debarred by DOL for Violations of the Davis-Bacon Act and the Service Contract Act for FY2020 and FY2021²⁶

Statute	FY2020	FY2021
Davis-Bacon Act	9	10
Service Contract Act	8	7

C. Protecting the Defense Industrial Base

In July 2022, GAO published a report recommending that the DOD increase its efforts to mitigate risks²⁷ to the DIB.²⁸ DOD’s general practice is to delegate risk mitigation to the lowest level possible, and DOD relies on its contracting activities to be the primary agents implementing risk mitigation efforts.²⁹ Acquisition program offices in the DOD must incorporate industrial base analysis into acquisition planning and contract administration, including identifying risks and potential mitigation efforts.³⁰ Four of ten risk archetypes that the DOD identified in a 2018 internal review as threatening the DIB are relevant to an analysis of suspension and debarment: sole source, single source, fragile supplier, and gaps in U.S.-based human capital.³¹ Limiting the number of qualified vendors by debarring contractors for any labor law violation would be a direct cause of one of the negative impacts on the DIB that DOD is trying to mitigate, specifically the loss of suppliers.³²

²⁶ Source: United States Department of Labor (Sept. 2, 2022).

²⁷ The GAO report defines risks to the DIB as “any event or condition that may disrupt or degrade DOD supplier capabilities or capacity needed to equip or sustain military forces now and in the future.” U.S. Gov’t Accountability Off., GAO-22-104154, Defense Industrial Base: DOD Should Take Actions to Strengthen Its Risk Mitigation Approach (2022).

²⁸ *Id.*

²⁹ *Id.*

³⁰ Department of Defense, *DOD Instruction 5000.85, Major Capability Acquisition* (Aug. 6, 2020) (Incorporating Change 1, Nov. 4, 2021).

³¹ Department of Defense, *Assessing and Strengthening the Manufacturing and Defense Industrial Base and Supply Chain Resiliency of the United States* (Report to President Donald J. Trump by the Interagency Task Force in Fulfillment of Executive Order 13806) (2018).

³² *Id.*

III. Labor Laws Generally Applicable to Federal Contractors

To assess the possible implications of making labor law violations an automatic ground for debarment, it is useful to review the full panoply of labor laws applicable to federal contractors. To promote a robust industrial base, existing federal contractors, as well as those entities seeking to do business with DOD, must provide their employees the following in accordance with various labor laws and executive orders: fair pay; protection from discrimination, including affirmative action and leave-related protections; and a workplace free of preventable injuries and fatalities. There are numerous labor laws that are generally applicable to federal contractors which embody these requirements. Notable examples of such laws and executive orders include:

- Fair Labor Standards Act of 1938;³³
- Occupational Health and Safety Act of 1970;³⁴
- National Labor Relations Act;³⁵
- Davis-Bacon Act;³⁶
- Service Contract Act;³⁷
- Executive Order 11246 (Equal Employment Opportunity);
- Section 503 of the Rehabilitation Act;³⁸
- Vietnam Era Veterans' Readjustment Assistance Act of 1974;³⁹
- Family and Medical Leave Act;⁴⁰
- Title VII of the Civil Rights Act of 1964;⁴¹
- Americans with Disabilities Act of 1990;⁴² and
- Age Discrimination in Employment Act.⁴³

Each of these statutes and executive orders embody important congressional and national goals and policy objectives that not only promote workplace fairness and safety, but also translate into federal contractor responsibility.

While compliance with all of the foregoing is important to ensuring a responsible federal contractor base, recent congressional focus has been on three particular statutes: the SCA, the FLSA, and the OSH Act. Legislative interest in these three laws arises because, collectively, these laws encompass federal policies of ensuring that federal contractor employees are fairly and timely compensated and are provided a work environment that meets basic safety standards.

³³ 29 U.S.C. §§ 201 *et seq.*

³⁴ 29 U.S.C. §§ 651 *et seq.*

³⁵ 29 U.S.C. §§ 151 *et seq.*

³⁶ 40 U.S.C. §§ 3141 *et seq.*

³⁷ 41 U.S.C. §§ 6701 *et seq.*

³⁸ 29 U.S.C. § 793.

³⁹ 38 U.S.C. §§ 4211 *et seq.*

⁴⁰ 29 U.S.C.A. §§ 2601 *et seq.*

⁴¹ 42 U.S.C. §§ 2000e *et seq.*

⁴² 42 U.S.C.A. § 12111 *et seq.*

⁴³ 29 U.S.C.A. § 621 *et seq.*

IV. Selected Statutes for Analysis: Service Contract Act, Fair Labor Standards Act, and OSH Act

A. The Service Contract Act

The SCA establishes record keeping, prevailing wage rates, and fringe benefit requirements applicable to service contracts entered into with the federal government or the District of Columbia, exceeding \$2,500.⁴⁴ Service contracts are those contracts with the “principal purpose” of performing an identifiable task or tasks through service employees.⁴⁵ DOL-WHD develops prevailing wage and fringe benefit determinations specific to job class and locality.⁴⁶ By its terms, the SCA does not provide, nor has it been interpreted by federal courts to provide, a private cause of action to aggrieved employees. Instead, the DOL-WHD is the exclusive enforcing authority of the SCA.⁴⁷

The SCA is somewhat unique as a labor law statute in that its text contains debarment language. Specifically, the SCA provides that:

(a) Distribution of List. —

The Comptroller General shall distribute to each agency of the Federal Government a list containing the names of persons or firms that a Federal agency or the Secretary has found to have violated this chapter.

(b) Three-Year Prohibition. —

*Unless the Secretary recommends otherwise because of unusual circumstances, a Federal Government contract may not be awarded to a person or firm named on the list under subsection (a), or to an entity in which the person or firm has a substantial interest, until 3 years have elapsed from the date of publication of the list. If the Secretary does not recommend otherwise because of unusual circumstances, the Secretary shall, not later than 90 days after a hearing examiner has made a finding of a violation of this chapter, forward to the Comptroller General the name of the person or firm found to have violated this chapter.*⁴⁸

⁴⁴ See 41 U.S.C. § 6702(a).

⁴⁵ FAR 37.101.

⁴⁶ See generally, 41 U.S.C. §§ 6701-6707.

⁴⁷ 41 U.S.C. § 6707(a) (“Section 6506 and 6507 of this title govern the Secretary’s authority to enforce this chapter, including the Secretary’s authority to prescribe regulations, issue orders, hold hearings, make decisions based on findings of fact, and take other appropriate action under this chapter.”). For a discussion of relevant decisions (both administrative decisions at the Labor Department, and in the federal courts) regarding debarment under the SCA, see U.S. Department of Labor, *SCA Benchbook* 48-66 (updated Feb. 15, 2021), available at https://www.dol.gov/sites/dolgov/files/OALJ/PUBLIC/DBA_SCA/REFERENCES/REFERENCE_WORKS/SCA_Benchbook_Feb_2021.pdf; see, e.g., *Ralton v. Collecto, Inc.*, 2015 WL 854976, *2 (D. Mass. 2015) (“[T]he court is persuaded by other courts that have considered the question and have concluded that the SCA does not provide an express or implied private right of action”) (citations omitted).

⁴⁸ 41 U.S.C. § 6706 (emphasis added).

Despite the statutory language which suggests that contracting agencies may find a contractor in violation of the SCA, as a practical matter, because DOL is the agency responsible for initiating SCA investigations and enforcement actions, it appears that the DOL initiates all debarment proceedings pursuant to the SCA. However, as was discussed above, the frequency with which DOL imposes statutory debarment upon SCA noncompliant contractors is low.

In October 2020, GAO issued a report in which it compared information contained in DOL-WHD's Wage and Hour Investigative Support and Reporting Database ("WHISARD") for fiscal years 2014 through 2019 with the General Service Administration's Federal Procurement Data-System-Next Generation ("FPDS") for the same period "to determine whether certain contractors found by DOL to have violated the SCA received subsequent federal contract awards."⁴⁹ GAO reported that during fiscal years 2014 through 2019, DOL-WHD completed 5,261 SCA investigations, of which 68% (or 3,562) resulted in a finding of non-compliance and a corresponding total recovery of \$224 million in back pay. The obligations associated with contracts in which there was a finding of non-compliance was approximately \$73 billion. However, the October 2020 Report also concluded only 60 debarments (1.68% of violating contractors) resulted from SCA violations.⁵⁰

Consistent with the low incidence of debarments based on SCA violations, GAO also identified 622 contractors (corresponding to 11,398 awards) that had SCA violations during the time period and yet received subsequent federal contract awards. These 11,398 awards involved in excess of \$35 billion in federal contract obligations.

⁴⁹ U.S. Gov't Accountability Off., GAO-21-11, Federal Contracting: Actions Needed to Improve Department of Labor's Enforcement of Service Worker Wage Protections, (Oct. 2020).

⁵⁰ The available data relating to SCA debarments did not provide clarification with respect to DOL's decision to decline pursuing debarment—*i.e.*, the conclusion that "unusual circumstances" were indeed present. With that said, the DOL's regulations implementing the SCA (see 29 C.F.R. 4.188, and related administrative case law interpreting the same) provide some insight into the decision-making process. A contractor found in violation of the SCA has the burden of satisfying a three-part test articulated in relevant SCA regulations to avoid debarment. "Under the first part of this test, the [contractor] must establish that the conduct giving rise to the SCA violation was not willful, deliberate, aggravated, or the result of culpable conduct." *In the Matter of: Darren G. Fields and W/D Enterprise, Inc.*, ARB Case No. 06-018 (Jan. 31, 2008). The contractor must then show "a good compliance history, cooperation in the investigation, repayment of the moneys due, and sufficient assurances of future compliance." *Id.* Finally, if the contractor succeeds in demonstrating the foregoing, other factors may be considered, including whether the contractor has previously been investigated for SCA violations, whether the contractor has committed recordkeeping violations that impeded DOL-WHD's investigation, whether the determination of liability was dependent upon the resolution of a bona fide legal issue of doubtful certainty, the contractor's efforts to ensure compliance, and the nature, extent, and seriousness of any past or present violations." *Id.*

B. The Fair Labor Standards Act

The FLSA, as amended, established a federal minimum wage, as well as overtime and record keeping requirements applicable to the majority of employers, including federal contractors.⁵¹ Regarding overtime, the FLSA requires employers to pay employees who are not otherwise exempt from the overtime requirement (via statutory exemptions set forth in the FLSA and governed by DOL implementing regulations), time and one half their regular rate of pay for all hours worked over forty in a given workweek.⁵² Additionally, the FLSA contains a retaliation provision which prohibits employers from taking adverse action against employees who raise complaints regarding employer compliance.⁵³

With respect to enforcement of the FLSA, DOL-WHD has the authority to investigate and pursue enforcement actions, as well as litigation, on behalf of aggrieved employees.⁵⁴ Relief commonly consists of back pay, liquidated damages, and in certain instances, the imposition of civil money penalties.⁵⁵ In addition to DOL-WHD's enforcement efforts, the FLSA contains a private right of action, whereby employees may pursue claims individually or via collective action in federal or state court.⁵⁶ The FLSA also contains a provision which provides for the award of attorneys' fees, and, as a result, these claims constitute a significant portion of labor-related claims brought in federal and state courts.⁵⁷ The FLSA does not contain statutory debarment language.

Compliance with the FLSA can be challenging, as evidenced by the thousands of DOL-WHD findings of non-compliance and the thousands of FLSA lawsuits filed each year. While at its most basic level, the FLSA requires employers to pay employees time and one half for all hours worked over forty in a work week, the statute and its implementing regulations can be complex. By way of example, the FLSA's implementing regulations set forth various exemptions to the overtime requirements for employees employed in a bona fide administrative, professional, and executive capacity.⁵⁸ In order to qualify for such exemptions, employees must, among other things, satisfy applicable duties tests, which are not always clear cut and are often the subject of litigation.⁵⁹ In this

⁵¹ See generally, 29 U.S.C. § 201 *et seq.*

⁵² 29 U.S.C. § 207.

⁵³ 29 U.S.C. § 215(a)(3).

⁵⁴ 29 U.S.C. § 216(c) (stating in part, “[t]he Secretary may bring an action in any court of competent jurisdiction to recover the amount of unpaid minimum wages or overtime compensation and an equal amount as liquidated damages”).

⁵⁵ *Id.*

⁵⁶ 29 U.S.C. § 216(b) (stating in part, “[a]n action to recover the liability . . . may be maintained against any employer . . . in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated.”).

⁵⁷ Notably, many courts accept the view that FLSA claims must be either court or DOL-WHD approved in order to be enforceable. Out-of-court settlements of FLSA claims, as compared to other labor-related statutes (*e.g.*, Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act), are less frequent for this reason.

⁵⁸ 29 U.S.C. § 213.

⁵⁹ See, Defining and Delimiting the Exemptions for Executive, Administrative, Professional, and Computer and Outside Sales Employees, 29 C.F.R. § 541.

regard, strict compliance with the FLSA and its implementing regulation can be particularly challenging for smaller contractors with more limited access to legal and compliance resources.⁶⁰

On July 20, 2020, GAO issued a report in which it reviewed FPDS data in order to identify entities that held contracts with DOD during fiscal years 2015 through 2019.⁶¹ GAO then manually compared this list of 114,051 contractors with DOL-WHD data reflecting entities that were cited for repeated or willful violations of various labor laws, including the FLSA and the OSH Act.⁶² During the relevant period, GAO concluded that 417 of the contractors included had performed work on behalf of DOD, of which 387 had been cited for “repeated” FLSA violations; 18 had been cited for “willful” FLSA violations; and 12 had been cited for “repeated *and* willful” FLSA violations. The DOD contractors cited for these violations represented “a range of industries, including manufacturing; professional, scientific, and technical services; and construction.”⁶³ The 2020 GAO Report observed that although only 1% of DOD contractors were cited for repeated or willful violations of OSH Act or the FLSA during the relevant time period⁶⁴, the total dollar value of awards associated with contracts awarded to entities with repeated and/or willful violations of OSH Act or the FLSA was \$208.5 billion, representing approximately 12% of the total value of DOD contract obligations during fiscal years 2015 through 2019.⁶⁵

⁶⁰ Recognizing small businesses’ limited access to such resources, the ISDC published a guide about suspension and debarment misconceptions along with its FY20 report on federal suspension and debarment activity to clarify the most common issues that arise in suspension and debarment actions.

⁶¹ U.S. Gov’t Accountability Off., GAO-20-587R, *Defense Contractors: Information on Violations of Safety, Health, and Fair Labor Standards*, (July 20, 2020). In its summary of the July 2022 report, GAO noted that the “Department of Labor cited about 1% of defense contractors for willful or repeated safety, health, or fair labor violations in fiscal years 2015-2019.” But, noted GAO, “the data we found didn’t indicate if the violations occurred while performing work related to a defense contract.” Furthermore, the data “also didn’t contain key company identification numbers necessary to match federal contracting data to safety and health violation data in about 40% of the cases.” <https://www.gao.gov/products/gao-20-587r>.

⁶² *Id.*

⁶³ *Id.* at 4.

⁶⁴ *Id.*

⁶⁵ At page 4, the GAO report stated (with footnotes omitted):

For fiscal years 2015 through 2019, about 114,000 companies had contracts with DOD, totaling approximately \$1.7 trillion in obligations. Of those companies, at least 727 (about 1 percent) had been cited for willful or repeated violations under the OSH Act or the FLSA over this time . . . Available data generally do not indicate whether the violations occurred while the employees were performing work related to a DOD contract. For the same time frame, these 727 companies had \$208.5 billion in DOD contract obligations (about 12 percent of the total), and represent a range of industries, including manufacturing; professional, scientific, and technical services; and construction.

C. The Occupational Safety and Health Act

The OSH Act, as amended, and its implementing regulations provide for the creation of workplace safety standards and recordkeeping and reporting requirements that are applicable to private sector employers.⁶⁶ The OSH Act's "General Duty Clause" provides that "[e]ach employer shall furnish to each of his employees, employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees."⁶⁷ The OSH Act also established the Occupational Safety and Health Administration ("OSH Administration") within DOL to set and enforce specific workplace safety standards through notice-and-comment rulemaking.⁶⁸ The OSH Administration has the authority to impose civil penalties for OSH Act violations, as well as to pursue injunctive relief. Employers may face criminal liability for willful violations of the OSH Act's standards.⁶⁹

In the case of employers who contest OSH Act violations, the Occupational Safety and Health Review Commission, an independent federal agency, adjudicates contested citations and penalties which federal courts then have jurisdiction to review.⁷⁰ With respect to debarment, the Contract Work Hours and Safety Standards Act ("CWHSSA") provides DOL with the authority to debar federal construction contractors in connection with OSH Act health and safety standard violations where such violations are found to be repeatedly willful or grossly negligent.⁷¹ Outside of the construction industry, however, it does not appear that DOL views itself as possessing debarment authority with respect to federal contractors who violate the OSH Act.⁷²

V. Current Use of Statutory and Discretionary Debarment and Effects of Increased Use

DOL's imposition of statutory debarment for SCA violations constitutes a small percentage of its total SCA violation findings. Again, during FY2015 to FY2019, there were only 60 SCA-related debarments among 3,562 investigations finding non-compliance. Such statistics reflect the exercise of discretion afforded to DOL within the language of the SCA itself in determining the existence of "unusual circumstances," as well as DOL's institutional objectives of ensuring workers ultimately receive the wages to which they are entitled.

On the one hand, some might argue that the application of statutory debarment under the SCA is fundamentally broken because so few firms are actually debarred; this, proponents of a more automatic debarment system might argue, creates a significant risk

⁶⁶ 29 U.S.C. § 651 *et seq.* Under the OSH Act, states may also adopt OSH Administration-approved state plans, which state occupational and health agencies administer. See 29 U.S.C. § 667.

⁶⁷ 29 U.S.C. § 654(a)(1).

⁶⁸ See *generally*, 29 U.S.C. § 651.

⁶⁹ 29 U.S.C. § 666.

⁷⁰ 29 U.S.C. §§ 659(a), 660-661; 29 C.F.R. § 1903.17.

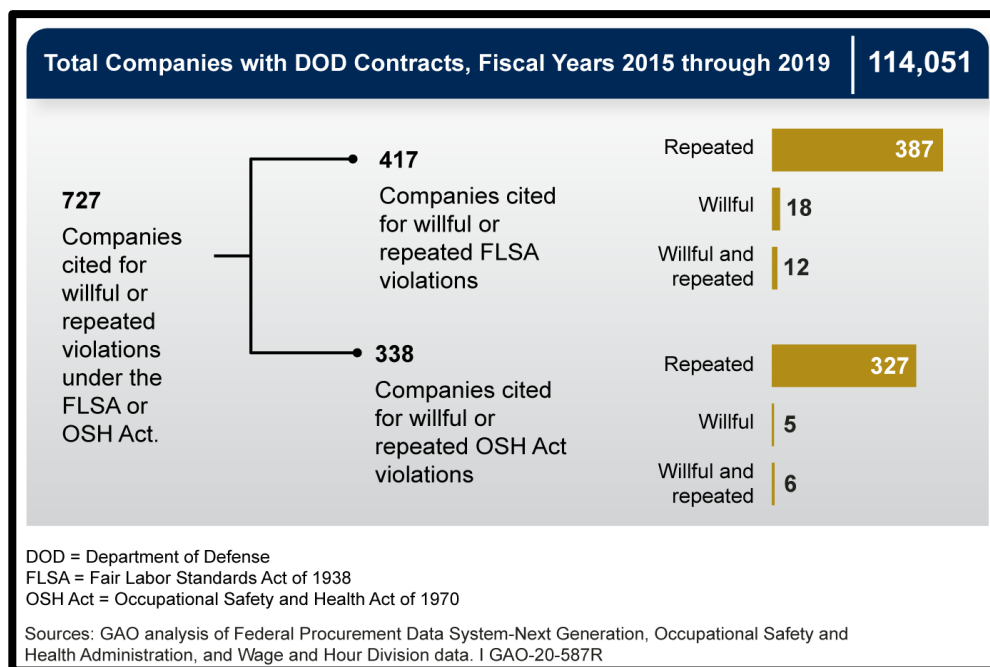
⁷¹ 40 U.S.C. § 3704(c).

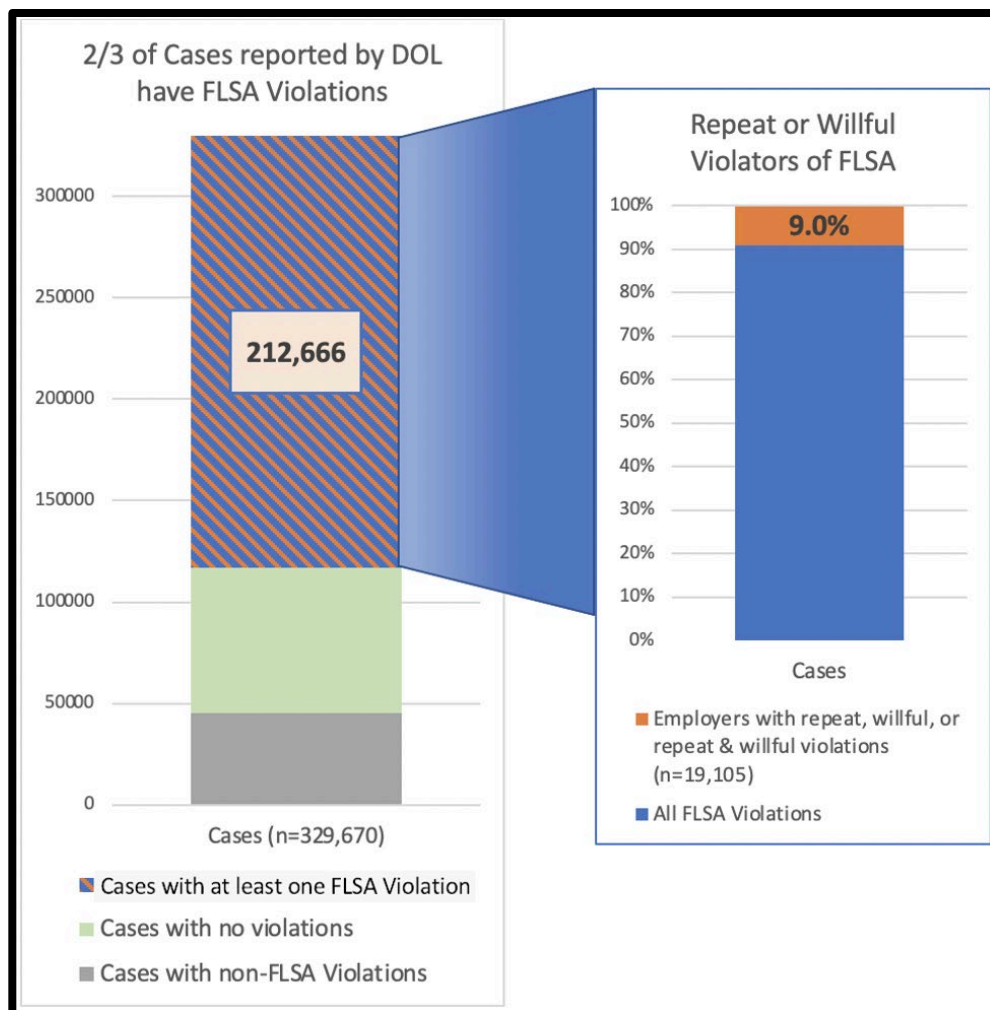
⁷² See U.S. Gov't Accountability Off. GAO-19-235, *Defense Contracting, Enhanced Information Needed on Contractor Workplace Safety*, at p. 12 (Feb. 2019).

that the government will be doing business with non-responsible federal contractors. On the other hand, DOL’s approach also allows the majority of federal contractors in violation of the SCA an opportunity to take satisfactory remedial measures, and thus remain among the pool of contractors with whom the government may do business.

Recently there has been interest in legislation that would impose statutory debarment upon contractors with repeated or willful violations of the FLSA and OSH Act. Putting to one side the administrative complexities that broadened statutory debarment would have for the Labor Department, an important practical consideration associated with such a broadening of statutory debarment would be the significant impact it would have upon the overall supply chain. As noted in the July 20, 2020, GAO report discussed above, the total dollar value of awards associated with contracts awarded to entities with repeated and/or willful violations of OSHA or the FLSA was \$208.5 billion, representing approximately 12% of the total value of DOD awards during fiscal years 2015 through 2019—a substantial figure. Although that figure would narrow substantially if debarments were limited to firms with willful *and* repeated violations (see the chart below, from the GAO report), even that narrowing raises issues regarding the additional administrative costs, enforcement utility and supply chain impacts of broadening the bases for statutory debarment.

To probe these issues further, data analyses were specially commissioned for this Report. These analyses focused first on the potential impact of making debarment statutory for FLSA violations. As noted, the DOL-WHD tracks labor violations from 2005 to present through WHISARD. The second chart shows the total number of labor violations DOL reported for the relevant period and the subset (roughly two-thirds) attributable to FLSA violations.

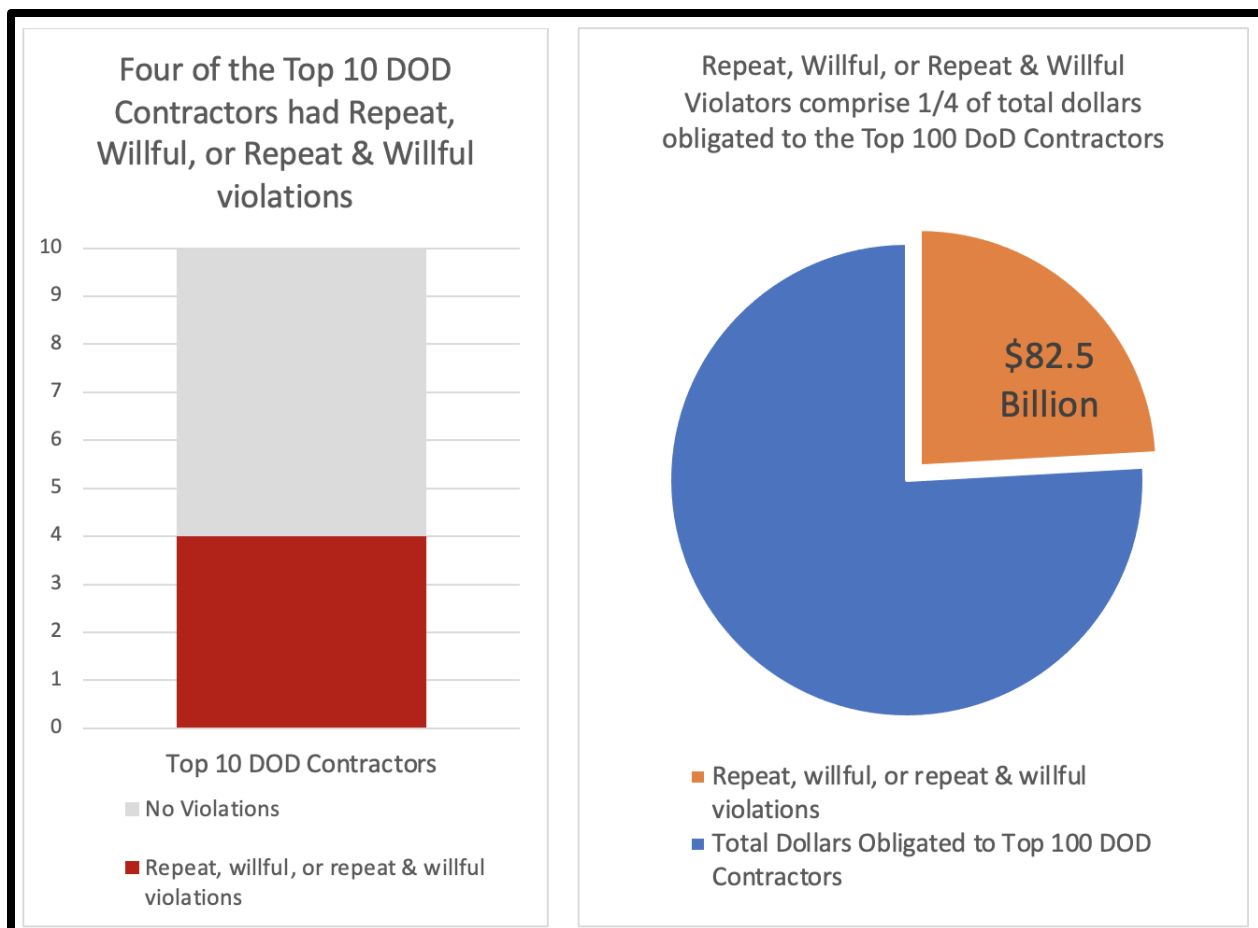




As noted, the DOL-WHD data shows that roughly two-thirds of cases for years 2005 to present were based upon FLSA violations. Of those (and assuming no repeat violators), roughly 9% (or 19,105) of employers cited were repeat, willful, or repeat *and* willful violators.

To address the potential supply chain impact of statutory debarment under the FLSA, research commissioned for this Report more closely analyzed the Labor Department’s data regarding FLSA violations, including especially violations by DOD contractors.

Apparent corporate affiliates of top DoD contractors (those with the highest total dollars obligated) are among the repeat, willful, or repeat *and* willful violators. In particular, corporate affiliates of four of the top ten DoD contractors are apparently such violators. In financial terms, \$82.5 billion (31.8%) of the total \$259 billion obligated to the top 100 DOD contractors in 2021 went to apparent corporate affiliates of companies that are repeat, willful, or repeat *and* willful violators of the FLSA.



These data may underestimate both the number of firms affected and the total dollars obligated, because:

1. The publicly available WHISARD dataset lacks unique identifiers (such as a DUNS number or SAM's new Unique Entity ID), which prevents definitive entity resolution of government contractors. Thus, for example, some federal contractors may not have been identified in this review of FLSA violators.
2. It is nearly impossible, presently, to connect government contractors to all of their affiliates, including those that do not do business with the government and are repeat, willful, or repeat *and* willful violators of the FLSA. As a result, the collateral impact that statutory debarment would have on DOD contractors (which are subject to possible discretionary debarment as affiliates) is difficult to assess.

In sum, depending on how debarment officials implement statutory debarment under the FLSA it may have a broader impact on the DOD supply chain than the figures above indicate. It is important to stress that precisely *which* contractors—and which aspects of the DOD industrial base—would be affected is difficult to predict, in part because of uncertainties in the available government data.

VI. Issues Presented for Analysis by AIRC

Based upon the foregoing review of the applicable law, interviews with senior government personnel, and data analysis, this Report now turns to the specific issues put forward by Congress.

Issue 1: Assess and distinguish the extent to which statutory and discretionary debarment procedures address the Department of Defense's interests in being protected from those entities whose conduct poses business integrity risk to the government.

Business integrity risks to DOD derive from contractors which, as a result of labor law violations and a lack of internal controls, may pose serious performance, reputational and/or corruption risks to the government. Interviews conducted for this Report and the legal review outlined above confirmed that it is difficult for DOL, which has primary authority to enforce violations of labor laws, to assess and mitigate those risks. Statutory debarment regarding labor law violations, which is primarily administered by the Labor Department, in practice has proven to be a relatively weak means of addressing business integrity risk to the DoD. DOD can, however, effectively address those risks through discretionary debarment as is discussed below. The main challenges in doing so are the resources, information and training necessary to empower DOD contracting officials to address those business integrity risks, where appropriate.

Issue 2: Identify any gaps in the current requirements for statutory debarment as a result of labor law violations.

As discussed above, the number of statutory debarment actions undertaken against contractors due to SCA non-compliance is small. In this regard, it is notable that DOL-WHD data show (and interviews confirmed) that prevailing wage statutes generally constitute a small portion of its overall enforcement efforts due in part to limited resources and the large number of statutes for which DOL-WHD has complete or partial enforcement authority. In short, there is a resource issue associated with DOL-WHD's ability to seek debarment for SCA violations generally.

Furthermore, there is an institutional consideration associated with DOL-WHD's enforcement approach with respect to SCA enforcement and seeking debarment generally. Specifically, as discussed, DOL-WHD's objectives are to protect workers by securing fair and timely wage payments and the opportunity for continued employment. Seeking debarment (which may cripple the contracting firm) is not consistent with this restitution-based objective.

Finally, historically, there have been deficiencies in information sharing among and between DOL-WHD and various federal agencies. As highlighted in recent GAO reports, efforts are underway to resolve these deficiencies to ensure that both Contracting Officers and SDOs have access to more comprehensive and accurate information when making responsibility determinations and debarment decisions. However, such information, while helpful, may not provide Contracting Officers (or SDOs) with the necessary knowledge

base needed to make fully informed decisions regarding the nature and circumstances of labor law violations as determined by DOL-WHD in the context of a contractor's present responsibility. Additional resources are needed for training and as discussed below, for the efficient transfer of information regarding violations and enforcement of relevant labor laws across the government.

Issue 3: Provide recommendations as to whether the mission of the Interagency Suspension and Debarment Committee, an interagency body of which DOD is a member and which reports to the Congress annually on the status and improvements made to the Federal suspension and debarment system (pursuant to Section 873 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 (Public Law 110-417)), should be expanded to include not just discretionary but also statutory suspension and debarment.

As was discussed above, the solution for addressing business integrity risks to the Defense Department probably does not lie in expanding statutory debarments for violations of labor laws. Instead, DOD debarring officials (and potentially Contracting Officers) can address those risks through discretionary debarment and responsibility determinations. The Interagency Suspension and Debarment Committee ("ISDC") does not currently play a coordinating role in those efforts unless individual contractors present business integrity risks that span more than one agency. The ISDC could, however, play an important role in opening lines of communication between the relevant agencies, through training and education if adequately resourced. Both DOD and DOL would benefit from greater communication and cooperation, if discretionary debarment is to be used for addressing labor law violations and the resulting business integrity risk of doing business with companies who are willful or repeat labor law violators. In order to support increased compliance supervision, it will be important for decision makers to have information on both the risks posed by companies who are willful or repeat offenders and the potential supply chain impacts if contractors supporting DOD are suspended or debarred for willful or repeated violations. These are, in fact, normal business considerations in any discretionary debarment decision.

Issue 4: Provide any other recommendations the AIRC finds relevant

The discussion above, in line with the directions from Congress, focused on *who* in government might debar contractors that engaged in labor violations, and *why*, i.e., on what grounds. Several of those we interviewed agreed, though, that increased transparency—making information on violations and enforcement more accessible, typically across the internet—could also enhance labor law compliance among federal contractors. Making violation and debarment information more readily accessible would be in keeping with the U.S. government's statutorily required shift to "open data," but would need to identify the practical and legal obstacles to achieving full transparency.

Efforts to improve transparency would be in line with existing federal laws which require transparency ("open data") in government. The Digital Accountability and Transparency (DATA) Act, signed by President Obama in 2014, called for government-

wide data standards.⁷³ In 2019 President Trump signed the OPEN Government Data Act, in which Title II⁷⁴ calls for federal data to be open and machine-readable by default.⁷⁵

A number of options for enhanced transparency emerged from our research:

- **Improving Transparency Regarding Debarment Actions:** The federal repository of debarment information, SAM, does not provide detailed information regarding the *reasons* for debarment.⁷⁶ Although FAR 9.404 says that the cause of debarment is to be listed, the explanation for a contractor's debarment is typically given in very generic terms.⁷⁷ It is generally impossible to determine, therefore, whether a contractor has been suspended or debarred for violations of labor laws. This makes debarment a less effective deterrent, for it means that other governments or parties which might look to this debarment information, not knowing the basis for debarment, will be less likely to rely on the mere listing of a debarred contractor.
- **Improving Procurement Officials' Access to and Understanding of Information Regarding Labor Law Violations:** Although DOL publishes extensive data regarding alleged violations of labor law in its publicly available *Data Enforcement* databases⁷⁸, procurement officials we spoke with generally did not know how to access or use that data. DOL does not assign or use unique identifiers for contractors that would allow for ready identification,⁷⁹ and contracting officers and debarment officials are seldom, if ever, trained in finding or assessing data regarding labor violations.
- **Transferring Data Regarding Labor Law Violations to SAM:** To simplify procuring officials' access to labor law violations, another option would be to share information between DOL and SAM (which a contracting officer must review before

⁷³ Pub. L. No. 113-101.

⁷⁴ Pub. L. No. 115-435.

⁷⁵ Accessibility and machine-readability are the cornerstones to "open contracting," a concept, focused on procurement, which is a subsidiary part of "open government." See, e.g., Open Contracting Partnership, *Global Principles* (calling for governments to disclose information regarding debarments), <https://www.open-contracting.org/what-is-open-contracting/global-principles/>.

⁷⁶ This is not a universal rule; the Environmental Protection Agency, for example, has long published its decisions to debar on proprietary databases such as LEXIS and Westlaw. See, e.g., *In re Stanley A. Peterson Respondent Determination*, 1995 WL 1212902, at *8 n.5.

⁷⁷ A typical exclusion entry on SAM.gov reads: "Nature (Cause) - Determined ineligible upon completion of administrative proceedings establishing by preponderance of the evidence of a cause of a serious and compelling nature that it affects present responsibility; or determined ineligible based on other regulation, statute, executive order or other legal authority."

⁷⁸ Data Enforcement, <https://enforcedata.dol.gov/views/search.php> (last accessed Sept. 15, 2022).

⁷⁹ The General Services Administration reported that on April 4, 2022 "the unique entity identifier for contractors used across the federal government changed from the DUNS Number to the Unique Entity ID (generated by SAM.gov)." GSA noted that the "Unique Entity ID is a 12-character alphanumeric ID assigned to an entity by SAM.gov." As part of this transition, "the DUNS Number has been removed from SAM.gov," and entity registration, searching, and data entry in SAM.gov now require use of the new Unique Entity ID. See also GSA, *Unique Entity Identifier Update*, <https://www.gsa.gov/about-us/organization/federal-acquisition-service/office-of-systems-management/integrated-award-environment-iae/iae-systems-information-kit/unique-entity-identifier-update?gsaredirect=entityid>.

making a responsibility finding prior award). Simply making the enormous trove of DOL data regarding alleged labor law violations available in SAM would not, however, necessarily be helpful to a Contracting Officer without an explanation and context for the labor law violations. SDOs are even more likely to use that data in a meaningful manner because their processes allow for investigation and review, typically focused on a specific contractor and assessing the contractor's compliance systems over a span of time to determine present responsibility.

- **Requiring Contractors to Disclose Labor Law Violations in SAM:** Another approach would be to require contractors to submit data regarding finally adjudicated labor law violations as part of their regular representations and certifications into SAM.⁸⁰ While prospective contractors are currently required to disclose whether they are suspended or debarred⁸¹, they are not required to disclose labor law violations. Issues regarding requiring contractor disclosure of labor law violations are discussed further below.
- **Requiring Contractor Disclosure of Labor Law Violations to the Contracting Agency:** Another approach would be to require contractors to disclose labor law violations directly to contracting agencies. This was a cornerstone to the Obama administration's "Fair Pay and Safe Workplaces" executive order, which would have required contractor disclosures of labor law compliance in an effort to enhance governmentwide compliance.⁸² That executive order was repealed by President Trump⁸³, and Congress passed a joint resolution⁸⁴ of disapproval of the implementing rule. The resolution was signed by President Trump and became Public Law 115-11.⁸⁵ Under the Congressional Review Act, a new rule "that is

⁸⁰ See, e.g., FAR 9.405.

⁸¹ FAR 52.209-5.

⁸² E.O. 13673, 79 Fed. Reg. 45309 (2014). Section 2 of the Executive Order said each federal agency "shall ensure that provisions in solicitations require that the offeror represent, to the best of the offeror's knowledge and belief, whether there has been any administrative merits determination, arbitral award or decision, or civil judgment . . . rendered against the offeror within the preceding 3-year period."

⁸³ E.O. 13782, 82 Fed. Reg. 15607 (2017).

⁸⁴ 81 Fed. Reg. 58562.

⁸⁵ Before passage of Public Law 115-11, the U.S. District Court for the Eastern District of Texas enjoined enforcement of DOL's "Fair Pay" rule. In an unpublished decision, the district court held that the Obama administration had exceeded its authority by issuing a rule which could impose debarment on contractors that violated those labor law statutes that do not already call for statutory debarment.

The Executive Order, FAR Rule, and DOL Guidance explicitly conflict with those labor laws that already specify debarment procedures, after full hearings and final adjudications, for contractors who violate the requirements specifically directed at government contracting, i.e., DBA, SCA, Rehabilitation Act, VEVRAA, Executive Order 11246, and Executive Order 13658. It defies reason that Congress gave explicit instructions to suspend or debar government contractors who violate these government-specific labor laws only after a full hearing and final decision, but intended to leave the door open to government agencies to disqualify contractors from individual contract awards without any of these procedural protections.

Associated Builders & Contractors of Southeast Texas v. Rung, No. 1:16-CV-425, 2016 WL 8188655, at *8 (E.D. Tex. Oct. 24, 2016). The district court cited a 1986 decision of the Supreme Court, *Wisconsin Department of Industry v. Gould*, in support of its conclusion that additional penalties—such as

substantially the same as” the rule disapproved by Congress “may not be issued, unless the . . . new rule is specifically authorized by a law enacted after the date of the joint resolution disapproving the original rule.”⁸⁶

More recently, the U.S. Department of Agriculture (USDA) published proposed rules that would require contractors to disclose labor law violations to USDA as part of the contract formation process.⁸⁷ Industry comments to the USDA proposed rules argued that the proposed rule violates the Congressional Review Act, and did not take into account the potentially substantial compliance burdens on industry or adequately define the adjudicated violations that would have to be disclosed.⁸⁸ Industry representatives argued that, given the numbers of potential labor law violations and the high costs of debarment (or misreporting), these clauses could harm the DIB by, for example increasing compliance costs and/or reducing the number of contractors willing to participate in defense contracting.

As the discussion above reflects, the first two options, improving transparency regarding debarment actions and improving procurement officials’ access to information regarding labor law violations, appear to be the ones that would pose the fewest practical and legal issues, in order to enhance transparency regarding labor law violations.

Enhancing public transparency would create incentives for agencies to improve data accuracy, both inside and outside the government. As Columbia University PhD candidate Brad Nathan has noted, agencies “may want or have to invest in better internal systems to report accurately. This may be due to protecting their reputations, avoiding litigation, or simply to comply with internal control requirements of external reporting rules.

debarment—cannot simply be “added” to existing labor law statutes, such as the National Labor Relations Act:

The Supreme Court overturned a similar government action in *Wisconsin Dep’t of Indus. v. Gould*, 475 U.S. 282, 286 (1986). There, a state attempted by law to disqualify government contractors who had been found by judicially enforced orders to have violated the NLRA on multiple occasions over a five-year period. *Id.* at 283. The Supreme Court held that the NLRA foreclosed both “regulatory or judicial remedies for conduct prohibited or arguably prohibited by the [NLRA].” *Id.* at 286.

Id. at *7.

⁸⁶ 5 U.S.C. § 801(b); see generally, Kevin Chen, *Why Congress Should Repeal the Congressional Review Act* (Apr. 2022), <http://eelp.law.harvard.edu/wp-content/uploads/Kevin-Chen-Why-Democrats-Should-Repeal-the-CRA.pdf>.

⁸⁷ 87 Fed. Reg. 9005, 9017 (2022) (proposed clauses would require contractors to certify (subject to possible fraud enforcement under the False Claims Act) that it “is in compliance with all applicable labor laws and that, to the best of its knowledge, its subcontractors of any tier, and suppliers, are also in compliance with all applicable labor laws.” Offerors would need to certify that “to the best of the offeror’s knowledge and belief, that they, and any subcontractor at any tier, are in compliance with all previously required corrective actions for adjudicated labor law violations”).

⁸⁸ See, e.g., Letter of Associated Builders & Contractors to Tiffany J. Taylor, Senior Procurement Executive, Director of Office of Contracting and Procurement, U.S. Department of Agriculture, re: Docket No. USDA-2022-0002, Agriculture Acquisition Regulation Proposed Rule [RIN: 0599-AA28] (Mar. 21, 2022). The comments on USDA’s proposed rule are collected at <https://www.regulations.gov/document/USDA-2022-0002-0001/comment>.

Such controls can lead to better internal information, resulting in better decision making.” In a 2018 interview with *Defense Matters*, the General Services Administration’s Tim DiNapoli pointed out that, when agencies are mandated to collect data and use it for decision-making, experience shows that the quality of data will likely improve.⁸⁹

As Brad Nathan has also noted, enhancing public transparency can cause a reduction in information biases due to having multiple audiences. “Information that is privately disclosed,” he points out, “can be biased by the sender in the direction valued by the recipient (e.g., management or other organizations).” That bias “can be reduced through public disclosure to multiple recipients, if the various recipients have distinct preferences.” If data are disclosed publicly, he notes, an entity “is constrained by the multiple audiences; and, hence, is more likely to report truthfully/less biasedly.”⁹⁰

Taken in sum, improving transparency is likely to improve labor law compliance among contractors. The challenge will be in *how* to improve that transparency, considering limited resources, the practical and legal obstacles, and allowing for the sometimes-unintended consequences of enhanced transparency.

VII. Conclusion

The choice of how to use debarment as a tool for the government to ensure that it only does business with presently responsible contractors, and in particular, contractors that comply with federal labor laws, is a matter of policy for both the Legislative and Executive branches of government to address. This report outlines four potential approaches for addressing business integrity risk in this regard:

- The Department of Labor, exercising either statutory or discretionary debarment authority, proposes contractors for debarment for labor law violations;
- Contracting agency SDOs exercise discretionary debarment authority to propose debarment for labor law violators;
- Contracting Officers, prior to making award decisions, address labor law violations as part of their present responsibility determinations; and
- Contractors report their history of adjudicated labor law violations as part of their annual representations and certifications.

⁸⁹ Government Matters, <https://govmatters.tv/report-using-data-to-make-spending-decisions-at-dod/> (last accessed Sept. 15, 2022)

⁹⁰ See, e.g., Joseph Farrell & Robert Gibbons, *Cheap Talk with Two Audiences*, 79 Am. Econ. Rev. 1214 (1989); Paul Newman & Richard Sansing, *Disclosure Policies with Multiple Users*, 31 J. Accounting Res. 92 (1993). *But cf.* Steven Vanhaverbeke, Benjamin Balsmeier & Thorsten Doherr, *Corporate Financial Transparency and Credit Ratings* (July 2019) (finding that increases in public information may cause analysts to rely less on more-accurate private information, because of reputational concerns), <https://www.wiwi.hu-berlin.de/en/Professorships/bwl/finance/seminars/papers-fin-acc-res-seminars/19ss/vanhaverbeke.pdf>.

None of these four approaches are mutually exclusive, and a regime could be constructed to use all four. However, the two approaches that focus on SDOs and Contracting Officers would require affording them greater access to data and expertise on what “finally adjudicated violations” mean vis-a-vis a contractor's present responsibility; that effort in transparency and training would almost certainly require additional resources.

In addition, whatever policy decision is made going forward, expectations must be managed. A final adjudication of a violation of a labor law is not on its face a determination that a contractor is not presently responsible and therefore warrants debarment. Debarment is not a form of punishment. It is a tool to protect the government from doing business with contractors that are not presently responsible—contractors that on balance pose unacceptable business integrity risk—which requires an analysis of what steps the contractor has taken, if any, to remedy the adjudicated violation. Debarment is a tool to increase the number of presently responsible contractors with which the government may do business, and to ensure that the government has access to the supply chain it needs to deliver services to the American taxpayer and to defend our nation.