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## Final Regulations Implementing Minimum Wage Increases on Federal Contractors

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On October 1, 2014, the Department of Labor issued final regulations implementing Executive Order 13658 that raises the minimum wage for workers and tipped employees of federal contractors. The new minimum wages, which will be set at \$10.10 for workers and \$4.90 for tipped employees, will apply to new contracts and replacements for expiring contracts with the federal government that result from solicitations issued on or after January 1, 2015, or to contracts that are awarded outside the solicitation process on or after January 1, 2015. Annual cost of living increases will begin on January 1, 2016.

The final regulations use existing definitions from the Executive Order, the Fair Labor Standards Act (FLSA), the Service Contract Act (SCA), and the Davis-Bacon Act (DBA).

### Covered Contracts

The minimum wage requirements only apply to contracts covered under the Executive Order. There are three main requirements for covered contracts.

First, a contract must be a "new contract," as defined in the regulations.<sup>1</sup> The term "new contract" includes contracts entered into on or after January 1, 2015, renewals and long-term extensions of previous contracts, modified contracts where the modification is outside the scope of the contract (such as providing an entirely new service), and replacements for expiring contracts, but it does not apply to pre-existing options to renew an existing contract by the federal government.

Second, it must fall into one of four categories of covered contracts:

- A procurement contract for construction covered by the Davis-Bacon Act;
- A contract for services covered by the Service Contract Act;
- A contract for concessions, including any concessions contract excluded from coverage under the Service Contract Act by Department of labor regulations at 29 CFR 4.133(b); and
- A contract entered into with the federal government in connection with federal property or lands and related to offering Services for federal employees, their dependents, or the general public.

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<sup>1</sup> The definition is found in Section 10.2.

Finally, the wages of the workers under these contracts must be governed by the FLSA, DBA, or SCA.<sup>2</sup> It is worth noting that subcontracts meeting the above criteria will also be subject to the minimum wage regulations.

## Excluded Contracts and Employees

The following are excluded from the minimum wage regulations:<sup>3</sup>

- Grants within the meaning of the Federal Grant and Cooperative Agreement Act;
- Contracts with, agreements with, and grants to Indian Tribes under the Indian Self-Determination and Education Assistance Act;
- Procurement contracts for construction not covered by the DBA; and
- Contracts for services that are exempted from the SCA.

With respect to excluded employees, except for workers who are otherwise covered by the DBA or the SCA, the minimum wage requirements do not apply to those who are not entitled to minimum wage under the FLSA.<sup>4</sup> Some of the excluded employees are:

- Learners, apprentices, and messengers;
- Students; and
- Individuals employed in bona fide executive, administrative, or professional capacity.

The regulations also exclude from their requirements FLSA-covered workers performing “in connection with” covered contracts less than 20 percent of their work hours in a given workweek.<sup>5</sup> This exclusion does *not* apply to workers “performing on” a covered contract whose wages are governed by the FLSA, SCA, or DBA. A worker will be considered to be performing on a covered contract if he or she is directly engaged in the performance of specified contract services or construction. For example, all laborers and mechanics working on the construction of a public building will be regarded as performing on a covered contract, and thus entitled to the minimum wage. On the other hand, excluded employees would be those who do not perform the construction due to the nature of their non-physical duties and/or because they are not present on the site of the work, such as a janitor performing cleaning duties off-site.

In order for a contractor to exclude employees, it must maintain records showing the hours worked by those employees, or provide other proof showing the hours worked in connection with the covered contract.

## Other Obligations

The contractor and any subcontractors must include in contracts and covered subcontracts the minimum wage clause found in the new regulations. The contractor must require, as a condition of payment, that the subcontractor include the minimum wage clause in any lower-tier subcontracts. The prime contractor and any upper-tier contractor are responsible for making sure that all workers performing work on or in connection with covered contracts are paid the minimum wage.<sup>6</sup>

Additionally, contractors will have to provide notice of the minimum wage to FLSA-covered workers performing work on or in connection with covered contracts by hanging a poster that will be provided by the Department.<sup>7</sup>

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<sup>2</sup> Section 10.3(a)(1)-(2).

<sup>3</sup> Section 10.4(a)-(d).

<sup>4</sup> Section 10.4(e).

<sup>5</sup> Section 10.4(f).

<sup>6</sup> Section 10.21(b).

<sup>7</sup> Section 10.29(a)-(c).

## Next Steps

Federal contractors should assess the contracts they intend to enter into in 2015 in order to prepare for the minimum wage increases mandated by the Executive Order and the regulations and to maintain the relevant payroll and other records. Contractors should also obtain copies of the minimum wage posters and post where appropriate.

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