

June 25, 2014

New Proposed Regulations Implementing Minimum Wage Increases on Federal Contractors

By William Hays Weissman

On June 18, 2014, the Department of Labor issued proposed regulations to implement President Obama's Executive Order¹ raising the minimum wage to \$10.10 per hour for many workers of federal contractors, and to \$4.90 per hour for tipped employees of federal contractors. Annual cost of living increases would begin in 2016. The Executive Order applies to new or renewed contracts entered into after December 31, 2014. It relies upon existing definitions, procedures, remedies, and enforcement processes under the Fair Labor Standards Act (FLSA), the Service Contract Act (SCA), and the Davis-Bacon Act (DBA) to implement and enforce the Executive Order.

The critical considerations for employers are (1) what contracts are covered; (2) what workers are covered; and (3) what wages are covered.

Covered Contracts

An initial determination must be made as to whether the Executive Order covers a contract. The Proposed Rules set forth 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); or
- 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.

In addition, the wages paid must be covered by the FLSA, SCA or DBA.²

1 On February 12, 2014, President Obama issued Executive Order 13658, "Minimum Wage for Contractors," available at <http://www.whitehouse.gov/the-press-office/2014/02/12/executive-order-minimum-wage-contractors>.

2 Section 10.3(a)(1)-(2).

Excluded Contracts and Employees

The Proposed Regulations exclude certain types of contracts and workers. Excluded contracts are:

- “Grants” within the meaning of the Federal Grant and Cooperative Agreement Act
- Contracts and grants to Indian Tribes under the Indian Self-Determination and Education Assistance Act
- Procurement contracts for construction, that are excluded from the Davis-Bacon Act’s coverage
- Contracts for services that are exempted from coverage under the Service Contract Act³

In addition, except for workers who are otherwise covered by the DBA or the SCA, the proposed regulations also exclude employees who are not entitled to the minimum wage under the FLSA, including:

- Learners, apprentices, or messengers
- Students
- Individuals employed in a bona fide executive, administrative, or professional capacity
- Outside salespersons⁴

Covered Wages

Even if a contractor is covered by the new minimum wage requirements, it does not mean that all wages a covered contractor pays to employees are subject to the Executive Order. A covered contractor is only required to pay the applicable Executive Order minimum wage for the time spent performing services on, or in connection with, a covered contract. In determining whether a worker is performing within the scope of a covered contract, a contractor must determine if the employee is performing the specific services called for by its terms, or is otherwise performing duties necessary to the performance of the contract.⁵ If the services are not specifically called for or otherwise necessary to the contract, the wages are not subject to the Executive Order, even if the contractor is covered and the employee performs services that might be tangentially related to a covered contract. Employers will have to keep records that allow federal agencies to determine which wages are covered and which wages are excludable from the Executive Order.

Other Obligations

Covered contractors must insert the minimum wage clause into covered subcontracts and must require, as a condition of payment to the subcontractors, that the subcontractors include the clause in all lower-tier subcontracts. The prime contractor and upper-tier contractor are responsible for compliance by any subcontractor or lower-tier subcontractor.

Next Steps

The Department of Labor is accepting comments until July 17, 2014, and the final rules should be published no later than October 1, 2014, in order to be effective on January 1, 2015. Given the nature of the Proposed Regulations, it is unlikely the final regulations will be radically different. To the extent that contractors are already paying more than \$10.10 per hour, whether under federal, state or local minimum wage laws or other laws (such as prevailing wage laws), the Executive Order will have little practical impact. Nonetheless, employers should begin to review contracts that they may be looking to enter into in 2015 and later to determine what wages might be covered and begin to develop record keeping practices in order to segregate covered wages as necessary.

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³ Section 10.4(a)-(d).

⁴ Section 10.4(e).

⁵ Section 10.22.