

Client Alert

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Federal Contractor Minimum Wage Provisions Finalized

By Tina D. Reynolds and Steven W. Cave

In July, we alerted government contractors and subcontractors to the Department of Labor's (DoL) Proposed Rule to implement Executive Order (EO) 13658, which raises the minimum wage for covered employees working directly on, or contributing to, covered federal contracts and subcontracts to \$10.10 per hour.

As we stated in our initial [client alert](#), EO 13658 requires, beginning January 1, 2015, that covered federal contracts and subcontracts contain a clause specifying that the minimum wage to be paid to covered workers must be at least \$10.10 per hour. As discussed further below, the EO and implementing regulations do not require contractors to pay all employees the minimum wage.

After the DoL published its Proposed Rule to implement the Executive Order in June of this year, it received more than 6,500 comments. The Final Rule, published on October 7, 2014 addresses many of these, but it appears the DoL found most of the comments unpersuasive. As a result, the Final Rule largely tracks the Proposed Rule. A few changes, some of which are discussed below, were made in response to comments, however.

HIGHLIGHTS FROM THE FINAL RULE

- The Final Rule narrows the definition of "contractor" to apply only to companies awarded a covered federal government contract or subcontract. The Proposed Rule broadly defined "contractor" to include former and prospective contractors and subcontractors not currently performing federal government work.
- The Final Rule limits its application to contracts that are awarded pursuant to solicitations issued on or after January 1, 2015, or awarded outside the solicitation process if the contract is issued on or after January 1, 2015. Under certain circumstances clarified by the Final Rule, certain contracts entered into prior to January 1, 2015, can constitute a "new contract" covered by the Rule. These include, for example, renewing or extending a contract on or after January 1, 2015, pursuant to bi-lateral negotiation.
- The Final Rule clarifies which federal contracts and subcontracts are covered. These include: (1) procurement contracts for construction *that are covered by the Davis-Bacon Act (DBA)*; (2) contracts for services *that are covered by the Service Contract Act (SCA)*; (3) contracts for concessions (including concessions contracts excluded from coverage under the SCA); and (4) contracts issued in connection with federal property or related to offering services for federal employees, their dependents, or the general public. Grants are expressly excluded from coverage. As a result, only those workers performing directly on, or in connection with, a covered contract or subcontract are entitled to receive the minimum wage.

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- Although all workers performing services “directly on” a covered contract are considered covered employees, the Proposed Rule raised questions about which employees providing services “in connection with” a covered contract are covered. The Final Rule clarifies a provision in the Proposed Rule regarding coverage of workers performing support services “in connection with a covered contract” who are covered by the Fair Labor Standards Act (FLSA). The Proposed Rule states that such workers must be paid the minimum wage even though they are not “service workers” covered by the SCA or onsite “laborers and mechanics” covered by the DBA. To address concerns related to this proposed provision, newly added subsection 10.4(f) creates a “20 percent of hours worked” exclusion. This exclusion states that workers performing less than 20 percent of their hours in a workweek to provide support in connection with a covered contract are not required to receive the \$10.10 minimum wage. The “20 percent of hours worked” exclusion does not apply to workers performing services directly on a covered contract.
- The Final Rule sets forth each agency’s responsibility to notify contractors of the Rule’s application. Agencies are required to insert the minimum wage clause into covered contracts and, if they fail to do so, the contractor may be entitled to an equitable adjustment to the contract value to reimburse the contractor for the additional labor costs.
- Beginning January 1, 2016, and annually thereafter, the minimum-wage for federal contractors may be increased by the Secretary of Labor in correlation with the annual percentage increase in the Consumer Price Index for Urban Wage Earners and Clerical Workers. If applicable, the Secretary must publish the new minimum wage at least 90 days before it is scheduled to take effect.
- The Final Rule implements new recordkeeping and notice requirements. First, contractors are required to maintain adequate records regarding each worker’s occupation, job classification, and total wages paid. Second, as with numerous regulatory requirements, contractors are now required to prominently post the new minimum wage rights and display a poster (to be created and provided by the DoL) providing information to support workers.
- Lastly, the Final Rule articulates the potential remedies and sanctions for failing to comply. Potential sanctions include: (1) requiring payment of back wages owed to workers; (2) withholding of amounts due to the contractor in order to satisfy the contractor’s wage obligations; and/or (3) debarment for a period of up to three years.

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