

CLIENT ALERT

DOL Publishes Final Rule Implementing Executive Order 13658

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This week the Department of Labor (DOL) published regulations implementing Executive Order 13658 in the Federal Register. As we first reported in [February 2014](#), Executive Order 13658 directed the DOL to implement regulations raising the hourly minimum wage paid by government contractors to workers performing work on covered Federal contracts to \$10.10 per hour, beginning on January 1, 2015. Beginning January 1, 2016, the minimum wage will be determined annually by the Secretary of Labor, who will publish the new wage rate at least 90 days before it is to take effect.

The Final Rule, which was issued on October 1, 2014, closely tracks the proposed rule that the DOL issued back in June, with few modifications. In issuing the Final Rule, the DOL addressed several of the 6,500 comments that it received from businesses, unions, and advocacy organizations in response to the proposed rule. Although the DOL stated that it found the comments helpful, it rejected nearly all of them, with precious few exceptions.

The key provisions of the Final Rule include the following:

Timing

The Final Rule applies to new contracts and replacement contracts (including amendments or modifications) 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.

Coverage

In our [February 2014 Alert](#) we noted that the scope of the Executive Order's coverage was ambiguous on the question of whether the minimum wage requirement applied to contracts that are not subject to the Service Contract Act (SCA) or the Davis-Bacon Act (DBA). The Final Rule clarifies this ambiguity. Under the Final Rule, the Executive Order applies to all individuals and legal entities awarded a Federal Government contract or subcontract under a Federal Government Contract, including (i) construction contracts covered by the DBA; (ii) contracts for services covered by the SCA; (iii) concessions contracts; and (iv) contracts to provide services on Federal property or lands. The Final Rule clarifies that the minimum wage requirement only applies to work done "on" covered contracts (i.e., workers directly performing work called for by the contract's terms) or "in connection with" covered contracts (i.e., workers performing other duties necessary to the performance of the contract). This means, for example, that employees who work on covered contracts 50% of the time are required to be paid the minimum wage only for that time, and not for the 50 percent of their time that they spend on other work. However, employees performing support work "in connection with" a covered contract for less than 20 percent of their workweek are not entitled to the minimum wage.

The Final Rule further clarifies the scope of coverage, noting that all of the SCA's exemptions are applicable to the Executive Order, unless such SCA-exempted contracts are one of the other three types of contracts noted above. And, contracts that are

only subject to Davis-Bacon Related Acts (provisions that apply DBA labor standards to federally assisted construction, such as the Federal-Aid Highway Acts, the Housing and Community Development Act of 1974, and the Federal Water Pollution Control Act) are not subject to the wage requirement. Additionally, except for workers whose wages are calculated pursuant to special certificates issued under 29 U.S.C. § 214(c) and workers who are otherwise covered by the SCA or DBA, workers who are exempt from minimum wage under the Fair Labor Standards Act (FLSA) are not subject to the Executive Order.

Administrative Obligations

The Final Rule sets forth administrative standards and obligations of contractors and subcontractors in order to comply with the Executive Order. First, contractors must include the Executive Order contract clause in all subcontracts of any tier on a contract with the Federal Government. Second, contractors must notify all workers who are covered by the FLSA and who perform work on or in connection with covered contracts of the applicable minimum wage rate and their minimum wage rights. Notice may be accomplished by posting a poster (provided by the DOL) in a principal place of business or electronically, as long as the contractor customarily posts notices to their workers electronically. Third, the Final Rule places an affirmative duty on contractors to maintain records reflecting each worker's occupation or classification and the total wages paid. Finally, contractors are prohibited from taking any kickback on covered contracts or for retaliating against workers for exercising their rights under the Final Rule.

Enforcement

The Final Rule provides that if a contractor fails to put the minimum wage clause into a contract or post the required notice, workers may be entitled to a contract adjustment to cover the additional costs. Additionally, the Final Rule contains mechanisms for Wage and Hour Division investigations and informal complaint resolution, based on existing mechanisms for enforcing other wage laws. According to the Final Rule, if contractors are found to have violated the Executive Order, they may be required to pay back wages and be subject to debarment.

Employers should begin assessing whether and how the Executive Order and Final Rule will impact their projected labor costs and operations. Because the Final Rule makes it clear that the Executive Order does not apply to all workers, employers should establish clear and reliable methods for identifying who does and does not qualify for the increased minimum wage. Finally, it is imperative that employers ensure that they are prepared to meet the various notice requirements mandated by the Final Rule to avoid significant penalties for violation of the Executive Order's requirements.

The [Final Rule](#), [FAQs](#), and a [Fact Sheet](#) discussing the Final Rule are available on the DOL's website.

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