

ESTABLISHING A MINIMUM WAGE FOR CONTRACTORS

EXECUTIVE ORDER 13658

INTRODUCTION

EXECUTIVE ORDER 13658 (E.O. 13658, E.O., or Order)

COVERAGE-REQUIREMENTS AND DEFINITIONS

Overview of the Final Rule Implementing E.O. 13658

COVERAGE OF EXECUTIVE AGENCIES AND DEPARTMENTS

GENERAL CONTRACT COVERAGE PRINCIPLES

DEFINITION OF “CONTRACT”

CATEGORIES OF COVERED CONTRACTS

1. PROCUREMENT CONTRACTS FOR CONSTRUCTION COVERED BY THE DBA
2. SERVICE CONTRACTS COVERED BY THE SCA
3. CONTRACTS FOR CONCESSIONS
4. CONTRACTS IN CONNECTION WITH FEDERAL PROPERTY OR LANDS

COVERAGE OF “NEW CONTRACTS”

VALUE THRESHOLD REQUIREMENTS

WAGES OF WORKERS GOVERNED BY THE FLSA, SCA, OR DBA

SUBCONTRACTS

GEOGRAPHIC SCOPE OF COVERAGE

CONTRACTS THAT ARE NOT COVERED BY THE E.O. AND FINAL RULE

REQUIREMENTS

WORKERS COVERED BY THE E.O. MINIMUM WAGE

WORKERS COVERED BY SECTION 14(c) OF THE FLSA

EFFECT OF E.O. ON THE WAGE RATES PAID TO TIPPED EMPLOYEES

WORKERS NOT COVERED BY THE EO

CONTRACTING AGENCY REQUIREMENTS

APPLICATION TO NEW CONTRACTS (insertion of contract clause)

APPLICATION TO NEW CONTRACTS RETROACTIVELY

WITHHOLDING FUNDS

FORWARDING COMPLAINTS TO THE WAGE AND HOUR DIVISION (WHD)

CONTRACTOR REQUIREMENTS

CONTRACT CLAUSE

RATE OF PAY

SEGREGATION: COVERED AND NON-COVERED WORK

DEDUCTIONS

FREQUENCY OF PAY

RECORDKEEPING REQUIREMENTS

ANTI-KICKBACK

NOTICE UNDER THE E.O.

RELATIONSHIP BETWEEN THE E.O. AND OTHER FEDERAL AND STATE WAGE LAWS

ENFORCEMENT AND ADMINISTRATIVE PROCEDURES

COMPLAINTS
WHD INVESTIGATION
APPEALS PROCESS
WORKER PROTECTION

INTRODUCTION

Executive Order 13658 (E.O. 13658, E.O., or the Order)

President Obama signed E.O. 13658 -- “Establishing a Minimum Wage for Contractors” – on February 12, 2014

E.O. 13658 seeks to increase efficiency and cost savings in the work performed by parties that contract with the Federal Government by raising the hourly minimum wage paid by those contractors to workers performing on or in connection with covered Federal contracts to: (i) \$10.10 per hour, beginning January 1, 2015; and (ii) beginning January 1, 2016, and annually thereafter, an amount determined by the Secretary of Labor (the Secretary) in accordance with the Order.

Overview of the Final Rule Implementing E.O. 13658

- The E.O. directed the Department of Labor (the Department or DOL) to issue regulations to implement the requirements of the Order. The Department published a Notice of Proposed Rulemaking (NPRM) in the Federal Register on June 17, 2014. The NPRM proposed standards and procedures for implementing and enforcing the minimum wage protections of E.O. 13658 and invited comment on the proposed provisions. The Department received comments from a variety of interested stakeholders, such as labor organizations; contractors and contractor associations; worker advocates, including advocates for individuals with disabilities; contracting agencies; small businesses; and workers.
- After carefully considering all timely and relevant comments, the Department published a final rule to implement the provisions of E.O. 13658 on October 7, 2014. As required by section 4(c) of the E.O., the Department’s final rule incorporates to the extent practicable 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). The final rule is posted on WHD’s website at <http://www.dol.gov/whd/govcontracts/>.
- The E.O. also required the issuance of regulations by the Federal Acquisition Regulatory Council (FARC). The FARC’s interim final rule implementing the E.O. was published in the Federal Register on December 15, 2014.
- The E.O. and its implementing regulations establish a minimum wage requirement for covered Federal contractors and subcontractors. The Order provides that executive departments and

agencies shall, to the extent permitted by law, ensure that new covered contracts, contract-like instruments and solicitations (collectively referred to as “contracts”) include a clause, which the contractor and any subcontractor shall incorporate into lower-tier subcontracts, specifying, as a condition of payment, that the minimum wage paid to workers in the performance of the contract or any subcontract thereunder, must be at least:

- ◆ \$10.10 per hour beginning January 1, 2015; and
- ◆ beginning January 1, 2016, and annually thereafter, an amount determined by the Secretary pursuant to the Order

Any annual increase to the E.O. minimum wage shall be:

1. Not less than the amount in effect on the date of such determination;
2. Increased from such amount by the annual percentage increase in the Consumer Price Index for Urban Wage Earners and Clerical Workers (United States city average, all items, not seasonally adjusted), or its successor publication, as determined by the Bureau of Labor Statistics; and
3. Rounded to the nearest multiple of \$0.05.

The Department will publish and maintain the applicable Executive Order minimum wage rate for the current year on Wage Determinations OnLine (WDOL), located at <http://www.wdol.gov> or any successor website. In the event of an annual increase to the Executive Order minimum wage, the Department will publish a notice in the Federal Register stating the new applicable minimum wage rate at least 90 days before the increase will take effect.

- ❖ The DOL and FAR regulations implementing E.O. 13658 and the respective DOL and FAR contract clauses can be found at:
 - DOL Regulations – 29 C.F.R. Part 10
 - DOL Contract Clause – 29 C.F.R. Part 10, Appendix A
 - FAR Regulations – 48 C.F.R. Part 22.19
 - FAR Contract Clause – 48 C.F.R. 52.222-55

The DOL contract clause at 29 C.F.R. Part 10, Appendix A, applies to all E.O.-covered contracts that are not subject to the FAR regulations. The FAR contract clause at 48 C.F.R. 52.222-55 applies to all E.O.-covered contracts that are subject to the FAR.

COVERAGE

Coverage of Executive Agencies and Departments

E.O. 13658 applies to all “executive departments and agencies.” The Order strongly encourages, but does not require, “[i]ndependent agencies” to comply with its requirements. The Department’s final rule interpreted “independent agencies” to mean any independent regulatory agency within the meaning of 44 U.S.C. § 3502(5). Such independent regulatory agencies, including those identified below, are not subject to the E.O.:

- Board of Governors of the Federal Reserve System,
- Commodity Futures Trading Commission,
- Consumer Product Safety Commission,
- Federal Communications Commission,
- Federal Deposit Insurance Corporation,
- Federal Energy Regulatory Commission,
- Federal Housing Finance Agency,
- Federal Maritime Commission,
- Federal Trade Commission,
- Interstate Commerce Commission,
- Mine Enforcement Safety and Health Review Commission,
- National Labor Relations Board,
- Nuclear Regulatory Commission,
- Occupational Safety and Health Review Commission,
- Postal Regulatory Commission,
- Securities and Exchange Commission,
- Bureau of Consumer Financial Protection,
- Office of Financial Research, and
- Office of the Comptroller of the Currency

General Contract Coverage Principles

E.O. 13658 applies to 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. (29 C.F.R. §§ 10.2, 10.3)

In order to for an agreement to be covered by E.O. 13658, the agreement must satisfy all of the following five prongs:

- (1) it must qualify as a contract or contract-like instrument under the definition set forth in 29 C.F.R. § 10.2;
- (2) it must fall within one of the four enumerated kinds of contracts set forth in 29 C.F.R. § 10.3;
- (3) it must be a “new contract” pursuant to the definition provided in 29 C.F.R. § 10.2;
- (4) it must meet the value threshold requirements provided in 29 C.F.R. § 10.3(b); and
- (5) workers’ wages under the contract must be governed by the FLSA, SCA or DBA.

Each of these five requirements is discussed in greater detail below.

Definition of “Contract”

The Department has defined the terms “contract” and “contract-like instrument” collectively for purposes of the Order to mean an agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law. The term “contract” broadly includes all contracts and any subcontracts of any tier thereunder, whether negotiated or advertised, including any procurement actions, lease agreements, cooperative agreements, provider agreements, intergovernmental service agreements, service agreements, licenses, permits, or any other type of agreement, regardless of nomenclature, type, or particular form, and whether entered into verbally or in writing.

An agreement that constitutes a contract under this definition is covered by the E.O., however, only if it fits within one of the four categories of agreements discussed below.

Categories of Covered Contracts

An agreement that qualifies as a “contract” under the definition set forth above is only covered by E.O. 13658 if it falls within one of the following specifically enumerated types of contracts set forth in section 7(d) of the Order and § 10.3 of DOL’s final rule:

- (1) Procurement contracts for construction covered by the Davis-Bacon Act (DBA);

- (2) Service contracts covered by the Service Contract Act (SCA);
- (3) Concessions contracts, including any concessions contract excluded from the SCA by the Department of Labor's regulations at 29 CFR 4.133(b); and
- (4) Contracts in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public.

1. Procurement Contracts for Construction Covered by the Davis-Bacon Act

Any contract covered by the DBA and its implementing regulations is subject to the E.O. minimum wage requirement. The E.O. does not apply, however, to contracts that are subject only to the Davis-Bacon Related Acts. For example, the E.O. would not be applicable to:

- ❖ HUD financed construction of low income housing projects
- ❖ Department of Energy loan guarantee programs

2. Service Contracts Covered by the Service Contract Act

Procurement and non-procurement contracts that are subject to the SCA and its implementing regulations are subject to the Order's minimum wage requirements (Section 7(d)(i)(B) of the E.O. and § 10.3(a)(1)(ii)).

Note that procurements through the AbilityOne program will be covered in the same manner as any other contract.

3. Contracts for concessions (29 C.F.R. § 10.2 and § 10.3(a)(1)(iii))

The E.O. defines the term *concessions contract* to mean a contract under which the Federal Government grants a right to use Federal property, including land or facilities, for furnishing services. The term *concessions contract* includes, but is not limited to, a contract whose principal purpose is to furnish food, lodging, automobile fuel, souvenirs, newspaper stands, and/or recreational equipment, regardless of whether the services are of direct benefit to the Government, its personnel, or the general public.

The Order covers all concession contracts with the Federal Government, including those excluded from SCA coverage by 29 CFR § 4.133(b). Examples of concessions contracts covered by the E.O. include concession contracts with the Federal Government to operate souvenir shops or to provide food or lodging in national parks.

4. Contracts in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public (29 C.F.R. § 10.3(a)(1)(iv))

This category broadly covers a variety of contractual instruments, including leases of Federal property and licenses to use such property entered into by the Federal Government for the purpose of offering services to Federal employees, their dependents, or the general public.

Examples of such agreements include delegated leases of space in a Federal building from an agency to a contractor whereby the contractor operates a child care center, credit union, gift shop, barber shop, coffee shop, or fitness center in the Federal building to serve Federal employees and/or the general public.

Coverage of “New Contracts”

In addition, the E.O. only applies to “new contracts.” A “new contract” is a contract that results from a solicitation issued on or after January 1, 2015, or a contract that is awarded outside the solicitation process on or after January 1, 2015. This term includes both new contracts and replacements for expiring contracts. It does not apply to the unilateral exercise of a pre-negotiated option to renew an existing contract by the Federal Government. For purposes of the Order, a contract entered into prior to January 1, 2015 will constitute a new contract if, through bilateral negotiation, on or after January 1, 2015:

- (1) The contract is renewed;
- (2) The contract is extended, unless the extension is made pursuant to a term in the contract as of December 31, 2014 providing for a short-term limited extension; or
- (3) The contract is amended pursuant to a modification that is outside the scope of the contract.

29 C.F.R. § 10.2.

Value Threshold Requirements

The E.O. also establishes value threshold requirements for coverage. The Order applies to prime contracts covered by the DBA that exceed \$2,000 and prime contracts covered by the SCA that exceed \$2,500. For procurement contracts where workers’ wages are governed by the FLSA, the Order specifies that it applies only to contracts that exceed the micro-purchase threshold set forth at 41 U.S.C. 1902(a), which is currently \$3,000.

There is no value threshold requirement for subcontracts awarded under such prime contracts. There also is no value threshold requirement for nonprocurement contracts where workers’ wages are governed by the FLSA.

Wages of Workers Governed by the FLSA, SCA, or DBA

Finally, in order for a contract to be covered by the E.O., the wages of workers under the contract must be governed by the FLSA, the SCA, or the DBA.

Subcontracts

As with the SCA and the DBA, all of the provisions of the E.O. that are applicable to covered prime contracts and contractors apply with equal force to covered subcontracts and subcontractors, except that there are no value threshold requirements for subcontracts.

Geographic Scope of Coverage

29 C.F.R. § 10.3(c) explains that the E.O. only applies to contracts with the Federal Government requiring performance in whole or in part within the United States, which is defined to mean the 50 States and the District of Columbia. If a covered contract is to be performed in part within and in part outside the United States, the E.O. would apply to that part of the contract that is performed within the United States.

Contracts that are not covered by the Executive Order and the final rule (29 C.F.R. § 10.4)

The following types of contractual agreements are excluded from coverage:

- (1) Grants, within the meaning of the Federal Grant and Cooperative Agreement Act, as amended, 31 U.S.C. 6301 et seq.
- (2) Contracts and agreements with and grants to Indian Tribes under the Indian Self-Determination and Education Assistance Act, as amended, 25 U.S.C. 450 et seq.;
- (3) Procurement contracts for construction that are not subject to the DBA (*i.e.*, procurement contracts for construction under \$2,000); and
- (4) Contracts for services, except for those expressly covered by the E.O. and the final rule, that are exempted from coverage of the SCA pursuant to its statutory language at 41 U.S.C. § 6702(b) or its implementing regulations, including those at 29 CFR §§ 4.115 through 4.122 and 29 CFR § 4.123(d) and (e). For example, the SCA exempts contracts for public utility services, including electric light and power, water, steam, and gas, from its coverage. *See* 41 U.S.C. § 6702(b)(5); 29 CFR § 4.120. It additionally exempts employment contracts providing for direct services to a Federal agency by an individual. *See* 41 U.S.C. § 6702(b)(6); 29 CFR § 4.121. Such contracts would also be exempt from coverage of the Executive Order and these regulations.

The Order also does not apply to contracts for the manufacturing or furnishing of materials, supplies, articles, or equipment to the Federal Government, *i.e.*, contracts subject to the Walsh-Healey Public Contracts Act (29 C.F.R. § 10.3(d)).

Contracts let under the Medicaid program that are financed by Federally-assisted grants to the states, and contracts that provide for insurance benefits to third parties under the Medicare program, are not covered by E.O. 13658 because they are not subject to the SCA and do not fall within the scope of the other three types of contracts covered by the Executive Order. *See* 29 CFR 4.107(b), 4.134(a); WHD FOH ¶ 14e01. Similarly, because the E.O. does not apply to contracts that are subject only to the

Davis-Bacon Related Acts, contracts entered into by State or local governments to administer Clean Water State Revolving Fund programs would not be subject to the Order or the regulations.

Workers Covered By the E.O. Minimum Wage (29 C.F.R. § 10.2)

The Department's final rule defines the term "worker" as any person engaged in performing work on or in connection with a contract covered by the E.O., and whose wages under such contract are governed by the FLSA, the SCA, or the DBA, regardless of the contractual relationship alleged to exist between the individual and the contractor.

The term "worker" includes any individual performing on or in connection with a covered contract whose wages are calculated pursuant to special certificates issued under 29 U.S.C. 214(c), as well as any person working on or in connection with a covered contract and individually registered in a bona fide apprenticeship or training program registered with the Department's Employment and Training Administration, Office of Apprenticeship, or with a State Apprenticeship Agency recognized by the Office of Apprenticeship.

Thus, the Order generally applies to the following categories of workers performing "on" or "in connection with" covered Federal contracts:

- (1) Workers who are entitled to the minimum wage under FLSA section 6(a)(1), employees whose wages are calculated pursuant to special certificates issued under FLSA section 14(c), and tipped employees under FLSA section 3(t);
- (2) Workers who are entitled to prevailing wages under the SCA; this includes individuals who are working on or in connection with an SCA contract and individually registered in a bona fide apprenticeship program registered with the Department's Employment and Training Administration, Office of Apprenticeship, or with a State Apprenticeship Agency recognized by the Office of Apprenticeship; and
- (3) Laborers and mechanics who are entitled to prevailing wages under the DBA; this includes individuals who are working on or in connection with a DBA contract and individually registered in a bona fide apprenticeship program registered with the Department's Employment and Training Administration, Office of Apprenticeship, or with a State Apprenticeship Agency recognized by the Office of Apprenticeship.

The E.O. minimum wage generally applies to workers performing "on" covered contracts, as well as workers performing "in connection with" covered contracts. For purposes of the Order, a worker performing "on" a covered contract is any worker who directly performs the specific services called for by the contract's terms. Any workers who are entitled to DBA and SCA prevailing wages are performing "on" a covered contract.

A worker performing work "in connection with" a covered contract is any worker who performs work activities that, although not the specific services called for by the contract itself, are necessary to the performance of the contract. For example, a payroll clerk responsible for maintaining payroll records

for service employees on an SCA-covered contract for janitorial services may be performing work in connection with the contract. Similarly, a security guard responsible for patrolling a worksite where work covered by the DBA is being performed may be performing work in connection with a covered contract. As described in greater detail below, the Order's minimum wage requirements only apply to workers performing "in connection with" covered contracts if such workers spend at least 20% of their hours worked in a particular workweek working in connection with covered contracts.

Workers Covered by Section 14(c) of the FLSA (Section 2 of the E.O.)

The Executive Order specifically applies its minimum wage requirements to workers whose wages are calculated pursuant to special certificates issued under FLSA section 14(c).

The Executive Order specifically provides that workers whose wages are calculated pursuant to special certificates issued under 29 U.S.C. 214(c) are entitled to receive at least the full Executive Order minimum wage for all time spent working on or in connection with contracts covered by the Order.

The minimum wage requirements of the Order are separate and distinct from the wage rates under FLSA section 14(c). If the commensurate wage rate paid to a section 14(c) worker, whether hourly or piece rate, is less than the Executive Order minimum wage, the contractor must pay no less than the higher Executive Order minimum wage rate. If the commensurate wage due on an Executive Order covered contract is higher than the Executive Order minimum wage, however, the contractor must pay the worker the higher commensurate wage.

Examples:

- The SCA prevailing wage rate for a janitor employed on a contract covered by the SCA and the Executive Order is \$14.00. If a worker with a disability is determined to complete the job at 50% productivity through the process defined by section 14(c), the commensurate wage rate would be \$7.00. The Executive Order, however, would raise the rate due to that employee to the current Executive Order minimum wage rate (i.e., \$10.10 per hour beginning January 1, 2015 and an amount determined annually thereafter by the Secretary of Labor).
- The SCA prevailing wage rate for a window washer employed on that same contract covered by the SCA and Executive Order is \$20.00. If a worker with a disability is determined to complete the job at 60% productivity through the process defined by section 14(c), the commensurate wage rate would be \$12.00. If this amount is higher than the applicable Executive Order minimum wage rate (i.e., \$10.10 per hour beginning January 1, 2015 and an amount determined annually thereafter by the Secretary of Labor), then the employee would be due the higher rate of \$12.00 per hour.

Effect of E.O. on the wage rates paid to tipped employees (79 FR 9851 and 29 C.F.R. § 10.28)

Under the Order, “tipped employee” means any employee engaged in an occupation in which he or she customarily and regularly receives more than \$30 a month in tips. An employee who does not customarily and regularly receive more than \$30 a month in tips is not a tipped employee for purposes of E.O. 13658. For purposes of the E.O., a worker performing on or in connection with a contract covered by the Order who meets this definition is a tipped employee. Additionally, an employee may be a “tipped employee” regardless of whether the employee is employed full time or part time so long as the employee customarily and regularly receives more than \$30 a month in tips. 29 C.F.R. § 10.28(b)(1).

Wage Payments for Tipped Employees

- ◇◇ Under the E.O., the wage paid to a tipped employee may be composed of a cash wage and a credit based on tips. This credit based on tips (“tip credit”) is an amount equal to the difference between the hourly cash wage paid to a tipped employee and the wage in effect under section 2 of E.O. 13658.
- ◇◇ Beginning January 1, 2015, tipped employees to whom the Order applies must be paid an hourly cash wage of at least \$4.90 per hour. In accordance with the E.O., this minimum hourly cash wage will steadily increase in subsequent years until it equals 70 percent of the E.O. minimum wage. 29 C.F.R. § 10.28(a)(1).
- ◇◇ Where tipped employees do not receive a sufficient amount of tips in the workweek to equal the amount of the tip credit, the employer must increase the cash wage paid for the workweek so that the amount of the cash wage paid and the tips received by the employee equal the full E.O. minimum wage. 29 C.F.R. § 10.28(a)(2).
- ◇◇ An employer may pay a higher cash wage than required by § 10.28(a)(1) and take a lower tip credit. The employer may not, however, pay a lower cash wage and take a higher tip credit. 29 C.F.R. § 10.28(a)(3).
- ◇ **Tips**
 - ◇◇ For purposes of E.O. 13658, a tip is a sum presented by a customer as a gift or gratuity in recognition of some service performed for the customer. It is to be distinguished from payment of a fixed charge, if any, made for service. Whether a tip is to be given, and its amount, are matters determined solely by the customer. 29 C.F.R. § 10.28(c).
 - ◇◇ Tips are the property of the employee whether or not the employer has taken a tip credit. The employer is prohibited from using an employee’s tips, whether or not it has taken a tip credit, for any reason other than as a credit against its minimum wage obligations under E.O. 13658 to the employee, or in furtherance of a valid tip pool. An employer and employee cannot agree to waive the worker’s right to retain his or her tips. 29 C.F.R. § 10.28(c).

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- ◇◇ An employer may pay a higher cash wage than required by § 10.28(a)(1) and take a lower tip credit. The employer may not, however, pay a lower cash wage and take a higher tip credit. 29 C.F.R. § 10.28(a)(3).

◇ **Tips**

- ◇◇ For purposes of E.O. 13658, a tip is a sum presented by a customer as a gift or gratuity in recognition of some service performed for the customer. It is to be distinguished from payment of a fixed charge, if any, made for service. Whether a tip is to be given, and its amount, are matters determined solely by the customer. 29 C.F.R. § 10.28(c).
- ◇◇ Tips are the property of the employee whether or not the employer has taken a tip credit. The employer is prohibited from using an employee's tips, whether or not it has taken a tip credit, for any reason other than as a credit against its minimum wage obligations under E.O. 13658 to the employee, or in furtherance of a valid tip pool. An employer and employee cannot agree to waive the worker's right to retain his or her tips. 29 C.F.R. § 10.28(c).
- ◇◇ A compulsory charge for service, such as 15 percent of the amount of the bill, imposed on a customer by an employer's establishment, is not a tip and, even if distributed by the employer to its workers, cannot be counted as a tip for purposes of determining if the worker is a tipped employee. Similarly where negotiations between a hotel and a customer for banquet facilities include amounts for distribution to workers of the hotel, the amounts so distributed are not tips. 29 C.F.R. § 10.28(d).
- ◇◇◇ Services charges and other similar sums are considered to be part of the employer's gross receipts and are not tips for purposes of EO 13658. Where such sums are distributed by the employer to its workers, however, they may be used in their entirety to satisfy the wage payment requirements of E.O. 13658. 29 C.F.R. § 10.28(d).

◇ **Dual Jobs – tipped employees**

- ◇◇ In some situations, an employee is employed in a tipped occupation and a non-tipped occupation (dual jobs). For example, a maintenance person in a hotel may also work as a server. In such a situation, if the employee customarily and regularly receives at least \$30 a month in tips for the work as a server, the employee is a tipped employee only when working as a server. 29 C.F.R. § 10.28(b)(2).
- ◇◇ The tip credit can only be taken for the hours spent in the tipped occupation and no tip credit can be taken for the hours of employment in the non-tipped occupation. Such a situation is distinguishable from that of a tipped employee performing incidental duties

that are related to the tipped occupation but that are not directed toward producing tips, for example when a server spends part of his or her time cleaning and setting tables, toasting bread, making coffee and occasionally washing dishes or glasses. Related duties may not comprise more than 20 percent of the hours worked in the tipped occupation in a workweek. 29 C.F.R. § 10.28(b)(2).

◇ **Notice to tipped employees**

Pursuant to 29 CFR § 10.28(f), an employer is not eligible to take the tip credit unless it has informed its tipped employees in advance of the employer's use of the tip credit. The employer must inform the tipped employee of:

- ◇◇ the amount of the cash wage that is to be paid by the employer, which cannot be lower than the cash wage required pursuant to 29 CFR § 10.28(a)(1);
- ◇◇ the additional amount by which the wages of the tipped employee will be considered increased on account of the tip credit claimed by the employer, which amount may not exceed the value of the tips actually received by the employee;
- ◇◇ that all tips received by the tipped employee must be retained by the employee except for a valid tip pooling arrangement limited to tipped employees; and
- ◇◇ that the tip credit shall not apply to any worker who has not been informed of these requirements.

◇ **Effect of higher cash wage required by other laws or regulations**

- ◇◇ If the wage required to be paid under the SCA or any other applicable law or regulation is higher than the wage required by section 2 of E.O. 13658, the employer shall pay additional cash wages equal to the difference between the wage in effect under section 2 of the E.O. and the higher wage required to be paid. 29 C.F.R. § 10.28(a)(4).

Workers not covered by the E.O. (29 C.F.R. § 10.4)

The Order and the final rule contain a few limited exclusions from coverage for certain workers. The Department's final rule provides that, except for workers whose wages are calculated pursuant to special certificates issued under FLSA section 14(c) and workers who are otherwise covered by the SCA or DBA, workers who are exempt from the minimum wage requirements of the FLSA under 29 U.S.C. 213(a) and 214(a)-(b) are generally not entitled to receive the E.O. minimum wage (29 C.F.R. § 10.4(e)).

For example, the Department’s final rule provides that learners, apprentices, messengers, and full-time students employed under special certificates pursuant to FLSA sections 14(a) and (b) are not entitled to the Executive Order minimum wage. Similarly, individuals employed in a bona fide executive, administrative, or professional capacity, as those terms are defined in 29 C.F.R. part 541, are exempt from coverage of the Executive Order pursuant to the Department’s final rule.

As mentioned above, the final rule also sets forth an exclusion whereby any FLSA-covered worker performing “in connection with” covered contracts for less than 20 percent of his or her hours worked in a given workweek will not be entitled to the Executive Order minimum wage for any hours worked (29 C.F.R. § 10.4(f)). For example, a full-time (i.e., 40 hour per week) security guard who monitors a Davis-Bacon construction worksite for only 4 hours in a week spends less than 20% of his work time performing “in connection with” covered contracts and thus will not be entitled to the E.O. minimum wage for any hours worked.

Importantly, however, this 20 percent exclusion only applies to FLSA-covered workers performing “in connection with” a covered contract for less than 20 percent of their hours worked in a given workweek. The exclusion does not apply to any workers performing “on” a covered contract, regardless of whether such covered work constitutes less than 20 percent of his or her overall hours worked in a particular workweek. For example, this exclusion does not apply to any workers entitled to DBA and SCA prevailing wages. Thus, a laborer working on a DBA-covered construction project would be covered for all hours worked on the DBA contract, even if he worked at the site less than 20 percent of his time.

CONTRACTING AGENCY REQUIREMENTS

Contracting agencies are responsible for ensuring that:

1. The applicable contract clause implementing the E.O. minimum wage requirement is included in any new contracts or solicitations for contracts covered by the E.O. (29 C.F.R. § 10.11(a) and FAR clause 48 C.F.R. 52.222-55).
2. The contract clause is incorporated retroactive to the commencement of performance under the contract in those instance where the appropriate E.O. clause was improperly omitted (29 C.F.R. § 10.11(b) and 10.44(e)).
3. Funds are withheld as may be considered necessary to pay workers the full amount of wages required by the E.O. (29 C.F.R. § 10.11(c)) and FAR 48 C.F.R. 52.222-55).
4. Any complaints alleging a contractor’s non-compliance with E.O.13658 are forwarded to the WHD within 14 calendar days. (29 C.F.R. § 10.11(d)).

CONTRACTOR REQUIREMENTS

Contract Clause (29 C.F.R. § 10.21(a) and FAR 48 CFR § 52.222-55)

Contractors and subcontractors must include the applicable E.O. contract clause in any covered lower-tiered subcontracts and require their subcontractors to include the applicable contract clause in their covered lower-tier subcontracts. Contractors and subcontractors must abide by the terms of the applicable contract clause.

Rate of Pay (29 C.F.R. § 10.22(a)-(b))

Contractors and subcontractors generally must pay all covered workers at least the E.O. minimum wage for all hours worked on or in connection with covered contracts. A contractor cannot discharge its E.O. minimum wage obligation by furnishing fringe benefits, or with respect to workers whose wages are governed by the SCA, the cash equivalent thereof.

Segregation: Covered and Non-Covered Work (29 C.F.R. § 10.26)

Contractors generally must pay workers performing on or in connection with covered contracts not less than the E.O. minimum wage rate for all hours worked on covered contracts. If a contractor is not engaged exclusively on E.O. covered contracts, the E.O. minimum wage need only be paid when a worker is working on or in connection with a covered contract, provided the contractor has effectively segregated the hours worked for each worker. Effective segregation requires that the contractor identify accurately in its records, or by other affirmative means, the periods in each workweek when a worker performs work on or in connection with covered contracts. An arbitrary assignment of time on the basis of a formula to segregate time spent on covered and non-covered contracts is not sufficient.

If the contractor does not keep detailed records segregating hours worked, the contractor may segregate on the basis of work shifts, workdays, or workweeks. For example, if a contractor only does E.O. covered work during the second shift each day, the contractor may apply the E.O. minimum wage requirement to all workers performing work during the second shift and not apply the E.O. minimum wage requirement to workers performing work during the other shifts. If the contractor does not maintain adequate records or other evidence segregating E.O.-covered work from non-covered work, a worker who spends any part of a day in a workweek performing work on or in connection with a covered contract will be presumed to be entitled to the E.O. rate for all hours worked in the workweek.

Deductions Allowed Under the E.O. (29 C.F.R. § 10.23)

A contractor may only make deductions that reduce a worker's wages below the E.O. minimum wage only if such deduction qualifies as a: (1) deduction required by Federal, State or local law, including withholding taxes; (2) deduction for payments made to third parties pursuant to court orders; (3) deduction directed by a voluntary assignment of the worker (e.g., union dues, charitable contributions); or (4) deductions for the reasonable cost or fair value of board, lodging, or other facilities as those terms are used in FLSA section 3(m).

Frequency of Pay. Pursuant to the Department's final rule, E.O. minimum wage payments to workers must be made no later than one pay period following the end of the regular pay period in

which such wages were earned or accrued. A pay period under E.O. 13658 may not be of any duration longer than semi-monthly.

Recordkeeping Requirements (29 C.F.R. § 10.25 and § 10.26)

Contractors and subcontractors must comply with recordkeeping requirements under the E.O (29 C.F.R. § 10.26). The contractor and each subcontractor performing work subject to the E.O. must make and maintain, for three years, records containing the following information:

- (1) Name, address, and social security number of each worker;
- (2) The worker's occupation(s) or classification(s);
- (3) The rate or rates of wages paid;
- (4) The number of daily and weekly hours worked by each worker;
- (5) Any deductions made; and
- (6) The total wages paid.

Contractors and subcontractors must make these records available for inspection and transcription by WHD. Contractors and subcontractors must also permit WHD to conduct interviews with workers at the worksite during normal working hours.

The E.O. does not, however, limit or otherwise modify the contractor's recordkeeping obligations, if any, under the DBA, the SCA, or the FLSA.

Anti-Kickback (29 C.F.R. § 10.27)

All wages paid to workers performing on or in connection with contracts covered by the E.O. must be paid free and clear and without subsequent deduction (except as set forth in 29 C.F.R. § 10.23), rebate, or kickback on any account. Kickbacks directly or indirectly to the employer or to another person for the employer's benefit for the whole or part of the wage are prohibited.

Notice under the E.O. (29 C.F.R. § 10.29)

The contractor must notify all workers performing work on or in connection with a covered contracts of the applicable minimum wage rate under the E.O. With respect to service employees on contract covered by the SCA and laborers and mechanics on contracts covered by the DBA, the contractor may meet this requirement by posting, in a prominent and accessible place at the worksite, the applicable wage determination under those statutes. With respect to workers performing work on or in connection with a covered contract whose wages are governed by the FLSA, the contractor may post a notice provided by the Department of Labor in a prominent and accessible place at the worksite so it may be readily seen by such workers (WH 1089). The E.O. poster is available at <http://www.dol.gov/whd/flsa/eo13658/>. Contractors that customarily post notices to workers

electronically may post the notice electronically provided such electronic posting is displayed prominently on any Web site that is maintained by the contractor, whether external or internal, and customarily used for notices to workers about terms and conditions of employment.

Relationship Between the E.O. and Other Federal or State Wage Laws (29 C.F.R. § 10.5(c))

Nothing in the E.O. excuses noncompliance with any other applicable Federal or State prevailing wage law, including the SCA and the DBA, or any applicable law or municipal ordinance establishing a minimum wage higher than the E.O. minimum wage. For example, if the applicable DBA or SCA rate is higher than the E.O. rate, the contractor must pay no less than the higher prevailing rate to the DBA- or SCA-covered worker in order to comply with the DBA or SCA. Conversely, if a contract is subject to the DBA or SCA and the E.O. and the prevailing wage rate on the applicable DBA or SCA wage determination for the classification of work a worker performs is less than the E.O. minimum wage, the contractor must pay at least the E.O. minimum wage in order to comply with the Order.

DEPARTMENT OF LABOR'S OBLIGATIONS

The Secretary of Labor is required to determine the E.O. minimum wage rate yearly beginning January 1, 2016, and publish this wage rate at least 90 days before the wage is to take effect (29 C.F.R. § 10.12 (a)-(c)).

The Department will publish annual wage rates in the Federal Register and on www.wdol.gov (29 C.F.R. § 10.12 (c)), and will publish a general notice on all wage determinations issued under the DBA and SCA stating the Executive Order minimum wage and that the Executive Order minimum wage applies to workers performing on or in connection with such contracts whose wages are governed by the FLSA, DBA, and SCA.

ENFORCEMENT AND ADMINISTRATIVE PROCEDURES

WHD Investigative Procedures

The following guidance is intended to list the various steps that will typically be undertaken by WHD in conducting an E.O. investigation:

Information to Obtain from Contracting Agencies

Obtain the following information:

1. Copy of the Contract Award documents as well as both the date of the contract award and the date of the solicitation, if a solicitation was issued.
2. Where applicable, a copy of the DBA wage determination(s) or SCA wage determination(s) included in the contract, and in the case of multiple schedules, any instructions concerning their application.
3. Copy of any documents referring to the DBA, SCA, and Minimum Wage E.O. contract clauses

4. Copies of the certified payrolls (DBA) submitted by the contractor under investigation, as well as the contractor's Employer Identification Number.
5. The percentage of completion of the project, and how much contract funds remain to be paid out.

Initial Employer Contact

- ◇ A responsible official of the firm must be contacted at the start of the investigation.
- ◇ When a subcontractor is being investigated, the prime contractor should be notified at the beginning of the investigation.
- ◇ When investigating a subcontractor, find out what clauses (FAR-based or non-FAR based) and wage determinations (or similar information) have been provided by the prime contractor (or higher-tier subcontractor) to the subcontractor. Ask the subcontractor for a copy of the subcontract.
- ◇ The prime contractor can provide information on the subcontractor's performance and may have records relating to the number of employees the subcontractor had on the project, the hours they worked, and the period of time they were on the project. The prime contractor should be asked to provide a copy of the subcontract.
- ◇ The prime contractor has responsibility for compliance on the contract and is liable for back wages not paid by the subcontractor., ◇ Inform the contractor that the purpose of the investigation is to determine compliance with applicable law, including the E.O., and outline in general terms the scope of the investigation, including the examination of pertinent records, employee interviews and physical inspection of the project.
- ◇ Obtain the exact legal name of the contractor and any trade names, the full address, full names of owners or officers and their titles, number of persons employed, name and address of any subcontractors, and such similar information as may be necessary to conduct and complete the investigation.

Examination of Payrolls

- ◇ The contractor's payrolls should be examined for accuracy, completeness, and true representation of the facts. The examination should cover the current or most recent payrolls as well as those for selected periods which reflect the practice of the contractor or subcontractor during the term of the contract. Determine whether the contractor is paying each worker performing work on or in connection with covered contracts no less than the applicable E.O. minimum wage for all hours worked on or in connection with the covered contract (subject to the 20% of hours worked exclusion).

- ◇ Check for completeness and accuracy of the payrolls as to the names, addresses, job classifications, hourly wage rates, daily and weekly hours worked during the payroll period, gross weekly wages earned, deductions made from wages, and net weekly wages paid the employee. Notice if there are distinctions made among the various classifications. Identify all workers who, on or after the date of award, are engaged in working on or in connection with the contract,.
- ◇ If the Fair Labor Standards Act and/or the Contract Work Hours and Safety Standards Act are applicable and an employee worked in excess of forty hours in any workweek, determine whether time and a half the employee's regular rate was paid.
- ◇ The wage rates should be compared against those listed on the wage determination, where applicable. If workers perform work in more than one classification, the payroll records should accurately reflect the time spent working in each.
- ◇ Ensure that the contractor is not attempting to satisfy any part of its minimum wage obligation under the Executive Order by furnishing fringe benefits or, with respect to workers whose wages are governed by the SCA, the cash equivalent thereof.
- ◇ Identify if the contractor has any tipped employees as defined in the Department's final rule implementing the E.O..

Examination of Records

- ◇ In addition to a review of payrolls, the examination should include a review of the basic time cards, time sheets, or other work or personnel records of a representative number of employees in each classification. These records should be checked against the payrolls in order to disclose any possible discrepancies, or to give reasonable assurance that none exist. Determine if basic time keeping information exists identifying the amount of hours worked for those employees subject to the E.O. working in conjunction with a covered contract.
- ◇ Examine documents which indicate that the firm has made contributions (or incurred costs) to fringe benefit plans. These documents might include: portions of the pension plan; documentation from the Internal Revenue Service (IRS) that indicates the plan has been approved by the IRS; and records of contributions made.

Check for Compliance with Apprenticeship/Trainee Requirements

- ◇ Apprenticeship/trainee program information should be obtained and examined to verify that the program has been approved by the appropriate authority. If the contractor's evidence is not sufficient, contact ETA/OA and/or the state apprenticeship council (where appropriate) for verification. A list of local ETA/OA offices is available at <http://www.doleta.gov/oa/stateoffices.cfm#CO>. Determine whether apprentices individually registered in these programs are receiving no less than the E.O. minimum wage.

- ◇ Obtain copies of the individual employees' apprentice/training registration forms for the file, as well as copies of the approved apprenticeship/training program itself.

Worker Interviews

- ◇ Worker interviews are essential to the completeness of the investigation.
- ◇ They should be sufficient in number to establish the degree of adequacy and accuracy of the records and the nature and extent of any violations.
- ◇ They should also be representative of all classifications of workers on the project under investigation.
- ◇ In some situations interviews with former workers may be appropriate.
- ◇ In cases involving alleged misclassification and/or falsification of payroll records, it is important to account, through the interview process, for as many workers as possible who worked on the contract.
- ◇ Workers should be questioned regarding other workers they worked with and the duties performed by those employees.
- ◇ Each worker should be informed that the information given is confidential, and that his/her identity will not be disclosed to anyone, including the employer, without the worker's prior consent, unless otherwise required by law.

◇◇ **Place of interview**

- ◇◇ Employees currently employed may be interviewed during working hours on the job, provided the interview can be properly and privately conducted on the premises.
- ◇◇ In cases of falsification of records, fear of reprisals or intimidation, it may be more advisable to conduct the interview elsewhere, such as in the employee's home, at the agency's office, or other suitable place where it may be arranged.
- ◇◇ Employees should never be interviewed in the presence of the employer, another employee, or any other person.

◇◇ **Telephone Interviews**

- ◇◇ Ordinarily, an interview should be made by telephone only if a personal interview is impracticable. When a telephone interview is used, it is suggested that the investigator send the employee the statement together with a request that the employee read the statement, make and initial any changes, sign and date it and return the statement to the investigator. It is suggested that the contracting officer keep a copy of the statement until the original is returned.

◇◇ **Mail interviews**

- ◇◇ Ordinarily, an interview should be made by mail only if a personal or telephone interview is impracticable.

◇◇ **Preparation of interview statements**

- ◇◇ When a written statement is taken, it should be recorded in the manner stated by the worker; it should be read by him/her, and contain a statement that it has been read and that it is correct. The contracting officer may restate or summarize the worker's remarks, but should do so in the first person and should phrase it in the worker's manner of speaking.
- ◇◇ The statement should be signed by the worker and the signature, except in mail interviews, should be witnessed by the investigator. In government contract cases, it is preferred that all interviews be signed. Where the statement is not signed, the investigator should give, either in the statement or his/her report, the worker's reason for not signing. Any changes in a signed statement should be initialed by the worker.

- ◇◇ Each interview statement should contain the following information:

1. Place and date of interview.
2. Name of employer (firm).
3. Name and permanent address of worker being interviewed.
4. Employment status (*e.g.*, whether present or former employee).
5. Period(s) of employment.
6. If an apprentice, the age, date of birth, and information concerning his status as an apprentice.
7. The statement should include specific information regarding:

◇◇◇ The manner in which the worker was provided any information regarding the E.O. by the contractor

◇◇◇ rate(s) of pay and wages received,

◇◇◇ hour for starting/stopping work and daily/weekly hours worked,

◇◇◇ manner in which time and work are recorded, and

◇◇◇ job classification(s) and exact work performed.

In cases alleging misclassification, the interview statement must specifically address the various types of duties performed. For example, it is not sufficient for a worker to only state he/she was a carpenter. The interview must identify the specific carpentry duties, and the tools and materials used. If a worker worked in more than one classification, the worker must be asked how much time he/she spent in each classification.

8. When possible, the interview statement should corroborate statements given by other workers. For example, the workers should be asked to identify other workers who performed the same work.
9. The interview should cover all the allegations of violations (particularly those in a complaint).
10. The interview should also cover any other details necessary to indicate accuracy of the employer's records, statements, or certifications.

◇◇ *All interview statements must be legible.*

CONCLUSION OF INVESTIGATION

Final Conference Procedure

- ◇ Ensure that the Contract Agency Officer/Representative and Prime Contractor are invited to attend any final conference.
- ◇ Inform the contractor generally of the investigation findings, and indicate that these findings are based solely on the facts and information disclosed by the investigation. Inform the contractor about those violations found specific to the E.O.
- ◇ Detail specifically what must be done to remedy the violations, if any, and provide any available informational material such as copies of 29 C.F.R. Part 10 as appropriate.

◇◇ **Request for payment of back wages:**

- ◇◇ A demand for the payment of the back wages must always be made even if the employer refuses to comply.
- ◇◇ Contracting officers may accept partial back wage restitution for undisputed issues involving violations of the E.O.
- ◇◇ Contracting officers may attempt to collect back wages due under the E.O. even though the case meets the debarment criteria. However, in no event will a contractor be left with the impression that the payment of back wages will eliminate the possibility of debarment.
- ◇◇ If the employer is a subcontractor and refuses to make full restitution, the prime contractor must then be requested to make restitution. The prime contractor is ultimately responsible for the payment of the back wages, including those found due under the E.O.

- ◇◇ If there is no agreement to pay back wages under the E.O., the file must be forwarded to the appropriate WHD Regional Office pursuant to 29 C.F.R. § 10.51 for further review and action, collection of back wages, and debarment consideration.

Withholding

- ◇ In refusal-to-pay cases under the E.O., the contracting agency shall upon request from the WHD withhold contract funds as may be necessary to cover the back wages due.
- ◇ If funds remaining on the contract under which the violations occurred are insufficient to cover the back wages due, the WHD can direct withholding of funds from any other federal contract held by the same prime contractor – “cross-withholding”.
- ◇ Contracting officers should immediately notify WHD if they become aware that the prime contractor may be filing for bankruptcy.
- ◇ In situations where WHD has instituted withholding actions, a letter to the prime contractor will describe the nature of the alleged violations and back wages found due. The prime contractor will have 15 days to provide written views on the alleged violations under the E.O.

Due Process for Withholding Action

- ◇ To ensure that contractors and subcontractors receive due process under the E.O. prior to the withholding of funds at the direction of the WHD, the following steps are included in the WHD enforcement procedures.
- ◇ Where a contractor refuses to pay back wages under the E.O. and funds are available for withholding, WHD will generally send a “due process” letter to the prime contractor. This letter will include:
 - ◇ A statement that the final conference was conducted, at which time the contractor was provided an opportunity to discuss alleged violations found under the E.O. (or if a final conference was not held, provide the reason(s) why);
 - ◇ A brief description of the alleged violations;
 - ◇ An affirmation that the contractor received a Summary of Unpaid Wages;
 - ◇ A statement that the matter is being forwarded to a designated WHD deciding official, who will decide whether withholding action will be taken regarding the back wage findings;
 - ◇ A statement that the contractor has fifteen (15) days to provide the WHD deciding official with written views on whether the violations occurred;

- ◇ A statement that any determination regarding the withholding of contract funds under the E.O. will not result in the distribution of the funds to the underpaid workers until such time as the administrative remedies available to the contractor have been completed.
- ◇ If the deciding official determines that withholding action under the E.O. is warranted, a copy of the WHD withholding request to the contracting agency and a letter indicating the deciding official's decision on withholding will be sent to the prime contractor and the relevant subcontractor.
- ◇ In certain cases, such as missed payrolls, likely bankruptcy filings, or imminent contract close out, it may be necessary to request withholding under the E.O. before the steps outlined above can be taken. In those cases, the procedures outlined above should be followed as quickly as reasonably possible after the withholding action.

How complaints will be addressed and investigations will be conducted by the WHD (29 C.F.R. § 10.41)

Complaints may be filed with the WHD by any person or entity that believes a violation of the E.O. or its implementing regulations has occurred. The complaint may be filed orally or in writing and the WHD will accept a complaint in any language. The WHD will treat information received related to a complaint confidentially to the extent permitted by law in order to protect the identity of complainants and other confidential sources. The WHD may initiate an investigation as the result of the complaint and may also seek to resolve the complaint through conciliation.

The WHD may inspect relevant records (*e.g.*, contracts and payroll), as well as interview the contractor. The WHD may also interview the contractor's workers at the worksite during normal work hours. Contracting agencies and contractors are required to cooperate with authorized representatives of the WHD in all aspects of the investigation, including through the production of documentary evidence that the WHD requests.

Appeals process if a party is found to be in violation of the E.O. (29 C.F.R. § 10.51 through 29 C.F.R. § 10.58)

In the event that a contractor violates the EO and/or its implementing regulations, the affected contractor (s) and the prime contractor (if different) will be notified in writing of the WHD's findings and will be provided an opportunity to request a hearing with the Department's Office of Administrative Law Judges. The contractor may appeal an order issued by the Office of Administrative Law Judges to the Administrative Review Board.

Debarment under the E.O. (29 C.F.R. § 10.52)

Whenever a contractor is found by the Secretary of Labor to have disregarded its obligations under the Order or its implementing regulations, the contractor and its responsible officers, and any firm, corporation, partnership, or association in which the contractor or responsible officers have an interest, shall be ineligible to be awarded any contract or subcontract subject to the E.O. for a period of up to

three years from the date of publication of the name of the contractor or responsible officer on the ineligible list. Neither an order for debarment of any contractor or its responsible officers from further Government contracts nor the inclusion of a contractor or its responsible officers on a published list of noncomplying contractors shall be carried out without affording the contractor or responsible officers an opportunity for a hearing before an Administrative Law Judge.

Protections for workers who attempt to assert their rights under the E.O. (29 C.F.R. § 10.6)

The Department's regulations incorporate the same broad prohibition against retaliation that exists to protect workers under the FLSA. It is unlawful for any person to discharge or in any other manner discriminate against any worker because such worker has filed any complaint or instituted or caused to be instituted any proceeding under or related to E.O. 13658 or its implementing regulations, or has testified or is about to testify in any such proceeding.