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General

1. Why is the Department of Labor issuing this final rule?

On February 12, 2014, President Barack Obama signed Executive Order 13658, *Establishing a Minimum Wage for Contractors* (the Executive Order or the Order). The Executive Order 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.

The Executive Order directs the Department of Labor (the Department) to issue regulations to implement the requirements of the Order by October 1, 2014. 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 Executive Order 13658 and invited comment on the proposed provisions. The Department received many 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 has issued this final rule to implement the provisions of Executive Order 13658. As required by the Executive Order and to the extent practicable, the Department's final rule incorporates 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).

2. What is the Executive Order minimum wage for Federal contractors?

The Executive Order establishes a minimum wage requirement for Federal contractors and subcontractors. The Order provides that executive departments and agencies must, 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 subcontractors must incorporate into lower-tier subcontracts, specifying, as a condition of payment, that the minimum wage to be paid to workers performing on or in connection with the contract or any subcontract thereunder, must be at least:

(1) \$10.10 per hour beginning January 1, 2015; and

(2) beginning January 1, 2016, and annually thereafter, an amount determined by the Secretary pursuant to the Order.

3. How will the Secretary determine the amount of the minimum wage under Executive Order 13658?

The Secretary will determine the Executive Order minimum wage beginning January 1, 2016, and annually thereafter. The amount of the Executive Order minimum wage will be published by the Secretary at least 90 days before such new minimum wage is to take effect and will 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.

In calculating the annual percentage increase in the Consumer Price Index for the purpose of setting the Executive Order minimum wage, the Secretary will compare such Consumer Price Index for the most recent year with the Consumer Price Index for the preceding year.

Contract Coverage

4. What types of contracts are covered by the Executive Order and these regulations?

Executive Order 13658 and the Department's final rule are intended to apply to a wide range of contracts with the Federal Government for services or construction. Coverage of the Order and the Department's final rule generally extends to four major categories of contractual agreements:

- (1) Procurement contracts for construction covered by the DBA;
- (2) Service contracts covered by the SCA;
- (3) Concessions contracts, including any concessions contract excluded from the SCA by the Department's regulations at 29 C.F.R. 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.

The Executive Order also establishes value threshold requirements for coverage. The Order only 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 \$3,000. There is no value threshold requirement for subcontracts awarded under such prime contracts.

The Executive Order minimum wage generally applies to workers performing on or in connection with the above types of contracts if the wages of such workers are governed by the DBA, the SCA, or the FLSA.

5. What is a "contract or contract-like instrument"?

The Department has collectively defined the terms “contract” and “contract-like instrument” for purposes of the Executive 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. A contract that meets this definition is covered by the Executive Order, however, only if it fits within one of the four categories of agreements discussed above.

6. What is a “new contract”?

The minimum wage requirements of Executive Order 13658 apply only to “new contracts” with the Federal Government. As explained in the Department’s final rule, 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. For purposes of the Executive Order, a contract that is 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.

Pursuant to the Department’s final rule, the minimum wage requirements of the Executive Order do not apply to the unilateral exercise of a pre-negotiated option to renew an existing contract by the Federal Government on or after January 1, 2015.

7. What is a “concessions contract”?

The Department’s final rule defines a “concessions contract” as 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 every contract with the principal purpose of furnishing 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.

Examples of concessions contracts that are generally covered by the Executive Order and the Department’s final rule include contracts with the Federal Government to operate souvenir shops in national parks or fast food restaurants in Federal buildings.

8. What is a “contract or contract-like instrument 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”?

Pursuant to the Department’s final rule, this category of covered contracts refers to leases of Federal property, including space and facilities, 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.

9. If I enter into a contract with the Federal Government, is it automatically covered by the Executive Order?

No. In order for a contractual agreement to be covered by the Executive Order, the agreement must (1) fall within the definition of a “contract or contract-like instrument” as set forth in the Department’s final rule, and (2) qualify as one of the specifically enumerated types of contracts described in the Executive Order. For example, a provider agreement will **not** be covered by the Executive Order and the Department’s final rule unless it is subject to the DBA or SCA, is a concessions contract, or is entered into in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public. Moreover, as explained above, the minimum wage requirements of Executive Order 13658 apply only to “new contracts” with the Federal Government as defined in the final rule.

10. Does the Executive Order cover AbilityOne contracts?

Yes. Procurements through the AbilityOne program will be covered in the same manner as any other contract. For example, if an AbilityOne service contract was awarded on January 1, 2011 and provided for a five-year contract term, a decision by the contracting parties to renew the contract on January 1, 2016 would qualify as a “new contract” subject to the Executive Order.

11. Are any types of Federal contracts excluded from coverage of the Executive Order and these regulations?

Yes. The Executive Order and the Department’s final rule set forth the following narrow categories of contracts that are not subject to the Order’s minimum wage requirements:

- (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 excluded from coverage of the DBA; and

(4) Contracts for services that are exempted from coverage under the SCA, unless expressly covered by the Executive Order and these regulations. 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 C.F.R. 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 C.F.R. 4.121. Such contracts would also be exempt from coverage of the Executive Order and these regulations.

Thus, for example, Federal grants under Medicaid or under the Clean Water State Revolving Fund (CWSRF) programs are not covered by Executive Order 13658 or these regulations, and contracts entered into by State or local governments to administer Medicaid or CWSRF programs therefore would not be subject to Executive Order 13658 or these regulations by virtue of such Federal financial support.

The Department also notes that contracts for the manufacturing or furnishing of materials, supplies, articles, or equipment to the Federal Government, *i.e.*, those subject to the Walsh-Healey Public Contracts Act, 41 U.S.C. 6501 *et seq.*, are not covered by Executive Order 13658.

Worker Coverage

12. Who is entitled to the Executive Order minimum wage?

Workers performing on or in connection with covered contracts are entitled to the Executive Order minimum wage if their wages under the contract are governed by the FLSA, the SCA, or the DBA. The Department's final rule explains that the following categories of workers are generally entitled to the Executive Order minimum wage for all hours worked on or in connection with covered Federal contracts:

- (1) Employees 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),¹ and tipped employees under FLSA section 3(t);
- (2) Service employees who are entitled to prevailing wages under the SCA; and
- (3) Laborers and mechanics who are entitled to prevailing wages under the DBA.

The Department's final rule specifically notes that the Executive Order minimum wage protections generally apply to FLSA-covered employees who provide support on a service contract that is necessary for the performance of the contract but who are not "service employees" under the contract for purposes of the SCA. For example, a payroll clerk who is covered by the FLSA and is responsible for maintaining payroll records for service employees employed on an SCA-covered contract for janitorial services would generally be covered by the

¹ 29 U.S.C. 214(c) authorizes employers, after receiving a certificate from the Wage and Hour Division, to pay subminimum wages to workers whose earning or productive capacity is impaired by a physical or mental disability for the work to be performed.

Executive Order for the hours spent performing work in support of the covered contract even though the payroll clerk may not qualify as a “service employee” entitled to SCA prevailing wages.

Similarly, the Department’s final rule states that the Executive Order generally applies to workers performing in connection with DBA-covered contracts for construction who are not laborers or mechanics but whose wages are governed by the FLSA. For example, the Department would generally view a security guard working in connection with a DBA-covered contract whose wages are governed by the FLSA as a covered worker entitled to the minimum wage established by the Executive Order.

13. Who qualifies as a “worker” covered under the Executive Order?

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 Executive Order, 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 employer. 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.

In the final rule, the Department explains that the Executive Order minimum wage applies to workers performing “on” covered contracts, as well as workers performing “in connection with” covered contracts. For purposes of the Executive Order, the Department views a worker performing “on” a covered contract as any worker who directly performs the specific services called for by the contract’s terms. The Department regards a worker performing “in connection with” a covered contract as any worker who performs work activities that although are not the specific services called for by the contract’s terms, are necessary to the performance of those specific services.

14. Do the Department’s regulations exclude any workers from coverage under the Executive Order?

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, employees who are exempt from the minimum wage protections of the FLSA are similarly not entitled to the minimum wage protections of Executive Order 13658.

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.

In the final rule, the Department also has adopted 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. The Department created this exclusion based on comments expressing concern that the regulations could impose compliance and recordkeeping burdens on contractors with respect to workers who may only spend a very small amount of time working in connection with a contract covered by the Executive Order.

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 security guard patrolling a DBA-covered construction site would not be covered if the security guard spent less than 20 percent of her time at the DBA-covered site, whereas a laborer working on a DBA-covered construction project would be covered, even if he worked at the site less than 20 percent of his time.

Contracting Agency Requirements

15. What are the responsibilities of contracting agencies in implementing the Executive Order?

Contracting agencies must include the Executive Order contract clause in all new contracts or solicitations for contracts covered by the Order. Contracting agencies must also forward any complaints alleging a contractor’s non-compliance with Executive Order 13658 to the Wage and Hour Division (WHD), and withhold payments due on the contract to the extent considered necessary to pay workers the full amount of wages due under the Executive Order if the agency has reason to believe a violation of the Executive Order has occurred.

16. How will contracting agencies and contractors know what the new wage is since the Executive Order minimum wage may change annually on January 1?

The Order requires the Secretary of Labor to determine the minimum wage for covered contracts and solicitations based on inflation on an annual basis beginning January 1, 2016. The Secretary will publish the new minimum wage rate in the Federal Register at least 90 days before it takes effect. It will also be posted on WHD’s website at <http://www.dol.gov/whd/> and the Wage Determinations OnLine website at www.wdol.gov. The Department of Labor will also publish a prominent general notice on SCA and DBA wage determinations that will state the Executive Order minimum wage and that the Executive Order minimum wage applies to all DBA- and SCA-covered contracts. This notice will be updated on all SCA and DBA wage determinations annually to reflect any inflation-based adjustments to the Executive Order minimum wage. Contractors are also required to provide notice of the Executive Order minimum wage to FLSA-

covered workers performing work on or in connection with covered contracts by posting a poster that will be provided by the Department.

Contractor Requirements

17. What are the responsibilities of contractors in complying with the Executive Order?

Contractors and subcontractors must include the Executive Order contract clause in any covered lower-tiered subcontracts. They must also notify all workers performing on or in connection with a covered contract of the applicable minimum wage rate under the Executive Order. Contractors and subcontractors must pay all covered workers the Executive Order minimum wage for all hours worked on or in connection with covered contracts, and must comply with pay frequency and recordkeeping requirements.

18. Will increases in the Executive Order minimum wage affect workers on multi-year contracts?

Yes. The applicable Executive Order minimum wage may increase each year over the span of a covered multi-year contract. Contractors must ensure that their workers are being paid no less than the Executive Order minimum wage in effect during each year of a multi-year contract. If appropriate, contractors are entitled to be compensated for the increase in labor costs resulting from the annual inflation increases in the Executive Order minimum wage beginning on January 1, 2016.

19. Can a contractor rely on the Executive Order to pay a wage less than that required by another law?

No. A contractor's obligation to pay the Executive Order minimum wage on a covered contract does not excuse noncompliance with any other applicable Federal or State prevailing wage law, including SCA and DBA, or any applicable law or municipal ordinance establishing a minimum wage higher than the Executive Order minimum wage.

20. Does the Executive Order affect the prevailing wage rates required by the Davis-Bacon Act (DBA) and Service Contract Act (SCA)?

The minimum wage requirements of the Executive Order are separate and distinct legal obligations from the prevailing wage requirements of the DBA and SCA. If a contract is subject to the DBA or SCA 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 Executive Order minimum wage, the contractor must pay the Executive Order minimum wage in order to comply with the Order. If the applicable DBA or SCA rate is higher than the Executive Order rate, the contractor must pay the higher prevailing rate to the DBA or SCA covered worker in order to comply with the DBA or SCA.

21. How does the Executive Order affect the wage rates paid to workers whose wages are calculated pursuant to a certificate under section 14(c) of the Fair Labor Standards Act, 29 U.S.C. 214(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 that 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 is higher than the Executive Order minimum wage, however, the contractor must pay the worker the higher commensurate wage.

22. How does the Executive Order apply to other staff employed by an FLSA section 14(c) certificate holder on or in connection with a contract covered by the Order?

Any FLSA-covered staff, whether a worker with a disability employed under an FLSA section 14(c) certificate or other staff of the certificate holder, who perform work on or in connection with a covered contract generally must be paid at least the Executive Order minimum wage for covered work. A detailed FAQ relating to FLSA section 14(c) will be issued separately.

23. Does the Executive Order apply to tipped employees?

Yes. A covered worker employed in an occupation in which he or she receives tips is a “tipped employee” when he or she customarily and regularly receives more than \$30 a month in tips. Only tips actually retained by the worker after any tip pooling may be counted in determining whether the person is a “tipped employee.” A worker may be a “tipped employee” regardless of whether the worker is employed full time or part time so long as the worker customarily and regularly receives more than \$30 a month in tips.

Under the Executive Order, the wage paid to a tipped employee may be composed of a cash wage and a credit based on tips. Beginning January 1, 2015, tipped employees to whom the Order applies must be paid a cash wage of at least \$4.90 per hour. In accordance with the Executive Order, this minimum hourly cash wage will steadily increase in subsequent years until it is at least 70 percent of the Executive Order minimum wage. Tipped employees must receive tips amounting to at least the difference between the cash wage paid and the Executive Order minimum wage.

24. Can a contractor make deductions from the wages of workers that bring the workers’ wages below the Executive Order minimum wage?

A contractor can only make deductions that reduce a worker’s wages below the Executive Order minimum wage under the following limited circumstances: (1) deductions required by Federal,

State or local law, including withholding taxes; (2) deductions for payments made to third parties pursuant to court orders; (3) deductions directed by a voluntary assignment of the worker (*e.g.*, union dues, charitable contributions); and (4) deductions for the reasonable cost or fair value of board, lodging, or other facilities as those terms are used in the FLSA.

25. Can contractor contributions to fringe benefits be used to satisfy part of the Executive Order minimum wage requirement?

No, a contractor cannot discharge its Executive Order minimum wage obligation by furnishing fringe benefits. The SCA and FLSA do not allow contractors to meet the statutes' respective wage obligations through the furnishing of fringe benefits. Although the DBA specifically includes fringe benefits within its definition of prevailing wage, thereby allowing a contractor to meet its prevailing wage obligation, in part, through the furnishing of fringe benefits, 40 U.S.C. 3141(2), the Executive Order contains no similar provision expressly authorizing a contractor to discharge its Executive Order minimum wage obligation through the furnishing of fringe benefits. Consistent with the Executive Order, the final rule accordingly precludes a contractor from discharging its minimum wage obligation by furnishing fringe benefits.

Enforcement and Administrative Proceedings

26. How will the Department enforce the provisions of the Executive Order?

The Executive Order authorizes the Department to enforce the provisions of the Order. The final rule sets forth an enforcement scheme that closely follows the processes used in the SCA and DBA and proposes remedies for violations of the Executive Order that are available under the SCA, DBA and/or FLSA, including payment of back wages, reinstatement, and debarment, as appropriate.

27. How are complaints addressed and investigations conducted by the Department?

An individual may file a complaint with any office of the WHD. 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 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 (*i.e.*, contracts and payroll), as well as interview the contractor. The agency 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.

28. What happens if a contractor is found to have failed to pay the Executive Order minimum wage?

If the WHD determines that a contractor has failed to pay the Executive Order minimum wage to workers, the WHD will request that the contractor remedy the violation. The WHD may additionally direct that the applicable contracting agency withhold payments due on the contract or any other contract between the contractor and the Federal Government as considered necessary to pay workers the full amount of wages due under the Executive Order. Upon the final order of the Secretary of Labor, the WHD may direct the relevant contracting agency to transfer the withheld funds to the Department for disbursement to affected workers.

29. Is there an appeals process if a party is found to be in violation of the Executive Order?

Yes. Parties will be notified in writing of the violation findings and will be provided an opportunity to request a hearing with the Department's Office of Administrative Law Judges. Any party may appeal an order issued by the Office of Administrative Law Judges to the Administrative Review Board.

30. What protections exist for workers who attempt to assert their rights under the Executive Order?

The final rule incorporates the same broad prohibition against retaliation that exists to protect workers under the Fair Labor Standards Act. Pursuant to the final rule, 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 Executive Order 13658 or its implementing regulations, or has testified or is about to testify in any such proceeding.