



**FACT SHEET: FINAL RULE TO
IMPLEMENT EXECUTIVE ORDER 13658,
ESTABLISHING A MINIMUM WAGE FOR CONTRACTORS**

On February 12, 2014, President Obama signed Executive Order 13658, “Establishing a Minimum Wage for Contractors,” to raise the minimum wage to \$10.10 for all workers on Federal construction and service contracts. The President took this executive action because boosting wages lowers turnover and increases morale, and will lead to higher productivity overall. Raising wages will improve the quality and efficiency of services provided to the government. The Executive Order directed the Department of Labor to issue regulations to implement the new Federal contractor minimum wage.

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 Executive Order 13658 and invited public 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 published a final rule to implement the provisions of Executive Order 13658. The final rule issued by Secretary of Labor Tom Perez is an important milestone in raising the minimum wage for workers on Federal contracts.

❖ **Key Provisions of the Final Rule** ❖

The final rule defines key terms used in the Executive Order, including *contracts*, *contract-like instruments*, and *concessions contracts*. The final rule makes clear that the Executive Order minimum wage requirement applies to all contracts for construction covered by the Davis-Bacon Act; contracts for services covered by the Service Contract Act; concessions contracts, such as contracts to furnish food, lodging, automobile fuel, souvenirs, newspaper stands, and/or recreational equipment on Federal property; and contracts to provide services, such as child care or dry cleaning, in Federal buildings for Federal employees or the general public.

The final rule provides guidance for contractors on their obligations under the Executive Order. The final rule sets forth the standards that contractors should apply to determine whether their workers are covered by the Executive Order, recordkeeping requirements, and where to find the required rate of pay for all workers, including tipped workers and workers with disabilities.

The final rule establishes an enforcement process that should be familiar to most government contractors and will protect the right of workers to receive the new \$10.10

minimum wage. The Department of Labor generally has adopted existing mechanisms for enforcing long-established prevailing wage laws to enforce the provisions of the Executive Order.

The final rule confirms that around 200,000 workers will benefit from the Executive Order.

❖ Details of Final Rule Key Provisions ❖

Coverage

Executive Order 13658 applies to new 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.

Executive Order 13658 applies to four major categories of contractual agreements:

- (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.

Procurement contracts for construction

Under the final rule, any contract covered by the DBA and its implementing regulations is subject to the Executive Order minimum wage requirement. The Executive Order does not apply, however, to contracts that are subject only to the Davis-Bacon Related Acts.

Service contracts

Both procurement and non-procurement contracts that are subject to the SCA and its implementing regulations are subject to the Executive Order minimum wage requirement.

Contracts for concessions

The final rule 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 Executive Order thus covers all concession contracts with the Federal Government, including those excluded from SCA coverage by regulations, such as concession contracts with the Federal Government to operate souvenir shops or to provide food or lodging in national parks.

Contracts in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public

The final rule interprets this provision as generally including 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 the Federal Government, its personnel, or the general public. For example, a lease of space in a Federal building from a Federal agency to a business to operate a coffee shop to serve Federal employees and/or the general public is covered by the Executive Order.

Contracts that are not covered by the Executive Order and the final rule

The Executive Order and the final rule contain certain narrow exclusions from coverage for the following types of contractual agreements: (1) grants; (2) contracts and agreements with and grants to Indian Tribes under Public Law 93-638, as amended; (3) any procurement contracts for construction that are not subject to the DBA (*i.e.*, procurement contracts for construction under \$2,000); and (4) any contracts for services, except for those otherwise expressly covered by the final rule, that are exempted from coverage under the SCA or its implementing 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 CFR 4.120. It additionally exempts employment contracts providing for direct services to a Federal agency by an individual, such as a contract with an individual to provide sign language interpretation for an event. *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 the final rule.

The Department also notes that the Executive Order does not apply to 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.

Workers who are entitled to the Executive Order minimum wage

Workers performing on or in connection with covered Federal contracts whose wages are governed by the Fair Labor Standards Act (FLSA), the SCA, or the DBA are generally entitled to receive the Executive Order minimum wage for all time spent performing on or in connection with covered Federal contracts. The Executive Order therefore generally applies to the following categories of workers performing on or in connection with covered Federal contracts: (1) employees who are entitled to the FLSA minimum wage; (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 Executive Order specifically provides that workers whose wages are calculated pursuant to special certificates issued under 29 U.S.C. 214(c)¹ are entitled to receive the Executive Order minimum wage. If a worker is entitled to a wage rate higher than the Executive Order minimum wage pursuant to another Federal, State, or local law (*e.g.*, the SCA or DBA), the worker must be paid the higher wage rate.

The Department's final rule specifically notes that the minimum wage protections of the Executive Order extend broadly to protect FLSA-, SCA-, and DBA-covered workers performing "on" covered contracts (*i.e.*, workers directly performing the specific services or construction

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.

called for by the contract's terms) as well as workers performing "in connection with" covered contracts (*i.e.*, workers performing other duties necessary to the performance of the contract). For example, the Executive Order minimum wage applies to FLSA-covered workers who provide support on SCA- and DBA-covered contracts that is necessary for the performance of the contract, such as an FLSA-covered security guard monitoring a DBA covered project for the entire work week.

FLSA section 14(c) and the Executive Order

Workers covered by the Executive Order and generally due the full Executive Order minimum wage for time spent performing on or in connection with covered contracts include workers with disabilities whose wages are calculated pursuant to certificates issued under section 14(c) of the FLSA. For additional information on the impact of the Executive Order and the section 14(c) program, please see fact sheet, "Raising The Minimum Wage For Workers With Disabilities Under Executive Order 13658," available at <http://www.dol.gov/whd/flsa/eo13658/EO-factsheet.htm>.

Workers that are not covered by the Executive Order and the final rule

The Executive Order and the final rule contain a few limited exclusions from coverage for certain workers. For example, workers who are employed in a bona fide executive, administrative, or professional capacity and who consequently are exempt from the FLSA's minimum wage and overtime requirements are not entitled to receive the Executive Order minimum wage. FLSA-covered workers performing "in connection with" covered contracts are also excluded from coverage of the Executive Order if they spend less than 20% of their work hours in a particular workweek performing in connection with covered contracts.

Contracting Agency Obligations

The final rule sets forth the responsibilities of contracting agencies under the Executive Order. Contracting agencies are responsible for ensuring that the contract clause implementing the Executive Order minimum wage requirement is included in any new contracts or solicitations for contracts covered by the Executive Order. Contracting agencies are also responsible for withholding funds when a contractor or subcontractor fails to abide by the terms of the applicable contract clause, such as by failing to pay the required Executive Order minimum wage, and for forwarding any complaints alleging a contractor's non-compliance with Executive Order 13658 to the Wage and Hour Division (WHD).

Contractor Obligations

The Department's final rule sets forth certain obligations that contractors and subcontractors must fulfill in order to comply with the Executive Order. For example, contractors and subcontractors must include the Executive Order contract clause in any covered lower-tiered subcontracts. They also must 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 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 obligations. Finally, the final rule prohibits the taking of kickbacks from wages paid to workers on covered contracts as well as retaliation against any worker for exercising his or her rights under the Executive Order or the implementing regulations.

Department of Labor Obligations

Under the Executive Order and the Department's rule, the Secretary of Labor is required to determine the Executive Order minimum wage rate yearly beginning January 1, 2016, and publish this wage rate at least 90 days before the wage is to take effect. The final rule outlines the methods that the Department will utilize to notify the public of the Executive Order minimum wage, including publication in the Federal Register and notice on DBA and SCA wage determinations and on www.wdol.gov.

Enforcement Procedures

Complaints may be filed with the WHD by any person or entity that believes a violation of the Executive Order or its implementing regulations has occurred. The final rule contains a mechanism for WHD investigations and informal complaint resolution, as appropriate; it also specifies remedies and sanctions for violations of the Executive Order and its implementing regulations, including the payment of back wages and debarment. The Department's final rule also includes an administrative process, including administrative hearings, to resolve disputes of fact or law.