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What Employers Need to Know about the New Minimum Wage Executive Order

By Jill Pedigo Hall

Other [authors have cited](#) recent increases to state minimum wage rates as possible harbingers of a minimum wage increase at the federal level. Now, such a change at the federal level is coming to fruition. On February 12, 2014, President Obama signed Executive Order 13658 (the "Executive Order"), raising the minimum wage to \$10.10 per hour for employees who work on federal government contracts or subcontracts for services or construction. The rate is subject to annual increases based upon corresponding percentage increases in the Consumer Price Index. The Executive Order also raised the minimum wage for tipped contract workers to \$4.90 per hour.

The new minimum wage rate is effective only for new government contracts and replacements of expiring contracts entered into beginning January 1, 2015. It covers procurement contracts for services or construction, as well as contracts or "contract-like instruments" that are for services or concessions, or that both involve federal property or lands and relate to services offered to federal employees, their dependents, or the general public. All federal contracts and covered subcontracts will be required to include a specific clause relating to the Executive Order obligation beginning January 1, 2015. Compliance with the Executive Order will be enforced by the Department of Labor ("DOL"). And, although final regulations related to the Executive Order have not yet been issued, affected employers should begin familiarizing

themselves with the nuances of the Executive Order.

Executive Order Impact

A contemporaneous Fact Sheet provided with the Executive Order identifies types of workers impacted by the Executive Order, including "janitors, construction workers, military base workers who wash dishes, serve food and do laundry, nursing assistants providing care to our veterans at nursing homes, concessions workers in National Parks, and individuals with disabilities working to maintain the grounds on military bases." In issuing the Executive Order, the Obama Administration expressed its belief that the wage increase would "reduce turnover and absenteeism, while also boosting morale and improving the incentives for workers, leading to higher productivity overall" and would "improve the quality and efficiency of services provided to the government."

While the Executive Order will undoubtedly impact federal contracting employers and their employees, the impact on the employer-contracting community as a whole may be modest. First, many service and construction contractors covered under the Executive Order are already subject to and complying with federal prevailing wage laws. The Davis-Bacon Act and the Service Contract Act already require that contract workers be paid at least the local prevailing wage as determined by the DOL. The majority of labor categories under these determinations have wage rates that substantially exceed \$10.10, and those few categories currently falling below the \$10.10 threshold are still close to that amount and will likely meet or surpass the Executive Order's minimum wage by next year. Under the terms of the Executive Order, contractors will be required to pay the higher of either the prevailing wage or the new federal minimum wage rate to those employees working on the federal contract or subcontract.

A second factor that might diminish the impact of the Executive Order is its delayed implementation. Although the Executive Order advises agencies that they are "strongly encouraged" to make sure that any contracts and "contract-like instruments" negotiated before January 1, 2015, require payment of the \$10.10 rate, there is no enforceable requirement. The converse consideration, however, is that as a result of the stated encouragement, federal contractor employers may find themselves negotiating over a higher wage rate in contracts this year despite the new minimum wage not yet being in effect.

Third, from the terms of the Executive Order, it appears that only those employees actually working on the government contracts must be paid the new minimum wage, rather than all employees working for that employer. This is not stated explicitly but rather implied in various provisions of the Executive Order. Regulations

implementing the Executive Order will presumably provide clarification on the scope and effect of the Executive Order, but the DOL has until October 1, 2014, to issue its regulations. Finally, if the DOL follows its frequent course of failing to meet deadlines for regulatory issuances, implementation of the Executive Order might be delayed further still.

Things to Consider Before January 1, 2015

Uncertainty and questions remain around some aspects of the Executive Order and suggest federal contracting employers should begin evaluating their positions even prior to issuance of the regulations.

Federal contractor employers will need to assess if and to what extent this new requirement will affect projected labor costs and operations, taking into account the timing of entrance into new contracts and contract terms. Employers should also make sure they have a method in place to identify which workers qualify for the increased wage rate. Moreover, employers may need to either reevaluate practices of interchanging those identified employees between covered and non-covered projects, or at least ensure protocols are in place to track time spent on the covered project. Special considerations may be needed if contractor employers have employees who work under collective bargaining agreements. It is also unclear what is meant by a "contract-like instrument," so depending upon the definition, the impact of the Executive Order may be expanded. It is hoped that the DOL regulations will define these terms and provide a detailed outline of the enforcement and penalty schemes.

As soon as possible after the regulations are issued, federal contractor employers would be well advised to carefully review the regulations and work with legal counsel to determine what changes, if any, they may need to make.

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