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DOL ANNOUNCES FINAL RULE ON FEDERAL CONTRACTOR MINIMUM WAGE

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On Wednesday, the U.S. Department of Labor released its **Final Rule** on **Executive Order 13658**, which established a new minimum wage of $10.10 an hour for employees working on certain federal contracts. The Final Rule is set to be published in the *Federal Register* on Tuesday, October 7.

What Contracts Are Covered?

The new rule applies to all "new contracts" with the federal government, provided that the contract

* is a procurement contract for construction covered by the Davis Bacon Act, or
* is a contract for services covered by the Service Contract Act, or
* is a contract for concessions, including any concessions contract excluded from coverage under the Service Contract Act at 29 CFR § 4.133(b), or
* is a contract in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public.

In addition, the wages of the workers under the contract must be governed by either the Fair Labor Standards Act, the Service Contract Act, or Davis Bacon. A "new contract" is defined as a new or replacement contract that results from a solicitation issued or after January 1, 2015, or that is awarded outside the solicitation process on or after January 1, 2015.

For contracts covered by the Service Contract Act or Davis Bacon, the Rule applies only to prime contracts at the thresholds specified in those statutes. For procurement contracts where workers' wages are governed by the FLSA, the minimum wage applies only when the prime contract exceeds the micro-purchase threshold as defined in 41 U.S.C. § 1902(a), or $3,000. The Rule provides that subcontracts are covered using the same "new contracts" test set forth above for prime contractors. Additionally, the minimum wage requirement applies only to contracts where the contract is performed, in whole or in part, within the United States.

The Final Rule specifically excludes certain agreements from coverage: grants; contracts and agreements with and grants to Indian Tribes; procurement contracts for construction that are excluded from coverage by Davis Bacon; contracts for services that are exempted from coverage under the Service Contract Act; contracts for the manufacturing or furnishing of materials, supplies, articles or equipment that are subject to the Walsh-Healey Public Contracts Act (41 U.S.C. § 6501); and employees who are exempt from the minimum wage requirements of the FLSA (such as apprentices, students, and white-collar exempt employees). All other contracts that meet the threshold requirements must comply with the law.

The DOL estimates that "nearly" 200,000 American workers will benefit from this new minimum wage.

Which Employees are Entitled to the Minimum Wage?

The proposed rule anticipated coverage of every employee "engaged in working on or in connection with the contract, either in performing the specific services called for by its terms or in performing other duties necessary to the performance of the contract."

The Final Rule, however, adds an exclusion for certain FLSA-covered workers who are not directly engaged in performing the specific work called for by the contract, but are performing "ancillary" work that is essential to the contract. *If such ancillary employees spend less than 20 percent of their hours worked in a particular workweek performing duties "in connection with" the contract, then those workers are not covered by the new minimum wage requirement for that week.* Examples of workers who are performing work "in connection with" a covered contract include a security officer at a Davis Bacon construction site, or a payroll clerk.

However, if the worker *directly* performs any specific work called for by the contract, this exclusion will not apply and the worker will be covered by the new minimum wage. It does not matter that the "direct" work may constitute only a very small percentage of the work performed in the relevant workweek.

To take advantage of the "ancillary work" exclusion, contractors will have to accurately distinguish between workers performing "on" a covered contract and those merely performing work "in connection with" a covered contract. Additionally, for those employees working "in connection with" the covered contract, the contractor will need to keep specific records to make certain that those hours do not equal or exceed 20 percent. If the contractor does not maintain records adequately identifying covered and non-covered work, then all workers in the establishment or department where such covered work is performed will be presumed to have worked on or in connection with the contract unless the contractor can provide affirmative proof to the contrary. Likewise, if a worker performs any work on or in connection with the contract in a workweek, and if the contractor fails to keep sufficient records, the government will assume that all work performed that workweek by the worker is covered. Unfortunately, neither the Final Rule nor the DOL's introductory comments provide any real direction to contractors as to what specific records are sufficient to allow the contractor to take advantage of the 20 percent rule.

Of course, if the worker is not performing any work necessary to the performance of the contract – either "on" or "in connection with" – then that worker is not entitled to the "contractor" minimum wage. An example of such an employee would be a landscaper at the home office of the contractor; in this case, the employee is not entitled to the new minimum wage because this work is not necessary to the performance of the contract.

How Much is the New Minimum Wage?

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The new minimum wage under the Final Rule is $10.10, and it will take effect on January 1. That minimum may be adjusted each year by the Secretary of Labor based on the annual percentage increase in the Consumer Price Index for Urban Wage Earners and Clerical Workers. A contractor cannot make deductions that would take the covered workers' wages below the minimum unless the deductions are (1) made pursuant to federal or state law, such as tax withholdings; (2) made for third parties pursuant to court order (such as garnishments); (3) made under a voluntary assignment by the worker or his representative; or (4) for the reasonable cost or fair value, as determined by the Administrator, of furnishing the worker with "board, lodging, or other facilities."

What Else Do I Need to Know?

There are a few more important facts to know about the Final Rule:

1. The Final Rule contains an anti-retaliation provision protecting any worker who has filed any complaint or instituted or caused to be instituted any proceeding under or related to the Executive Order, or who has or is about to testify in any such proceeding.

2. A worker cannot waive his or her rights under the Executive Order or regulations.

3. The government will include the minimum wage contract language in all covered contracts. If the government fails to do so, it can go back and retroactively add the language.

4. Contractors must include the specific contract clause provided in Appendix A of the Final Rule in all covered subcontracts.

5. Contractors must require covered subcontractors to include the contract clause in all lower-tier subcontracts as a condition of payment.

What Are the Penalties for Non-Compliance?

If a contractor fails to pay the required minimum wage, the government can withhold from the contractor the funds necessary to pay workers the full amount of wages required by the Final Rule. If the withheld funds do not cover the full amount of wages owed, the government can bring a civil action to recover the remaining amounts of underpayments. The government may also take action to suspend any further payments until such violations are corrected. Additionally, failure to comply with the Rule may be grounds for debarment (termination of the right to perform contract work).

What Records Must Covered Contractors Keep?

The Final Rule has recordkeeping requirements, but they are the same as those already required by various other wage and hour laws. The contractor must allow authorized representatives of the Wage and Hour Division to conduct on-site interviews with employees during normal working hours.

Must Covered Contractors Post a Notice?

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Yes, covered contractors must provide notice of the applicable minimum wage under the EO to all workers performing work "on" or "in connection with" a covered contract. For contracts under Davis Bacon or the Service Contract Act, the contractor can satisfy this obligation by posting, in a prominent and accessible place at the worksite, the applicable wage determination under those statutes. For workers whose wages are governed by the FLSA, the contractor must post a notice that is included as an Appendix to the Final Rule. If a contractor regularly posts notices electronically, it may do likewise with the notices required under the Final Rule, provided that the electronic posting is displayed prominently on the website.

What About Tipped Employees?

As the Executive Order provides, tipped employees receive special attention under the Final Rule. Tipped employees must be paid an hourly cash wage of at least $4.90 an hour beginning January 1. This hourly cash rate will increase each year by 95 cents until the hourly rate paid equals 70 percent of the minimum hourly wage paid to other employees under the EO for the previous year. In addition, the tipped employee must receive tips which, when added to the hourly rate, bring the tipped employee to the minimum hourly wage under the EO. If the tipped employee does not receive enough in tips to bring his total hourly rate up to the minimum, the contractor must make up the difference. Further, when a tipped employee works overtime, the Rule requires that the tipped employee's "regular rate of pay" for purposes of calculating overtime should include both the cash wages paid by the employer and the amount of any tip credit taken. Any tips received by the employee in excess of the tip credit are not included in the regular rate. The regulations provide specific definitions of "tipped employee" that track those under the Fair Labor Standards Act. To take a tip credit, the contractor must provide specific notice to the tipped employee as set forth in Section 10.28(f) of the regulations.

What Should Contractors Do Now?

We have received a lot of inquiries from federal contractors wondering whether these new requirements will apply to them. As **previously reported**, the coverage of this Final Rule is rather limited in scope and does not include all federal contractors and subcontractors. Those contractors involved solely in "supplying" goods to the government should not be covered by this Final Rule. On the other hand, contractors that are involved in construction projects or that provide "services" or concessions to the government or on government property should review new solicitations and contracts very carefully to determine whether the new contract clause is included. Pay close attention to any references to "Executive Order 13658" or "29 C.F.R. Part 10."

Of course, for specific questions relating to potential coverage or application of the new requirements, please contact any member of Constangy's **Strategic Affirmative Action Practice Group** or the Constangy attorney of your choice.

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