

FACT SHEET: PROPOSED RULEMAKING 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 raising wages will improve the quality and efficiency of services provided to the government. Boosting wages lowers turnover, increases morale, and will lead to higher productivity overall on Federal contracts. The Executive Order directed the Department of Labor to issue regulations to implement the new Federal contractor minimum wage. The Notice of Proposed Rulemaking 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 NPRM ❖

The NPRM defines key terms used in the Executive Order, including *contracts, contract-like instruments, and concessions contracts*. The NPRM 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 NPRM provides guidance for contractors on their obligations under the Executive Order. The NPRM sets forth the standards that contractors should apply to determine whether their employees 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 NPRM 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 proposes to adopt existing mechanisms for enforcing long-established prevailing wage laws to enforce the provisions of the Executive Order.

The NPRM estimates that hundreds of thousands of workers will benefit from the Executive Order.

The Department encourages interested parties to submit comments on the NPRM. The full text of the NPRM, as well as information on the deadline for submitting comments and the procedures for submitting comments, can be found at www.dol.gov/whd/flsa/nprm-eo13658

Details of NPRM 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 NPRM, 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 exceeding \$2,500 that are subject to the SCA and its implementing regulations are subject to the Executive Order minimum wage requirement.

Contracts for concessions

The NPRM proposes to define 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 proposed rule thus extends coverage of the Executive Order to 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. See 29 CFR 4.133(b).

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

To the extent that such agreements are not otherwise covered by the SCA, the NPRM 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 contractor to operate a child care center 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 NPRM

The Executive Order and the proposed 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 proposed 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. 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 NPRM.

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 covered Federal contracts whose wages are governed by the FLSA, the SCA, or the DBA are entitled to receive the Executive Order minimum wage for all time spent performing on covered Federal contracts. The Executive Order therefore generally applies to the following categories of workers performing on 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 Department's proposed rule also specifically notes that the Executive Order minimum wage protections apply to FLSA-covered employees who provide support on SCA- and DBA-covered contracts that is necessary for the performance of the contract. 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 or State law (*e.g.*, the DBA or SCA), the worker must be paid the higher wage rate.

Contracting Agency Obligations

The NPRM sets forth the responsibilities of contracting agencies under the Executive Order. Contracting agencies are responsible for ensuring that a 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 proposed 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 pay not less than the Executive Order minimum wage to workers for all hours spent performing on covered contracts; they must include the Executive Order minimum wage contract clause in lower-tiered subcontracts; and they must comply with obligations related to wage deductions, frequency of pay, and recordkeeping. The NPRM also 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.

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.

Department of Labor Obligations

Under the Executive Order and the Department's proposal, 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 proposal 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 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 NPRM 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 proposal also includes an administrative process, including administrative hearings, to resolve disputes of fact or law.

How to Comment

The Department encourages interested parties to submit comments on the NPRM. The full text of the NPRM, as well as information on the deadline for submitting comments and the procedures for submitting comments, can be found at www.dol.gov/whd/flsa/nprm-eo13658.

The Department will review comments received and issue a Final Rule by October 1, 2014.

U.S. Department of Labor
Frances Perkins Building
200 Constitution Avenue, NW
Washington, DC 20210

1-866-4-USWAGE
TTY: 1-866-487-9243
[Contact Us](#)