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Secretary of Labor Issues Final Rule Implementing Executive Order 13658 Establishing a Minimum Wage for Government Contractors

On February 12, 2014, President Obama signed Executive Order 13658, “*Establishing a Minimum Wage for Contractors*,” applicable to covered workers (including workers whose wages are calculated in accordance with special certificates issued under Section 14(c) of the Fair Labor Standards Act (FLSA)) on or in connection with new covered contracts e.g., federal service, concessions, and construction contracts. The Executive Order (EO) directs the Department of Labor to issue regulations to implement the new Federal contractor minimum wage. On June 17, 2014, Secretary of Labor Tom Perez published in the *Federal Register* a [Notice of Proposed Rulemaking](#) implementing the Executive Order. On October 1, 2014, the Secretary of Labor issued a [final rule implementing the EO](#). For more information about the final rule, including fact sheets and answers to frequently asked questions, please visit <http://www.dol.gov/whd/flsa/eo13658/>.

The Preamble to the final rule includes a specific section describing the application of the EO to workers covered by Section 14(c) of FLSA (see Appendix to memo):

- The final rule adds language in the contract clause explicitly stating that workers with disabilities whose wages are calculated pursuant to special certificates issued under section 14(c) of the FLSA must be paid at least the EO minimum wage (or the applicable commensurate wage rate under the certificate, if such rate is higher than the EO minimum wage) for hours spent performing on or in connection with covered contracts.
- All workers performing on or in connection with covered contracts whose wages are governed by FLSA section 14(c), regardless of whether they are considered to be “employees,” “clients,” or “consumers” are covered by the EO (unless the 20 percent of hours worked exclusion applies – see page 4, paragraph 6)).
- DOL appreciates the concerns raised by ACCSES and other organizations regarding the potential loss of employment or reduction in public benefits that could result by requiring that the EO minimum wage be paid to FLSA section 14(c) workers performing on or in connection with covered contracts, particularly with respect to workers with severe disabilities, but DOL explains that it lacks rulemaking authority to implement the recommendations or the criteria used by other agencies in determining eligibility for public benefits.

The “Frequently Asked Questions” accompanying the issuance of the final rule includes the following policy applicable to AbilityOne contracts:

“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.”

The “Frequently Asked Questions” also reaffirms that “the Department 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 are not covered by Executive Order 13658.”

Set out below is a summary of key provisions in the final rule.

KEY PROVISIONS

Purpose and Policy

The final rule relates to the administration of Executive Order 13658 “*Establishing a Minimum Wage for Contractors.*” The Executive Order provides that executive departments and agencies shall, 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 shall incorporate into lower-tier subcontracts, specifying, as a condition of payment, that the minimum wage to be paid to workers, including workers whose wages are calculated pursuant to special certificates issued under 29 U.S.C. 214(c), in the performance of the contract or any subcontract thereunder, shall be at least:

- (1) \$10.10 per hour, beginning January 1, 2015; and
- (2) An amount determined by the Secretary of Labor, beginning January 1, 2016, and annually thereafter.

Definitions

The term “**contract**” means an agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law. The term “contract” shall be interpreted broadly as to include, but not be limited to, any contract that may be consistent with the definition provided in the Federal Acquisition Regulation (FAR) or applicable federal statutes. The term includes, among other things, contracts covered by the Service Contract Act and concessions contracts not otherwise subject to the Service Contract Act.

The term “**contractor**” means any individual or other legal entity that is awarded a federal government contract or subcontract under a federal government contract. The term includes employers of workers performing on covered Federal contracts whose wages are calculated pursuant to special certificates issued under Section 14(c) of FLSA.

Covered Contracts and Exclusions

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 provided that the wages of workers under such contract are governed by the Fair Labor Standards Act, the Service Contract Act or the Davis-Bacon Act.

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 negotiations, on or after January 1, 2015 the contract is renewed; 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 extension); or the contract is amended pursuant a modification that is outside the scope of the contract.

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

(1) **Procurement contracts** for construction covered by the Davis-Bacon Act (DBA). 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.

(2) **Service contracts** covered by the Service Contract Act (SCA). 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.

(3) **Concessions contracts** including contracts 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 final rule 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).

(4) **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 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 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 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 Davis-Bacon Act (*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.
- 5) Except for workers who are otherwise covered by the Davis-Bacon Act or the Service Contract Act, employees who are not entitled to the minimum wage under specific provisions of the FLSA, including learners, apprentices, or messengers whose wages are calculated under section 14(a) of the FLSA, students whose wages are calculated under section 14(b) of the FLSA, and individuals employed in a bona fide executive, administrative, or professional capacity.
- 6) FLSA-covered workers performing in connection with covered contracts for less than 20 percent of their work hours in a given workweek. The EO does not apply to FLSA-covered workers performing “in connection with” covered contracts *i.e.*, those workers who perform work duties necessary to the performance of the contract but who are not directly engaged in performing the specific work called for by the contract, that spend less than 20 percent of their hours worked in a particular workweek performing in connection with such contracts. This exclusion is inapplicable to covered workers performing on covered contracts, *i.e.*, those workers directly engaged in performing the specific work called for by the contract.
- 7) The “Frequently Asked Questions” reaffirms that “the Department 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 are not covered by Executive Order 13658.”

Workers Who are Entitled to the Executive Order Minimum Wage

Workers engaged in performing work on or in connection with covered Federal contracts whose wages are governed by the Fair Labor Standards Act, the Service Contract Act, or the Davis-Bacon Act 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 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 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 final rule 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 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 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 final rule 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.

Department of Labor Obligations

Under the Executive Order and the Department's final 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 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.

If the WHD determines that a contractor has failed to pay EO 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 EO.

The Department's final rule also includes an administrative process, including administrative hearings, to resolve disputes of fact or law.

APPENDIX

Preamble to the Final Rule Regarding FLSA Section 14(c) Workers [pages 105-109]

The Department received numerous comments pertaining to the coverage of workers with disabilities whose wage rates are calculated pursuant to special certificates issued under section 14(c) of the FLSA. Executive Order 13658 expressly provides that its minimum wage protections extend to such workers. See 79 FR 9851. Many of the comments received by the Department, such as those submitted by the National Down Syndrome Congress, the American Association of People with Disabilities, the National Industries for the Blind, the National Federation of the Blind, and the State of Alaska's Governor's Council on Disabilities and Special Education, generally supported the inclusion of FLSA section 14(c) workers in the scope of the Order's coverage. A few commenters, including MVW Services, opposed the payment of the Executive Order minimum wage to workers paid pursuant to 14(c) certificates and requested that the Department exempt such workers from coverage of the Order. Comments questioning the coverage of such workers are not within the purview of this rulemaking action because the Executive Order explicitly provided that FLSA section 14(c) workers performing on or in connection with covered contracts are entitled to its protections. See 79 FR 9851.

The Department received many comments, including those submitted by the National Down Syndrome Congress, the Association for People Supporting Employment First (APSE), the Autism Society of America, and the World Institute on Disability, requesting that it include additional language in the contract clause set forth in Appendix A explicitly stating that workers with disabilities whose wages are calculated pursuant to special certificates issued under section 14(c) of the FLSA must be paid at least the Executive Order minimum wage (or the applicable commensurate wage rate under the certificate, if such rate is higher than the Executive Order minimum wage) for hours spent performing on or in connection with covered contracts. The Department agrees with this proposed addition to the contract clause because it helps to clarify the scope of the Executive Order's coverage and has thus made this change to the contract clause in Appendix A.

The National Association of Councils on Developmental Disabilities also suggested that the Department create a specific section of the final rule that would address all of the relevant issues regarding the coverage of FLSA section 14(c) workers. This commenter also recommended that the Department clarify that all of the contractor requirements set forth in the final rule apply with equal force to Federal contractors employing workers performing on or in connection with covered contracts pursuant to FLSA section 14(c) certificates. As noted, the Department has adopted this commenter's suggestion by creating a separate section of the preamble in the final rule addressing specific issues that were raised in comments regarding the coverage of FLSA section 14(c) workers. However, because the Department has expressly included FLSA section 14(c) workers within its definition of the term worker and has specifically revised the contract clause to expressly state that such workers are entitled to the Executive Order minimum wage, the Department does not believe that it is necessary to create a specific subsection of the regulatory text devoted to FLSA section 14(c) workers or the contractors that employ them. All workers performing on or in connection with covered contracts whose wages are governed by FLSA section 14(c), regardless of whether they are considered to be "employees," "clients," or "consumers," are covered by the Executive Order (unless the 20 percent of hours worked exclusion applies). Moreover, all of the Federal contractor requirements set forth in this final rule apply with equal force to contractors employing FLSA section 14(c) workers performing on or in connection with covered contracts.

Some commenters, such as SourceAmerica, stated that they supported the payment of the Executive Order minimum wage to FLSA section 14(c) workers performing on covered contracts but also expressed concerns that such inclusion could potentially lead to a loss of employment or public benefits for those workers. A few of these commenters, like Goodwill Industries International, Inc., ACCSES, PRIDE Industries, and SourceAmerica, suggested that, in order to mitigate these potential problems, the Department should direct Federal agencies to subsidize the wage differential between the Executive Order minimum wage rate and the wage rate currently paid under the workers' FLSA section 14(c) certificate and/or direct Federal agencies to increase the funding of government contracts covered by the Order to allow disability service providers and other employers to pay the wage differential. Other commenters, such as Easter Seals, The Arc, and Goodwill Industries International, Inc., suggested that the Department implement a variety of other initiatives to mitigate potential problems, such as ensuring that all Federal contracts are designed to promote the hiring and retention of individuals with significant disabilities; annually tracking and monitoring the number of individuals with significant disabilities that may be displaced or shifted to non-Federal contract work after implementation of the Executive Order minimum wage; or dedicating funds for on-the-job coaches, accommodations, and training to help promote the retention of workers with disabilities performing on Federal contracts.

The Department appreciates the concerns raised by these commenters regarding the potential loss of employment or reduction in public benefits that could result by requiring that the Executive Order minimum wage be paid to FLSA section 14(c) workers performing on or in connection with covered contracts, particularly with respect to workers with severe disabilities. The Department believes that many of these potential adverse employment effects will be mitigated by the economy and efficiency benefits that contractors will experience by paying their workforce, including workers with disabilities, the Executive Order minimum wage. The concerns raised by a few commenters that some workers with disabilities will lose their public benefits because, as a result of the Executive Order, they will now earn more than the statutory amount allowed (e.g., their earnings will exceed the Substantial Gainful Activity limit for purposes of Social Security benefits) reflects a recognition that many workers will not experience a loss of employment or reduction in their work hours. The Department recognizes the concerns raised by commenters regarding a potential loss of public benefits that could result from application of the Executive Order minimum wage to workers receiving disability benefits, but lacks the regulatory authority to alter the criteria used by other Federal, State, and local agencies in determining eligibility for public benefits.

With respect to other commenters' suggestions that the Department could mitigate all of these potential adverse effects by engaging in a variety of different measures (e.g., ordering contracting agencies to pay the resulting wage differential; ensuring that all Federal contracts are designed to promote the hiring and retention of individuals with significant disabilities; annually tracking and monitoring the number of individuals with disabilities that may be displaced or shifted to non-Federal contract work after implementation of the Executive Order; or dedicating funds for on-the-job coaches, accommodations, and training), the Department has carefully considered all of these suggestions but ultimately concludes that they are beyond the scope of the Department's rulemaking authority to implement the Executive Order.