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NEWSLETTER

President Obama Signs Executive Order Raising Contractor Minimum Wage

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On February 12, 2014, President Obama signed an Executive Order (EO) that will require many federal contractors to pay wages of at least $10.10 per hour to employees working on federal contracts. The EO provides many details about its implementation but also defers some details to rulemaking by the Department of Labor (DOL) and Federal Acquisition Regulation (FAR) Council. These pending details aside, the EO warrants attention not just because it may increase wages for some contractors' employees, but also because it may signal that additional EOs affecting broader groups of contractors are to come from the White House.

The EO will require some contractors to begin paying the new minimum wage on some contracts and contract-like instruments (contracts) beginning after January 1, 2015. Under the EO, solicitations for covered contracts (see below) issued after January 1, 2015, and resulting contracts, must include clauses requiring the new contractor minimum wage. The EO expressly states that solicitations issued before January 1, 2015, are not covered by the EO, which means that some contracts awarded after that date still might not be subject to the contractor minimum wage. But the EO also encourages agencies "to take all steps that are reasonable and legally permissible" ensure that contracts negotiated between now and January 1, 2015, require the contractor minimum wage beginning on January 1.

Not all federal contracts will be subject to the new contractor minimum wage next year, however. The EO limits its coverage to contracts under which wages are governed by the Fair Labor Standards Act (FLSA), Service Contract Act (SCA), or Davis Bacon Act (DBA), **and** that fit into one of the following categories:

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- Procurement contracts for services or construction;
- Contracts for services covered by the SCA;
- Contracts for concessions, including any concessions contract excluded by DOL regulations at 29 C.F.R. 4.133(b); or
- Contracts entered into with the Government in connection with federal property or lands and related to offering services for federal employees, their dependents, or the general public.

The EO notably thus omits coverage of contracts for supplies, such as manufacturing contracts covered by the Walsh-Healey Public Contracts Act. The EO also expressly does not cover grants, certain contracts and agreements with and grants to Indian Tribes, and any contracts excluded by forthcoming implementing regulations.

By October 1, 2014, DOL must issue regulations implementing the EO, including provisions for the exclusions from the new contractor minimum wage. The EO requires the FAR Council to soon afterwards issue companion regulations providing for a FAR clause for solicitations and contracts. The EO also requires agencies to "take steps" after the DOL issues its regulations to "to exercise any applicable authority to ensure" that the new contractor minimum wage applies to contracts solicited before January 1, 2015, but awarded after that date for the concessions, federal lands, and federal-employee services contracts described above. For all these regulations, the EO encourages implementing agencies to incorporate "definitions, procedures, remedies, and enforcement processes" from the FLSA, SCA, and DBA.

The EO is silent on whether and, if so, when existing contracts will ultimately require the new minimum wage, which is a possibility because in some circumstances, such as under the SCA regulations, multi-year contracts can be treated as "new" contracts when agencies exercise options. Nonetheless, the President's remarks when signing the EO suggest that agencies might even consider incorporating the contractor minimum wage when exercising contract options after January 1, 2015: "Once I sign this order, starting next year, as their contracts come up, each of them and many of their fellow coworkers are going to get a raise." If agencies do begin requiring the contractor minimum wage when exercising options, contractors should evaluate whether they can pursue equitable adjustments for the increased required wages through any SCA, DBA, or other price-adjustment clauses in their contracts. (Note that the EO expressly states, without elaboration, that it creates no rights under the Contract Disputes Act.) Whether agencies will attempt to apply the minimum wage to existing contracts may be among the details filled in by the forthcoming rules.

The EO does provide several additional salient details at present. First, Section 2 of the EO states that the clauses implementing the new contractor minimum wage must make payment of the higher wage a condition of payment, which could open the door to False Claims Act suits against contractors that fail to pay the required minimum wages. Second, the forthcoming contract clauses must flow down to lower-tier subcontractors; the EO did not limit the flowdown by tier, dollar value, contract type, or any other contract element. Third, DOL must set a new minimum wage annually, with increases tied to inflation. And finally, tipped contractor employees, such as barbers, similarly must receive a new minimum wage (with the employer responsible for ensuring employees receive at least $10.10 an hour) that will increase annually.

According to a fact sheet issued by the White House, the EO will increase hourly wages for "hundreds of thousands" of contractor employees who now earn less than $10.10, though the basis for this calculation was not made available. (The current federal minimum wage is $7.25; 21 states and the District of Columbia require higher minimum wages.) In fact, most employees of federal contractors already earn much more than the EO's contractor minimum wage because they are covered by prevailing-wage minimums set under the SCA, DBA, and similar federal legislation. Moreover, although the White House is suggesting, at least implicitly, by this EO that federal contractors do not pay their employees enough, the White House also was at the forefront of efforts to "cap" contractor pay, codified in the National Defense Authorization Act for Fiscal Year 2014 and then further reduced by the subsequent signing by the President of the Bipartisan Budget Act of 2013, at least implicitly suggesting that some contractor employees may be paid "too much." *See* President Obama Signs Fiscal Year 2014 National Defense Autho rization Act; Congress Continues Efforts to Decrease Allowability of Contractor Compensation.

Whatever its impact, this EO also may signal the President's increased willingness to issue EOs that affect contractors' interests. President Obama indicated during the State of the Union address that he plans to increase his use of EOs if he finds he cannot achieve his policy objectives through legislation. The President may find contractors an attractive subject for such EOs because the executive branch has broad statutory authority to issue policies and directives concerning federal procurement.

The President has signed EOs affecting contractors before—such as an EO in 2009 that required successor contractors to hire many predecessor service employees who would otherwise be displaced from employment and an EO in 2012 to combat human trafficking. (These EOs were later the subject of notice-and-comment rulemaking, and the human-trafficking order was augmented by legislation.) But the President also decided two years ago not to issue a widely-expected order that would have required federal contractors to prohibit discrimination based on employees' sexual orientation and gender identity, an action seemingly consistent with both the President's policies and many contractors' current practices. Thus, although President's history suggests he may indeed take further executive action this year, there are no guarantees even where contractors are concerned.

As one final note, though the EO states that the minimum wage will apply to covered contracts beginning on January 1, 2015, DOL and the FAR Council may take longer than the EO allows to issue their final rules and by doing so may delay the minimum wage's application. Similar delays have happened before. When the non-displacement EO was signed by President Obama in January 2009, it directed DOL and the FAR Council to issue rules within 180 days of the order, including FAR clause(s) for inclusion in federal contracts. Yet DOL did not issue its final rule until September 2011 and the FAR Council needed another 15 months to issue its final rule. The non-displacement rule FAR clause formally took effect in solicitations issued beginning in January 2013. The new contractor minimum wage could encounter similar delays, though its high priority in the President's agenda suggests that such delays are less likely to occur than for previous EOs.

In sum, the EO is a fairly straightforward directive that should begin affecting contractor employees' wages early next year. Contractors should review the forthcoming DOL and FAR Council regulations, and also any individual agencies' actions, upon issuance to ensure all remaining gaps in coverage are filled or explained,

and should seek guidance from counsel in doing so. In addition, contractors should ask questions of their government customers to clarify any remaining ambiguities as they apply to contracting opportunities being pursued.