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ALERT

DOL Announces Final Contractor Minimum Wage Rule

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The Department of Labor (DOL) has announced its final rule establishing a minimum wage for workers involved in performing or performing in connection with certain federal contracts. DOL initially proposed the rule in June 2014, as directed by Executive Order (EO) 13658. DOL announced the final rule yesterday on its website , publishing the final rule along with an accompanying fact sheet and frequently asked questions. Final publication in the Federal Register is expected on October 7, 2014, and the final rule provides that it will be effective 60 days after publication.

The final rule closely follows the proposed rule, which we analyzed here. In so doing, the final rule clarifies important requirements and definitions—with much of the explanation and interpretation provided in the comprehensive preamble to the actual text of the final rule. In this alert, we have identified the key changes and additions in the final rule contractors.

- **The Definition of "Contracts" and "Contract-Like Instruments."** Despite comments from interested parties questioning the broad definition for these terms in the proposed rule, DOL explained that the final rule applies to both "contracts" and "contract-like instruments," that the terms were defined to be "intentionally all-encompassing," and that these terms are to be construed broadly to include non-procurement legal arrangements outside the scope of the Federal Acquisition Regulation (FAR) including agreements not reduced to writing. DOL also emphasized that although these terms apply broadly, not every contract and contract-like instrument will be subject to the rule; they must satisfy the additional requirements for coverage (which are discussed in

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our prior coverage). Notably, the final rule also simplified the definition of "contractor" and clarified its definition of "solicitation" to avoid confusion as to the application of the final rule.

- **Definition of "New Contracts."** DOL revised the definition of "new contract" provided in Section 10.2 of the proposed rule. Most notably, DOL advised that multiple-year contracts awarded based on solicitations issued before January 1, 2015 will not be considered a "new contract," subject to the minimum-wage rule solely by virtue of an agency's unilaterally exercising an option after January 1, 2015, if that option was provided for in the contract at award and exercised at the agency's sole discretion. DOL also confirmed that such an option exercise can also provide for adjustments to account for increases in wages and fringe benefits required by new Service Contract Act (SCA) or Davis-Bacon Act (DBA) wage determinations or by other applicable compensation laws (e.g., an increased state minimum wage) without turning the option exercise into a "new contract." In addition, DOL confirmed that existing contracts that are renewed on or after January 1, 2015 as a result of bilateral negotiations qualify as "new contracts" subject to two limitations. First, extensions would not be treated as "new contracts" if such extensions were made pursuant to terms in the contract as of December 31, 2014 that authorized a short-term limited contract extension (such as a bridge contract). Second, modifications (other than extensions or renewals that constitute new contracts) would not be treated as "new contracts" unless they qualify as modifications outside the scope of the contract.
- **SCA Exemption Clarifications.** The proposed rule exempted from coverage those service contracts that are exempt from SCA coverage by statute or regulation (except for SCA-exempt concession contracts, which *are* subject to the minimum-wage rule). The final rule clarified the relevant SCA exemptions that apply: specifically those at 41 U.S.C. § 6702(b) and at 29 C.F.R. §§ 4.115 through 4.122, 4.123(d), and 4.123(e).
- **Performance Outside the United States**. The final rule clarifies that for covered contracts where only a portion of the work will be performed in the United States, payment of the federal minimum wages is required only for work performed in the United States (as defined in the rule). In other words, for covered contracts that involve performance both inside and outside the United States, the minimum wage does not apply to the work time outside the United States.
- **Workers Performing "In Connection With" a Covered Contract.** The proposed rule contained a broad definition of the term "worker" and sought to apply the federal minimum wage requirements to personnel that otherwise would not be covered under the SCA or DBA (but instead the Fair Labor Standards Act (FLSA)) who perform work "in connection with" a covered contract. The final rule established a bright-line test and created an exclusion whereby any covered worker performing only "in connection with" covered contracts (as opposed to those who perform directly on covered contracts) for less than 20% of his or her hours worked in a given workweek will not be entitled to the federal minimum wage for any hours worked. Nevertheless, the burden remains on the contractor to retain sufficient documentation and records to demonstrate that a specific worker performing in connection with a covered contract does satisfy the 20% of hours worked exclusion. This addition to the final rule should somewhat limit the scope of the application of the final rule especially for workers that perform a small portion of work "in connection with" covered contracts.

- **Fringe Benefits.** DOL clarified and confirmed that contractors may not count the cost of providing fringe benefits (or cash equivalents) towards the minimum wage required by the rule. DOL explained that although the DBA expressly permits fringe benefits to be credited towards prevailing wages (and vice versa), the practice may not be used to satisfy the minimum wage requirements under this rule.
- **Revisions Related to Recovery for Future Wage Increases.** The contract clause included as Appendix A (for use with contracts and contract-like instruments not subject to the FAR) has been revised to state that a contractor will be entitled to be compensated, "if appropriate," for inflation-based increases to the minimum wage effective January 1, 2016, and in ensuing years. DOL advised that compensation will be appropriate when the increases in minimum wages increase the contractor's actual costs; this is similar to the contractors' entitlement to price adjustments under the SCA and DBA. DOL indicated that it expects that the forthcoming FAR clause will contain language substantially similar to the language in the Appendix A contract clause.
- **Revisions to SCA and DBA Wage Determinations.** DOL advised that it will not revise wage rates in SCA and DBA wage determinations that are currently below the new $10.10 federal minimum wage. Instead, DOL will "publish a prominent general notice on SCA and DBA wage determinations that will state the [EO 13658] minimum wage and that the [EO 13568] minimum wage applies to all DBA- and SCA-covered contracts," and will update the notice annually.
- **New Poster for Notifying Employees**. DOL also created a new poster for contractors to use to notify covered workers of the minimum-wage requirements. Section 10.29(a) of the final rule states that contractors must notify all workers performing work on or in connection with a covered contract of the applicable federal minimum wage rate. The final rule identifies three methods a contractor can use to satisfy this obligation. First, the contractor may meet this requirement for SCA and/or DBA covered workers by posting, in a prominent and accessible place at the worksite, the applicable SCA or DBA wage determination. Second, with respect to workers performing work on or in connection with a covered contract whose wages are governed by the FLSA, the contractor must display the DOL poster in a prominent and accessible place in the worksite. Finally, contractors that customarily post notices to workers electronically may provide notice electronically provided such posting is displayed prominently on a site customarily used to notify workers about terms and conditions of employment.
- **Recordkeeping Requirements**. Although the record keeping requirements under the final rule generally mirror those found in the SCA, DBA and FLSA, the final rule included two additional recordkeeping requirements. Contractors also must now maintain records reflecting: (a) each worker's occupation(s) or classification(s); and (b) total wages paid - in addition to the record keeping requirements set forth in the proposed rule.

Contractors should note that the final rule by its terms does not apply to procurement contracts subject to the FAR until the FAR Council promulgates implementing rules and a contract clause. That said, we expect that agencies will seek to insert the minimum wage requirements before then, either by inserting a clause based on a class deviation or by inserting a custom clause. No matter how the timing works out, though, the best compliance approach will be to monitor all contracts for the forthcoming minimum-wage requirements.

Overall, although the final rule improves the clarity of contractors' obligations for providing the minimum wage in certain areas, experience shows that implementing compensation rules such as this one (and monitoring compliance of not only the contractor, but in this case all tiers of covered subcontractors) often proves much more challenging in practice than in theory. Wiley Rein has deep experience counseling clients on SCA and DBA compliance and is ready to assist contractors with ensuring compliance with the minimum-wage rule as well.