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DOL Issues Proposed Rule on Raising Minimum Wage to $15 per Hour for Federal Contractor Employees

Government Contractor Compliance & Regulatory Update Blog on **July 23, 2021**

Quick Hit

On July 21, 2021, the Department of Labor ("DOL") announced a proposed rule (the "Proposed Rule") to implement President Biden's Executive Order (the "Order") requiring an increase of the minimum wage for certain employees of covered federal contractors and subcontractors to $15.00 per hour – except for tipped workers who must be paid $10.50 per hour – beginning January 30, 2022, with annual increases beginning in 2023 to account for inflation. With some exceptions, the requirement will apply to new contracts issued on or after January 30, 2022, or existing contracts renewed or extended on or after that date. The final rule will be issued by November 24, 2021.

Key Takeaways

Although the Proposed Rule is not final and may be subject to revisions, federal government contractors should begin to prepare for its implementation by (1) ensuring they properly understand who is covered; and (2) particularly where not all of their workforce will be covered, assessing how best to ensure accurate records and address the practical issues of potentially having two different payment structures for their employees.

More Detail

The Proposed Rule seeks to implement the Order's requirement that workers on government contracts receive a minimum wage of at least $15 per hour. The Proposed Rule requires the minimum wage for covered workers on covered "new contracts" to be increased to $15 per hour starting on January 30, 2022, and then to be assessed by DOL and potentially increased annually beginning January 1, 2023. Any increases will be announced at least 90 days before the new rates take effect. For covered tipped employees, the Proposed Rule would establish a minimum wage of $10.50 beginning January 30, 2022, and, in the event the new $15 minimum wage for non-tipped employees is increased, the minimum wage for tipped employees would increase to be 85 percent of the new rate until January 1, 2024, when tipped workers will be subject to the same minimum wage requirements as non-tipped employees. Further, if the tips received by the tipped employees when combined with the minimum wage do not equal or exceed the standard minimum wage for non-tipped employees, the contractor must provide additional wages so that the tipped worker earns at least $15 per hour (or the new increased rate).

Under the Proposed Rule, any worker working on or in connection with a covered contract will be subject to the new minimum wage requirements. This includes workers who are performing the specific services called for by the terms of the contract, as well as those performing "other duties necessary to the performance of the contract," unless a specific exemption would apply.

The Proposed Rule requires the new minimum wage requirements apply to and be incorporated into all "new contracts" with government agencies beginning January 30, 2022. The term "new contract" is not limited to contracts issued on or after January 30, 2022, but also includes any pre-existing contracts where such contracts are renewed or extended on or after that date, or where the government exercises an option to purchase additional supplies or services on or after January 30, 2022.

Notably, the Proposed Rule excludes contracts where the solicitation pre-dates January 30, 2022, and the contract is entered into between January 30, 2022 and March 30, 2022, but renewals, extensions and exercised options during this period appear to be subject to the new minimum wage requirement.

The minimum wage requirement will apply to a "new contract" requiring performance in whole or in part in the United States that is (i) a procurement contract for construction covered by the Davis-Bacon Act; (ii) a contract for services covered by the Service Contract Act; (iii) a contract for concessions, including any concessions contract excluded from coverage under the Service Contract Act by Department of Labor regulations at 29 CFR 4.133(b); or (iv) a contract entered into with the Federal Government in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public. Further, the minimum wage requirements will only apply where the wages of the workers under such contract are governed by the Fair Labor Standards Act, the Service Contract Act, or the Davis-Bacon Act.

The Proposed Rule does not apply to grants, employees who are exempt from the minimum wage requirements of the FLSA, student workers, and a limited number of other categories of workers.

Under the Proposed Rule, the DOL Wage and Hour Division would be responsible for enforcing the rule's requirements. DOL would accept complaints in either oral or written form, and could initiate investigations into violations as a result of such complaints or on its own initiative. The Proposed Rule would also permit DOL to inspect relevant records and interview both the contractor and the contractors' workers. If a government contractor is found to have violated any of the regulations in the Proposed Rule, DOL would notify the contractor of the violation and request it be remedied. If the contractor does not remedy the violation, DOL could require the contracting agency to withhold payments to the contractor and then transfer the withheld money to the eligible workers. Contractors could also be subject to debarment proceedings.

Under the Proposed Rule, covered contractors and subcontractors would be required to include in any covered subcontracts a flow down provision requiring the lower-tier subcontractor to comply with the minimum wage requirements. The Proposed Rule provides that irrespective of whether this clause is included in the subcontract, the prime contractor and any upper-tier subcontractor(s) will be responsible for compliance by any subcontractor or lower-tier covered subcontractor.

The Proposed Rule also includes the following requirements:

- Wage payments to workers must be made no later than one pay period following the end of the regular pay period in which such wages were earned or accrued;

- Contractors and subcontractors subject to the Order must maintain records containing information on each worker for a period of three years; and
- The contractor must notify all workers performing work on or in connection with a covered contract of the applicable minimum wage rate under the Order.

DOL will accept comments on the Proposed Rule until August 21, 2021 before publishing its final version by November 24, 2021.

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