

Proposed Regulations Implementing \$15 Hourly Federal Contractor Minimum Wage Executive Order

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The Department of Labor (DOL) is publishing a [Notice of Proposed Rulemaking](#) (NPRM) detailing proposed regulations implementing new minimum wage requirements that certain federal contractors must pay workers performing work “on or in connection with” a covered federal contract or subcontract. The NPRM is scheduled to be published in the *Federal Register* on July 22, 2021.

The NPRM is in response to President Joe Biden’s April 27, 2021 [Executive Order 14026](#) raising the minimum wage from \$10.95 an hour to **\$15 an hour** (with increases to be published annually). At the time, [President Biden said](#) the higher wage “will benefit many women and people of color who likely have children and are the breadwinners in their households It will help improve the economic security of their families and narrow racial and gender disparities in income.” The current minimum wage was established under Obama Administration Executive Order 13658.

While the NPRM is substantially similar in key areas to the [final regulations implementing Executive Order 13658](#), it is more expansive in critical areas, including coverage of “new contracts,” coverage of geographic areas, and limitations on exclusions of tipped wage workers. Most importantly, the NPRM proposes coverage of the same types of contracts as those covered by Executive Order 13658, but, for the most part, all such contracts likely will be covered on or after January 30, 2022, including those never covered by Executive Order 13658 requirements. This is because DOL has proposed a more expansive definition of “new contracts” (than that under regulations implementing Executive Order 13658) subject to coverage to include contracts with options exercised unilaterally by the contracting agency on or after January 30, 2022.

Executive Order 14026 directs DOL to issue final regulations by November 24, 2021, and the regulations will become effective as of January 30, 2022. Public comments on the NPRM must be submitted by August 21, 2021, and may be submitted at www.regulations.gov, RIN 1235-AA41.

\$15 Wage Rate Does Not Apply to All Federal Contractors, All Federal Contracts, or All Workers

Covered Contracts

The \$15 wage rate will apply to workers on four specific types of federal contracts that are performed in the U.S. (including the District of Columbia, Puerto Rico, and certain U.S. territories):

- Procurement contracts for construction covered by the Davis-Bacon Act (DBA), but not the Davis-Bacon Related Acts)
- Service Contract Act (SCA) covered contracts

- Concessions contracts - meaning 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 the principal purpose of which is to furnish food, lodging, automobile fuel, souvenirs, newspaper stands, or recreational equipment, regardless of whether the services are of direct benefit to the government, its personnel, or the general public
- Contracts related to federal property and the offering of services the general public, federal employees, and their dependents

Significantly, the Executive Order does not apply to contracts or other funding instruments, including:

- Contracts for the manufacturing or furnishing of materials, supplies, articles, or equipment to the federal government;
- Grants;
- Contracts or agreements with Indian Tribes under the Indian Self-Determination and Education Assistance Act;
- Contracts excluded from coverage under the SCA or DBA and specifically excluded in the implementing regulations; and
- Other contracts specifically excluded. (See NPRM Section 23.40.)

Effective Date; Definition of “New” Contracts Expanded

The NPRM specifies that the wage requirement will apply to new contracts and contract solicitations as of January 30, 2022. Despite the “new contract” limitation, the proposed regulations, consistent with the language of the Biden Executive Order, strongly encourages federal agencies to require the \$15 wage for all existing contracts and solicitations issued between the date of the Executive Order and the effective date of January 30, 2022.

Similarly, agencies are “strongly encouraged” to require the new wage where they have issued a solicitation before the effective date and entered into a new contract resulting from the solicitation within 60 days of such effective date.

Pursuant to the proposed rule, the new minimum wage will apply to:

- New contracts; new contract-like instruments; new solicitations; *extensions or renewals of existing contracts or contract-like instruments* and *exercises of options on existing contracts* or contract-like instruments on or after January 30, 2022.
- With respect to options, the NPRM is directly contrary to the Obama-era regulations and means the federal government may unilaterally exercise an option in an “old” contract not subject to the \$15 rate or even the requirements of the Obama Executive Order, and make the contract subject to the new \$15 wage requirement.

Geographic Limitations Expanded

President Obama’s Executive Order did not apply to federal contractor employees performing work outside the 50 United States, and defined “United States” to include only the “50 States and the District of Columbia.”

The current NPRM proposes to apply coverage to workers outside the 50 states and expands the definition of “United States” to include the 50 states, the District of Columbia,

Puerto Rico, the Virgin Islands, Outer Continental Shelf lands as defined in the Outer Continental Shelf Lands Act, American Samoa, Guam, the Commonwealth of the Northern Mariana Islands, Wake Island, and Johnston Island. However, similar to the Obama Executive Order regulations, the NPRM proposes to apply coverage only to federal contracts to be performed in whole or in part in the United States.

Workers Performing Work “On or In Connection With” a Covered Contract

Consistent with regulations promulgated under Executive Order 13658, the proposed rule would apply the \$15 wage requirement only to workers (not just employees) who perform the work covered by the contract and whose wages are already covered by the Fair Labor Standards Act (FLSA), the SCA, or the DBA. This means “service workers” under the SCA, construction workers under the DBA, and workers whose wages are covered by the FLSA, except for workers in a bona fide executive, administrative, or professional capacity (as defined in 29 C.F.R. Part 541), who are exempt from the FLSA’s minimum wage and overtime requirements.

Only workers performing work on or in connection with a covered contract must be paid \$15 per hour and only for such work performed on or in connection with the contract. The definition of “Worker” in the NPRM offers the following guidance:

A worker performs “on” a contract if the worker directly performs the specific services called for by the contract. A worker performs “in connection with” a contract if the worker’s work activities are necessary to the performance of a contract but are not the specific services called for by the contract.

Consistent with President Biden’s Executive Order, the NPRM also includes a “less-than-20% exception” for those workers who only perform work “in connection with” a covered contract, but do not perform any direct work on the contract. For workers who spend less than 20% of their hours in a workweek working indirectly in connection with a covered contract, the contractor need not pay the \$15 wage for any hours for that workweek.

Tipped Employees

Under the NPRM, the DOL proposes to phase out lower wages and tip credits for tipped employees on covered contracts. Employers must pay tipped employees \$10.50 per hour in 2022 and increase those wages incrementally, under a proposed formula in the NPRM. Beginning 2024, tipped employees must receive the full federal contractor wage rate.

\$15 Wage Contract Clause Requirements, Enforcement Obligations

The NPRM provides that a Minimum Wage contract clause will appear in covered prime contracts, except that procurement contracts subject to the Federal Acquisition Regulation (FAR) will include an applicable FAR Clause (to be issued by the Federal Acquisition Regulation Council) providing notice of the wage requirement.

In addition, covered prime contractors and subcontractors must include the Contract Clause in covered subcontracts and, as will be in the applicable FAR Clause, procurement prime contractors and subcontractors will be required to include the FAR clause in covered subcontracts.

In addition, the NPRM provides that contractors and subcontractors:

... shall require, as a condition of payment, that the subcontractor include the minimum wage contract clause in any lower-tier subcontracts ... [and] shall be responsible for the compliance by any subcontractor or lower-tier subcontractor with the Executive Order minimum wage requirements, whether or not the contract clause was included in the subcontract.

Contractor Notice Obligations

As with the FLSA minimum wage, contractors and subcontractors will be required to post notices for all workers performing work on or in connection with a covered contract. This includes:

- SCA “Service Employees” and Davis-Bacon Laborers and Mechanics: Post in a prominent and accessible place at the worksite the applicable wage determination under those statutes. The DOL provides wage determination posters.
- For FLSA-covered Workers: Post a DOL-provided poster in prominent and accessible places.
- Where contractors customarily post notices for workers electronically, the \$15 wage notices may also be posted prominently on contractor websites.

Recordkeeping Obligations

Covered contractors must “make and maintain, for three years,” the following records:

- Name, address, and Social Security number of each worker;
- The worker’s occupation(s) or classification(s);
- The rate or rates of wages paid;
- The number of daily and weekly hours worked by each worker;
- Any deductions made; and
- The total wages paid.

Although not specified above, contractors also must maintain records to establish the exception to the \$15 wage for workers who spend less than 20% of any given workweek performing work in connection with a covered contract.

Begin to Prepare

To prepare, contractors and subcontractors of covered contracts should consider taking the following steps:

- Review existing contracts to determine if any are already covered by Executive Order 13658’s minimum wage of \$10.95;
- Review existing multi-year contracts with options or extensions that may be exercised on or after January 30, 2022, to plan for wage increases at the exercise of the option or extension;
- Review existing contracts to determine whether federal contracting agencies may already have modified the contracts (and be on the lookout for modifications) as allowed under the Biden Executive Order and NPRM;
- Identify job titles that typically perform work directly on covered contracts and those that perform indirect work above 20% in a workweek;
- Plan for wage increases for those covered workers who are not already making \$15 per hour;
- Prepare for submission of price/equitable adjustments based on wage increases if allowed under the contract terms; and Consider the upward impact of this required

wage increase on the wages of other employees whether or not those employees are working on a covered contract.

We will provide further updates on the NPRM. In the meantime, affected contractors should review the NPRM and consider filing comments.

If you have any questions about this or other workplace developments or are interested in working with Jackson Lewis to file comments, please contact the Jackson Lewis attorney with whom you regularly work.

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