Segregating Worktime For Purposes Of The "Contractor Minimum Wage"

Insights
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The U.S. Labor Department's voluminous final regulations "Establishing a Minimum Wage for Contractors" under Executive Order 13658 (about which we have written previously) have now been published. The provisions and related commentary occupy nearly 100 pages in the *Federal Register*.

The many details, nuances, and unresolved questions presented by the Executive Order and these implementing rules will of course be the subject of extensive analysis in coming months. But lurking among its many components is a little-discussed potential recordkeeping landmine.

First, Some Good News
The initial $10.10 minimum wage (and the later, likely-higher ones) need only be paid for hours worked "on or in connection with" the covered contract. It will not apply to worktime devoted to duties falling outside of the Executive Order's reach.

Also, the final regulations continue to say that a "worker" entitled to the Executive Order's minimum wage will include people other than just those individuals who are actually performing the duties called for under a covered contract. The term also sweeps-in those who perform duties "in connection with" the covered contract, that is, individuals whose work is indirectly "necessary to the performance of the contract" (such as, for example, an accounting or payroll clerk or a human-resources assistant). However, the final rules exclude from the minimum-wage requirement an otherwise-covered worker:

- Whose contract-related work is *only* "in connection with" a covered contract (as distinguished from an individual who does at least some work specified in the contract), *and*
- Who spends *less than* 20% of his or her hours worked in a workweek on these "in connection with" duties.

Now For The Kicker . . .
But to apply these principles correctly, an employer must be able to establish through properly-kept time records or (as USDOL puts it) "other affirmative proof" that it has appropriately segregated hours worked on covered contracts or in connection with covered contracts from one another and from other work that is not subject to the Executive Order.

For instance, an employer asserting the less-than-20% exception for an individual must be prepared to demonstrate that the person's work associated with one or more covered contracts during a workweek (i) was limited to the "in connection with" variety, and (ii) was in fact less than 20% of the person's total hours worked in that workweek. Otherwise, the exception could be disallowed for that worker.

As another illustration, USDOL's position is that a worker performing any work on or in connection with a covered contract in a workweek will be presumed to have continued to do so throughout the workweek, unless the employer presents adequate worktime-segregating records or other "affirmative proof" to the contrary. Consequently, if a person spends 10 hours out of 40 in a workweek working on or in connection with a covered contract, an employer having no such segregating records or other proof risks a finding that it should have paid at least the $10.10 rate (or a later, higher rate) for *all 40* hours, rather than only for 10 hours.

The Bottom Line

Employers to whom these principles are relevant should ensure that they have in place an effective work-segregating timekeeping procedure well before January 1, 2015. Given the inherent uncertainties that will always surround what kinds and quantities of "other affirmative proof" might ultimately support what an employer did, it is preferable to avoid having to engage in any such debates.