



President Signs Federal Contractor "Minimum Wage" Order (Updated 02 20 14)

Insights

2.14.14

The White House Press Office reports that President Obama has now signed an Executive Order to raise the minimum-wage rate for workers on federal contracts, as he announced he would do in his recent State of the Union speech. His intentions are clearer than they were, but the document is not a model of intelligibility or precision; significant ambiguities and questions remain.

The Basics

The order says that covered "new" federal contracts, "contract-like instruments", and related subcontracts must include a clause providing that, no sooner than January 1, 2015, workers performing under such arrangements will be paid a rate of at least \$10.10 per hour. Under the clause, the minimum rate will be determined (and probably raised) annually thereafter by the U.S. Secretary of Labor with reference to percentage increases in the Consumer Price Index.

The minimum cash wage for tipped employees falling within the order's provisions will be \$4.90 an hour (it is currently \$2.13 per hour under the federal Fair Labor Standards Act) no sooner than January 1, 2015. It will rise annually thereafter until the rate equals 70% of the minimum rate (\$7.07 based upon a \$10.10 rate). Of course, tips themselves must make up the difference; if they do not, then the employer must pay the shortfall in cash.

The order refers to a variety of contracts and "contract-like instruments" as falling within its scope. Among them will be those for certain federal procurements, for a variety of services (including at federal properties and on federal lands), for construction, and for certain concessions, the wages under which are governed by the FLSA, the Service Contract Act, or the Davis-Bacon Act.

"Details To Follow . . ."

Official elaborations upon the order's meaning and implementation apparently must await the issuance of regulations by the U.S. Labor Department and the Federal Acquisition Regulatory Council. USDOL's are due by October 1, 2014, with the FARC's to follow within 60 days after USDOL's. Presumably, they will address such matters as, for instance, the circumstances under which "a new contract" will be deemed to include renewed and modified agreements. On the other hand, even assuming that these agencies meet the deadlines, there will be little lead time before January 1, 2015.

Experience suggests that these provisions will be lengthy, densely-worded, complicated, and ambiguous in their own ways. Moreover, again using history as a guide, one could anticipate that the regulations might well contain significant requirements, limitations, and "interpretations" that are by no means obvious from or even discernible on the face of the order itself.

The order also contains several qualifiers, such as multiple insertions of the phrase "to the extent permitted by law". Whether this is boilerplate or is instead an implicit acknowledgement of insecurity about the validity of the order's requirements remains to be seen. As we said earlier, it is subject to debate whether President Obama may unilaterally impose these measures in circumstances in which wages are controlled by the FLSA, the SCA, or the DBA (or another federal law).

The Bottom Line

At least there is now enough information for employers to begin to evaluate what President Obama's earlier announcement means for them, including their (i) determining whether they will be affected, and (ii) assessing the extent and timing of the order's potential impact. Nonetheless, the degree to which employers can do this is unavoidably limited by continuing uncertainty as to the order's exact meaning and what the coming regulations might say.

And we continue to believe that many will be raising questions, expressing doubts, and perhaps even planning legal challenges concerning the extent to which and with respect to whom a president has any enforceable power to do what the order calls for.

UPDATED 02 20 14: The order has now been officially published in the *Federal Register*. It has been designated Executive Order 13658.