



SOTU "Minimum Wage" Announcement: What Does It Mean?

Insights

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Considerable concern and confusion has arisen from President Obama's State of the Union announcement that he will raise the minimum wage for individuals working on federal contracts to \$10.10 per hour. Until it is possible to study any Executive Order(s) he issues on the matter, the precise meaning, parameters, and effects of what he intends to do will remain unclear. As of this writing, no such order has been published in the Federal Register.

May The President Do This?

Published reports seem to indicate that any such measures will apply only to new contracts or to some renewals of contracts; some say that no change will occur before 2015. If this turns out to be so, then many or even most federal contractors might not face any pressure to act immediately. If instead the President is proposing to change ongoing contracts, then he is likely to face significant challenges in this regard.

A broader question is whether President Obama has any enforceable authority to order such an increase without Congressional action. Administration officials reportedly are contending that authority flows from the Federal Property and Administrative Services Act of 1949, which calls for "economical and efficient" federal procurement. What rationale the administration might offer for how a minimum-wage increase would advance this aim, and whether the courts will defer to such an explanation, are difficult to predict at present.

But What About *Other* Federal Laws?

However, the rates to be paid under many federal contracts are specified by or under *other* federal laws which do not appear to grant President Obama the power simply to pick a different amount that he happens to prefer. For example, the Service Contract Act requires "service employees" furnishing services under many federal contracts to be paid (i) "prevailing rates in the locality" as determined by the Secretary of Labor under a prescribed procedure, or (ii) the rates in an applicable collective-bargaining agreement, none of which may be less than the federal Fair Labor Standards Act's minimum (currently \$7.25 an hour).

Similarly, the Davis-Bacon Act, which has to do with the construction, alteration, or repair of public buildings and public works (including many projects funded by or under the American Recovery and Reinvestment Act), requires "laborers and mechanics" engaged in this activity to be paid at least the locally-prevailing wage rates for corresponding work on similar projects in the area. Again, these

rates (which cannot be less than the FLSA minimum wage) are to be established by the Secretary of Labor based upon an adequate analysis of specific, relevant information.

Another illustration is the Walsh-Healey Act, which applies to certain prime contractors or "substitute manufacturers" on some federal contracts for furnishing goods or supplies. It says that workers on these contracts must be paid at least "the prevailing minimum wages, as determined by the [U.S. Labor] Secretary, for individuals employed in similar work or in the particular or similar industries or groups of industries currently operating in the locality in which the materials, supplies, articles, or equipment are to be manufactured or furnished under the contract . . ." The current prevailing rate determined by the Secretary "[i]n all industries" is the FLSA minimum wage.

The Bottom Line

Concerned employers should await the actual publication of any directive(s) before deciding what impact, if any, President Obama's remarks might have. Only then will it be possible to begin evaluating what steps are advisable.

And it is likely that further questions will be raised in coming days about whether, to what extent, and with respect to whom a president has the power to raise a minimum wage for private-sector employees merely with the stroke of a pen.