

THE NEW ERA OF EXECUTIVE ACTION

PROMOTING A MINIMUM WAGE FOR FEDERAL CONTRACTORS

May 5, 2015

Background

The federal minimum wage, last set at \$7.25 an hour in 2009, is not indexed to inflation. Absent legislative action, its real value erodes over time, undermining the living standards of the 19 million Americans who are compensated at this level. Today, the minimum wage is worth a third less than its 1968 peak (\$10.53 an hour in 2015 dollars).

Action

On February 12, 2014, President Barack Obama signed Executive Order 13658: Establishing a Minimum Wage for Contractors.

What It Does

The order raises the minimum wage for federal contractors to \$10.10 an hour, beginning January 1, 2015, and indexes it to inflation for subsequent years. (For tipped workers, the 2015 increase was from \$2.13 to \$4.90.)

Federal agencies are now required to include a new clause in all covered contracts specifying the minimum wage to be paid under the order. They are also directed to withhold payments in the event of contractor violations. Contractors are required to include the minimum wage clause in any subcontracts and notify all employees of their wage rights.

Four categories of contracts are covered by the order:

1. Construction contracts under the Davis-Bacon Act (DBA). The DBA applies to contracts \$2,000 or greater that involve the construction, alteration, or repair of public buildings or public works. The order applies specifically to procurement contracts.

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2. Service contracts under the Service Contract Act (SCA). The SCA requires service contractors with contracts greater than \$2,500 to pay prevailing wages.
3. Concessions contracts. This class of contracts includes services such as food, souvenirs, or recreation that are provided on federal property.
4. Contracts which grant the right to use federal property to provide services. Similar to concessions contracts, these involve situations where businesses lease government space to furnish services to federal employees or the public. Example are coffee shops and child care.

Workers covered by the order include: (a) employees protected by the federal minimum wage under the Fair Labor Standards Act; (b) employees guaranteed prevailing wages under either the DBA or the SCA. In cases where workers are legally entitled to a wage rate higher than the executive order rate, the higher rate prevails. The order, and the related regulations, are also carefully written to avoid adverse conflicts with existing law.

Several types of contractual agreements are exempt from the order, including grants, contracts with Indian Tribes, construction procurement contracts not covered by the DBA, service contracts exempt from the SBA (for example, public utilities), and contracts with individuals.

Although the wage increase is designed to improve the well-being of low-wage workers, it was also justified on efficiency grounds. It is well documented in the economics literature that better paid workers are happier and work harder, boosting productivity. Such workers are also less prone to change jobs, miss work, or shirk, reducing recruitment, training, and supervisory costs.

By raising the wages of government contractors, the Obama administration hopes to improve vendor performance and the effectiveness of the procurement process.

Status

In response to the order, the Department of Labor published a Notice of Proposed Rulemaking (NPRM) in the Federal Register on June 17, 2014. After reviewing the many comments submitted by interested parties, the Department of Labor issued a Final Rule on October 1, 2014. The new rule took effect January 1, 2015.

Impact

The order applies only to solicitations issued (or contracts otherwise awarded) after January 1, 2015. Existing contracts are unaffected, which means that the impact will be gradual.

The direct impact of the order will be modest. Although the federal government holds many contracts, the minimum wage workers covered by these contracts are a small fraction of the national minimum wage population. At full implementation, the Department of Labor anticipates the order will raise the wages of about 200,000 people (183,814 to be exact), who currently make an average

of \$8.79 per hour for 2,080 annual hours of work. However, the ramp up will be gradual, as the order applies only to new contracts. The Department of Labor estimates that 20 percent of contracts turn over each year, which means that most contracts will be covered by 2019. Consequently, the projected cost of the order will be \$100.2 million in 2015, and rise to \$501 million by 2019.

However, there is reason to believe the indirect impact will be larger. The order, along with the administration's broader call for raising the national minimum wage, has brought attention to the issue and helped to build pressure for higher wages. Since the president's initial proposal for a minimum wage increase in 2013, thirteen states and the District of Columbia have raised their minimum wage, impacting an estimated 7 million workers by 2017. Cities have also taken notice, with Seattle, Philadelphia, St. Louis, Louisville, and others raising local wages. The private sector has joined the movement as well, with Gap, Disney, IKEA, and, most recently, Wal-Mart increasing minimum pay levels.

Response

There has been expected hostility from business groups and conservatives, who contend that higher minimum wages destroy jobs and hurt growth.

Comments submitted to the Department of Labor by the National Restaurant Association and the International Franchise Association contend that the new rule puts restaurants operating on federal premises at a competitive disadvantage with those located on nearby private properties, which they warn could lead to layoffs, pay cuts among other employees, and outright closures of establishments. Similarly, comments issued jointly by the National Federation of Independent Businesses (NFIB) and the U.S. Chamber of Commerce characterize the rule as overly broad, affecting businesses beyond those which would traditionally be considered federal contractors, as well as lacking in clarity, thus causing confusion in compliance. They also argue that administration failed to provide adequate evidence that the rule would achieve "economy and efficiency."

Virtually all opponents of the rule, which also include the HR Policy Association and the Associated Builders and Contractors, Inc., take the position that the administration overstepped its statutory authority in raising the minimum wage for contractors.

Equally unsurprisingly, labor advocates, including the AFL-CIO, the National Women's Law Center, Interfaith Worker Justice, Demos, and the National Employment Law Project, among others, have supported the administration's action. Many supporters, such as Demos, assert that not only is the rule "reasonable and appropriate," but also that it will have "additional public benefits" beyond those described by the Department of Labor, and will affect more workers—perhaps 350,000. Similarly, NELP noted that the actual cost to contractors would be less than the administration estimated.

However, progressives have also voiced concerns, urging the administration to push for more sweeping action, including expanding other workplace protections, such as paid leave and guaranteed hours.