Insight

IN-DEPTH DISCUSSION

DECEMBER 8, 2015

Agencies Issue Final Rules Governing Contractor Minimum Wage, Whistleblower Protections

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On December 4, 2015, three federal agencies[1] published a final rule amending the Federal Acquisition Regulation (FAR) to implement Executive Order (E.O.) 13658, Establishing a Minimum Wage for Contractors. The same day, the same federal agencies also published a separate rule finalizing a statutory pilot program to enhance whistleblower protections for contractor employees. As legislation to raise the federal minimum wage and carry out other items on the Obama Administration's workplace policy agenda remain stalled in Congress, the President has repeatedly turned to executive action to advance these initiatives, at least for federal contractors.

Below is a summary of the final rules and some of the issues they raise for federal contractors and subcontractors.

Requirements for Contractors

The final minimum wage rule requires contractors to pay an hourly wage of $10.10 to all employees covered by the Fair Labor Standards Act, Davis-Bacon Act, or Service Contract Act who are performing work "on or in connection with" a covered contract or subcontract. The $10.10 hourly wage requirement was effective as of January 1, 2015, and will increase to $10.15 per hour on January 1, 2016 based on changes to the Consumer Price Index. Contractors must pay an hourly wage of $4.90 to "tipped"[2] employees in 2015 (to increase to $5.85 in 2016) and the aggregate total of the employees' tips and hourly wage must be at least equal to the amount the employee would be paid were he or she an untipped employee.

In addition to setting forth obligations to pay the above amounts, the final rule requires that contractors provide notice both to their employees and to anyone with whom they enter into a lower-tier contract. Contractors must provide notice to employees by conspicuously displaying

1 Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA), collectively, "FAR Council." The Department of Labor (DOL) issued its final rule to carry out this E.O. on October 7, 2014.

2 An employee will be considered a "tipped" employee if he or she makes more than $30 per month in tips after any pooling or tip sharing that may be required by the employer.

a poster that will be provided by the DOL. Contractors must provide notice to suppliers and subcontractors by including in all covered subcontracts, and requiring subcontractors to include in all lower-tier contracts, a clause specifying that, as a condition of payment, the wages paid for work covered under the contract must comply with the minimum hourly wage rates mentioned above.

Finally, the rule prevents contractors from taking any adverse employment action against employees who assert their rights under the E.O.

Types of Contracts Covered

The contractor minimum wage is limited to "contracts and contract-like instruments" awarded, renewed, extended or modified through bi-lateral negotiation on or after January 1, 2015. Additionally, only the following types of contract or contract-like instruments will be covered:

1. Prime contracts for procurement related to construction covered under the Davis-Bacon Act (DBA) whose monetary value exceed $2,000;
2. Prime contracts for providing services covered under the Service Contract Act (SCA) whose monetary value exceed $2,500;
3. Prime contracts for procurement covered under the Fair Labor Standards Act (FLSA) whose monetary value exceed $3,000;
4. Concessions contracts regardless of monetary value;[3] and
5. Contracts in connection with federal property or lands and related to offering services to federal employees, their dependents, or the general public.[4]

Types of Activity Covered

If a company is determined to have a covered contract with the federal government, it is obligated to pay the contractor minimum wage to the following employees whose work is "covered" under the final rule:

1. Employees who are entitled to the minimum wage under FLSA section 6(a)(1), employees whose wages are calculated pursuant to special certificates issued under FLSA section 14(c), and tipped employees under FLSA section 3(t);
2. Service employees who are entitled to prevailing wages under the SCA; and
3. Laborers and mechanics who are entitled to prevailing wages under the DBA.

The above employees will be considered "covered" if they perform "work on or in connection with" a covered contract. An employee will be deemed to perform work "on" a covered contract if he or she "directly performs specific services called for by the contract's terms." An employee will be deemed to perform work "in connection with" a covered contract if he or she performs "work activities necessary to the specific services called for by the contract's terms."[5]

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3 A "concessions contract" is any contract under which the federal government grants a right to use federal property, including land or facilities, for furnishing services. This includes, but is not limited to every contract with the principal purpose of furnishing food, lodging, automobile fuel, souvenirs, newspaper stands, and/or recreational equipment, regardless of whether the services are of direct benefit to the Government, its personnel, or the general public.

4 A "contract in connection with Federal property or lands and related to offering services" refers to leases of federal property, including the space and facilities, and licenses to use such property entered into by the federal government for the purposes of offering services to federal employees, their dependents, or the general public.

5 Employees performing work "in connection with" a covered contract are only entitled to be paid the contractor minimum wage if such work represents at least 20% of their average weekly workload.

The FLSA Employee Working on a SCA or DBA Contract

The portion of the rule that covered contractors are most likely to violate unknowingly is the inclusion of FLSA-covered employees working "in connection with" a covered contract under the SCA or DBA. FLSA employees who provide support on service contracts that is necessary for the performance of the contract, but who are not considered "service employees" under the contract for purposes of the SCA, are entitled to be paid at the rate established by the final rule for time spent performing work in support of the covered contract. Similarly, FLSA employees who are not laborers or mechanics, but who are performing work supporting the DBA-covered contract, would be entitled to the contractor minimum wage for those hours.

One commenter to the FAR Council's interim rule expressed concern that the E.O. and the implementing FAR rule will have a negative impact on the employment of individuals with significant disabilities. The FAR Council rejected any specific changes to the rule, stating that while it can "appreciate the concerns raised by this respondent" regarding the potential loss of employment for such individuals that could result, it does not have the discretion to adjust the rule, as the rule implements the E.O.

Final Rule on Pilot Program for Whistleblower Protections

The FAR Council also published its final rule implementing a four-year pilot program enhancing whistleblower protections for contractor employees. The pilot program is mandated by section 828, of the National Defense Authorization Act (NDAA) for Fiscal Year 2013 (Pub. L. 112-239, enacted January 2, 2013). The pilot program, which took effect by operation of law on July 1, 2013, is effective through January 1, 2017 and suspends the pre-existing whistleblower protections in 41 U.S.C. 4705. With the exception of Department of Defense, National Aeronautics and Space Administration, and the Coast Guard, as well as any element of the intelligence community, the pilot program applies to the employees of government contractors and their subcontractors. The three agencies are covered by another statutory provision, which was amended by the NDAA to impose permanent requirements very similar to the temporary requirements of the pilot program.

The program protects employees of government contractors, subcontractors and grantees from reprisal for reporting gross mismanagement of a federal contract or grant, gross waste of federal funds, abuse of authority relating to a federal contract or grant, a substantial and specific danger to public health or safety, or a violation of law, rule, or regulation related to a federal contract or grant including the competition for or negotiation of the contract or grant. Remedies can include reinstatement of the employee, as well as payment of damages and attorneys' fees.