

CONSTRUCTION BILLS: RECENT CHANGES TO CONSTRUCTION LAWS

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Obama Administration's Active Interest in Government Contracting Regulations

In 2014, President Obama unilaterally took action within the public contracts sphere, expressing his administration's position on larger social and economic issues facing America. Over the course of the past 12 months, President Obama has been active, regulating government contractors by issuing four executive orders and two memorandums setting forth his vision for workplace equality and his goal to "give America a raise."

\$10.10 Minimum Wage Executive Order

Following up on a promise made in his 2014 State of the Union address, on February 12, 2014, the president issued Executive Order 13658 increasing the minimum hourly wage on federal contracts to \$10.10, affecting hundreds of thousands of federal contract workers. Under the executive order, for contracts renewed or entered into on or after January 1, 2015, federal contractors and subcontractors are required to incorporate into lower-tier subcontracts terms specifying that, as a condition of payment, the minimum wage paid to workers shall be at least \$10.10 per hour and that as of January 1, 2016, the minimum wage shall not be less than the amount determined by the Secretary of Labor. The order specifically does not excuse compliance with federal or state prevailing wage laws or municipal ordinances establishing a higher minimum wage.

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Related regulations issued by the Secretary of Labor confirm that the order governs contracts for construction covered by the Davis-Bacon Act of 1931¹ and contracts for services covered by the McNamara-O'Hara Service Contract Act of 1965.² However, the order does not apply to contracts that are subject only to the Davis-Bacon Related Acts. The regulations also set forth record-keeping requirements and propose adoption of existing wage law enforcement mechanisms to enforce the provisions of the order. According to the administration, raising wages will increase economy and efficiency in government procurement by lowering turnover and increasing morale, leading to higher productivity³ and quality of work and reduced supervisory costs.

Memorandum on Raising the Threshold for Overtime Exemption

On March 13, 2014, by way of memorandum to the Secretary of Labor, the president directed the Secretary of Labor to update and modernize the Department of Labor's overtime exemption regulations governing white-collar workers under the Fair Labor Standards Act of 1938 (FLSA).⁴ For work in excess of 40 hours per week, most workers covered by FLSA must receive overtime wages at a rate of at least 1.5 times their regular rate. According to the memorandum, regulations regarding exemptions from FLSA's overtime pay requirement, particularly for executive, administrative, and professional employees, have not kept up with our modern economy, leaving millions of Americans without overtime protections. Since 2004, the regulation designed to limit overtime for highly paid employees exempted workers earning as little as \$23,600 a year from overtime pay protections. "It doesn't make sense that in some cases this rule actually makes it possible for salaried workers to be paid less than the minimum wage," the president said.

Under the memorandum, the president directed the Secretary of Labor to update regulations to provide protections in line with the purpose of FLSA, to address the changing nature of the workplace and simplify regulations to make them easier for both workers and business to understand. Final regulations from the Department of Labor may revamp several areas of the regulations but, at minimum, are expected to revisit and raise the exempt minimum salary level of \$455 a week, equal to \$23,600 a year, which today is below the poverty line for a worker supporting a family of four. Regulations may link further

threshold increases to consumer price or cost-of-living indexes, similar to regulations implementing Executive Order 13658, discussed above.

Nonretaliation for Disclosure of Compensation Executive Order

On April 8, 2014, the president issued Executive Order 13665 barring federal contractors from discharging or discriminating against employees or applicants who inquire about, discuss, or disclose compensation information. As stated in the order, when employees are prohibited, either implicitly or tacitly, from inquiring about and discussing compensation information, it becomes more difficult to discover and remediate compensation discrimination, and the practice is more likely to persist. In the government's interest, the order, intended to reduce compensation discrimination, is designed to promote economy and efficiency in government contracting by decreasing the need for enforcement actions and the occurrence of labor disputes, which can disrupt, delay, and increase the expense of contracting for the federal government.

On September 15, 2014, the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) announced proposed rules to prohibit pay secrecy policies and actions by covered federal contractors and subcontractors. The OFCCP accepted comments on the proposed rules until December 16, 2014.

Memorandum on Advancing Pay Equity Through Compensation Data Collection

In a memorandum to the Secretary of Labor dated April 8, 2014, the president directed the Secretary of Labor to propose rules that would require federal contractors and subcontractors to provide compensation data to the Department of Labor by race and gender of employees. In the memorandum, the president notes that although women have made progress in pay equity since the passage of the Equal Pay Act of 1963,⁵ women still earn 77 cents for every dollar a man makes. The gap can be even greater for African-American women and Latinas. Though federal laws exist prohibiting paying men and women differently for the same work, effective enforcement of these laws is impeded by a lack of available data on employee compensation, especially broken down by gender and race.

On August 6, 2014, the Department of Labor responded to the president by issuing proposed rules requiring federal contractors and subcontractors to submit to the Department of Labor an annual Equal Pay Report on employee compensation. Companies that file an Employer Information Report (EEO-1 Report), have more than 100 employees, and hold federal contracts or subcontracts worth \$50,000 or more for at least 30 days would be subject to the proposed rules. Such contractors and subcontractors would be required to supplement their EEO-1 Report with summary compensation information, as contained in the Form W-2 Wage and Tax

Statement (W-2) forms, by sex, race, ethnicity, and specified job categories, as well as other relevant data points, such as hours worked and the number of employees. The filings will assist the OFCCP in directing its enforcement resources toward companies whose filings suggest potential pay violations and will hopefully increase voluntary compliance with equal pay laws. The comment period on the proposed rules ended on January 5, 2015.

Executive Order Barring Discrimination Based on Sexual Orientation and Gender Identity

On July 21, 2014, the president took further steps toward his administration's goals of equality in contracting and employment by issuing regulations prohibiting discrimination based on sexual orientation and gender identity by government contractors. Executive Order 13672 amended Executive Order 11246, which prohibits federal contractors and subcontractors from discriminating on the basis of race, color, religion, sex, or national origin; by executive order, the president added "sexual orientation" and "gender identity" to this list of protected categories.

Executive Order 13672 will apply only to covered federal contractors that enter into contracts on or after the effective date of the Department of Labor's implementing regulations, but enforcement as to gender identity and transgender status became effective on August 19, 2014, when the OFCCP issued Directive 2014-02, Gender Identity and Sex Discrimination. Based on the Equal Employment Opportunity Commission (EEOC) ruling in *Macy v. Holder*, Appeal No. 0120120821, 2012 WL 1435995 (E.E.O.C. Apr. 20, 2012), the OFCCP clarified in its directive that henceforth the OFCCP would consider complaints of discrimination from job applicants and employees based on gender identity and/or transgender status as complaints of discrimination based on sex, thereby essentially making Executive Order 13672 effective as to gender identity despite the lack of rule making.

Executive Order on Fair Pay and Safe Workplaces

Executive Order 13673, issued July 31, 2014, by the Obama administration, requires federal contractors to self-report violations of federal labor laws and to provide employees with pay information. It also affects the enforceability of arbitration agreements between contractors and employees.

On solicitations for contracts for goods and services, including construction, where the estimated value exceeds \$500,000, the contracting officer must require the contractor to provide information on violations of labor laws, including related executive orders, for the preceding three-year period. The contracting officer must also provide the contractor an opportunity to disclose corrective actions, including agreements with the enforcement agency. Such information shall be reviewed by the contracting officer to determine if the contractor is a "responsible source that has a satisfactory record of integrity and business ethics." The reporting requirements extend to subcontractors

providing supplies or services that exceed \$500,000 in value. The contractor must represent that it will consider the subcontractor's report in determining whether to engage the subcontractor. During performance of the contract, contractors and subcontractors must update disclosures on labor law violations every six months. If labor law violations are discovered through reporting or other sources, the contracting officer may consider action, including remedial measures, compliance assistance, or contract termination.

Contracts and subcontracts subject to the disclosure requirements discussed above must also require contractors and subcontractors to provide employees subject to the FLSA⁶ with the following information each pay period: hours worked, overtime hours, pay, and any additions made to or deductions made from pay. Individuals exempt from employee overtime under the FLSA

or treated as independent contractors must be provided with documentation of their status.

On federal contracts and subcontracts where the estimated value exceeds \$1 million, contractors and subcontractors must agree that they will not arbitrate a claim of sexual discrimination, assault, or harassment unless the employee voluntarily consents to the arbitration process after the dispute arises. Such requirement does not apply to employees under collective bargaining agreements.

Endnotes

1. 40 U.S.C. § 3141 et seq.
2. 41 U.S.C. § 6701 et seq.
3. *Id.*
4. 29 U.S.C. § 201 et seq.
5. 29 U.S.C. § 206 et seq.
6. 29 U.S.C. § 201 et seq.