

AFFIRMATIVE ACTION UPDATE

- **MINIMUM WAGE FOR FEDERAL CONTRACTORS/SUBCONTRACTORS**
 - **LISTING REMOTE JOBS WITH STATE JOB DELIVERY SYSTEM**
 - **RECORD RETENTION – SELF-ID FORMS**
 - **NEW VETS-4212 REPORT**
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MINIMUM WAGE FOR FEDERAL CONTRACTORS/SUBCONTRACTORS

The Department of Labor has recently issued final regulations that implement Executive Order 13658, which raises the minimum wage for individuals working under certain federal contracts to \$10.10 per hour effective January 1, 2015. It is critical to note that the new minimum wage applies only to some federal contractors and not all federal contractors.

The regulations simply address the contracts/subcontracts that are covered. However, they do not list the contracts/subcontracts not covered. There is some discussion in the preamble to the regs of exceptions to the regulations.

What Contracts Are Covered?

First, the regs only cover “new” contracts which are entered into or existing contracts that are modified or extended after January 1, 2015.

Second, the regs only apply to the following contracts/subcontracts:

- Procurement contracts for construction covered by the Davis-Bacon Act (DBA). It does not include construction contracts covered by DBA related acts such as the Federal-Aid Highway Acts, the Community Development Act, or the American Recovery and Investment Act.
- Service contracts covered by the Service Contract Act (SCA). Coverage of the SCA is fairly specific. A DOL fact sheet, discussing coverage of the act can be found [here](#). If you have a service contract that does not specify that it is covered by the SCA, the regs do not apply.
- Contracts for Concessions where the federal government contracts for the provision of food, lodging, fuel, souvenirs, recreational equipment or newspaper stands in connection with the use of federal property, lands or facilities.
- Contracts in connection with federal property or lands for the provision of services to federal employees, their dependents, or the general public. The provision of supplies in support of these contracts is not covered by the regs.

What Contracts Are Not Covered?

In the simplest terms, if a type of federal contract is not listed above, then it is not covered by the regs. More specifically, the preamble states that contracts for supplies and materials are excluded. So, if you have a contract with the navy to build ships, the regs do not apply. If you are selling parts to the prime contractor who is building ships for the navy, the regs do not apply. If you are a manufacturer covered by the Walsh-Healey Act, the regs do not apply. If you are a financial institution whose affirmative action obligation arises because you are covered by FDIC insurance, the regs do not apply. If you are a hospital who has a contract with NIH to do medical research and your contract with the NIH does not specify coverage under the SCA, the regs do not apply.

If You Have a Covered Contract, What Must You Do?

If you have a covered contract, the regs may not apply to all your employees. Rather, they apply only to those individuals performing work “...on...” or “...in connection with...” the covered contract, and whose wages are governed by the SCA, DBA or the FLSA. If you have employees working on a covered contract but their wages are not covered by the SCA, DBA or the FLSA (e.g., students), they are not covered by the regs.

In addition, the regs may include individuals working in support of the covered contract even though they are not working directly on the contract. So for example, a payroll clerk who spends most of their time keeping payroll records and generating payroll for the individuals actually working on the contract would be eligible for the minimum wage. However, if the payroll clerk is spending less than 20% of their time in that capacity, they do not have to be paid the minimum wage.

So, What Should I be Doing?

- Monitor new contracts that will be effective or have a scheduled modification effective after January 1, 2015, as well as all new contracts or modifications that are not currently scheduled that will be effective after January 1, 2015. Determine whether any new or modified contracts are a covered contract as set forth above.
- If a covered contract, determine what employees are working on or in connection with the covered contract.
- Evaluate the pay of any covered employees and determine whether their pay is currently below the new minimum of \$10.10 per hour. If so, schedule a wage increase to the new minimum wage as of the effective date of the new/modified contract.
- Incorporate the minimum wage contract clause into any contracts with covered subcontractors. See [Appendix A](#) of the regulation for the language of the clause.
- Provide notice to covered employees by posting the new minimum wage poster (not yet made available by the DOL).
- Ensure that appropriate records identifying covered employees and their wages are maintained in the event of an audit by the Wage-Hour Division of the DOL.

- Monitor annual adjustments to the minimum wage as determined by the DOL and adjust wages of covered employees accordingly.

Summary

Unlike most other requirements placed on federal contractors, enforcement of these regulations is not vested with the Office of Federal Contract Compliance Programs (OFCCP). Rather, it is vested with the Wage-Hour Division (WHD) of the U.S. Department of Labor. As such, contractors should not expect that in the event of an OFCCP compliance review, that compliance with the new minimum wage regulations will be part of the review. Rather, the regs provide that confirmation of compliance will only occur in response to a complaint filed with the WHD.

LISTING REMOTE JOBS IN COMPLIANCE WITH VEVRAA REGULATIONS

In response to questions regarding compliance with the VEVRAA requirement that all covered job openings be listed with the appropriate state job delivery system, the OFCCP has published the following FAQ:

1. How should contractors list job openings for "remote jobs," that is, jobs that are full-time telework positions from any location, in order to comply with VEVRAA's job listing requirement?

VEVRAA requires that contractors list all employment openings which exist at the time of the execution of the contract, and which occur during the performance of the contract, with the appropriate employment service delivery system (ESDS) where the opening occurs. Typically, the location of a job opening, or where a job opening "occurs," is the location to which the employee must report for work. For a job opening that does not require the employee to report to, or work from, a specific location, a contractor may satisfy the job listing requirement by listing the job opening with the state or local ESDS where the work unit, division, department or supervisor to which the employee will report or be assigned is located.

RECORD RETENTION – SELF-ID FORMS

In response to questions regarding demonstrated compliance with the 503 requirement regarding retention of self-id forms, the OFCCP has published the following FAQ:

4. What information must a contractor store in order to demonstrate its compliance with the requirement to invite voluntary self-identification of disability from applicants and employees?

Regarding paper invitations - a contractor that invites voluntary self-identification of disability by using paper copies of the OFCCP self-identification form must retain either the hard copies of the completed self-identification forms, or electronic copies (e.g., pdf, scanned, etc.) of the completed paper forms. The contractor must also retain any log, spreadsheet, or database that it may have developed to record the data from the self-identification forms.

Regarding electronic invitations - a contractor that electronically invites voluntary self-identification of disability must either:

- Retain electronic copies (e.g., pdf, scanned, etc.) of the electronically completed self-identification forms, as well as any log, spreadsheet or database it may have developed to record the data from the self-identification forms;
- Retain hard copies of the electronically completed self-identification forms, as well as any log, spreadsheet or database it may have developed to record the data from the self-identification forms; or
- Retain a detailed log, spreadsheet or database of the data collected from each electronically completed form, without copies of each individually completed form, if the electronic system does not store completed forms. However, the contractor must also be able to demonstrate how they delivered and/or displayed the voluntary invitation to self-identify. This allows compliance officers to verify that contractors met their obligation to use the OMB-approved form.

Obviously, contractors using electronic invitations to self-id must determine how the invitations are stored and then decide how they want to retain this data in conformance with one of the three options above.

NEW VETS-4212 REPORT AND REVISED VETERANS POST-OFFER SELF-ID

Beginning in 2015, employers will no longer be filing VETS-100 or VETS-100A reports. Consistent with OFCCP's deletion of Section 250 of the VEVRAA regulations and implementation of the new regulations, the Veterans' Employment and Training Service (VETS) has eliminated the VETS-100 form, which applied only to contracts entered into prior to December 1, 2003.

Additionally, VETS has revised and renamed the VETS-100A report. The new report will be called the "VETS-4212," named after the U.S. Code Section where the VEVRAA regulations are published. The most notable difference between the VETS-100A and the new VETS-4212 report is that employers will no longer be required to collect or report data on the specific categories of protected veterans. Instead, employers will simply report the aggregate number of all protected veterans within each EEO category.

Due to this change in reporting, it will no longer be necessary for employers to collect detailed data on specific categories of protected veterans. As such, contractors may consider updating their veterans' post-offer self-id forms to reflect this change. While soliciting and collecting the detailed data is not prohibited, continuing to collect the detailed data when not required could potentially raise questions as to why the employer still feels the need to collect data. In any event, employers should be collecting the date of discharge for newly hired veterans in order to adjust their records when the individual has been separated from service for more than three years.

Attached to this newsletter is a sample revised veterans post-offer self-id form. With the elimination of the need to ask for specific categories, the post-offer self-id form can now mirror the pre-offer form, making compliance with the regulation easier for most employers.

If there are any questions or comments concerning anything contained above, they can be directed to this office by calling us at 440-564-7987 or sending an email to dbb@dbbrown.com. The discussion of this matter is for the clients and friends of Douglas B. Brown & Associates, LLC and does not represent nor is intended as a substitute for professional legal advice.

ORGANIZATION

ALL EMPLOYEES AND APPLICANTS HAVING BEEN MADE AN OFFER OF EMPLOYMENT, PLEASE COMPLETE THE FOLLOWING SURVEY

As an employer with an Affirmative Action Obligation pursuant to the Vietnam Era Veterans Readjustment Assistance Act, 38 U.S.C. 4212 (VEVRAA), as appropriate, we must comply with government regulations regarding the collection of demographic information about our employees. We are required to invite all employees to self-identify for consideration under our Disabled and Veteran's Affirmative Action Programs. Provision of this information is voluntary and refusal to provide it will not subject the employee to adverse treatment. Further, if provided, the information will be kept confidential and used only in accordance with the Acts and regulations.

We are required to take affirmative action to employ and advance in employment: 1) disabled veterans; 2) recently separated veterans; 3) active duty wartime or campaign badge veterans; and 4) Armed Forces Service Medal Veterans. Please see below for the definition of each classification.

Disabled Veteran: 1) a veteran of the U.S. Military, ground, naval or air service who is entitled to compensation (or who but for the receipt of military retired pay would be entitled to compensation) under laws administered by the Secretary of Veterans Affairs; or 2) a person who was discharged or released from active duty because of a service connected disability.

Recently Separated Veteran: Any veteran during the three-year period beginning on the date of such veteran's discharge or release for active duty in the U.S. military, ground, naval, or air service.

Active Duty Wartime or Campaign Badge Veteran: Any veteran who served on active duty during a war or in a campaign or expedition for which a campaign badge has been authorized. A list of qualifying wars, campaigns and expeditions is attached.

Armed Forces Service Medal Veteran: This award, authorized by Executive Order 12985, Jan. 11, 1996, is awarded to members of the armed forces of the U.S. who, after June 1, 1992: 1) participate, have participated, as members of U.S. military units, in a U.S. military operation that is deemed to be significant activity by the Joint Chiefs of Staff; and 2) encounter no foreign armed opposition or imminent threat of hostile action.

If you believe you belong to one or more of the categories of protected veterans listed above, please indicate by checking the appropriate box below. As a government contractor, we request this information in order to measure the effectiveness of the outreach and positive recruitment efforts we undertake pursuant to VEVRAA.

- I IDENTIFY AS ONE OR MORE OF THE CLASSIFICATIONS OF PROTECTED VETERANS LISTED ABOVE
- I AM NOT A PROTECTED VETERAN
- I CHOOSE NOT TO SELF-IDENTIFY AT THIS TIME

Name: _____ Signature: _____
(Please Print)

Date: _____