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FIELD ASSISTANCE BULLETIN No.: 2022-1

MEMORANDUM FOR: Regional Administrators
Deputy Regional Administrators
Directors of Enforcement
District Directors

FROM: Jessica Looman
Acting Administrator

SUBJECT: Application of Executive Order 14026, “Increasing the Minimum Wage for Federal Contractors”

This memorandum provides guidance as to the application of Executive Order 14026, “Increasing the Minimum Wage for Federal Contractors” (EO 14026), including how EO 14026 is similar to or different from Executive Order 13658, “Establishing a Minimum Wage for Federal Contractors” (EO 13658).

Background

On February 12, 2014, President Obama signed EO 13658, which requires contractors to pay at least the established minimum wage to workers performing work on or in connection with certain covered federal contracts for construction or services. EO 13658 established an initial minimum wage of \$10.10 and provided that the Secretary would increase the applicable minimum wage rate annually based on inflation. The current EO 13658 minimum wage rate is \$10.95 (\$7.65 for tipped workers) and will increase to \$11.25 (\$7.90 for tipped workers) on January 1, 2022.

On April 27, 2021, President Biden signed EO 14026, which raises the hourly minimum wage for workers performing work on or in connection with certain covered federal contracts for construction or services. EO 14026 establishes an initial minimum wage of \$15.00 (\$10.50 for tipped workers) as of January 30, 2022, which the Secretary will also increase annually based on inflation. EO 14026 shares many similarities with EO 13658 but does have some key differences relating to coverage and applicability, as discussed below. The Department published a final rule in the Federal Register to implement the provisions of EO 14026 on November 24, 2021. These regulations are found at 29 CFR Part 23 and become effective on January 30, 2022.

Contract Coverage

Contracts or Contract-Like Instruments

Under both EO 13658 and EO 14026, *contract or contract-like instrument* is broadly defined to include any agreement between two or more parties creating obligations that are enforceable or otherwise recognizable under the law. Although the term includes any contract within the

definition provided in the Federal Acquisition Regulation (FAR) at 48 CFR chapter 1 or applicable Federal statutes, and any contract covered under any Federal procurement statute, it also applies much more broadly. The term includes a wide variety of contractual arrangements, whether negotiated or advertised, or the result of competitive bidding or single source award, such as any procurement actions, lease agreements, cooperative agreements, provider agreements, intergovernmental service agreements, service agreements, licenses, or permits.

In addition to bilateral instruments, the definition similarly includes awards and notices of awards; job orders or task letters issued under basic ordering agreements; letter contracts; orders, such as purchase orders, under which the contract becomes effective by written acceptance or performance; and bilateral contract modifications. Unlike EO 13658, EO 14026 also explicitly **applies to exercised contract options**. *See* 29 CFR 23.20.

EO 14026 is intended to be of potential applicability to virtually any type of agreement with the Federal Government that is contractual in nature, regardless of nomenclature, type, or particular form, and whether it was made verbally or in writing.

Executive Department or Agency

EO 14026 applies to covered contracts entered into by executive departments or agencies. 29 CFR 23.20 defines “executive departments” within the meaning of 5 U.S.C. 101, “military departments” within the meaning of 5 U.S.C. 102, “independent establishments” within the meaning of 5 U.S.C. 104(1), and “wholly owned Government corporations” within the meaning of 31 U.S.C. 9101. This definition is somewhat broader than the definition under EO 13658. EO 13658 strongly encouraged but did not require independent agencies to comply with its requirements, but EO 14026 includes independent agencies in its coverage, such as the Nuclear Regulatory Commission or the Consumer Product Safety Commission.

Covered Types of Contracts

As with EO 13658, the requirements of EO 14026 apply to four categories of contracts (29 CFR 23.30):

1. procurement contracts for construction covered by the Davis-Bacon Act (DBA);
2. service contracts covered by the Service Contract Act (SCA);
3. concessions contracts; and,
4. contracts entered into with the Federal Government in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public.

The term “procurement contract for construction” includes any contract subject to the provisions of the DBA, as amended, and its implementing regulations. EO 14026 does **not** apply to contracts subject only to the Davis-Bacon Related Acts, including those set forth at 29 CFR 5.1.

Service contracts subject to the SCA generally include every contract entered into by the United States that has as its principal purpose the furnishing of services in the United States through the use of service employees, regardless of the direct beneficiary of the services, the source of the

funds from which the contractor is paid for the service, or the location where the work is performed.

A “concessions contract” means a contract under which the Federal Government grants a right to use Federal property, including land or facilities, for furnishing services. A concessions contract includes, but is not limited to, a contract with the principal purpose to furnish 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. This definition also generally includes contracts for the provision of noncommercial educational or interpretive services, energy, transportation, communications, or water services to the general public. Although many concessions contracts will also be service contracts subject to the SCA, this definition includes all contracts with the Federal Government for concessions, even concessions contracts that are excluded from SCA coverage by 29 CFR 4.133(b).

“Contracts entered into with the Federal Government in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public” include, for example, contracts, licenses, or permits to operate a child care facility, dry cleaning establishment, coffee shop, fitness center, or other similar facilities in a Federal building. Many contracts in this category may also be subject to the SCA, but EO 14026 coverage applies to these contracts even where SCA is not applicable. However, the term “Federal property” does not include money, so purely financial transactions with the Federal Government (i.e., contracts that are not in connection with physical property or lands) would not be covered under this category. Similarly, because contracts in this category must involve offering services, this category does not include contracts merely to supply materials in connection with Federal property or lands.

The above categories can include contracts in connection with seasonal recreational services and seasonal recreational equipment rentals offered for public use on Federal lands. Executive Order 13838, “Exemption from Executive Order 13658 for Recreational Services on Federal Lands,” provided an exemption from EO 13658 for such contracts, but EO 14026 rescinds EO 13838 as of January 30, 2022. Therefore, as of January 30, 2022, contracts in connection with seasonal recreational services and seasonal recreational equipment rentals offered for public use on Federal lands are not exempt from the requirements of either EO 13658 or EO 14026. Such contracts will generally be subject to the minimum wage requirements of either EO 13658 or EO 14026, depending on the date that the relevant contract was entered into, renewed, or extended and the appropriate steps taken by contracting agencies to insert the relevant EO clause into such contracts.

Dollar Threshold

For contracts covered by the DBA or SCA, EO 14026 and EO 13658 apply only to contracts at the thresholds specified in those statutes, i.e., \$2,000 for contracts subject to the DBA and \$2,500 for contracts subject to the SCA. For procurement contracts not subject to either the DBA or SCA, where workers’ wages are governed by the Fair Labor Standards Act (FLSA), both EOs apply only to contracts that exceed the micro-purchase threshold, as defined in 41 U.S.C.

1902(a). This threshold applies only to prime contracts. There is no monetary threshold for covered sub-contracts.

New Contracts

EO 14026 applies to covered new contracts entered into on or after January 30, 2022, as well as contracts entered into prior to January 30, 2022, where the contract is renewed, extended, or an option on the contract is exercised on or after January 30, 2022. *See* 29 CFR 23.20. Unlike EO 13658, the exercise of a pre-negotiated option is considered a new contract under EO 14026. For contracts that were entered into prior to January 30, 2022, the EO 14026 minimum wage requirement applies prospectively as of the date that such contract is renewed or extended (pursuant to an exercised option or otherwise) on or after January 30, 2022; EO 14026 does not apply retroactively. Task orders placed or issued under multiple-award contracts or other indefinite-delivery, indefinite quantity contracts will only be covered when placed or issued under a master contract that is itself a covered new contract, even where the task order is placed or issued after January 30, 2022. EO 14026 includes an exception from coverage for contracts where the solicitation was issued prior to January 30, 2022 and the contract is entered into on or between January 30, 2022 and March 30, 2022. Coverage under EO 14026 would subsequently apply to such a contract if it is later extended or renewed, or an option is subsequently exercised.

As of January 30, 2022, EO 14026 supersedes EO 13658 to the extent they are inconsistent. This means that workers performing on or in connection with covered new contracts that would otherwise have been subject to EO 13658 will be entitled to the higher minimum wage rate established by EO 14026 if they qualify as “new contracts” under EO 14026. EO 13658 will remain in effect for some existing contracts until they qualify as “new contracts” subject to the requirements of EO 14026.

Geographic Scope

Both EO 13658 and EO 14026 apply to contracts requiring performance in the fifty States or the District of Columbia. EO 14026, however, expands coverage to contracts requiring performance in Puerto Rico, the Virgin Islands, Outer Continental Shelf lands as defined in the Outer Continental Shelf Lands Act, American Samoa, Guam, the Commonwealth of the Northern Mariana Islands, Wake Island, and Johnston Island. Note, however, EO 14026 does not apply to contracts entered into by or with the governments of these specified territories, but rather applies to covered contracts with the Federal Government that are being performed inside the geographical limits of those territories.

Excluded Contracts

Certain contracts are specifically excluded from coverage under EO 14026 (29 CFR 23.40):

- grants within the meaning of the Federal Grant and Cooperative Agreement Act, as amended, 31 U.S.C. 6301 *et seq*;
- contracts or agreements with Indian Tribes under the Indian Self-Determination and Education Assistance Act, as amended, 25 U.S.C. 5301 *et seq*;

- procurement contracts for construction that are not covered by DBA, such as prime contracts under the DBA's \$2,000 threshold;
- contracts that are subject only to the Davis-Bacon Related Acts;
- service contracts that are exempt from SCA coverage pursuant to its statutory language at 41 U.S.C. 6702(b) or its implementing regulations, including those at 29 CFR 4.115 through 4.122 and 29 CFR 4.123(d) and (e), unless such contracts fall within one of the other covered categories;
- contracts for the manufacturing or furnishing of materials, supplies, articles, or equipment to the Federal Government, including those that are subject to the Walsh-Healey Public Contracts Act (PCA), 41 USC 6501 *et seq*; and
- prime procurement contracts where workers' wages are governed by the FLSA that are below the micro-purchase threshold (currently, \$10,000).

Worker Coverage

Workers Whose Wages under the Contract Are Governed by the FLSA, SCA, or DBA

Workers performing on or in connection with covered contracts are entitled to the EO 14026 minimum wage if their wages under the contract are governed by the FLSA, SCA, or DBA, regardless of the contractual relationship alleged to exist between the individual and the employer. This definition of a covered worker includes any individual performing on or in connection with a covered contract whose wages are calculated pursuant to certificates issued under 29 U.S.C. 214(c), as well as any person working on or in connection with a covered contract and individually registered in a bona fide apprenticeship program registered with the Department's Employment and Training Administration, Office of Apprenticeship, or with a State Apprenticeship Agency recognized by the Office of Apprenticeship. It also includes tipped workers who are engaged in an occupation in which they customarily and regularly receive more than \$30 a month in tips, as defined in FLSA section 3(t).

Working On or in Connection with a Covered Contract

Workers are working "on" a covered contract when they perform the specific services called for by the contract. In determining whether a worker is performing work on a covered contract, the Wage and Hour Division (WHD) will consider the scope of work or a similar statement set forth in the covered contract that identifies the work (*e.g.*, services or construction) to be performed under the contract. For example, all service employees performing the specific services called for by the terms of an SCA-covered contract are performing work on that contract. Similarly, laborers and mechanics engaged in the construction of a public building or public work directly on the site of the work are performing work on a DBA-covered contract. For purposes of concessions contracts and contracts in connection with Federal property or land and related to offering services that are not subject to the SCA, any worker performing the specific services called for by the terms of the contract is performing work on the covered contract.

Workers are performing work "in connection with" a covered contract when their work activities are necessary to the performance of a contract but are not the specific services called for by the contract. Examples of such workers could include a payroll clerk who performs billing work for

services rendered on a covered contract or processes payroll for a covered contract, a job coach who supports workers with disabilities employed under an FLSA section 14(c) certificate, a janitor performing custodial work on an SCA contract at a federal building, a security guard who patrols or monitors a construction worksite where DBA-covered work is being performed, or a mechanic who repairs equipment used for DBA-covered work back at the contractor's shop.

Workers Excluded from Coverage

The EO 14026 minimum wage does not apply to learners, apprentices, or messengers whose wages are calculated pursuant to certificates issued under 29 U.S.C. 214(a), student workers whose wages are calculated pursuant to certificates issued under 29 U.S.C. 214(b), or employed in a bona fide executive, administrative, or professional capacity, as those terms are defined in 29 CFR part 541.

Both EO 14026 and EO 13658 exclude workers who spend less than 20% of their work time performing work in connection with a covered contract in a particular workweek; such workers are not entitled to the EO minimum wage rate during any such workweek. Note, however, this exclusion only applies to workers who only perform work in connection with covered contracts, and is not applicable to workers who perform work on a covered contract, even where the time spent on work performed on covered contracts is less than 20% of the workweek.

Minimum Wage Executive Order Requirements

Minimum Wage Rates

For contracts covered by EO 14026, contractors must generally pay all covered workers at least \$15.00 per hour for all hours spent performing on or in connection with the contract beginning January 30, 2022. *See* 29 CR 23.50. The EO 13658 minimum wage rate, which will increase to \$11.25 in January 2022, will only be applicable to contracts covered under that EO entered into on or between January 1, 2015 and January 29, 2022, and not renewed or extended on or after January 30, 2022. The wage rates under both EO 14026 and EO 13658 will be adjusted by the Secretary annually based on inflation. The Secretary will publish the new EO minimum wage rates in the Federal Register at least 90 days before the updated rates become effective, and will also post the rates on WHD's website at www.dol.gov/agencies/whd and sam.gov. The rates will also be listed in the general notice on EO minimum wage rates that is included on all SCA and DBA wage determinations. Contractors must ensure that they are paying their workers no less than the applicable EO minimum wage rate in effect during each year of a multi-year contract, even if the applicable wage determination remains the same. If appropriate, contractors are entitled to be compensated for the increase in labor costs resulting from the annual inflation increases in the applicable EO minimum wage rates. Contractors may not take a credit for fringe benefit contributions towards their obligation to pay the applicable EO minimum wage.

Workers must receive at least the applicable EO minimum wage rate free and clear, without subsequent kickbacks, rebates, or, except as specified, deductions. The contractor may make deductions that reduce a worker's wages below the EO minimum wage rate only if such deduction qualifies as a deduction required by Federal, state, or local law. For example, such

deductions may include, Federal or state withholding of income taxes, a deduction for payments made to third parties pursuant to court order, a deduction directed by a voluntary assignment of the worker or his or her authorized representative, or a deduction for the reasonable cost or fair value of “board, lodging, or other facilities,” as defined in 29 U.S.C. 203(m)(1) and part 531 of Title 29. *See* 29 CFR 23.230 and 23.270.

The EO minimum wage rates reflect the lowest minimum wage rate that must be paid. If a higher wage rate applies under any applicable Federal or state prevailing wage law or any applicable law or municipal ordinance, or any applicable contract, the contractor must pay the highest applicable rate. Similarly, if a classification considered necessary for performance of work on the contract does not appear on the contract’s wage determination, the contractor cannot just pay the applicable EO minimum wage rate, but must still submit a conformance request, and must pay the higher of either the conformed rate or the applicable EO minimum wage rate. Additionally, employers who hold certificates under FLSA section 14(c) must pay the higher of the commensurate wage rate or the applicable EO minimum wage.

Tipped Employees

EO 14026 requires contractors to pay a cash wage of at least \$10.50 for tipped workers as of January 30, 2022 (as compared to \$7.90 under EO 13658). Where tipped workers do not receive a sufficient amount of tips in the workweek to equal the amount of the tip credit, the difference between the cash wage paid and the EO minimum wage rate, the contractor must increase the cash wage paid for that workweek until the amount of the cash wage paid and the tips received by the workers equal the applicable EO minimum wage rate. *See* 29 CFR 23.280. As with EO 13658, if the cash wage rate (not including tip credit) required to be paid by the SCA or any other applicable law or regulation is higher than the EO 14026 required cash wage rate, the employer must pay additional cash wages equal to the difference between the EO 14026 cash wage rate in effect and the highest cash wage rate required to be paid.

Whereas EO 13658 provides that the cash wage rate for tipped workers will be increased annually in accordance with inflation until it reaches 70% of the EO 13658 minimum wage rate, EO 14026 requires that the cash wage for tipped workers be raised to 85% of the EO 14026 minimum wage rate on January 1, 2023, and to 100% of the EO 14026 minimum wage rate on January 1, 2024. Therefore, after January 1, 2024, tipped employees on covered EO 14026 contracts will be paid no less than the full applicable EO minimum wage rate and contractors will not be able to claim a tip credit towards the EO 14026 minimum wage rate for covered federal contract work.

Commensurate Wages Paid to Workers with Disabilities under FLSA Section 14(c)

Employers who hold a certificate under FLSA section 14(c) may continue to pay appropriate commensurate wages to workers with disabilities only if the commensurate wage rate is higher than the applicable EO minimum wage. The employer should calculate the appropriate commensurate wage rate under section 14(c) for a worker employed on or in connection with an EO 14026 or EO 13658 covered contract. The employer must pay the higher of either the commensurate wage rate, whether hourly or piece rate, or the applicable EO minimum wage.

The contractor must pay workers performing work on or in connection with a covered contract, including workers with disabilities, full fringe benefits required by the contract. See Fact Sheet #29C for additional information about contractors' responsibilities under EO 14026 and FLSA section 14(c).

Notice to Workers

The contractor must notify all workers performing work on or in connection with a covered contract of the applicable EO minimum wage rate. With respect to service employees on contracts covered by the SCA and laborers and mechanics on contracts covered by the DBA, the contractor may meet this notice requirement by posting the applicable wage determination under those statutes in a prominent and accessible place at the worksite, as long as the wage determinations include the appropriate EO notice. With respect to workers performing work on or in connection with a covered contract whose wages are governed by the FLSA, the contractor must post the applicable EO poster provided by WHD in a prominent and accessible place at the worksite so it may be readily seen by workers. Contractors that customarily post notices to workers about terms and conditions of employment electronically may use the same method to post the EO notice electronically, provided such electronic posting is displayed prominently on any website that is maintained by the contractor, whether external or internal. *See* 29 CFR 23.290.

Flow-down of Clauses

Contracting agencies are required to incorporate the applicable EO 14026 and EO 13658 contract clauses into covered prime contracts. If the contracting agency has failed to incorporate the required clauses, the contracting agency must incorporate the clause retroactive to the beginning of the contract, either on its own initiative or within 15 calendar days of notification by the Department. Prime contractors and upper tier subcontractors are required to incorporate the required EO clauses into contracts with their subcontractors. *See* 29 CFR 23.210(b).

Recordkeeping

Contractors are required to maintain records reflecting each worker's:

- name, address, and Social Security number;
- occupation(s) or classification(s);
- rate(s) of wages paid;
- number of daily and weekly hours worked;
- any deductions made; and,
- total wages paid.

For contractors not exclusively engaged in work under EO-covered contracts that want to pay a lower rate for the non-covered work, contractors must maintain records adequately segregating non-covered work from the work performed on or in connection with the covered contract, or otherwise have affirmative proof that the contractor appropriately segregated the hours worked. Without such proof, all hours worked will be presumed to have been worked on or in connection with covered contracts and subject to the EO minimum wage.

Anti-Retaliation

Contractors are prohibited from discharging or in any other manner discriminating against any worker because such worker has filed any complaint or instituted or caused to be instituted any proceeding under or related to EO 14026, or has testified or is about to testify, in any such proceeding. Examples of discriminatory acts include, but are not limited to, reassigning a worker to fewer shifts, less preferable shifts, a position with less pay, or to non-covered contracts; or using the worker's complaint or testimony as a negative factor in a hiring, promotion, or disciplinary decision. The prohibition against discrimination generally also applies in situations where there is no current employment relationship between the parties; for example, it would protect a worker from retaliation by a prospective or former employer, or by a person acting directly or indirectly in the interest of an employer. *See* 29 CFR 23.60.

Remedies

When a WHD investigation finds that a contractor has failed to pay the applicable EO 14026 or EO 13658 minimum wage to workers or has engaged in prohibited retaliation against workers, the investigator will notify the contractor and the applicable contracting agency of the violation and request the contractor to remedy the violation. Remedies for wage violations will generally involve the contractor paying wages due to the workers. Remedies for prohibited retaliation may include any appropriate relief, such as employment, reinstatement, promotion, and/or the payment of lost wages. If the contractor does not agree to remedy the violations, WHD will issue an investigative findings letter directing the contractor to pay all unpaid wages and take other appropriate remedies, such as incorporation of clauses in subcontracts or make whole relief for retaliation. WHD may additionally direct the contracting agency to withhold funds due on that contract, or any other contract with the same prime contractor, to pay the unpaid wages. Where WHD requests a withholding, no funds will be disbursed until the contractor has had an opportunity to request and, if requested, obtain a hearing.

Whenever WHD finds a contractor has disregarded its obligations to workers or subcontractors under EO 14026 or EO 13658, the contractor, and its responsible officers, and any firm, corporation, partnership, or association in which such contractor or responsible officers have an interest, shall be ineligible to receive any contract or sub-contract subject to the applicable EO for a period of three years. The three-year period begins from the date of publication of the name or names of the contractor or responsible person(s) on the ineligible list. Prior to being placed on the ineligible list, WHD will notify the contractor of its findings and provide an opportunity to request a hearing.

Additional Information

Please address any questions regarding this FAB to the Government Contracts Enforcement Division. Please visit the Wage and Hour Division website at <https://www.dol.gov/agencies/whd/government-contracts/> and/or call our toll-free information and helpline, available 8 a.m. to 5 p.m. in your time zone, 1-866- 4USWAGE (1-866-487-9243)..