



WESTON HURD CLIENT ADVISORY July 2014

ARE YOU A FEDERAL SUBCONTRACTOR WITHOUT EVEN KNOWING IT?

Prepared by
Donald N. Jaffe

Federal contractors and subcontractors are subject to various Executive Orders regulating the employment relationship, depending on the size of their contracts. Some businesses can be considered to be subject to these requirements even if they do not get a penny directly from the Federal Government. And, if your business qualifies as a federal subcontractor, recent changes in Executive Orders can make the cost of business much more expensive.

For example, last January, during President Obama's State of the Union message to Congress and the country, the President proposed enactment of an increase in the Federal minimum wage, which, to date, has not been acted upon by Congress. Nevertheless, however, what the President has failed to achieve by legislative enactment, he has substantially achieved by Executive Order.

On February 12, 2014 (effective February 20, 2014), the President issued Executive Order 13658 (Federal Register Document 2014-03805; 79 Federal Register 9849). The major components of the Executive Order are to increase the minimum wage to \$10.10 per hour beginning January 1, 2015 and apply it to new contracts issued on or after January 1, 2015. Part of the Executive Order requires Executive Departments and Agencies, when preparing or issuing a contract, a "contract-like instrument" or a solicitation to include a clause requiring a contractor or any subcontractor to specify the minimum wage in the contract.

What becomes important, therefore, is the question of the type of contract involved and what subcontractors are affected by the Executive Order.

The Executive Order applies to the following categories: (1) a procurement contract for services or construction; (2) a contract or contract-like instrument for services; (3) a contract or contract-like instrument for concessions; (4) a contract or contract-like instrument 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 Executive Order's establishment of a minimum wage of \$10.10 per hour is only the beginning figure, as the Order further provides that commencing January 1, 2016, and annually thereafter, the minimum wage for federal contractors and subcontractors is to be "increased . . . by the annual percentage increase in the Consumer Price Index for Urban Wage Earners and Clerical Workers (United States City Average, All Items, Not Seasonally Adjusted)" as determined by the Bureau of Labor Statistics. Overseeing the compliance of federal contracts is a function assigned to the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP).

Although the President's Executive Order also applies to *subcontractors*, no specific definition of what constitutes a subcontractor is set forth in the Order. For guidance in that area, reference must be made to OFCCP's Regulation 41 C.F.R. §60-1.3. Under that regulation, a "subcontract" means any agreement or arrangement between a contractor and any person, except where the parties are in an employer-employee relationship, involving "the purchase, sale or use of personal property or non-personal services which, in whole or in part, is necessary to the performance of any one or more contracts" or "any portion of the contractor's obligation under any one or more contracts is performed, undertaken or assumed" by the subcontractor.

Although it remains to be seen how the Order will be interpreted and applied in determining whether a particular subcontractor's actions do or do not come within the scope of Executive Order 13658, however, there is some handwriting on the wall which may illustrate what lies ahead.

In the case of *UPMC Braddock v. Seth D. Harris, Acting Secretary, U.S. Dept. of Labor*, U.S. District Court, District of Columbia, Civil Case No. 09-1210 (decided March 30, 2013), the Court was reviewing a dispute between three hospitals affiliated with the University of Pittsburgh Medical Center and Executive Order 11246 which required that government agencies include in their contracts a provision for nondiscrimination and an affirmative action program, empowering the Secretary of Labor via OFCCP to determine compliance and enforcement of the equal employment requirements. In the cited case, the hospitals had entered into various contracts with a health maintenance organization called UPMC Health Plan, under which the hospitals provided medical services and supplies to individuals enrolled in the Health Plan's program. The Health Plan, in turn, had contracted with the U.S. Office of Personnel Management to provide coverage for federal employees who participate in the Federal Employees' Health Benefits Program. Because the hospitals *might* be providing medical services to a federal employee who elected to participate in the UPMC Health Plan, the Department of Labor concluded that the hospitals thereby qualified as a government subcontractor and were subject to the statutory and regulatory requirements involving equal employment opportunities. The Labor Department sought the records of the hospitals to determine compliance. The hospitals refused, essentially on the basis that they were not federal contractors or subcontractors.

One of the arguments by the hospitals was that there was no equal employment opportunity provision in their contract with the UPMC Health Plan. That argument was summarily rejected by the Court, holding that the Executive Order effectively trumps any contract provision to the contrary or even if there is no contract provision. As the Court noted at Slip Opinion p. 5: "In other words, the regulations provide that the equal opportunity clauses are deemed included in all qualifying contracts and subcontracts by operation of law, regardless of whether the contracting entities actually include the clause in their agreements."

Another argument asserted by the hospitals was that the business of supplying medical care is one of offering "personal services" not "non-personal services" and, therefore, do not fall within

the definition of a subcontractor under the regulation. That argument likewise was rejected by the Court.

The Court ultimately held that the hospitals were subcontractors under the Executive Order and regulations and were, therefore, subject to audit and equal employment examination by OFCCP.

While the *Braddock* decision was by a federal district court and was not reviewed by any appellate court, there is little doubt that this case will be used in furtherance of OFCCP's administration of the minimum wage Executive Order. Hence, it is a warning that employers will be subject to increased scrutiny by OFCCP as to their status as a federal subcontractor.

The labor and employment attorneys at Weston Hurd LLP are available to address your questions and concerns regarding the impact of this Executive Order. Please contact your Weston Hurd lawyer with any questions.



Donald N. Jaffe is Of Counsel to Weston Hurd LLP. He focuses his practice on estate planning, labor and employment matters, litigation and arbitration. Don can be reached at 216.687.3262 or djaffe@westonhurd.com.

About Weston Hurd LLP

With offices in Cleveland, Columbus and Beachwood, Weston Hurd LLP provides comprehensive legal counsel to Fortune 500 companies, insurance carriers, financial institutions, healthcare providers, small- and medium-sized businesses, the real estate industry, governmental agencies, non-profit enterprises and individuals.

For additional information regarding Weston Hurd's publications, please visit the [Publications](#) page on Weston Hurd's web site. Information about Weston Hurd's practice groups and attorneys, can be found on the [Practice Areas](#) page.

As a reminder, this material is being provided to draw your attention to the issues discussed.

Although prepared by professionals, it should not be utilized as a substitute for legal advice and representation in specific situations.



www.westonhurd.com

Copyright 2014