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## Executive Order Issued on Minimum Wage for Federal Contractors and Subcontractors

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*On February 12, 2014, President Obama issued an Executive Order to raise the minimum wage for Federal contractors and subcontractors under certain contracts, as he had foreshadowed in this year's State of the Union. The Executive Order sets forth the new wage rate, when it may take effect, and what contracts will be affected by this minimum wage increase.*

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### Minimum Wage:

- As of January 1, 2015, the minimum wage for affected federal contracting and subcontracting personnel will be increased from \$7.25 per hour to \$10.10 per hour for new federal service and construction contracts (but not supply contracts) awarded based on solicitations issued on or after that date. (Meeting the January 1, 2015 date will be dependent on the Department of Labor and the Federal Acquisition Regulatory Council meeting the deadlines for issuing implementing regulations, as discussed below.)
- Beginning January 1, 2016, and annually thereafter, the Department of Labor will increase the minimum wage using a cost of living adjustment (based on the Consumer Price Index for Urban Wage Earners and Clerical Workers).
- Notably, the new minimum wage will be lower than most prevailing minimum wages already paid to employees under the Service Contract Act ("SCA") and Davis-Bacon Act ("DBA"), so the impact of the new law will be limited to particular labor classifications.

### Timeline for Regulatory Implementation of the Minimum Wage Clause:

- The Executive Order directs the Department of Labor to issue regulations implementing the requirements of the order by October 1, 2014.
- Within 60 days thereafter, the Executive Order directs that a corresponding Federal Acquisition Regulation ("FAR") provision be issued for inclusion in federal procurement solicitations and contracts.

- The Executive Order requires that contractors incorporate the clause in subcontracts and subcontractors incorporate the clause in lower-tier subcontracts.

### Which Contracts are Affected?

- Although the specifics will become clearer once regulations are issued, the Executive Order appears to sweep in most service and construction federal procurement contracts that are governed by the Fair Labor Standards Act (“FLSA”), the SCA, or the DBA. The Executive Order also includes other contract and contract-like instruments governing services, concessions, or made in connection with Federal land or property and to provide services for Federal employees or the general public that are similarly governed by the FLSA, SCA, or DBA. The Executive Order does not apply to supply contracts.

### Contract Disputes Act Applicability?

- The Executive Order asserts that disputes regarding whether a contractor has paid its employees in accordance with this order will not be permitted under the Contract Disputes Act. Rather, the Department of Labor Regulations will provide a process for disposing of such disputes.
- The FAR already includes a similar provision that preempts the applicability of the Contract Disputes Act and remits contractors to the Department of Labor – the Disputes Concerning Labor Standards clause. However, Boards of Contract Appeals have carved out some exceptions and taken jurisdiction over certain disputes involving the SCA, DBA, and other labor provisions under the Contract Disputes Act. *See Burnside-Ott Aviation Training Ctr., Inc. v. United States*, 985 F.2d 1574, 1580-81 (Fed. Cir. 1993) (permitting dispute seeking equitable adjustment under Changes and Price Adjustment Clauses for increased costs due to Department of Labor wage determination); *Caddell Constr. Co.*, ASBCA No. 57831, 12-2 BCA ¶ 35059 (permitting dispute alleging mistake in bid of labor rates induced by the government).

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If you have any questions about the content of this alert, please contact the Pillsbury attorney with whom you regularly work, or the authors below.

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