



DISABILITY RIGHTS NEW MEXICO

1720 Louisiana Blvd. NE, Suite 204 • Albuquerque, New Mexico 87110

TEL/TTY: (505) 256-3100 • FAX: (505) 256-3184

State-wide Toll Free 1-800-432-4682

WEBSITE: www.drn.org • EMAIL: info@drnm.org

James Jackson, Executive Director

Promoting and Protecting the Rights of Persons with Disabilities

FEDERAL INITIATIVES TO PROMOTE EMPLOYMENT OF INDIVIDUALS WITH DISABILITIES

Presentation to Disability Subcommittee
Legislative Health and Human Services Committee

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Jim Jackson, Executive Director
Disability Rights New Mexico

Overview

Recent Federal Initiatives

Section 503 Regs: “utilization” employment goal and reporting requirements

Exec. Order: \$10.10 minimum for contractor employees, including 14(c) workers

Options for New Mexico

1. A few dismal employment statistics

- Over 18% of all Americans have a disability; over 12% have a severe disability (Census*)
- 10.5% of working age Americans have a disability (11.8% in NM) (Census**)
- Unemployment rate for persons with disabilities is 6.5 to 7.2 percentage points higher than persons without disabilities (OFCCP***)
- Since 2009, percentage of working age adults with significant disabilities who are working is lower than percentage who are not working (Census*)
- Workers with disabilities earn 20 to 23% less than those without disabilities (OFCCP***)

*2010 Census figures, compiled by Census employee Matthew Brault 2012

**2011 Census, American Community Survey, compiled by Susanne Bruyere, Cornell University, 2013

***OFCCP analysis of census data from 2008-2010 American Community Survey, as noted in the Federal Register Sept. 24, 2013

2. Sec 503 of the Rehabilitation Act, first passed 1973

- Applies to businesses that contract to provide goods or services to the federal government
- Prohibits discrimination in employment by contractors against persons with disabilities, and

requires affirmative action to employ and promote persons with disabilities

- Not very effective in promoting employment of persons with disabilities in private sector

Section 503 Reg Amendments

- Published 9/24/13, Effective date: 3/24/2014 [Fed. Register Vol. 78, #185]
- Applies to all federal contractors with contracts worth more than \$10,000. Some more detailed provisions apply to businesses with 50 or more employees and at least \$50,000 in contracts – e.g. requirement for written affirmative action plan
- Major changes:
 - Workforce utilization goal: At least 7% of employees in each work group (or company as a whole for smaller companies) should be persons with disabilities, as defined by ADA
 - Not a quota
 - Failure to meet goal does not mean non-compliance but triggers self-review
 - Data reporting: add to current reports already required
 - How many applicants?
 - How many self-identify as people with disabilities?
 - How many were hired?
 - OK to ask applicants in pre-hiring stage, and again post-offer, to voluntarily disclose disability as part of affirmative action plan. Not a violation of ADA
 - Survey existing employees on voluntary basis every five years and report: How many in work force self-identify or are known to company to be persons with disabilities?
 - If contractor is not meeting utilization goal, contractor is required to self-assess whether there are barriers to equal opportunity employment. If so, must develop a plan to address barrier(s)
 - OFCCP can also review data, conduct site visits, request remedial plan
- Can't use sheltered workshops to meet utilization goal; can't be part of affirmative action plan unless company promises to hire persons coming out of sheltered workshops in bona fide jobs at prevailing wage
- **If goal is met nationally – expect 600,000 additional employees with disabilities**

3. Executive Order #13658 – Minimum Wage for Contractors

- Issued by President Barack Obama on February 12, 2014
- Establishes a minimum wage of \$10.10 for most employees of most federal contractors
- Minimum wage will increase each year based on Consumer Price Index
- Applies to the following types of federal contracts
 - Procurement contracts for construction, as covered by the Davis-Bacon Act
 - Contracts for services provided to or on behalf of federal agencies, as covered by the federal Service Contract Act
 - Contracts to operate concessions
 - Contracts related to the use of federal property or lands and involving services provided to federal employees, their dependents, or the general public

- Exceptions: Does not apply to the following federal transactions
 - Grants
 - Contracts or grants to Indian Tribes
 - Contracts for public utilities
 - Contracts to provide materials, supplies, or equipment to the federal government

- Employees covered by the Executive Order
 - Employees entitled to minimum wage under the Fair Labor Standards Act or the Service Contract Act.
 - Laborers and mechanics covered by the Davis-Bacon Act
 - Employees covered only to the extent they are working on federal contracts
 - **Specifically includes workers with disabilities who are otherwise paid less than the minimum wage by contractors authorized to pay such sub-minimum wage. Such workers must be paid at least \$10.10 per hour for work performed on federal contracts if those contracts are covered by the Executive Order**

- Exceptions: Does not apply to the following employees
 - Employees of a federal contractor who are not working on a federal contract
 - Employees who are exempt from minimum wage requirements under the Fair Labor Standards Act - e.g. professional employees, management etc.

- Proposed federal regulations to implement the Executive Order published June 17, 2014
 - Deadline for public comment was July 17, 2014
 - Final regulations are expected no later than Oct. 1, 2014

RESULT OF THESE 2 INITIATIVES SHOULD BE MORE JOBS AT HIGHER WAGES

4. Options for Potential State Legislation Promoting Employment by State Contractors
 - Set a utilization goal, and ask for self-assessment by those not meeting the goal
 - Require payment of at least state minimum wage for employees working on state contracts, including employees of sheltered workshops who would otherwise be paid less than the minimum wage.
 - Provide incentives for potential contractors to hire individuals with disabilities by giving preference points in state RFPs to businesses that employ individuals with disabilities



FACT SHEET New Regulations on Section 503 of the Rehabilitation Act of 1973

Background

On September 24, 2013, the U.S. Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) published a Final Rule that makes changes to the regulations implementing Section 503 of the Rehabilitation Act of 1973, as amended (Section 503), at 41 CFR Part 60-741. The new regulations became effective on March 24, 2014. You can view the new regulations on OFCCP's Web site at <http://www.dol.gov/ofccp/503Rule>. Section 503 prohibits employment discrimination against individuals based on disability by federal contractors and subcontractors. Section 503 also requires that federal contractors and subcontractors take affirmative action to recruit, employ, train, and promote qualified individuals with disabilities.

Need for the New Regulations

The framework articulating contractors' Section 503 responsibilities had been in place since the 1970's. However, both the unemployment rate of working age individuals with disabilities and the percentage of working age individuals with disabilities that are not in the labor force remain significantly higher than for those without disabilities. A substantial disparity in the unemployment rate of individuals with disabilities continues to persist despite years of technological advances that have made it possible for people with disabilities, sometimes severe, to apply for and successfully perform a broad array of jobs.

- Bureau of Labor Statistics (BLS) data cited in the Preamble to the Final Rule showed a workforce participation rate of 31.6% for working age people with disabilities in 2012, compared with 76.5% of working age individuals without such disabilities.¹
- BLS data further indicated that the unemployment rate for working age people with disabilities in 2012 was 15%, compared with an unemployment rate of 8% for working age individuals without disabilities.²
- The median household income for "householders" with a disability in 2011, aged 18 to 64, was \$25,420, compared with a median income of \$59,411 for households with a householder who did not report a disability.³
- The poverty rate for individuals with disabilities, age 18 to 64, was 28.8 percent, compared to 12.5 percent for individuals without a disability.⁴

¹ Bureau of Labor Statistics, [Table A. Employment status of the civilian noninstitutional population by disability status and age, 2011 and 2012 annual averages](http://www.bls.gov/news.release/disabl.a.htm), available online at <http://www.bls.gov/news.release/disabl.a.htm> (last accessed July 5, 2013). The participation rate is the percentage of working age people (ages 16 to 64) who are employed, and those who are unemployed but looking for work. For individuals 16 years and older the participation rate for persons with disabilities is 20.6 percent.

² Id.

³ *Income, Poverty and Health Insurance Coverage in the United States: 2011*, Current Population Reports, issued September 2012, <http://www.census.gov/prod/2012pubs/p60-243.pdf> (last accessed July 8, 2013), p. 10. The "householder" is typically the head of a household. Only one person per household is designated the "householder."

⁴ Id.

The new Section 503 regulations are an important tool for reducing barriers to equal employment opportunity for individuals with disabilities, and addressing income inequality and poverty.

In addition, the new regulations implement changes necessitated by the passage of the ADA Amendments Act (ADAAA) of 2008. The ADAAA amends the definition of disability in Section 503 to the same extent that it amends the ADA, and became effective on January 1, 2009.

Highlights of the New Regulations

The new Section 503 regulations introduce a variety of regulatory changes. Some of these changes revise the nondiscrimination provisions to incorporate the requirements of the ADAAA. Others strengthen the affirmative action provisions. The new regulations:

- Establish, for the first time, a 7% utilization goal for individuals with disabilities. This utilization goal, applied at the job group level, is not to be used as a quota or a ceiling that limits or restricts the employment of individuals with disabilities. Instead, the goal is a management tool that informs decision-making and provides real accountability. Failing to meet the disability utilization goal is not a violation of the regulation and it will not lead to a fine, penalty or sanction.
- Require contractors to invite applicants to voluntarily self-identify as an individual with a disability at the pre-offer stage of the hiring process, in addition to the existing requirement that contractors invite applicants to voluntarily self-identify after receiving a job offer. This data collection should provide contractors with useful information about the extent to which their outreach and recruitment efforts are effectively reaching people with disabilities.
- Require contractors to invite incumbent employees to voluntarily self-identify on a regular basis. The status of employees may change and a regular invitation to self-identify provides employees a way to self-identify for the first time, or to change their previously reported status. Providing a regular invitation should contribute to increased self-identification rates. Improving data collection is important to assessing employment practices.
- Require contractors to maintain several quantitative measurements and comparisons for the number of individuals with disabilities who apply for jobs and the number of individuals with disabilities they hire in order to create greater accountability for employment decisions and practices. Having this data will enable contractors and OFCCP to evaluate the effectiveness of contractors' outreach and recruitment efforts, and examine hiring and selection processes related to individuals with disabilities.
- Require prime contractors to include specific, mandated language in their subcontracts in order to provide knowledge and increase compliance by alerting subcontractors to their responsibilities as federal contractors.
- Implement changes necessitated by the passage of the ADA Amendments Act (ADAAA) of 2008 by revising the definition of "disability" and certain nondiscrimination provisions of the implementing regulations.

For more information, please go to www.dol.gov/ofccp.

FACT SHEET: PROPOSED RULEMAKING TO IMPLEMENT EXECUTIVE ORDER 13658, ESTABLISHING A MINIMUM WAGE FOR CONTRACTORS

On February 12, 2014, President Obama signed Executive Order 13658, "Establishing a Minimum Wage for Contractors," to raise the minimum wage to \$10.10 for all workers on Federal construction and service contracts. The President took this executive action because raising wages will improve the quality and efficiency of services provided to the government. Boosting wages lowers turnover, increases morale, and will lead to higher productivity overall on Federal contracts. The Executive Order directed the Department of Labor to issue regulations to implement the new Federal contractor minimum wage. The Notice of Proposed Rulemaking issued by Secretary of Labor Tom Perez is an important milestone in raising the minimum wage for workers on Federal contracts.

❖ Key Provisions of the NPRM ❖

The NPRM defines key terms used in the Executive Order, including *contracts, contract-like instruments, and concessions contracts*. The NPRM makes clear that the Executive Order minimum wage requirement applies to all contracts for construction covered by the Davis-Bacon Act; contracts for services covered by the Service Contract Act; concessions contracts, such as contracts to furnish food, lodging, automobile fuel, souvenirs, newspaper stands, and/or recreational equipment on Federal property; and contracts to provide services, such as child care or dry cleaning, in Federal buildings for Federal employees or the general public.

The NPRM provides guidance for contractors on their obligations under the Executive Order. The NPRM sets forth the standards that contractors should apply to determine whether their employees are covered by the Executive Order, recordkeeping requirements, and where to find the required rate of pay for all workers, including tipped workers and workers with disabilities.

The NPRM establishes an enforcement process that should be familiar to most government contractors and will protect the right of workers to receive the new \$10.10 minimum wage. The Department of Labor generally proposes to adopt existing mechanisms for enforcing long-established prevailing wage laws to enforce the provisions of the Executive Order.

The NPRM estimates that hundreds of thousands of workers will benefit from the Executive Order.

The Department encourages interested parties to submit comments on the NPRM. The full text of the NPRM, as well as information on the deadline for submitting comments and the procedures for submitting comments, can be found at www.dol.gov/whd/flsa/nprm-eo13658

Details of NPRM Key Provisions

Coverage

Executive Order 13658 applies to new contracts and replacements for expiring contracts with the Federal Government that result from solicitations issued on or after January 1, 2015 or to contracts that are awarded outside the solicitation process on or after January 1, 2015.

Executive Order 13658 applies to four major categories of contractual agreements:

- (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, including any concessions contract excluded from the SCA by the Department of Labor's regulations at 29 CFR 4.133(b); and
- (4) contracts in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public.

Procurement contracts for construction

Under the NPRM, any contract covered by the DBA and its implementing regulations is subject to the Executive Order minimum wage requirement. The Executive Order does not apply, however, to contracts that are subject only to the Davis-Bacon Related Acts.

Service contracts

Both procurement and non-procurement contracts exceeding \$2,500 that are subject to the SCA and its implementing regulations are subject to the Executive Order minimum wage requirement.

Contracts for concessions

The NPRM proposes to define the term *concessions contract* to mean a contract under which the Federal Government grants a right to use Federal property, including land or facilities, for furnishing services. The term *concessions contract* includes, but is not limited to, a contract whose principal purpose is 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. The proposed rule thus extends coverage of the Executive Order to all concession contracts with the Federal Government, including those excluded from SCA coverage by regulations, such as concession contracts with the Federal Government to operate souvenir shops or to provide food or lodging in national parks. *See* 29 CFR 4.133(b).

Contracts in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public

To the extent that such agreements are not otherwise covered by the SCA, the NPRM interprets this provision as generally including leases of Federal property, including space and facilities, and licenses to use such property entered into by the Federal Government for the purpose of offering services to the Federal Government, its personnel, or the general public. For example, a lease of space in a Federal building from a Federal agency to a contractor to operate a child care center to serve Federal employees and/or the general public is covered by the Executive Order.

Contracts that are not covered by the Executive Order and the NPRM

The Executive Order and the proposed rule contain certain narrow exclusions from coverage for the following types of contractual agreements: (1) grants; (2) contracts and agreements with and grants to Indian Tribes under Public Law 93-638, as amended; (3) any procurement contracts for construction that are not subject to the DBA (*i.e.*, procurement contracts for construction under

\$2,000); and (4) any contracts for services, except for those otherwise expressly covered by the proposed rule, that are exempted from coverage under the SCA or its implementing regulations. For example, the SCA exempts contracts for public utility services, including electric light and power, water, steam, and gas, from its coverage. See 41 U.S.C. 6702(b)(5); 29 CFR 4.120. It additionally exempts employment contracts providing for direct services to a Federal agency by an individual. See 41 U.S.C. 6702(b)(6); 29 CFR 4.121. Such contracts would also be exempt from coverage of the Executive Order and the NPRM.

The Department also notes that the Executive Order does not apply to contracts for the manufacturing or furnishing of materials, supplies, articles, or equipment to the Federal Government, *i.e.*, those subject to the Walsh-Healey Public Contracts Act.

Workers who are entitled to the Executive Order minimum wage

Workers performing on covered Federal contracts whose wages are governed by the FLSA, the SCA, or the DBA are entitled to receive the Executive Order minimum wage for all time spent performing on covered Federal contracts. The Executive Order therefore generally applies to the following categories of workers performing on covered Federal contracts: (1) employees who are entitled to the FLSA minimum wage; (2) service employees who are entitled to prevailing wages under the SCA; and (3) laborers and mechanics who are entitled to prevailing wages under the DBA. The Department's proposed rule also specifically notes that the Executive Order minimum wage protections apply to FLSA-covered employees who provide support on SCA- and DBA-covered contracts that is necessary for the performance of the contract. The Executive Order specifically provides that workers whose wages are calculated pursuant to special certificates issued under 29 U.S.C. 214(c)¹ are entitled to receive the Executive Order minimum wage. If a worker is entitled to a wage rate higher than the Executive Order minimum wage pursuant to another Federal or State law (*e.g.*, the DBA or SCA), the worker must be paid the higher wage rate.

Contracting Agency Obligations

The NPRM sets forth the responsibilities of contracting agencies under the Executive Order. Contracting agencies are responsible for ensuring that a contract clause implementing the Executive Order minimum wage requirement is included in any new contracts or solicitations for contracts covered by the Executive Order. Contracting agencies are also responsible for withholding funds when a contractor or subcontractor fails to abide by the terms of the applicable contract clause, such as by failing to pay the required Executive Order minimum wage, and for forwarding any complaints alleging a contractor's non-compliance with Executive Order 13658 to the Wage and Hour Division (WHD).

Contractor Obligations

The Department's proposed rule sets forth certain obligations that contractors and subcontractors must fulfill in order to comply with the Executive Order. For example, contractors and subcontractors must pay not less than the Executive Order minimum wage to workers for all hours spent performing on covered contracts; they must include the Executive Order minimum wage contract clause in lower-tiered subcontracts; and they must comply with obligations related to wage deductions, frequency of pay, and recordkeeping. The NPRM also prohibits the taking of kickbacks from wages paid to workers on covered contracts as well as retaliation against any worker for exercising his or her rights under the Executive Order or the implementing regulations.

¹ 29 U.S.C. 214(c) authorizes employers, after receiving a certificate from the Wage and Hour Division, to pay subminimum wages to workers whose earning or productive capacity is impaired by a physical or mental disability for the work to be performed.

Department of Labor Obligations

Under the Executive Order and the Department's proposal, the Secretary of Labor is required to determine the Executive Order minimum wage rate yearly beginning January 1, 2016, and publish this wage rate at least 90 days before the wage is to take effect. The proposal outlines the methods that the Department will utilize to notify the public of the Executive Order minimum wage, including publication in the Federal Register and on www.wdol.gov.

Enforcement Procedures

Complaints may be filed with the WHD by any person or entity that believes a violation of the Executive Order or its implementing regulations has occurred. The NPRM contains a mechanism for WHD investigations and informal complaint resolution, as appropriate; it also specifies remedies and sanctions for violations of the Executive Order and its implementing regulations, including the payment of back wages and debarment.

The Department's proposal also includes an administrative process, including administrative hearings, to resolve disputes of fact or law.

How to Comment

The Department encourages interested parties to submit comments on the NPRM. The full text of the NPRM, as well as information on the deadline for submitting comments and the procedures for submitting comments, can be found at www.dol.gov/whd/flsa/nprm-eo13658.

The Department will review comments received and issue a Final Rule by October 1, 2014.

U.S. Department of Labor
Frances Perkins Building
200 Constitution Avenue, NW
Washington, DC 20210

1-866-4-USWAGE
TTY: 1-866-487-9243
Contact Us