Office of Advocacy
www.sba.gov/advocacy

Advocacy: the voice of small business in government

July 25, 2014

VIA ELECTRONIC SUBMISSION

The Honorable Thomas E. Perez
Secretary, U.S. Department of Labor
Frances Perkins Building
200 Constitution Avenue, NW
Washington, DC 20210

The Honorable Dr. David Weil
Administrator, Wage and Hour Division
U.S. Department of Labor
Frances Perkins Building
200 Constitution Avenue, NW
Washington, DC 20210

Mary Ziegler
Director of the Division of Regulations,
Legislation, and Interpretation
Wage and Hour Division
U.S. Department of Labor
Frances Perkins Building
200 Constitution Avenue, NW
Washington, DC 20210

Re: Establishing a Minimum Wage for Contractors, Notice of Proposed Rulemaking

Dear Secretary Perez, Administrator Weil and Ms. Ziegler:

The Office of Advocacy (Advocacy) of the U.S. Small Business Administration (SBA) is pleased to submit these comments to the Wage and Hour Division of the U.S. Department of Labor (DOL) regarding its proposed rule, *Establishing a Minimum Wage for Federal Contractors*.[1]

The Office of Advocacy

Congress established Advocacy under Pub. L. 94-305 to represent the views of small entities before Federal agencies and Congress. Advocacy is an independent office within the U.S.

[1] DOL, *Establishing a Minimum Wage for Federal Contractors*, 79 Fed. Reg. 34568 (June 17, 2014).

Small Business Administration (SBA); as such the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. The Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA), gives small entities a voice in the Federal rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, Federal agencies are required by the RFA to assess the impact of the proposed rule on small business and to consider less burdensome alternatives.

The Small Business Jobs Act of 2010 requires agencies to give every appropriate consideration to comments provided by Advocacy. The agency must include, in any explanation or discussion accompanying the final rule's publication in the Federal Register, the agency's response to these written comments submitted by Advocacy on the proposed rule, unless the agency certifies that the public interest is not served by doing so.

Based on small business feedback on this issue, Advocacy is concerned that it remains unclear whether certain types of workers are covered by this rule, and that DOL's Initial Regulatory Flexibility Analysis (IRFA) lacks essential information required by the Regulatory Flexibility Act (RFA). Specifically, DOL's IRFA incorrectly estimates the number of small businesses affected by this rule and does not consider key industries that may be impacted by this proposal. Furthermore, DOL underestimates the compliance costs of this rule and fails to consider some costs to small businesses.

At Advocacy's Small Business Roundtable on this issue, participants stressed that the proposed rule will result in extreme financial hardship for affected small businesses—and may even result in some small businesses on government property closing altogether. The IRFA also does not discuss significant alternatives to this rule that would accomplish the agency's objectives while minimizing the significant economic impact on small businesses as required by the RFA. Given the extent of the anticipated high compliance costs of this proposal, Advocacy recommends that DOL publish a Supplemental IRFA for public comment before proceeding with this rulemaking. DOL should also consider any small business alternatives that may minimize the economic impact of this rulemaking.

Background

On February 12, 2014, President Barack Obama issued Executive Order 13658 ("Order"), which increases the hourly minimum wage for federal contractors, subcontractors and their workers to $10.10 per hour, beginning January 1, 2015; and beginning January 1, 2016, and annually thereafter, an amount determined by the Secretary of Labor.[2] The Order directs the Secretary of Labor to issue regulations by October 1, 2014. On June 17, 2014, DOL issued the proposed rule implementing this Order.[3] Under this rule, the increased minimum wage shall apply only to a new contract. [4]

[2] Executive Order 13658, *Establishing a Minimum Wage for Contractors* ,79 Fed. Reg. 9851 (Feb. 20, 2014).
[3] 79 Fed. Reg. 34568.
[4] *Id.* The increased minimum wage applies if:
(A) it is a procurement contract for services or construction;

On June 24, 2014, Advocacy submitted a comment letter requesting an extension of the comment period for this rule to provide extra time for the small business community to provide meaningful comments; DOL extended the comment period by 11 days.[5]

Small Business Concerns

On April 23, 2014, Advocacy co-hosted a conference call listening session with DOL officials, small businesses, and small business representatives on Executive Order 13658. On July 8, 2014, Advocacy held a Small Business Roundtable on the proposed rule with DOL officials, small businesses, and small business representatives from the construction, service, manufacturing, restaurant and hospitality, and outdoor recreation industries. The following comments are reflective of the issues raised during these discussions and in subsequent conversations with small business representatives.

1. **Types of Workers Covered by the Rule**

As a threshold matter, DOL should clarify the types of workers covered by this regulation. Roundtable participants from the construction industry stated that the proposed rule is not clear whether workers who participate in apprenticeship programs are covered by the rule. One part of the preamble states that individuals who are employed on a Service Contract Act (SCA) contract or a Davis Bacon-Act (DBA) contract and individually registered with the Department's apprenticeship programs are covered by the regulation.[6] However, under the "Exclusions" section, it states that this rule does not cover certain apprentices.[7]

The recreation and hospitality industry also seeks clarification if seasonal workers and students are covered by this regulation. In the "Exclusions" section of this rule, it states that certain students are not covered.[8] The Alliance for International Educational and Cultural Exchange seeks clarification if this rule applies to exchange students performing seasonal work in camps and restaurants located in National Parks. A small camp seeks clarification of whether this rule applies to their 90 summer employees who are college graduates and graduate students and who provide educational programming for a set summer rate. A representative from this camp stated that if these students are included in this rule, it would result in triple their labor expenses and would force them to close after 42 years in business.

(B) it is a contract for services covered by the Service Contract Act;
(C) it is a contract for concessions, including any concessions contract excluded by DOL regulations at 29 CFR 4.133(b);
(D) it is a contract entered into the Federal Government in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public; and

(ii) the wages of the workers are governed by the Fair Labor Standards Act (FLSA), the Service Contact Act (SCA), or the Davis-Bacon Act (DBA).

[5] Comment letter from the Office of Advocacy to the U.S. Department of Labor (June 24, 2014) at: http://www.sba.gov/advocacy/6242014-establishing-minimum-wage-contractors-notice-proposed-rulemaking.
[6] 79 Fed. Reg. at 34577.
[7] 79 Fed. Reg. at 34612. The provision states: "this part does not apply to learners, apprentices or messengers whose wages are calculated pursuant to special certificates issued under 29 U.S.C. 214(a).
[8] *Id.* This provision states: "this part does not apply to student workers whose wages are calculated pursuant to special certificates issued under 29 U.S.C. 214(b).

2. DOL's IRFA Does Not Consider Key Small Business Industries Affected by the Rule

Advocacy is concerned that DOL's IRFA does not consider key small business industries in its analysis. DOL's IRFA does not discuss the numbers of small business that are affected in the following categories: (i) concessions contracts currently excluded by DOL regulations (such as concessions contracts with the National Park Service that provide services to the general public) and (ii) contracts entered into the Federal Government in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public.

For example, a representative from the America Outdoors Association (AOA) cited concern that DOL's analysis did not provide data on the number of recreational companies or the number and type of federal interactions that would be covered in this rulemaking. Small businesses want to know how the rule will apply to U.S. Forest Service, Bureau of Land Management, U.S. Fish and Wildlife Service, and National Park Service contracts, permits and commercial use authorizations. Small camps and outfitting companies have also inquired how this rule impacts seasonal businesses or short term trips to public lands. DOL's IRFA also does not analyze the number of private small businesses that lease space in Federal buildings that would now have to pay a higher minimum wage such as restaurants, gift shops, and day care centers.

Roundtable participants were also concerned that DOL's IRFA does not estimate the number of subcontractors impacted by this new rule. The proposed rule impacts prime contractors and all of its first or lower-tier subcontractors on a contract with the Federal Government.[9] DOL utilizes the General Services Administration's System for Award Management (SAM), a database for primary federal contractors, and estimates that there are 328,552 small contractor firms that could be impacted by this rule. Subcontractors are not required to be in SAM, particularly if they are not paid directly by the Federal government. Other DOL rulemakings have provided estimates or assumptions regarding the number of subcontractors a typical prime contractor may have. Participants at the roundtable also seek clarification on what types of subcontractors are covered by this rule, because they are concerned that everyone in the supply chain may be impacted by this rule. For example, one fast food franchise on a military base seeks clarification on whether all of their food suppliers' workers must also be paid the higher minimum wage.

3. DOL's IRFA Underestimates Small Business Compliance Costs

DOL's IRFA underestimates the costs of the minimum wage increase to affected small businesses; small businesses anticipate much higher costs. DOL only analyzes the cost of the minimum wage increase for entry level workers. Participants at Advocacy's roundtable stressed that because the base pay for workers has increased, they will also have to increase the pay for the rest of the workforce because these other workers may have more experience or may be a supervisor. Additionally, employers may have to incur more than the $10.10 wage per hour. At the Advocacy roundtable, fast food franchisees on bases believe that they will have to pay entry level costs above the minimum wage increase of around $12 or $13

[9] 79 Fed. Reg. at 34572.

per hour, due to payroll taxes and a new health and welfare benefits requirement of $.92 per hour (effective May 16, 2014).[10]

Affected small businesses are concerned that they can't pass on the costs of a higher minimum wage to the government or customers. Fast food franchisees at Advocacy's roundtable expressed concern that DOL is imposing labor costs that are almost double inside the military base than outside the military base (the federal minimum wage is $7.25 an hour) and therefore on-base restaurants may close because they cannot compete with these restaurants outside the military base. Participants noted that franchisees on bases will incur higher costs than traditional federal contractors subject to this rule because they cannot pass the costs onto the federal government or to their customers. Not only do these businesses have to compete with similar restaurants off-base, but many of their lease contracts do not allow them to raise their prices. According to the National Restaurant Association, restaurants in general have thin profit margins and cannot absorb these costs.[11]

One franchisee participant stated that the unintended consequence of this rule is that he has to either fire the highest paid workers, eliminate two or three positions at each location or simply close altogether. These sentiments were echoed by other participants who own cafeterias and hotels on military bases. One fast food franchisee stated that military personnel may suffer, as they will have fewer food and retail options on-base and because many of their family members and dependents also work at these establishments. Small businesses with leases in Federal buildings face the same concerns, as they face higher labor costs than their competitors across the street.

Advocacy also received feedback from small recreational guides and camps who stated that the higher minimum wage requirement would be extremely burdensome for operators of multi-day trips or overnight trips in National Parks; and the rule would make these types of trips unprofitable to operate.[12] For example, Advocacy spoke to a small recreational company who operates multi-day river guide trips who stated that as a result of this rule he will have to have more customers per excursion and also will raise his prices; he believes that he will lose a significant amount of business as a result.

---

[10] Department of Labor Website, *Announcements, available a*t http://www.wdol.gov/. In 2013, DOL initially issued health and welfare benefits, vacation and holiday pay for Service Contract Act workers of $3.81 per hour. However, on May 16, 2014, DOL lowered this rate to $.92 per hour for fast food workers ($.66 per hour in fringe benefits, $.17 per hour in vacation pay for workers who have been employed for more than a year, and $.09 per hour in holiday pay). According to roundtable participants, fast food establishments were exempt from this requirement in the past.

[11] National Restaurant Association, *2013-2014 Restaurant Operations Report* (2014), available at: http://www.restaurant.org/News-Research/Research/Operations-Report. According to this report, median income before taxes for full-service restaurants was 4.1 percent of total sales in operations is under $15; five percent for restaurants with an average check of $15 to $24.99; and 4.5 percent for fullservice operations with average checks of $25 and over.

[12] 79 Fed. Reg. at 34582. Current regulations require employers to include all periods in which a worker is permitted to work, whether or not required to do so, and all time during which the worker is required to be on the employer's premises or a prescribed workplace (although in some cases employees who work more than 24 hours may agree with an employer to exclude sleep hours).

DOL's IRFA also omits many small business compliance costs from this regulation, such as the high paperwork burdens required by this rule. DOL acknowledges that there may be other costs that have not been analyzed in this IRFA; and DOL specifically seeks feedback on "management and human resources costs, impacts of staffing and other related issues." Roundtable participants commented that small businesses will have difficulty complying with this regulation because they often do not have a dedicated human resources or legal staff to understand and implement this rule. Small businesses commented that they will have to make staff changes to try to absorb the costs of this rule, such as firing staff or limiting hours.

Small business participants cited one particularly burdensome provision, which impacts federal contractors and concessions companies whose workers perform both covered (federal work) and non-covered work. These employers must pay the increased minimum wage on all work, unless they can segregate or track the work completed by this worker in both of these categories.[13] This paperwork burden is not calculated in DOL's IRFA.[14] For example, an employee at a recreational company may be taking customers on a multi-day backpacking trip in both Federal land and private land; this employee would have to track how many hours they spent in each of these locations. To complicate matters, employers would have to segregate and track the hours of support staff that are not normally covered under the Service Contract Act or the Davis-Bacon Act but are covered by the Fair Labor Standards Act. For example, a construction contractor would have to segregate and track the hours of a security guard patrolling a construction worksite or who performs some administrative support for a DBA contract.[15]

4. DOL Must Consider Significant Regulatory Alternatives

Under the RFA, the IRFA must contain a description of any significant regulatory alternatives to the proposed rule which accomplish the stated objectives of the applicable statutes and which minimize any significant economic impact of the proposed rule on small entities.[16] DOL's IRFA states that the Executive Order does not allow the agency to consider alternatives that will minimize the impact of this regulation for small businesses.[17] The stated goal of Executive Order 13658 is to "increase efficiency and costs savings in the work performed by parties who contract with the Federal Government."[18] However, small businesses at Advocacy's roundtable cited the Executive Order's unintended consequences of high costs and possible closures for small businesses such as franchisees and recreational companies. DOL should consider any alternatives provided in the comment period which minimize the impact of the rule on small business while accomplishing the objectives of the rule.

---

[13] 79 Fed. Reg. at 34572.
[14] 79 Fed. Reg. at 34596. In the Executive Order 12866 section, DOL calculates one hour of regulatory familiarization time—the time necessary for contractors to read the contract clause, evaluate and adjust their pay rates to ensure workers on covered contracts receive a rate not less than the Executive Order minimum wage, and modify their contracts to include the required clause. Small businesses at the Advocacy's Roundtable have commented that they will incur higher costs and burdens to complete these tasks.
[15] *Id.*
[16] 5 U.S.C. § 603(c).
[17] 79 Fed. Reg. at 34604.
[18] 79 Fed. Reg. at 9851.

Conclusion

Based on small business feedback, Advocacy is concerned that this rule will result in unintended consequences of high costs and possible closures for small businesses. For this reason, Advocacy strongly recommends that DOL republish for public comment a Supplemental IRFA reanalyzing the numbers of small businesses affected and compliance costs before proceeding with this rulemaking. DOL should also adopt any recommended small business alternatives that may minimize the economic impact of this rulemaking. For additional information or assistance please contact me or Janis Reyes at (202) 619-0312 or Janis.Reyes@sba.gov.

Sincerely,

Winslow Sargeant, Ph.D.
Chief Counsel for Advocacy

Janis C. Reyes
Assistant Chief Counsel

Copy to: The Honorable Howard Shelanski, Administrator, Office of Information and Regulatory Affairs, Office of Management and Budget