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U.S. Department of Labor, Room S-3510
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Washington, DC 20210

RE: Proposed Rule, Establishing a Minimum Wage for Contractors (RIN 1235-AA10)

The National Employment Law Project (NELP) appreciates the opportunity to submit comments on the proposed rule implementing President Obama’s Executive Order 13658, “Establishing a Minimum Wage for Contractors” (EO). Over many years of research, we have found that decent wages for contracted workers leads to better quality of services, lower employee turnover, and more robust bidding by high-road employers, all of which will improve the efficiency and economy of federally contracted work.¹

We believe that the impact analysis offered by the Department overstates the increased cost to contractors, and by extension to contracting agencies, due to the volume of states and cities that are now raising their minimum wages to a level equal to or above the level set by this EO. As proposed §10.22(a) points out, contractors must continue to abide by applicable Federal or State prevailing wage laws, as well as applicable laws or municipal ordinances that establish a higher minimum wage. Five states have already raised their minimum wage to move toward \$10.10 an hour or higher (Massachusetts, Vermont, Connecticut, Maryland, and Hawaii) and several jurisdictions now call for even higher rates, including Seattle, Washington, the District of Columbia, and several California cities. The minimum wage across California, the nation’s largest state, will be just 10 cents less than that established by the EO. In these cases, the cost of the wage increase called for in the EO for workers performing contracted work in those states does not add additional costs. The section further reiterates that if a contract is covered by the Service Contract Act (SCA) or Davis-Bacon Act (DBA) and the wage rate under those acts is higher than the minimum wage established by this EO, the contractor must still pay the prevailing wage.

Raising the Minimum Wage for Contracted Workers Fulfills Historical Commitments to Make Taxpayer-Funded Jobs Good Jobs

We support President Obama’s recognition that the federal government can and should act as a model purchaser of goods and services. In addition to improving the jobs and lives of hundreds of thousands of low-wage workers performing federal work, researchers have estimated that firms that do business with the federal government employ as much as a quarter of all American workers, so to the extent that high standards on government work can influence employment practices across a company’s workforce, this new policy has the potential to trigger massive improvements across the national labor market.²

Throughout the twentieth century, the United States Congress recognized its responsibility to promote quality jobs and high standards in procurement policies and passed a series of measures intended to protect those who did the work paid for by the federal government.³ These lawmakers recognized that when low-bid

bidders win federal contracts by paying poverty-level wages, responsible employers who would create quality jobs would be unable to compete for business with the government.⁴ Unfortunately, as pressures to award bids based almost exclusively on the lowest-cost proposal and changes in the broader American economy revealed shortcomings in these protections, the current generation of lawmakers has proven unwilling to reiterate the commitments of their predecessors. We applaud the Administration's determination to address these deficiencies and urge Congressional leaders to follow suit and take action to ensure that taxpayer-funded jobs are not poverty-level jobs.

Furthermore, we commend the Secretary of Labor and the Department's Wage and Hour Division for issuing its proposed rulemaking so quickly, putting the process on pace for issuing final regulations by October 1, 2014 and being prepared for the increase in wages beginning on January 1, 2015. Many federally contracted service workers have not received meaningful wages for many years, and the timely implementation of this EO will mean real improvements for their family budgets, their communities, and the national economy.

Even with a Strong Wage Floor, More Must Be Done to Raise the Quality of Federally Contracted Jobs

At the same time, we urge federal policymakers to see this measure as a first step in a longer process to make federally contracted jobs high quality ones, and to continue to address the myriad workplace problems that these workers face. Numerous investigations by federal officials have found that many employers who hold federal contracts also have records of breaking employment laws. A 1998 report by the U.S. Government Accountability Office (GAO) found that 13 percent of all federal contracts in 1993 (as measured by dollars spent) were awarded to 80 firms that had violated the National Labor Relations Act or the Occupational Safety and Health Act.⁵ A 2004 GAO investigation found that in more than three-fourths of cases in which workers alleged violations of federal SCA contracting rules, employers had failed to pay legally mandated minimum wages and benefits.⁶ And a 2013 report issued by the Senate HELP Committee found that approximately 30 percent of the companies upon which the largest fines were levied for violations of federal wage and hour and health and safety laws also won bids for federal contracts.⁷ When NELP interviewed hundreds of federally contracted service workers in the summer of 2013, significant numbers reported being denied lunch or rest breaks, being made to work "off the clock" by their employers, and being injured on the job.⁸

These illegal behaviors go beyond hurting workers. As early as the 1980s, an audit of the Department of Housing and Urban Development found a "direct correlation between labor law violations and poor quality construction" on HUD projects. The audit concluded that, "[T]his systematic cheating costs the public treasury hundreds of millions of dollars, reducing workers' earnings, and driving the honest contractor out of business or underground."⁹ The Center for American Progress has found that roughly one quarter of federal contractors with workplace violations were also found to have problems performing the scope of work in the contract; taxpayers who fund companies who break employment laws may find themselves paying for companies that break other rules and regulations as well.¹⁰

The quality of service on these contracts can also suffer unless measures are implemented to ensure workforce stability. When a contract is awarded to a new bidder, workers who have been employed in a federal facility for years and who have accumulated significant knowledge about policies and practices may lose their jobs. If a labor conflict emerges between workers and a contractor or concessionaire, workers may lose pay, hours, or even their jobs, and the agency contracting for the services may risk a loss of revenue or a disruption of

service. Washington D.C.-based contract workers surveyed by NELP confirmed these practices, noting that employers cut scheduled work hours and intimidated them when they attempted to organize to address poor working conditions. Worker retention and labor peace policies, such as those adopted by numerous cities and states as part of their living wage policies, would provide critical protections for federally contracted workers and the agencies that ultimately pay for their labor.¹¹

The Notice of Proposed Rulemaking Includes Significant Provisions that Expand Worker Protections and Reflect Current Labor Market Structures, But Some Workers are Still Left Behind

NELP strongly supports the proposal to define “concessions contracts,” “contract,” and “contract-like instrument” to include a broad range of land, facilities, and services. We believe these definitions fairly reflect the increasing complexity of leasing and contracting relationships between the Federal Government and the private sector, and that they restore the original intention to raise job quality for private sector workers who perform work for the federal government.

Proposed §10.2 details how the Department would implement the provision to incorporate existing definitions under the Fair Labor Standards Act (FLSA), SCA, and DBA, and we applaud the Department for doing so in such a way as to extend coverage to workers who have previously been excluded from some protections. We support proposed §10.3(a)(iii) implementing the extension of the EO to concessions contracts furnishing food, lodging, automobile fuel, souvenirs, newspaper stands, and recreational equipment to the general public, and §10.3(a)(1) extending coverage to contracts offering services to Federal employees, their dependents, or the general public. Similarly, by extending coverage to construction workers who are not laborers or mechanics but who are governed by the FLSA, proposed §10.3(a)(2) reflects the real working conditions on contemporary construction worksites. Section 3 of the EO, and proposed §10.28 implementing that section, will finally bring tipped workers’ wages closer to those of their non-tipped counterparts, and its subsections making clear that service charges added by the business do not constitute tips to the workers, and that employers may not use pooled tips to supplement the wages of non-tipped employees address ongoing abusive practices in these industries.

Together, these several provisions provide a solid wage floor for workers in important and, in some cases, growing industries, like food service, personal care, construction, and child care. Further, because these occupations are disproportionately female, as are those that typically depend upon voluntary tips from customers, these extensions of decent minimum wages will especially help women workers and set important precedents in heavily feminized industries.

However, NELP is disappointed that the EO did not include workers subject to the Walsh-Healey Public Contracts Act (PCA). These workers manufacture critical materials, supplies, and equipment for the Federal Government, including uniforms and equipment for military personnel. Indeed, in 2012 the Defense Logistics Agency alone purchased almost \$2 billion worth of clothing and textiles from 400 suppliers.¹² The uniform manufacturing workers interviewed by NELP in 2013 reported low base pay rates coupled with challenging and ever-changing piece rate bonuses that in some cases meant they earned more money sewing civilian clothes for private sector discount retailers than they did making uniforms for service men and women.¹³ Similarly, while section 7 of the EO excludes “grants” from coverage, we note that researchers have estimated nearly 1.2 million low-wage workers’ labor is funded by Medicare and Medicaid spending alone.¹⁴ We encourage policy

makers to further the process started by this EO to create fair wage floors for these important, and still excluded, federally-funded workers.

We also note that the starting cash wage for tipped workers as set by the EO (\$4.90) constitutes just over 40 percent of the minimum wage floor being set for federally contracted workers, and that the proposed pace for increasing that cash wage until it reaches 70 percent of the wage in effect under section 2 of the order could prove slow for workers who are struggling to make ends meet. The sub-minimum wage for tipped workers forces these workers to rely heavily on their tips for income, as they lack a strong base income paid directly by their employers. Without a significant and stable base income, tipped workers are vulnerable to sudden drops in pay as tips are notoriously erratic, varying from shift to shift and season to season.

Indeed, a recent study of tipped workers demonstrates that in states where tipped workers get the full minimum wage as their base wage paid directly by their employer (with tips in addition to, and not a substitute for, wages), poverty rates are almost 4 points lower than in states with a lower base rate for workers in the same occupations. As a result, this study finds that approximately 46 percent of tipped workers depend on public benefits to survive.¹⁵ For federally contracted work, this means that cost savings realized by the contracting agency from a sub-minimum tipped wage are simply pushed onto the budgets of agencies that fund and distribute safety net programs. Furthermore, the existing FLSA requirement provision that employers make up the difference when tips are not enough to bring a worker's average wage up to the full minimum wage is notoriously difficult to enforce; a multi-city survey of low-wage workers found that 30 percent of tipped workers were not paid the tipped worker minimum wage, and that 12 percent reported their employer or supervisor stole their tips.¹⁶

The NPRM Includes Meaningful Enforcement Proposals, But Widespread and Well-Documented Illegal Employment Practices by Federal Contractors Call for More

NELP endorses the Administration's assertion in section 2(a) of the EO that compliance with the minimum wage obligation rises to the level of an express "condition of payment" to a contractor or subcontractor. This sends a clear message to employers that fair payment of employees is a priority for federal agencies, and that those who abide by the law will not find themselves unfairly competing with those who would cheat workers of pay. To that end, we support the withholding procedures proposed in §10.11(c) and detailed in §10.44(a) and (b), as well as the debarment provision modeled on those of the SCA and DBA proposed in §10.44(c) and §10.52.

We also commend the DOL for specifying in proposed §10.11(d), that contracting agencies report all complaint-related information to the WHD's Branch of Government Contracts Enforcement within 14 calendar days of receipt of a complaint. However, as last year's U.S. Senate HELP Committee's report underscored, all too often contracting officers do not have important information about complaints when assessing potential bidders and we urge the DOL to ensure that complaints under the new Minimum Wage EO be fully integrated into the FAPIIS database.¹⁷

While we appreciate proposed §10.41 and §10.42 for allowing both oral and written complaints, complaints in languages other than English, and for confidentiality in making complaints, we do believe that in an enforcement system that depends upon worker reports of wrongdoing, every effort must be made to ensure

workers know their rights and the amount of payment that they are due. Proposed §10.12(c) provides that the Secretary will notify contractors and subcontractors of the applicable minimum wage each year, and states that the Administrator of the WHD will publish the information on the DOL website and “may” publish the applicable wage in “any other media the Administrator deems appropriate.” This is inadequate notice to affected workers in a system that depends upon their monitoring of their own pay. In NELP’s interviews with contracted workers in Washington, D.C., many worked for employers engaged in what this rule will categorize as “contract-like” arrangements, relationships complicated enough such that the workers did not even realize they worked on a federally funded contract. To expect that they would go to the U.S. Department of Labor’s website to determine what they should be paid under this EO is unfair. The Administrator of the WHD should be required to publish the annual applicable minimum wage in mainstream media outlets, and employers should be required to provide the applicable wage rate to employees on a regular basis and workers should be provided with clear information about which of their hours of work were performed in connection to a contract subject to the EO if the employer intends assign them to both covered and uncovered job duties.

Section 4(c) of the Order directs that the regulations the Secretary issues should, to the extent practicable, incorporate existing procedures, remedies, and enforcement processes under the FLSA, SCA and DBA. We would therefore urge that proposed §10.44(a), which provides for the remedies available to a worker whose wages have been unlawfully withheld, be expanded to include an additional amount of damages equal to the unpaid wages as liquidated damages, as provided for under Section 216(b) of the FLSA. Such a “double damages” provision is crucial in deterring violations in the first instance, because without it, the only damages an employer found liable for underpaying its workers would have to pay would be the wages it should have paid its employees in the first place. For this reason, double damages are a crucial economic incentive to foster compliance with the Act. Indeed, as the Supreme Court explained early on in the FLSA context, “not the least effective aspect of this remedy is the possibility that an employer who gambles on evading the Act will be liable for payment not only of the basic minimum originally due but also damages equal to the sum unpaid.” *Brooklyn Sav. Bank*, 324 U.S. 697, 709 (1945).

Thank you again for the opportunity to share NELP’s reactions to the Proposed Rule, Establishing a Minimum Wage for Contractors (RIN 1235-AA10). We believe that the President’s EO and the Department of Labor’s commitment to implementing and enforcing it are an important first step toward reinstating the premise that all federal taxpayer-funded jobs should be good jobs. This long-overdue raise for low-wage contracted workers will improve the lives of workers, their families, and their communities and allow them to be full participants in the American economy.

The following organizations also sign on to NELP’s comments regarding RIN 1235-AA10:

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Americans for Democratic Action
Dēmos
InclusionUS (Centre for Economic & Social Inclusion)
National Center for Economic Justice
National Partnership for Women & Families
National Women’s Law Center
USAction

¹ See for example, Catherine Ruckelshaus, Rebecca Smith, Sarah Leberstein, and Eunice Cho, “Who’s the Boss: Restoring Accountability for Labor Standards in Outsourced Work,” New York, NY: National Employment Law Project, May 2014; Eunice Hyunhye Cho, Anastasia Christman, Maurice Emsellem, Catherine Ruckelshaus, and Rebecca Smith, “Chain of Greed: How Walmart’s Domestic Outsourcing Produces Everyday Low Wages and Poor Working Conditions for Warehouse Workers,” New York, NY: National Employment Law Project, June 2012; Rebecca Smith, Paul Alexander Marvy, and Jon Zerolnick, “The Big Rig Overhaul: Restoring Middle-Class Jobs at America’s Ports Through Labor Law Enforcement,” Washington, D.C.: National Employment Law Project, Change to Win Strategic Organizing Center, and the Los Angeles Alliance for a New Economy, February 2014; Anastasia Christman, Amy Masciola, Robert Masciola, Shelley Sperry, and Paul Sonn, “Taking the Low Road: How the Federal Government Promotes Poverty-Wage Jobs Through its Contracting Practices,” Washington, D.C.: National Employment Law Project, July 2013; Paul K. Sonn and Tsedeye Gebreselassie, “The Road to Responsible Contracting: Lessons from States and Cities for Ensuring that Federal Contracting Delivers Good Jobs and Quality Services,” New York, NY: National Employment Law Project, 2009; David Madland, Karla Walter, Paul Sonn, and Tsedeye Gebreselassie, “Making Contracting Work: Promoting Good Workplace Practices in the Federal Procurement Process,” Washington, D.C.: Center for American Progress Action Fund with the National Employment Law Project, 2009.

² “Jobs Well Done: A Special Report on How the Government Can Use its Executive Power,” Washington, D.C.: The American Prospect, 2010.

³ William G. Whittaker, “Federal Contract Labor Standards Statutes: An Overview,” Washington, D.C.: Congressional Research Service, 2005; U.S. Congress, House Committee on Labor, “Hours of Labor and Wages on Public Works,” Hearings on H.R. 17069, 69th Congress, February 18, 1927; “The Walsh-Healey Public Contracts Act,” U.S. Department of Labor, available at <http://www.dol.gov/compliance/laws/comp-pca.htm>; “The McNamara-O’Hara Service Contract Act,” U.S. Department of Labor, available at: <http://www.dol.gov/compliance/laws/comp-sca/htm>; and House Report No. 948, September 1, 1965.

⁴ Herbert Moton, “Public Contracts and Private Wages: Experience under the Walsh-Healey Act,” Washington, D.C.: The Brookings Institution, 1965.

⁵ “Federal Contractors: Historical Perspective on Noncompliance with Labor and Worker Safety Laws,” Washington, D.C.: GAO, 1998.

⁶ “Service Contract Act: Wage Determination Process Could Benefit from Greater Transparency, and Better Use of Violation Data Could Improve Enforcement,” Washington, D.C.: GAO, 2005.

⁷ United States Senate, Health, Education, Labor, and Pensions Committee Staff, “Acting Responsibly?: Federal Contractors Frequently Put Workers’ Lives and Livelihoods at Risk,” Washington, D.C.: December 2013.

⁸ “Taking the Low Road,” 2013.

⁹ The HUD Inspector General found that “Poor workmanship quality, in our opinion, results from the use of inexperienced or unskilled workers and shortcut construction methods... Poor quality work led to excessive maintenance costs and increased risk of defaults and foreclosures...” U.S. Department of Housing and Urban Development, Office of Inspector General, Audit Report on Monitoring and Enforcing Labor Standards (1983) (on file with the National Employment Law Project).

¹⁰ David Madland and Michael Paarlberg, “Making Contracting Work for the United States: Government Spending Must Lead to Good Jobs,” Washington, D.C.: Center for American Progress, December 2008.

¹¹ See the Partnership for Working Families, “Policy and Tools: Worker Retention Policies,” Website resource page, for more on these policies. Available at: <http://www.forworkingfamilies.org/resources/policy-tools-worker-retention-policies>

¹² “Clothing and Textiles Directorate,” Defense Logistics Agency, Department of Defense. Available at: <http://www.troopsupport.dla.mil/ClothingandTextiles/>

¹³ “Taking the Low Road,” 2013.

¹⁴ Amy Traub and Robert Hiltonsmith, “Underwriting Bad Jobs: How Our Tax Dollars Are Funding Low-Wage Work and Fueling Inequality,” New York, NY: Dēmos, 2013.

¹⁵ Silvia A. Allegretto and David Cooper, “Twenty-three Years and Still Waiting for Change: Why It’s Time to Give Tipped Workers the Regular Minimum Wage,” Washington, D.C.: Economic Policy Institute, 2014.

¹⁶ Annette Bernhardt, et. al., “Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America’s Cities,” New York, NY: National Employment Law Project, 2009.

¹⁷ “Acting Responsibly?” 2013.