THE IMPACT OF EXECUTIVE ORDER 13658 ON PUBLIC LAND GUIDES AND OUTFITTERS

HEARING

BEFORE THE

SUBCOMMITTEE ON
THE INTERIOR

OF THE

COMMITTEE ON OVERSIGHT
AND GOVERNMENT REFORM
HOUSE OF REPRESENTATIVES

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THE IMPACT OF EXECUTIVE ORDER 13658 ON PUBLIC LAND GUIDES AND OUTFITTERS

Wednesday, June 10, 2015

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON INTERIOR
COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM,
Washington, D.C.

The subcommittee met, pursuant to call, at 10:05 a.m., in Room 2154, Rayburn House Office Building, Hon. Cynthia M. Lummis [chairman of the subcommittee] presiding.

Present: Representatives Lummis, Buck, Palmer, Lawrence, and Plaskett.

Also Present: Representative Meadows.

Mrs. LUMMIS. Good morning. The Subcommittee on the Interior will come to order.

Without objection, the chair is authorized to declare a recess at any time.

Today the Subcommittee on the Interior will examine the impact of Executive Order 13658 on Public Land Guides and Outfitters. The executive order mandates a $10.10 minimum hourly wage be paid by employers who contract with the Federal Government. The order was issued in February 2014, and the implementing rule was finalized by the Department of Labor in October 2014.

I want to make it clear that we are not here today to debate the idea of raising the minimum wage in and of itself. That will be done by another committee at another time, but today we're here to discuss the impact on—of how this order and its implementation will negatively impact seasonal rural businesses.

The order will leave many locales in danger of losing small businesses that are providing outdoor and recreational services to the public. It's particularly damaging to rural economies that rely on tourism revenue. Wyoming had more than 10 million visitors who contributed more than $3 billion to the economy in 2014, according to the Wyoming Office of Tourism, from skiing to river rafting trips to trips on horseback. Many of these visitors rely on private businesses that operate on Federal lands.

The Federal Government has promoted tourism as a replacement for logging and mineral development projects that have been strangled by regulation, so it's rather ironic that now the executive branch is working to regulate wilderness tourism out of business. These businesses provide young Americans an opportunity to obtain employment while also providing a valuable service to the visitors of these taxpayer-owned lands.

The rule unnecessarily burdens seasonal operators and small businesses using permits to enhance the use of our outdoors. The Forest Service submitted comments upon the proposed rule, stating that these seasonal guides and outfitters operating under permit are not Federal contractors and, as a result, should be exempt. As a Federal agency very familiar with guides and outfitters using the land under its jurisdiction, the Forest Service recognizes the unique nature of these businesses. It's unfortunate that the Department of Labor chose to disregard them.

As Americans, we are fortunate to live in a Nation with diverse and beautiful landscapes. These landscapes provide families and individuals affordable quality recreation opportunities. Public land guides and outfitters deliver a service that allows for an indepth enjoyment of these activities. This executive order unnecessarily endangers the economic existence of this industry and diminishes the enjoyment of our public lands by Americans nationwide.

Representative Chris Stewart of Utah has introduced H.R. 2215, the Outdoor Recreation Enhancement Act. This legislation seeks to maintain the current level of tourism on public lands. Today we will hear from Congressman Stewart about his legislation to address these concerns and protect rural jobs. We will then hear from representatives of the outfitter and guide community to discuss how their businesses operate and the effects this rule will have on them.

We will also hear from a representative of the Department of Labor, Wage and Hour Division, regarding the implementation of the President's executive order and the rule to enforce its provisions across the Federal Government.

What we have here is something that, unfortunately, we see time and again, especially in the West. The Federal Government in Washington forcing a one-size-fits-all directive on the American people. I sincerely hope that the Department of Labor listens closely to the representatives that we have here and recognizes that this situation as presently drawn up is not workable. I sincerely hope that we can take a commonsense approach to this issue and do the right thing.

With that, I'd like to thank our witnesses in advance for their testimony. I now recognize Ms. Lawrence, the ranking member of the Subcommittee on the Interior, for her opening statement.

Mrs. LAWRENCE. Thank you, Madam Chair, for holding this hearing. Today we are focussing on the outfitter and outdoor guide business that holds permits to conduct business on Federal land. I understand from the testimony that these organizations are looking for an exemption to the Federal minimum wage rule so that workers will be paid less than the $10.10 required in the President's executive order.

I always support the rights of businesses to earn a profit in their chosen field. However, I do not support their right to earn extra profits at the expense of hard-working Americans. Just as business owners must provide for their families, so must the people who work for them. We must strike a balance between competing interests. I hope that today's testimony can help us to do so with respect to the outdoor industry.

I want to also note that decades of research have shown that raising the minimum wage raises economic growth, and raising the minimum wage is one of the most effective economic tools we have to ensure that the American working class retains its position as the most affluent in the world, a destination it's recently lost.

President Obama's Executive Order 13658 established a minimum wage of $10.10 for businesses that contract with the Federal Government. The order was based on a well-supported finding that raising the pay of low-wage workers increases the quality of their work; more importantly, enables them to support themselves and their families. It should be noted that 29 States and the District of Columbia as well as 21 cities and counties have set their minimum wages above the $7.25. It is also important to note that data has shown that an individual that makes the current $7.25 minimum wage earns about $15,000 a year. Now, let's assume that a husband and wife with two children both make the minimum wage and work full time. That's a gross income of approximately $30,000. You break that down to monthly and weekly, having to feed, clothe, provide housing. I'm from Michigan. There is no public transportation, so cars, insurance, and gasoline.

We are creating a society that I feel has effectively been addressed through the President's executive order, and I do believe firmly that I have the responsibility in this Congress to ensure that, in America, that those who are working every day have what they call an opportunity and resources. If they work every day hard, and they do their jobs, that they can, at minimum, support their families and not be in poverty.

Thank you so much, and I look forward to the testimony today. Thank you, Madam Chair.

Mrs. LUMMIS. I thank the ranking member.

We're pleased that our fellow colleague from the full committee, Mr. Meadows, has joined us today.

Without objection, Mr. Meadows is welcome to participate fully in today's hearing.

Welcome.

Thank you. I'll hold the record open for 5 legislative days for any member who would like to submit a written statement.

We'll now recognize our distinguished witness on our first panel. I'm pleased to welcome our colleague, the Honorable Chris Stewart, Congressman from Utah's Second District.

Welcome, Congressman. We thank you for your appearance today, and we look forward to your testimony. We know you're in a markup in another committee, so, without further ado, know that your entire written statement will be made part of the record. And the floor is yours.

STATEMENT OF THE HON. CHRIS STEWART, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF UTAH

Mr. STEWART. Thank you, Madam Chair. It's interesting to be on the other side of the table here. It's kind of lonely down here. Thank you for holding this hearing, Ranking Member Mrs. Lawrence as well, to give us this opportunity to look at how the President's executive order on minimum wage is harming seasonal

recreation jobs and public lands and how I believe my bill, the Outdoor Recreation Enhancement Act, can address the problem.

This may not be the most exciting issue, I recognize that, but it's an important one. It impacts real people, and I appreciate the chance to be part of the discussion here today. And, again, I apologize in advance for the fact that I have to leave immediately after my testimony.

Chairwoman, you and I both represent districts that are almost entirely controlled by the Federal Government. Federal ownership on our public lands has all kinds of frustrating outcomes for the residents of Western States, and I'm here to talk about one of those situations, where decisions made here in Washington, D.C., are hurting local businesses, local jobs, and access to public lands.

In February of 2014, President Obama issued an executive order establishing a new minimum wage for Federal contractors which raises the minimum wage to $10.10 per hour for businesses operating under Federal contracts.

First, I should note the minimum wage itself is a misguided economic policy that hurts the very people that we most want to help, those at the bottom of the economic scale. Study after study shows that increasing the minimum wage increases unemployment among low-skilled workers. It accelerates the move from labor to capital and makes it harder—not easier but harder—for young people to get those entry-level jobs that develop the basic skills that helps workers advance and earn more.

But, of course, we're not here to talk about that. We want to talk about the impact the President's actions are having on a specific industry. Because the executive order applies to businesses with a Federal contract, that includes guides and outfitters and other recreational businesses whose only connection to the Federal Government is a permit to operate on Federal lands.

That permit is a pretty tenuous link, but it's enough to bring these businesses under the President's executive order. The Department of Labor's subsequent interpretation of the order requires a number of new regulations that will add additional compliance cost to an industry that operates on very small margins. This increase will force many outfitting businesses to either close or to cease operations on public lands or to operate with fewer workers.

Madam Chairwoman, as you know, my district is huge. It's almost 40,000 square miles, and it comprises almost entirely of public land. We have four national parks and millions of acres of BLM and Forest Service land. Raising the cost of businesses to operate on these public lands will certainly have an impact on local jobs and the ability of guides and outfitters to provide the remarkable experience that attracts millions of visitors from around the world every year to our public lands.

We have other witnesses here who I'm sure will elaborate on how some of these new costs will impact their businesses, but I'd like to briefly read from a letter sent to me by a tour operator located in my district that addresses his concerns. He says: "We very much want to maintain our commitment to the recreational experience in national parks and on public lands. However, the cost of compliance and the draconian overtime restrictions created by this rule

have significant impacts on our business. So this is very serious to us, and we may have to cease running trips in national parks."

This business owner is not alone. I'm sure that other witnesses today will testify of similar concerns. To address these problems, I again have proposed the Outdoor Recreation Enhancement Act just to simply clarify and expand an existing exemption to wage and hour laws for seasonal recreational establishments under the Fair Labor Standards Act.

The bill will broaden this exemption, which currently exempts ski resorts to include businesses involving rafting, horseback riding, hiking, cycling, and other seasonal recreational business, and I think that's key to point out: These are seasonal recreational businesses.

It's also important to emphasize that these—these businesses typically employ high school and college students who are looking for a position for a summer and want to spend time outdoors. Congress already recognized how these circumstances applied to similar industries almost 40 years ago when it exempted the ski business operating on public lands.

My bill is a simple fix that will allow these businesses to continue to operate on Federal lands and allow all of us the opportunity to enjoy extraordinary experiences in our national parks and other public lands. And for those reasons, I'm grateful for this opportunity to appear before this subcommittee.

And, Madam Chairwoman, I yield back my time.

[Prepared statement of Mr. Stewart follows:]

The Impact of Executive Order 13658 on Public Land Guides and Outfitters

Representative Chris Stewart

Thank you Chairwoman Lummis for holding this hearing to look at how the President's executive order on the minimum wage is harming seasonal recreation jobs on public lands and how I believe my bill, the *Outdoor Recreation Enhancement Act*, can address the problem. This may not be the most exciting issue, but it is an important one that impacts real people, and I appreciate the chance to be a part of the discussion.

I apologize in advance that I will have to leave immediately after my testimony to participate in a mark-up in another committee.

In February of 2014, President Obama issued an executive order establishing a new minimum wage for federal contractors which raised the minimum wage to $10.10 per hour for businesses operating under federal contracts.

First I should state that the minimum wage itself is bad economics that hurts the very people we should most want to help—those at the bottom of the economic scale. Study after study shows that increasing the minimum wage increases unemployment among low-skilled workers. It accelerates the move from labor to capital and makes it harder for young people to get those entry-level jobs that develop the basic job skills that help workers advance and earn more.

But of course we're here to talk about the impact the President's actions are having on a specific industry. Because the executive order applies to businesses with a federal contract, this includes guides, outfitters, and other recreational businesses whose only connection to the federal government is a permit to operate on federal lands. That permit is a pretty tenuous link, but it's enough to bring these businesses under the President's executive order. The Department of Labor's subsequent interpretation of the order requires a number of new regulations that will add additional compliance costs for an industry that operates on very small margins. This increase will force many outfitting businesses to either close, cease operations on public lands, or operate with fewer workers.

Madame Chairwoman, as you know, my district is huge and is comprised almost entirely of public land. We have four national parks and millions of acres of BLM and Forest Service land. Raising the costs for businesses to operate on these public lands will certainly have an impact on local jobs and on the ability of guides, outfitters, and other recreational businesses to provide remarkable experiences for the millions of visitors who come from all over the world each year to recreate on our public lands.

We have other witnesses here who I'm sure will elaborate on how these new costs will impact their businesses, but I'd like to briefly read from a letter sent to me by a travel tour operator located in my district, describing his concerns with the executive order. He wrote,

> We very much want to maintain our commitment to the recreational experience in National Parks and on other public lands. However, the cost of compliance and the draconian overtime restrictions created by this rule, have significant impacts on our business. This is so serious to us that [we] may have to cease running trips in National Parks.

It's important to note that these businesses are *seasonal*. Most only operate a few months a year. The employees are typically high school and college students who are looking for a position for the summer and want to spend time outdoors. Congress already recognized how these circumstances applied to a similar industry almost 40 years ago when it exempted ski businesses operating on public lands from the Fair Labor Standards Act.

To address the problem, what I propose with the *Outdoor Recreation Enhancement Act* is to simply clarify and expand an existing exemption to wage and hour laws for seasonal recreational establishments under the Fair Labor Standards Act. The bill will broaden the exemption, which currently exempts ski resorts, to include businesses involved in rafting, horseback riding, hiking, cycling, and other seasonal recreational businesses.

It's a simple fix that will allow these businesses to continue to operate on federal lands and allow all of us the opportunity to enjoy extraordinary experiences in our national parks and other public lands.

Again, I appreciate the opportunity to testify.

Mrs. LUMMIS. Thank you, Congressman Stewart, for being here today, and we so appreciate the work you're doing on the Appropriations Committee. Your bill, I believe, is an important bill to address the very situation that is the subject of this hearing.

With that, you are excused, and we will just pause while the next panel of witnesses joins us. Thank you.

Mr. STEWART. Thank you, Madam Chairwoman.

Mrs. LAWRENCE. Thank you, Representative.

Mrs. LUMMIS. Gentlemen, please join us. And before I recognize you, could you—is it Lazzeri or Lazzeri?

Mr. LAZZERI. It's Lazzeri.

Mrs. LUMMIS. Lazzeri. Thank you so much.

You ready? Okay. We will now recognize our second panel of witnesses. I am pleased to welcome Mr. Michael Lazzeri, Assistant Administrator for Government Contracts at the U.S. Department of Labor; Mr. Mike Cottingham, owner of Wilderness Ventures; and Mr. David Brown, executive director of the America Outdoors Association.

Welcome, gentleman. Pursuant to committee rules, all witnesses will be sworn in before they testify, so please rise and raise your right hands.

Do you solemnly swear or affirm that the testimony you are about to give will be the truth, the whole truth, and nothing but the truth?

Thank you. Please be seated. Let the record reflect that all witnesses answered in the affirmative.

In order to allow time for discussion, please limit your testimony to 5 minutes. Your entire statement, if it's longer, will be made part of the record.

I now would like to recognize our panel. Mr. Lazzeri, are you recognized for 5 minutes. Welcome. Thank you for being here.

WITNESS STATEMENTS

STATEMENT OF MICHAEL LAZZERI

Mr. LAZZERI. Good morning, Chairman Lummis, Ranking Member Lawrence, and members of the subcommittee, and I thank you for the invitation to testify today. I appreciate the opportunity to discuss the effect of the Executive Order 13658 on outfitters and guides operating on Federal lands.

On February 12 of 2014, President Obama signed the executive order requiring certain parties that contract with the Federal Government to pay covered workers no less than $10.10 hourly wage. The order obligated the Department to issue regulations to implement its requirements. The Department, accordingly, proposed regulations implementing the executive order on June 17 of 2014 and published final regulations later that year on October 7.

As Secretary Perez said upon issuance of the final rule: No one who works full time in America should have to raise their family in poverty, and if you serve meals to our troops for a living, then you shouldn't have to go on food stamps to serve a meal to your family at home.

By raising the minimum wage for workers on Federal contracts, we're rewarding a hard day's work with fair pay. This action will

also benefit taxpayers. Boosting wages lowers turnover and increases morale and will lead to higher productivity.

The Department conducted a robust outreach effort during the drafting of the rule, including conducting a variety of listening sessions with private associations and other groups. The Department has continued to provide additional outreach since issuance of the final rule, producing a number of fact sheets, frequently asked questions, webinars, and other guidance to help contractors understand and implement the rules' requirements.

The Department has worked with contracting agencies to develop additional guidance concerning application of the executive order to particular agency agreements that apply to particular stakeholders. The order itself applies to four categories of contracts, including contracts in connection with Federal lands and related to providing services for the general public. Provided that such agreements qualify as new contracts, our final rule defined a new contract as one that results from a solicitation issued on or after January 1st of this year or that is awarded outside the solicitation process on or after January 1st of this year.

So even if a contract satisfies these criteria, the order only covers individuals working on or in connection with the contract if those individuals' wages are governed by the Fair Labor Standards Act, the Service Contract Act, or the Fair Labor Standards Act. In their comments, the AOA and OARS companies sought clarification as to whether or not the order applies to special-use permits, commercial use authorizations, and outfitter and guide permits issued by the Departments of Interior and Agriculture.

In its final rule, the Department defined contracts and contract-like instruments as agreements between two or more parties, creating obligations that are enforceable or otherwise recognizable at law, including but not limited to lease agreements, licenses, or permits.

The permits addressed by AOA and OARS typically authorize the use of Federal land in exchange for the payment of fees to the Federal Government, creating obligations that enforceable or otherwise recognizable at law and, therefore, would constitute contracts under the purposes of the executive order.

The Department considered the information provided by the AOA and OARS and determined that even if their contracts with the Federal Government were outside the scope of the Service Contract Act, those contracts were covered contracts because they authorize the use of Federal land and relate to offering services to the general public.

In addition, wages of the workers on these contracts, even if not covered by the SCA, are likely covered by the Fair Labor Standards Act, and because the executive order applies only to new contracts, wage increases will not affect contractors that are midway through performance of the contract that was entered into before January 1 of this year. We have found that assertions that a contractor will be adversely affected by the E.O. Often overlook not only the benefits of the E.O. But also the fact that the E.O. Only applies to new contracts with the Federal Government, enabling contractors to prepare for any potential economic impact of the E.O.

I would like to thank you again for inviting me to testify in the payment of the $10.10 minimum wage to outfitters and guides working on Federal lands. We invite the AOA and others to provide us, as well as our counterparts at Agriculture and Interior, with additional information they believe may assist those agencies in the development of additional guidance. We will do our part to provide them with our views. We welcome and look forward to continuing the dialogue. Thank you.

[Prepared statement of Mr. Lazzeri follows:]

STATEMENT OF MICHAEL A. LAZZERI
ASSISTANT ADMINISTRATOR FOR GOVERNMENT CONTRACTS
WAGE AND HOUR DIVISION, U.S. DEPARTMENT OF LABOR
BEFORE THE
INTERIOR SUBCOMMITTEE OF THE
HOUSE COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM
UNITED STATES HOUSE OF REPRESENTATIVES
June 10, 2015

Chairman Lummis, Ranking Member Lawrence and members of the Subcommittee, thank you for the invitation to testify today. I appreciate the opportunity to discuss the effect of Executive Order 13658 on ventures, such as outfitters and guides, operating on Federal lands.

On February 12, 2014, President Barack Obama signed Executive Order 13658, Establishing a Minimum Wage for Contractors (the Executive Order or the Order). The Order requires certain parties that contract with the Federal Government to pay covered workers no less than a $10.10 hourly wage. The Order obligated the Department to issue regulations to implement its requirements. The Department accordingly proposed regulations to implement the Executive Order on June 17, 2014, and—after carefully considering the comments—published final regulations on October 7, 2014.

As Secretary Perez said upon the issuance of the final rule, "No one who works full time in America should have to raise their family in poverty, and if you serve meals to our troops for a living, then you shouldn't have to go on food stamps in order to serve a meal to your family at home. By raising the minimum wage for workers on Federal contracts, we're rewarding a hard day's work with fair pay. This action will also benefit taxpayers. Boosting wages lowers turnover and increases morale, and will lead to higher productivity."

The final rule provides guidance and sets standards for employers concerning what contracts are covered and which of their workers are covered. The rule also establishes obligations that contractors must fulfill to comply with the minimum wage provisions of the Executive Order, including record-keeping requirements. It provides guidance about where to find the required rate of pay for all workers, including tipped employees and workers with disabilities. Additionally, the rule 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 conducted a robust outreach effort during the drafting of the rule, including conducting a variety of listening sessions with private associations and other groups. The Department has continued to provide additional outreach since issuance of the final rule, producing a number of fact sheets, Q & A's, webinars and other guidance to help contractors understand and implement the rule's requirements. This outreach has not been limited to public stakeholders. The Department conducted numerous conference calls with agency General Counsels and procurement officials, among others. Since the Department issued its final rule, certain Federal agencies with covered non-procurement contracts have, consistent with Section

4(b) of the Executive Order, developed additional guidance concerning application of the Executive Order to particular agency agreements that apply to particular stakeholders. The Department has been advising these Federal agencies, including the United States Forest Service (FS) as it develops additional guidance relating to its special use authorizations and other agency-specific agreements. The guidance the Department has provided has been based, in part, on information provided to federal agencies by individual stakeholders. Because federal agencies have a wealth of experience working with stakeholders on particular contracts, the Department would recommend stakeholders continue to consult with their agency partners regarding specific questions.

Before I discuss the particular topic at issue before this subcommittee, I should begin by discussing some of the general principles laid out in the Department's final rule.

General Application of the Executive Order

The Order applies to four categories of contracts, provided such agreements qualify as "new contracts" under the Order and its implementing regulations. Even if a contract satisfies these criteria, the Order only covers individuals working on or in connection with the contract if those individuals' wages are governed by the Fair Labor Standards Act (FLSA), Service Contract Act (SCA), or Davis-Bacon Act (DBA).

First, Executive Order 13658 explicitly applies to four categories of contractual agreements: procurement contacts for construction covered by the DBA; service contracts covered by the SCA; concessions contracts, including any concessions contract excluded from the SCA by the Department of Labor's regulations at 29 CFR 4.133(b); and contracts 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 Department understands this fourth category pertaining to new contracts in connection with Federal lands to be the most relevant category for this hearing. The final rule interprets this broad fourth category as generally including leases of Federal property, including space and facilities, and licenses to use and occupy 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 business to operate a coffee shop to serve Federal employees and/or the general public is covered by the Executive Order. This category of contracts also encompasses special use permits and similar instruments that constitute contracts or contract-like instruments in connection with Federal property or lands that relate to offering services to the general public.

Second, the Order applies only to "new contracts" as defined consistent with Section 8 of the Order. The implementing regulations define a "new contract" as one that results from a solicitation issued on or after January 1, 2015, or that is awarded outside the solicitation process on or after January 1, 2015. The term "new contract" includes replacements for expiring contracts, but it does not include the unilateral exercise of a pre-negotiated option to renew an existing contract by the Federal Government that was established prior to January 1, 2015.

It is important to note that under the rule as proposed, existing contracts would have qualified as "new contracts" if extended, renewed, or modified in any way except for administrative changes as a result of bilateral negotiations on or after January 1, 2015. However, the Department amended its definition of "new contract" to respond, in part, to comments received from stakeholders, including the FS and America Outdoors Association (AOA), an organization representing outfitters and guides.[1] Under the Department's final rule, existing contracts that are amended qualify as "new contracts" if the amendment constitutes a modification that is outside the scope of the contract.

Finally, as pointed out in the Department's final rule, coverage of a contract does not automatically extend coverage to all workers performing on that contract. In order for the minimum wage protections of the Executive Order to extend to a particular worker performing work on or in connection with a covered contract, that worker's wages must be governed by the FLSA, SCA, or DBA.

Application of the Executive Order to Outfitters and Guides

The Department received comments on the Notice of Proposed Rulemaking relating to outfitters and guides primarily from the AOA and O.A.R.S. Companies, Inc. (O.A.R.S.).

The AOA and O.A.R.S. sought clarification as to whether the Executive Order applies to special use permits issued by the FS, commercial use authorizations (CUAs) issued by the National Park Service (NPS), and outfitter and guide permits issued by the Bureau of Land Management (BLM) and the United States Fish and Wildlife Service (USFWS). The AOA and O.A.R.S. also raised concerns about increased costs that would be incurred by outfitters and guides in connection with implementation of the Order.

Coverage of Special Use Permits under the Executive Order

Consistent with the Executive Order, which provides that its minimum wage requirement applies broadly both to traditional contracts and "contract-like instruments," the Department defined contracts and contract-like instruments to include all contracts and any subcontracts of any subordinate tier, whether negotiated or advertised, including but not limited to lease agreements, licenses, and permits. The particular instruments addressed by the AOA and O.A.R.S. typically authorize the use of Federal land in exchange for the payment of fees to the Federal Government. These instruments create obligations that are enforceable or otherwise recognizable at law and therefore would constitute contracts for purposes of the Executive Order.

As previously mentioned, simply determining that a contract exists does not mean that workers are covered. In order for the minimum wage protections of the Executive Order to extend to a particular worker performing work on or in connection with a contract, (1) the contract must qualify as one of the specifically enumerated types of contracts described in the Executive Order;

[1] For comments submitted to the proposed rule, please see http://www.regulations.gov/#!docketBrowser;rpp=25;po=0;dct=PS;D=WHD-2014-0001

(2) the worker's wages must be governed by the FLSA, SCA, or DBA; and (3) the contract must qualify as a "new contract" under the Executive Order and the Department's final rule.

As the Department noted in its final rule, "...FS special use permits generally are SCA-covered contracts, unless a permit holder can invoke the SCA exemption for certain concessions contracts contained in 29 CFR 4.133(b)." Moreover, as noted above, the fourth category of covered contracts enumerated in the Executive Order – "contracts in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public" – broadly encompasses a wide range of contracts involving the use of public lands to provide services, including special use permits and related instruments. Thus, even where a particular contract is exempt from coverage under the SCA, workers performing on or in connection with the contract nonetheless may be entitled to the Executive Order minimum wage if the contract falls within this fourth category of covered contracts, and if the wages of workers on the contract are governed by the FLSA.

Specifically, the Department considered the information provided by the AOA and O.A.R.S. and determined that even if their contracts with the Federal government were outside of the scope of the SCA, the contracts fell within the fourth category of covered contracts because they constituted contracts in connection with Federal property or lands and related to offering services for the general public, and because the wages of the workers on these contracts were likely covered by the FLSA:

> The FLSA generally governs the wages of employees of holders of CUAs issued by the NPS and permits issued by the FS, BLM and USFWS, at least to the extent such instruments are not covered by the SCA. 29 U.S.C. 213(a)(3) exempts employees of certain amusement and recreational establishments from the minimum wage and overtime provisions of the FLSA, but, as the AOA acknowledged, that provision "does not apply with respect to any employee of a private entity engaged in providing services or facilities (other than, in the case of the exemption from section 206 of this title, a private entity engaged in providing services and facilities directly related to skiing) in a national park or a national forest, or on land in the National Wildlife Refuge System, under a contract with the Secretary of the Interior or the Secretary of Agriculture." See 29 U.S.C. 213(a)(3). As explained above, the Department has concluded that the holders of CUAs issued by the NPS, and permits issued by the FS, BLM and USFWS, are operating under a contract with the Secretary of the Interior or the Secretary of Agriculture. Thus, the exemption from the FLSA's minimum wage requirement will normally not apply and the FLSA will usually govern the wages of the employees of such holders for purposes of the Executive Order (unless, as noted, the SCA applies to such contracts)."

79 Fed. Reg. 60652, 60656 (Oct. 7, 2014).

Significantly, however, the Executive Order minimum wage requirements apply, as noted, only to "new contracts," which are defined in the Department's regulations as contracts that result from solicitations issued on or after January 1, 2015, or contracts that are awarded outside the solicitation process on or after January 1, 2015. Because of this important limitation on application of the Executive Order, contracting agencies and contractors entering into "new

contracts" on or after January 1, 2015, will be aware of Executive Order 13658 and can take into account any potential economic impact of the Order on projected labor costs.

Similarly, because the Executive Order minimum wage applies only to "new contracts," wage increases will not affect contractors that are mid-way through performance of a contract that was entered into before January 1, 2015. We have found that assertions that contractors may be adversely affected by the Executive Order often overlook not only the benefits of the Executive Order, but also the fact that the Executive Order applies only prospectively to new contracts with the Federal government, thereby enabling contractors to evaluate and address any potential economic impact of the Order on projected labor costs before the new contract is executed and as they plan for performance on that contract.

Costs and Benefits Associated with Raising the Minimum Wage

In addition to questions of coverage, AOA and other commenters raised concerns about potential additional costs generated by the increase of the minimum wage for outfitters and guides, among others. These commenters argued that the outfitting and guiding permits create a relationship that, unlike procurement contracts, does not contain a mechanism by which the holder of the instrument can "pass on" costs related to operation of the Executive Order to contracting agencies.

The Department carefully considered these comments and thoroughly addressed them in its final rule. *See, e.g.*, 79 Fed. Reg. 60652, 60655-57 (Oct. 7, 2014). In particular, the Department declined to create an exemption from the Executive Order for outfitters and guides, as well as for other stakeholders who made similar arguments. The Department believes several factors will substantially offset any potential negative economic effects of the Order. As reflected in the Executive Order itself, as well as in the Department's final rule, the Executive Order can be expected to benefit workers, contractors, and the government through reduced absenteeism and turnover in the workplace, improved employee morale and productivity, reduced supervisory costs, and increased quality of services provided to the Federal Government and the general public, which in turn would draw an increased number of customers and generate higher sales. Moreover, because the Executive Order applies only to new contracts, contracting agencies and contractors will be aware of Executive Order 13658 and can take into account any potential economic impact of the Order on projected labor costs before the new contract is executed and as they plan for performance under that new contract.

Conclusion

Thank you again for inviting me to testify on application of the $10.10 minimum wage to outfitters and guides working on Federal lands. The Department continues to work with contracting agencies to provide assistance to their stakeholders and to answer remaining questions regarding coverage and other issues arising under the Executive Order and the Department's final rule. We invite the AOA and others to provide us, as well as our counterparts at the Departments of Agriculture and the Interior, with additional information they believe may

assist those agencies in the development of additional guidance. We will do our part to provide them with guidance. We welcome that exchange and look forward to continuing the dialogue.

Mrs. LUMMIS. Thank you, Mr. Lazzeri.

I would now like to recognize Mr. Cottingham for 5 minutes.

STATEMENT OF MIKE COTTINGHAM

Mr. COTTINGHAM. Thank you. How do I turn this on? Okay.

Thank you, Madam Chairwoman, and members of the subcommittee, for the opportunity to offer my support for H.R. 2215 and to explain why the Department of Labor rule, Executive Order 13658, threatens the viability of my program and numerous similar travel camp programs and summer camps for youth operating on public lands.

In 1973, my wife and I quit our teaching jobs in order to create an alternative educational experience for young people. The purpose of our program has been to assist young men and women in becoming responsible adults through team building, group living, and caring for one another in challenging outdoor activities.

Since 1973, we have produced—provided life-altering experiences for over 24,000 young adults, including children of several Governors, Congressmen and women, and Senators. Our staff—our self-funded scholarship program enables at least 30 deserving young people, who couldn't afford otherwise, to participate in these experiences each summer.

Our programs operate in 17 federally designated wilderness areas in 12 national parks throughout the United States. These adventures range from 2 to 5 weeks in length and usually involve our subcontracting activities such as rock climbing and white water rafting. Executive Order 13658 would require our monitoring compliance of over 30 subcontractors we work with operating on Federal lands, which would be extremely difficult, if not impossible, for us from both a personnel and a financial perspective.

If they fail to meet the requirements of the Department of Labor rule and do not pay their staff the higher minimum wage for Federal contractors, then we would have to make up the difference. Each summer, we hire between 80 and 100 leaders who are current college students and graduate students. They work 6 weeks on average while they guide our groups on public lands. They also participate as clients with our students on a variety of subcontracted activities, such as climbing Washington's Mount Rainier or Wyoming's Grand Teton or rafting for 4 days on Idaho's Salmon River or Utah's Colorado River. As is the case with hundreds of summer camps and other similar travel camp programs for youth, we must price our programs competitively.

The implementation of the Department of Labor rule would not only be impossible to calculate but would be impossible for anyone in the summer camp industry to afford, as it would increase our salaries dramatically. Implementation of Executive Order 13658 would shut down many summer programs for youth unless they were eligible for an exemption under the Fair Labor Standards Act as it would be impossible to meet the payroll requirements of camp counselors who must be on call 24 hours a day for multiweek employment periods

As a seasonal educational summer program for teens, we also view ourselves as a training program for young leaders. Nearly all of our staff members view their time with us as a break from the

rigors of school or as a final opportunity to share their love for the outdoors with youth before they pursue life—full-time careers in law, business, medicine, the arts, et cetera.

Leading a group of young adults for several weeks is a challenging and very fulfilling opportunity as it provides a platform for—which stresses responsibility, accountability, organization, and many other life skills required for success. I always tell my staff if you can successfully lead one of our programs, you are well prepared for future and larger challenges.

I very much appreciate your attention to this issue and to the corrective action of H.R. 2215, which will be necessary to save many summer camps and travel camp programs similar to mine from going out of business. Thank you.

[The statement of Mr. Cottingham follows:]

Testimony of

J. Michael Cottingham

Wilderness Ventures, Inc. dba Wilderness Adventures

On

The Impact of Executive Order 13658 on Public Land Guides and Outfitters

Committee on Oversight and Government Reform Subcommittee on the Interior United State House of Representatives

June 10, 2015

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www.wildernessadventures.com - email: info@wildernessadventures.com

Thank you Madam Chairman and members of the Subcommittee for the opportunity to offer my support for H.R. 2215 and to explain why the Department of Labor Rule implementing Executive Order 13658 threatens the viability of my program and numerous other similar travel camp programs and summer camps for youth operating on public lands.

In 1973, my wife Helen and I quit our teaching jobs in order to create an alternative outdoor educational experience for young people. The purpose of our program has been to assist young men and women in becoming responsible adults through team building, group living and caring for one another in challenging outdoor activities. Since 1973, we have provided life-altering experiences for over 24,000 young adults, including the children of several governors, congressmen and senators. Our self-funded scholarship program enables at least thirty deserving students to participate each summer.

Our programs operate in seventeen federally designated wilderness areas and twelve national parks throughout the United States. These adventures range from two to five weeks in length and usually involve our sub-contracting activities such as rock climbing and whitewater rafting. Executive Order 13658 would require our monitoring compliance of over thirty subcontractors operating on federal lands, which would be extremely difficult if not impossible for us both from a personnel and a financial perspective. If they fail to meet the requirements of the Department of Labor rule and do not pay their staff the higher minimum wage for federal contractors, then we would have to make up the difference.

Each summer, we hire between 80 to 100 leaders who are current college students or graduate students. They work six weeks on average. While they guide our groups on public lands, they also participate as clients with our students on a variety of sub-contracted

activities such as climbing Washington's Mount Rainier or Wyoming's Grand Teton or rafting for four days on Idaho's Salmon River or Utah's Colorado River. As is the case with hundreds of summer camps and other similar travel camp programs for youth, we must price our programs competitively. The implementation of the Department of Labor rule would not only be impossible to calculate but would be impossible for anyone in the summer camp industry to afford as it would increase our salaries dramatically. Implementation of Executive Order 13658 would shut down many summer programs for youth unless they were eligible for an exemption under the Fair Labor Standards Act as it would be impossible to meet the payroll requirements of camp counselors, who must be on call twenty-four hours a day for multi- week employment periods.

As a seasonal, educational summer program for teens, we also view ourselves as a training program for young leaders. Nearly all of our staff members view their time with us as a break from the rigors of school or as a final opportunity to share their love for the out-of-doors with youth before they pursue fulltime careers in law, business, medicine or the arts etc. Leading a group of young adults for several weeks is a challenging and very fulfilling opportunity as it provides a platform, which stresses responsibility, accountability, organization and many other life skills required for success. I always tell my staff that if you can successfully lead one of our programs, you are prepared for future and larger challenges ahead.

I very much appreciate your attention to this issue and to the corrective action in H.R. 2215 which will be necessary to save many summer camps and travel camp programs similar to mine from going out of business.

June 5th, 2015

J. Michael Cottingham, Director of Wilderness Ventures, Inc., dba Wilderness Adventures

Mike Cottingham, along with his wife Helen, co-founded Wilderness Adventures in 1973 for the purpose of assisting young people in becoming responsible adults through two to five-week long outdoor experiences involving team building, group living and outdoor skills training in America's national forests and parks. Since 1973, more than 24,000 young people have participated in these life changing outdoor adventures.

Since 1975, Mike and His wife Helen have resided in Jackson Hole, Wyoming, where they raised two boys. Mike has been involved in a wide range of community affairs, serving on the boards of the Jackson Hole Conservation Alliance, Jackson Youth Skating and the Jackson Hole Community School. Mike also served on the board of America Outdoors Association for nine years.

Prior to co-founding Wilderness Adventures in 1973, Mike taught at Indian Hill High School in Cincinnati, Ohio after receiving his Bachelor of Arts degree from the University of Notre Dame in 1967 and his Masters degree in education from Xavier University in 1971.

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Committee on Oversight and Government Reform
Witness Disclosure Requirement – "Truth in Testimony"
Required by House Rule XI, Clause 2(g)(5)

Name: J. Michael Cottingham

1. Please list any federal grants or contracts (including subgrants or subcontracts) you have received since October 1, 2012. Include the source and amount of each grant or contract.

No federal grants.

2. Please list any entity you are testifying on behalf of and briefly describe your relationship with these entities.

Wilderness Ventures Inc.
DBA
Wilderness Adventures

3. Please list any federal grants or contracts (including subgrants or subcontracts) received since October 1, 2012, by the entity(ies) you listed above. Include the source and amount of each grant or contract.

No federal grants.

I certify that the above information is true and correct.
Signature: J. Michael Cottingham Date: 6/5/15

Mrs. LUMMIS. Thank you, Mr. Cottingham.
And, Mr. Brown, you are recognized for 5 minutes.

STATEMENT OF DAVID L. BROWN

Mr. BROWN. Thank you, Madam Chairwoman and Ranking Member Representative Lawrence. I so much appreciate the opportunity to offer America Outdoors' support for H.R. 2215, and I'm also testifying to explain why the Department of Labor rule implementing Executive Order 13658 threatens viability for many outfitters and guide companies operating on public lands.

The implementation of this rule may force many of them out of business. While the minimum wage increase is an issue for some seasonal businesses which hire a large number of entry-level employees, a larger issue is compliance with the complex Department of Labor clause including in this rule, which will become part of every new permit.

Permit holders are required to comply with the DOL clause or face potential disqualification and loss of the permit. As you will see from my testimony, compliance is very difficult for family-run seasonal businesses who do not have a team of labor lawyers on their staff.

The Fair Labor Standards Act includes an exemption for employees hired by seasonal recreational establishments and a partial exemption for recreational establishments under permit by Federal land managing agency. Inconsistent interpretation of the recreational establishment provision under 13(a)(29) leaves many public land outfitters uncertain as to what overtime standard they are subject to.

Some courts have ruled that recreational businesses do not qualify as an establishment under the FLSA if the recreation venue is more than 6 miles or, in one case, more than 9 miles from their headquarters. In these situations, some outfitters would qualify for the exemption, but others providing services in the same area might not.

Outfitters with traveling camps may not qualify as a recreational establishment according to another court ruling. The DOL rule requires permit holders to enforce their contract clause, as my colleague mentioned, on their subcontractors to make up the difference between the executive order wage and the wage paid by the subcontractor.

Some outfitters subcontract with other outfitters for services. Other subcontractors are not even operating on public lands. A guest ranch in Wyoming, for example, might be expected to require a laundry service to comply with the DOL rule and include the standard contract clause in their contract with the laundry service.

Enforcing the DOL contract clause on a subcontractor will be impossible for seasonal recreational businesses. In analyzing the compliance quandary faced by many outfitters and guides, a law firm specializing in Fair Labor Standards Act compliance concluded, although most courts in the Department of Labor consider the same issues when determining whether a company is a seasonal recreational establishment, there is very little consensus regarding how to analyze these questions, much less the outcome of the review.

If the courts, the Department of Labor, and various law firms cannot reach consensus on the interpretation of the FLSA in this area, how can a family-run business be expected to comply? Unfortunately, the quandary now puts their business at risk because it is part of permit compliance.

The DOL rule also requires permit holders to enforce the contract clause under subcontractors, as I mentioned, and that is one of the other challenges that—with compliance that will be very difficult. Aside from the uncertainty and difficulty with compliance, the FSLA correctly interpreted the need for an exemption for seasonal recreational businesses. That exemption needs to be fully restored for these businesses to survive in the long term, and that is why we support H.R. 2215.

Looking beyond the issues related to Executive Order 13658, the accumulation of regulations and their costs on these small outfitter and guide businesses are making their ability to provide services to the public increasingly tenuous. I respectfully request that you continue oversight and hope that members of the subcommittee will work together to encourage the executive branch to streamline and reduce the regulatory burdens which jeopardize employment in the high-quality recreational services the public currently enjoys on public lands. Thank you.

[Prepared statement of Mr. Brown follows:]

Testimony

Of

David L. Brown

America Outdoors Association

On

The Impact of Executive Order 13658 on Public Land Guides and Outfitters

Committee on Oversight and Government Reform Subcommittee on the Interior

United State House of Representatives

June 10, 2015

America Outdoors Association
P.O. Box 10847, Knoxville, TN 37939
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Madam Chairman and members of the Subcommittee thank you so much for the opportunity to offer America Outdoors Association's support for H.R. 2215. I am also testifying to explain why the Department of Labor rule implementing Executive Order 13658 threatens the viability of many outfitter and guide companies operating on public lands.

America Outdoors Association and our partners in the Outfitter and Guide Outdoor Recreation Coalition represent 1,100 outfitting business operating throughout the United States serving approximately 3 million Americans each year.

As Representative Stewart observed in his press release announcing introduction of H.R. 2215, the United States is blessed with richly diverse, high-quality recreational experiences made available to the general public through thousands of small outfitting and guiding businesses. By nature these are seasonal businesses for which the seasonal recreational establishment exemption in the Fair Labor Standards Act (FLSA) was designed to cover. For reasons that are not clear, that exemption was modified by an amendment to the FLSA in 1977 for many recreation businesses on public lands and reduced to a partial exemption.

If a seasonal recreational establishment operates on private land and meets the three part test, the exemption from the FLSA applies. There is no requirement to comply with wage and hour laws or the overburden of regulation and increased costs associated with the Department of Labor rule increasing the minimum wage to $10.10. If on the other hand, a business operates a river rafting, hiking, fishing or hunting service on public lands managed by the USDA Forest Service, National Park Service, BLM or the Fish and Wildlife Service, they would be subject to provisions and regulations associated with E.O. 13658.

The Department of Labor rule implementing E.O. 13658 will have a devastating and disproportionately negative impact on rural economies in states and areas where public lands are predominant. Many of these states are in the West or in rural areas in the Midwest and East which need the employment opportunities provided by thousands of outfitting and guiding businesses

Let me explain why the Rule and the evolving case law has created a threat to many of these businesses and to the economies which are dependent upon them.

When new permits and contracts are issued, federal land managing agencies are required to include the Department of Labor Standard Contract clause in those authorizations. Over 5,000 Forest Service outfitter and guide special use permits and an estimated 3,000 BLM permits will ultimately be impacted. National Park Service commercial use authorizations (CUA's) are issued for terms no longer than two years, so several thousands of those authorizations will soon come under the rule's requirements and regulatory burdens. NPS concession contracts for outfitting services and U.S. Fish and Wildlife Service permits will also be required to include the DOL standard contract clause. The magnitude of this issue is significant, especially in western states where thousands of businesses in rural areas are effected.

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The new DOL requirements and costs are difficult for seasonal businesses to absorb. The immediate net impact of the rule will be to reduce employment. Over the long term many companies will likely be forced out of business by higher labor costs and the regulatory burdens associated with the rule.

Please allow me to offer some examples.

- One company in the Southeast found the rule would require them to raise their prices by 18% in one year to cover the increased labor costs. So, they reduced seasonal payroll and cut hours for employees. Some companies are decreasing the number of guides by increasing the number of guests per guide. When the rule takes effect, many companies will be forced to hold down labor costs by shortening their trips. These strategies may help them manage their operation costs, but they will negatively impact the quality of services. Still the increased labor costs are driving up prices for their trips on federal lands which makes them less competitive when a consumer compares their offerings to trips in areas managed by states or conducted on private lands.
- Some outfitters are reducing hours for employees and hiring more part-time workers as the impacts of the ever-changing recreational establishment exemption in the FLSA calls into question which overtime standard applies to their operation. Since the DOL rule makes compliance with these wage and hour laws a criteria for qualification for permits, many small businesses find themselves at risk and struggling to understand the complex nexus of law, rules and recent court rulings. Indeed, as my testimony points out, even the legal community is struggling to understand some of these issues.
- The increase in the minimum wage results in higher wages throughout a company because the increased labor costs ripple throughout the organization. There is pressure to raise wages for experienced employees so they are paid a higher wage than entry level employees.
- For multi-day trip outfitters, the record-keeping requirements for backcountry guides under the FLSA are significant. Guides in the backcountry for several days, have to keep logs of sleep time and any interruptions. The value of meals they eat has to be calculated and added to hourly computation for overtime wages.
- If an employee spends part of their work week on public lands and part on private lands on uncovered activities, under the DOL rule an outfitter would have to keep scrupulous records to determine what percentage of the work week is covered by the rule. An employee's time spent on work "in connection with" a covered contract, such as answering customer inquiries or packing lunches for a trip counts toward the 20% threshold that requires payment of the minimum wage for covered contracts. Logs would have to be kept to determine if an employee has exceeded the threshold. Once the 20% of hours worked threshold is met during a work week, then the DOL rule and specified minimum wage kicks in and employees' wages would have to be adjusted to comply with the E.O. Outfitters with covered contracts and employees' work which is not covered will likely not be able to keep this documentation or manage two different wage scales for employees. In effect they will have to absorb the costs of compliance with the E.O. across the board.
- Perhaps, the most onerous part of the DOL rule is the requirement for permit holders to enforce the increased minimum wage requirement and related wage and hour laws on their subcontractors. If subcontractors do not pay the specified minimum wage for covered contracts, the DOL rule requires the outfitter to make up the difference to the subcontractors'

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employees even though the subcontractor may not hold a covered contract. The DOL refused to clarify who qualified as a subcontractor under the rule, making it next to impossible for a family-run business to figure out. For example, would a laundry service utilized by a guest ranch operating under a covered contract in Wyoming or Colorado be covered by the DOL rule? Can you imagine the operators of the guest ranch calling up the laundry service and demanding that it meet this complex DOL rule and its minimum wage requirements?

- In the final rule the Department of Labor suggested the Service Contract Act applied to Forest Service and other agency permits. The Service Contract Act may require prevailing wages, which would likely exceed the minimum wage requirement in the Executive Order. How are small businesses to know which standard applies?

A larger problem exists for many businesses who have to determine if they qualify as "recreational establishments" under the FLSA to determine which overtime standard they must comply with. Certain types of businesses clearly qualify for an exemption or the partial exemption because they are identified as being exempt from the wage and hour laws under the FLSA. For others the determination is so fact specific, it will be impossible for most family-run business to ascertain.

FLSA Section 13(a)(3) (29 U.S.C. § 213(a)(3)) provides an exemption for specific non-profit entities, camps and seasonal recreational establishments except for those operating on public lands.

"any employee employed by an establishment which is an amusement or recreational establishment, organized camp, or religious or non-profit educational conference center, if:
(A) it does not operate for more than seven months in any calendar year, or (B) during the preceding calendar year, its average receipts for any six months of such year were not more than 33 1/3 per cent of its average receipts for the other six months of such year," qualifies for the exemption.

except that the exemption . . . . does not apply with respect to any employee of a private entity engaged in providing services or facilities (other than, in the case of the exemption from section 206 of this title, a private entity engaged in providing services and facilities directly related to skiing) in a national park or a national forest, or on land in the National Wildlife Refuge System, under a contract with the Secretary of the Interior or the Secretary of Agriculture."

This amendment to the FLSA from 1977 specifies a 56-hour overtime threshold for recreational establishments under contract (or permit) with the cited land managing agencies. The catch-22 is how to determine if an outfitting business qualifies as a recreational establishment, which is then eligible for this overtime standard. Department of Labor opinion letters and the Courts are inconsistent in their interpretations of the law.

To amplify how complex the determination can be and why it is unfathomable for most small businesses, I turn to a citation in a document America Outdoors Association had prepared by labor lawyers to help outfitters comply with wage and hour laws.

"The recreational exemption applies only to 'establishments.' An 'establishment' refers to 'a distinct physical place of business rather than integrated business enterprise.' See 29 C.F.R. §§779.23, 779.203. Two physical locations (e.g., facilities/warehouses) can be considered one 'establishment' so long as the physical separation between the locations is not 'substantial.'

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Some courts have found that to be one "establishment" the locations should be no more than 6 to 9 miles apart. In determining whether two or more locations are considered an 'establishment,' it does not matter that the two locations operate under the same central management and share employees, marketing, and strategic plans. Under this analysis, an employee working in an administrative office over 9 miles away from a recreational area would likely not be exempt from federal minimum wage and overtime requirements."[1]

The same document explains why traveling camps are not eligible for the recreational establishment partial exemption.

"A recent decision from a federal district court in California determined that a 'trip-and-travel camp' for teenagers was not an "amusement/recreational establishment" or "organized camp" falling under the exemption. In that case, the employer had an administrative office but provided customers with offsite camping. Specifically, the employer organized and led trips to wilderness areas and foreign countries during which teenagers engaged in recreational activities.

The court in that case found that the recreational exemption did not apply because the employer was a 'travel camp,' whose recreational activities were conducted outside of its premises, i.e. the administrative office. Based on this case, to qualify for the exemption, an employer must operate a distinct physical place of business where the recreation or amusement activities take place on its establishment or premises. If the recreation takes place off the premises, the exemption likely will not apply. Although this particular issue has not been widely examined by the DOL or the courts, employers who conduct recreational services off-site from their offices or premises risk not falling within this exemption. Similarly, outfitters who provide camping services, but who do not have an office, facility, or a location that could otherwise be defined as an 'establishment,' would likely not fall under this exemption.[2]"

The conundrum most outfitting businesses find themselves in on public lands is described succinctly in a subsequent legal memorandum which AOA had prepared. It concludes the following:

"Although most courts and the Department of Labor consider the same issues when determining whether a company is a 'seasonal recreational establishment,' there is very little consensus regarding how to analyze those questions, much less the outcome of the review. Therefore, the analysis of each company is extremely fact-specific, and companies should always receive individualized advice before assuming they are a seasonal recreational establishment."[3]

While the Department of Labor rule implementing Executive Order 13658 rule cannot be blamed for all the complications of wage and hour compliance besetting outfitting businesses, it has definitely contributed to the confusion for outfitters on public lands. For that reason, we appreciate this subcommittee's attention to this issue and respectfully urge members to support passage of H.R. 2215.

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[1] Federal Wage and Hour Guidelines for Employers, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, February 2015, page 12 -13.
[2] Ibid, page 13.
[3] Memorandum, Seasonal Recreational Establishments and the Fair Labor Standards Act, March 25, 2015.

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Thank you for the opportunity to testify.

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Mrs. LUMMIS. Thank you, panel.

The members of the committee will now ask questions, and the chair will begin. She will recognize herself for 5 minutes.

Mr. Lazzeri, in response to comments on the executive order implementing rule, Department of Labor said that any increase in costs to business would be offset by gains in output or quality of service, perhaps even increasing revenue. What study or information was used by DOL to reach this conclusion?

Mr. LAZZERI. Thank you for your question, Madam Chairman. In studying the issue, the Department relied upon a number of empirical studies that focused on the impacts of productivity that increasing the minimum wage could have or increased wages. I'm prepared and very happy to provide a very complete answer in a question for the record following rather than citing individual studies, if that's okay.

Mrs. LUMMIS. We may follow up with you asking for copies of those empirical studies.

Mrs. LUMMIS. In response to comments that raising the minimum wage of the seasonal employees would lead to staff reductions, Department of Labor said there were alternative ways for these businesses to operate without reducing staff.

Mr. Lazzeri, what are these alternatives?

Mr. LAZZERI. That's a very good question, and thank you again. When we looked at the potential economic impacts, again, we studied increases in productivity that could result from an increase in the minimum wage and the potential that an increase in the quality of the services that are provided could in turn lead to an increase in the number of customers that would bring additional revenue to a particular employer. In the Department's final rule, we did consider this information generally.

Mrs. LUMMIS. Has DOL performed an analysis of the outfitting and guide industry to identify better ways they can operate?

Mr. LAZZERI. Thank you again for the question. I believe that, you know, the Department, when we considered the information that was presented to us, and as in any rule of general applicability, we look at the impacts of a particular rule pursuant to the Executive Order 12866.

Mrs. LUMMIS. So the answer is no? The answer is no, right?

Mr. LAZZERI. We're happy to take additional information to——

Mrs. LUMMIS. Well, wait a minute. The answer to the question.

Mr. LAZZERI. The answer to the question specific to that industry, we did not look at the particular impacts of the rule on any particular industry.

Mrs. LUMMIS. Thank you.

Mr. Cottingham, the Department of Labor says this order is good for everyone because it will result in reduced absenteeism and turnover, improve employee morale, increase quality of services. Could you comment on that statement as it applies to your business?

Mr. COTTINGHAM. Yes, ma'am. First of all, implementation of this would basically put me out of business. It's—would—our average salaries are about $2,500 a summer, and it would turn the industry, at least for teenagers and summer camps for children, into

elitist opportunities only for people with a ton of money who could possibly afford it, and I see that as a real, real problem.

Mrs. LUMMIS. So you don't believe it will make your business more successful?

Mr. COTTINGHAM. Well, no. It could not make it more successful. I would not be able to have a clientele except for maybe 50 or 100 people who could probably afford to pay what I would have to charge.

Mrs. LUMMIS. So you would have to reduce staff or just——

Mr. COTTINGHAM. Totally reduce staff or go out of business in my particular case, yeah.

Mrs. LUMMIS. Mr. Brown, can you talk about the important impact the members of your association have on the economies of local communities?

Mr. BROWN. Well, in one recent economic study on the Ocoee River, the recreation activity on that river created 622 full-time job equivalents, and $43 million in economic benefits within a 60-mile radius. That is a rural county, very poor, so many of the local residents sustain themselves, in part, by the jobs—seasonal jobs on that river.

Mrs. LUMMIS. Because they operate seasonally and the seasonal nature of these businesses makes it a different business model from the traditional model, should there be a different minimum wage requirement?

Mr. BROWN. Well, I think that the basic Federal minimum wage requirement is, you know, obviously, the one that should exist for these businesses. Seasonal—or, you know, the exemption from the seasonal, there was—in 1939, Fair Labor Standards Act anticipated an exemption for seasonal recreational businesses, which was appropriate, I think, and that's what we're trying to restore. It's an exemption that exists for organized camps, for ski areas, and for a number of other nonprofit conference centers and a number of other similar businesses.

Mrs. LUMMIS. Thank you. My time is expired.

I now recognize the ranking member for 5 minutes.

Mrs. LAWRENCE. Thank you, Madam Chair.

And thank you, gentlemen, for your information here today.

My first question goes to Mr. Lazzeri, correct?

Mr. LAZZERI. Lazzeri.

Mrs. LAWRENCE. Can you explain why the outfitter and guide business was no longer exempted from the FLSA, Fair Labor Standard Act, starting in 1977? It is my understanding that the exemption was removed, and today, the discussion again centers around making those businesses exempt so that the Federal minimum wage would no longer apply. Can you tell me the history, why was it removed?

Mr. LAZZERI. I'm happy to, Ranking Member Lawrence. Thank you for the question. We've looked at again the legislative history for the 1977 amendments and their specific mention of wilderness workers and why they were pulled out of the exemption, and it was based on just a simple premise that for work that's performed on Federal land, should be covered by Federal laws and standards.

Mrs. LAWRENCE. Can you tell me why the Department of Labor, why are the outfitter and guide businesses, which hold permits, are required to be covered by the executive order?

Mr. LAZZERI. I'd be happy to. Thank you. When we looked at the requirements of the executive order and the categories of covered contracts in the executive order, there were four. There were contracts that were covered by the Davis-Bacon Act, by the Service Contract Act, concession contracts that have previously not been covered by the Service Contract Act, and then also a fourth category, which is the category which is relevant today. And it was agreements that were in connection with the use of Federal lands for the general public, and when we looked and in our notice of proposed rulemaking and also with the comments and considered the information that was provided to us, it seemed to be fairly clear that the executive order intended these particular agreements to be exempted—I'm sorry, these particular agreements to be covered by the executive order

Mrs. LAWRENCE. Mr. Cottingham, can you explain to me, you mentioned your industry and the services you provide, which are very impressive. Why should the people who work on Federal lands in the outfitter and guide industry make less money than other employees by Federal contractors on those very same lands, why?

Mr. COTTINGHAM. First of all, in my particular situation, my employees are on duty 24 hours a day.

Mrs. LAWRENCE. Uh-huh.

Mr. COTTINGHAM. So we are talking about a minimum wage plus overtime on a 96-hour week if my calculations are correct, and that type of level of wage is simply not possible in the summer camp industry. It's just not possible to achieve, and—did I answer that question to your——

Mrs. LAWRENCE. Yes. I have a followup question.

Mr. COTTINGHAM. Yes, go ahead.

Mrs. LAWRENCE. In your timekeeping requirement for your employees, aren't there guides that when they're on several days, they have logs of sleep time and interruption, so if a person is out on one of these, there is actual—they are not on the clock for the whole 24 hours; aren't there logs for sleep time and interruptions?

Mr. COTTINGHAM. Yes. It's my understanding, Congresswoman, that the—you know, you have to obviously get sleep when you can get sleep, but——

Mrs. LAWRENCE. But it's not a 24-hour. If someone is out on a—they are not paid for every single hour that they are——

Mr. COTTINGHAM. No, no, they get paid on a salary basis.

Mrs. LAWRENCE. Okay. I have another question.

Mr. Brown, you stated something that it was kind of what I—a point I wanted to make. You said that you—it's a rural area, and there is poverty, and the jobs that we're talking about aren't only young college students. They are not only the people who are entry level. The type of jobs that we're talking about sometimes sustain, in those rural areas, employment and income on off-seasons for people in your area; is that correct?

Mr. BROWN. I think, if I understand your question, yeah, they're—these are—a lot of this income is supplemental.

Mrs. LAWRENCE. Yes, that's my point.

Mr. BROWN. Yeah. And it's certainly for the students and the entry-level employees, it's—you're helping them get through college or——

Mrs. LAWRENCE. But it's also supplemental for those who live in that area.

Mr. BROWN. Yeah, exactly.

Mrs. LAWRENCE. For working adults.

Mr. BROWN. And most of those working adults are actually paid more than the minimum wage, so that's just not an issue for the more experienced employees in the managerial positions. Usually, if they've got families, you know, they have enough experience that they're making more than the minimum wage.

Mrs. LAWRENCE. But they hold these jobs we're talking about, correct?

Mr. BROWN. Some of the—well, they hold higher levels.

Mrs. LAWRENCE. They do hold these jobs we're talking about, working——

Mr. BROWN. Working higher level jobs, yes

Mrs. LAWRENCE. —adults. Thank you.

Mr. BROWN. The entry-level jobs are usually held by students and young people.

Mrs. LAWRENCE. But they have the same job classification.

Mr. BROWN. Different duties.

Mrs. LAWRENCE. But they are classified as outfitters, correct?

Mr. BROWN. They are classified usually as guides or managers.

Mrs. LAWRENCE. Yes. Thank you.

Mr. BROWN. Yes.

Mrs. LUMMIS. I thank the gentlelady.

And the chair now have recognizes Mr. Meadows.

Mr. MEADOWS. Thank you, Madam Chairman, and thank you for your leadership on this particular issue.

It is of critical importance to me in that outdoor outfitters are a vital part of western North Carolina.

Mr. Brown, you mentioned the Ocoee. There's the Ocoee. There's the Nantahala. There's the Chattooga. There's a number of different outfitters in my area. Sadly, in those counties, very close to many of those outfitters, the unemployment rate is at 15 percent still today, and yet here we have, Mr. Lazzeri, a rule that threatens to put many of those businesses out of business, and so the augmenting—you know, it's great to say that we have a minimum wage at $10.10 an hour, but when you don't have a job, it doesn't really matter.

So Mr. Lazzeri, I'm going to go to you because I'm troubled by some of the logic. You opened up with a quote with Mr. Perez that says no full-time worker should have to work, and yet we're not really talking about full-time workers here. We're talking about part time and seasonal, so how would that apply to your opening quote from Mr. Perez?

Mr. LAZZERI. Well, thank you.

Mr. MEADOWS. Or wouldn't?

Mr. LAZZERI. Well, thank you, Congressman.

When the Department is considering the executive order and conducted its economic analysis, as I stated before, we looked very broadly at the impact of the executive order on all workers who

would be impacted and all employers who would be impacted. Therefore, we don't look at the specific economic impact on one individual employer. We do recognize, however, in the executive order final rule, through our economic analysis, that any impact for the increase in cost can be offset by the increase in benefits to——

Mr. MEADOWS. Now, how is that? You keep saying that. How many seasonal businesses have you actually owned, Mr. Lazzeri? I've owned four of them, so you tell me how that's going to happen because it sounds real good, but I am very troubled by you suggesting that it can be offset when—have you made payroll for seasonal businesses on a regular basis?

Mr. LAZZERI. And, again, I appreciate your question, Congressman. My role today——

Mr. MEADOWS. Yes or no. Have you owned seasonal businesses?

Mr. LAZZERI. I have not.

Mr. MEADOWS. Okay. Thank you.

So let me go further. How can you make that kind of assumption? Hold on. Let me clarify that because that's too open-ended. Mr. Cottingham is sitting there right beside you.

Mr. Cottingham, when we look at the business that you make, how much of your income that you get paid by the Federal Government to do? I mean, do they contract with you and pay you for these tours and guidance services?

Mr. COTTINGHAM. No, they do not.

Mr. MEADOWS. So they are not actually contracting with you and paying you with Federal dollars. What you are in fact doing is getting a special-use permit to actually come on Federal lands; is that correct?

Mr. COTTINGHAM. That is correct.

Mr. MEADOWS. Because we can understand if you were getting Federal tax dollars and we were paying you for that to set this new standard.

Mr. Lazzeri, do you not see the difference between the two of those?

Mr. LAZZERI. Congressman, what I—and I appreciate, again, the question. What I can say is that the executive order was very clear.

Mr. MEADOWS. Do you see a difference? You're answering—you're giving great answers to questions that I'm not asking. So do you see a difference between someone who pays for a service and then, Mr. Cottingham, who is getting a special use permit, is there a difference? Yes or no.

Mr. LAZZERI. Congressman, I, again, I appreciate the distinction that you're making. However, we did consider all of the information that was provided to us when we considered the final rule in connection with our economic analysis.

Mr. MEADOWS. So, since you considered it, is there a difference, yes or no?

Mr. LAZZERI. That would be reflected in our economic analysis.

Mr. MEADOWS. So you saw no difference.

Mr. LAZZERI. It was very clear to the Department through the executive order that——

Mr. MEADOWS. All right. Then let me go—since you're not going to answer that question, let me give you a different question.

How are you implementing this particular rule with regards to people who have a special-use permit here on the National Mall?

Mr. LAZZERI. That's a great question, Congressman.

We are continuing to provide additional outreach and guidance to all contractors, including contractors—including businesses that are covered in—for special-use permits, commercial use authorizations.

Mr. MEADOWS. So you have implemented it with regards to everybody who demonstrates here on the National Mall, their contractors, subcontractors, and everybody else have to meet this new standard.

Mr. LAZZERI. In May of this year, we recently conducted a webinar for all contractors where we answered questions live from contractors, regardless of their background and interested stakeholders, and we'll continue to do so.

Mr. MEADOWS. That's not the question I asked. I said, are you enforcing it, yes or no?

Mr. LAZZERI. The Department is enforcing the executive order on covered contracts.

Mr. MEADOWS. Here on the National Mall? Because I want you to submit that to the committee, and actually, I'm here today because of some of the people that are in my district because it's personal to me; it's going to put people out of business in western North Carolina. But I also have oversight over your particular agency and how it handles it, and so I would ask you give that to the committee on how you're doing it here on the National Mall because, under your definition, there is no difference from Mr. Cottingham and anybody else that gets a special-use permit here on the National Mall.

Mr. LAZZERI. We'd be happy to provide it.

Mr. MEADOWS. So are you—are you implementing that?

Mr. LAZZERI. Specifically to the National Mall, I would have to do additional research and be able to provide you a response.

Mr. MEADOWS. All right. Madam Chair, you have been very generous with your time.

I yield back

Mrs. LUMMIS. I thank the gentleman.

The chair now recognizes Mr. Palmer for 5 minutes.

Mr. PALMER. Thank you.

Mr. Lazzeri, what is the meaning of verbal agreements covered by the rule?

Mr. LAZZERI. I'm sorry. Can you repeat the question, please, Congressman?

Mr. PALMER. Okay. What is the meaning of a verbal agreement covered by the rule?

Mr. LAZZERI. A verbal agreement, I'd have to—I'd have to be able to research that and get back to you. I don't know that we distinguish verbal agreements from any other type of agreement.

Mr. PALMER. Well, following on Mr. Meadows' questions and how you have gone from giving permits to companies like Mr. Cottingham's organization to operate on Federal land, you've now decided that that verbal agreement or that permit is now a contract, and so you're going to impose this wage standard.

Mr. Cottingham and Mr. Brown, you can respond to this as well if you'd like. The Department of Labor has contended that the outfitters have failed to consider that their sales might increase due to better service being offered by employees with higher morale. Are your employees suffering a low morale?

Mr. COTTINGHAM. I don't think any of my employees are suffering low morale. If you can climb Mount Rainier in the summer, kayak in Glacier Bay National Park, it is an amazing opportunity. And they love working with kids. They love sharing their love for the out of doors.

Mr. PALMER. Mr. Brown.

Mr. BROWN. Yes, sir. I think this rule actually has the reverse effect. It does not increase the income of entry-level employees because these businesses are actually competing with other businesses outside public lands and have to set their prices accordingly, and so what a lot of outfitters are doing is having to reduce hours to stay on budget, and so the effect on morale certainly is not what the Department of Labor would anticipate from that standpoint.

Mr. PALMER. Well, these businesses are different anyway from traditional businesses in that they are seasonal and they're subject to a different minimum wage requirement. Would that be an accurate statement?

Mr. BROWN. Yes.

Mr. PALMER. All right. The guides and outfitters typically operate by paying the Federal Government for a permit to provide certain services to the consumers on Federal lands. How would you distinguish—and this is for you, Mr. Brown. How would you distinguish this permit arrangement from traditional contracts entered into between other entities?

Mr. BROWN. Well, the permit is actually, it says in the permit that it's not a contract. There are different—I think, if I'm answering your question, I understand it, there are Park Service contracts, and then there's certainly contracts that permit holders will have with other entities. The permit is—the Forest Service says the permit is not a contract, and BLM will say the same thing. The only contract specifically in our industry are Park Service concessions contracts.

Mr. PALMER. Mr. Lazzeri, having heard his response, why is it the Department of Labor now classifies these as contract-like instruments?

Mr. LAZZERI. Thank you for the question, Congressman. When we looked at developing the notice of proposed rulemaking in the final rule, we referred back to the executive order definition. And the fourth category of covered contracts is agreements for the use of Federal land for the general public. And then, for us, when we looked at the information that was provided and even during the comment period and the information that was provided by the American Outdoors Association and OARS company, another contractor or employer, we—we didn't see that there was—we at least saw that it was very clear that these types of agreements were contemplated as being covered by the executive order explicitly.

Mr. PALMER. But you've never defined it like that before until now.

Mr. LAZZERI. Well, the executive order in the third and fourth category of contracts covered a number of contracts that were previously not covered by the service—or by the Davis-Bacon Act or arguably by the Service Contract Act.

Mr. PALMER. Okay. I want to go back to a line of questions that Mr. Meadows was on, and he asked you if you had ever had a seasonal business. Have you ever worked for a business?

Mr. LAZZERI. Have I worked for a business?

Mr. PALMER. Have you ever owned a business?

Mr. LAZZERI. I have not owned my own business.

Mr. PALMER. Okay. I doubt you'll be able answer this, but I'll throw it out just in case. Anyone involved in this process making this determination have—how many of those have ever owned a business?

Mr. LAZZERI. I do not have that information, Congressman.

Mr. PALMER. My guess is, Mr. Lazzeri, that most of you never—not only never owned a business, you probably haven't worked for a business, which I think explains a lot of how we come up with some of these policies that impact groups like Mr. Cottingham's and industries like Mr. Brown represents, and it—it is one of those areas that kind defies common sense. It's rulemaking outside of an area of expertise that does not do any good. It doesn't increase morale, and it doesn't—it doesn't help create an environment where these businesses can make a living and thrive and offer opportunities for a lot of young people like Mr. Brown is talking about. It just makes no sense.

Thank you, Madam Chairman.

Mrs. LUMMIS. I thank the gentleman. We'll now go to a second round of questions, and the chairman recognizes herself for 5 minutes.

Mr. Lazzeri, would the rule apply to someone who gets a permit for filming on public lands?

Mr. LAZZERI. For nonpublic lands?

Mrs. LUMMIS. Public lands. If someone is filming on public lands, would the rule apply?

Mr. LAZZERI. I would have to get back to you on that. For the particular instance, a lot depends on the contract and particular services that are provided in the agreement

Mrs. LUMMIS. It's a permit.

Mr. LAZZERI. Again, respectfully, Madam Chairman, I would have to consider that again. I don't want to provide an answer for you that's not complete or accurate. I'd rather be able to consider and provide you a more complete response.

Mrs. LUMMIS. Yes, I would ask for that. Please submit in writing whether it applies.

Mrs. LUMMIS. What other permits would fall under the rule requirement?

Mr. LAZZERI. So there are special-use permits, commercial-use authorizations, so permits, for example, in the Forest Service for use of other lands, so there's those types of permits; permits issued by the Fish and Wildlife Service. There's a number of different permits or lease agreements. In addition, concessions contracts that were previously not covered under the Service Contract Act are now covered.

Mrs. LUMMIS. Does it apply to interns at the Wage and Hour Division?

Mr. LAZZERI. That's an excellent question.

Mrs. LUMMIS. Would you let me know? Would you answer that question in writing as well?

Mr. LAZZERI. I will go back, and I will provide you a response. However, the key to coverage for the executive order is not just that it's a covered contract under the executive order, but they would have to be covered under the Fair Labor Standards Act, so if they are not—if they're an intern that's not covered by the Fair Labor Standards Act, they'll likely not be covered.

Mrs. LUMMIS. Mr. Cottingham, can you walk me through how this would apply to overnight stays? What kind of recordkeeping would be required if I were an employee of yours taking young people out on public lands for an overnight trip?

Mr. COTTINGHAM. It would require another full-time employee, at least one, in my office—at least one to monitor all of this. And it would keep—it would also require my leaders to keep logs in the back country, which is another hindrance to their primary charge, and that is the wellbeing and the care of the young adults that they're working with. And I see that that would be—would be very burdensome.

Mrs. LUMMIS. Mr. Brown, do you represent other businesses that do overnight trips?

Mr. BROWN. We—mostly outfitters and guides.

Mrs. LUMMIS. Okay. So——

Mr. BROWN. We have guest ranches as well.

Mrs. LUMMIS. So these people are out on horseback sometimes?

Mr. BROWN. Yes, hunting trips, a variety of outdoor recreation experiences.

Mrs. LUMMIS. So are they going to have to take notebooks with them to keep track of—to log all this, like when they're asleep, when they're awake?

Mr. BROWN. They would. And it's even more complex than that because they have to keep track of the meals they eat and then take the value of those meals, add those to the base wage when overtime is calculated. If they operate under a covered—if they're employed under a covered contract, activity is under a covered contract, and activities not under a covered contract, they have to keep records—precise records of the time spent on the activities under the covered contract and the activities that are not on the covered contract.

For example, if you're not working on a permitted activity, you're working doing something at a guest ranch, you know, that's not related to the permitted activity, you're not covered by the rule, but in order to not have to pay, or you know, to—you have to have very precise records.

Mrs. LUMMIS. And so the employee has to understand when they're working on a covered contract versus non?

Mr. BROWN. That's correct. If they're keeping the log, and very often, as you know, when you're working two or three different types, multitasking at any business, small business, you're hopping from one task to the next, you might be packing lunches for a pack

trip out in the back country one minute and the next minute you might be tending to horses that are used just on a guest ranch.

Mrs. LUMMIS. I can't imagine the complications associated with this rule for outfitters and guides.

Mr. BROWN. Yes, ma'am.

Mrs. LUMMIS. Last question. Mr. Lazzeri, sort of on a different subject. I know the wage and hour division is currently working on updating the special procedures that govern the H–2A Visa Program. Sheep and cattle grazers help the Federal Government manage much of its Federal land. Many of my constituents utilize the program, the H–2A Visa Program, and, for example, Mountain Plains Agricultural Service in Casper, Wyoming works with them. Mountain Plains has repeatedly tried to meet with your division to discuss their concerns and provide input but has been denied. I know you're dealing with a deadline imposed by a court case, but will you commit your organization to meet with them and other stakeholder groups?

Mr. LAZZERI. I appreciate the question. My role, Madam Chairwoman, is to represent the wage and hour division particular to my specific branches in the government contracts arena. What I can do is I can take back the concerns that you have and be able to raise them with our leadership. I can commit to that.

Mrs. LUMMIS. Thank you. And I would ask you to identify a specific person that will respond in writing to my request. And thank you.

Mrs. LUMMIS. Mrs. Lawrence, you're recognized for 5 minutes.

Mrs. LAWRENCE. I just want to say I have to go to another committee meeting, but my goal on my bucket list is whitewater rafting. So I may see you gentlemen soon.

Mr. MEADOWS. If the gentlewoman will yield for just a second, you have a standing invitation to come to western North Carolina at my expense.

Mrs. LAWRENCE. Well, I get to determine what level of the whitewater rafting. That's the only thing.

Gentlemen, today I hear the concerns of the industry. Mr. Lazzeri, can you please tell me if with the executive order, is it immediate, is there a phase-in? What would be the impact or the timeframe on the impact that this executive order will have on this industry?

Mr. LAZZERI. Well, the executive order, in the final rule, the Department defined new contracts as covered. The new contracts entered into after January 1 of this year. So if a permit holder had an existing permit in December of last year and they had a 2-year permit, as I believe that the AOA has specified are commonplace, then they would not be required to be in compliance with the executive order and pay the $10.10 until 2 years—until the expiration of their contract.

Mrs. LAWRENCE. I have a question. There's a lot of concern because the businesses are operating as you are now, but we're saying things like it's going to have—Mr. Brown, you stated it's going to result in unemployment and reducing of pay. What is your data and where do you get that data from? Is it a concern? Has it been documented? Where does that——

Mr. BROWN. Well, it's actually—excuse me. Thank you, Congresswoman. It's actually what my members who've had this—the contract clause on their permit have said. Some, as Mr. Lazzeri said, new permits have the contract clause on them, and we have some outfitters who've gotten contracts—new clause—new permits with the contract clause on it. In fact, they were told that December 1 it was going to be on their permit which was issued shortly after the first of the year. They were totally unprepared for it because they'd already sold trips. And so their response was that they had to adjust their employment, reduce employment, cut hours. They went from 8-hour days to 7-hour days, for example, in order to accommodate the increase of pre-entry level employees primarily.

Mrs. LAWRENCE. Two things that I heard. I firmly believe that raising the minimum wage has a positive impact on all of America, and I'm very strong on that. But I do also understand that in doing business that you need the opportunity to make those adjustments, and there is an immediate impact.

Mr. Lazzeri, you have stated that there has been some training. I would like for the record, what are you doing to assist these companies in the transition? Some of the things that were stated by Mr. Cottingham and Mr. Brown in this industry you're already doing because you already have individuals who are performing these tasks and you are keeping because you have a Federal contract now and you do have to separate the activities. So I don't see that as being an additional burden. I see that as you doing business.

The last question I have. How long, Mr. Cottingham, have you been in the business?

Mr. COTTINGHAM. Congresswoman Lawrence, I have been in the business for—this will be the 43rd year.

Mrs. LAWRENCE. Wow. So I would consider you a pro. What I want stated for the record, during that time, the fee that you charge for individuals participating in your services, they've been increased over the years. Correct?

Mr. COTTINGHAM. Some years, yes. Not all.

Mrs. LAWRENCE. But over the, let's say the last 10 years, you've increased the fees, I'm sure.

Mr. COTTINGHAM. Most certainly, as cost of living has increased. Yes.

Mrs. LAWRENCE. Yes. And the point I want to make is the cost of living has increased and you had to make business decisions, people who work every day are confronted with that same issue, and fundamentally that's why I am a very strong component of increasing the minimum wage. And as businesses must do what they need to do to meet their bottom line because we need strong industry, across the country they're making those decisions to raise the cost of their services.

I drive an automobile. There's never been the same price, but we also need to be focused on the cost. But I feel that the—we should support you in preparing you for that so you can make the right decisions.

Thank you.

Mrs. LUMMIS. I thank the gentlelady.

And the gentleman from North Carolina is recognized for 5 minutes.

Mr. MEADOWS. Thank you, Madam chair.

Mr. Lazzeri, since we are talking about outfitters, it would be appropriate for me to say that I have a burr in my saddle with regards to this particular rule that you have put forth. And so in saying that, can you assure the committee that you are fairly and equally, with the emphasis on equally, applying this rule to all U.S. citizens who contract in one way or another under your definition, with the Federal Government, are all of them having to meet the same standards?

Mr. LAZZERI. Thank you, Congressman. What I can say is that we are—we do our best, for all the laws we enforce, to ensure that we enforce them consistently and fairly for all employers, and on the behalf of all employees regardless of background.

Mr. MEADOWS. Okay. So you're doing your best. So how do you do that? Going back to be the National Mall, other than your Webinar training, how are you putting the same requirements on those permit holders as you would Mr. Brown's members or Mr. Cottingham? How are you doing that?

Mr. LAZZERI. Thank you, Congressman. We work very closely with contracting agencies to make sure that they have the right training so that way they're inserting the contract clauses appropriately——

Mr. MEADOWS. But it's a different standard, Mr. Lazzeri. And let's have an intellectual discussion here. There's a difference between enforcement and training. So how are you enforcing that with regards to that?

Mr. LAZZERI. And I appreciate the question, Congressman. We treat those equally. We provide an equal amount of outreach and enforcement, not just for this particular executive order, but for all the laws we enforce. And we'll continue to do so and have made the offer to the AOA.

Mr. MEADOWS. All right. So you mentioned that you listened to all kinds of stakeholders while you were doing this rule. The majority of the stakeholders that responded, were they in favor of this rule?

Mr. LAZZERI. In the comment period, Congressman, to answer your question, I appreciate it again, we received 6,500 comments, not all unique. We received about 100 unique comments opposed to the rule.

Mr. MEADOWS. And so are you suggesting that there was 6,400 unique responses in favor of the rule?

Mr. LAZZERI. No. But I can get you more specific information as far as the breakout of the numbers.

Mr. MEADOWS. All right. So you're saying only 100 people complained in the comment period?

Mr. LAZZERI. During the comment period, we received only 100 comments—or I don't want to say only. We received one—because every one is valuable——

Mr. MEADOWS. So how many of those recommendations did you implement? Well because you keep coming back to talk about the executive order said this, the executive order said that, and it

sounds like you didn't really pay attention to any of the stakeholder input as much as you did what the executive order said.

Mr. LAZZERI. Well, Congressman, we did make changes to the final rule to exempt new contracts from the coverage of the rule.

Mr. MEADOWS. But in this particular case, there's a new contract—if I'm traveling on a Federal road and paying a toll, I enter into a new contract each and every time that I do that because I'm paying a fee to use a Federal asset. So is that a new contract?

Mr. LAZZERI. Congressman, I would prefer not to respond to the particular circumstance without giving it more thought. But my understanding is that would probably not be covered by the executive order.

Mr. MEADOWS. All right. So what about if I lease a building from the Federal Government? Do I have to comply with those standards when you're the lessor?

Mr. LAZZERI. There are a number of requirements, Congressman, not just under the executive order but the Service Contract Act that would govern contracts governed by lease agreements as well.

Mr. MEADOWS. So I would have to meet the new executive order if I'm a lessee?

Mr. LAZZERI. Well, Congressman, you would likely have to comply with not just the executive order but also the Fair Labor Standards Act.

Mr. MEADOWS. But that's a different number. And so—when we really look at that. So let me go on a little bit further.

Is there, in your opinion, any way that we can give a waiver to seasonal businesses and that you re-address this and work this without us doing a legislative fix? Are you willing to look at that?

Mr. LAZZERI. Thank you, Congressman. We're happy to take additional information. However, we did consider these types of agreements in conjunction with the scope of the executive order, and we determined that these agreements were clearly ones that were meant to be covered by the very terms of the executive order.

Mr. MEADOWS. So, again, it was more what the executive order said than what the stakeholders said.

Mr. LAZZERI. We considered both.

Mr. MEADOWS. All right. So how many—how many times did you go out and visit seasonal businesses before you made your rule? You personally. How many times did you go? Since you're one of the ones that are in charge, how many times did you travel to see the impact?

Mr. LAZZERI. I can't comment on that. I actually don't have——

Mr. MEADOWS. So did you go or not?

Mr. LAZZERI. I can't tell you for sure——

Mr. MEADOWS. So you don't know whether you went to a seasonal business or not?

Mr. LAZZERI. I can look back and I can respond, but I can respond in questions for the record if you prefer.

Mr. MEADOWS. So it wasn't that long ago. So did you travel to go and visit personally or not? Come on, Mr. Lazzeri.

Mr. LAZZERI. I do not want to provide you with an answer that's inaccurate, Congressman. But I do appreciate the question, and I understand the importance of this issue to you. And I do want to provide you with a more complete response.

Mr. MEADOWS. So you may have.

Mr. LAZZERI. I can't say for sure.

Mr. MEADOWS. Madam Chairwoman, I find it just amazing. I hope that his wife or—if you're married——

Mr. LAZZERI. I am.

Mr. MEADOWS. —that you can remember your anniversary better than you can potential trips.

Mrs. LUMMIS. The chair now recognizes the gentleman from Colorado for 5 minutes.

Mr. BUCK. And I would be glad to yield to the gentleman from North Carolina. I'm enjoying this. So I don't have any questions. So if you'd like to continue.

Mr. MEADOWS. I have one other question, Mr. Lazzeri. If you say you're willing to take additional input but yet it's not going to affect the outcome, why take the additional input?

Mr. LAZZERI. Well, I can talk about the testimony provided by the American Outdoors Association as an example. Providing additional compliance assistance can resolve some of the issues that have been raised that we believe may not be exactly accurate. For example, for meals and breaks, under the Fair Labor Standards Act the AOA has referred to that as a burden. But that burden, as it's described, is currently required by the Fair Labor Standards Act, but only if you take a credit as an employer against the minimum wage.

So you're already reducing the hourly pay for that hour where a meal break is being provided. That is why these employers are provided—or asked to keep logs. And for the Department, we would be happy to provide additional compliance assistance, because we think that there are ways, just based on the testimony, that we can help clarify some of the misperceptions that we believe the industry has about the rule.

Mr. MEADOWS. All right. Madam Chairman, I want to close with one other request. Mr. Lazzeri, since you can't seem to recall whether you've been there or not, are you willing to accompany me to some of the seasonal businesses in western North Carolina so that you can see firsthand what you're talking about and the rules that you are and how they potentially impact people that are dealing with double digit unemployment in western North Carolina? Are you willing to go with me? I'll be glad to pay.

Mr. LAZZERI. I appreciate that, Congressman. I would have to consult with the Department as far as what I can do. However, I'm more than happy to consult with also additional employers. In addition, members for the AOA, we're happy to respond to any questions that they have specifically to help them to be able to comply with the law.

Mr. MEADOWS. All right. I thank you, Madam Chairman, for your leadership on this issue. I yield back to the gentleman from Colorado. I appreciate you graciousness.

Mr. BUCK. Thank you.

Mr. Cottingham, anything that you want to mention today that hasn't come up? Anything that you think is important to put on the record?

Mr. COTTINGHAM. Well, I've been in business for 43 years, and I don't know how many employees I've had over all those years. A

lot. I've never met a mountain guide on Mount Rainier, Grand Teton, Mount Shasta, I've never met a river rafting guide on any of the rivers I've run who had low morale engaging in those kinds of activities.

When I led for the first 9 years—I didn't just start a company and hire a bunch of people. I actually led. I led for 9 straight years with my wife. And those were the finest, most rewarding summers I ever had in my life. And when I hire a young person today, as a leader, I am so thrilled that they have an opportunity to have the experience that I had.

So I would just like to add that because I think it—you—the Department of Labor misses the whole point about the need for this exemption, because these jobs are for people who are not—in my particular case, I can tell you that they aren't people who are trying to put bread on the table and feed their families. They are people who are doing this because they just love the opportunity to share their enthusiasm. It's a pretty amazing group of people.

Mr. BUCK. Thank you. Mr. Brown, same question.

Mr. BROWN. Well, I think one of the concerns we have is the subcontractor requirement that—to require the Department of Labor contract clause to be put on any subcontract that a permittee has. We're still unclear on who qualifies as a subcontractor. We asked the Department of Labor to clarify that, and they referred us to the Service Contract Act. Well, there aren't many permittees who have the opportunity or inclination to read the Service Contract Act. So that would be one of the real concerns we have about implementation of the rule.

Mr. BUCK. Okay. Thank you.

I yield back.

Mrs. LUMMIS. I thank the gentleman from Colorado.

And we have been joined by Ms. Plaskett from the Virgin Islands. You are recognized for 5 minutes.

Ms. PLASKETT. Yes. Thank you so much for your time. I don't have that many questions. I know there's been quite a bit of discussion going back and forth on this, and that Ranking Member Lawrence did ask some questions previously.

I just had just a couple that I wanted to speak on. Mr. Brown, I know that this was asked to Mr. Cottingham, but, Mr. Brown, your testimony about the guides in the back country for several days have to keep logs of sleep time and any interruptions. The value of meals they eat have to be calculated and added to hourly computation for overtime wages. Is that correct that keeping these records are not specified in the executive order?

Mr. BROWN. No. Well, there's a requirement, Congresswoman, to maintain records for examination. And so I would presume that those records are required, although they're not referred to in the rule.

Ms. PLASKETT. But it would be something that you would expect to be kept?

Mr. BROWN. Yes.

Ms. PLASKETT. And how would that change the amount of wages that individuals are receiving if you were to calculate that as well?

Mr. BROWN. Well, potentially if you certainly took the credit for sleep time, it would reduce the amount of pay.

Ms. PLASKETT. Right. Because you're sleeping probably almost as much as you're working. Right?

Mr. BROWN. No. Probably not. Probably working more than sleeping.

Ms. PLASKETT. Okay. Well, that's how I work, but I don't know how other people—but it would significantly make the amount of pay that individuals are receiving per hour of a significant change?

Mr. BROWN. It would change the gross pay, yes.

Ms. PLASKETT. And when we talk about the gross pay, Mr. Cottingham, in earlier testimony there was discussion about average salaries for the summer, $300 to $500 a summer. How many months is that?

Mr. COTTINGHAM. Excuse me. I don't quite understand $300 to $500. What are you referring to? Our average salary is approximately $2,500 for a 6- to 7-week employment period.

Ms. PLASKETT. Okay. Okay. The employment period is how long?

Mr. COTTINGHAM. Six to seven weeks.

Ms. PLASKETT. Okay. So for 6 or 7 weeks they're making how much in gross pay?

Mr. COTTINGHAM. Twenty-five hundred dollars, plus they are getting the bonuses of being able to climb major peaks, raft rivers and——

Ms. PLASKETT. So the $300 to $500 amount, what is that? Per week, then? Is that what this is?

Mr. COTTINGHAM. I didn't say anything about $300 to $500.

Ms. PLASKETT. Okay.

Mr. COTTINGHAM. Yeah. No.

Ms. PLASKETT. All right. Thank you for that clarification.

Mr. Brown, you can you describe any other specific burdens that the executive order will generate for businesses?

Mr. BROWN. Well, the one issue that I described a little earlier was the requirement, for example, if you have an employee that works under a covered part—part-time under covered contracts and then part-time under activities that are not covered under the Department of Labor rule, then assuming that they are not paid the same scale for those other activities outside the covered contract, precise records have to be maintained so that you are able to show the Department of Labor how many hours are worked under the activities covered by the contract.

Ms. PLASKETT. But that would just be good business practice anyway. Would it not?

Mr. BROWN. It would not be required without this Department of Labor rule.

Ms. PLASKETT. Okay. And, Mr. Lazzeri—is that the correct——

Mr. LAZZERI. Yes. It is.

Ms. PLASKETT. Okay. I'm very particular about the pronunciation of my name. So I try to get people's correct.

How do you respond to business concerns about the increased labor cost affecting profitability? And then how has the Department responded to that if there are those business concerns?

Mr. LAZZERI. Thank you for the question. We—as described in the executive order, we did a careful economic analysis, and it was our determination based on that analysis that any additional costs that would be borne by employers could be offset by additional pro-

ductivity increases, reduced turnover, less absenteeism, lower supervisory costs, for example, and the Department continues to provide additional outreach and guidance and are willing to do so for the AOA and its members, to Mr. Cottingham, and to others who have additional questions about how to comply with the law and how to comply in an easier manner, so to speak.

Ms. PLASKETT. Okay. Thank you. Thank you very much for the time.

Mrs. LUMMIS. I thank the gentlelady.

The chair now recognizes Mr. Palmer for 5 minutes.

Mr. PALMER. I want to go back to that previous question. Thank you, Madam Chairman.

You were saying that it would increase productivity and efficiency, but earlier in the rule it says increased costs can be offset in contract negotiations entered into by the businesses and its suppliers and consumers. This would imply that those people who did your little analysis might have anticipated that there'd be a cost increase.

And you said this would—it also said this would either mean the payments it makes to the Forest Service and other land managements agencies or to customers who are Americans, usually a taxpayer, on land. Will the Department of Labor ensure that other Federal land management entities such as the Forest Service, for instance, will charge guides and outfitters less for public land permits to make up for the increased labor costs caused by the executive order? Any plans for that?

Mr. LAZZERI. We've been working with other Federal partners like the United States Forest Service to be able to answer questions from the regulated community and from their specific stakeholders. We recognize in the rule that, you know, it is a rule of general applicability and that we do not have all of the experience that some of the contracting agencies like Bureau of Land Management, for example, would have with individual stakeholders, and we're happy to work with them to be able to help them answer additional questions.

As far as influence over the cost of the permit, I would have to defer to the contracting agency.

Mr. PALMER. Before you started—before you put forth this rule, did you sit down with anyone from the Forest Service, Bureau of Land Management, any of these other agencies that deal directly with these businesses to discuss with them how this might impact these businesses?

Mr. LAZZERI. Following the issuance of the executive order and the development of the notice of proposed rulemaking and the final rule and throughout our rulemaking, we do consult with additional—with other contracting agencies and receive comments through interagency comments that we receive, and we respond to those accordingly.

Mr. PALMER. So are you saying that you did sit down with the Forest Service and discuss how this would impact these businesses?

Mr. LAZZERI. Congressman, we did receive their input.

Mr. PALMER. And would you be willing to share that with the committee?

Mr. LAZZERI. I would have to discuss that with the Department and—however, if you request any additional information, we will respond accordingly.

Mr. PALMER. Madam Chairman, I would like to request that any documented discussions that they had with the Forest Service be provided to the committee.

Mr. PALMER. Mr. Brown, about a year ago on behalf of the American Outdoor Association you wrote a letter to Director Ziegler, I think it was in July of last year, and asking what is the meaning of verbal agreements covered by the rule. Did you get a response?

Mr. BROWN. No. I did not. There were references in the final rule, which was 300 pages, but I would not be able to tell you the answer. Not sure there is one.

Mr. PALMER. Mr. Lazzeri, and, Madam Chairman, I would like for Director Ziegler to provide a response to Mr. Brown's letter to Mr. Brown and to the committee, if I may ask for that.

Mrs. LUMMIS. Without objection, so ordered.

Mr. PALMER. Thank you.

Mr. PALMER. The Forest Service doesn't view permits as contracts or contract-like instruments. Can you give me some explanation as to why the Department of Labor has decided to equate permits to contracts?

Mr. LAZZERI. I appreciate the question, Congressman. When we considered the executive order and we looked at the definitions—the four categories of covered contracts, they were explicitly mentioned in the executive order.

And when we considered the information provided by stakeholders, including the American Outdoors Association and others, Forest Service and others, it was clear to us when we looked at the executive order definition that the executive order very explicitly intended to cover just these particular types of agreements.

Mr. PALMER. All right.

Mr. LAZZERI. Under the fourth category of covered contract.

Mr. PALMER. Madam Chairman, I yield the balance of my time. Thank you.

Mrs. LUMMIS. I thank the gentleman, and I thank all members of the committee and the panel, thank the staff.

Particularly want to thank our witnesses today. We appreciate your being here. Appreciate your testimony. Mr. Lazzeri, you've been asked for—to follow up in writing on several matters today at the hearing, and we will look forward to your responses and the Department's responses to our requests. Thank you all for being here.

If there's no further business, without objection, the subcommittee stands adjourned.

[Whereupon, at 11:33 a.m., the subcommittee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

FEDERAL REGISTER

Vol. 79 Thursday,
No. 34 February 20, 2014

Part IV

The President

Executive Order 13658—Establishing a Minimum Wage for Contractors

Federal Register
Vol. 79, No. 34
Thursday, February 20, 2014

Presidential Documents

Title 3—

The President

Executive Order 13658 of February 12, 2014

Establishing a Minimum Wage for Contractors

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Federal Property and Administrative Services Act, 40 U.S.C. 101 et seq., and in order to promote economy and efficiency in procurement by contracting with sources who adequately compensate their workers, it is hereby ordered as follows:

Section 1. Policy. This order seeks to increase efficiency and cost savings in the work performed by parties who contract with the Federal Government by increasing to $10.10 the hourly minimum wage paid by those contractors. Raising the pay of low-wage workers increases their morale and the productivity and quality of their work, lowers turnover and its accompanying costs, and reduces supervisory costs. These savings and quality improvements will lead to improved economy and efficiency in Government procurement.

Sec. 2. Establishing a minimum wage for Federal contractors and subcontractors. (a) Executive departments and agencies (agencies) shall, to the extent permitted by law, ensure that new contracts, contract-like instruments, and solicitations (collectively referred to as "contracts"), as described in section 7 of this order, include a clause, which the contractor and any subcontractors shall incorporate into lower-tier subcontracts, specifying, as a condition of payment, that the minimum wage to be paid to workers, including workers whose wages are calculated pursuant to special certificates issued under 29 U.S.C. 214(c), in the performance of the contract or any subcontract thereunder, shall be at least:

(i) $10.10 per hour beginning January 1, 2015; and

(ii) beginning January 1, 2016, and annually thereafter, an amount determined by the Secretary of Labor (Secretary). The amount shall be published by the Secretary at least 90 days before such new minimum wage is to take effect and shall be:

(A) not less than the amount in effect on the date of such determination;

(B) increased from such amount 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), or its successor publication, as determined by the Bureau of Labor Statistics; and

(C) rounded to the nearest multiple of $0.05.

(b) In calculating the annual percentage increase in the Consumer Price Index for purposes of subsection (a)(ii)(B) of this section, the Secretary shall compare such Consumer Price Index for the most recent month, quarter, or year available (as selected by the Secretary prior to the first year for which a minimum wage is in effect pursuant to subsection (a)(ii)(B)) with the Consumer Price Index for the same month in the preceding year, the same quarter in the preceding year, or the preceding year, respectively.

(c) Nothing in this order shall excuse noncompliance with any applicable Federal or State prevailing wage law, or any applicable law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this order.

Sec. 3. Application to tipped workers. (a) For workers covered by section 2 of this order who are tipped employees pursuant to 29 U.S.C. 203(t),

the hourly cash wage that must be paid by an employer to such workers shall be at least:

(i) $4.90 an hour, beginning on January 1, 2015;

(ii) for each succeeding 1-year period until the hourly cash wage under this section equals 70 percent of the wage in effect under section 2 of this order for such period, an hourly cash wage equal to the amount determined under this section for the preceding year, increased by the lesser of:

(A) $0.95; or

(B) the amount necessary for the hourly cash wage under this section to equal 70 percent of the wage under section 2 of this order; and

(iii) for each subsequent year, 70 percent of the wage in effect under section 2 for such year rounded to the nearest multiple of $0.05.

(b) Where workers do not receive a sufficient additional amount on account of tips, when combined with the hourly cash wage paid by the employer, such that their wages are equal to the minimum wage under section 2 of this order, the cash wage paid by the employer, as set forth in this section for those workers, shall be increased such that their wages equal the minimum wage under section 2 of this order. Consistent with applicable law, if the wage required to be paid under the Service Contract Act, 41 U.S.C. 6701 et seq., or any other applicable law or regulation is higher than the wage required by section 2, the employer shall pay additional cash wages sufficient to meet the highest wage required to be paid.

Sec. 4. Regulations and Implementation. (a) The Secretary shall issue regulations by October 1, 2014, to the extent permitted by law and consistent with the requirements of the Federal Property and Administrative Services Act, to implement the requirements of this order, including providing exclusions from the requirements set forth in this order where appropriate. To the extent permitted by law, within 60 days of the Secretary issuing such regulations, the Federal Acquisition Regulatory Council shall issue regulations in the Federal Acquisition Regulation to provide for inclusion of the contract clause in Federal procurement solicitations and contracts subject to this order.

(b) Within 60 days of the Secretary issuing regulations pursuant to subsection (a) of this section, agencies shall take steps, to the extent permitted by law, to exercise any applicable authority to ensure that contracts as described in section 7(d)(i)(C) and (D) of this order, entered into after January 1, 2015, consistent with the effective date of such agency action, comply with the requirements set forth in sections 2 and 3 of this order.

(c) Any regulations issued pursuant to this section should, to the extent practicable and consistent with section 8 of this order, incorporate existing definitions, procedures, remedies, and enforcement processes under the Fair Labor Standards Act, 29 U.S.C. 201 et seq.; the Service Contract Act, 41 U.S.C. 6701 et seq.; and the Davis-Bacon Act, 40 U.S.C. 3141 et seq.

Sec. 5. Enforcement. (a) The Secretary shall have the authority for investigating potential violations of and obtaining compliance with this order.

(b) This order creates no rights under the Contract Disputes Act, and disputes regarding whether a contractor has paid the wages prescribed by this order, to the extent permitted by law, shall be disposed of only as provided by the Secretary in regulations issued pursuant to this order.

Sec. 6. Severability. If any provision of this order, or applying such provision to any person or circumstance, is held to be invalid, the remainder of this order and the application of the provisions of such to any person or circumstance shall not be affected thereby.

Sec. 7. General Provisions. (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an agency or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

(d) This order shall apply only to a new contract or contract-like instrument, as defined by the Secretary in the regulations issued pursuant to section 4(a) of this order, if:

(i) (A) it is a procurement contract for services or construction;

(B) it is a contract or contract-like instrument for services covered by the Service Contract Act;

(C) it is a contract or contract-like instrument for concessions, including any concessions contract excluded by Department of Labor regulations at 29 C.F.R. 4.133(b); or

(D) it is 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; and

(ii) the wages of workers under such contract or contract-like instrument are governed by the Fair Labor Standards Act, the Service Contract Act, or the Davis-Bacon Act.

(e) For contracts or contract-like instruments covered by the Service Contract Act or the Davis-Bacon Act, this order shall apply only to contracts or contract-like instruments at the thresholds specified in those statutes. For procurement contracts where workers' wages are governed by the Fair Labor Standards Act, this order shall apply only to contracts or contract-like instruments that exceed the micro-purchase threshold, as defined in 41 U.S.C. 1902(a), unless expressly made subject to this order pursuant to regulations or actions taken under section 4 of this order.

(f) This order shall not apply to grants; contracts and agreements with and grants to Indian Tribes under the Indian Self-Determination and Education Assistance Act (Public Law 93–638), as amended; or any contracts or contract-like instruments expressly excluded by the regulations issued pursuant to section 4(a) of this order.

(g) Independent agencies are strongly encouraged to comply with the requirements of this order.

Sec. 8. Effective Date. (a) This order is effective immediately and shall apply to covered contracts where the solicitation for such contract has been issued on or after:

(i) January 1, 2015, consistent with the effective date for the action taken by the Federal Acquisition Regulatory Council pursuant to section 4(a) of this order; or

(ii) for contracts where an agency action is taken pursuant to section 4(b) of this order, January 1, 2015, consistent with the effective date for such action.

(b) This order shall not apply to contracts or contract-like instruments entered into pursuant to solicitations issued on or before the effective date for the relevant action taken pursuant to section 4 of this order.

(c) For all new contracts and contract-like instruments negotiated between the date of this order and the effective dates set forth in this section, agencies are strongly encouraged to take all steps that are reasonable and legally permissible to ensure that individuals working pursuant to those contracts and contract-like instruments are paid an hourly wage of at least $10.10 (as set forth under sections 2 and 3 of this order) as of the effective dates set forth in this section.

THE WHITE HOUSE,
February 12, 2014.

[FR Doc. 2014-03805
Filed 2-19-14; 11:15 am]
Billing code 3295-F4

USDA United States Department of Agriculture | Forest Service | Washington Office | 1400 Independence Avenue, SW Washington, DC 20250

File Code: 1010/2720
Date: July 28, 2014

Ms. Mary Ziegler
Director of the Division of Regulations, Legislation, and
Interpretation, Wage and Hour Division
U.S. Department of Labor
200 Constitution Avenue, NW
Room S-3510
Washington, DC 20210

Dear Ms. Ziegler:

Thank you for this opportunity to comment on the proposed regulation to establish a minimum wage for Federal contractors, RIN 1235-AA10. The Forest Service's (FS) suggested revisions to the proposed rule follow.

Consolidation of Terms and Definitions for a Contract
The definitions for "concessions contract or contract for concessions" and "contract or contract-like instrument" in §10.2 should be consolidated. The Department of Labor's (DOL) proposed rule has two separate terms for a contract, "concessions contract or contract for concessions" and "contract or contract-like instrument," and separate definitions for those terms. Two separate terms and definitions are unnecessary, as the definition for "concessions contract or contract for concessions" ("a contract under which the Federal Government grants the right to use Federal property") is subsumed in the definition for "contract or contract-like instrument" ("an agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law"). In addition, the definition for "concessions contract or contract for concessions" would be confusing for the FS and perhaps other federal land management agencies to implement, as the FS construes the term "concession" much more narrowly than the definition for "concessions contract or contract for concessions" in the proposed rule. The FS interprets concessions to include only commercial recreation public services such as ski areas, marinas, and outfitting and guiding. The FS does not interpret concessions to include the provision of noncommercial interpretive or educational services or the provision of energy, communications, transportation, or water services to the public. For clarity and simplicity, the FS recommends incorporating the definition for "concessions contract or contract for concessions" into the definition for "contract or contract-like instrument."

De Minimus Threshold for Concessions Subject to the Fair Labor Standards Act (FLSA)
The proposed rule includes a de minimus threshold ranging from $2,000 to $3,000 for procurement contracts. However, the proposed rule does not include a de minimus threshold for nonprocurement concession contracts subject to the FLSA. Given that most concessions on National Forest System lands are operated under a nonprocurement instrument and that many involve land use fees to the FS at, or below, the micro-purchase threshold for the FLSA, the FS recommends modifying §10.3(b) to add a de minimus threshold for nonprocurement contracts that are subject to the FLSA when the land use fee to the Federal Government does not exceed the micro-purchase threshold, as defined in 41 U.S.C. 1902(a). This revision could be accomplished by adding the following sentence to §10.3(b):

> For nonprocurement concessions contracts or contracts for concessions where workers' wages are governed by the Fair Labor Standards Act, this part applies where

> the land use fee to the Federal Government exceeds the micro-purchase threshold, as defined in 41 U.S.C. 1902(a).

This revision would provide for consistent treatment of procurement and nonprocurement concession contracts that involve only negligible amounts of money. In addition, this revision would avoid excessive paperwork and administrative costs associated with application of the minimum wage requirement when only minor business transactions are involved. As shown in the discussion below of the Regulatory Flexibility Act analysis, many FS nonprocurement concessions involve very small business entities that earn less than $100,000 in annual revenue and pay de minimus land use fees to the Federal government.

Scope and Meaning of Bilateral Contract Modifications

The FS would like clarification on the scope of bilateral contract modifications that would require adding the minimum wage clause to a concession instrument. On page 34575, the proposed rule states:

> The Department notes that only truly automatic renewals of contracts or exercises of options devoid of any bilateral negotiations fall outside the scope of the Executive Order. As discussed above and consistent with the FAR, the Department's proposed definition of the term contract specifically includes bilateral contract modifications. Any renewals or extensions of contracts resulting from bilateral negotiations involving contractual modifications other than administrative changes would therefore qualify as ''new contracts'' subject to the Executive Order.

The FS seeks clarification of whether, based on the foregoing, the proposed rule is intended to apply to bilateral contract modifications exclusively in the context of renewal or extension of contracts, or rather to bilateral contract modifications in any context, e.g., to revisions during the term of the contract that do not change the scope of the authorized use.

The FS also seeks clarification of whether the proposed rule is intended to apply exclusively to bilateral contract modifications that change the scope of offered services or facilities, or rather to any type of bilateral contract modifications, such as updating an annual operating plan or a land use fee offset agreement, which do not change the scope of authorized services or facilities. FS concession instruments often have operating plans that typically are reviewed and updated annually by the holder and approved by the FS. Furthermore, the FS utilizes Section 7 of the Granger-Thye (GT) Act to authorize the use of Federally owned improvements. The GT Act allows the holder to offset the land use fee due the United States by the cost of renovation, reconditioning, improvement, and maintenance of the authorized improvements performed at the holder's expense. A GT fee offset agreement is utilized to identify the work that will be performed in the upcoming year. Fee offset is contemplated in the initial solicitation. However, identification of fee offset projects takes place each year.

Enforcement Responsibility
The FS seeks confirmation of DOL's responsibility for enforcement of the minimum wage clause. In particular, the FS seeks confirmation that if it receives a complaint regarding proper payment of wages under the clause, the FS should refer that complaint to DOL; that DOL will determine whether there is a violation; and that DOL will notify the holder of the instrument and the FS as to the corrective action that needs to be taken and the timeframe for completing it. The FS has authority to suspend or revoke the instrument based on noncompliance with its terms, including noncompliance with the minimum wage clause, after giving the holder notice and an opportunity to comply. The FS has authority to refer a holder whose instrument has been revoked for debarment and suspension in accordance with applicable law and FS directives.

Regulatory Flexibility Act Analysis
In the Regulatory Flexibility Act analysis, the threshold utilized to analyze the impacts on small business is too high for the Other Services sector. The FS recommends that DOL include additional thresholds below $2,500,000 in Table D-8 for the Other Services sector on page 34608. In Table D-8, the lowest category is firms earning less than $2,500,000 in annual revenue, whereas for some other sectors, the threshold is less than $100,000 in annual revenue (see Tables D-1 through D-3 for the Construction, Transportation and Warehousing, and Information Industries). FS concessions would fall into the Other Services sector. To illustrate how the threshold would apply to outfitting and guiding services for example, we estimate that 90 percent of permits for outfitting and guiding services involve annual revenue of less than $100,000; 9.5 percent of permits involve annual revenue between $100,000 and $2,500,000 (the floor in Table D-8); and only 0.5 percent of outfitting and guiding permits have annual revenue of over $2,500,000.

Recordkeeping Requirements Subject to the Paperwork Reduction Act
The Paperwork Reduction Act analysis on page 34593 states that §10.21 of the proposed rule, which would require contractors and subcontractors to comply with the minimum wage clause in the proposed rule, would impose no new recordkeeping requirements. The rationale given for this conclusion is that the recordkeeping requirements in the minimum wage clause of the proposed rule are no different from the recordkeeping requirements contractors and subcontractors must already meet under existing federal law and which have already been approved by the Office of Management and Budget. However, it could be argued that inclusion of the minimum wage clause itself in instruments such as FS concession instruments that do not already contain a minimum wage provision constitutes a new information collection requirement. To address this concern, the FS recommends that the preamble to the final rule expressly state that inclusion of the minimum wage clause in contracts or contract-like instruments that do not already contain a minimum wage provision does not constitute a new information collection requirement, since all the information collected under the clause is already being collected under existing federal law.

Sincerely,

/s/ Gregory C. Smith, for
LESLIE A. C. WELDON
Deputy Chief, National Forest System

cc: Joe Meade
Carolyn Holbrook
Elrand Denson

Chairman Cynthia Lummis

1) Does Executive Order 13658 apply to permit holders for filming on public lands?

In order to answer this question, the Department would need more information about the specific type of permit that was issued by a Federal agency to the company. In order for any permit for activities taking place on Federal land to be covered by Executive Order 13658 ("the Executive Order" or "the Order"), the permit must fall into one of the four categories of covered contracts: (1) procurement contracts for construction covered by the Davis-Bacon Act ("DBA"); (2) contracts for services covered by the Service Contract Act ("SCA"); (3) contracts for concessions, including any concessions contract excluded from coverage under the SCA by Department of Labor regulations at 29 CFR 4.133(b); or (4) contracts 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 wages of workers performing on or in connection with those contracts must also be covered by the DBA, SCA, or Fair Labor Standards Act ("FLSA") in order for a contract to be covered by the Executive Order.

For purposes of determining whether the holder of a permit for filming on Federal lands would be subject to the Order, the Department would need to evaluate (i) whether the specific permit itself is a covered contract, and (ii) whether the wages of the permit holder's workers (e.g., the film crew) are governed by the DBA, SCA, or FLSA. In the final rule, the Department explained that a permit to conduct a wedding on Federal land would not be covered by the Executive Order because such a permit generally would not relate to offering services for Federal employees, their dependents, or the general public, but rather would relate to offering services only to the specific individual applicant. If a company obtained a permit to film scenes on the National Mall for an internal orientation video for its staff, for example, the Department would not view such a permit as covered by the Executive Order because the filming would not be related to offering services to the general public. However, if a company was hired by the National Park Service and obtained a permit, for example, to film at the Grand Canyon in order to create an informational video for visitors to the national park, such a permit may be covered by the Executive Order because the filming is related to offering services to the general public.

2) Does Executive Order 13658 apply to interns at the Department of Labor?

Worker coverage under Executive Order 13658 is necessarily a fact-intensive inquiry and thus it is difficult to address in the abstract whether a particular group of individuals are entitled to the Executive Order minimum wage. In order to determine whether the Executive Order applies to an intern working at the Department, the Department would first need to determine the type of work performed by that individual. The EO would apply to that individual only if that person was working on or in connection with a covered contract, i.e., one that falls within the definition of a "contract or contract-like instrument" as set forth in the Department's final rule; qualifies as one of the four specifically enumerated types of contracts described in the Executive Order; and

constitutes a "new contract" as defined in the Department's final rule. Second, if the intern was determined to be working on or in connection with a covered contract, the Department would need to determine whether that individual's wages were governed by the SCA, the DBA, or the FLSA. The Executive Order applies to workers performing on or in connection with covered contracts whose wages are governed by the SCA, the DBA, or the FLSA. As the Department's final rule provided, it is well-established that worker coverage under those statutes does not depend upon the existence or form of any contractual relationship that may be alleged to exist between the contractor or subcontractor and such persons. For example, under the FLSA, the titles given to workers are not dispositive, and in order to determine whether a worker is a bona fide intern or an employee, the Wage and Hour Division ("WHD") utilizes a multi-factor test. See Fact Sheet #71, http://www.dol.gov/whd/regs/compliance/whdfs71.pdf. The Department would rely on these principles to determine whether the wages of a specific individual designated as an intern were governed by the SCA, DBA, or FLSA.

3) **Please provide the Committee with the contact information for an individual at the Department of Labor who will promptly respond to the concerns of stakeholders impacted by Executive Order 13658.**

Any individual or entity who has questions or concerns relating to the Executive Order can address them to Mr. William Brooks, Acting Branch Chief, WHD, Branch of Government Contracts Enforcement, at brooks.william@dol.gov or (202) 693-0064.

4) **Please provide any studies or information that the Department of Labor used to reach the conclusion that higher wages result in increased productivity and higher quality of services rendered.**

The Department's rulemaking noted that increasing the minimum wage of Federal contract workers would generate several important benefits, including reductions in turnover and absenteeism, a reduction in supervisory costs, increase in worker morale and worker productivity, and an increase in the quality of services provided to the Federal Government and the general public. In its final rule, the Department identified and discussed a variety of studies that provide support for the benefits of raising the pay of low-wage workers. Specifically, the Department cited to the following studies:

Dionne, Georges and Benoit Dostie, "New Evidence on the Determinants of Absenteeism Using Linked Employer-Employee Data," Industrial and Labor Relations Review, Vol. 61, No. 1, (2007)

Pfeifer, Christian, "Impact of Wages and Job Levels on Worker Absenteeism," International Journal of Manpower, Vol. 31, No. 1, pp 59–72, (2010)

Fairris, David, David Runsten, Carolina Briones, and Jessica Goodheart, ''Examining the Evidence: The Impact of the Los Angeles Living Wage Ordinance on Workers and Businesses,'' LAANE, (2005)

Allen, Steven, ''How Much Does Absenteeism Cost?'' Journal of Human Resources, Vol. 18, No. 3, pp 379–393, (1983)

Mefford, Robert, ''The Effects of Unions on Productivity in a Multinational Manufacturing Firm,'' Industrial and Labor Relations Review, Vol. 40, No. 1, pp 105–114, (1986)

Zhang, Wei, Huiying Sun, Simon Woodcock, and Aslam Anis, ''Valuing Productivity Loss Due to Absenteeism: Firm-level Evidence from a Canadian Linked Employer-Employee Data,'' Canadian Health Economists' Study Group, The 12th Annual CHESG Meeting, Manitoba, Canada, (May 2013)

Reich, Michael, Peter Hall, and Ken Jacobs, ''Living Wages and Economic Performance: The San Francisco Airport Model,'' Institute of Industrial Relations, University of California, Berkeley, (March 2003)

Dube, Arindrajit, T. William Lester, and Michael Reich, ''Minimum Wage Shocks, Employment Flows and Labor Market Frictions,'' UC Berkeley Institute for Research on Labor and Employment, Working Paper, (July 20, 2013)

Brochu, Pierre and David Green, ''The Impact of Minimum Wages on Labor Market Transitions,'' The Economic Journal, Vol. 123, No. 573, pp 1203–1235, (December 2013)

Howes, Candace, ''Living Wages and Retention of Homecare Workers in San Francisco,'' Industrial Relations, Vol. 44, No. 1, pp 139–163, (2005)

Niedt, Christopher, Greg Ruiters, Dana Wise, and Erica Schoenberger, ''The Effect of the Living Wage in Baltimore,'' Working Paper No. 119, Department of Geography and Environmental Engineering, Johns Hopkins University, (1999)

Holzer, Harry, ''Wages, Employer Costs, and Employee Performance in the Firm,'' Industrial and Labor Relations Review, Vol. 43, No. 3, pp 147–164, (1990)

Groshen, Erica L. and Alan B. Krueger, ''The Structure of Supervision and Pay in Hospitals,'' Industrial and Labor Relations Review, Vol. 43, No. 3, pp 134–146, (1990)

Osterman, Paul, ''Supervision, Discretion, and Work Organization,'' The American Economic Review, Vol. 84, No. 2, pp 380–84, (1994)

Rebitzer, James, ''Is There a Trade-Off Between Supervision and Wages? An Empirical Test of Efficiency Wage Theory,'' Journal of Economic Behavior and Organization, Vol. 28, No. 1, pp 107-129, (1995)

Georgiadis, Andreas, ''Efficiency Wages and the Economic Effects of the Minimum Wage: Evidence from a Low-Wage Labour Market,'' Oxford Bulletin of Economics and Statistics, Vol. 75, No. 6, pp 962–979, (2013)

Akerlof, George, ''Labor Contracts as Partial Gift Exchange,'' The Quarterly Journal of Economics, Vol. 97, No. 4, pp 543–569, (1982)

Akerlof, George, ''Gift Exchange and Efficiency-Wage Theory: Four Views,'' The American Economic Review, Vol. 74, No. 2, pp 79–83, (1984)

Mas, Alexandre and Enrico Moretti, ''Peers at Work,'' American Economic Review, Vol. 99, No. 1, pp 112–45, (2009)

Thompson, Jeff and Jeff Chapman, ''The Economic Impact of Local Living Wages,'' Economic Policy Institute, Briefing Paper #170 (2006)

5) Did the Department of Labor have input into Executive Order 13658 before it was finalized by the President?

Pursuant to standard Administration practice and procedure, the Department reviewed the proposed Executive Order in the course of the interagency clearance process.

6) Please list all permits issued by a public land agency that would not be subject to the provisions of Executive Order 13658 or its implementing regulations.

In order to answer this question, the Department would need more information about the specific types of land use permits that are issued by Federal agencies to determine whether they would be subject to the provisions of Executive Order 13658 or its implementing regulations. Broadly speaking, some of the categories of permits that are not subject to the Executive Order include permits 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, 41 U.S.C. 6501 *et seq.*, and land use permits that are not related to offering services to Federal employees, their dependents, or the general public.

Representative Mark Meadows

1) Prior to the rulemaking had Mr. Lazzeri visited a seasonal outfitting business? If yes, please provide details of his outreach.

Mr. Lazzeri did not visit any seasonal outfitting and guiding business prior to the rulemaking implementing Executive Order 13658. However, outreach to affected contractors and workers was conducted by the Division of Regulations and Legislative Interpretations in the Wage and Hour Division. As Mr. Lazzeri discussed in his testimony, the Department conducted several

listening sessions at various Prevailing Wage Seminars. Moreover, the Department expressly considered outfitters and guides with permits on Federal lands in implementing the Executive Order. The Department received a few comments on its proposed rule seeking clarification and expressing concern about the coverage of outfitter and guide permits. The Department carefully considered those comments and thoroughly addressed them in the *Federal Register* notice for the final rule.

2) **Please provide information on how the Department of Labor is enforcing Executive Order 13658 in regards to permits granted for activities on the National Mall?**

In order for any permit for activities taking place on the National Mall to be covered by the Executive Order, the permit must fall into one of the four categories of covered contracts: (1) procurement contracts for construction covered by the DBA; (2) contracts for services covered by the SCA; (3) contracts for concessions, including any concessions contract excluded from coverage under the SCA by Department of Labor regulations at 29 CFR 4.133(b); or (4) contracts in connection with Federal property or lands and related to offering services to Federal employees, their dependents, or the general public. Moreover, the wages of workers performing on or in connection with those contracts must be governed by the DBA, SCA, or FLSA. In the final rule, the Department explained that a permit to conduct a wedding on Federal land would not be covered by the Executive Order because such a permit generally would not relate to offering services for Federal employees, their dependents, or the general public, but rather would relate to offering services only to the specific individual applicant. Presumably, many of the activities taking place pursuant to a permit on the National Mall would similarly be excluded from coverage. For covered contracts, the Department's final rule contains a mechanism for investigations by WHD and informal complaint resolution, as appropriate. The Executive Order authorizes the Department to enforce the provisions of the Order. The final rule sets forth an enforcement scheme that closely follows the process used in enforcing the SCA and DBA and proposes remedies for violations of the Executive Order that are available under the SCA, DBA, and/or FLSA, including payment of back wages, reinstatement, and debarment, as appropriate.

Representative Gary Palmer

1) **Will DOL produce any conversations and the contents of those conversations that occurred between DOL and U.S. Forest Service?**

The U.S. Forest Service provided comments in connection with the Department's development of a final rule implementing Executive Order 13658; the Forest Service's comments are available at www.regulations.gov.

2) Will DOL provide a response to Mr. Brown's (America Outdoors Association) letter to DOL in regards to verbal contracts and the order, and will that response be provided to both Mr. Brown and the Committee?

The Department is not aware of any letter from Mr. Brown concerning verbal contracts and Executive Order 13658 other than Mr. Brown's letter (on behalf of the America Outdoors Association) commenting on the Department's proposed rule to implement the Executive Order. In that letter, Mr. Brown referred to "verbal agreements" in a portion of one sentence. Although the Department did not refer specifically to Mr. Brown's comment concerning verbal agreements in its final rule, the Department did analyze and respond to comments concerning coverage of verbal agreements as follows: "[T]he Department's decision to include verbal agreements as part of its definition of the term 'contract' derives from the SCA's regulations. . . . The purpose of including verbal agreements in the definition of contract and contract-like instrument is to ensure that the Executive Order's minimum wage protections apply in instances where the contracting parties, for whatever reason, rely on a verbal rather than written contract. As noted, such instances are likely to be exceedingly rare, but workers should not be deprived of the Executive Order's minimum wage because contracting parties neglected to memorialize their understanding in a written contract." *See* 79 Fed. Reg. 60668.

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