



### **Minimum Wage for Employees Working “On or in Connection With” Federal Contracts Increasing to \$16.20 Per Hour**

In April 2021, President Biden issued Executive Order 14026, which increased the minimum wage for employees of federal government contractors to \$15.00 per hour. Notably, the Executive Order provided that the minimum wage would be annually adjusted to account for inflation. On September 30, 2022, the Wage and Hour Division of the U.S. Department of Labor (WHD) published a Notice indicating that the minimum wage for contractors would rise to \$16.20 as of January 1, 2023, an increase of 8%. The same day, WHD published a Notice increasing the minimum wage under Executive Order 13658 to \$12.15 per hour.

EO 14026 applies to federal contracts entered into after January 30, 2022, and existing federal contracts that are renewed or extended after this date. EO 13658, and its lower minimum wage, applies to federal contracts entered into between January 1, 2015, and January 29, 2022. To the extent the rising minimum wage increases contractors’ cost of performance, they may be able to request an equitable adjustment or price adjustment. Contractors may also seek adjustments to increase wages beyond those thresholds to maintain wage differentials among employees. The merits of such an argument will be determined by contracting officers and ultimately the Boards of Contract Appeal and Court of Federal Claims.

Both of the minimum wage executive orders extend beyond direct labor and cover individuals working “in connection with” federal contracts. A worker performing “on” a covered contract is defined as one “who directly performs the specific services called for by the contract’s terms.” WHD uses the example of a nurse or nurse’s aide at an assisted living facility who performs the specific medical services called for by the contract. In contrast, a worker who performs “in connection with” a covered contract is any worker who performs work activities that, while not the specific services called for by the contract’s terms, are necessary to the performance of contract services. Here, the WHD uses the example of a worker who washes laundry for the patients at the assisted living facility mentioned above as performing “in connection” with the SCA contract. That is, while laundry services are not specifically identified by the contract, the contract could not be performed without the laundry services being performed. In the construction context, WHD also uses the example of a security guard patrolling a job site as an individual working “in connection with” a covered contract.

Notably, the scope of “in connection with” can also extend to a contractors’ headquarters staff. For example, a payroll clerk that processes certified payroll records as required by the Davis-Bacon Act arguably is working “in connection with” covered contracts. Particularly where contractors perform primarily federal work, the scope of “in connection with” might extend to the entirety of an organization’s employees. In this regard, employees who spend less than twenty percent (20%) of their time working “in connection with” federal contracts are excluded from coverage under the executive orders. Thus, the scope of coverage of headquarters staff may ultimately turn on the mix of federal and non-federal work a contractor performs.



Finally, it should be noted that there are two lawsuits challenging President Biden’s authority to increase the federal contractor minimum wage through executive order. In February 2022, the Tenth Circuit, in *Bradford v. U.S. Department of Labor*, No. 22-1023, stayed implementation of EO 14026 as it applies to “contracts ... in connection with seasonal recreational services or seasonal recreational equipment rental for the general public on federal lands.” Thus, the EO is currently not being enforced by WHD with respect to those contracts. On February 9, 2022, the states of Indiana, Idaho, Arizona, Nebraska, and South Carolina filed an action in the Federal District Court for the District of Arizona, *Mark Brnovich, et. al. v. Joseph R. Biden, et. al.*, Case No. 2:22-cv-213-JJT, challenging the President’s ability to increase the federal contractor minimum wage by executive order. Both cases remain pending.

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