

Do You Know What to Pay Your Work Force? New Decision Invalidates the Federal Contractor Minimum Wage Rule

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Employers with Federal contracts have experienced unique challenges in the past few years—from navigating the Federal contractor vaccine mandate to new rules related to sick leave and time off. One of the most significant developments was President Biden’s Executive Order 14026, which imposed minimum wage requirements for Federal contractors. But on November 5, 2024, the Ninth Circuit invalidated Executive Order 14026 and the implementing Department of Labor Rule, 86 Fed. Reg. 67,126. In reaching its decision, the court significantly narrowed the President’s power to set a minimum wage through government contracts under the Federal Property and Administrative Services Act (the “Act”). See *Nebraska v. Su*, No. 23-15179, 2024 U.S. App. LEXIS 28010 (9th Cir. Nov. 5, 2024).

First, some context. Recall that President Obama issued an executive order in 2014 setting the minimum wage at \$10.10 per hour. See Executive Order 13658. Then, in 2018, President Trump issued a subsequent executive order that maintained the \$10.10 minimum but excluded certain types of contracts from its coverage. See Executive Order 13838.

Under President Biden, the DOL issued a final rule, Increasing the Minimum Wage for Federal Contractors, 86 Fed. Reg. 67,126 (Nov. 24, 2021). Soon after DOL finalized its rule implementing EO 14026, five states sued in the District of Arizona to set aside the Rule and the EO. The states also sought a preliminary injunction to prohibit the government from enforcing the minimum wage requirement anywhere in the United States. The district court denied the preliminary injunction, and the states appealed to the Ninth Circuit.

On appeal, the states argued that EO 14026 exceeded the scope of the President’s authority under the Act. In response, the DOL and other government defendants argued the purpose of the Act, as outlined in 40 U.S.C. § 101, was to create an efficient and economical procurement system for the federal government. The Ninth Circuit held that this provision is purposive only and by itself does not confer any procurement authority to

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the President. The court remanded to the district court to grant an injunction, though the scope of that injunction remains unclear and could apply only in favor of the plaintiff states, only to Federal contractors that reside in those states, or could, conceivably, apply nationwide.

The decision widened an already significant circuit split about the President's authority to use the Act to impose upon Federal contractors social policy objectives. Most directly, the Tenth Circuit upheld the minimum wage rule and executive order earlier this year. See *Bradford v. United States DOL*, 101 F.4th 707 (10th Cir. 2024). More broadly, the Fifth, Sixth, and Ninth Circuits have held that the President has no authority under § 101 of the Act to impose social policy objectives. But the D.C., Fourth, and Tenth Circuits have held that the Act's purpose confers expansive procurement power to the President in matters of government efficiency and the economy.

With the scope and impact of this decision, clients with federal contracts should consider the following implications.

First, clients should reassess the wages and benefits of employees—at a minimum monitoring this litigation and contingency planning about the proceedings on remand. If the requested injunction takes effect, employers may need to evaluate whether to adjust wages. Employers should keep in mind, however, that other prevailing wages regimes may still apply, such as the Service Contract Act or the Davis Bacon Act. Moreover, state minimum wage laws still apply, and several states have implemented minimum wages hikes based on a \$15 target, including those newly implemented in states like Missouri and Alaska. Additionally, employers with unionized workforces may face limitations in changing wages unilaterally.

Second, the removal of the minimum wage requirement might spark a race to the bottom on wages. That, in turn, could lead to problems retaining employees. That same wage environment, on the other hand, might also create opportunities to pick up employees from competitors.

Third, the Ninth Circuit's decision may signal additional challenges to Rules and EOs in the federal contractor employment context. That signal is likely to be especially strong where the Rule or EO bases its authority under § 101 of the Act. It may also augur future adverse rulings regarding Office of Federal Contract Compliance Programs obligations related to affirmative action plans and paid sick leave.

Finally, the new Administration has the ability to issue new executive orders, of course. Although the Trump Administration did not revoke the Federal contractor minimum wage the last time around, it may do so this time around—and set its sights on other regulatory obligations enforced by the OFCCP on Federal contractors. For Federal contractors, the pace of the legal and regulatory changes is likely to be the one constant in an otherwise frenetic period reaching back a decade.