

PUBLICATION

DOL Publishes Final Rule: Executive Order 14026 Implements Federal Contractors \$15 Minimum Wage

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On November 22, 2021, the U.S. Department of Labor (DOL) announced publication of the Final Rule, "Increasing the Minimum Wage for Federal Contractors" implementing President Biden's Executive Order 14026 (the Order), signed on April 27, 2021. The Order provides that the federal government's procurement interests in economy and efficiency are promoted when it contracts with sources that adequately compensate their workers. The Order raises the minimum wage paid by those contractors to workers performing work "on or in connection with" covered federal contracts to \$15 per hour beginning January 30, 2022. Beginning January 1, 2023, and annually thereafter, the required minimum wage will be an amount determined by the Secretary of Labor. The Final Rule establishes standards and procedures for implementing and enforcing the minimum wage protections of the Order, and is effective on January 30, 2022.

Covered Contracts

The Order applies to new contracts entered into on or after January 30, 2022, and also covers existing contracts that are renewed or extended (pursuant to an exercised option or otherwise) on or after January 30, 2022. The Order covers work performed "on or in connection with" covered contracts and applies to federal contracts performed within the 50 states, the District of Columbia, and specified U.S. territories, consistent with coverage of the Service Contract Act (SCA).

The minimum wage requirement applies to four major categories of contractual agreements:

- Procurement contracts for construction covered by the Davis-Bacon Act (DBA);
- Service contracts covered by the SCA;
- Concessions contracts, including concessions contracts excluded from SCA coverage; and
- 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.

Federal agencies are "strongly encouraged" to require the \$15 minimum wage where they have issued a solicitation before the Final Rule's effective date and entered into a new contract resulting from the solicitation within 60 days of the effective date.

The following types of contracts are *not* covered by the Final Rule:

- Grants within the meaning of the Federal Grant and Cooperative Agreement Act;
- Contracts or agreements with Indian Tribes under Public Law 93-638, as amended;
- Any procurement contracts for construction that are not subject to the DBA (*i.e.*, procurement contracts for construction under \$2,000);
- Any contracts for services, except for those otherwise expressly covered by the Final Rule, that are exempted from coverage under the SCA or its implementing regulations; and
- Contracts that result from a solicitation issued before January 30, 2022, and that are entered into on or between January 30, 2022 and March 30, 2022. (However, if such a contract is subsequently

extended or renewed, or an option is subsequently exercised under that contract, the Order will apply to that extension, renewal, or option.)

The Order does not apply to contracts for the manufacturing or furnishing of materials, supplies, articles, or equipment to the federal government, including that subject to the Walsh-Healey Public Contracts Act.

Covered Employees

Employees performing work *on or in connection with* covered federal contracts whose wages are governed by the Fair Labor Standards Act (FLSA), the SCA, or the DBA are generally entitled to receive the newly required minimum wage for all time spent performing on or in connection with covered federal contracts.

An employee performs work "on" a contract if the worker directly performs the services called for by the contract. An employee performs work "in connection with" a contract if the worker's work activities are necessary to the performance of a contract but are not the specific services called for by the contract.

The Final Rule contains a "less-than-20% exception" for employees who only perform work "in connection with" a covered contract, but do not perform any direct work on the contract. As such, for employees who spend less than 20% of their work hours in a workweek working indirectly in connection with a covered contract, the federal contractor is not required to pay the \$15 wage for any hours in that workweek. By comparison, the vaccination mandate under Executive Order 14042 and the Safer Federal Workforce Task Force guidance implementing that mandate does *not* contain a less than 20% exception for those employees who perform work in connection with a covered contract.

If an employee is entitled to a wage rate higher than the Order minimum wage pursuant to another federal, state, or local law (*e.g.*, the SCA or DBA), the worker must be paid the higher wage rate. Employees covered by the Order and due the full mandated minimum wage include workers with disabilities performing on or in connection with covered contracts whose wages are calculated pursuant to certificates issued under section 14(c) of the FLSA.

The Order requires contractors to pay covered workers who qualify as tipped employees pursuant to section 3(t) of the FLSA a cash wage of at least i) \$10.50 an hour, beginning on January 30, 2022; ii) 85 percent of the Order minimum wage rate, as annually adjusted, beginning January 1, 2023; and 100 percent of the Order minimum wage rate, as annually adjusted, beginning January 1, 2024, and for each subsequent year.

Notice Requirements

Federal contractors (and subcontractors) must notify all workers performing work on or in connection with a covered contract of the applicable minimum wage rate under the Order. For service employees on contracts covered by the SCA and laborers and mechanics on contracts covered by the DBA, contractors may meet the notification requirement by posting, in a prominent and accessible place at the worksite, the applicable wage determination. For employees performing work on or in connection with a covered contract whose wages are governed by the FLSA, the contractor may meet this requirement by posting, in a prominent and accessible place at the worksite, a poster that will be provided by the DOL.

Steps to Take Now

To plan for the potential impact of the required \$15 minimum wage, federal contractors and subcontractors should assess existing contracts that contain options or extensions that may arise on or after January 30, 2022. Contractors should also be prepared for contract modifications from agencies that may elect to include the higher minimum wage earlier than the Final Rule requires. Further, contractors should assess the impact, if any, of the "less-than-20% exception" to determine if any employees may be excluded from the Final Rule's

application. Finally, contractors should assess the financial impact of the Final Rule on their businesses and consider any steps they can take to minimize that impact under the applicable contract terms.

If you have any questions, please contact the author or any member of Baker Donelson's [Government Contracts Team](#), which represents clients in all aspects of government contracting at the federal, state and local levels. Our team of more than 40 lawyers advises clients throughout the southeastern United States as well as clients with national markets.