

## DOL Publishes Final Rule Implementing President Biden's \$15 Federal Contractor Minimum Wage Executive Order 14026

By Leslie A. Stout-Tabackman

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The Department of Labor (DOL) has published its [Final Rule](#) implementing President Joe Biden's April 27, 2021, [Executive Order 14026](#) raising the minimum wage from \$10.95 an hour to [\\$15 an hour](#) (with increases to be published annually). The new wage rate will take effect January 30, 2022, although, as discussed below, the rate increases will not be applied to contracts automatically on that date.

The Final Rule is substantially similar to the DOL's proposed Notice of Rulemaking issued in [July 2021](#) and is more expansive in coverage than the current federal contractor minimum wage requirements in effect under former President Barack Obama's Executive Order 13658.

### \$15 Wage Rate Does Not Apply to All Federal Contractors, All Federal Contracts, or All Workers

#### *Covered Contracts*

The \$15 wage rate will apply to workers on four specific types of federal contracts that are performed in the United States (including the District of Columbia, Puerto Rico, and certain U.S. territories):

- Procurement contracts for construction covered by the Davis-Bacon Act (DBA), but not the Davis-Bacon Related Acts
- Service Contract Act (SCA) covered contracts
- Concessions contracts – meaning a contract under which the federal government grants a right to use federal property, including land or facilities, for furnishing services. The term “concessions contract” includes, but is not limited to, a contract the principal purpose of which is to furnish food, lodging, automobile fuel, souvenirs, newspaper stands, or recreational equipment, regardless of whether the services are of direct benefit to the government, its personnel, or the general public
- Contracts related to federal property and the offering of services to the general public, federal employees, and their dependents

The Executive Order does not apply to contracts or other funding instruments, including:

- Contracts for the manufacturing or furnishing of materials, supplies, articles, or equipment to the federal government
- Grants
- Contracts or agreements with Indian Tribes under the Indian Self-Determination and Education Assistance Act
- Contracts excluded from coverage under the SCA or DBA and specifically excluded in the implementing regulations and
- Other contracts specifically excluded (see NPRM Section 23.40)

#### *Effective Date; Definition of “New” Contracts Expanded*

The Final Rule specifies that the wage requirement will apply to new contracts and contract solicitations as of January 30, 2022. Despite the “new contract” limitation, the regulations, consistent with the language of the Biden Executive Order, strongly encourage federal agencies to require the \$15 wage for all existing contracts and solicitations issued between the date of the Executive Order and the effective date of January 30, 2022.

Similarly, agencies are “strongly encouraged” to require the new wage where they have issued a solicitation before the effective date and entered into a new contract resulting from the solicitation within 60 days of such effective date.

### Meet the Author



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### Practices

Affirmative Action, OFCCP and Government Contract Compliance  
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### Industries

Government Contractors

Pursuant to the Final Rule, the new minimum wage will apply to new contracts; new contract-like instruments; new solicitations; *extensions or renewals of existing contracts or contract-like instruments*; and *exercises of options on existing contracts or contract-like instruments* on or after January 30, 2022.

#### *Geographic Limitations Expanded*

The Final Rule applies coverage to workers outside the 50 states and expands the definition of “United States” to include the 50 states, the District of Columbia, Puerto Rico, the Virgin Islands, Outer Continental Shelf lands as defined in the Outer Continental Shelf Lands Act, American Samoa, Guam, the Commonwealth of the Northern Mariana Islands, Wake Island, and Johnston Island.

#### *Workers Performing Work “On or In Connection With” a Covered Contract*

Only workers who are non-exempt under the Fair Labor Standards Act and performing work on or in connection with a covered contract must be paid \$15 per hour. The wage requirement applies only to hours worked on or in connection with a covered contract.

A worker performs “on” a contract if the worker directly performs the specific services called for by the contract. A worker performs “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 includes a “less-than-20% exception” for those workers who only perform work “in connection with” a covered contract, but do not perform any direct work on the contract. For workers who spend less than 20 percent of their hours in a workweek working indirectly in connection with a covered contract, the contractor need not pay the \$15 wage for any hours for that workweek.

#### *Tipped Employees*

Under the Final Rule, DOL is phasing out lower wages and tip credits for tipped employees on covered contracts. Employers must pay tipped employees \$10.50 per hour in 2022 and increase those wages incrementally, under a proposed formula in the NPRM. Beginning in 2024, tipped employees must receive the full federal contractor wage rate.

#### **\$15 Wage Contract Clause Requirements, Enforcement Obligations**

The Final Rule provides that a Minimum Wage contract clause will appear in covered prime contracts, except that procurement contracts subject to the Federal Acquisition Regulation (FAR) will include an applicable FAR Clause (to be issued by the FAR Council) providing notice of the wage requirement.

In addition, covered prime contractors and subcontractors must include the Contract Clause in covered subcontracts and, as will be in the applicable FAR Clause, procurement prime contractors and subcontractors will be required to include the FAR clause in covered subcontracts.

In addition, the Final Rule provides that contractors and subcontractors:

... shall require, as a condition of payment, that the subcontractor include the minimum wage contract clause in any lower-tier subcontracts ... [and] shall be responsible for the compliance by any subcontractor or lower-tier subcontractor with the Executive Order minimum wage requirements, whether or not the contract clause was included in the subcontract.

The DOL will investigate complaints and enforce the requirements but under the Final Rule, contracting agencies may also enforce the minimum wage requirements and take actions including contract termination, suspension and debarment for violations.

#### **Preparation for the \$15 Wage**

To prepare, contractors and subcontractors of covered contracts should consider taking the following steps:

- Review existing multi-year contracts with options or extensions that may be exercised on or after January 30, 2022, to plan for wage increases at the exercise of the option or extension, but also review any contract modifications to see if an agency is including the requirement earlier than required, as is allowed under the Final Rule
- Identify job titles that typically perform work directly on covered contracts and those that perform indirect work above 20 percent in a workweek
- Plan for wage increases for covered workers who are not already making \$15 per hour
- Determine impact on existing collective bargaining agreements, particularly on SCA-covered contracts
- Prepare for submission of price/equitable adjustments based on wage increases if allowed under the contract terms

If you have any questions about this or other workplace developments or are interested in working with Jackson Lewis to file comments, please contact the Jackson Lewis attorney with whom you regularly work.

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