

Federal Contractors in Flux: Ninth Circuit Finds President Biden Can't Mandate Minimum Wage Under EO 14026

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Takeaways:

- The Ninth Circuit reversed a district court decision denying the plaintiffs' motion for injunctive relief barring application of the federal contractor wage mandate.
- There is currently a circuit split on whether the president has authority to issue a wage mandate, and a petition for certiorari is pending in the U.S. Supreme Court.
- The federal contractor minimum wage rate is slated to increase on Jan. 1, 2025, from \$17.20 to \$17.75 per hour. The Trump Administration is expected to take action addressing the federal contractor minimum wage requirements, such as rescinding prior executive orders or issuing new orders, but not before the wage increase takes effect.
- Federal contractors should consult with counsel on the impact of the Ninth Circuit decision and other minimum wage mandate developments, as well as other statutes setting contractor wage rates, such as the Davis-Bacon Act.

Related links:

- [*State of Nebraska v. Su*](#)
- [Executive Order on Increasing the Minimum Wage for Federal Contractors](#)
- [Texas Federal Court Bars Enforcement of \\$15 Minimum Wage for Federal Contractors Against Three States](#)
- [Tenth Circuit Upholds Court's Refusal to Enjoin Federal Contractor Minimum Wage Hike](#)
- [Petition for certiorari, *Bradford v. U.S. Department of Labor*](#)

The U.S. Court of Appeals for the Ninth Circuit has vacated an Arizona federal court's decision denying a request by several western states to enjoin President Joe Biden's executive order increasing the minimum hourly wage for employees working on federal government contracts. [*State of Nebraska v. Su*](#), No. 23-15179 (Nov. 5, 2024).

The divided three-member panel found that the president did not have authority under the Procurement Act to implement the wage mandate. Neither the statute's statement of purpose or the operative sections of the law granted such authority. The appeals court also found that the Department of Labor's (DOL's) implementing regulation was arbitrary or capricious because DOL failed to consider alternatives to the \$15 rate, such as a lower rate or phasing in the \$15 rate over several years.

The Ninth Circuit reversed the district court's order denying the injunction and remanded

the case for further proceedings.

EO 14026

EO 14026, implemented in 2021, increased to \$15 the minimum hourly wage for employees working on federal government contracts and provided for annual increases to the minimum wage. The current minimum hourly wage is \$17.20.

The DOL issued regulations implementing EO 14026 and the Federal Acquisition Regulatory Council amended the federal procurement regulations accordingly. EO 14026 applied to employees of entities that contract with the federal government who work on or in connection with a covered federal government contract — an estimated 500,000 employers, costing federal contractors an estimated \$1.7 billion annually.

Ninth Circuit Decision

A coalition of states (Arizona, Idaho, Indiana, Nebraska, and South Carolina) filed a lawsuit challenging EO 14026 in their capacity as federal contractors. The plaintiffs sued to overturn the wage mandate and sought a preliminary injunction barring enforcement. A federal court in Arizona dismissed the suit, and the plaintiffs filed an appeal. The Ninth Circuit, in a divided 2-1 panel decision, reversed the district court's order.

The appeals court concluded that the Procurement Act did not give the president “unrestrained authority to issue any procurement policy that he desires,” such as a minimum wage mandate. The Act only empowers the president to issue policies that carry out operative provisions of the statute, the court held. While some courts have found authority under § 101 of the Act to implement policies the president considers necessary to promote economy and efficiency in government procurement, the Ninth Circuit rejected this “faulty interpretation” and concluded that the minimum wage mandate does not serve this purpose anyhow.

Other Litigation Pending

Two other challenges to the federal contractor wage mandate are pending. The Fifth Circuit will consider the Biden Administration's appeal of a 2023 decision invalidating EO 14026 in a case brought by the states of Louisiana, Mississippi, and Texas. (*Texas v. Biden*, No. 23-40671.) The Texas district court narrowly enjoined the wage mandate only as applied to the plaintiff state governments, refusing to issue a nationwide injunction because it did not want to “encroach” upon the other federal courts that had upheld the executive order. The Fifth Circuit could reverse the Texas court and uphold EO 14026, setting up a circuit split with the Ninth Circuit. This outcome is unlikely, however — and the incoming Trump Administration may opt to abandon the appeal.

In another case, a divided Tenth Circuit panel affirmed a lower court's decision denying a motion for preliminary injunction barring enforcement of the wage mandate. The appeals court held the plaintiffs were not likely to show that the DOL lacked statutory authority to issue the DOL rule implementing EO 14026; however, the appeals court did *not* issue a final decision on the merits. The plaintiffs filed a petition for certiorari at the U.S. Supreme Court. They have asked the justices to address whether the wage mandate exceeds the president's authority under the Procurement Act and, if not, whether the statute improperly gives lawmaking authority to the president, in violation of the Constitution's nondelegation doctrine. (*Bradford v. U.S. Department of Labor*, No. 24-232.)

Takeaways for Federal Contractors

The Ninth Circuit decision held there was no presidential authority under the Procurement Act to impose a minimum wage mandate. However, the divided panel did not invalidate EO 14026 or the DOL rule implementing the executive order, instead sending the case back to the district court. The district court is expected to issue a preliminary injunction barring application of the mandate, although it is not clear whether it will apply to just the plaintiff states to the extent of their relationships with the federal government as federal contractors or as a complete ban to enforcement within the states.

A broader reprieve may be forthcoming. President-Elect Donald Trump may ultimately rescind President Biden's executive order and decline to defend the wage mandate if the Supreme Court decides to review the Tenth Circuit case. At issue in that case is whether the wage mandate could be applied to a group of outfitters and recreation providers with contracts to operate on federal lands. In 2018, President Trump issued an executive order expressly exempting outfitters and similar entities from the minimum wage for contractors, which President Biden had revoked with EO 14026. President Trump will likely restore the exemption through executive action.

Please contact your Jackson Lewis attorney if you have questions about the status of the federal contractor minimum wage mandate and its application to your business.

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