

ALERT

Biden Signs EO for \$15 Federal Contractor Minimum Wage

April 29, 2021

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WHAT: As anticipated, President Biden issued an executive order (EO) on Wednesday raising the minimum wage to \$15 for many employees of federal contractors, effective January 30, 2022. All agencies will need to incorporate the new minimum wage into their solicitations and incorporate it into existing contracts at option exercise or other extension or renewal by that date. Covered contracts are principally those subject to the Service Contract Act (SCA) or Davis-Bacon Act (DBA).

This new EO builds on the existing contractor minimum wage required by EO 13658, which began applying to federal contracts in January 2015 and is currently \$10.95 per hour. Forthcoming implementing regulations for the \$15 minimum wage order will likely incorporate, where appropriate, existing definitions and obligations from the EO 13658 implementation. One new provision is notable: the new EO requires phasing out the tipped minimum wage (currently \$7.65) and paying the full cash minimum wage to covered employees by 2024.

WHEN: President Biden signed the EO on April 27, 2021. The EO calls for the U.S. Department of Labor (DOL) to promulgate implementing rules by November 24, 2021; the Federal Acquisition Regulatory (FAR) Council is to follow with its own rules within 60 days; and agencies are to start incorporating this increased minimum wage effective January 30, 2022. Annual inflation-based adjustments will apply starting January 1, 2023.

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WHAT DOES IT MEAN FOR INDUSTRY: The new EO increases the contractor minimum wage by almost 37% starting in about eight months and has several implications for federal service and construction contractors we discuss further in this alert. But far in advance of the January 30, 2022 effective date of this EO, contractors should start monitoring solicitations and proposed contract modifications or extensions for any language inserted by agencies before DOL and the FAR Council complete their rulemakings. The EO “strongly encouraged” inserting such terms early, though the EO’s plain language still provides for the \$15 rate to take effect January 30, 2022, even if incorporated in advance of that date.

Contractors should also begin coordinating internally to identify employees currently earning less than \$15 per hour likely to be covered by the EO—both those working “on” covered contracts and employees who spend at least 20% of their workweeks working “in support of” such contracts. Educating pricing teams and customer contracting agencies about the forthcoming cost impact related to these workers should follow.

For a primer, or refresher, on the existing minimum-wage requirements under EO 13658, our prior alerts addressing issues such as contract coverage and employee coverage are available [here](#), [here](#), and [here](#).

As for additional considerations, the new EO leaves open whether the DOL will update the rates in DOL-issued wage determinations for labor categories currently below the new \$15 minimum. The DOL did not individually change each wage determination with the last federal minimum wage and instead put a note at the top of the wage determinations to inform agencies and contractors of the new federal minimum wage. Given the jump from the current minimum to \$15, this change will affect many more covered labor categories. Updating wage determinations will thus likely be time-consuming and may be an undertaking that DOL defers. Contractors should keep an eye out for any DOL guidance that may suggest how the new minimum wage will be implemented in these wage determinations.

In addition, the EO does not require agencies to start applying the new minimum wage until next January. The EO provides that if an agency issues a solicitation or enters into a contract within 60 days of the January 2022 effective date, it is *strongly encouraged* but not required to incorporate the new minimum wage. This means that some contracts may not see the wage increase until much further into 2022. On the other hand, agencies incorporating the new minimum wage early (as the EO encourages) might not appreciate that even early incorporation should not result in the new \$15 minimum wage applying before January 30, 2022.

Contractors will also want to be mindful that the EO does not specify the mechanism for adjusting contract pricing to reflect the cost increase of the increased minimum wage. The most likely process for contractors performing FAR-based contracts is that agencies will incorporate DOL-issued wage determinations requiring the new minimum wage (as wage determinations do now for the currently-effective federal minimum wage), and contractors will seek a price adjustment under the FAR 52.222-43 clause.

Contractors should pay attention to any agencies’ efforts to incorporate the increased minimum wage outside of the times specified in FAR 52.222-43; in these circumstances, contractors may have a basis to seek an equitable adjustment under the changes clause, which provides a broader measure of recovery as compared to FAR 52.222-43. No matter the mechanism specified in the forthcoming rules, contractors should be cognizant

to document all their increased costs resulting from the new minimum wage to support future adjustment requests.

The new wage minimum may also cause employee-relations concerns because it compresses the differences between the required wage rates for many labor categories in DOL wage determinations. With many labor categories moving up to \$15 per hour, contractors may have to increase wages of those already earning more than \$15 per hour to continue attracting workers to those positions and maintain the satisfaction of workers already employed. Contractors in these situations will have to balance these market-type forces against understanding their compensation and are not entitled to receive under FAR 52.222-43, changes clauses, and similar clauses. These types of practical issues are exactly where Wiley attorneys excel at advising and representing contractors at all levels of the federal supply chain.