

An Interesting Development in DoL's Proposed Implementation of EO 14026's \$15 Contractor Minimum Wage

August 2, 2021

WHAT: The U.S. Department of Labor (DoL) published its proposed rule to implement Executive Order (EO) 14026, Increasing the Minimum Wage for Federal Contractors. EO 14026, covered in our prior alert, requires increasing the minimum wage for many employees of federal contractors to \$15 per hour, effective January 30, 2022. The proposed rule reads largely as anticipated based on DoL's implementation of the existing contractor minimum wage executive order (EO 13658) and the text of this year's EO 14026. For example, the proposed rule follows EO 14026's direction to phase out a special minimum wage for tipped contractor employees by 2024. But two developments in the proposed rule are of note, as discussed in this alert.

WHEN: DoL issued the Notice of Proposed Rulemaking on July 22, 2021. The comment period closes on August 23, 2021. The \$15 minimum wage would begin taking effect on January 30, 2022.

WHAT DOES IT MEAN FOR INDUSTRY: DoL predicts that around 327,300 employees will see an increase in their hourly wage during the first year of implementation. Some of those employees likely work on or in connection with contracts that would already be covered by the existing contractor minimum wage under EO 13658. Others might be working on or in support of contracts not subject to the existing minimum wage but subject to EO 14026's minimum wage. (One example is contracts with independent regulatory agencies, which were not covered by EO 13658, even if meeting the other requirements for coverage.) For contractors who will now be applying the minimum-wage obligations for the first time on account of EO

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14026, background on the existing minimum-wage obligations and their application under the new EO 14026 is available [here](#), [here](#), and [here](#).

Regardless of experience with these minimum-wage obligations, all contractors should take note of two related developments in DoL's proposed implementation of EO 14026.

First, DoL has proposed keeping the existing rules that implement the original minimum wage EO 13658 at 29 C.F.R. part 10 largely unchanged, while proposing that EO 14026 be implemented via an entirely new 29 C.F.R. part 23. The proposed rule even creates a new, EO 14026-specific contract clause, and it seems likely (though far from certain) that the Federal Acquisition Regulatory (FAR) Council will follow suit by proposing a new contract clause distinct from the existing FAR 52.222-55 clause that applies to the EO 13658.

It goes without saying that having two parallel, almost-mirror image minimum-wage rules creates significant risk of confusion that will require careful attention in the contracting community until action is taken to sunset EO 13658. But it also means that EO 14026 will function more like an entirely new set of obligations versus—as we had expected—a targeted set of updates to the EO 13658 minimum wage regulations already in place.

This separation of the two EOs leads to the second notable development: DoL has proposed applying EO 14026's \$15 minimum wage to contracts when, among other times, an agency exercises an option period unilaterally. This trigger was not included in how DoL originally implemented EO 13658: that implementation had *excluded* unilateral option exercises from the list of events triggering coverage by the then-new contractor minimum wage.

So what do these two developments mean? Contractors should pay close attention to how agencies attempt to incorporate EO 14026 obligations into their existing contracts. In many cases, the contractor may have a basis to seek an equitable adjustment for costs of a new compliance obligation, rather than a price adjustment under their existing contract obligations.

To illustrate the distinction, consider a hypothetical five-year contract awarded on February 10, 2020, that is covered by the contractor minimum wage obligations under EO 13658. That minimum wage was \$10.80 for 2020, then \$10.95 starting January 1, 2021. Under FAR 52.222-55(b)(3)(i), the contractor would have requested a price adjustment for any direct costs of increasing wages to \$10.95 for calendar year 2021 along with associated increases in social security and unemployment taxes and workers' compensation insurance—but not overhead, G&A, or profit.

This price-adjustment process would presumably repeat in 2022 had DoL proposed implementing EO 14026 as simply an update and expansion of the EO 13658 requirements, applied to contracts by the existing FAR 52.222-55 clause already incorporated into many federal contracts. But instead, DoL has proposed implementing EO 14026's minimum wage as a new obligation that will apply to this hypothetical contract effective with the unilateral option period that starts February 10, 2022 (i.e., after January 30, 2022). The contracting agency will have to modify the contract to incorporate the new EO 14026 obligations at that point, presumably using authority of the contract's changes clause.

That use of the changes clause could provide a basis for the contractor to request an equitable adjustment based on incorporation of the \$15 minimum wage under EO 14026. That request would presumably include the overhead, G&A, and profit not available in FAR 52.222-55 price adjustments. And the contractor might have a stronger argument to recover the costs of increasing wages above the \$15 minimum to avoid compression of many labor categories' wage rates right at the \$15 minimum. In other words: not just the employees moving from \$10.95 or \$12 to \$15 per hour, but also those moving from \$15 to \$17 to help keep separation between labor categories' compensation. For large contracts with many workers currently earning below, or even just above, \$15 per hour, recovery through an equitable adjustment could thus be significantly larger than under a price adjustment.

So bottom line, although DoL's choice to implement EO 14026 as separate from its fraternal twin EO 13658 might cause confusion, it may offer more help to contractors seeking to mitigate the financial impact of the increase to \$15 per hour. DoL's final rule, and the corresponding rulemaking by the FAR Council, will of course determine whether the pursuit of equitable adjustments looks at all viable. Wiley attorneys will be monitoring and providing updates as the implementation progresses.

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