

New Executive Order Requires Many Federal Contractors to Increase Minimum Wage for Workers by 2022

On April 27, 2021, President Biden issued his latest executive order (the EO), which requires all federal agencies to incorporate a \$15 per hour minimum wage into nearly every federal contract effective January 2022.

The EO

Beginning on January 30, 2022, all agencies will incorporate the \$15 minimum wage in new contract solicitations, and the wage will be implemented in all new contracts beginning on March 30, 2022. In an effort to keep the minimum wage at a sustainable level for workers, the EO institutes an index for the wage to keep pace with inflation and cost of living increases. At present, the minimum wage for federal contract employees is \$10.95 per hour, and the tipped minimum wage is \$7.65 per hour.

The EO also eliminates the tipped minimum wage for federal contractors, which must be phased out by agencies and contractors by 2024. Until now, federal contractors employing tipped workers could pay sub-minimum wages as long as tips closed the gap up to the minimum wage. Under the EO, the tipped minimum wage will increase to \$10.50 per hour beginning January 30, 2022, reach 85 percent of the federal contractor minimum wage on January 1, 2023, and then match the federal contractor minimum wage effective January 1, 2024.

The Secretary of Labor will issue regulations implementing the EO by November 24, 2021, with revisions to the Federal Acquisition Regulations to occur within 60 days thereafter. Federal agencies will also have 60 days from the Department of Labor's issuance of new regulations to begin exercising any authority to ensure contracts entered into on or after January 30, 2022, comply with the EO.

The increased minimum wage will broadly apply to all new federal contracts, solicitations, renewals, extensions, or options entered into on or after January 30, 2022. The terms of the EO specify that it applies if the wages of workers under a federal contract are governed by the Fair Labor Standards Act, Service Contract Act, or the Davis-Bacon Act **and**:

1. It is a procurement contract or contract-like instrument for services or construction;
2. It is a contract or contract-like instrument for services covered by the Service Contract Act;
3. It is a contract or contract-like instrument for concessions; or
4. It is a contract or contract-like instrument 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.

Impacts for Federal Contractors

Although the EO's provisions do not take effect until January 30, 2022, federal government contractors likely need to consider its effects now to ensure sustainability and compliance with the EO. While it will likely be difficult to amend existing contracts, those that have upcoming option years could potentially be impacted. Also, separate from the pure financial impacts, contractors will face administrative hurdles in establishing clear demarcations for which employees, and their portion of hourly work in a given workweek, will be subject to the EO's requirements.

As the EO was recently released, there are no supporting administrative rules or regulations at this time that define the parameters of the EO's requirements. However, the EO's accompanying fact sheet notes that it will build on President Obama's EO 13658, issued in February 2014. The Obama-era EO established a \$10.10 per hour minimum wage indexed to inflation and increased the



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tipped minimum wage to the current level.

While the Biden EO increases wages, it is possible that the EO's scope and application will mirror the rules applied in 2014 by the Obama administration. As such, it may be beneficial for contractors to review prior FAQs and rules issued by the Department of Labor (DOL) to implement EO 13658 until additional guidance is provided. Contractors may also seek additional information from contracting/procurement officers as DOL releases regulations on this matter.

The DOL's 2014 guidance includes information as to which workers may be subject to the EO, notably separating workers into those who perform "on" a covered contract and those who perform "in connection with" a federal contract. The EO would generally cover the former for the time spent on a federal contract, while the latter may be subject to the EO's wage scheme unless certain exceptions apply. For instance, a worker who performs "in connection with" a federal contract for less than 20 percent of his/her hours in a given work week would not be entitled to the increased minimum wage under DOL's guidance for the Obama-era EO.

While Cozen O'Connor's Government Contracts Team will continue to provide updates on this EO and the implementing regulations, all federal contractors are encouraged to review their current contracts that have upcoming renewal options, as well as any upcoming bids, to ensure appropriate steps are taken to factor in and comply with the new minimum wage rules.
