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New Executive Order Requires Federal Contractors to Increase Minimum Wage

By [Kenneth Gage](#), [Carson Sullivan](#) & [Elizabeth Minoofar](#)

On April 27, 2021, President Biden issued an Executive Order that will require many federal contractors and subcontractors to increase the minimum wage paid for work performed on covered contracts. Starting January 30, 2022, federal contractors and subcontractors that meet certain criteria must include in their contracts a provision stating that, as a condition of payment, workers employed in the performance of the contract or subcontract must be paid at least \$15.00 per hour. From January 1, 2023 onward, this amount will be annually adjusted to account for inflation. Following is a summary of the key provisions of the Order and considerations for covered employers.

What Contracts Are Affected?

The Executive Order applies to all new federal contracts, solicitations, renewals, extensions, or options entered into on or after **January 30, 2022**, where: (1) the contract is governed by the Fair Labor Standards Act, the Service Contract Act, or the Davis-Bacon Act, and (2) at least one of the following applies:

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, including any concessions contract excluded by Department of Labor regulations at 29 C.F.R. 4.133(b); 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.

How Does the Executive Order Affect Tipped Workers?

Under existing law, tipped workers performing work pursuant to federal contracts could be paid less than minimum wage so long as their tips made up the delta to minimum wage. Now, under the new Executive Order, federal contractors and subcontractors that meet the criteria above must pay tipped workers a minimum wage of \$10.50 per hour (in addition to tips), starting January 30, 2022. That amount will increase each year until January 1, 2024, when it will be eliminated and tipped employees are to be paid the same minimum wage as non-tipped employees.

Is There Any Regulatory Guidance Regarding the Order?

Currently, there are no regulations implementing the Executive Order. However, the Secretary of Labor will issue regulations by November 24, 2021. The regulations will include definitions of the relevant terms of the Executive Order as well as appropriate exemptions.

The Executive Order's accompanying fact sheet notes that it builds upon the Obama-Biden Executive Order 13658, issued in February 2014, which required federal contractors to pay employees working on federal contracts \$10.10 per hour (an amount which has been subsequently indexed to inflation).¹ Accordingly, contractors and subcontractors seeking guidance may find it helpful to review the regulatory guidance issued in connection with the 2014 Executive Order.²

Conclusion

Going forward, federal contractors should evaluate whether their future contracts or changes to existing contracts may be covered by the Executive Order and, if so, ensure full compliance with the Order, including incorporating a minimum wage clause in the contract as required by the Order. Contractors should also watch for additional guidance from the Secretary of Labor in November 2021 clarifying requirements of the new Order and which contracts are covered.



If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings lawyers:

Los Angeles

Elizabeth Minoofar
1.213.683.6249

elizabethminoofar@paulhastings.com

New York

Kenneth Gage
1.212.318.6046

kennethgage@paulhastings.com

Washington, D.C.

Carson Sullivan
1.202.551.1809

carsonsullivan@paulhastings.com

San Francisco

Zach P. Hutton
1.415.856.7036

zachhutton@paulhastings.com

¹ Fact Sheet: Biden-Harris Administration Issues an Executive Order to Raise the Minimum Wage to \$15 for Federal Contractors, <https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/27/fact-sheet-biden-harris-administration-issues-an-executive-order-to-raise-the-minimum-wage-to-15-for-federal-contractors/>.

² See Department of Labor Notice in the Federal Register: Establishing a Minimum Wage for Contractors, Notice of Rate Change in Effect as of January 1, 2021, <https://www.federalregister.gov/documents/2020/08/31/2020-19037/establishing-a-minimum-wage-for-contractors-notice-of-rate-change-in-effect-as-of-january-1-2021>.

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