

# Interim rule issued amending Federal Acquisition Regulations (FAR) to implement EO 14026, increasing the minimum wage for federal contractors

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In April 2021, President Biden issued Executive Order 14026, *Increasing the Minimum Wage for Federal Contractors*, directing an increase in the hourly minimum wage paid by contractors to workers under federal contracts governed by the Fair Labor Standards Act, the Service Contract Act, or the Davis-Bacon Act to \$15 per hour, effective Jan. 30, 2022.<sup>1</sup>

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*The Interim Rule replaces the previous minimum wage of \$10.10 established by E.O. 13658 with the minimum wage of \$15 specified by E.O. 14026.*

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On Jan. 26, 2022, the Department of Defense, General Services Administration, and NASA issued an interim rule amending the Federal Acquisition Regulation to implement EO 14026 (Interim Rule).<sup>2</sup> This GT Alert provides a summary of the key requirements of the Interim Rule and the associated FAR amendments.

## Summary of key FAR amendments

The Interim Rule implements amendments to numerous FAR provisions to make minor conforming changes, including replacing the reference to the previous E.O. on federal contractor minimum wage requirements<sup>3</sup> with E.O. 14026 or adding references to E.O. 14026, as appropriate, throughout FAR parts 22 and 52. More importantly, the Interim Rule implements the key substantive changes to the FAR provisions discussed below.

### (1) Increasing the minimum wage

Throughout FAR subpart 22.19 and FAR clause 52.222–55, the Interim Rule replaces the previous minimum wage of \$10.10 established by E.O. 13658 with the minimum wage of \$15 specified by E.O. 14026. This change effectively increases the hourly minimum wage paid to workers performing work on or in connection with covered federal contracts to \$15 per hour, beginning Jan. 30, 2022, and beginning Jan. 1, 2023, the hourly minimum wage will

be increased annually by an amount determined by the Secretary of Labor.

### (2) Clarifying the definition of ‘worker’

The Interim Rule amends the definition of “worker” at FAR 22.1901 and 52.222–55(a) to explain that a worker “performs on a contract” if the worker directly performs the specific services called for by the contract; and a worker performs “in connection with a contract” if the worker’s work activities are necessary to the performance of a contract but are not the specific services called for by the contract.

This clarification is consistent with the definition of “worker” in DOL’s final rule implementing E.O. 14026 and the definition of “employee” in FAR subpart 22.21, which implements E.O. 13706, *Establishing Paid Sick Leave for Federal Contractors*. This new definition adds some needed guidance for contractors regarding the scope of potentially impacted employees.

### (3) Definition of ‘United States’

The Interim Rule adds a definition of “United States” to FAR 22.1901 and revises the definition at FAR clause 52.222–55(a), to include Puerto Rico, the Northern Mariana Islands, American Samoa, Guam, the U.S. Virgin Islands, Johnston Island, Wake Island, and the outer Continental Shelf. The expansion of the definition beyond the 50 states and the District of Columbia is consistent with DOL’s final rule implementing E.O. 14026 and expands the geographic reach of federal minimum wage requirements applicable to federal contractors.

### (4) Revocation of recreational services exemption

The Interim Rule deletes from FAR subpart 22.19 and FAR clause 52.222–55 the exemption authorized by E.O. 13838 for seasonal recreational services or seasonal recreational equipment rental. This modification is consistent with E.O. 14026, and DOL’s final rule implementing E.O. 14026, and expands federal minimum wage requirements applicable to federal contractors to cover these workers.

## (5) New requirements for tipped workers

The Interim Rule amends FAR 22.1902 and FAR clause 52.222-55 to implement the new requirements for tipped workers contained in E.O. 14026. FAR clause 52.222-55(b)(10) specifically notes that contractors shall follow the policies and procedures in DOL's rules implementing E.O. 14026 at 29 C.F.R. §§ 23.240(b) and 23.280 for treatment of workers engaged in an occupation in which they customarily and regularly receive more than \$30 per month in tips.

*The attorneys general of Arizona, Idaho, Indiana, and Nebraska filed suit, alleging that EO 14026 constitutes an improper response to Congress's rejection of the same minimum wage increase in a COVID-19 relief package.*

Those DOL rules follow the requirements of E.O. 14026 and require, starting Jan. 30, 2022, that tipped minimum wages will be increased to \$10.50 per hour. Thereafter, the tipped minimum wage will increase to 85% of the indexed minimum wage for federal contract employees and will finally increase to equal the minimum wage beginning Jan. 1, 2024.

### Application and effective dates

The Interim Rule is effective Jan. 30, 2022, and specifically notes that it applies:

- (1) To solicitations issued on or after Jan. 30, 2022, and their resulting contracts.
- (2) To new contracts awarded without a prior solicitation (e.g., a purchase order under FAR part 13), on or after Jan. 30, 2022.
- (3) To new contracts with a prior solicitation awarded on or after March 31, 2022.
- (4) To existing contracts, including procurements for recreational services, when extending, renewing, or exercising an option on the existing contract on or after Jan. 30, 2022.

Additionally, the Interim Rule "strongly encourages" contracting officers, in accordance with FAR 1.108(d)(3) and with "appropriate consideration," to include the amended clause at FAR 52.222-55 in other contracts governed by the Fair Labor Standards Act, the Service Contract Act, or the Davis-Bacon Act and awarded before March 31, 2022. Finally, the Interim Rule sets a March 28, 2022 deadline for the submission of written comments to be considered in the formation of the final rule.

### Legal challenges

Several lawsuits have already been filed in federal court directly challenging the implementation of EO 14026. On Feb. 9, 2022, the attorneys general of Arizona, Idaho, Indiana, and Nebraska filed suit

in Arizona federal district court, alleging that EO 14026 constitutes an improper response to Congress's rejection of the same minimum wage increase in a COVID-19 relief package.<sup>4</sup> Similarly, on Feb. 10, 2022, the attorneys general of Louisiana, Mississippi, and Texas filed a suit in a Texas federal district court challenging EO 14026.<sup>5</sup>

Both complaints contain similar allegations including, *inter alia*, that the increase in minimum wages directed by EO 14026 is: (1) not authorized by the Procurement Act or any other statute; (2) arbitrary and capricious under the Administrative Procedures Act; (3) the result of an unconstitutional delegation of legislative power, and (4) an unconstitutional exercise of the spending power reserved to Congress. These pending suits both seek declaratory and injunctive relief.

On Feb. 17, 2022, the Court issued an order enjoining the government from enforcing the Minimum Wage Order in the context of contracts or contract-like instruments entered into with the federal government in connection with seasonal recreational services or seasonal recreational equipment rental for the general public on federal lands. In granting the motion, the Court found that the plaintiffs "have demonstrated an entitlement to relief from the Minimum Wage Order in their particular circumstances."<sup>6</sup>

This injunction was issued in a case filed by several outdoor groups in Colorado federal district court challenging the application of the minimum wage requirements of EO 14026 to seasonal recreational companies on federal land in December 2021.

The complaint argued, *inter alia*, that the application of EO 14026 to seasonal recreational companies constituted an overreach of authority under the Federal Property and Administrative Services Act, or Procurement Act, when it removed a previous exemption to the federal contractor minimum wage requirement for seasonal recreation firms.<sup>7</sup>

*An injunction was issued in a case filed by several outdoor groups challenging the application of the minimum wage requirements of EO 14026 to seasonal recreational companies on federal land.*

In late January 2022, the federal district court denied the outdoor groups' request for an injunction, and on Feb. 1, 2022, the outdoor groups sought an injunction pending appeal from the 10th Circuit, which was entered Feb. 17.

Close continued monitoring of these legal challenges over the next several months is recommended for contractors expecting to be impacted by EO 14026's requirements.

### Key takeaways

Federal contractors with service contracts subject to the Federal Acquisition Regulation should review the new clause at FAR 52.22-25 and evaluate the expansion in application and

changes to the federal minimum wage requirements included therein. Those contractors should also ensure that bilateral modifications, proposals, and pricing subject to these new requirements account for required wage increases.

## Notes

<sup>1</sup> See May 2021 GT Alert, <https://bit.ly/36460Ui>.

<sup>2</sup> 87 FR 4117.

<sup>3</sup> E.O. 13658

<sup>4</sup> Complaint at 1, 21, *State v. Walsh*, No. 2:22-cv-00213-SPL (D. Ariz. Feb. 2, 2022).

<sup>5</sup> Complaint at 1, 6, *State v. Biden*, No. 6:22-cv-4 (S.D. Tex. Feb. 10, 2022).

<sup>6</sup> Order at 2, *Bradford v. U.S. Dep't of Labor*, No. 22-1023 (D.C. No. 1:21-CV-03283-PAB-STV (D. Colo. Feb. 17, 2022).

<sup>7</sup> Complaint at 15, *Bradford v. U.S. Dep't of Labor*, No. 1:21-cv-03283-PAB-STV (D. Colo. Dec. 7, 2021).

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