

Texas Federal Court Bars Enforcement of \$15 Minimum Wage for Federal Contractors Against Three States

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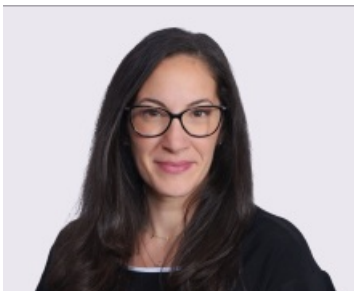
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President Joe Biden exceeded his authority under the Procurement Act when he issued an executive order ([EO 14026](#)) raising the minimum wage rate for employees of federal contractors to \$15 per hour, a federal court in Texas ruled in a suit brought by the states of Louisiana, Mississippi, and Texas. [Texas, et al. v. Biden, et al.](#), No. 6:22-cv-00004 (S.D. Tex. Sept. 26, 2023).

Not wishing to “encroach” upon the jurisdiction of two other federal courts that have upheld EO 14026, the Texas court declined to issue a nationwide injunction. It barred enforcement of EO 14026 only against the plaintiff states, which routinely contract with the federal government directly and as subcontractors.

Legal Challenge to EO 14026

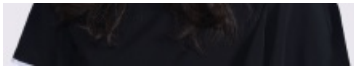
President Biden issued [Executive Order on Increasing the Minimum Wage for Federal Contractors](#) on April 27, 2021, setting a salary floor of \$15 per hour for employees of entities that contract with the federal government who work on or in connection with a covered federal government contract. The Department of Labor (DOL) issued regulations implementing the EO and the Federal Acquisition Regulatory Council amended the federal procurement regulations accordingly. The \$15 minimum wage took effect January 30, 2022, with increases to be published annually. The current federal contractor minimum wage is \$16.20 per hour.

Louisiana, Mississippi, and Texas filed suit alleging EO 14026 is unlawful under the Procurement Act and Administrative Procedure Act. The plaintiffs also contended that, even if the EO was lawful under these provisions, the president’s action was unconstitutional as a wrongful transfer of legislative power and a violation of the Spending Clause.

Procurement Act Violation

The court held the president exceeded his authority under the Procurement Act and awarded judgment as a matter of law to the states on their statutory claim.

Applying a textual analysis and looking to the historical backdrop of the statute, the court concluded the president’s authority under the Procurement Act extended only to “the supervisory role of buying and selling goods.” The statute did not endow the president with “unilateral policy-making power to increase the minimum wage of employees of federal contractors.” By way of contrast, the court pointed to the express authority given the secretary of labor in the Davis Bacon Act and Walsh-Healey Public Contracts Act to set a wage floor for specific classes of federal contractors. According to the court, these statutes show that “Congress knew how to delegate this wage-setting authority and reinforce[] the conclusion that the Procurement Act did no such thing with respect to



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the President.”

A Major Question Breach

The court also held that EO 14026 ran afoul of the major questions doctrine, a claim used with increasing frequency by plaintiffs challenging federal regulatory action. (See our article, [U.S. Supreme Court’s Decision Curtailing Regulators May Raise ‘Major Questions’ for Employers](#).) The doctrine provides that, if Congress wants to empower the executive branch to regulate matters of “vast economic and political significance,” it must “speak clearly” of this intent. The U.S. Court of Appeals for the Fifth Circuit, in which the Texas district court sits, has concluded that the major questions doctrine is meant to restrain the president as well as the federal agencies and has applied the doctrine in a Procurement Act case, prompting the district court to do so here.

The court found the major questions doctrine was triggered because EO 14026 regulated a matter of vast economic significance. It likened EO 14026 to the federal contractor vaccine mandate (also issued by executive order), which several circuit courts have found involved a major question. The court also said the DOL in its final rule implementing the EO had sharply underestimated the financial impact of the minimum wage increase on federal contractors, including by failing to account for significant spillover effects in the form of upward wage pressure for those earning *more* than \$15 an hour. Having found the Procurement Act did not authorize EO 14026, the court then held that Congress did not speak clearly of an intent to empower the president to set a minimum wage for federal contractors.

Appeals Pending

The Biden Administration is likely to appeal the Texas district court’s decision.

This case is one of several lawsuits seeking to invalidate EO 14026. In *Arizona v. Walsh*, No. 3:22-CV-00213 (D. Ariz. Jan. 6, 2023), a federal court dismissed litigation brought by a coalition of five states (Arizona, Idaho, Indiana, Nebraska, and South Carolina). The court found the president did not exceed his authority under the Procurement Act and the Act did not violate the non-delegation doctrine by granting this authority. The court also held the EO and final rule did not violate the Spending Clause (a claim the Texas court declined to address). An appeal is pending in the U.S. Court of Appeals for the Ninth Circuit.

In *Bradford v. U.S. Dep’t of Labor*, 582 F.Supp.3d (D. Colo. 2022), a federal court refused to enjoin EO 14026 and the final rule implementing the order, rejecting a motion by a group of outfitters and outdoor recreation companies that hold government contracts to operate on federal lands. The plaintiffs challenged a provision in EO 14026 rescinding EO 13838, issued by President Donald Trump in 2018. EO 13838 exempted “seasonal recreational services” employees from federal contractor minimum wage requirements. The plaintiffs sought an injunction barring enforcement of EO 14026 as applied to them. However, in a January 24, 2022, ruling, the court found the plaintiffs failed to show a likelihood of success on the merits of their claim that President Biden exceeded his authority under the Procurement Act or violated the separation of powers or nondelegation doctrines or that the DOL final rule was arbitrary and capricious. On the plaintiffs’ interlocutory appeal, the U.S. Court of Appeals for the Tenth Circuit on February 17, 2022, enjoined enforcement of EO 14026 nationwide as applied to employers in the seasonal recreation industry that operate on public lands. The appellate panel

heard oral argument in September 2022.

Please contact a Jackson Lewis attorney if you have questions about the legal challenges to EO 14026 and the impact of ongoing litigation on the minimum wage rate applicable to federal contractors.

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