

Tenth Circuit Upholds Court's Refusal to Enjoin Federal Contractor Minimum Wage Hike

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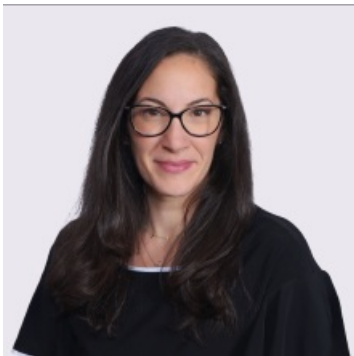
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President Joe Biden likely has authority under the Procurement Act to raise the minimum wage for employees of federal contractors to \$15 per hour, the U.S. Court of Appeals for the Tenth Circuit ruled. *Bradford v. U.S. Dep't of Labor*, No. 22-1023 (Apr. 30, 2024).

The appeals court upheld a decision by a federal court in Colorado refusing to enjoin a U.S. Department of Labor (DOL) rule implementing a 2021 executive order (EO) increasing the federal contractor minimum wage. The divided Tenth Circuit panel found the EO had a sufficient nexus to promoting economy and efficiency in federal government contracting, and therefore, it was probably permissible under the Procurement Act. The Tenth Circuit has jurisdiction over federal courts in Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming.

This case is one of several lawsuits seeking to invalidate the [Executive Order on Increasing the Minimum Wage for Federal Contractors](#) (EO 14026) and the DOL rule implementing the contractor minimum wage increase.

Executive Order

On April 27, 2021, President Biden issued EO 14026. The EO set a salary floor of \$15 per hour (up from the previous \$10.95 per hour minimum) with increases to be published annually. The \$15 minimum wage took effect Jan. 30, 2022; the current federal contractor minimum wage is \$17.20 per hour. EO 14026 applies to employees of entities that contract with the federal government who work on or in connection with a covered federal government contract — an estimated 500,000 employers. The DOL issued regulations implementing EO 14026 and the Federal Acquisition Regulatory Council amended the federal procurement regulations accordingly.

District Court's Decision

A group of outfitters and outdoor recreation companies that hold government contracts to operate on federal lands sued to invalidate the DOL rule. They challenged a specific 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 a preliminary injunction barring enforcement of the EO and rule as applied to them.

A Colorado federal court refused to preliminarily enjoin the DOL rule or EO 14026. *Bradford v. U.S. Dep't of Labor*, 582 F.Supp.3d (D. Colo. 2022). The court found the plaintiffs failed to show a likelihood of success on the merits of their claim that President Biden exceeded his authority, that the Procurement Act violated the separation of powers or nondelegation doctrines, or that the DOL final rule was arbitrary and capricious.

On the plaintiffs' interlocutory appeal, the Tenth Circuit on Feb. 17, 2022, temporarily enjoined enforcement of EO 14026 nationwide but only as applied to employers in the

seasonal recreation industry that operate on public lands.

EO Likely Is Lawful; Preliminary Injunction Denied

With the case before it again, the Tenth Circuit affirmed the district court's order denying injunctive relief. The appellate panel found that the outfitters and recreation companies ("recreational service permittees") were not likely to show that the DOL lacked statutory authority to issue the DOL rule implementing EO 14026.

The recreational service permittees, who merely contract with the government to operate on federal lands, argued that the federal government does not "procure" services from them or "supply" the recreational services that the permittees provide, as defined by the Procurement Act. Therefore, the DOL was not authorized to apply the minimum wage increase to them, and the DOL's failure to exempt them was arbitrary and capricious. The permittees also contended that the Procurement Act, and its purpose of promoting "economy" and "efficiency" in government contracting, limits presidential authority to actions that would reduce the waste of government resources, but the contractor minimum wage increase has the opposite result. Next, they argued it was implausible that Congress authorized the president to increase the minimum wage under the Procurement Act because Congress explicitly imposed a minimum wage for federal contractors in the Davis-Bacon Act and other statutes. The permittees also claimed that the Procurement Act violates the nondelegation doctrine and that the DOL rule implementing the Biden EO was arbitrary or capricious. The panel majority rejected all of these arguments.

The Tenth Circuit also rejected the permittees' "major questions" doctrine challenge. The major questions doctrine, which is used increasingly by litigants seeking to invalidate federal agency action, provides that Congress cannot defer significant issues of national policy to an administrative agency unless there is a clear expression of such intent. The permittees argued the doctrine was implicated here because of the "major economic impact" of federal contracting. However, the majority explained that the government was acting pursuant to its proprietary authority and not as a regulator, and the government has the right to decide which companies it will do business with, and the terms on which it will do so. Further, it explained the doctrine typically applies to the exercise of regulatory authority where agency action on a matter has lain dormant. However, numerous executive orders have been issued in the decades since the Procurement Act was enacted, and President Biden's EO is consistent with that longstanding practice.

Other Legal Challenges to EO 14026

In a case on appeal before the Ninth Circuit, a federal district court in Arizona rejected a lawsuit brought by a coalition of states (Arizona, Idaho, Indiana, Nebraska, and South Carolina) challenging the EO. *Arizona v. Walsh*, No. 3:22-CV-00213 (D. Ariz. Jan. 6, 2023).

However, in a suit brought by Louisiana, Mississippi, and Texas, the three states that comprise the Fifth Circuit, a district court in Texas held the president exceeded his authority under the Procurement Act and that EO 14026 violated the major questions doctrine. *Texas, et al. v. Biden, et al.*, No. 6:22-cv-00004 (S.D. Tex. Sept. 26, 2023). The Texas court enjoined the contractor minimum wage increase, but it did not issue a nationwide injunction. It barred application of the mandate only as to the states of Louisiana, Mississippi, and Texas, though not as to private federal contractors within those states. The Biden Administration has filed an appeal.

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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