

Government contractors once again used as lab rats for higher minimum wage requirements

By Richard W. Arnholt, Esq., Bass, Berry & Sims*

MAY 19, 2021

On April 27, President Biden issued an Executive Order (EO) on Increasing the Minimum Wage for Federal Contractors raising the minimum wage for federal contractors,¹ covered subcontractors, and lower-tier subcontractors by 27% from \$10.95 to \$15.00.

President Biden perhaps signaled his intent to make this increase on his first day in office, directing the Office of Personnel Management (OPM) in one of his first EOs² to provide a report with recommendations to promote a \$15.00 an hour minimum wage for federal employees.

This executive order is yet another example of the president using government contractors to test social policies that have insufficient support in Congress, tests that create further separation between the government and commercial supply chains.

After the changes directed by this EO go into effect, the minimum wage applicable to government contractor employees will be *more than double* the generally applicable federal minimum wage rate.

While the federal minimum wage is \$7.25 an hour, in 2014 President Obama issued an EO³ that increased the rate required for employees of federal contractors to \$10.10 and indexed it to inflation (it is currently \$10.95).

The \$15.00 minimum wage is a rate widely discussed by members both of Congress and the Biden Administration as a potential floor for the generally applicable minimum wage, but that proposal does not appear to have sufficient congressional support to make that legislative change. It was initially included in the recent \$1.9 trillion COVID-19 relief legislation, but it was not included in the final package.

As has been the case many times in the past few decades, this EO is yet another example of the president using government contractors to test social policies that have insufficient support in Congress, tests that create further separation between the

government and commercial supply chains and often result in additional compliance challenges for contractors as well as higher costs to taxpayers for goods and services purchased by the government.

INCREASES THE MINIMUM WAGE TO \$15.00 AND INDEXES IT TO INFLATION

The EO, which applies to procurement contracts for services or construction, contracts for services covered by the Service Contract Act, contracts for concessions, and contracts in connection with federal property or lands that offer services, includes several important changes that government contractors should begin preparing for now.

First, it requires that starting on January 30, 2022, any new solicitation must include the new \$15.00 minimum wage requirements and that by March 30, 2022, that new minimum wage must be applied to all new contracts.

The increased minimum wage, which will be tied to inflation and adjusted annually beginning on January 1, 2023, will also have to be incorporated into current contracts and "contract-like instruments" if an option is exercised, a change that will almost certainly entitle contractors to increased compensation.

ELIMINATES THE TIPPED MINIMUM WAGE

Second, the EO eliminates the "tipped minimum wage" for federal contractor employees. At \$7.65, that rate is over \$3.00 lower than the standard \$10.95 wage and applies to positions in which workers eligible for tips.

The EO directs that those workers be paid at least \$10.50 an hour beginning on January 30, 2022, 85% of the new wage in effect by January 1, 2023, and 100% of the new minimum wage by January 1, 2024. If tips do not make up the difference, employers must provide additional compensation to cover the gap.

REVOKES EO APPLICABLE OUTFITTERS AND GUIDES

Third, the EO revoked EO 13838⁴ issued by President Trump that excluded outfitters and guides who work on federal lands from the minimum wage requirement applicable to federal contractors.

WHITE HOUSE JUSTIFICATION FOR EO

The EO claims that the order will promote “economy and efficiency in federal procurement” because the increase “enhances worker productivity and generates higher-quality work by boosting workers’ health, morale, and effort; reducing absenteeism and turnover; and lower supervisory and training costs.”

While White House officials estimated that the number of contractor employees who would be subject to the increase was in the hundreds of thousands, they conceded that they did not know how many workers would be impacted.

The White House also expressed its belief that the increased minimum wage will “benefit many women and people of color” and will “help improve the economic security of their families and narrow racial and gender disparities in income.”

And while White House officials estimated that the number of contractor employees who would be subject to the increase was in the hundreds of thousands, they conceded that they did not know how many workers would be impacted.

Importantly, neither the EO nor associated statements mention the potentially negative effects identified by the Congressional Budget Office’s (CBO) recent report⁵ on the potential impact of phasing in an increase to \$15.00 of the generally-applicable federal minimum wage.

Those effects, which could be significant, included:

- An increase in the cumulative budget deficit over the 2021–2031 period by \$54 billion.
- Higher prices for goods and services — stemming from the higher wages of workers paid at or near the minimum wage, such as those providing long-term healthcare — would contribute to increases in federal spending.
- While the number of people living in poverty was estimated to be reduced by 0.9 million by the time the increase was fully phased in by 2025, the CBO also estimated that employment would be reduced by 1.4 million workers, or 0.9%, in an average week in 2025.

The Biden administration speculates that the higher minimum wage will not result in higher costs to the taxpayers because increased pay will result in higher productivity and decreased supervisory and training expenses.

While the White House Fact Sheet⁶ on the EO cites some studies that support this position, it is not clear what percentage of service contracts for relatively unskilled labor will be positively impacted by these speculative productivity increases.

CONCLUSION

While there may be valid policy reasons for increasing the minimum wage to \$15.00 an hour, it is unfortunate that such a significant change potentially applicable to hundreds of thousands of workers has been made by Executive Order.

But for those companies that do work both in the government and commercial markets, this increase will offer an opportunity to adjust their workforces in response to these higher minimum wage requirements in advance of what may soon be a national \$15.00 minimum wage federal mandate.

Notes

¹ <https://bit.ly/2Rty7oJ>

² <https://bit.ly/3uX8tr9>

³ <https://bit.ly/3eUn1lz>

⁴ <https://bit.ly/3eS4Lcw>

⁵ <https://bit.ly/2SYJPZ2>

⁶ <https://bit.ly/2SYJPZ2>

This article was published on Westlaw Today on May 19, 2021.

* © 2021 Richard W. Arnholt, Esq., Bass, Berry & Sims

ABOUT THE AUTHOR



Richard W. Arnholt is a member at **Bass, Berry & Sims** in Washington, D.C. He advises companies on government contracting, focusing on risk mitigation through ethics and compliance programs as well as responses to government allegations of procurement fraud or misconduct. He can be reached at rarnholt@bassberry.com. This article was originally published April 29, 2021, on the firm’s website. Republished with permission.

Thomson Reuters develops and delivers intelligent information and solutions for professionals, connecting and empowering global markets. We enable professionals to make the decisions that matter most, all powered by the world’s most trusted news organization.

This publication was created to provide you with accurate and authoritative information concerning the subject matter covered, however it may not necessarily have been prepared by persons licensed to practice law in a particular jurisdiction. The publisher is not engaged in rendering legal or other professional advice, and this publication is not a substitute for the advice of an attorney. If you require legal or other expert advice, you should seek the services of a competent attorney or other professional. For subscription information, please visit legalsolutions.thomsonreuters.com.