

Arizona judge dismisses challenge to government contractor minimum wage executive order

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On January 6, U.S. District Judge John Tuchi in the District of Arizona agreed¹ to dismiss a lawsuit brought by five states challenging the April 2022 Executive Order (EO), increasing the minimum wage for federal contractors to \$15 per hour.

Arizona, Idaho, Indiana, Nebraska, and South Carolina argued the administration did not have the authority to stipulate an increase in the minimum wage of federal contractors under the Federal Property and Administrative Services Act (FPASA). Judge Tuchi disagreed.

The district judge agreed with the president's determination that higher wages would lead to increased productivity and improved quality of work.

The FPASA was enacted to provide the U.S. government with an "economical and efficient system" for "procuring and supplying property and nonpersonal services, and performing related functions including contracting."

Additionally, the FPASA provides the president with authority to "prescribe policies and directives that the President considers necessary to carry out [the Act]." Therefore, there must be "a sufficiently close nexus" between the statutory means and "goals of economy and efficiency in federal contracting."

Judge Tuchi agreed with the Biden administration that an increase in wages was sufficient to meet the nexus requirement. The district judge agreed with the president's determination that higher wages would lead to increased productivity and improved quality of work. The court therefore held the determination was consistent with the policies undergirding the FPASA.

The district court also highlighted that President Biden is the third consecutive president to issue EOs related to federal contractor minimum wage requirements. In 2014, President Obama issued an EO establishing a minimum wage for federal contractors. Four years later, President Trump issued an EO exempting certain "seasonal recreation workers" from the minimum wage requirement, leaving the rest of the Obama EO intact.

President Trump's actions "indicat[e] he understood setting minimum wages for contractors to be within the scope of his authority under the FPASA." The district court reasoned that "while the President's view of his own statutory authority is not controlling, when that view has been acted upon over a substantial period of time without eliciting congressional reversal, it is entitled to great respect."

Judge Tuchi also rejected the plaintiff's argument analogizing the contractor minimum wage EO to the EO mandating government contractors be vaccinated, blocked² last January in *Brnovich*. The court distinguished the rulings, claiming the connection between the vaccine mandate and economy and efficiency in government contracting was too tenuous.

In contrast, the contractor minimum wage pertains to the direct relationship between a contractor and its employees, which will immediately improve the federal contracting system.

Additionally, the district court order held the EO's application to subcontractors to be proper. Judge Tuchi called the extension of the EO's application necessary "to prevent government contractors from simply subcontracting out the bargained-for services to avoid paying the minimum wage."

For decades, the president has used the FPASA to circumvent Congress and test new policies using the government contracting community as a guinea pig.

The plaintiff's arguments around the EO being arbitrary and capricious, an unconstitutional delegation of power, and in violation of the Spending Clause were also dismissed.

Going forward

The Supreme Court has never delineated the outer bounds of presidential authority under the FPASA, allowing presidents to implement social policy under the guise of government procurement. For decades, the president has used the FPASA to

circumvent Congress and test new policies using the government contracting community as a guinea pig. This EO is no different.

The breadth of FPASA authority is informed by a patchwork of court decisions, each providing a little more color into how the judicial system understands presidential power. In the Jan. 6 decision, Judge Tuchi distinguished the minimum wage EO from the EO in *Brnovich* largely due to 1) the nexus running through “intermediate steps” in *Brnovich* rather than there being a direct relationship and 2) the history of FPASA’s usage.

The decision is only the first domino to fall in the legal fight around the minimum wage increase and likely will be appealed.

The district court found the government’s assertion that the mandate’s “overall effect” would “decrease the spread of COVID-19, which [would] in turn decrease worker absence, save labor costs on net, and thereby improve efficiency in federal contracting” required “intermediate steps” and therefore, was too tenuous.

About the author



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Also, while “Presidents of both parties have issued orders like EO 14026 pertaining to the compensation of contractor’s employees ... the President had never ‘in seventy years since the [FPASA] was enacted, ever used his authority ... to effectuate sweeping public health policies.’” This “imposition of an irreversible medical procedure” was a bridge too far for the court.

The decision is only the first domino to fall in the legal fight around the minimum wage increase and likely will be appealed. Texas, Louisiana, and Mississippi filed a lawsuit in Texas federal court in February 2022 and the Tenth Circuit granted an injunction pending appeal as the minimum wage applies to seasonal recreational companies operating businesses on federal land.

As higher courts rule on the limits of presidential authority under FPASA, the boundaries of presidential authority in the federal contracting space will hopefully become clearer.

Notes

¹ <https://bit.ly/3WTDIAh>

² <https://bit.ly/3kVdBfd>

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