



Save the Date: Federal Contractors to See Minimum Wage Increase to \$15 Effective January 30

Insights

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The U.S. Department of Labor recently announced a Final Rule raising the minimum wage for some federal contractors to \$15 per hour – and it takes effect on January 30. The Final Rule – formally known as “Increasing the Minimum Wage for Federal Contractors” – also requires annual increases of that minimum wage rate for contracts entered into on or after January 1, 2023. Contractors may recall President Biden issuing Executive Order 14026 in the early days of his administration; this Final Rule implements that Executive Order. What do you need to know about the Final Rule and how can you successfully implement it? Here’s what we have to share:

What does the Final Rule Mean for Federal Contractors?

Starting January 30, some federal contractors must have a minimum wage rate of \$15 per hour. Then, beginning January 1, 2023, the wage rate will be determined annually by the Secretary of Labor. This new wage rate will be published at least 90 days before each new minimum wage is to take effect. The amount will not be less than the amount in effect on the date of the wage determination, will be increased in the amount of the annual percentage increase in the Consumer Price Index for Urban Wage Earners and Clerical Workers (CPI-W), rounded to the nearest multiple of \$0.05.

For example, if the CPI-W’s annual percentage increase applied to the current minimum wage rate of \$15 per hour raises it to \$15.68 per hour in 2023, then the Secretary of Labor will round up to \$15.70 per hour. For tipped employees, the Final Rule also provides that covered federal contractor employees must earn at least \$10.50 per hour, starting January 1, 2023. However, covered employers will no longer be able to pay employees a tipped wage after January 1, 2024.

How do I Know if Our Contract is Covered by the New Rule?

Federal contractors may already know if they have “covered contracts” to pull them into the minimum wage coverage because the recently stayed federal contractor vaccine mandate borrowed its own definition of coverage from the proposed rulemaking EO 14026. Covered federal contractors have contracts, subcontracts, or contract-like instruments in four major categories:

- Concessions contracts, including those not covered by the Service Contract Act (SCA);

- Federal government contracts in connection with federal property or lands and related to offering services for federal employees, their dependents, or the general public;
- Procurement contracts for construction covered by the Davis Bacon Act (DBA); and
- Service contracts covered by the SCA, unless subject to an exemption.

The Final Rule applies to workers performing work on or in connection with a covered contract in all 50 states, the District of Columbia, Puerto Rico, the Virgin Islands, and Outer Continental Shelf lands.

How Do I Know if Our Contract is NOT Covered?

Importantly, the following contracts are not covered by the Final Rule:

- Contracts for the manufacturing or furnishing of materials, supplies, articles, or equipment to the Federal Government, including those subject to the Walsh-Healey Public Contracts Act;
- Contracts, contract-like instruments or agreements with Indian Tribes under the Indian Self-Determination and Education Assistance Act;
- Grants;
- Procurement contracts for construction that are excluded from coverage of the DBA;
- Contracts for services that are exempted from coverage under the SCA unless expressly covered by the Final Rule; and
- Government solicited bids issued prior to January 30, 2022 that lead to contracts being formed before March 31, 2022.

What if I Am Not Sure if Our Contract is Covered or if We Have Contracts that Include Both Products and Services?

Where the contractor has hybrid contracts that provide for products as well as services that support its products, such as installation or repairs, these contracts must be very carefully examined to determine if the services portion(s) of the contracts may be sufficiently robust as to trigger the minimum wage coverage requirement. The contractor should review the contract documents themselves to make this determination and may want to engage legal support to do so.

How Do I Know Which Workers Are Covered?

Contractors must pay the required minimum wage and the minimum wage rate only applies to those workers who are performing work “on” or “in connection” with a covered contractor and whose wages are governed by the DBA, the SCA, or the FLSA. For purposes of the Rule, a worker who performs “on” a covered contract is any worker who directly performs the specific services called for by the contract’s terms. A worker who performs work “in connection with” a covered contract is

any worker who performs work activities that, although not specific services called for in the contract's terms, are necessary to the performance of those specific services. Note that workers who perform only *de minimis* work in connection with a covered contract (less than 20% of their work) may be exempt from coverage.

How Does the New Rule Affect Our Tipped Employees?

As previously stated, after January 1, 2024, covered employees will no longer be able to pay employees a tipped wage. As a refresher, part-time and full-time employees are generally considered "tipped employees" when they customarily and regularly receive more than \$30 a month in tips. Only tips actually retained by the worker after any tip pooling may be counted in determining whether the person is a tipped employee. Under the Final Rule, the wage paid to a tipped employee may be composed of a cash wage and a credit based on tips. Beginning January 30, 2022, the cash wage that must be paid to such worker shall at least be \$10.50 per hour. Beginning January 1, 2023, it increases to at least \$12.75 per hour and the applicable federal contractor minimum wage rate in effect beginning January 1, 2024.

What Else Should Covered Contractors Consider?

Notably, only covered contracts entered on or after January 30, 2022 — in addition to any existing contracts that are renewed or extended after that date through a bi-lateral modification — fall under the Final Rule's purview. Federal contractors and subcontractors mustn't develop tunnel vision and focus solely on the minimum wage increase, though. The Final Rule also requires: (i) compliance with pay frequency and recordkeeping requirements; (ii) a compliant minimum wage contract clause be included in covered subcontracts; and (iii) federal contractors must notify workers of the minimum wage increase, as described in the Rule (and possibly as required by the relevant state laws).

Takeaways

Failure to comply with the Final Rule can result in harsh penalties, including but not limited to significant monetary backpay awards, liquidated damages, reasonable attorneys' fees, and having contract payments withheld and/or being debarred from working on future federal contracts. Workers are also entitled to enforce their rights under the FLSA in a private action filed in a federal district court against federal contractors and subcontractors.

To best prepare for the Final Rule, federal contractors and subcontractors should:

- Ensure that they have properly determined whether or not they hold a covered contract or subcontract. If covered contracts are held, federal contractors and subcontractors should implement the new minimum wage requirements as of the effective date of the Executive Order.
- Monitor the wage increases set to be promulgated annually started in 2023.

- Plan to phase out the tipped wage if the covered contractors and subcontractors are paying employees a tipped wage.

You should work with your legal counsel to determine if you hold a covered contract or contract-like instrument.

Conclusion

Fisher Phillips will continue to monitor any further developments in this area as they occur, so you should ensure you are subscribed to [Fisher Phillips' Insight system](#) to gather the most up-to-date information. If you have any questions regarding how the Final Rule can impact your organization, or best practice for addressing adaptation to it, please consult your Fisher Phillips attorney, the authors of this Insight, or a member of Fisher Phillips' [Affirmative Action and Federal Contract Compliance Practice Group](#).

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