

July 29, 2021

DEPARTMENT OF LABOR INITIATES RULEMAKING TO RAISE THE MINIMUM WAGE TO \$15 PER HOUR FOR FEDERAL CONTRACTORS

To Our Clients and Friends:

Last week the Department of Labor published a notice of proposed rulemaking to increase the minimum wage for federal contractors to \$15.00 per hour, starting on January 30, 2022. This represents an approximately 37 percent increase over the current minimum wage for federal contractors of \$10.95 per hour. The proposal follows President Biden's April 27th Executive Order, titled "Increasing the Minimum Wage for Federal Contractors," which directed the Department to undertake the rulemaking. The notice provides for a 32-day comment period that will close on August 23rd. Under President Biden's Order, the Department has until November 24th of this year to issue a final regulation.

Under the proposed rule, the increased minimum wage would apply only to new contracts, including renewals and extensions of existing contracts, and to workers who are employed on or in connection with a federal contract. Beginning on January 1, 2023, and annually thereafter, the minimum wage would be increased in line with the annual percentage increase of the Consumer Price Index. Like President Biden's Executive Order, the proposed rule offers as justification for the wage increase the purported efficiency benefits that come with a higher wage, including "enhance[d] worker productivity" and "higher quality work" due to increased worker health, morale, and effort. The proposal also reasons that a higher wage will reduce absenteeism and turnover, and lower supervisory and training costs.

Federal contractors concerned about the \$15 minimum wage can participate in the rulemaking by submitting comments explaining how the wage requirement may increase, rather than decrease, their costs and their contract prices with the government.

The Executive Order, and by extension the proposed rule, rely on the President's authority under the Federal Property and Administrative Services Act (the "Procurement Act") to establish contracting practices that promote economy and efficiency in federal procurement. It is the latest in a long line of executive orders issued by presidents of both parties to use the procurement authority to influence contractors' employment practices. Past orders addressed paid sick leave, use of the E-Verify system, mandatory postings about union members' rights, and non-discrimination in hiring and employment. In the 1970s, President Carter cited efficiency in contracting as the reason to impose *maximum* wage requirements, in the form of wage controls.

The new \$15 per hour wage requirement could be legally vulnerable if a court challenge is brought to the final rule. Courts have recognized that policies adopted under the Procurement Act must be connected to cost savings or other efficiency gains that benefit the federal government. A policy that

GIBSON DUNN

has more to do with effecting a president's domestic policy priorities than with saving the government money could be held to exceed the president's authority. The wage requirement, insofar as its rationale is that increased labor costs will ultimately save federal funds, may be particularly vulnerable to such a challenge.



Gibson Dunn lawyers are available to assist in addressing any questions you may have about these developments. Please contact the Gibson Dunn lawyer with whom you usually work in the firm's Labor and Employment practice group, or the following authors:

*Eugene Scalia – Washington, D.C. (+202-955-8210, escalia@gibsondunn.com)
Blake Lanning* – Washington, D.C. (+1 202-887-3794, blanning@gibsondunn.com)*

Please also feel free to contact any of the following practice leaders:

Labor and Employment Group:

*Katherine V.A. Smith – Los Angeles (+1 213-229-7107, ksmith@gibsondunn.com)
Jason C. Schwartz – Washington, D.C. (+1 202-955-8242, jschwartz@gibsondunn.com)*

** Mr. Lanning is admitted only in Indiana and practicing under the supervision of members of the District of Columbia Bar.*

© 2021 Gibson, Dunn & Crutcher LLP

Attorney Advertising: The enclosed materials have been prepared for general informational purposes only and are not intended as legal advice.