

# PRATT’S GOVERNMENT CONTRACTING LAW REPORT

---

---

VOLUME 11	NUMBER 1	January 2025
-----------	----------	--------------

---

<b>Editor’s Note: Final Rules?</b> Victoria Prussen Spears	407
<b>15 Key Takeaways From Final CMMC Program Rule Issued by U.S. Department of Defense</b> Eric S. Crusius	409
<b>Resetting the “Buy American” Waiver List: Federal Government Slashes Exceptions to Domestic Procurement</b> Brett W. Johnson, Derek Flint, T. Troy Galan, Cole Craghan and Kristen N. Iteen	414
<b>Executive Order 14026—The \$15 Contractor Minimum Wage—Is Rejected By a Panel of the U.S. Court of Appeals for the Ninth Circuit</b> Craig Smith and W. Benjamin Phillips, III	417
<b>Small Business Administration Proposed Rule Would Enact Material Changes and Promote Regulatory Uniformity Across Size and Status Programs—Part II</b> Olivia Lynch, Michael E. Samuels and Zachary Schroeder	420
<b>Small Business Administration Reports on Surety Program, Contracting Certifications</b> Victoria Prussen Spears	430
<b>In the Courts</b> Steven A. Meyerowitz	433

**QUESTIONS ABOUT THIS PUBLICATION?**

For questions about the **Editorial Content** appearing in these volumes or reprint permission, please call or email:

Julie Chee at ..... 1-800-306-5230  
Email: ..... Julie.Chee@lexisnexus.com

For assistance with replacement pages, shipments, billing or other customer service matters, please call:

Customer Services Department at ..... (800) 833-9844  
Outside the United States and Canada, please call ..... (518) 487-3385  
Fax Number ..... (800) 828-8341  
LexisNexis® Support Center ..... <https://supportcenter.lexisnexus.com/app/home/>

For information on other Matthew Bender publications, please call

Your account manager or ..... (800) 223-1940  
Outside the United States and Canada, please call ..... (518) 487-3385

Library of Congress Card Number:

ISBN: 978-1-6328-2705-0 (print)

ISSN: 2688-7290

Cite this publication as:

[author name], [article title], [vol. no.] PRATT’S GOVERNMENT CONTRACTING LAW REPORT [page number] (LexisNexis A.S. Pratt)

Michelle E. Litteken, GAO Holds NASA Exceeded Its Discretion in Protest of FSS Task Order, 1 PRATT’S GOVERNMENT CONTRACTING LAW REPORT 30 (LexisNexis A.S. Pratt)

Because the section you are citing may be revised in a later release, you may wish to photocopy or print out the section for convenient future reference.

This publication is designed to provide authoritative information in regard to the subject matter covered. It is sold with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional services. If legal advice or other expert assistance is required, the services of a competent professional should be sought.

LexisNexis and the Knowledge Burst logo are registered trademarks of RELX Inc. Matthew Bender, the Matthew Bender Flame Design, and A.S. Pratt are registered trademarks of Matthew Bender Properties Inc.

Copyright © 2025 Matthew Bender & Company, Inc., a member of LexisNexis. All Rights Reserved. Originally published in: 2017

No copyright is claimed by LexisNexis or Matthew Bender & Company, Inc., in the text of statutes, regulations, and excerpts from court opinions quoted within this work. Permission to copy material may be licensed for a fee from the Copyright Clearance Center, 222 Rosewood Drive, Danvers, Mass. 01923, telephone (978) 750-8400.

Editorial Office  
230 Park Ave., 7th Floor, New York, NY 10169 (800) 543-6862  
[www.lexisnexus.com](http://www.lexisnexus.com)

MATTHEW  BENDER

# *Editor-in-Chief, Editor & Board of Editors*

---

## **EDITOR-IN-CHIEF**

**STEVEN A. MEYEROWITZ**

*President, Meyerowitz Communications Inc.*

## **EDITOR**

**VICTORIA PRUSSEN SPEARS**

*Senior Vice President, Meyerowitz Communications Inc.*

## **BOARD OF EDITORS**

**MARY BETH BOSCO**

*Partner, Holland & Knight LLP*

**PABLO J. DAVIS**

*Of Counsel, Dinsmore & Shohl LLP*

**MERLE M. DELANCEY JR.**

*Partner, Blank Rome LLP*

**J. ANDREW HOWARD**

*Partner, Alston & Bird LLP*

**KYLE R. JEFcoat**

*Counsel, Latham & Watkins LLP*

**JOHN E. JENSEN**

*Partner, Pillsbury Winthrop Shaw Pittman LLP*

**DISMAS LOCARIA**

*Partner, Venable LLP*

**MARCIA G. MADSEN**

*Partner, Mayer Brown LLP*

**KEVIN P. MULLEN**

*Partner, Morrison & Foerster LLP*

**VINCENT J. NAPOLEON**

*Partner, Nixon Peabody LLP*

**KEITH SZELIGA**

*Partner, Sheppard, Mullin, Richter & Hampton LLP*

**STUART W. TURNER**

*Counsel, Arnold & Porter*

**ERIC WHYTSELL**

*Partner, Stinson Leonard Street LLP*

*Pratt's Government Contracting Law Report* is published 12 times a year by Matthew Bender & Company, Inc. Copyright © 2025 Matthew Bender & Company, Inc., a member of LexisNexis. All Rights Reserved. No part of this journal may be reproduced in any form—by microfilm, xerography, or otherwise—or incorporated into any information retrieval system without the written permission of the copyright owner. For customer support, please contact LexisNexis Matthew Bender, 9443 Springboro Pike, Miamisburg, OH 45342 or call Customer Support at 1-800-833-9844. Direct any editorial inquiries and send any material for publication to Steven A. Meyerowitz, Editor-in-Chief, Meyerowitz Communications Inc., 26910 Grand Central Parkway Suite 18R, Floral Park, New York 11005, smeyerowitz@meyerowitzcommunications.com, 631.291.5541. Material for publication is welcomed—articles, decisions, or other items of interest to lawyers and law firms, in-house counsel, government lawyers, senior business executives, and anyone interested in privacy and cybersecurity related issues and legal developments. This publication is designed to be accurate and authoritative, but neither the publisher nor the authors are rendering legal, accounting, or other professional services in this publication. If legal or other expert advice is desired, retain the services of an appropriate professional. The articles and columns reflect only the present considerations and views of the authors and do not necessarily reflect those of the firms or organizations with which they are affiliated, any of the former or present clients of the authors or their firms or organizations, or the editors or publisher.

POSTMASTER: Send address changes to *Pratt's Government Contracting Law Report*, LexisNexis Matthew Bender, 230 Park Ave. 7th Floor, New York NY 10169.

# Executive Order 14026—The \$15 Contractor Minimum Wage—Is Rejected By a Panel of the U.S. Court of Appeals for the Ninth Circuit

***By Craig Smith and W. Benjamin Phillips, III\****

*In this article, the authors discuss a decision by a panel of a federal circuit court of appeals striking down the executive order commonly known as the \$15 contractor minimum wage.*

The U.S. Court of Appeals for the Ninth Circuit has issued a split decision<sup>1</sup> in *Nebraska v. Su* holding that Executive Order (EO) 14026,<sup>2</sup> commonly known as the \$15 contractor minimum wage, exceeded the President's authority under the Federal Property and Administrative Services Act. The majority also found that the U.S. Department of Labor's (DOL) rules<sup>3</sup> implementing EO 14026 were subject to arbitrary-or-capricious review under the Administrative Procedure Act (APA), and in turn found that the implementing rules were arbitrary and capricious because DOL failed to consider alternatives to the prescribed minimum wage.

The majority reversed a district court order dismissing the underlying complaint, vacated the district court's denial of a preliminary injunction, and remanded for further proceedings. This panel decision creates a circuit split with a decision by the U.S. Court of Appeals for the Tenth Circuit in April 2024<sup>4</sup> finding EO 14026 to be a valid exercise of authority (for which a cert petition for U.S. Supreme Court review is pending). A third appeal over EO 14026 has been argued at the U.S. Court of Appeals for the Fifth Circuit and awaits a decision.

The Ninth Circuit issued the panel decision on November 5, 2024. On December 20, 2024, DOL and the other appellees filed a petition for rehearing en banc taking issue with the Ninth Circuit panel's interpretation of the

---

\* The authors, attorneys with Wiley Rein LLP, may be contacted at [csmith@wiley.law](mailto:csmith@wiley.law) and [bphillips@wiley.law](mailto:bphillips@wiley.law), respectively.

<sup>1</sup> <https://cdn.ca9.uscourts.gov/datastore/opinions/2024/11/05/23-15179.pdf>.

<sup>2</sup> <https://www.federalregister.gov/documents/2021/04/30/2021-09263/increasing-the-minimum-wage-for-federal-contractors>.

<sup>3</sup> <https://www.federalregister.gov/documents/2021/11/24/2021-25317/increasing-the-minimum-wage-for-federal-contractors>.

<sup>4</sup> <https://www.ca10.uscourts.gov/sites/ca10/files/opinions/010111040629.pdf>.

Procurement Act and holding related to the APA. The timing of any other steps at the district court or by DOL, FAR Council, or contracting agencies remains to be seen.

## WHAT IT MEANS FOR INDUSTRY

In the near term, the decision introduces modest uncertainty. The contractor minimum wage increases annually effective January 1, where the next scheduled increase is to \$17.75. It is not certain if by then the Ninth Circuit will issue its mandate, the district court will determine the scope of the likely forthcoming preliminary injunction, and contracting agencies will make any corresponding adjustments to contract terms. Readers may recall that in challenges to procurement-related EOs, courts have been trending towards narrower injunctions, so even if the anticipated preliminary injunction is issued quickly, it might apply only to the handful of state governments that are the plaintiffs in this case.

Contractors with covered contracts that have an actual or potential connection to the Ninth Circuit's geographic footprint should thus consider inquiring with their contracting officers about the agencies' plans for application of the minimum wage now and effective January 1—and to capture the contracting officer's instructions in writing.

As for the future of the contractor minimum wage beyond the January 1 increase, contractors should plan for a wide range of potential outcomes. The election results might be read to signal that the government is likely to discontinue defending EO 14026 in litigation, or withdraw the EO, or both. But recall that the prior \$10.10 contractor minimum wage specified by EO 13658,<sup>5</sup> issued in 2014, received only a modest narrowing in scope by the first Trump administration, and another EO specifying paid sick leave for contractor employees<sup>6</sup> has remained in place since 2015. So for the newer, higher contractor minimum wage under EO 14026, it is likely too early to gauge what the next Trump administration might do.

More broadly, the decision adds another point to the constellation of decisions addressing the president's authority under the Federal Property and Administrative Services Act. Litigation over the scope of that authority, whether in the context of EO 14026 or involving other presidential actions, will

---

<sup>5</sup> <https://www.federalregister.gov/documents/2014/02/20/2014-03805/establishing-a-minimum-wage-for-contractors>.

<sup>6</sup> <https://www.federalregister.gov/documents/2015/09/10/2015-22998/establishing-paid-sick-leave-for-federal-contractors>.

presumably continue. Contractors should remain attuned to these developments as they consider compliance and/or challenges related to implementation of any particular EOs going forward.

Finally, the Ninth Circuit's decision may influence how EOs related to procurement, and perhaps other topics, are drafted and implemented in the future. In holding that EO implementation is subject to APA arbitrary-and-capricious review, the court rejected the government's position that DOL lacked discretion to depart from EO 14026's directions. Agencies have made similar lack-of-discretion assertions in implementing several EOs in recent years, even over highly granular details of implementation that commenters have signaled just need some adjustments to be workable.

## CONCLUSION

The Ninth Circuit's decision indicates that agencies must consider alternatives to EOs' directions. This obligation to consider alternatives might prompt future administrations to draft EOs at higher levels of generality so that implementing agencies have flexibility to give rulemaking comments meaningful consideration, and at times adopt alternatives proposed by commenters, without giving the appearance of having departed from an EO's directions. It may be many years before any trends along these lines can be discerned, however. But in the more immediate term, this aspect of the Ninth Circuit's decision suggests that when agencies propose rules to implement EOs, there may be more value to submitting comments than previously perceived and evaluating agencies' responses to those comments.