wiley

ALERT

Ninth Circuit Panel Rejects EO 14026 Contractor Minimum Wage

November 8, 2024

WHAT: The U.S. Court of Appeals for the Ninth Circuit issued a split decision in *Nebraska v. Su* holding that Executive Order (EO) 14026, 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 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 Tenth Circuit decision earlier this year 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 Fifth Circuit and awaits a decision.

WHEN: The Ninth Circuit issued the panel decision on November 5, 2024. The timing of next steps at the district court and any actions 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, meaning the time from now to the next scheduled increase to $17.75 is roughly seven weeks. It is far from certain that within that time, the Ninth Circuit will issue its mandate, the district court will determine the scope of the likely

Authors

Craig Smith
Partner
202.719.7297
csmith@wiley.law

W. Benjamin Phillips, III
Associate
202.719.4376
bphillips@wiley.law

Practice Areas

Employment & Labor

Employment and Labor Standards Issues in Government Contracting

Government Contracts

Wage and Hour Requirements

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. This week's 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, issued in 2014, received only a modest narrowing in scope by the next Presidential Administration, and another EO specifying paid sick leave for contractor employees (EO 13706) 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 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 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.

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.