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U.S. Government Defeats Multi-State Challenge to Federal Minimum Wage Increase

*By Marcia G. Madsen, Cameron R. Edlefsen and Luke Levasseur**

In this article, the authors examine a recent district court decision rejecting a challenge to efforts by the federal government to increase the federal minimum wage applicable to government contractors.

Since taking effect over one year ago, President Biden's executive order (EO 14026) and the final rule issued by the Department of Labor (DoL) increasing the federal minimum wage applicable to government contractors (Final Rule) has faced several challenges in different courts across the nation. This article focuses on a recent district court decision rejecting such a challenge.

In that case, *Arizona v. Walsh*,¹ a federal judge in the U.S. District Court for the District of Arizona dismissed a multi-state lawsuit challenging EO 14026 and the Final Rule in *Arizona v. Walsh*.

Another challenge to the rule, in *Texas v. Biden*,² is being pursued by Texas, Louisiana, and Mississippi in the U.S. District Court for the Southern District of Texas.

In a similar case, *Bradford v. U.S. Dep't of Labor*,³ the U.S. Court of Appeals for the Tenth Circuit issued an order enjoining enforcement of the executive order in a limited context in which the plaintiffs challenged the rule as applied to seasonal recreational services or seasonal recreational equipment rental for the general public on federal lands. Since no preliminary injunctions were issued by district courts in Arizona or Texas, federal contractors must comply with the federal minimum wage hikes, except for the seasonal recreational service or equipment rental entities described in the Tenth Circuit order.

The government notified the District Court for the Southern District of Texas and the Tenth Circuit of the *Arizona v. Walsh* decision, asking both to

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¹ *Arizona v. Walsh*, No. CV-22-00213-PHX-JJT, 2023 WL 120966 (D. Ariz. Jan. 6, 2023). The plaintiff states are Arizona, Idaho, Indiana, Nebraska, and South Carolina.

² *Texas v. Biden*, No. 6:22-CV-0004 (S.D. Tex. Feb. 10, 2022).

³ *Bradford v. U.S. Dep't of Lab.*, No. 22-1023, Doc. 10110656538 (10th Cir. Feb. 17, 2022).

consider this opinion as persuasive authority and issue rulings in favor of the government.⁴ The key points of the *Arizona* decision are discussed below.

EO 14026 AND THE DOL'S FINAL RULE DO NOT EXCEED THE PRESIDENT'S AUTHORITY UNDER THE FEDERAL PROPERTY AND ADMINISTRATIVE SERVICES ACT (FPASA A/K/A THE PROCUREMENT ACT OR THE PROPERTY ACT)

President Biden issued EO 14026 pursuant to his executive powers and pursuant to the FPASA⁵ to “promote economy and efficiency in procurement by contracting with sources that adequately compensate their workers.”⁶ The purpose of the FPASA is to “provide the Federal Government with an economical and efficient system” for various activities, which include “[p]ro-curing and supplying property and nonpersonal services, and performing related functions including contracting.” Under the FPASA, Congress granted the president authority to “prescribe policies and directives that the President considers necessary to carry out [the Act].”⁷

The *Arizona* decision recognized that the FPASA’s grant of presidential authority is broad but noted that “policies issued pursuant to the FPASA must have a ‘sufficiently close nexus’ to the statutory purposes of promoting ‘economy’ and ‘efficiency’ in federal contracting.” The court explained that there was “a sufficiently close nexus between EO 14026 and the Final Rule and the FPASA’s goals of economy and efficiency in federal contracting” because the president “rationally determined that increasing the minimum wages of contractors’ employees will lead to improvements in their productivity and the quality of their work, and thereby benefit the government’s contracting operations.”

The *Arizona* court also recognized that “presidents of both parties have exercised their authority under the FPASA to issue orders pertaining to the compensation of contractors’ employees” and that “each of the three most recent presidents have issued orders pertaining to contractors’ minimum wages.” The court explained that the use of executive authority “over a substantial period of time without eliciting congressional reversal” is “entitled to

⁴ Defendant’s Notice of Supplemental Authority, *Texas v. Biden*, No. 6:22-CV-0004, Doc. 66 at *3 (S.D. Tex. Jan. 11, 2023); Defendant’s Notice of Supplemental Authority, *Bradford v. U.S. Dep’t of Lab.*, No. 22-1023, Doc. 10110795219 (10th Cir. Jan. 10, 2023).

⁵ 40 U.S.C. § 101 et seq.

⁶ *Increasing the Minimum Wage for Federal Contractors*, 86 FR 67126 (Nov. 24, 2021), <https://www.govinfo.gov/content/pkg/FR-2021-11-24/pdf/2021-25317.pdf>.

⁷ 40 U.S.C. § 121(a).

great respect.” The court further determined that the president properly “relied on a broad statutory delegation to exercise proprietary authority in an area – general administrative control of the Executive Branch – over which he also enjoys inherent powers [under the Constitution].”

The *Arizona* court rejected the plaintiff’s comparison between the minimum wage requirements at issue and judicial decisions invalidating federal contractor vaccine mandates. The state-plaintiffs argued that EO 14026 lacked a sufficient nexus to the president’s authority under the FPASA and the DoL’s Final Rule, citing as persuasive authority several court decisions invalidating President Biden’s executive order mandating COVID-19 vaccines for federal contractors, including the district court’s decision in *Brnovich v. Biden*.⁸

In *Brnovich*, the court held that “the [government’s] asserted nexus to economy and efficiency in federal contracting ran through intermediate steps involving public health,” i.e., “the ‘overall effect’ of the mandate ‘[would] be to 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.” The court explained that “such a tenuous connection to the purposes of the FPASA would permit the government to regulate any number of public health concerns by asserting that, through improvements to public health, such measures indirectly decreased absenteeism and improved productivity.”

The *Arizona* court, however, distinguished its decision in *Brnovich* from its decision here. The court held that, unlike the vaccine mandate, “EO 14026 and the Final Rule pertain directly to the economic relationships between the government, its contractors and their employees, setting requirements for employees’ wages.”

The *Arizona* court also found that the major questions doctrine did not force a “narrow construction of the FPASA” in this context as compared to the “novel and ‘breathhtaking’ authority that concerned the court in *Brnovich*.”

Based on this analysis, the *Arizona* court granted the government’s motion to dismiss the plaintiff’s substantive challenges to EO 14026 and the DoL’s Final Rule.

CONCLUSION

The *Arizona* decision means that EO 14026 and the DoL’s Final Rule currently survive. But federal contractors will want to follow the pending case in the United States District Court for the Southern District of Texas for further

⁸ *Brnovich v. Biden*, 562 F. Supp. 3d 123, 145 (D. Ariz. 2022).

developments on the federal minimum wage increases. For now, federal contractors must continue to comply with the minimum wage increases directed by the Biden administration.

While the president may issue executive orders to set forth policies and federal agencies may implement such policies through regulations such as here with EO 14026 and the DoL's Final Rule, the federal judiciary will continue to review the legality of these executive powers. As seen here, judicial review will analyze the sources of presidential authority (e.g., Article II of the Constitution or congressional delegation of authority).