

\$15 minimum wage for federal contractors faces challenges

Final regulations issued Nov. 24, 2021, raised the minimum wage for non-exempt employees working for federal contractors to \$15, from \$11.25, effective for new and renewing federal contracts signed on or after Jan. 30, 2022.

The final regulations were the last stop in a long line of administrative proceedings. It started with an Executive Order issued in April 2021, followed by proposed regulations issued July 22, 2021.

The order of administrative action is important, because attorneys general in Arizona and Texas have filed two lawsuits contesting the raise. The two lawsuits represent a total of eight states—Arizona and Texas, plus Idaho, Indiana, Louisiana, Mississippi, Nebraska, and South Carolina.

Do these lawsuits stand a chance of succeeding? Let's take a look.

A very brief explanation of arbitrary and capricious

Procedure—how regulations are written and issued—is everything to federal agencies. We will spare you the excruciating details of administrative law analysis, except for these two pearls of wisdom:

- All federal regulations (aside from certain IRS regs) are subject to notice and comment. So they're first published in proposed form in the *Federal Register* and public comments are solicited. Skip either step and the regulations will be invalidated.
- The arbitrary-and-capricious [standard](#) requires regulations to be reasonable and agencies to reasonably explain them and the relevant issues they considered in issuing final regulations. Regulations will be arbitrary and capricious if they're issued by a federal agency that doesn't have authority to issue them or the agency doesn't meet the reasonableness test.

Is it arbitrary and capricious?

The [complaint](#) filed by the Arizona AG was on behalf of Arizona, Idaho, Indiana, Nebraska, and South Carolina in their capacity as federal contractors. Texas filed a separate complaint on its behalf and for Louisiana and Mississippi.

According to the Arizona plaintiffs, the Department of Labor acted arbitrarily and capriciously because it lacked authority to issue the regulations under the Procurement Act. The Procurement Act authorizes the president to prescribe policies and directives the president considers necessary to ensure economical and efficient government procurement and administration of government property.

In addition, the suit alleges the DOL acted arbitrarily and capriciously because:

- It ignored the costs of the increase in the minimum wage and didn't evaluate the impact of any transfers.
- Neither the regulations nor the executive order considers or discusses any alternatives to a blanket

national \$15 minimum wage. In particular, alternative minimum wages—higher or lower—weren't considered.

- Neither the regulations nor the EO attempts to conduct a real analysis of whether a blanket \$15 minimum wage would accomplish its stated goals of increasing the economy and efficiency of government contractors.

The Texas [complaint](#) makes similar allegations.

The plaintiffs want the regulations and the executive order thrown out. However, they don't want the entire framework for paying federal contractor employees to be tossed. This framework was established in 2014, also by an executive order, and requires nonexempts to be paid a minimum wage higher than \$7.25 an hour.

The DOL has yet to file an answer. As part of its answer, the DOL will likely cite the administrative steps it took before it published the final regulations to show it didn't act arbitrarily and capriciously—the regulations were proposed, comments were collected, and then considered in formulating the final regulations.

We aren't making predictions about the outcome of these lawsuits. We're still smarting from having read article after article predicting OSHA's shot mandate was a shoe-in.