



GUAM DEPARTMENT OF LABOR Wage & Hour Division

GUIDANCE ON BIDEN EXECUTIVE ORDER 14026 Relative to \$15.00 per hour minimum wage for federal contractors In relation to 5 GCA §5801- Government Service Contracts

1. Purpose: To establish an interim policy for guidance on the applicability of President Biden's Executive Order mandating a \$15.00 minimum wage for federal projects.

Reference to this executive order has been included on the US Department of Labor Service Contract Act Wage Determination for Guam Northern Marianas Wake Island. The most current wage determination is number 2015-5693, Revision 17, last revision 7/27/22.

The Guam Department of Labor has fielded inquiries as to the \$15.00 minimum wage applicability and has determined that the \$15 minimum wage is not applicable to Government of Guam contracts as mandated in 5 GCA §5801.

2. Explanation of EO – Applicability

President Biden Executive Order 14026

Sec. 8. Applicability. (a) This order shall apply to any new contract; new contract-like instrument; new solicitation; extension or renewal of an existing contract or contract-like instrument; and exercise of an option on an existing contract or contract-like instrument, if (i):

(A) it is a procurement contract or contract-like instrument for services or construction;

(B) it is a contract or contract-like instrument for services covered by the Service Contract Act;

(C) it is a contract or contract-like instrument for concessions, including any concessions contract excluded by Department of Labor regulations at 29 C.F.R. 4.133(b); or

(D) it is a contract or contract-like instrument entered into with the Federal Government in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public; and

(ii) the wages of workers under such contract or contract-like instrument are governed by the Fair Labor Standards Act, the Service Contract Act, or the Davis-Bacon Act.

(b) For contracts or contract-like instruments covered by the Service Contract Act or the Davis-Bacon Act, this order shall apply only to contracts or contract-like instruments at the thresholds specified in those statutes. Where workers' wages are governed by the Fair Labor Standards Act of 1938, this order shall apply only to procurement contracts or contract-like instruments that exceed the micro-purchase threshold, as defined in 41 U.S.C. 1902(a), unless expressly made subject to this order pursuant to regulations or actions taken under section 4 of this order.

(c) This order shall not apply to grants; contracts, contract-like instruments, or agreements with Indian Tribes under the Indian Self-Determination and Education Assistance Act (Public Law 93-638), as amended; or any contracts or contract-like instruments expressly excluded by the regulations issued pursuant to section 4(a) of this order.

Based on provisions in the Executive Order, the wage was not intended to apply to:

- Contracts NOT covered under the federal Service Contract Act
- Contracts NOT entered into with the federal government related to offering services for Federal employees, their dependents, or the general public
- For micro-purchase threshold contracts under the SCA, DBA or FLSA unless expressly specified
- Not applicable to federal grants or any contracts excluded in USDOL regulations

3. We now explore the USDOL Final Rule for clarity:

USDOL Final Rule

Federal Register /Vol. 86, No. 224 /Wednesday, November 24, 2021 /Rules and Regulations

Section 23.20 Definitions

Worker means any person engaged in performing work on or in connection with a contract covered by the Executive Order, and whose wages under such contract are governed by the Fair Labor Standards Act, the Service Contract Act, or the Davis-Bacon Act, other than individuals employed in a bona fide executive, administrative, or professional capacity, as those terms are defined in 29 CFR part 541, regardless of the contractual relationship alleged to exist between the individual and the employer.

Contractor means any individual or other legal entity that is awarded a Federal Government contract or subcontract under a Federal Government contract. The term *contractor* refers to both a prime contractor and all of its subcontractors of any tier on a contract with the Federal Government. The term *contractor* includes lessors and lessees, as well as employers of workers performing on or in connection with covered Federal contracts whose wages are calculated pursuant to special certificates issued under 29 U.S.C.

In the Final Rule, both the definition of Worker and Contractor specify that work must be done in connection with a FEDERAL contract.

We now look at Exclusions in the federal rules (with emphasis added):

Federal Register /Vol. 86, No. 224 /Wednesday, November 24, 2021 /Rules and Regulations

§ 23.40 Exclusions.

(a) Grants. The requirements of this part do not apply to grants within the meaning of the Federal Grant and Cooperative Agreement Act, as amended, 31 U.S.C. 6301 et seq.

(b) Contracts or agreements with Indian Tribes. This part does not apply to contracts or agreements with Indian Tribes under the Indian Self-Determination and Education Assistance Act, as amended, 25 U.S.C. 5301 et seq.

(c) Procurement contracts for construction that are excluded from coverage of the Davis-Bacon Act. Procurement contracts for construction that are not covered by the Davis-Bacon Act are not subject to this part.

(d) Contracts for services that are exempted from coverage under the Service Contract Act. Service contracts, except for those expressly covered by § 23.30(a)(1)(iii) or (iv), that are exempt from coverage of the Service Contract Act pursuant to its statutory language at 41 U.S.C. 6702(b) or its implementing regulations, including those at 29 CFR 4.115 through 4.122 and 29 CFR 4.123(d) and (e), are not subject to this part.

Exclusions language in the Final Rule specifically state that the wage does not apply to:

- Grants – Many Government of Guam agencies are funded under grants from the federal government and contain language which direct the grantee to follow federal regulation, however, the exclusion at § 23.40(a) leads us believe that coverage does not extend to these activities.
- Contracts not covered under the Davis Bacon Act- Government of Guam projects are not subject to Davis-Bacon provisions.
- Contracts not covered under the Service Contract Act- Government of Guam contracts are not subject to federal SCA provisions.

It is the Department's position that the mere inclusion of language to the Wage Determination does not make the \$15 minimum wage applicable, in light of the EO coverage provisions and exclusions.

We further find that the inclusion of a minimum wage instituted by executive order is not a part of the prevailing wage in the SCA wage determination and was never envisioned by the Guam Legislature while passing Guam P.L. 26-111. In fact, on page 67129 of the Final Rule, it states:

"As the Department explained in the NPRM, and consistent with the relevant discussion in the rulemaking implementing Executive Order 13658, the minimum wage requirements of Executive Order 14026 are separate and distinct legal obligations from the prevailing wage requirements of the DBA and SCA."

The discussion in the final rule confirms that the EO minimum wage is in fact not a prevailing wage identified in the wage determination.

"REGISTER OF WAGE DETERMINATIONS UNDER THE SERVICE CONTRACT ACT By direction of the Secretary of Labor		U.S. DEPARTMENT OF LABOR EMPLOYMENT STANDARDS ADMINISTRATION WAGE AND HOUR DIVISION WASHINGTON D.C. 20210	
Daniel W. Simms Director	Division of Wage Determinations	Wage Determination No.: 2015-5693 Revision No.: 17 Date Of Last Revision: 07/27/2022	
Note: Contracts subject to the Service Contract Act are generally required to pay at least the applicable minimum wage rate required under Executive Order 14026.			
If the contract is entered into on or after January 30 2022 or the contract is renewed or extended (e.g. an option is exercised) on or after January 30 2022:		With certain exceptions Executive Order 14026 applies to the contract. The contractor must pay all covered workers at least \$15.00 per hour (or the applicable wage rate listed on this wage determination if it is higher) for all hours spent performing on the contract in 2022.	


4. Federal SCA Applicability- Additionally, we have previously sought legal guidance from the Office of the Guam Attorney General on the applicability of federal SCA provisions. Although P.L. 26-111 required wage and benefit levels specified in the federal SCA wage determination, the statute did not adopt SCA regulations in association with Government of Guam contracts.

2.

We next address the issue of whether the Department may utilize 29 CFR Part 4 ("Part 4") to enforce the wage and benefit determinations mandated by 5 GCA Chapter 5 Article 13. We understand that Part 4 was not adopted by the Department through any formal process including the AAL, but it may have been used by the former Wage and Hour Administrator in Article 13 complaints and cases.

Part 4 contains the USDOL's rules and regulations for the enforcement of the Service Contract Act of 1965. Article 13 adopted the USDOL's Wage Determination for Guam and the Northern Mariana Islands, which are promulgated pursuant to the Service Contract Act. However, Article 13 did not expressly adopt any other part of the Service Contract Act. It is likely therefore, that parts of Part 4 are not applicable to Article 13. Using only discretion to pick and choose what parts of Part 4 are applicable to the enforcement of Article 13 defeats the purpose of rule-making and places the Department in the position of potentially exceeding its statutory authority.

Therefore, the Department cannot rely exclusively on Part 4. Instead, the Department should consider using Part 4 for guidance on drafting rules for promulgation through the AAL process.


ANDREW S. QUENGA
Assistant Attorney General


The above opinion was solicited in determining if SCA regulations could be used to enforce requirements in 5 GCA §5801 and not necessarily the applicability of the \$15 minimum wage, but the opinion does reinforce the fact that P.L. 26-111 merely adopted the wage and benefit levels in the wage determination and nothing more with relation to the federal SCA.

5. Decision of the Wage Commissioner:

The Commissioner finds that the \$15 minimum wage is not a prevailing wage or health and welfare benefit delineated in the wage determination in spite of the inclusion of the minimum wage language on the Wage Determination document.

Based on the analysis above and in the absence of administrative rules which address the issue, the Wage Commissioner has determined that the \$15.00 per hour minimum wage, indicated in the Guam Northern Marianas Wake Island SCA Wage Determination, **is not applicable to Government of Guam Service Contracts and is not enforceable under 5 GCA § 5801** and contractors will not be compelled by the Department of Labor to comply with this minimum wage.

Date: 10-24-22


DAVID DELL'ISOLA
Wage Commissioner and
Director of Labor