Published on *The National Law Review* https://natlawreview.com

Navigating Executive Orders: Insights and What Lies Ahead

Article By:

Corben J. Green

Robert E. Wanerman

On January 20, 2025, a new administration took control of the Executive Branch of the federal government, and it has signaled that it will make aggressive use of executive orders.

This would be a good time to review the scope of executive orders and how they may affect employers and health care organizations.

Executive orders are not mentioned in the Constitution, but they have been around since the time of George Washington. Executive orders are signed, written, and published orders from the President of the United States that manage and direct the Executive Branch and are binding on Executive Branch agencies. Executive orders can be used to implement or clarify existing federal law or policies and can direct and manage the way federal agencies interact with private entities. However, executive orders are not a substitute for either statutes or regulations.

The current procedure for implementing executive orders was set out in a 1962 executive order that requires that all such orders must be published in the Federal Register, the same publication where executive agencies publish proposed and final rules. Once published, any executive order can be revoked or modified simply by issuing a new executive order. In addition, Congress can ratify an existing executive order in cases where the authority may be ambiguous.

Although the President has extensive powers under Article II of the Constitution, that does not necessarily mean that executive orders can be issued and enforced on a whim. Over time, federal courts have reviewed executive orders and typically base their decisions on three questions: (1) has Congress delegated any authority to the President to act through an executive order?; (2) if so, what is the scope of any delegation?; and (3) did the President act within the scope of that delegation?

In a seminal case, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), the Supreme Court reviewed an executive order signed by President Truman directing the Secretary of Commerce to take possession of and operate most of the nation’s steel mills to prevent a strike from disrupting steel production during the Korean War. On appeal, the Court ruled that the executive order was not authorized under the Constitution or any statute, and that the President lacked any legislative power. It also rejected the argument that the President had an implied authority to issue the executive order under the military powers delegated to the President, as that did not extend to labor disputes.

More recently, during the COVID-19 pandemic, an executive order used the authority delegated in the Defense Production Act to address potential national defense and food supply disruptions. Nevertheless, deference to an executive order should not be presumed. Even at the height of the pandemic, the Sixth Circuit ruled that the President lacked the authority to issue an executive order mandating that federal contractors be vaccinated against the COVID virus. In *Kentucky v. Biden*, 23 F.4th 585 (6th Cir. 2022), the Sixth Circuit ruled that the President's reliance on the Federal Property and Administrative Services Act of 1949 ("FPASA") was misplaced and did not authorize issuing an executive order binding on federal contractors; it determined that the act's goal of improving economy and efficiency in federal procurement of property and services applied to the government itself and did not extend to issuing directives that may "improve the efficiency of contractors and subcontractors."

The question of a delegation of authority to a President is not necessarily solved with an executive order directing an agency to issue regulations. For example, President Biden signed an executive order directing the Secretary of Labor to publish regulations setting a minimum wage of $15 per hour for federal contractors, based on his reading of FPASA. The regulations were challenged, and two Courts of Appeal reached opposite conclusions. In *Bradford v. U.S. Dep't of Labor*, 101 F.4th 707 (10th Cir. 2024) the Tenth Circuit ruled that Congress had delegated broad authority under FPASA to the President in the language setting out the act's purpose, and that he was justified in determining that a $15 minimum wage was consistent with the act's goals. Nevertheless, in *State of Nebraska v. Su*, 121 F.4th 1 (9th Cir. 2024), the Ninth Circuit determined that the minimum wage mandate *did* exceed the authority granted to the President and the Department of Labor. That decision relied on a narrow reading of FPASA, and concluded that the intent of the statute was limited to ensuring that the federal government received value in contracts with private entities, and that setting a minimum wage for the employees of those contractors fell outside the reach of FPASA. Although there was a clear split among the circuits, the Supreme Court declined to resolve the matter. For now, disputes involving executive orders may have to be resolved on a case-by-case basis.

In the future, employers and health care organizations that supply goods or services to federal agencies or federally-funded programs should be concerned that if there are executive orders that affect their business, those orders should be examined carefully to evaluate not only the content of those orders, but whether they are authorized by law. EBG intends to monitor these developments along with any relevant rulemaking by federal agencies.

National Law Review, Volume XV, Number 24