

#### The Service Contract Act: What Government Contractors Need to Know

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#### / Today's Speakers



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## Agenda

- Overview of the Service Contract Act (Service Contract Labor Standards)
- Labor Mapping and Conformances
- DOL Audit Risk and Exposure
- Common SCA Pitfalls/Issues
- Competitive Landscape
- Other Related Rules





#### **Overview of the Service Contract Act**

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#### **Overview of the Act**

- McNamara-O'Hara Service Contract Act created in 1965
- SCA applies to contracts "the principal purpose of which is to provide services in the US through the use of service employees" (41 U.S.C. 6702(a))
  - "Principal purpose" is a simple majority of contract requirements
    - (>50% of FTEs and/or value)
- Provides protection of prevailing wages and benefits for workers
  - On federal service contracts > \$2,500
  - For contracts that incorporate the SCA clause and Wage Determination
  - Similar to protections under Davis-Bacon Act (construction) and Walsh-Healey (manufacturing)



#### **Overview of the Act: Exempt Contracts**

- SCA does not apply to all service contracts:
  - Contracts for professional services performed almost exclusively by employees who meet the exemption under 29 CFR Part 541
  - Commercial contracts specifically exempted by FAR 22.1003. Very limited exemption does not apply to contracts for commercial items
  - Employment contracts providing direct service to a federal agency
  - Contracts for leasing of space
  - Public Utility Services
  - Federally assisted contracts for services entered into by state governments (Medicaid, Medicare programs)
  - Work covered by Walsh-Healy Public Contracts Act (Supply or manufacturing)



#### **Overview of the Act: Employee Coverage**

- SCA coverage applies to "service employees" historically non-exempt, "blue collar" workers
  - All contract employees may not be covered
- Recent DOL actions highlight a shift to include more professional services under SCA
- Determination of coverage is primarily based on job function, secondarily salary tests
- SCA does not apply to contracts where non-exempt employees are a minor factor in contract performance (29 CFR 4.113(a)(3))

– DOL applies a 10 – 20% range



# **Overview of the Act: Exempted Employees**

- Service Contract Act <u>does not</u> apply to the following classes of employees as defined by 29 CFR Part 541:
  - Executives/Supervisors: Salaried (minimum \$455/wk), supervise two or more workers, exercise authority, and spend most of their time doing so
  - Administrative/Managers: Salaried, make decisions of importance and significance using independent judgment and discretion, and spend most of their time doing so
  - Professionals: Salaried or fee-based; perform work primarily requiring advanced knowledge, predominantly intellectual, customarily acquired by a prolonged course of specialized intellectual instruction (e.g., college-level); and exercise independent judgment and discretion



## **Overview of the Act: Exempted Employees**

- Service Contract Act also does not apply to the following classes of employees:
  - **Teachers:** Primary duty of teaching, instruction, no salary requirement, work for an educational institution
  - Computer employees: Perform higher-level duties (e.g., design, development work with greater responsibilities), paid NLT \$27.63/hr or \$455/wk
  - Creative professionals: Salaried (\$455/wk) primary duty is the performance of work requiring imagination, invention or originality in a recognized field of artistic or creative endeavor
  - Outside salesperson: Primary duty is making sales or obtaining orders or contracts for services or for the use of facilities which a consideration will be paid by the client or customer; customarily engaged away from employer's place of business



## **Overview of the Act: Compliance Requirements**

- WDs stipulate the minimum requirements for:
  - Wages
  - Benefits
    - $\circ$  Health and Welfare (H&W)
    - o Vacation
    - o Holiday
- SCA also requires contractors to post DOL notice WH 1313 and applicable wage determinations in a prominent area at the work site





# **Overview of the Act: Wages**

- Wages may be paid by hourly rates, salary, piecework, bonuses or some combination
- Contractors must be able to document all hours work and demonstrate that the SCA rate (or more) was paid for each covered hour



#### **Overview of the Act: Health and Welfare**

- Current WDs establish minimum benefits of \$4.27/hour for all covered labor (exception in Hawaii)
- Employers may comply with the required benefits by providing
  - Cash payment at the H&W rate
  - Bona fide benefits
  - Or a combination of the two
- Bona fide benefits must "constitute a legally enforceable obligation" which meet the following criteria:
  - Specified in writing and communicated to the employee
  - Provide for the payment of benefits to employees on account of death, disability, retirement, medical expenses, unemployment benefits, etc.
  - Contain a definite formula for determining the amount contributed by the contractor and the benefits received by participating employees
  - Contributions must be paid irrevocably to a trustee or third party
  - Not otherwise required by law



#### **Overview of the Act: Health and Welfare**

- Examples of typical H&W benefit plans are:
  - Life, disability, health, dental, or vision-care insurance
  - Sick leave
  - Employer contributions to 401(k) or other retirement savings plans
  - Vacation or holiday benefits (in excess of WD requirements)
  - Jury duty, bereavement leave
- Examples of benefit plans that are <u>not</u> considered bona fide:
  - Unfunded, self-insured fringe benefit plans under which contractors make "out of pocket" payments as expenses arise, rather than making irrevocable contributions – unless DOL approval is obtained
  - Benefits required by law
  - Payments for conveniences considered to be "business expenses" of the contractor (e.g., relocation expenses)



# **Overview of the Act: Holiday**

- Wage Determinations specify the number of holidays owed
  - WD lists specific holidays to be received (e.g., New Year's, July 4th, etc.)
  - Employer may comply by providing a different designated holiday than listed on the WD, if communicated to employees in writing
- Employee is entitled to holiday pay if they work in the week a holiday occurs
  - Part-time employee is eligible for holiday pay commensurate with their regularly scheduled hours in the week the holiday occurs
- Employee is not entitled to holiday pay if holiday is not named in WD (e.g., government closes by presidential proclamation)
- Cannot enforce a "use or lose" policy



# **Overview of the Act: Vacation**

- WDs stipulate "x Wks after x Years of Service"
  - Employee is vested on his/her anniversary date
  - Years of Service is calculated from employee's service date
  - No use or lose. Vested balances must be discharged at next anniversary date, completion of the contract or when employee terminates employment
  - May require annual reconciliation if vacation is accrued
- Years of Service is determined by total length of time an employee
  - Works <u>continuously</u> for present employer
  - Works <u>continuously</u> for predecessor contractors performing similar services at the same facility



#### **Overview of the Act: Contract Price Adjustments**

- WD current on anniversary date of multiple year contract or beginning of option shall apply to contract
- When the contract is modified to incorporate new SCA rates, the contractor is entitled to a change in contract price
  - New SCA WD rates should be incorporated at each option extension, substantial change in scope or no less than every two years
- No price adjustment under cost-reimbursable subcontracts
- Under fixed-price contracts, a contract price adjustment can be changed only under the changes clause or the SCA/FLSA Price adjustment clause (FAR 52.222-43)
  - Price will be adjusted to reflect the actual increase or decrease in wages or benefits ...to the extent an increase is made to comply...or decrease is voluntarily made...as a result of a new WD
  - Dilutive adjustment no application of G&A, overhead or profit
    - Notify Contracting Officer within 30 days after receipt of new WD



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#### **Errors Discovered by DOL**

- If DOL discovers that the SCA did not apply to the acquisition or failed to include appropriate WD, contractor has right to "equitable adjustment" (FAR 22.1015)

   Equitable adjustment is different than dilutive adjustment
- CO shall include FAR 52.222-41 and appropriate WD in contract
- DOL may require retroactive application



# Labor Mapping

- SCA requires a wage rate for every labor classification employed on a contract
  - Can NOT "split" labor classification duties, create trainees, helpers or intermediate classification levels
- Covered employees must be mapped to a SCA position listed on incorporated WDs/Directory of Occupations
  - Examples include: General Clerk, Word Processor, and Computer Programmer
- Mapping is not always black and white
  - Internal labor categories will not match the job descriptions in the directory
  - Key is function actually performed, not just SCA classification listed in contract or scope of work described in contract
- Employees performing any part of the duties of a classification listed in the Directory of Occupations must be classified in that role
- Companies may request a conformance if no appropriate mapping exists



# **DoL Audit Risk and Exposure**

- SCA enforcement is on the rise:
  - Change in administration has had NO impact on the aggressiveness of local auditors
  - Slow rate of hiring in leadership positions may be
- Increase in targeted vs. complaint driven investigations
- Sanctions for non-compliance can be harsh:
  - Monetary impact: Back pay, interest, etc.
  - Non-monetary impact: Contract termination, company and/or individual debarment, etc.
  - Statutory 3-year debarment absent proof by contractor of "unusual circumstances."
  - Recent examples of SCA debarment of companies and individuals.
  - Recent Davis Bacon Act criminal case for false certifications of payrolls.
- Voluntary back pay vs. settlement with DOL vs. DOL enforcement proceedings



#### **Common SCA Pitfalls/Issues**

- Part time or temporary employees are mistakenly ignored during the assessment of SCA coverage
- Pay stubs commingle wage and benefit amounts
- Benefits are included that are not "bona-fide"
- Lack of communication between departments
- Subcontractors fail to comply with SCA
- Contracts contain the SCA clause, but no incorporated WDs
  - DOL can retroactively apply SCA coverage and require contractor to pay back wages and benefits
  - Back pay reported via the Summary of Unpaid Wages (WH-56)
  - Contractor can subsequently file for an equitable adjustment
- Failure to segregate SCA hours from commercial time
- Employees perform multiple functions
- Waiting for contract adjustment before paying SCA wages
- Classify employees based on contract description vs. actual work performed
- SCA clause in master IDIQ contract but not task order



# **Common SCA Pitfalls/Issues**

- Even where the back pay was not the fault of the contractor, (i.e., Contracting Officer fails to incorporate WD), DOL will issue a WH-56
- This is part of a settlement so costs are allowable
- Contractor agrees to provide back pay

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		12200000 to 1022/2005		\$2,843.70
		05/18/2005 45 07/30/2005		\$314.56
		01/17/2034 to 07/00/2005		\$4,332.69
		11/20/2003 fo 04/26/2005		\$3,859.00
	-	04/10/2304 60 09/11/2004		\$491.72
		025292005 to 040822005		\$205.13
		64102004 to 66042005		\$795,05
		02/14/2004 fo d5/21/2005		\$487.63
		05/21/2005 fo 69/24/2005		\$1,913.33
1		09/18/2004 fp. 67/53/2004		\$150.54
	R.	11/22/2063 to 03/11/2004		\$970.74
their second		05/21/2008 to 07/30/2005		\$371.50
		12/20/2023 to 01/31/2004		\$315.00
	-	08/27/2005 to 09/10/2005		\$117.93
		03/26/2005 to 66/04/2005		\$287.62
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# **Competitive Landscape**

- The manner in which fringe is paid can have a significant impact on price
  - Many contractors choose to pay "cash in lieu"
    - Easiest method to comply with H&W requirements
    - o BUT H&W payments paid in this manner are subject to statutory fringes
    - This small amount (7.45%) of H&W dollars can be the difference between winning or losing the contract
    - $\circ$  Not compatible with ACA requirements; you could end up paying twice
- Changing from cash in lieu to providing benefits can result in an employee relations issue



# **Competitive Landscape**

- What is a smart contractor to do?
  - Take advantage of the Q&A process. Level the playing field (i.e., make sure everyone is bidding appropriately)
    - o If it looks like an SCA contract but nothing is there, ask
    - o If no WD is incorporated, specifically ask for it
    - $\,\circ\,$  Ask for an employee census
    - o Ask for detailed description of work
  - Educate your customer
    - Help them to understand the labor categories you utilize and WHY!
  - Examine your labor categorizations carefully
    - Can the work be done using a lower labor category, even at the risk of losing experienced employees
  - Carefully consider how you pay H&W
    - Cash in lieu = Additional Employer Cost (especially in light of Affordable Care Act)
    - $\,\circ\,$  Failure to provide coverage could result in fines and penalties



# **Other Related Rules: Minimum Wage**

- Effective January 1, 2015 Executive Order 13658 requires contractors and subcontractors to pay employees a minimum of \$10.20 per hour for work performed on federal contracts
  - The hourly rate will be revised annually
- Applies to new Federal construction and service contracts that started after 1/1/2015
- Applies to employees entitled to FLSA minimum wage, prevailing wages under the SCA, and prevailing wages under the DBA
- A challenge for contractors is that the rule also extends minimum wage coverage to "employees performing work 'on' or 'in connection' with covered contracts
  - "In connection with" is defined as any employee spending 20% or more of his or her hours in a given work week performing on covered contracts
  - Example: FLSA-covered security guard monitoring a covered project



# Other Related Rules: Non-Displacement of Qualified Workers

- Non-displacement of qualified workers requires contractors to offer predecessor contractor's employees right of first refusal of employment
  - Final rule effective Jan. 18, 2013
  - Bona Fide, good faith offer of employment to qualified SCA employees
  - Restricts additional screening
  - Job offer may be for a different position
  - Offers not required in very limited situations



# Other Related Rules: Pending Regulations and Changes

#### Fair Pay and Safe Workplaces

• Revoked by congress!

#### Changes to method for development of SCA WDs

- Dec 8, 2015 All Agency Memorandum
- Impact on existing wage rates?

#### Paid sick leave EO

- Effective January 2017 for new contracts with the clause
- Impact of contractor heath and welfare fringe benefit practices
- Sick leave must be provided in addition to Vacation and Holiday



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#### **Questions?**

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Next Month's Government Contracts Webinar:

**Bid Protests** 

Wednesday, August 16, 2017 12:00 pm – 1:30 pm ET

