



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

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James Y. Boland, Esq. Partner, Government Contracts Practice, Venable LLP

> **Jennifer Flickinger** Principal, Baker Tilly Virchow Krause, LLP

# Today's Speakers



James Y. Boland, Esq. Partner **Government Contracts Practice** Venable LLP



Jennifer Flickinger Principal **Baker Tilly** 



# **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**



#### **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
    - o Health and Welfare (H&W)
    - Vacation
    - Holiday
- SCA also requires contractors to post DOL notice WH 1313 and applicable wage determinations in a prominent area at the work site



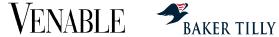


### **Overview of the Act: Wages**

- 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**

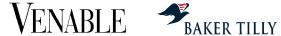
- WDs stipulate "x Wks after x Years of Service"
  - Employee is vested on his/her anniversary date
  - Years of Service is calculated from employee's service date
  - No use or lose. Vested balances must be discharged at next anniversary date, completion of the contract or when employee terminates employment
  - 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 continuously for predecessor contractors performing similar services at the same facility





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

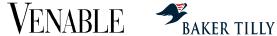
- WD current on anniversary date of multiple year contract or beginning of option shall apply to contract
- When the contract is modified to incorporate new SCA rates, the contractor is entitled to a change in contract price
  - New SCA WD rates should be incorporated at each option extension, substantial 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
    - o Notify Contracting Officer within 30 days after receipt of new WD





### **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**

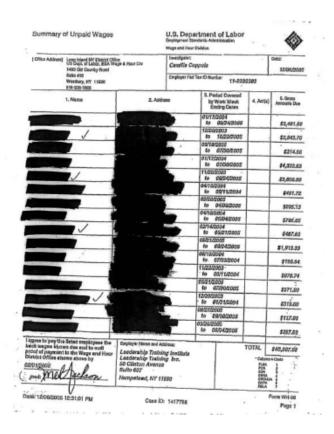
- Part time or temporary employees are mistakenly ignored during the assessment of SCA coverage
- Pay stubs commingle wage and benefit amounts
- Benefits are included that are not "bona-fide"
- Lack of communication between departments
- Subcontractors fail to comply with SCA
- Contracts contain the 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







### **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
    - o This small amount (7.45%) of H&W dollars can be the difference between winning or losing the contract
    - o 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**

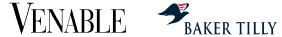
- What is a smart contractor to do?
  - Take advantage of the Q&A process. Level the playing field (i.e., make sure everyone is bidding appropriately)
    - o If it looks like an SCA contract but nothing is there, ask
    - o If no WD is incorporated, specifically ask for it
    - Ask for an employee census
    - 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
    - o 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)
    - o 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







#### **Questions?**

James Y. Boland, Esq.

Partner, Government Contracts Practice, Venable LLP jyboland@Venable.com 703.760.1997

#### **Jennifer Flickinger**

Principal, Baker Tilly Virchow Krause, LLP Jennifer.Flickinger@bakertilly.com 703.923.8211

#### **Next Month's Government Contracts Webinar:**

#### **Bid Protests**

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



