

Top Ten Service Contract Act Mistakes and How to Avoid Them to Stay in Compliance and Protect Your Bottom Line

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Preventive Strategies and
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Date: November 10, 2011

Time: 12:00-1:30PM Eastern



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Important Legal Notice

This presentation is to provide general information and updates regarding Service Contract Act and related prevailing wage requirements for federal contractors and recipients of ARRA funds.

These materials are not intended to provide legal advice on specific compliance issues. Attendees should consult either with in-house counsel or, as directed, with an outside counsel for legal advice about whether, based on specific facts and circumstances, the company complies with the applicable prevailing wage requirements.



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SCA Basics

- FAR Clause 52.222-41.
- The McNamara-O'Hara Service Contract Act of 1965, as amended, covers most federal *service* contracts in excess of \$2,500 (41 USC § 351 et seq. and 29 CFR Part 4).
- Provides minimum labor standards protection to service employees.
- Wage Determinations issued that set wage rates and benefits for classes of employees used in service contracts.
- Purpose is to remove wages as a bid factor in competition for federal service contracts.



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What is Covered?

- Contracts entered into by federal and District of Columbia agencies in which the *principal purpose* of the contract is to furnish services in the U.S. through the use of "service employees."
 - Includes contracts with federal agencies and instrumentalities (DOD, DHS, Coast Guard, USPS).
- Above \$2,500 threshold – for IDIQ and task order contracts must aggregate \$ amounts of purchase orders and task orders under umbrella contracting vehicle on annual basis.
- SCA provisions apply to subcontractors under SCA-covered prime contracts.



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Basic Requirements

- Wages and fringe benefits minimum rates are separately specified and must be paid/provided separately to workers (unlike DBA).
 - Determined by the DOL in WDs.
 - Includes holidays, vacation, and *bona fide* health and welfare fringe benefits or cash equivalent.
- Posting requirements—notice and WD rates and benefits.
- Recordkeeping requirements.
- Health and safety requirements (not much enforcement activity).



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Penalties

- Back wages and benefits.
- A “hold” on contract payments by agency.
- Contract cancellation and reprocurement costs.
- Personal liability for corporate officials and others who exercise control, supervision or management of contract performance.
- Debarment for three-year term from **all** government contracts unless showing of “unusual circumstances.”
- Debarment applies to contractor in its capacity as both a prime contractor and a subcontractor.



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Enforcement

- DOL is the enforcement agency, and relies on audits.
 - DOL audits may be triggered by complaints or DOL's selection.
- Often, an initial DOL complaint or audit focuses on alleged FLSA or Family and Medical Leave Act (“FMLA”) compliance.
- Once DOL is “in the door” DOL can then audit for SCA compliance.



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Enforcement (cont.)

- DOL can and will expand audit to multiple contractors and/or multiple locations where initial audit shows violations that may be systemic or are found to be willful.
- No private cause of action, although an employee or union may file a *qui tam* action under the Civil False Claims Act.



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Enforcement (cont.)

- DOL has stepped up enforcement of prevailing wage laws:
 - 150 new investigators in DOL field offices.
 - 100 investigators to ensure that contractors on ARRA projects are in compliance with the applicable laws.
 - Creation of 33 new Senior Investigation Advisor positions.
 - Uptick in audits in 2010-2011.
 - Targeted audits; not just complaint driven.
 - More aggressive debarment sanctions for repeat violators and egregious violations.



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#1 – Where’s My Wage Determination?

- Contracting agency is responsible for selecting appropriate WD(s) and incorporating WD(s) into contract.
- Contractor *should not* independently select the WD(s)—risk following the wrong WD and risk losing price adjustment.
- New WD(s), as applicable during course of contract, should be selected by contracting agency and incorporated into contract (more on that later).



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#2- What? A Collective Bargaining Agreement?

- Successor contractor rule under Section 4 (c) of the SCA requires that a successor contractor providing substantially the same services in the same location must pay the wage rates and fringe benefits of the predecessor contractor’s CBA for the base year of the contract.
- Successor obligation is self-executing (with limited exceptions).
- Critical to get incumbent contractor’s collective bargaining agreement from CO during bid and solicitation process.



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Collective Bargaining Agreement (cont.)

- Successor contractor is not required to recognize union or follow CBA provisions relating to:
 - Seniority.
 - Grievance procedures.
 - Work rules.
 - Overtime



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Collective Bargaining Agreement (cont.)

- If company has CBA at site where contract is to be performed, CBA information must be provided to CO in response to bid and/or at time of contract award.
- If new or modified CBA during course of contract, CO must be notified and provided the CBA or modification.



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#3- Hmmm- Who is an SCA Worker?

- Employees (both FT and PT), temps, independent contractors.
- Work necessary to contract but not in direct performance?
- Exempt/Non-exempt? Check both duties test and salary basis test.
- *Try* to get confirmation from CO regarding which employees are considered "service employees."
- Back pay and CWHSSA penalties for misclassification of SCA workers – good luck obtaining adjustment from agency.



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#4- Classification of Workers-Oops!

- Match SOW, actual job duties with SCA Directory of Occupations –don't rely on job descriptions alone.
- *Try* to get confirmation from CO regarding proper classification of employees
- If job is not on the WD, must conform it by filing SF 1444.
- Conformance may not be used to:
 - Subdivide an existing job class;
 - Combine two or more classes to create a new class;
 - Establish a job level lower than that for a particular job class grouping (e.g., for Accounting Clerks, there is no conformance allowed below level I); or
 - Create a helper or trainee class.



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Classification of Workers (cont.)

- Employers must propose rate based on “reasonable relationship” to rates in the WD.
- No single formula used.
- Often GS rates from OPM or WG, WS, WL rates from DoD can be used to help determine and support proposed rate.
- Must furnish job description, federal wage grade equivalent and proposed rate rationale.



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Classification of Workers (cont.)

- Employer prepares SF 1444 form and submits to CO no later than 30 days after affected employees begin work.
- CO reviews, makes recommendation and submits to DOL.
- Employer should pay affected employees at proposed rate until approval or disapproval from DOL.
- If DOL disapproves rate, employer must provide back pay.



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Classification of Workers (cont.)

- When a contract, whether an option or extension period or a new contract, succeeds a contract under which a class was previously conformed, there are two options to determine a new wage rate for the conformed class: indexing or requesting a new conformance based on the new WD.
- Indexing: contractor calculates the overall percent change between the previously issued rates on the applicable WD for those jobs on the contract and the rates for those jobs issued in the new WD for the new contract period.
 - Resulting percentage increase (if any) is then applied to the wage rate of the conformed class.
 - CO must be advised.

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Classification of Workers (cont.)

- Beware of "job creep" –periodically check actual job duties being performed and change classification if necessary (discuss with CO and modify contract to match change).
- In addition to back pay for improper classification, CHWSSA penalties for improper OT pay based on misclassification – good luck again getting adjustment from the agency.

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#5- I Have to Segregate What?

- Hours worked subject to SCA wages (and benefits) are hours worked on covered contract.
- Employer must keep segregate time and keep records of time spent on SCA-covered and non-SCA covered work each workweek *or else all work may need to be paid at SCA rate.*
- Employer must track and keep proof of SCA-covered work performed by employees who perform work in different classifications *or else all work may need to be paid at the highest SCA rate.*



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#6- Vacation and Holiday Benefits - Pitfalls

- Amount of vacation due employees is listed on the WD.
- “Continuous service” determines employee’s eligibility for vacation benefits and is determined by the length of time:
 - Worked for the contractor in any capacity (includes non-SCA work); and/or
 - Worked for the predecessor contractor in performance of same or similar contract at same facility.
- Prior to beginning contract work, ensure predecessor contractor has provided required data regarding length of service of any predecessor service employees hired by Company for purpose of determining vacation benefits.



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Vacation and Holiday Benefits (cont.)

- Vacation becomes vested upon employee's anniversary date.
- Where there is predecessor/successor contractor situation, contractor that employs employee as of anniversary date must pay the vested unpaid vacation benefit.
- Vacation becomes vested and due on anniversary date, but need not be used or paid out until the *earliest* of:
 - The employee's next anniversary date;
 - The date of contract completion; or
 - The employee terminates employment.



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Vacation and Holiday Benefits (cont.)

- Many employers' vacation policies may be in conflict with or fail to fully meet the SCA's vacation requirements.
 - The SCA doesn't provide for carryover of vacation even though many employers allow it.
 - Vacation is determined based on anniversary date of employee, not calendar year or employer's fiscal year.
 - Part-time employees are entitled to pro-rata vacation; temps and independent contractors must also receive vacation or cash equivalent.
- For employers that hire employees who worked for predecessor contractor performing similar contract work at a federal facility, the contractor with whom the employee works at the time her vacation vests must provide the full vacation benefit.



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Vacation and Holiday Benefits (cont.)

- Named holidays are listed on WD.
- Employee entitled to holiday pay if he/she performs *any work* during the holiday workweek.
- Employee is also entitled to holiday pay if he/she is on paid vacation or sick leave during holiday workweek.
- Holiday benefits must be provided regardless of the length of time the employee has worked for the employer at the time a holiday occurs and regardless of whether she works the day before or after the holiday (as some employers require).



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Vacation and Holiday Benefits (cont.)

- Okay to provide or trade named holidays for another day off if policy is communicated in writing to employees.
- Can pay holiday pay (in addition to regular pay) if employee must work on holiday and is not provided alternative holiday.
- Remember, part-time employees are entitled to pro-rata vacation; temps and independent contractors must also receive holidays or cash equivalent.



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#7- Health & Welfare Benefits- Traps for the Unwary

- Unless otherwise specified on the applicable WD, health and welfare payments are due for all hours worked/paid, including paid vacation, sick leave and holiday hours; up to a maximum of 40 hours per week and 2,080 hours per year on each contract.
- Employer may provide H&W rate through bona fide fringe benefits or in cash payments.



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H&W Benefits (cont.)

- Life Insurance.
- Health Insurance.
- Disability Insurance.
- Pension/401(k).
- Sick leave.
- Vacation, holidays, PTO provided in excess of WD requirements.



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H&W Benefits (cont.)

- Contractors may take credit (without prior approval from DOL) for *bona fide* fringe benefit fund contributions made to third-party trustees or insurers that:
 - Are *irrevocably* paid; and
 - Are made regularly, not less often than *quarterly*.
- Credit is for payments made for individual workers eligible to participate in the plan, program, or fund.
- If plan is self-funded (e.g. self-insured medical insurance) and meets requirements for approval, plan to seek approval letter from DOL.



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H&W Benefits (cont.)

- Cash payments in lieu of fringe benefits must be paid on the regular pay date.
- Fringe benefit cash payments must be separately listed on payroll or DOL will not give credit.
- Higher wage payments (above the SCA rate) may not be used to offset fringe benefit payments due to employees.
- Payments into *bona fide* fringe benefit plans must be made no less often than quarterly.



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H&W Benefits (cont.)

- If participation in the FB plan requires a contribution from the employee's wages, the employee's consent is necessary.
- The cost of providing fringe benefits may not be credited towards meeting the SCA wage or benefit requirements under the contract.
- Employer cannot count any benefits mandated by law toward the H&W benefit required (e.g., social security taxes, unemployment compensation, worker's compensation).
 - State mandated sick leave is an exception.



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#8- Multiyear Contract Concerns

- A new wage determination is applicable on the anniversary date of contract in multi-year contract (non-appropriated funds contracts require new WDs every two years rather than annually).
- Extension of contract (but not if contractor just granted extra time to fulfill original commitment) or exercise of option.
- Major modification or amendment of contract affecting labor requirements.
- New WDs should be provided by CO by incorporation into contract (typically via a modification).



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Multiyear Contract Concerns (cont.)

- What should you do when the anniversary date passes and the CO has not incorporated the new wage determination?
- Price adjustment requests – timely and accurate.
- PACT Tool at <http://www.wdol.gov/pact/index.aspx>



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#9 – Subcontractors – What Me Worry?

- Joint and several liability for prime contractors and subcontractors.
- Contractor responsible for SCA flow-down provisions including wage determination.
- Check debarred contractor list at <https://www.epls.gov/>
- Contractors should ensure subcontractors understand SCA requirements.
- Consider certification requirements and include specific indemnification provisions.



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#10- Who is in Charge Here?

- Often contractors take in SCA contracts but don't create and/or follow robust SCA compliance plans.
- Create SCA working group of all stakeholders.
- Create SCA compliance checklist and internal flow chart with responsible persons for each task.
- Train responsible persons.
- Include SCA compliance in performance metrics.
- Perform internal periodic reviews and promptly remediate problem areas.

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Bonus Round- Are Posting, Notice, and Recordkeeping Requirements a Big Deal?

- Yes. When DOL comes calling during an audit it will look to see if company has complied with posting and notice requirements.
- Investigators make initial assessments of employer as a "good" contractor or a "bad" contractor.
- Failure to keep adequate records is more than just a recordkeeping violation – if your records are not in good order and do not show clearly job classifications, hours worked, wages paid, benefits provided, etc., the audit process will be slower and more underlying records will be sought.

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Posting and Notice Requirements

- Employer performing work covered by the SCA is required to:
 - Provide each employee working on the contract notice of the SCA payment and fringe benefit requirements for the different classes of service employees, and
 - Post the “Employee Rights on Government Contracts” notice (including any applicable WD) at the site of the work in a prominent and accessible place where it may be easily seen by employees.
- If the contractor employs workers with disabilities under special minimum wage certificates, the “Notice to Workers with Disabilities/Special Minimum Wage” (PDF) poster must also be posted.



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Recordkeeping

- Some of the records required under the SCA are also required under the Fair Labor Standards Act (see Wage and Hour Division Fact Sheet #21: Recordkeeping).
- Contractors and subcontractors are required to maintain certain records for each employee performing work on the covered contract. Basic records, such as name, address, and Social Security number of each employee must be maintained for three years from completion of the work.



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Recordkeeping (cont.)

- In addition, records on the following must be maintained for three years:
 - The correct work classification(s), wage rate(s), and fringe benefits provided (or cash equivalent payments provided in lieu of fringe benefits);
 - The total daily and weekly compensation of each employee;
 - The number of daily and weekly hours worked by each employee;
 - Any deductions, rebates, or refunds from each employee's compensation;
 - Any list of a predecessor contractor's employees which had been furnished showing employee's length of service information;
 - A list of wages and fringe benefits for those classes of workers conformed to the WD attached to the contract; and
 - The contractor shall also make available a copy of the contract upon request from the Wage and Hour Division



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Questions?

- I am happy to take your questions at this time.



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