

SCA for Executives: Service Contract Act Compliance Principles



Presented by: Jennifer Flickinger and Megan Connor

Agenda



- > Overview of the Service Contract Act
- > Labor Mapping & Conformances
- > DOL Audit Risk & 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”
 - “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: Covered Contracts



- > Concessionaires
- > Landscaping
- > Surveying & mapping
- > Guard and security guard services
- > Demo & dismantling of government property
- > Scheduling and routine maintenance building services agreement
- > Contracts for intermittent labor services
- > Services and items provided under a single contract
- > Contracts with hotels for meal and lodging
- > Nursing home services
- > Information Technology Services

Overview of the Act: Exempt Contracts



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> 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



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- > 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



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- > Service Contract Act does not 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



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- > 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: When is compliance required



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- > Contracting Officers are required to determine if SCA applies
 - Contracting Officers must insert SCA clauses and WDs into the solicitation and contract
- > If SCA clause and WD are not in the contract, SCA does not technically apply
 - Christian doctrine is not applicable
- > DOL has sole and final authority to determine applicability

Overview of the Act: Compliance Requirements



- > WDs stipulate the minimum requirements for:
 - Wages
 - Benefits
 - Health & 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



WD 05-2103 (Rev.
15)

Overview of the Act: Types of Wage Determinations



> Area WDs (Standard)

- Generic, issued per locality, reflect locally prevailing wages
 - Locality is considered a county, a group of counties, or larger area
- May list over 300 labor classifications
- Can be odd or even numbered (discussed later)

> Non-Standard WDs

- Reflects wages for a specific industry
- Examples include: fast food, elevator maintenance, diving, moving household goods, urinalysis, etc.

> Collective Bargaining Agreements

- Stipulate unique wage and/or benefit requirements for employees working on that contract

Overview of the Act: Odd vs. Even WDs



- > **Odd-numbered Standard WDs (i.e., 2005-2019)**
 - Require payment of the H&W rate for all paid hours (SCA hours and paid leave) up to a maximum of 40 hours each week per contract
 - “Per-Person H&W Rate”
- > **Even-numbered Standard WDs (i.e., 2005-2020)**
 - Require a contractor to pay a minimum level of benefits for all hours worked on the contract, including overtime
 - “Averaging H&W Rate”
 - Even H&W WDs are grandfathered into existing contracts

Overview of the Act: Predecessor CBAs



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- > 1972 Amendment protects wages and benefits, including accrued or prospective increases, listed in a predecessor contractor's CBA
- > CBA's wages and monetary benefits become the minimum for successor contractors
 - Applies to predecessor contractor employees performing same services at the same facilities
 - Contracting agency must receive the CBA timely
 - Predecessor CBA rates must not have a substantial variance from local prevailing rates
 - Predecessor CBA must be the result of arm's length negotiations between the union and predecessor

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 & Welfare



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- > 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 & 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 not 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



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- > 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



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- > 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 continuously for present employer
 - Works continuously for predecessor contractors performing similar services at the same facility

Overview of the Act: Contract Price Adjustments



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- > When the contract is modified to incorporate new SCA rates, the contractor should be 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 52.22-43)
 - Price will be adjusted to reflect the actual increase or decrease in wages or benefites 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

Labor Mapping



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- > 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 performed
- > Employees performing any part of the duties of a classification listed in the Directory of Occupations must be classified in that role

Labor Mapping



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- > Contractor initiates the conformance process by preparing form SF1444
- > Contractor provides the completed form, with employee signature, to the CO for DOL approval
- > CO will submit request to DOL for approval or denial
- > When DOL responds, CO reports response to contractor
 - Contractor complies with decision and retroactively pays employee to start of performance (if new rate is higher)



SF1444

DoL Audit Risk and Exposure



- > SCA enforcement is on the rise.
- > Increase in targeted vs. complaint driven investigations
- > Sanctions for non-compliance can be harsh
 - Monetary impact: backpay, interest, etc.
 - Non-monetary impact: contract termination, company and/or individual debarment, etc.
 - Statutory 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 backpay vs. settlement with DOL vs. DOL enforcement proceedings

DoL Audit Risk and Exposure



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> Typical investigation causes:

- Failure to segregate SCA hours from commercial time – all hours presumed to be covered by the SCA. See 29 C.F.R. 4.179.
- Companies failing to provide H&W benefits to part time and irregular workers
- Misclassification disputes

> Increase in DOL scrutiny of contracts where the SCA clause was omitted by the contracting agency

- Some of these cases have involved misapplication of SCA commercial services exceptions
- In these situations, FAR 22.1015 language supports basis for contractor recovery of back wages, but process not always simple.
- Allegations by agency that contractor should have known the SCA applied.
- Funding of valid claim challenges especially for large backpay scenarios.

DoL Audit Risk and Exposure



- > DOL has focused on specific industries when conducting targeted investigations:
 - Security Services
 - Staffing Services
 - Janitorial Services
 - Data Processing & Hosting
 - Facilities Support Services
 - Nursing/Medical Care & Analysis
 - Consulting

Common SCA Pitfalls / Issues



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- > 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
- > SCA applicability is established at the IDIQ level, but only the TO is reviewed
- > Contractors selecting a WD on their own via www.WDOL.gov
- > Complying with a newly published WD before an incorporation
- > Employees are performing more than one job, but timekeeping data can't illustrate when, and to what extent, that is happening
 - DOL requires the contractor to pay the highest wage rate of all the functions the employee is performing

Common SCA Pitfalls / Issues



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- > 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

Common SCA Pitfalls / Issues



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- > 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
- > WH-56's are reportable under Fair Pay Act

Summary of Unpaid Wages

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division

Office Address: Long Island NY District Office
US Dept. of Labor, ESA Wage & Hour Div
1400 Old Country Road
Suite 410
Westbury, NY 11590
516-335-1520

Investigator: **Camilla Coppola**

Date: **12/06/2005**

Employer Fed Tax ID Number: **11-2239383**

| 1. Name | 2. Address | 3. Period Covered by Work Week Ending Dates | 4. Act(s) | 5. Gross Amounts Due |
|--------------|------------|---|-----------|----------------------|
| [REDACTED] | [REDACTED] | 01/17/2004 to 06/24/2005 | | \$3,481.68 |
| [REDACTED] ✓ | [REDACTED] | 12/29/2003 to 10/22/2005 | | \$2,043.70 |
| [REDACTED] | [REDACTED] | 08/18/2005 to 07/30/2005 | | \$314.56 |
| [REDACTED] | [REDACTED] | 01/17/2004 to 07/30/2005 | | \$4,332.63 |
| [REDACTED] ✓ | [REDACTED] | 11/22/2003 to 08/24/2005 | | \$3,600.00 |
| [REDACTED] | [REDACTED] | 04/10/2004 to 09/11/2004 | | \$491.72 |
| [REDACTED] | [REDACTED] | 02/23/2005 to 04/09/2005 | | \$205.13 |
| [REDACTED] | [REDACTED] | 04/10/2004 to 06/04/2005 | | \$706.05 |
| [REDACTED] ✓ | [REDACTED] | 02/14/2004 to 05/21/2005 | | \$487.69 |
| [REDACTED] | [REDACTED] | 05/21/2005 to 03/24/2005 | | \$1,913.33 |
| [REDACTED] | [REDACTED] | 06/18/2004 to 07/03/2004 | | \$186.54 |
| [REDACTED] | [REDACTED] | 11/22/2003 to 09/11/2004 | | \$970.74 |
| [REDACTED] | [REDACTED] | 05/21/2005 to 07/30/2005 | | \$371.90 |
| [REDACTED] ✓ | [REDACTED] | 12/20/2003 to 01/31/2004 | | \$319.00 |
| [REDACTED] | [REDACTED] | 08/27/2005 to 09/10/2005 | | \$117.93 |
| [REDACTED] | [REDACTED] | 03/26/2005 to 06/04/2005 | | \$287.60 |
| TOTAL | | | | \$46,507.68 |

I agree to pay the listed employees the back wages shown due and to mail proof of payment to the Wage and Hour District Office shown above by 02/01/2006
Signed: Mel Jackson

Employer Name and Address:
Leadership Training Institute
Leadership Training Inc.
50 Clinton Avenue
Suite 607
Hempstead, NY 11550

Column 4 Code
FLSA 1
PCA 2
ESA 3
DIRA 4
ENRISA 5
COPA 6
PLA 7

Date: 12/06/2005 12:31:01 PM Case ID: 1417788 Form WH-58 Page 1

Competitive Landscape



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- > Price is the determining factor for most contracting officers
 - Not unlike the competitive landscape in 1965
- > Theoretically, incorporation of the Service Contract Act should be an equalizing factor
 - All service employees should be paid the same wages and benefits
- > Contracting officers do not always incorporate the wage determination
 - Without a wage determination there is little to comply with from a technical standpoint
 - Can be problematic for contractors who perform similar work and incumbents

Competitive Landscape



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Labor mapping is subjective

For example, one employer's General Maintenance Worker is another employer's Plumber/Painter/Electrician

23370 GENERAL MAINTENANCE WORKER - *The General Maintenance Worker performs general maintenance and repair of equipment and buildings requiring practical skill and knowledge (but not proficiency) in such trades as painting, carpentry, plumbing, masonry, and electrical work. Work involves a variety of the following duties: replacing electrical receptacles, wires, switches, fixtures, and motors, using plaster or compound to patch minor holes and cracks in walls and ceilings, repairing or replacing sinks, water coolers, and toilets painting structures and equipment; repairing or replacing concrete floors, steps, and sidewalks, replacing damaged paneling and floortiles, hanging doors and installing door locks, replacing broken window panes, and performing general maintenance on equipment and machinery. **Excluded are:** a. Craft workers included in a formal apprenticeship or progression program based on training and experience; b. Skilled craft workers required to demonstrate proficiency in one or more trades; c. Workers performing simple maintenance duties not requiring practical skill and knowledge of a trade (e.g., changing light bulbs and replacing faucet washers).*

Competitive Landscape



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> Labor Mapping is Subjective

- Some companies are willing to more aggressively map labor categories to gain a competitive advantage
- Contracting Officers are not necessarily educated in the mapping process
 - » May not understand the impact of mapping during the evaluation process
- Often an issue for the incumbent who may have “upgraded” personnel (i.e., General Clerk I to General Clerk II) in order to retain experienced personnel
- All service employees should be paid the same wages and benefits
 - » Frequently occurs when WD labor rates have been static

Competitive Landscape



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- > 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
 - » 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
 - » 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



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> 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)
 - » If it looks like an SCA contract but nothing is there, ask
 - » If no WD is incorporated, specifically ask for it
 - » Ask for an employee census
- 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)
 - » Failure to provide coverage could result in fines and penalties

Other Related Rules: Minimum Wage



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- > Effective January 1, 2015 Executive Order 13658 requires contractors and subcontractors to pay employees a minimum of **\$10.15** 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



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- > January 30, 2015: Executive Order 13658 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: Non-Displacement of Qualified Workers



- > Fair Pay and Safe Workplaces
 - April 2016 Final Rule.
 - Myriad of unanswered questions.
 - Reporting of SCA violations.
- > Changes to method for development of SCA WDs.
 - Dec 8, 2015 All Agency Memorandum.
 - Impact on existing wage rates?
- > Paid sick leave EO
 - Regulations pending with anticipated effective date of January 2017.
 - Impact of contractor health and welfare fringe benefit practices.

Other Related Rules: Pending Regulations & Changes



> Fair Labor Standards Act

- Spring 2016 expected date for final rule
- Potential increase in threshold for overtime exemption to \$50,000
- Increased number of non-exempt employees could significantly increase the SCA covered employee population

Questions?

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