



Nuts & Bolts:

McNamara O'Hara Service Contract Act of 1965

Nichole Atallah of PilieroMazza PLLC and
Mary Holmes of BOOST LLC

July 14, 2020

About PilieroMazza

PilieroMazza – a business law firm – serves as a strategic partner to government contractors and commercial businesses from across the United States.

We deliver results for our clients by implementing legal and business solutions that take the client’s best interests into consideration. Moreover, PilieroMazza’s efficient operational structure and lean approach to staffing matters translates into competitive pricing for our clients, while providing the highest standard of client service and legal acumen.

PilieroMazza is privileged to represent clients in the following areas:

- Audits & Investigations
- Business & Corporate Law
- Cybersecurity & Data Privacy
- False Claims Act
- Government Contracts Law
- Mergers & Acquisitions
- Intellectual Property & Technology Rights
- Labor & Employment Law
- Litigation & Dispute Resolution
- Native American Law
- Small Business Programs & Advisory Services
- Private Equity & Venture Capital

Sign up for our newsletters and blog at
www.pilieromazza.com



Nichole Atallah



Nichole Atallah, Esq.
Partner, PilieroMazza PLLC
natallah@pilieromazza.com
888 17th Street, NW
11th Floor
Washington, DC 20006

Nichole Atallah counsels clients in a broad range of employment matters, including compliance with Title VII, ADA, ADEA, FLSA/wage and hour, FMLA, wrongful termination, and reduction in force. She advises clients in general business matters, including interpreting and drafting employee compensation and benefit arrangements, confidentiality, non-compete and non-solicitation agreements, as well as separation agreements.

Ms. Atallah has substantial experience assisting government contractors with FAR Part 22 compliance, including the Davis Bacon Act, the Service Contract Act, and Equal Employment Opportunity requirements specific to government contractors. Additionally, she has advised tribally-owned entities on unique labor and employment issues, including Native American preferences, sovereign immunity questions, and Title VII jurisdiction.

About BOOST

At BOOST, we exclusively serve GovCons – and we’ve seen it all: sequestration, fiscal cliff, elections and federal uncertainty.

We help clients navigate complicated compliance issues and win business. We perform the time-consuming, back-office functions of running a business so our clients can focus their time and energy on the things they do best.

Specifically, we help clients in the following areas:

- **Accounting:** We can fully manage your accounting functions or provide expert-level support when you need a hand.
- **Contracts:** We know how to write, review and negotiate government-compliant contracts.
- **Recruiting and Sourcing:** We provide recruiting support for technical, corporate and highly cleared positions.
- **Human Resources:** BOOST can lead the HR functions for your growing company. Or use BOOST to extend your current team. It’s like phoning a friend when you need expert advice.
- **Strategic Pricing:** BOOST helps you evaluate and pursue each opportunity so you’re positioned to win.

Mary Holmes



Mary Holmes
Senior HR Specialist, BOOST LLC
mholmes@boostllc.net
12110 Sunset Hills Road
Suite 600
Reston, VA 20190

Mary Holmes is a Senior HR Specialist with BOOST LLC where she provides strategic guidance and HR support to her clients. She is a highly accomplished and progress-driven professional with extensive track record of success directing multifaceted HR operations for small and large organizations in diverse industries across many states in the US and internationally. Mary's experience includes designing effective policies/procedures, aligning corporate objectives with individual goals, and enhancing personnel relations/morale. She is a trusted business partner, advisor, and contributor to senior leadership teams with exceptional assessment, mediation, and conflict resolution skills.

Overview

- SCA Compliance Outline
- Sick Leave (FAR 52.222-43)
- Common Challenges

Service Contract Act

- McNamara O'Hara Service Contract Act of 1965
- Requires general contractors and subcontractors providing services on prime contracts (United States and D.C.) in excess of \$2,500 to pay service employees in various wage classes no less than the wage rates and fringe benefits found prevailing in the locality as determined by DoL, or the rates contained in the predecessor's collective bargaining agreement
- FAR 52.222-41

Coverage

Contracts:

- Entered into by Federal Government and District of Columbia
- “Principally” for services
 - a. 20% rule
 - b. FTEs or Dollars
- Performed in the U.S.
- Performed through the use of service employees
- Exceptions

Service Employee

Who is a “Service Employee”?

- Any person engaged in the performance of the contract
- Exception for employees who qualify for exemption as bona fide executive, administrative or professional employees under the FLSA (29 C.F.R. Part 541)
- Regardless of contractual relationship (independent contractors)
- Examples: janitors, security guards, support services, nurses, cafeteria and food services

Agency Responsibility

- Determine SCA applicability (BUT DoL has final authority on coverage decisions)
- Incorporate correct contract clauses
FAR 52.222-41 and federal equivalents
- CORRECT Area Wide Wage Determination (“WD”)
 - a. At each option, extension, substantial change to scope of work and no less than every 2 years if not funded annually
 - b. DO NOT GET YOUR OWN WD!
- Christian Doctrine – not applicable

Contractor's Responsibility

- Read CAREFULLY
- Pick the correct labor classification from the WD in the contract (exception where place of performance unknown!)
- Notify the employee of wages and benefits
- If none, request conformance or guidance from DoL
- Pay at least the required hourly rate and benefits
 - a) Maintain a record of all hours worked
 - b) Maintain pay records

The Wage Determination

Sample Wage Determination
 WD 05-2214 (Rev.-15) was first posted on www.wdol.gov on 06/19/2012

 REGISTER OF WAGE DETERMINATIONS UNDER THE SERVICE CONTRACT ACT
 By direction of the Secretary of Labor

U.S. DEPARTMENT OF LABOR
 EMPLOYMENT STANDARDS ADMINISTRATION
 WAGE AND HOUR DIVISION
 WASHINGTON D.C. 20210

Diane C. Koplewski Director
 Division of Wage Determinations
 Wage Determination No.: 2005-2214
 Revision No.: 15
 Date Of Revision: 06/13/2012

State: Kansas

Area: Kansas Counties of Brown, Clay, Cloud, Coffey, Dickinson, Geary, Jackson, Jefferson, Lyon, Marshall, Morris, Nemaha, Osage, Ottawa, Pottawatomie, Republic, Riley, Saline, Shawnee, Wabaunsee, Washington

Fringe Benefits Required Follow the Occupational Listing

OCCUPATION CODE - TITLE	FOOTNOTE	RATE
01000 - Administrative Support And Clerical Occupations		12.46
01011 - Accounting Clerk I		14.00
01012 - Accounting Clerk II		15.65
01013 - Accounting Clerk III		18.70
01020 - Administrative Assistant		16.14
01040 - Court Reporter		11.27
01051 - Data Entry Operator I		12.31
01052 - Data Entry Operator II		14.93
01060 - Dispatcher, Motor Vehicle		12.34
01070 - Document Preparation Clerk		12.34
01090 - Duplicating Machine Operator		11.85
01111 - General Clerk I		12.94
01112 - General Clerk II		14.52
01113 - General Clerk III		16.31
01120 - Housing Referral Assistant		9.90
01141 - Messenger Courier		11.73
01191 - Order Clerk I		12.93
01192 - Order Clerk II		13.97
01261 - Personnel Assistant (Employment) I		15.59
01262 - Personnel Assistant (Employment) II		17.37
01263 - Personnel Assistant (Employment) III		21.17
01270 - Production Control Clerk		11.12
01280 - Receptionist		12.18
01290 - Rental Clerk		12.18
01300 - Scheduler, Maintenance		14.18
01311 - Secretary I		14.66
01312 - Secretary II		16.31
01313 - Secretary III		12.18
01320 - Service Order Dispatcher		18.70
01410 - Supply Technician		13.09
01420 - Survey Worker		12.58
01531 - Travel Clerk I		13.25
01532 - Travel Clerk II		14.27
01533 - Travel Clerk III		12.47
01611 - Word Processor I		14.01
01612 - Word Processor II		15.93
01613 - Word Processor III		19.19
05000 - Automotive Service Occupations		
05005 - Automobile Body Repairer, Fiberglass		17.36
05010 - Automotive Electrician		16.62
05040 - Automotive Glass Installer		16.62
05070 - Automotive Worker		16.62

Page 1

Sample Wage Determination	
99810 - Sales Clerk	11.92
99820 - School Crossing Guard	12.01
99830 - Survey Party Chief	19.88
99831 - Surveying Aide	12.44
99832 - Surveying Technician	15.54
99840 - Vending Machine Attendant	13.20
99841 - Vending Machine Repairer	15.03
99842 - Vending Machine Repairer Helper	13.20

ALL OCCUPATIONS LISTED ABOVE RECEIVE THE FOLLOWING BENEFITS:

HEALTH & WELFARE: Life, accident, and health insurance plans, sick leave, pension plans, civic and personal leave, severance pay, and savings and thrift plans. Minimum employer contributions costing an average of \$3.71 average computed on the basis of all hours worked by service employees employed on the contract.

VACATION: 2 weeks paid vacation after 1 year of service with a contractor or successor; 3 weeks after 5 years, and 4 weeks after 15 years. Length of service includes the whole span of continuous service with the present contractor or successor, wherever employed, and with the predecessor contractors in the performance of similar work at the same Federal facility. (Reg. 29 CFR 4.173)

HOLIDAYS: A minimum of ten paid holidays per year. New Year's Day, Martin Luther King Jr.'s Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, and Christmas Day. (A contractor may substitute for any of the named holidays another day off with pay in accordance with a plan communicated to the employees involved.) (See 29 CFR 4174)

THE OCCUPATIONS WHICH HAVE NUMBERED FOOTNOTES IN PARENTHESES RECEIVE THE FOLLOWING:

1) COMPUTER EMPLOYEES: Under the SCA at section 8(b), this wage determination does not apply to any employee who individually qualifies as a bona fide executive, administrative, or professional employee as defined in 29 C.F.R. Part 541. Because most Computer System Analysts and Computer Programmers who are compensated at a rate not less than \$27.63 (or on a salary or fee basis at a rate not less than \$455 per week) an hour would likely qualify as exempt computer professionals, (29 C.F.R. 541.400) wage rates may not be listed on this wage determination for all occupations within those job families. In addition, because this wage determination may not list a wage rate for some or all occupations within those job families if the survey data indicates that the prevailing wage rate for the occupation equals or exceeds \$27.63 per hour conformances may be necessary for certain nonexempt employees. For example, if an individual employee is nonexempt but nevertheless performs duties within the scope of one of the Computer Systems Analyst or Computer Programmer occupations for which this wage determination does not specify an SCA wage rate, then the wage rate for that employee must be conformed in accordance with the conformance procedures described in the conformance note included on this wage determination.

Additionally, because job titles vary widely and change quickly in the computer industry, job titles are not determinative of the application of the computer professional exemption. Therefore, the exemption applies only to computer employees who satisfy the compensation requirements and whose primary duty consists of:

- (1) The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications;
- (2) The design, development, documentation, analysis, creation, testing or

Page 7



The Wage Determination

Consolidated Wage Determinations:

- Wage rates for approximately 400 occupations grouped by several broad occupational categories
- Based primarily on cross-industry survey data
- Job descriptions are listed in the SCA Directory of Occupations
 - a. Contains standard position descriptions for most SCA occupations listed in prevailing WDs
 - b. Contains Federal Grade Equivalencies (FGE)
 - c. If WD occupation is not listed in the Directory, the position description may be included in the WD

The Wage Determination

Odd vs. Even-Numbered WD

- DoL issues two standard wage determinations for each locality
- Classifications and wage rates are the same on both
- ODD (i.e., 2012-2019) pay Health & Welfare (“H&W”) for all hours paid each week (work and paid leave) up to 40 hours. “Per-person” H&W rate
- EVEN (i.e., 2012-2020) pay minimum contribution for benefits costing an average of the H&W for all hours worked (including overtime) by all service employees. “Averaging” H&W rate
- When do you use an even wage determination?

The Wage Determination

Other Types

- Non-standard Wage Determinations
- CBA Wage Determinations

Wage Determinations

- May need to have multiple WDs incorporated into a contract
- There may be more than one type of WD that is appropriate
- There may be multiple locations where the work is performed
- There may be Davis-Bacon Act work to consider
- Construction included within a contract principally for services may also require DBA incorporation
- Minor amount of services in a supply contract does not require SCA if services are not the principal purpose of the contract

Classification

- SCA requires enforceable wage rates for each classification employed
- The contractor must classify each employee and a worker performing any part of the duties in a listed classification
- The DoL Directory of Occupations defines classifications and duties
- One person may perform multiple jobs
- What if nothing fits?

Conformances

- If the wage determination does not list a classification required to perform the work, the awarded contractor must obtain DoL approval to add a new classification and wage rate
- The added classification must bear a reasonable relationship to those listed on the wage determination
- No intermediate classes allowed
- Contractor must submit to the contracting officer, SF 1444, with other pertinent data, listing the proposed additional classification, minimum wage rate, any fringe benefits payments.

Wages

- May be paid by the hour, salary, piecework, bonuses or any combination of these
- Notice
- Regardless of pay method, employer must retain records
- Mixed rates for different classifications/ locations
- Overtime calculations
- Remember minimum wage laws including Executive Order 13658 (\$10.80)

Health and Welfare

- Hourly amount paid in addition to wages as listed in the wage determination (you now see 2 rates: \$4.22 and \$4.54)
- The total of all benefits not legally required, except vacation & holiday
- Cash or bona fide benefits at the employer's discretion
 - A bona fide benefit is a legally enforceable obligation communicated in writing to workers under a definite formula for determining the amount of the contribution and benefit provided
- Segregate on pay records
- Applies to part-time employees

Health and Welfare

Bona fide benefits may include:

- Health insurance
- Life and/or disability insurance
- Dental and/or vision insurance
- Accidental death
- Sick leave (Except if Sick Leave EO is incorporated)
- 401(k)/pension contributions
- Educational assistance
- Additional vacation or holidays
- Jury duty, bereavement leave
- Cash

Health and Welfare

Bona fide benefits may NOT include:

- Benefits primarily for the convenience of employer
- FICA, unemployment, workers' compensation, taxes
- Statutory payments
- Relocation expenses, travel expenses, tools, uniforms
- Social functions, clubs

Health and Welfare

- Increases by DoL often annually, BUT;
- Employees are not entitled to an increase unless and until the contract is modified to incorporate a revised wage determination
- Usually occurs at the option year or when a new contract issues
- Contractor is entitled to a price adjustment for the difference in its costs as result of increase to health and welfare or wage rates

Sick Leave

- FAR 52.222-62
- New solicitations issued on or after January 1, 2017
- Covered Employees:
 - a. performing work on or in connection with a contract covered by the Executive Order whose wages under such contract are governed by the SCA, DBA, or Fair Labor Standards Act
 - b. If CBA provides employee less than 7 days of sick leave, contractor must provide covered employees with the difference
- No sick leave required under SCA/DBA

Sick Leave

Accrual

- Employees accrue 1 hour of paid sick leave for every 30 hours worked on or in connection with covered contract
- Employees for whom contractors are not required to keep records of hours worked – assume 40 hours worked each week is on or in connection with a covered contract
- Contractors permitted to provide 7 days of paid sick leave at the beginning of each accrual year rather than based upon hours worked
- At the end of each pay period, employees to be notified of amount of time accrued
- Rehired by same contractor within 12 months – contractor must reinstate employees unused accrued sick leave

Reasons for Sick Leave

1. A physical or mental illness, injury, or medical condition
2. Obtaining diagnosis, care, or preventive care from a health care provider
3. Caring for a family member who has any of the conditions or needs for diagnosis, care, or preventive care described above.
4. Domestic violence, sexual assault, or stalking, if the time absent from work is for the purposes described in (1) or (2) or to obtain additional counseling, seek relocation, seek assistance from a victim services organization, take related legal action, including preparation for or participation in any related civil or criminal legal proceeding, or assist an individual related to the employee as described in (3) in engaging in any of these activities

Documentation

- Inform employees in writing each pay period
- Record approvals and denials of sick leave
- Only request a doctor's note for absences of 3 days or more
- Only ask questions that are narrowly tailored
- Foreseeable leave 7 days in advance but otherwise reasonable

Sick Leave

Carryover

- Must permit employees to carry over accrued, unused sick leave
- May limit the accrual of paid sick leave accrued to 7 days
- Not required to pay out accrued unused sick leave at the time of job separation

Sick Leave

- Cannot count against H&W benefits (unlike before)
- Use of PTO policies
- New SCA Rates

No Sick Leave	Sick Leave	Hawaii
\$4.54	\$4.22	\$1.94/\$1.63
Odd: per hour paid	Per hour worked	Must provide Hawaii health care

Vacation

- Vesting System
- No vacation until the anniversary date of employment
- Vests on anniversary date (the date the employee began working on the contract or with the employer)
- Amount depends on years of continuous service
 - a. 1 week after 1 year
 - b. 2 weeks after 3 years
 - c. 3 weeks after 7 years
- Part-time: Prorate hours worked in the last year

Vacation

- Continuous service is employment on same or similar contract or with the same employer
- A break in service occurs when the break is intended to be permanent (not a temporary layoff)
- Must be used or paid out by next anniversary date when the employee gets their next “bucket”
- Pay out anything in the “bucket” at termination or contract end
- Accrual challenges

Holidays

- Usually 10 and sometimes 11 per year
- As listed in the wage determination or an alternative day
- For part-time employees, look at the hours worked in the week prior to when the holiday falls . . .
- And whether the employee worked during the week of the holiday

Subcontracting

- Subcontractor and any lower-tiered subcontractors are subject to the SCA
- Prime contractor is on the hook for lower tier violations
- Flow down the applicable SCA contract clauses into subcontractor agreements (and IC agreements) (just like the Agency had to)
- Make sure the subcontract protects you!
 - ✓ The clauses
 - ✓ Indemnification
 - ✓ Inspection rights

DoL Enforcement

- DoL has sole enforcement authority
- Inexperienced contracting personnel
- Reliance on advice from agency officials is not a defense
- Reliance on other government officials is not a defense
- Withholding, suspension, debarment
- Retroactive application

How to Bid a CBA Wage Determination

- Section 4(c)
 - a. National Labor Relations Act applies
 - b. Section 4(c) protects wages and fringe benefits, including accrued and prospective increases, listed in a CBA
 - c. Incorporate collective bargaining agreement into contract as wage determination until expiration
 - d. The CBA's wages and fringe benefits become the SCA minimums for the contract period and for the successor
 - e. For a re-compete, the predecessor contractor's CBA should be incorporated into the solicitation
 - f. Those monetary provisions control for first year of the new contract
 - g. The new contractor then negotiates a new CBA

How to Bid a CBA Wage Determination

- You bid on a contract that includes a CBA wage determination. What wages and benefits must you consider when pricing your bid?
 - a. Wages, shift differentials
 - b. Health and welfare
 - c. Funeral leave, jury leave, military leave
 - d. Retirement, pension plans
 - e. Vacation pay, Holiday pay, Sick leave, etc. (consider FAR 48 CFR 52.222-62)
- Remember: No need to provide specific fringe benefits, just the equivalent value
- New contracts, monetary provisions control for first year

Incorporating a CBA

- Timeliness (signed, ratified, delivered)
 - a. Not effective if received after award and performance starts within 30 days
 - b. If performance starts more than 30 days after award, CBA effective if received 10 days prior to start of performance
 - c. Time limitations only apply if the CO has given both the contractor and the Union written notification at least 30 days in advance of all applicable estimated procurement dates
- Arms-Length
 - a. Precludes arrangements by parties to a CBA who, either separately or together, act with an intent to take advantage of the wage determination scheme.

Incorporating a CBA

- Substantial Variance
 - a. Does not apply if the Secretary finds that wages and fringe benefits under the predecessor contract are substantially at variance with wages and fringe benefits prevailing in the same locality for services of a similar character
- Effective Dates
 - a. CBAs must be effective prior to expiration of the predecessor contract
 - b. But, for price adjustment purposes, wage rates should not become effective until option year
- Contingency Clauses
 - a. Wage and fringe benefit provisions based on contingencies, such as agency acceptance of the CBA's terms, will be rejected by the DoL

Price Adjustments

- 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 applicable **price adjustment clause**.
 - FAR 52.222-43 -- Fair Labor Standards Act and Service Contract Labor Standards - Price Adjustment (Multiple Year and Option Contracts)
- **Calculating adjustments:** difference between current hourly rate of pay for employees and newly issued rate that results in an increase in hourly pay. **The Delta!**

Recoverable Costs

- **Adjustments may include:**

- a. Associated labor costs as a result of changes in social security and unemployment taxes, and workers' compensation insurance in some states
- b. Increased costs due to increased fringe benefits, such as vacation, holidays, sick days

- **Adjustments do not include:**

- a. General administrative costs, overhead and/or profit
- b. Costs which reimburse employees, such as for travel expenses, uniform allowances, or per diem rates
- c. Costs associated with exempt employees (e.g. administrative, executive or professional employees)
- d. Any costs where there is an escalation of option period pricing

Questions?



Nichole Atallah
PilieroMazza PLLC
natallah@pilieromazza.com



Mary Holmes
BOOST LLC
mholmes@boostllc.net

Disclaimer

This communication does not provide legal advice, nor does it create an attorney-client relationship with you or any other reader. If you require legal guidance in any specific situation, you should engage a qualified lawyer for that purpose. Prior results do not guarantee a similar outcome.

Attorney Advertising

It is possible that under the laws, rules, or regulations of certain jurisdictions, this may be construed as an advertisement or solicitation.