



Compliance and Your Business: Managing SCA Costs and Liability

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July 16, 2020

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

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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.

Overview

- Review common SCA issues and pitfalls
- Explore DOL audit risk and exposure
- Identify when sick leave is a requirement
- Additional COVID -19 considerations

Service Contract Act Overview

- 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
- Applies to contracts "...the principal purpose of which is to provide services...in the US...through the use of service employees..."
 - "Principal purpose": simple majority of contract requirements
 - Greater than 50% of contract effort
 - US is defined as 50 states, District of Columbia, and US territories

Service Contract Act Overview

- Who is a “service employee”?
 - Any person engaged in the performance of the contract
 - Non-exempt employees under the FLSA
 - Regardless of contractual relationship (independent contractors)
- Who is not a service employee?
 - Employees who qualify for exemption as bona fide executive, administrative or professional employees under the FLSA
 - Teachers, computer systems analysts / programmers, outside salespersons, creative professionals (e.g. actors, musicians, cartoonists)

Health and Welfare Benefits

- Employers may comply with the required benefits by providing
 - Cash payment (segregate on paycheck)
 - Bona fide benefits
- 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.
 - Contributions must be paid irrevocably to a trustee or third party
 - Not otherwise required by law

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

Pitfall I: Properly classifying employees and independent contractors as service employees

- Service employees include full-time, part-time and temporary employees as well as independent contractors
- Employees must be classified based on the actual work they perform, not their job titles or the contract description
- Remember that hourly employees are non-exempt, service employees
- Ultimate responsibility falls to the prime contractor! Just because you include a flow-down provision does not relieve you of responsibility

Pitfall I: Properly classifying employees and independent contractors as service employees

- **Example:** Contractor employs a biologist whose duties would generally qualify for an FLSA exemption, but due to scheduling preferences pays the biologist an hourly wage. Is the employee exempt from the SCA?

Pitfall II: Properly classifying employees under the correct SCA labor category

- Carefully review the DOL's Directory of Occupations
- Just because an employee's duties / classification are not listed in the directory does not mean that an employee is exempt
- Contractors must request a conformance for non-exempt employees who are not in the wage determination
 - Must be submitted no later than 30 days after employee starts to perform work

Pitfall III: Accurately administering SCA vacation

- The contractor at the time an employee's vacation right vests (i.e. on the employee's anniversary date of employment) must provide the full benefit required by the wage determination
- Continuous service is employment on same or similar contract with a contractor or successor as long as there is not a break in service
- A break in service occurs when the break is intended to be permanent (not a temporary layoff)

Pitfall III: Accurately administering SCA vacation

- Vacation leave:
 - Vesting system
 - Vacation vests on anniversary date (the date the employee began working on the contract or with the employer)
 - Must be used or paid out by next anniversary date when the employee gets their next “bucket”
 - Be mindful of state law requirements to ensure the payment, or nonpayment, of vacation complies with state law

Pitfall IV: Compliance in the age of COVID-19

- Does FFCRA require employees paid H&W benefits?
 - Even versus odd wage determination
 - Method of H&W payment?
 - Cash in lieu
 - Health insurance (including medical & vision)
 - Other benefits (i.e. retirement, STD, life insurance)
 - FMLA H&W requirements
- What if employees can perform work remotely?
- Furloughing versus laying off SCA employees

Pitfall VI: Sick leave considerations

- Sick leave is not required by the SCA but understanding sick leave compliance is integral to accurate application of SCA wage determinations

No Sick Leave	Sick Leave	Hawaii
\$4.54	\$4.22	\$1.94/\$1/63

- FAR 52.222-62
- Employees accrue 1 hour of paid sick leave for every 30 hours worked on or in connection with covered contract (or approx. 7 days annually for FTEs)
- Carryover required, but can be capped at 56 hours each year
- Unlike vacation, no pay out required

Pitfall VII: Combining cash H&W into wages

- Paying cash in lieu of benefits is acceptable and bona fide
- Cash H&W must be listed as a separate pay line
- Employees need to be on notice of what benefits they receive and what they receive in base pay

Pitfall VIII: Treating a unionized workforce the same as a non-unionized workforce

- Incorporating the CBA
- Timely (signed, ratified, delivered)
- Not effective if received after award and performance starts within 30 days
- If performance starts more than 30 days after award, CBA effective if received 10 days prior to start of performance
- Arms-length, substantial variance, contingency clauses

Pitfall IX: Giving employees increases before an increased WD is incorporated

- If a wage determination is issued resulting in increases, the contracting officer is supposed to incorporate the new WD into the contract at the option
- A contractor is not obligated to increase wages or fringe before the new WD is incorporated into the contract
- If a contractor decides to increase ahead of incorporation, they may forego the right to a price adjustment because there would be no difference in wages and fringe benefits at the time of incorporation

Pitfall X: Determining part-time benefits

- Each type of benefit may have calculations that impact part-time service employees
- Vacation
- Holidays

Best Practices

- Read the (draft) solicitation carefully
- Evaluate employee duties regularly to determine whether appropriately classified as exempt
- Ask questions
- Keep careful records of vacation vesting and sick leave accrual
- Understand what it means to bid on a contract with a CBA

Questions?



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