

A DOL Perspective on SCA, FLSA, and Wage and Hour Compliance



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McNamara-O'Hara Service Contract Act



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SCA Coverage

The Service Contract Act applies to “any contract”

- 1) Made by the Federal Government or District of Columbia
- 2) Exceeds \$2,500
- 3) Includes use of service employees, and
- 4) Principal purpose is furnishing of services in the U.S.



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Contracts to Furnish Services

The SCA does not define or limit the types of services that may be contracted for. Examples of service contracts:

- Security and guard services
- Janitorial services
- Cafeteria and food services
- Support services at Government installations

29 CFR 4.111 & 4.130



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Use of Service Employees

- Section 8(b) of SCA defines service employee as:
 - Any person engaged in performance of contract, except
 - Employees who qualify for exemption as bona fide executive, administrative or professional employees under the FLSA (29 CFR Part 541)
- Employee coverage does not depend on contractual relationship

29 CFR 4.113 & 4.155



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Requirements of SCA

Contracts in excess of **\$2,500** must contain labor standards clauses and:

- Minimum monetary wages and fringe benefits determined by Department of Labor (DOL)
- Recordkeeping - Posting requirements
- Safety and health provisions
- Statement of rates paid to federal employees

29 CFR 4.6



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Contracts Not SCA Covered

- Contracts primarily for something other than services, e.g., construction
- Contracts for leasing of space
- Contracts for professional services
- Federally-assisted contracts for services entered into by state governments, e.g., Medicaid and Medicare programs

29 CFR 4.134



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Basic Statutory Requirement

Sections 2(a)(1) and (2) of SCA provide that covered contracts in excess of \$2,500 contain a wage determination:

2(a)(1) = Wages

2(a)(2) = Fringe Benefits



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What is a Wage Determination (WD)?



WDs set prevailing wages and fringe benefits contractors, or their subcontractors, must pay covered service employees working under SCA-covered contracts



Wages are defined as monetary compensation provided to service employees



They are usually listed in the WD as minimum hourly rates



Obtaining Wage Determinations

Agencies must obtain a new WD at least once every two years.

- A new WD may be required each year if:
 - The contract is subject to annual appropriations; or
 - An annual contract option being exercised
 - Most contract extensions, even if shorter than one year, require a new WD

29 CFR 4.143 – 4.145



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SCA Directory of Occupations

- Contains standard position descriptions for most SCA occupations listed on prevailing WDs
- Contains Federal Grade equivalencies
- If a WD occupation is not listed in the Directory, the position description may be included on WD



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SAM.GOV

Created by an inter-agency task force including DOL, DOD, OMB, GSA, DOE, and the National Technical Information Systems

- The purpose was two-fold:
 - To meet the Presidential initiative for e-government
 - To enhance the public's ability to obtain WDs



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What is a Conformance?

Conformance is the process used to add occupational classes to a contract after it has been awarded.



29 C.F.R. 4.6(b)(2)



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Adding a Missing Classification of Work

- Work not performed by a class on WD
- Proposed rate must bear a reasonable relationship to those listed on WD:
 - No single formula
 - Look at comparable classes on WD
 - No specific analytical process to determine conformable rate



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Impermissible Uses

Conformances may not be used to:

- Artificially subdivide classes listed in WD
- Combine two or more classes listed in WD to create a new class
- Establish a job level lower than lowest level listed in WD for a job classification family (Computer Operator I through V)
- Establish helper and trainee classifications



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Conformance Requests

The contractor prepares the conformance request (SF 1444) or other format:

- Proposes a class of worker and job description
- Proposes an hourly wage rate and rationale
- Submits the request to the contracting agency no later than 30 days after the employee begins performing work on the contract



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Davis-Bacon and Related Acts



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Contracts for Construction

- “Construction” includes all types of work done on a particular building or work on the site of the work, as defined in the regulations (29 CFR 5.2)
- A contract is for construction as long as it requires more than an incidental amount of construction
- This means that the Davis-Bacon Act (DBA) can apply to a federal contract even if the primary purpose of the contract is not construction



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Alteration or Repair

- Restoration or improvement of a facility by modifications to the facility's components, systems, or materials is considered to be alteration or repair
- Alterations or repairs will generally improve the building or work, either by fixing something that is broken or by improving upon the building or work's existing condition
- In contrast, maintenance work that is routinely and regularly performed to keep the building or work functioning in the same condition is not considered construction



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Public Building or Public Work

- Includes any building or work, when its construction:
 - Is carried on directly by authority of or with funds of a federal agency
 - To serve the general public interest
- A building or work does not have to be owned or operated by the federal government to serve the general public interest, so long as it fulfills a significant need or a goal of the relevant federal agency



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Davis-Bacon Related Acts

•Davis-Bacon (DB) requirements extend to numerous “Related Acts” that provide federal assistance by, for example:

- Grants
- Loans
- Loan guarantees
- Insurance



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Funded In Whole Or In Part

- Davis-Bacon prevailing wage requirements generally apply to construction funded or assisted in whole or in part under a Related Act, regardless of how the recipient allocates the funding
- Even if funding is allocated only to a portion of the construction of a project, prevailing wage requirements generally will still apply to all construction work on the project



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Labor Standards Clauses

- Contracting agencies must ensure that the Davis-Bacon labor standards clauses in 29 CFR 5.5 and the applicable wage determination(s) are included in all construction contracts for projects assisted in whole or in part under a Related Act
- Contracting agencies must also advise prime contractor(s) that they must include Davis-Bacon labor standards clauses and applicable wage determination(s) in all subcontracts



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Incorporation by Reference

- Contract clauses and wage determinations are equally effective if they are incorporated by reference, although agencies are still required to insert the contract clauses in full for any contract not subject to the Federal Acquisition Regulations (FAR)



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Prime Contractor

- Broadly defined as any person or entity that enters into a covered contract with an agency, including non-profit organizations, owners/developers, borrowers or recipients, project managers, or single-purpose entities
- Also includes the controlling shareholder or member of any entity holding a prime contract, the joint venturers or partners in any entity holding a prime contract, and any contractor that has been delegated the responsibility for overseeing all or substantially all of the construction anticipated by the prime contract



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Flow-Down of Clauses: Prime Contractors

- Prime contractors are responsible for flowing down both the contract clauses and the applicable wage determinations to their subcontracts
- The prime contractor must cover any unpaid wages or other liability for any subcontractor violations
- Prime contractors may be debarred for disregarding their obligations



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Flow-Down: Upper Tier Contractors



- Upper-tier subcontractors may also be held liable for back wages owed to the workers
- Upper-tier subcontractors may also be debarred for disregarding their obligations



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Laborers and Mechanics

- Workers whose duties are manual or physical in nature
- Applies to any individual who performs laborer or mechanic duties, regardless of any alleged contractual relationship
- No employment relationship required – independent contractors usually should receive prevailing wages



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Exempt Workers

- Business owners are excluded from the term “laborers and mechanics” when they:
 - Own at least a 20% equity interest in the company in which they are employed, **and**
 - Are actively engaged in its management
- A working supervisor is generally not an exempt employee under the FLSA and 29 CFR part 541



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Prevailing Wage Requirements

- All laborers and mechanics employed or working upon the site of the work must be paid at least the applicable prevailing wage rate for the classification of work performed as listed in the applicable wage determination or a rate approved in accordance with the “conformance process” set forth at 29 CFR 5.5(a)(1)(iii), without regard to skill
- Laborers and mechanics who perform work in more than one classification may be paid the different applicable rates for the work they actually perform if the employer keeps an accurate record of the time spent working in each classification and pays accordingly



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Site of the Work Types

- Primary construction site
- Secondary construction site
- Adjacent or virtually adjacent dedicated support sites



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Site of the Work: Secondary Sites

- Any site where a significant portion of a building or work is constructed for specific use in that building or work, as long as the site is either:
 - established specifically for the performance of the contract or project, or
 - is dedicated exclusively, or nearly so, to the performance of the contract or project for a specific period of time



Fringe Benefits Examples

**Life
insurance**

**Health
insurance**

Pension

Vacation

Holiday

Sick leave



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Wages and Fringe Benefits Payment

- Fringe benefits are a component of the DBA “prevailing wage”
- The prevailing wage obligation may be satisfied by:
 - Paying the base hourly rate (BHR) and FB in cash (including negotiable instruments payable on demand)
 - Contributing payments to a bona fide plan, or
 - Any combination of the two
- Prevailing wages due must be paid weekly, with the exception of FB contributions paid into a bona fide FB plan, which must be paid no less often than quarterly



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Funded Fringe Benefit Plan

- Contractors may take credit (without prior approval from DOL) for bona fide FB fund contributions made to third-party trustees or insurers that are:
 - Irrevocably paid, and
 - Made regularly, not less often than quarterly
- The allowable credit that may be taken is for payments made for individual workers eligible to participate in the plan, program, or fund



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Unfunded Fringe Benefit Plan

Costs for an “unfunded” FB plan may count towards a contractor’s prevailing wage obligation if specific criteria are met:

Contributions reasonably anticipate the cost to provide a bona fide FB

Contributions are made pursuant to an enforceable commitment

Plan or program is financially responsible

Plan has been communicated in writing to the affected workers

Plan has been approved by the Wage & Hour Division (WHD)



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Apprentices

- **An apprentice is a person who is**
 - Individually registered in a bona fide apprenticeship program registered with DOL's Employment Training Administration (ETA), Office of Apprenticeship (OA), or a State Apprenticeship Agency recognized by OA, **or**
 - An individual in their first 90 days of probationary employment as an apprentice in such a program, provided certain requirements are met



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Apprentice Requirements

- Bona fide apprentices are permitted to work on DB covered projects and be paid less than the journey level WD rate for the classification of work performed when they are employed in accordance with the terms of the applicable apprenticeship program
- However, apprentices must be paid the full prevailing wage rate for the classification of work performed if they are not individually registered in and employed pursuant to the terms of a bona fide apprenticeship program



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Is Overtime Required?



- Federal laws that require overtime pay:
 - The Contract Work Hours and Safety Standards Act (CWHSSA)
 - The Fair Labor Standards Act (FLSA)



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Overtime Pay

CWHSSA

- Covers contracts over \$100,000 (\$150,000 for contracts procured under the Federal Acquisition Regulations) that require or involve employment of laborers, mechanics, watchmen, or guards on DBA or DBRA covered construction contracts
- Self-executing (even if not stated in contract)
- Has no “site of the work” limitation

FLSA

- Applies more broadly
- Over 155 million workers subject to coverage



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What Does CWHSSA Require?

- Overtime pay for laborers, mechanics, guards, and watchpersons at a rate not less than one and one-half times the basic rate of pay for hours worked over 40 in a workweek on covered contracts
- Liquidated damages can be assessed per day for each laborer, mechanic, guard, or watchperson not paid required overtime



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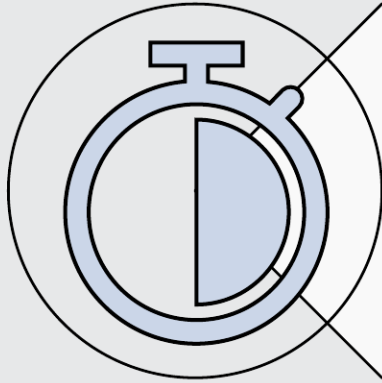
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Basic Rate of Pay Under CWHSSA

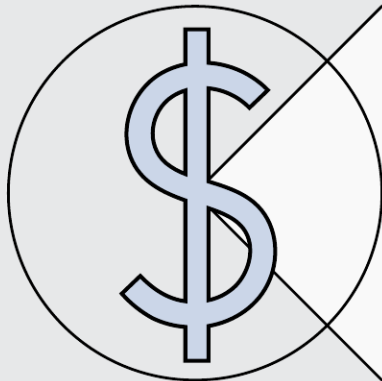
- CWHSSA requires the payment of not less than one and one-half the “basic rate” of pay for all hours worked over 40 hours in a workweek
- The basic rate of pay under CWHSSA is the straight time hourly rate, which cannot be less than the basic hourly rate required in an applicable wage determination, not including any required fringe benefit amount
- However, if a worker is paid a regular rate above the basic hourly rate (excluding fringe benefits or cash in lieu of fringe benefits), that regular rate will be considered the basic rate



Fringe Benefits and CWHSSA



Although FBs must be paid for all hours worked, additional half-time premiums do not need to be computed for amounts paid to fulfill the FB rate listed in the applicable wage determination under CWHSSA



This applies to both cash payments made to comply with the FB portion of the prevailing wage requirement and contractor contributions to bona fide benefit plans made to comply with that requirement



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Basic Record Requirements

- Contractors must maintain basic time and payroll records and last known phone numbers and email addresses for each worker
- Contractors must also maintain records relating to apprenticeship programs or fringe benefit plans, if the contractor uses such programs or plans
- In addition, contractors must maintain copies of their contract and any subcontracts, and related documents such as solicitations, bids, amendments, modifications, and extensions



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Maintaining Records

- Contractors must maintain all of these records required at 29 CFR 5.5(a)(3) for at least 3 years after all work on the prime contract has been completed
- This requirement also applies to subcontractors, even though the subcontractor's work may be finished prior to the completion of the prime contract
- A contractor's failure to make the required records available to WHD within the requested timeframe will prevent that contractor from using those records as evidence in a hearing under 29 CFR part 6



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Enforcement



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Investigations

- **DOL Functions and Responsibilities:**
- Determine “prevailing wages”
- Issue regulations and standards to be observed by contracting agencies
- Perform oversight function along with independent authority to conduct investigations



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Anti-Retaliation Provisions

It is unlawful to commit the below actions, or to *cause* any person to commit these actions, against any worker or job applicant for engaging in protected activities:

Discharge

Demote

Intimidate

Threaten

Restrain

Coerce

Blacklist

Harass

Discriminate



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Protected Activities

- Workers or job applicants are protected from being retaliated against for the following activities:
 - Making a contractor aware of any conduct the worker reasonably believes is a violation
 - Asserting DBRA rights on behalf of themselves or others, such as filing a complaint
 - Cooperating in an investigation or other compliance action
 - Informing another person of their rights under the DBRA



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Withholding

- DBA and CWHSSA provide for withholding of contract funds to satisfy alleged wage underpayments pending resolution of a wage dispute (40 U.S.C. § 3142(c)(3); 40 U.S.C. § 3702(d))
- Withholding of contract funds is an effective enforcement tool in DBA/DBRA/CWHSSA cases
- It protects the rights of covered workers to wages due them



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Cross-Withholding

- Cross-withholding may be accomplished on contracts held by agencies other than the agency that awarded the contract
- Withholding from another federal contract with the same prime contractor is called “cross-withholding”
- Withholding can be done on the contract in question or any other federal contract or federally assisted contract subject to Davis-Bacon prevailing wage and other labor standards requirements with the same prime contractor
- Funds withheld for DBRA wage underpayments have priority over other competing claims



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Priority of Withheld Funds

- In order to ensure that underpaid workers receive the money to which they are entitled, the Department has priority to funds withheld or to be withheld in accordance with 29 CFR 5.5(a)(2)(i) and/or 29 CFR 5.5(b)(3)(i)
- Withheld funds may not be used or set aside for other purposes until the prevailing wage issues are resolved



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Debarment

- Occurs when a contractor is declared *ineligible* for future contracts due to:
 - Violations of the Davis-Bacon and Related Acts (DBRA) involving disregard of its obligations to workers or subcontractors
- Period of ineligibility is 3 years with no early removal from the exclusion list for both DBA and Related Act



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Debarment Criteria

Debarment is considered when a contractor has:



Submitted falsified certified payrolls



Required “kickbacks” of wages or back wages



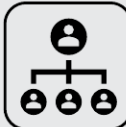
Committed repeat violations



Committed serious violations



Misclassified covered workers in clear disregard of proper classification norms



As a prime contractor, failed to ensure compliance by subcontractors



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Prime Contractor Debarment

- Prime contractors can be debarred for subcontractor violations where such violations reflect a disregard of the prime contractor's obligations
- For example, debarment could be appropriate if a prime contractor and many of its subcontractors violated provisions of the DBRA and CWHSSA, the prime contractor failed to flow down the DBRA labor standards clauses and to take steps to ensure its subcontractors complied with the DBRA



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Resources



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Useful Resources

- Wage Determinations: <https://sam.gov>
- Wage and Hour Division: <http://www.dol.gov/agencies/whd/government-contracts>
- WHD Protections for Workers in Construction under the Bipartisan Infrastructure Law: <https://www.dol.gov/agencies/whd/government-contracts/protectations-for-workers-in-construction>
- Prevailing Wage Resource Book: <https://www.dol.gov/agencies/whd/government-contracts/prevailing-wage-resource-book>
- Office of the Administrative Law Judges Law Library: <https://www.dol.gov/agencies/oalj/topics/libraries/LIBDBA>
- Prevailing Wage Topic Videos: <https://www.dol.gov/agencies/whd/government-contracts/construction/presentations>



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