



GovCon 101: Service Contract Act

Nichole Atallah, Partner, Labor and Employment, PilieroMazza PLLC



Nichole Atallah



Nichole Atallah
Partner, Labor & Employment
Pilieromazza PLLC
202.857.1000
natallah@pilieromazza.com

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.

Nichole 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 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.

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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
 - 20% rule
 - 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)
 - At each option, extension, substantial change to scope of work and no less than every 2 years if not funded annually
 - DO NOT GET YOUR OWN WD!
- Christian Doctrine – not applicable

Contractor's Responsibility

- 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
 - Maintain a record of all hours worked
 - Maintain pay records
 - Minimum Wages for Government Contractors

Polling Question 1

True or False: It is the Contracting Officer's responsibility to provide the appropriate labor classification to the contractor?

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
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Diane C. Koplewski Division of
 Director 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		
01011 - Accounting Clerk I		12.46
01012 - Accounting Clerk II		14.00
01013 - Accounting Clerk III		15.65
01020 - Administrative Assistant		18.70
01040 - Court Reporter		16.14
01051 - Data Entry Operator I		11.27
01052 - Data Entry Operator II		12.31
01060 - Dispatcher, Motor Vehicle		14.93
01070 - Document Preparation Clerk		12.34
01090 - Duplicating Machine Operator		12.34
01111 - General Clerk I		11.85
01112 - General Clerk II		12.94
01113 - General Clerk III		14.52
01120 - Housing Referral Assistant		16.31
01141 - Messenger Courier		9.90
01191 - Order Clerk I		11.73
01192 - Order Clerk II		12.93
01261 - Personnel Assistant (Employment) I		13.97
01262 - Personnel Assistant (Employment) II		15.59
01263 - Personnel Assistant (Employment) III		17.37
01270 - Production Control Clerk		21.17
01280 - Receptionist		11.12
01290 - Rental Clerk		12.18
01300 - Scheduler, Maintenance		12.18
01311 - Secretary I		12.18
01312 - Secretary II		14.66
01313 - Secretary III		16.31
01320 - Service Order Dispatcher		12.18
01410 - Supply Technician		18.70
01420 - Survey Worker		13.09
01531 - Travel Clerk I		12.58
01532 - Travel Clerk II		13.25
01533 - Travel Clerk III		14.27
01611 - Word Processor I		12.47
01612 - Word Processor II		14.01
01613 - Word Processor III		15.93
05000 - Automotive Service Occupations		
05005 - Automobile Body Repairer, Fiberglass		19.18
05010 - Automotive Electrician		17.36
05040 - Automotive Glass Installer		16.62
05070 - Automotive Worker		16.62

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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 Repair 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

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The Wage Determination

- Odd vs. Even-Numbered WD
 - 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?
- Other Types
 - Non-standard Wage Determinations
 - CBA Wage Determinations

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

Health and Welfare

- Hourly amount paid in addition to wages as listed in the wage determination (you now see 2 rates: \$4.23 and \$4.60)
- Hawaii (pre-paid healthcare)
- 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

- 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:
 - 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
 - 1 hour for every 30 hours worked or 56 hours front loaded
 - If CBA provides employee less than 7 days of sick leave, contractor must provide covered employees with the difference
 - Cap at 56 hours, carry over what is accrued
 - No payout, reinstate within 6 months if rehired

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

Polling Question 2

True or False: I can count sick toward the health and welfare amount list on the wage determination?

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
 - 1 week after 1 year
 - 2 weeks after 3 years
 - 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 now 11 per year
- As listed in the wage determination or an alternative
- 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

Non-Displacement of Service Employees

- Provide a right of first refusal to incumbent employees
- Written offer open for business 10 days
- Predecessor list 30 days in advance
- Obligations stay open for 90 days
- Exceptions

Polling Question 3

True or False: You can decline to offer an incumbent a job if the contracting officer says they do not want the employee hired?

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

Questions?



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