

# Prevailing Wage: Davis-Bacon Act and Service Contract Act

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Sarah advises government contractors and commercial businesses on a wide variety of labor and employment issues, including the Fair Labor Standards Act, the National Labor Relations Act, Office of Federal Contract Compliance Programs regulations, and anti-discrimination law. Her practice also includes counseling employers on terminations, labor relations matters, employment agreements, wage and hour issues, and employment practices and policies. Sarah regularly advises clients on compliance specific to government contracting, including offering counsel on prevailing wage laws, such as the Service Contract Act, codes of ethics, and equal employment opportunity requirements.

# Overview

- Basics of SCA and DBA Standards
- Common Pitfalls
- Compliance Strategies

# Service Contract Act Overview

- McNamara O’Hara Service Contract Act of 1965
- Requires general contractors and subcontractors providing services on prime contracts 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”: DoL 10-20% rule
  - 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
  - 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)
- CORRECT Area Wide Wage Determination (“WD”)
- Place of Performance Unknown (52.222-49)
- At each option, extension, substantial change to scope of work and no less than every 2 years if not funded annually
- Contractors should never be in a position where they need to pull their own wage determination
- Christian Doctrine – not applicable

# Contractor Responsibility

- Read CAREFULLY
- Pick the correct labor classification from the WD in the contract
- 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

# Wage Determinations: A Snapshot

"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
Daniel W. Simms Director	Division of Wage Determinations	Wage Determination No.: 2015-4281 Revision No.: 25 Date Of Last Revision: 12/27/2022

Note: Contracts subject to the Service Contract Act are generally required to pay at least the applicable minimum wage rate required under Executive Order 14026 or Executive Order 13658.

If the contract is entered into on or after January 30, 2022, or the contract is renewed or extended (e.g., an option is exercised) on or after January 30, 2022:	Executive Order 14026 generally applies to the contract. The contractor must pay all covered workers at least \$16.20 per hour (or the applicable wage rate listed on this wage determination, if it is higher) for all hours spent performing on the contract in 2023.
If the contract was awarded on or between January 1, 2015 and January 29, 2022, and the contract is not renewed or extended on or after January 30, 2022:	Executive Order 13658 generally applies to the contract. The contractor must pay all covered workers at least \$12.15 per hour (or the applicable wage rate listed on this wage determination, if it is higher) for all hours spent performing on the contract in 2023.

The applicable Executive Order minimum wage rate will be adjusted annually. Additional information on contractor requirements and worker protections under the Executive Order is available at [www.dol.gov/whd/govcontracts](http://www.dol.gov/whd/govcontracts).

States: District of Columbia, Maryland, Virginia

Area: District of Columbia Statewide  
Maryland Counties of Calvert, Charles, Prince George's  
Virginia Counties of Alexandria, Arlington, Fairfax, Falls Church, Fauquier, Loudoun, Manassas, Manassas Park, Prince William, Stafford

\*\*Fringe Benefits Required Follow the Occupational Listing\*\*

OCCUPATION CODE - TITLE	FOOTNOTE	RATE
01000 - Administrative Support And Clerical Occupations		
01011 - Accounting Clerk I		19.39
01012 - Accounting Clerk II		21.79
01013 - Accounting Clerk III		24.36
01020 - Administrative Assistant		37.47
01035 - Court Reporter		28.71
01041 - Customer Service Representative I		16.73
01042 - Customer Service Representative II		18.25
01043 - Customer Service Representative III		20.48

\*\*\*Workers in this classification may be entitled to a higher minimum wage under Executive Order 14026 (\$16.20 per hour) or 13658 (\$12.15 per hour). Please see the Note at the top of the wage determination for more information. Please also note that the minimum wage requirements of Executive Order 14026 and 13658 are not currently being enforced as to contracts or contract-like instruments entered into with the federal government in connection with seasonal recreational services or seasonal recreational equipment rental for the general public on federal lands.

Note: Executive Order (EO) 13706, Establishing Paid Sick Leave for Federal Contractors, applies to all contracts subject to the Service Contract Act for which the contract is awarded (and any solicitation was issued) on or after January 1, 2017. If this contract is covered by the EO, the contractor must provide employees with 1 hour of paid sick leave for every 30 hours they work, up to 56 hours of paid sick leave each year. Employees must be permitted to use paid sick leave for their own illness, injury or other health-related needs, including preventive care; to assist a family member (or person who is like family to the employee) who is ill, injured, or has other health-related needs, including preventive care; or for reasons resulting from, or to assist a family member (or person who is like family to the employee) who is the victim of, domestic violence, sexual assault, or stalking. Additional information on contractor requirements and worker protections under the EO is available at [www.dol.gov/whd/govcontracts](http://www.dol.gov/whd/govcontracts).

ALL OCCUPATIONS LISTED ABOVE RECEIVE THE FOLLOWING BENEFITS:

HEALTH & WELFARE: \$4.80 per hour, up to 40 hours per week, or \$192.00 per week or \$832.00 per month

HEALTH & WELFARE EO 13706: \$4.41 per hour, up to 40 hours per week, or \$176.40 per week, or \$764.40 per month\*

\*This rate is to be used only when compensating employees for performance on an SCA-covered contract also covered by EO 13706, Establishing Paid Sick Leave for Federal Contractors. A contractor may not receive credit toward its SCA obligations for any paid sick leave provided pursuant to EO 13706.

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 eleven paid holidays per year: New Year's Day, Martin Luther King Jr.'s Birthday, Washington's Birthday, Memorial Day, Juneteenth National Independence 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 4.174)

# 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?

# Special Wage Determinations

- Non-standard Wage Determinations
  - Issued for specific contracts or types of contracts that may be based on different data sources that may be industry specific and/or cover different geographic areas
- Collective Bargaining Agreement (CBA) Wage Determinations
  - Reflect a predecessor contractor's CBA wage and benefit rates and are only issued when certain criteria are met
  - Supersedes any standard or non-standard wage determination

# 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

# Employee Classification

- SCA requires enforceable wage rates for each classification employed
- The contractor must classify each employee
  - A worker performing any part of the duties in a listed classification must be classified as such
- 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
- Look at the way that similar jobs are rated within the federal pay system
- 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

# Payment of Wages

- May be paid by the hour, salary, piecework, bonuses or any combination of these
- Notice
- Regardless of pay method, employer must retain records
- Overtime calculations
- Remember minimum wage laws including E.O. 14026 (\$16.20)

# Health and Welfare

- Hourly amount paid in addition to wages as listed in the wage determination (you now see 2 rates: \$4.41 and \$4.80)
- 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

- Increased 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 a result of an increase to health and welfare or wage rates

# 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
- 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 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

# Ancillary Legal Obligations

- Sick Leave (FAR 52.222-62)
- Minimum Wage for Government Contractors (FAR 52.222-55)
- Non-Displacement of Qualified Workers TBD

# Subcontracts

- 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)
- Contractors should ensure certain provisions included:
  - ✓ The clauses
  - ✓ Indemnification
  - ✓ Inspection rights

# Construction Labor Standards

- Governed by the Davis-Bacon Act of 1931 (“DBA”)
- Coverage
  - Contracts in excess of \$2,000, to which the Federal Government or the District of Columbia is a party
  - For construction, alteration, or repair, including painting and decorating
  - Public buildings and public works
  - Requires or involves the employment of mechanics or laborers
  - Shall contain a provision stating the minimum wages to be paid various classes of laborers and mechanics
  - On-site (may be small or large)

# DBA is not...

- Manufacturing
- Furnishing of materials (unless incident to on-site construction)
- Servicing and maintenance work (SCA)
- Work off-site

# DBA Coverage Specifics

- New construction
- Alterations, remodeling, installation, painting and decorating
- If performed at the site of and in connection with the work, covered work may also include the manufacture or furnishing of materials, articles, supplies and equipment
- SCA v. DBA – Segregable construction work

# Contractor's Responsibility

- Pay all mechanics and laborers:
  - Employed directly on the site of the work
  - Unconditionally and at least once a week, and without subsequent deduction or rebate
  - At wage rates not less than those stated in the wage determination
  - Regardless of any contractual relationship which may exist
  - Post the scale of wages to be paid in a prominent and easily accessible place at the site of the work

# Mechanics and Laborers

- At least those workers whose duties are manual or physical in nature (including those workers who use tools or who are performing the work of a trade) as “distinguished from mental or managerial”
- Workers whose duties are primarily administrative, executive or managerial or clerical are not covered
- A working foreman who spends more than 20 percent of his or her time working with the tools, as opposed to supervising others, may be covered by the Davis-Bacon Act requirements for the time spent working with the tools
- Apprentices, trainees, and helpers are included, but may only be categorized and paid as such under the Act if they meet certain requirements
- The employee must be engaged in construction work as distinguished from manufacturing, the furnishing of materials, or service and maintenance work

# Wage Determinations

- No nationwide standard classifications like in SCA. All local area wage scales
- May be a combination of union and non-union rates listed in wage determination

# Wages and Benefits

- Prevailing wage = Wage + Bona Fide Fringe
- Interchangeable components (unlike SCA)
- Any combination
- Do not need to be separated out on documentation
- Fringe must be paid for all hours worked – straight time and overtime
- Must be paid weekly!
- Certified payrolls
- If the individual performs work covered by more than one classification, the employer may compensate the individual under each classification for the time spent in that classification

# Recent Developments

- March 18, 2022, NPRM proposed significant changes to Davis Bacon in a number of areas:
  - Method for setting local prevailing wage rates
  - Conformances
  - Expansion of Site of Work, Covered Work
  - Applying DBA “by operation of law”
  - Enforcement
- Recent legislation (Bipartisan Infrastructure Law and Inflation Reduction Act of 2022) includes prevailing wage requirements
  - Will be implemented through grants
  - Increases scope of application of Davis Bacon
  - Enhanced penalties for non-compliance under IRA of 2022
- Project Labor Agreements (EO and proposed rule)

# SCA/DBA Crossover: Overtime

- Application
  - Covered, non-exempt employees
  - 1.5 times the regular rate of pay
  - Hours worked over 40 per work week
  - Not required to pay for work on weekends, holidays, or regular days of rest, unless overtime is worked on such days

# SCA/DBA Crossover: Overtime

- Hours Worked: When are employees “working?”
  - Hours worked ordinarily include all the time during which an employee is required to be on the employer’s premises, on duty, or at a prescribed workplace
  - If working, the time must be recorded
  - Active area of enforcement
- Role of discipline

# SCA/DBA Crossover: Special Overtime Issues for Government Contractors

- Administrative tasks that are viewed as “non-billable”
- Overtime that is not billable to the Government
- Time accessing the work site (security)
- Client advises employee not to record time worked
- Client tells employee to be 5 minutes early (even if work is not started)
- Badge swipes vary from time recorded

# Contract Work Hours and Safety Standards (40 U.S.C. §§ 327-332)

- No laborer or mechanic (including guards and watchmen) shall be required or permitted to work more than 40 hours in a workweek unless paid for overtime hours at no less than 1.5 times basic rate of pay
- Also applies to guards and watchmen
- CWHSSA applies to contracts in excess of \$100,000 (\$150,000 for contracts procured under the Federal Acquisition Regulations)
- Liquidated damages (\$25 per day for each day of violation)

# Questions?



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