



Service Contract Act Training Session II

Nichole D. Atallah, Partner, Labor & Employment, PilieroMazza PLLC



Nichole D. Atallah



Nichole D. 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.

PilieroMazza is privileged to represent clients in the following areas:

- Audits & Investigations
- Bid Protests
- Business & Transactions
- Business Succession Planning
- Construction
- Corporate and Organizational Governance
- Cybersecurity & Data Privacy
- Debt Financing
- Employee Incentive and Bonus Plans
- False Claims Act
- Fund Formation & Structuring
- Government Contracts
- Government Contract Claims & Appeals
- Intellectual Property & Technology Rights
- Labor & Employment
- Litigation & Dispute Resolution
- Mergers & Acquisitions
- Native American Law & Tribal Advocacy
- Nonprofits
- Private Equity & Venture Capital

Session 2 Overview

- Health and Welfare
- Vacation
- Holidays
- Sick Leave
- Other items of Note
- Collective Bargaining Agreements
- Onboarding Considerations
- Record Keeping

Health and Welfare Benefits

- Determining the applicable H&W rate
 - Does FAR 52.222-62 apply to your contract?
 - If yes, pay the lower H&W rate and provide sick leave
 - If no, pay the higher H&W rate
 - Updated annually BUT....
 - Per hour paid up to 40 hours (odd numbered)
- Hawaii
- Family and Medical Leave Act Considerations

Health and Welfare Benefits

- Employers may comply with the required benefits by providing
 - Cash payment (segregated on paycheck and paid each payday)
 - Bona fide fringe benefits (each payday or reconciled quarterly)
- 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
 - Self-funded plans - PRE-APPROVAK
 - Third party benefits administration (fee)
 - Employee contributions must be voluntary

Health and Welfare Benefits (NOT)

- If disapproved by IRS
- Otherwise required by laws (unemployment, workers' comp, social security)
- Board, lodging, etc. (29 CFR Part 531)
- For the benefit of employer (laundering uniforms, travel, business expenses, relocation)
- Social functions, flowers, gym memberships

Health and Welfare Benefits: Example

- Employer retains a vendor to handle health insurance for SCA employees. The vendor requires everyone to be in a healthcare plan unless they have bona fide alternative coverage. Employee signs up for employee only coverage but doesn't work enough to cover the cost. Can the employer deduct the additional cost from the employees wages?

Yes/no

CBA Considerations

- Section 4(c) of the Service Contract Act
- Pay wages and fringe benefits in the CBA
- Do not have to follow other terms in CBA
- Do not need to agree to the “same” benefits but the dollar value has to be the same
- Vacation, holidays, uniforms, etc. do not have to be the same
- Sick leave needs to comply with FAR 52.222-62
- Negotiating a new CBA (timing, contingencies, substantial variance, arms length)

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.
- **Vesting System** is a lump sum payment after a full year of service.
 - Must be used or paid out by termination, contract end, or 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.
 - California requires vacation to vest as it accrues. All vacation must be paid out upon termination.
- Amount is based on a full time employee
- Example: 2 weeks after 1 year, 3 weeks after 5 years, 4 weeks after 15 years

SCA Vacation: Anniversary Date

- **Anniversary date** is the date an employee worked on the current contract or any same or similar prior contract at the same location
- **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)

SCA Vacation

- Accrual: Can a company use an accrual method instead of a vesting method? Likely, yes BUT...
 - Advance Agreements
 - Financial risk
 - True up on anniversary dates
- Incumbent to give list of employees and anniversary dates to KO 10 days before contract end
- Pay the vacation at current rate of pay

Vacation Examples

1) Jane worked for the predecessor contractor for 5 years. There was one month in between contracts where no work was performed. Then your company hires her. HR tells Jane that she her anniversary date will be today's date. Is that correct?

2) The predecessor contractor used accrual for their vacation method and you have it on good authority that they were paid out all vacation accrued. Your company also uses an accrual method. 3 employees have anniversary dates 5 days after they are hired. Given their years of service they would accrue 2 weeks per year. How much vacation are they owed on the anniversary date?

A. 5 days because they were paid for everything else by the predecessor.

B. 2 weeks-accrued so far because they vest in the full amount of vacation on their anniversary date

C. Nothing because you accrue vacation as well and they will be made whole.

Holidays

- List in wage determination
- Can pick alternates with notice to employees
- Vests by working in the same workweek (or paid leave)
- Presidential declarations generally not applicable
- First week of work, holiday earlier than started, no requirement

Sick Leave (FAR 52.222-62)

- 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
\$4.98	\$4.57	\$2.04/\$1.65

- 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 full time employees)
- Exempt and non-exempt employees
- Carryover required, but can be capped at 56 hours each year
- Unlike vacation, no pay out required
- Keep state sick leave requirements in mind. E.g. Maryland requires a cap on sick leave use of no less than 64 hours
- No note for absences 3 days or less

Part-time, Temporary, Irregularly Sch.

- Are they entitled to H&W? Yes!
- Are they entitled to vacation? Yes!
 - Regular part-time- prorate based on regularly scheduled hours
 - Irregularly scheduled- prorate based on hours worked in the year as of the anniversary date
- Are they entitled to sick leave? Yes!
- Are they entitled to holidays? Yes!
 - Regular part-time- Prorate based on hours worked each week
 - Irregularly scheduled- Prorate based on the hours worked the week prior
 - Must work the week of the holiday

Onboarding Considerations

- Non-displacement of federal contractor employees
- Offer letters and initial SCA notice
- Avoiding perfectly clear successor issues with unionized workforces
- Requirement to negotiate with union representatives
- Pitfall: Transition to new classifications, benefits administration

Non-Displacement of Qualified Workers Under Service Contracts

- Subject to Federal Acquisition Regulation, new solicitations and contracts issues after February 12, 2024
- 29 C.F.R. Part 9 contains the regulations implementing the EO.
- Any contract or contract-like instrument with an executive:
 - covered by the Service Contract Act (“SCA”), and
 - Prime contract exceeds simplified acquisition threshold (currently \$250,000)
- Contract for the “same or similar work”
- CO may waive application under limited circumstances
- Terms and conditions can be different

Non-Displacement of Qualified Workers Under Service Contracts

- Predecessor must give list of employees and provide notice to employees or face non-payment
- KO must provide list within 21 days to new contractor
- Contractors must make a good faith offer to covered employees who are on list or provide evidence of work in the last month of the contract absent just cause (even if not on list)
- Contractors have an affirmative obligation to notify the contracting officer if the NDQW contract clauses are not in a covered contract
- Do not have to adopt staffing level
- Obligation is for 90 days

Pitfalls: Non-Displacement

- Location continuity preference
- No retaliation
- Notifying KO of missing clauses
- Exceptions: Reasonable belief
 - Retained by predecessor
 - Had commercial and fed responsibilities
 - Just cause (reliable information from knowledgeable source)
 - Exempt employees

Non-Displacement: Example

You receive notice of contract award 5 days before performance is set to begin. Your team works tirelessly to get offer letters out to incumbent employees. Can you require employees start working on the first day of performance? Yes/No

A KO tells you that one of these employees is just terrible and asks you not to hire this person. Is this an acceptable reason not to make an offer? Yes/No

DOL gets a complaint and tells you that you violated the non-displacement rules because you did not make an offer to the incumbent project manager. Is the DOL investigator accurate?
Yes/No

Record Keeping

- Defend your case
- H&W Records
 - Segregate cash H&W from wages
 - Sick and vacation
- Pay Frequency
 - Pay 2x per month
- Notice
 - Obligation to provide Service Employees with prevailing wages, H&W, and other benefits
 - Post onsite
 - Notice in offer letters

Questions?



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