Chapter 14

THE McNAMARA-O'HARA SERVICE CONTRACT ACT

Table of Contents

Chapter 14

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Table of Contents - Page 2

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14a GENERAL AND STATUTORY PROVISIONS - SCA

14a00 Purpose and use of FOH Chapter 14.

This chapter supplements Regulations, 29 CFR Part 4, in FOH Vol 1, which contains the regulations and interpretations with respect to the McNamara-O'Hara Service Contract Act of 1965, as amended. Enforcement policy and procedural instructions are set forth in FOH 52i.

14a01 Coverage - general.

(a) The SCA applies to most contracts entered into by the United States or the District of Columbia the principal purpose of which is to furnish services in the United States through the use of service employees. (See Reg 4.107-4.114.)

(b) Contracts for services which are performed essentially by bona fide executive, administrative, or professional employees which involve only a minor or incidental use of service employees would not require application of SCA. (See Reg 4.113(a)(3).)

(c) Specifications for services in a contract which is not as a whole principally for services are not subject to SCA.

(d) An illustrative listing of typically covered contracts is contained in Reg 4.130.

14a02 Statutory provisions of the SCA.

(a) Unless a specific exemption is provided under Sec 7 of the Act or by the S/L under Sec 4(b) of the Act, every contract subject to SCA entered into by any agency or instrumentality of the United States or the District of Columbia (i.e., direct Federal Government contracts) in excess of $2,500 must contain stipulations requiring:

(1) That specified minimum monetary wages and fringe benefits (FBs) determined by the S/L (based on wage rates and FBs prevailing in the locality or, in certain circumstances, the wage rates and FBs contained in a CBA applicable to employees who performed on a predecessor contract, see (b) below) be paid to the various classes of service employees employed by the contractor or any subcontractor in performing the services contracted for;

(2) That working conditions which are under the control of the contractor or subcontractor meet S&H standards; and

(3) That notice be given to employees of the compensation due them under the MW and FB provisions of the contract.

(b) Section 4(c) of the Act provides that a successor contractor furnishing substantially the same services as were furnished under a predecessor contract, must pay its service employees no less than the wages and FBs to which they would have been entitled under the predecessor's CBA, unless it is found after a DOL hearing that such wages and FBs vary substantially from those prevailing in the locality for similar services, or it is found that the CBA was not reached as a result of arm's-length negotiations. WDs which are issued for successor contracts subject to Sec 4(c) are intended to accurately reflect the predecessor's CBA. However, failure to include in the WD any job classification, wage rate or FB encompassed in the CBA does not relieve a successor contractor of the statutory requirement to comply at a minimum with the terms of the CBA insofar as wages and FBs are concerned. Since the successor's obligations are governed by the terms of the CBA, any interpretation of the wage and FB provisions of the CBA where its provisions are unclear must be based on the intent of the parties to the CBA provided that such interpretation is not violative of law. (See Reg 4.163.)

14a03 Contract clauses.

(a) The amount of the contract is not determinative of the Act's coverage although the statutory requirements and the contract clauses are different for contracts in excess of $2,500 and for contracts of a lesser amount.

(b) Contracts exceeding $2,500.

In every contract in excess of $2,500, or in an indefinite amount, the principal purpose of which is to furnish services through the use of service employees, the contracting agency is required to include the contract clauses set forth in Reg 4.6. In addition to other matters, such as R/K requirements and a summary of liabilities and penalties for violations, these clauses contain the basic provisions of Sec 2(a)(1) through (4) of the Act relating to: payment of prevailing MW rates, furnishing of FBs, observance of S&H standards, and notice of compensation to employees (posting). In the absence of a WD attached to the contract specifying the prevailing rate or rates to be paid and the FBs to be furnished, the clauses also provide that neither the prime contractor nor any subcontractor shall pay any employees performing work on the contract less than the MW required by Sec 6(a)(1) of the FLSA. No OT requirements are included in SCA. OT payments to employees subject to SCA will depend on coverage under CWHSSA or FLSA.

(c) Contracts not exceeding $2,500.

The only clause required in Federal service contracts of $2,500 or less is that provided in Reg 4.7 which contains the basic provisions of Sec 2(b)(1) of the Act relating to the payment of the MW required by Sec 6(a)(1) of the FLSA to employees engaged in performing work on the contract.

14a04 Geographical scope of the Act.

(a) The SCA covers contract services furnished in the "United States" as defined in Sec 8(d) of the Act. The definition of the term "United States" expressly excludes any territory

under the jurisdiction of the United States other than those named in the law and also excludes any United States base or possession within a foreign country.

(b) Under a treaty between the U.S. and the Republic of Kiribati which was ratified on June 21, 1983, the U.S. agreed, among other things, to renounce all claims to sovereignty over Canton Island (Treaties and other International Act Series No. 10777). Thus, the SCA no longer applies on Canton Island.

(c) Pursuant to the Compact of Free Association Between the United States and the Republic of the Marshall Islands (Public Law 99-239, 99 Stat. 1770), SCA no longer applies on Eniwetok Atoll and Kwajalein Atoll.

(d) Pursuant to Section 502 of the Covenant to Establish a Commonwealth of the Northern Mariana Islands (Public Law 94-241, 90 Stat. 263 (48 U.S.C. 1681, note)), SCA applies to the Northern Mariana Islands.

(e) Section 4.112 of revised regulations issued on October 27, 1983, provided that a service contract performed essentially outside the United States, with only an incidental portion performed within the United States as defined would not be subject to the SCA. However, on March 22, 1985, the U.S. Court of Appeals for the District of Columbia Circuit overturned this provision of the revised regulations (AFL-CIO v. Donovan, 757 F. 2d 330 (D.C. Cir. 1985)). Accordingly, the provisions of Reg 4.112 set forth in the prior edition of Reg 4 are applicable for determining the geographic scope of the SCA. Under Reg 4.112 of the prior regulations, if any portion of a service contract is performed in the United States, the contract is subject to SCA and the labor standards apply to the services performed in the United States. The SCA requirements are not applicable to the services furnished outside the United States.

14a05 Payroll and recordkeeping requirements.

(a) Payrolls and basic records relating thereto must be maintained and preserved as required by Reg 4.6(g). (See also Reg 4.185.)

(b) The failure of a contractor to make the required records available to WH representatives may result in the suspension of contract payments until such violations cease. Contractors must also permit WH to conduct employee interviews at the worksite during normal working hours. (See Reg 4.6(g).)

14a06 Wage payments to employees - general.

(a) Monetary wages specified under the SCA must be paid to employees promptly and in no event later than one pay period following the end of the regular pay period in which such wages were earned or accrued. A pay period under the SCA may not be of any duration longer than semi-monthly. (See Reg 4.6(h).)

(b) Wages due service employees must be paid "free and clear" and without subsequent deduction, rebate, or kickback on any account. (See Reg 4.165-4.168.)

(c) A contractor cannot offset an amount of FBs paid in excess of the FBs required under a WD in order to satisfy its MW obligations, and vice versa. (See Reg 4.170(a) and 4.177(a)(1).)

14a07 Tipped employees.

(a) Tips may generally be included in wages of employees working on SCA contracts (such as at military post barber shops, etc.) in accordance with Sec 3(m) of the FLSA and Reg 531. (See FOH 30d.)

(b) Where Sec 4(c) of the SCA applies, the use of FLSA Sec 3(m) tip credit must have been permitted under the terms of the predecessor's CBA in order for it to be utilized by the successor in satisfying the SCA MW. (See Reg 4.163(k).)

14a08 Child labor.

The SCA contains no CL requirements. However, if the employer is covered under the FLSA, the FLSA CL provisions are applicable.

14a09 SCA contractors and FLSA Exemptions.

In some cases a covered service contract may be awarded to an establishment whose employees otherwise would be exempt from the MW provisions of the FLSA under FLSA Sec 13(a). Sec 6(e)(1) of the FLSA negates the exemption provisions of FLSA Sec 13 (except Secs 13(a)(1) and 13(f)) and requires payment of the FLSA MW to all of a service contractor's employees whose pay is not governed by the SCA. (See also FOH 30e.)

14b COVERED SCA CONTRACTS

14b00 Beneficiary of contract services - concessionaires, etc.

(a) As provided in Reg 4.133, where the principal purpose of a Government contract is to furnish services through the use of service employees, the contract is subject to SCA regardless of who is the direct beneficiary of the services or the source of the funds from which the contractor is paid for the service and irrespective of whether the contractor performs the work in its own establishment, on a Government installation or elsewhere. The fact that the contract requires or permits the contractor to provide the services directly to individual government personnel as a concessionaire rather than through a contracting agency does not negate coverage of the Act.

(b) An administrative exemption is provided in Reg 4.133(b) for certain concession contracts, such as those entered into by the National Park Service, which are principally for the furnishing of food, lodging, automobile fuel, souvenirs, newspaper stands, and recreational equipment to the general public as opposed to furnishing such services to the United States Government or its personnel.

(c) Questions arise in distinguishing between a contract whose principal purpose is the furnishing of services through the use of service employees (subject to SCA) and a contract which is not for the purpose of procuring services, but rather only sets forth general conditions under which persons desiring to transact business with individuals on Government installations may enter and do so. Such agreements are not subject to SCA.

(1) For example, where the contract provides for the use of Government space or equipment on the installation for the activity involved or prescribes to a significant extent conditions relating to prices, performance and quality or type of performance, the contract would generally be considered to have as its principal purpose the furnishing of services subject to SCA.

(2) In contrast, SCA coverage would not generally be asserted on a contract which merely requires a contractor to comply with general police regulations designed to control traffic, maintain order, and suppress nuisances such as restricting solicitation or pick-up practices to specified areas on the installation, restricting hours of operation, requiring observance of speed limits or other rules and regulations generally applicable to those permitted to do business on a Government installation. Also, absent other evidence that the contract's purpose is to secure services, SCA coverage will not be asserted by reason of inclusion in the contract of requirements to ensure the responsibility of the contractor such as bonding or licensing requirements.

14b01 Vending machine concession agreements.

(a) If a vending machine contractor is obligated to furnish, install, stock, and service the vending machines; maintain such machines in efficient working order; make any

necessary repairs; and maintain them in a clean, attractive, orderly and sanitary condition, the contract would be subject to SCA. Under such a contract, the contractor's function is primarily that of furnishing a service, rather than a mere sale of supplies since it contemplates a continuing use of service employees to carry out the contract. The question of who owns the items available from the machines at the time a purchase is made is immaterial to the application of SCA.

(b) If a contractor has an agreement as described in (a) above where a continuing use of service employees is involved, the delivery route personnel and any employees performing any servicing of the machines would be covered by SCA. Additionally, it is the position of WH that the production employees' work involves the performance of duties necessary to the accomplishment of the contract and such employees must be paid not less than the MW required by Sec 2(b) of the Act. (See Reg 4.153.)

(c) Where the Government enters into either a leasing or rental/purchase agreement with regard to vending machines under which the Government agency stocks and services the machines with the contractor merely delivering the goods to a designated storage area, such an agreement is not subject to SCA.

14b02 Exploratory drilling.

Contracts for subsurface exploration, which have as their principal purpose the furnishing of technical information, together with soil samples and rock cores, and/or a record to the Government of what was encountered during subsurface drilling, are subject to the SCA if such drilling operations are not directly connected with the construction of a public work (D-B covered). (See FOH 15d03.)

14b03 Gathering and processing of geophysical and seismic data.

Where the principal purpose of a contract is to gather, compile, analyze, and report geophysical and seismic data, such contracts are covered by the SCA even though certain tangible end items (paper, maps, or manuscripts) may result from the intelligence, information, and labor service. (See Reg 4.131(a) and (c).) Thus, while professional services may be involved and individual employees may be exempt under Reg 541, the "principal purpose" of such contracts is to provide services which could not be furnished without a significant number of logistic support service workers to carry out the survey work. (Also see FOH 14e00.)

14b04 Surveying and mapping services.

Contracts for surveying and mapping services for transmission lines, highways, dams, etc., are subject to the SCA if they are not directly related to construction (D-B covered), even if they are preliminary to the construction.

14b05 Contracts with hotels, motels, and restaurants for lodging and meals.

(a) A contract between the Government and a hotel or restaurant for furnishing of lodging and/or meals is a service contract within the meaning of the SCA.

(b) The various branches of the military issue "chits" to military personnel so that meals, lodging, or transportation may be obtained. The name of the vendor is left blank and the "chit" may be exchanged for overnight lodging, meals, or transportation. In view of the absence of a general contractual agreement between the Government and a particular establishment for the provision of these services, coverage by SCA will not be asserted.

14b06 Management of repossessed properties.

Federal Housing Administration (FHA), Department of Housing and Urban Development, management contracts with real estate brokerage firms calling for the brokers to perform services and to furnish materials and labor in connection with the management, operation, repair, maintenance, and rental of properties repossessed by FHA, are subject to the SCA. Typical broker contracts contain authorization to employ a variety of service employees, including classifications such as rental clerk, maintenance supervisor, maintenance personnel, janitor, security guard, and pool attendant.

14b07 Contracts with States and political subdivisions.

A State or political subdivison may obtain a Federal service contract and undertake to perform it with State or municipal employees; for example, police, fire, or trash removal services. The SCA does not contain an exemption for contracts performed by State or municipal employees. Thus, the SCA will apply to contracts with States or political subdivisions in the same manner as to contracts with private contractors. (See Reg 4.110.)

14b08 Demolition, dismantling, and removal of Government property.

(a) Property demolition, dismantling and removal contracts which involve demolition of buildings or other structures are subject to the SCA when their principal purpose is the furnishing of dismantling and removal services, and no further construction at the site is contemplated (in which case the contract would be subject to D-B), even though the contractor receives salvaged materials. (See Reg 4.116(b), 4.131(f) and FOH 15d02.)

(b) However, if the principal purpose of a demolition contract is the sale of material, and the services provided thereunder are incidental to the sale, the contract would not be covered by the SCA.

14c CONTRACTS NOT SUBJECT TO SCA PROVISIONS

14c00 Medical and related services.

(a) Contracts with hospitals for patient care.

SCA is not applied to contracts with hospitals for the care of patients. Thus, SCA would not be applicable, for example, to agreements with the Social Security Administration under which patient care services are furnished by hospitals participating in the Medicare program.

(b) Contracts with nursing homes.

The SCA does not apply to nursing homes solely by reason of their participating in the Medicare or Medicaid programs. (See (a) above.) However, contracts between the Veterans Administration and nursing homes are covered.

(c) Contracts for ambulance services.

While contracts for the furnishing of ambulance services are not within the exemption provided by Sec 7(3) (See Reg 4.118) and are covered by the Act generally, the SCA is not applied to ambulance services furnished pursuant to contracts for Medicare or Medicaid.

14c01 Job Corps facilities.

SCA is not applied to prime contracts entered into by the DOL with private firms for the operation of a Job Corps facility. However, SCA may apply to secondary or subcontracts let by such contractors if the principal purpose of the secondary contract is the furnishing of services through the use of service employees. Such contracts awarded for or on behalf of the Job Corps facility by its operating contractor will be subject to the Act to the same extent and under the same conditions as if they were awarded by the Government directly. (See Reg 4.107.)

14c02 On-the-job training.

(a) SCA is not applied to contracts which provide for the training and teaching of vocational skills to the disadvantaged, such as those operated in connection with the Job Training Partnership Act (which replaced the Comprehensive Employment and Training Act (CETA)) or other DOL Employment and Training Administration programs.

(b) However, where a contractor providing training under such a program also enters into a contract with a Government agency for the furnishing of services, e.g., janitorial, any trainees who are performing the services called for in the service contract are subject to the SCA.

14c03 Contracts with the National Guard.

(a) Contracts for the operation and maintenance of State National Guard training and logistical facilities are generally not subject to the SCA. While the National Guard Bureau provides full or partial funding for these contracts, services are provided directly to the States and not the U.S. Government. The States independently obtain services to support training and logistical facilities for each State National Guard unit. Contracts are signed by State officials and are administered by the individual States according to State contracting procedures.

(b) However, contracts entered into between the National Guard Bureau, DOD, and State National Guard units which provide for the acquisition of services for the direct benefit or use of the National Guard Bureau and which are signed by a U.S. Property and Fiscal Officer would be subject to SCA.

14c04 Contracts between a Federal or District of Columbia agency and another such agency.

Prime contracts between a Federal or District of Columbia agency and another such agency are not subject to the SCA. However, "subcontracts" awarded under "prime contracts" between the Small Business Administration and another Federal agency pursuant to various small business/minority set-aside programs, such as the 8(a) program, are covered by the SCA. (See Reg 4.110.)

14c05 Federal timber sales contracts.

(a) Timber sales contracts generally are not subject to the SCA because the services normally provided under such contracts are considered incidental to the principal purpose of the contract; i.e., the sale of timber. (See Reg 4.131(f).)

(b) However, the SCA would apply to contracts which in fact are principally for some purpose other than the sale of timber; e.g., the clearing of land to open up the forest for public use, or the removal of diseased or dead trees.

14d EXEMPTIONS AND EXCLUSIONS

14d00 Exemptions - general.

(a) Statutory exemptions.

Section 7 of the Act specifically exempts from coverage seven types of contracts (or work) which might otherwise be subject to SCA. These exemptions are discussed in Reg 4.115-4.122.

(b) Administrative exemptions.

(1) Sec 4(b) of the SCA as amended in 1972 authorizes the S/L (delegated to the Adm) to "provide such reasonable limitations" and to "make such rules and regulations allowing reasonable variations, tolerances, and exemptions to and from any or all provisions of this Act (other than Sec 10), but only in special circumstances where [it is determined] that such limitation, variation, tolerance, or exemption is necessary and proper in the public interest or to avoid the serious impairment of Government business, and is in accord with the remedial purpose of this Act to protect prevailing labor standards."

(2) The following types of contracts have been exempted from all the provisions of the SCA pursuant to Sec 4(b):

a. Postal Service contracts entered into with common carriers for the carriage of mail by rail, air (except air star routes), bus and ocean vessel on regularly scheduled runs where the revenue received for the carriage of the mail is insubstantial (Reg 4.123(d)(1));

b. Postal Service contracts entered into with individual owner- operators of vehicles for transportation of mail where it is not contemplated at the time the contract is made that the owner-operator will hire any service employee except for brief periods of time or for unexpected emergency situations such as illness or accident (Reg 4.123(d)(2));

c. Contracts for the carriage of freight or personnel where such carriage is subject to rates covered by Sec 10721 of the Interstate Commerce Act (Reg 4.123(d)(3)), see also FOH 14d04; and

d. Contracts principally for the maintenance, calibration and/or repair of certain automated data processing, scientific and medical, and office business equipment. (See Reg 4.123(e) and FOH 14d01.)

14d01 Maintenance and repair of certain ADP, scientific and medical, and office and business equipment.

(a) Pursuant to Sec 4(b) of the SCA, the S/L has exempted from all provisions of the Act contracts which are principally for the maintenance, calibration and/or repair of:

(1) ADP equipment and office information/word processing systems;

(2) Scientific equipment and medical apparatus or equipment where the application of microelectronic circuitry or other technology of at least similar sophistication is an essential element; and

(3) Office/business machines not otherwise exempt under (1) above, where such services are performed by the manufacturer or supplier of the equipment.

(b) The exemptions are limited to the servicing of only such listed items of equipment furnished to the government which are also furnished commercially, the contract services must be furnished at catalog or market prices, and the contractor must utilize the same compensation plan for all service employees performing on both government and commercial work. The contractor must certify to all of these conditions in the contract. In addition, the contracting officer is required to make an affirmative determination that the conditions of the exemption have been met prior to contract award. (See also Reg 4.123(e).)

14d02 Carpet installation.

(a) Section 7(1) of the SCA exempts from coverage contracts for construction, alteration, and/or repair including painting or decorating of public buildings or public works which are subject to D-B. Where carpet laying is performed as an integral part of, or in conjunction with, "new" construction, alteration, or reconstruction of a public building or a public work, as opposed to routine maintenance, the D-B would be applicable. (See Reg 4.116.)

(b) However, where the installation of carpeting is performed as a separate contract and is not an integral part of either a construction project or incidental to a supply contract, the installation work would be subject to the SCA.

14d03 Overhaul and modification of aircraft and other equipment.

(a) Section 7(2) of the SCA exempts from its provisions "any work required to be done in accordance with the provisions the Walsh-Healey Public Contracts Act."

(b) Reg 4.117 provides detailed guidelines for delineating when contracts for major overhaul of equipment would be considered "remanufacturing" subject to the PCA rather than the SCA. Complete or substantial teardown and overhaul of heavy construction equipment, aircraft, engines, etc. where the Government receives a totally rebuilt end item with a new (or nearly new) life expectancy resulting from processes similar to original manufacturing will normally be considered "remanufacturing" subject to the PCA.

Contracts for routine maintenance or repair, inspection, etc., continue to be subject to SCA.

(c) Contracting agencies are required to initially determine whether work to be performed under a proposed contract would involve principally "remanufacturing" work or service work based on the guidelines, and incorporate the appropriate PCA or SCA labor standards clauses into the contract prior to soliciting bids. Application of SCA or PCA to any type of contract not discussed in the regulations will be decided on a case-by-case basis by the Adm.

14d04 Storage and local drayage of household goods.

(a) Contracts for the carriage or transportation of goods or personnel must be actually governed by published tariff rates for such carriage in order for the Sec 7(3) exemption to apply. An administrative exemption has also been provided for certain contracts where such carriage is subject to Sec 10721 of the Interstate Commerce Act. (See Reg 4.118 and 4.123(d)(3).)

(b) The Sec 7(3) exemption does not apply where the principal purpose of the contract is packing, crating, handling, loading, and/or storage of goods prior to, or following, line-haul transportation to the ultimate destination. The fact that substantial local drayage to and from the contractor's establishment may also be required does not alter the fact that the principal purpose of such a contract is other than the carriage of freight. However, if a firm has a separate contract for transportation subject to a published tariff rate, the Sec 7(3) exemption would apply to that contract.

14d05 Shipbuilding, alteration and repair, as distinguished from maintenance and/or cleaning.

(a) The building, alteration, and repair of ships under Government contract is work performed upon "public works" and is within the Sec 7(1) exemption (DB-covered). Thus, for example, the SCA will not apply to contracts for the alteration and repair of merchant ships let by the Maritime Administration.

(b) A contract for the construction, alteration, furnishing, or equipping of a naval vessel, i.e., U.S. Navy (including U.S. Coast Guard vessels), is within the Sec 7(2) exemption for work subject to the PCA.

(c) However, a contract which calls principally for the maintenance and/or cleaning, rather than alteration or repair, of a ship or naval vessel is a service contract within the meaning of the SCA. (See FOH 13b11 and 15d08.)

14e SERVICE EMPLOYEE

14e00 "Service employee" - general.

(a) Sec 8(b) of the Act defines "service employee" as any person engaged in the performance of a covered contract (i.e., a U.S. contract principally for services) except those persons who individually qualify for exemption as bona fide executive, administrative or professional employees as defined in Reg 541. (See Reg 4.156.)

(b) The Act applies to all persons who actually perform the service work called for by a covered contract, "regardless of any contractual relationship that may be alleged to exist between a contractor or subcontractor and such person." (See Reg 4.155.) Thus, if a person is engaged in performing any work called for under a covered contract, such person must be paid the wage and FBs provided under the Act, irrespective of any alleged "independent contractor" or non-employment relationship.

(c) Those employees who do not themselves perform the services required by the contract, but whose duties are necessary to the performance thereof, as, for example, clerical employees who handle paper work in connection with the contract (such as billing or payrolls), must be paid not less than the MW required by Sec 2(b) of the Act. (See Reg 4.153.)

14e01 Airplane and rotorcraft pilots and copilots.

Pilots and copilots are "service employees" within the meaning of the SCA and "laborers and mechanics" within the meaning of the CHWSSA when they are performing in that capacity on covered contracts. While the work of a pilot requires dexterity, coordination, a degree of physical strength and other physical and mental processes necessary to control an airplane or rotorcraft in flight, such work does not meet the primary duty requirement for exemption as a bona fide executive, administrative, or professional employee. (See also Reg 5.15(d)(4) for the variation from the CWHSSA OT requirements for pilots and co-pilots performing on contracts for firefighting or suppression and related services.)

14e02 Employees performing grooming services under concessionaire contracts.

Employees performing work involving the grooming of people under concessionaire contracts for such services entered into with nonappropriated fund instrumentalities of the United States (see FOH 14b00) are "service employees" under the SCA. This includes, among others, barbers, shoeshiners, beauticians, and manicurists. (Such employees are also "laborers and mechanics" for purposes of CWHSSA.)

14e03 Flight instructors - contracts for flight training.

(a) Flight instructors who qualify for exemption as teachers under Reg 541.3(a)(3) are not "service employees" for purposes of the SCA. (See FOH 22d19.)

(b) Because such flight instructors are not "service employees," the typical Government contract to provide flight training is not performed "through the use of service employees" and thus the SCA has no application to any employee working on such a contract. However, in some cases the contract may call for significant additional services, such as the operation of all or a major portion of a base facility, and involve more than a minor use of service employees. In such cases, the Act would apply. (See Reg 4.113.)

14f SPECIAL RULINGS AND INTERPRETATIONS

14f00 Segregation under SCA: covered and noncovered work.

Reg 4.179 provides that if a contractor desires to segregate covered work from noncovered work under SCA for purposes of applying the SCA WD, the contractor must identify such covered work accurately in the records or by other means. In this regard, an arbitrary assignment of time on the basis of a formula, as between covered and noncovered work, is not sufficient. However, if the contractor does not wish to keep detailed hour-by-hour records for segregation purposes under the SCA, records can be segregated on the wider basis of departments, work shifts, days, or weeks in which covered work was performed. For example, if on a given day, no Government work was performed by a laundry under its contract, this day can be segregated and shown in the records. Similarly, if on a given day only noontime meals were provided by a restaurant under a covered contract to furnish meals to military personnel, employment on the night shift could be segregated. See Reg 4.179 and FOH 52i16.

14f01 Cost of furnishing and maintaining uniforms.

(a) Employees performing on most SCA food service, security guard service, nursing home service, and janitorial service contracts are required by the employer, by the employer's Government contracts, by law, or by the nature of the work, to wear clean uniforms and/or related apparel or equipment. In such situations, the financial cost of furnishing and maintaining (except in the case of wash and wear uniforms, see (d) below) clean uniforms or equipment are considered to be a business expense of the employer and may not be imposed upon the employees if to do so would reduce their wages below the FLSA MW or SCA prevailing wage rate (or FLSA or CWHSSA OT). Where the MW (or OT) is diminished, the employer must bear the cost of providing clean uniforms and equipment up to the amount of any such deficiency.

(b) A determination of the cost of furnishing the uniforms (and related equipment) itself presents no problem. If the employee is required to furnish the uniform, the actual cost incurred shall be used to ascertain whether a MW or OT violation has occurred. The same is true where a commercial laundry or uniform rental services is utilized. (See also Reg 4.168(b) and FOH 30c06.)

(c) Where uniform cleaning and maintenance is the responsibility of the employee, a contractor may satisfy its wage obligation under the Act by paying employees $3.35/wk or $.67/day. (See Reg 4.168 (b)(1)(ii).)

(d) However, as provided in 4.168(b)(2) there generally is no requirement that employees be reimbursed where the uniforms furnished are made of "wash and wear" materials which may be routinely washed and dried with other personal garments and require no special treatment such as daily washing, dry cleaning or commercial laundering. This limitation does not apply, however, where a different provision has been set forth in the applicable WD. In the case of WDs issued under Sec 4(c) of the Act for successor contracts, the amount established by the parties to the predecessor CBA is deemed to be the cost of laundering uniforms.

14f02 Security guard services - compensability of training time.

(a) Where a covered contract dictates that persons are required to complete certain training before performing on the contract as security guards, such persons are considered employees of the contractor while undergoing such training and time spent in training is compensable hours worked. Whether this training is of limited application or more general in nature (e.g. State-mandated training courses), it cannot be considered "voluntary" within the meaning of Reg 785.27 since the contractor is obligated to provide employees in order to meet the stipulations in the contract which require the training. Likewise, time spent in training which is specifically required by a covered contract is compensable hours worked even if the training is performed prior to formal contract award or the trainee subsequently is not hired as a contract security guard. The contractor must pay wages for this training time at rates not less than those prescribed in Sec 2(b)(1) of the SCA unless otherwise specified in the applicable WD. (See Reg 4.146.)

(b) Time spent in on-the-job training (i.e. after start of contract performance) must be paid for at not less than the SCA minimum wage rate specified for the guard classification listed in the WD included in the contract.

14f03 Mail haul contracts - hours worked by SCA mail haul contract truck drivers on duty 24 hours or more.

(a) The basic principles for determining hours worked by a truck driver on duty for 24 hours or more set forth in FOH 31b09 and 31b12 are applicable to SCA mail haul truck drivers.

(b) The principles set forth in IB 785.12 through 785.16 must be applied to determine whether layover or breakdown time is hours worked. Where such time is compensable hours worked and occurs on an SCA contract, it must be paid at a rate not less than the applicable SCA WD rate for drivers since such time is intrinsically related to contract work. Moreover, if a contractor chooses to pay for layover and breakdown time which would otherwise not be considered hours worked under IB 785, for the purpose of not breaking a driver's continuous tour of duty on tours of 24 hours or more, such time must also be paid at the applicable SCA WD rate.

14g FRINGE BENEFITS

14g00 Fringe benefits - general.

(a) Subpart D of Reg 4 contains the interpretations regarding FBs under the SCA. FOH 14g supplements these interpretations.

(b) The FBs, if any, which an employer is required to furnish employees performing on a covered contract will be specified in the applicable WD included in the contract documents. (See also FOH 14a02.)

(c) FB obligations may be discharged by furnishing any equivalent combination of cash or bona fide FBs as explained in Reg 4.170 and 4.177.

(d) The terms "equivalent fringe benefit" and "cash equivalent" mean equal in terms of monetary cost to the contractor. COs must ascertain whether the employer is actually incurring costs for FBs in the amounts provided in the WD.

(e) FB requirements under successor contracts subject to SCA Sec 4(c) are discussed in Reg 4.163. See also FOH 52i14.

14g01 "Bona fide" fringe benefit plans

(a) To be considered "bona fide" for SCA purposes, a FB plan, fund, or program must constitute a legally enforceable obligation which meets the criteria set forth in Reg 4.171(a).

(b) Unfunded, self-insured FB plans under which a contractor allegedly makes "out of pocket" payments to provide benefits for employees as costs are incurred, rather than making irrevocable contributions to a trust or other funded arrangements, are not normally considered "bona fide" plans or equivalent benefits. However, under certain conditions, a contractor may request approval by the Adm of an unfunded self-insured plan in order to allow credit for payments under such a plan in meeting the FB requirements of the Act (Reg 4.171(b)).

(c) The furnishing of facilities which are primarily for the benefit or convenience of the contractor or the cost of which is properly a business expense of the contractor is not the furnishing of a "bona fide" FB or equivalent benefit or the payment of wages; e.g., items such as relocation expenses, travel and transportation expenses incident to employment, incentive or suggestion awards, etc. Also, a contractor cannot take credit toward its MW and FB obligations for the cost of providing social functions or parties for employees, flowers, cards, or gifts on employee birthdays, anniversaries, etc. (sunshine funds), employee rest or recreation rooms, paid coffee breaks, magazine subscriptions, and professional or club dues.

14g02 Crediting of fringe benefit payments.

FBs specified in the WD must be furnished separate from and in addition to the specified minimum monetary wage rates to the employees engaged in the performance of the contract. A contractor may not offset an amount of monetary wages paid in excess of the wages required under the WD in order to satisfy its FB obligations, and must keep appropriate records separately showing amounts paid for wages or furnished for FBs. (See Reg 4.170(a).)

14g03 Vacation pay.

(a) General.

Eligibility for vacation benefits specified in a WD is based on completion of a standard period of past service (Reg 4.173). The principles to be followed in determining an employee's length of service for vacation eligibility are summarized below:

(b) Determining length of service.

Most WDs require an employer to furnish employees a specified amount of paid vacation upon completion of a specific length of service with a contractor or successor; e.g., "one week paid vacation after one year of service with a contractor or successor" or "one week's paid vacation after one year of service". Unless specified otherwise in an applicable WD, the following two factors must be taken into consideration in determining when an employee has completed the required length of service to be eligible for vacation benefits:

(1) The total length of time spent by an employee in the continuous service of the present (successor) contractor, including both the time spent performing commercial work and the time spent performing on the Government contract(s) itself, and

(2) Where applicable, the total length of time spent in any capacity as an employee in the continuous service of any predecessor contractor(s) who carried out similar contract functions at the same Federal facility.

(c) Eligibility requirement - continuous service.

Under the principles set forth above, if an employee's total length of service adds up to at least one year, the employee is eligible for one week of vacation with pay. The term "continuous service" does not require the combination of two entirely separate periods of employment where there has been a break in service. Whether or not there is a break in the continuity of service so as to make an employee ineligible for a vacation benefit is dependent upon all the facts in the particular case. (See Reg 4.173(b).)

(d) Accrual or vesting and payment of vacation benefits.

Where a WD specified "one week paid vacation after one year of service with a contractor or successor", an employee who renders the "one year of service" continuously becomes eligible for the "one week paid vacation" (i.e., 40 hours of paid vacation, unless otherwise specified in an applicable WD) upon his/her anniversary date of employment and upon each succeeding anniversary date thereafter. There is no accrual or vesting of vacation eligibility before the employee's anniversary date of employment, and no segment of time smaller than one year need be considered in computing the employer's vacation liability, unless otherwise specifically provided for in a particular WD. The vacation benefit need not be provided by the employer on the date it vests. However, the required benefit must be furnished before the employee's next anniversary date, before the current contract is completed, or before the employee terminates employment, whichever occurs first (see Reg 4.173(c)(2)).

(e) Contractor liability for vacation benefits.

The liability for an employee's vacation is not prorated among contractors unless specifically provided for in a particular WD. The contractor by whom a person is employed at the time the vacation right vests, i.e., on the employee's anniversary date of employment, must provide the full benefit required by the WD which is applicable on that date.

(f) Certified listing of employee anniversary dates.

In the case of a contract performed at a Federal facility where employees may be retained by a succeeding contractor, Reg 4.6(1)(2) provides that the incumbent prime contractor must furnish a certified list of all service employees on the contractor's or subcontractor's payroll during the last month of the contract, together with the anniversary dates of employment (with the incumbent as well as predecessor contractors) of each such employee, to the contracting officer not less than 10 days before contract completion. A copy of this list is to be provided to the successor contractor for determining employee eligibility for vacation FBs which are based on length of service with predecessor contractors (where such benefit is required by an applicable WD). Failure to obtain such employment data does not relieve a contractor from any obligation to provide vacation benefits.

(g) Rate applicable to computation of vacation benefits.

The rate applicable to the computation of vacation benefits is the applicable WD rate or employee's regular rate of pay, whichever is higher, at the time the vacation benefit is provided or a cash equivalent is paid. (See Reg 4.177(c)(2).) If an applicable WD requires that the hourly wage rate be increased during the period of the contract, the rate applicable to the computation of any required vacation benefits is the hourly rate in effect in the w/w in which the actual paid vacation is provided or the equivalent is paid, as the case may be, and would not be the average of two hourly rates. This rule would not apply to situations where a WD specified a different method of computation and the rate to be used (Reg 4.173(e)).

(h) Cash equivalent for vacation.

Where an employer elects to pay an hourly cash equivalent in lieu of a paid vacation, which is computed in accordance with Reg 4.177(c)(5), such payments need commence only after the employee has satisfied the "after one year of service" requirement. However, should the employee terminate employment for any reason before receiving the full amount of vested vacation benefits due, the employee must be paid the full amount of any difference remaining as a final cash payment. The rate applicable to the computation of cash equivalents for vacation benefits is the hourly wage rate in effect at the time such equivalent payments are actually made. (See subparagraph (f) above.)

14g04 Holiday pay.

(a) Most WDs list a specific number of named holidays for which payment is required. A full-time employee who is eligible to receive payment for a named holiday must receive a full day's pay up to 8 hours unless a different standard is used in the WD (such as one reflecting CBA benefit requirements issued pursuant to Sec 4(c) or a different historic practice in an industry or locality). Also, a full-time employee who works on the day designated as a holiday must be paid, in addition to the amount he/she ordinarily would be entitled to for that day's work, the cash equivalent of a full-day's pay up to 8 hours, or be furnished another day off with pay.

(b) An employee's entitlement to holiday pay fully vests by working in the w/w in which the named holiday occurs. Accordingly, any employee who is terminated before receiving the full amount of holiday benefits due must be paid the holiday benefits as a final cash payment.

(c) The principles for determining an employee's eligibility for holiday benefits and examples showing the basis on which a contractor's obligations for the payment of holiday benefits may be discharged are set forth in Reg 4.174, 4.176 and 4.177.

14g05 Temporary and part-time employees.

(a) The SCA makes no distinction between temporary, part-time, and full-time employees. In the absence of express limitations, the FBs specified in the WD apply to all temporary and part-time service employees engaged in covered work. However, in general, temporary and part-time employees are only entitled to an amount of the FBs specified in the WD which is proportionate (i.e. a pro rata share) to the amount of time spent in covered work.

(b) Holiday obligations to temporary and part-time employees who work an irregular schedule of hours may be discharged by paying such employees a proportion of the holiday benefits due full-time employees based on the number of hours each such employee worked in the w/w prior to the w/w in which the holiday occurs. With respect to vacations, the number of hours each such employee worked in the year preceding the employee's anniversary date of employment may be utilized to determine vacation benefits due. Examples illustrating the method of computing FBs for temporary and part-time employees are set forth in Reg 4.176.

14g06 Health, welfare, and pension benefits.

(a) Most WD's containing H & W and/or pension requirements specify a fixed payment per hour on behalf of each service employee. These payments are usually also stated as weekly or monthly amounts. Unless otherwise specified in the applicable WD, such payments are due for all hours paid for, including paid vacation, sick leave, and holiday hours, up to a maximum of 40 hours per week and 2,080 hours per year on each contract. If a WD specifies an FB which can be obtained for less than the amount of contribution required on the WD, the employer must make up the difference in cash to the employee, or furnish equivalent benefits, or a combination thereof. (See Reg 4.175(a).)

(b) In determining eligibility for H & W or pension benefits under WD's containing hours or length of service requirements (such as having to work 40 hours in the preceding month), the contractor must take into account time spent by employees on commercial work as well as time spent on the Government contract work.

(c) Some WD's specifically provide for H & W and/or pension benefits in terms of average cost. In such cases, a contractor's contributions per employee to a "bona fide" plan are permitted to vary, depending upon the individual employee's marital or employment status. However, the firm's total contributions for all service employees enrolled in the plan must average at least the WD requirements per hour per service employee. In determining average cost, "all hours worked" by service employees employed on the contract during the payment period must be counted, rather than the standard of "all hours paid for, up to a maximum of 40 hours per week". If the contractor's contributions average less than the amount required by the WD, the firm must make up the deficiency by making cash equivalent payments or equivalent FB payments to all service employees in the plan who worked on the contract during the payment period. (See example in Reg 4.175(b).)

(d) Some H & W and pension plans contain eligibility exclusions for certain employees. Also, employees receiving benefits through participation in plans of an employer other than the contractor or by a spouse's employer may be prevented from receiving benefits from the contractor's plan because of prohibitions against "double coverage". While such exclusions do not invalidate an otherwise bona fide plan, the employees excluded from participation in the plan must be furnished equivalent bona fide FB's or be paid a cash equivalent payment during the period they are not eligible to or choose not to participate in the plan.

(e) It is not required that all employees participating in an FB plan be entitled to receive payments from the plan at all times. For example, Reg 4.175(c) permits a contractor to claim credit for contributions made to FB plans on behalf of participating employees during periods of time when they may not be entitled to receive benefits (e.g., a 30-day "waiting period" under some insurance plans for newly hired employees). However, if no contributions are made for such employees, no credit may be taken toward the contractor's FB obligations.

(f) Payments to a "bona fide" insurance plan or trust program may be made on a periodic basis, which is not less often than quarterly. However, where the WD specifies a fixed contribution on behalf or each employee, and a contractor exercises the option to make hourly cash equivalent or differential payments, such payments must be made promptly on the regular payday for wages. (See Reg 4.175(d).)

(g) Compliance with fringe benefits requirements under SCA must be determined on a contract-by-contract basis. If an employee is performing on more than one contract subject to the Act, that employee must receive the full amount of fringe benefits to which he/she is entitled under each contract and each applicable wage determination. (See Reg 4.172.)