

Chapter 14

THE McNAMARA-O’HARA SERVICE CONTRACT ACT

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Chapter 14

THE McNAMARA-O'HARA SERVICE CONTRACT ACT

14a INTRODUCTION

14a00 Purpose and use of FOH Chapter 14.

This chapter supplements 29 C.F.R. Part 4, which contains the U.S. Department of Labor's regulations and interpretations with respect to the McNamara-O'Hara Service Contract Act of 1965, as amended.

14a01 The McNamara-O'Hara Service Contract Act (SCA or the Act).

The SCA (41 U.S.C. § 351, *et seq.*) applies to every contract 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. Contractors performing on such Federal service contracts in excess of \$2,500 must observe minimum wage and safety and health standards, and maintain certain records. Service employees on covered contracts in excess of \$2,500 must be paid not less than the monetary wages and fringe benefits contained in wage determinations issued by the U.S. Department of Labor (DOL) for the contract work. Such wage and fringe benefit determinations may reflect what has been determined to be prevailing in the locality, or may reflect the wage rates and fringe benefits contained in the predecessor contractor's collective bargaining agreement (CBA), if any, pursuant to Section 4(c) of the SCA. (*See* 29 C.F.R. Part 4.)

14a02 The Fair Labor Standards Act (FLSA).

The FLSA (29 U.S.C. § 201, *et seq.*) prescribes standards for the basic minimum wage and overtime pay that may affect SCA-covered contracts. The FLSA interacts with the SCA in three key ways:

- (a) Section 2(b)(1) of the SCA provides that no contractor or subcontractor shall pay any employee engaged in performing work on a covered contract less than the minimum wage specified under Section 6(a)(1) of the FLSA. (*See* 29 C.F.R. 4.159.)
- (b) Section 8(b) of the SCA defines the term "service employee" as any person engaged in the performance of a contract or that portion of a contract subject to the SCA except those employees in bona fide executive, administrative, or professional capacities as those terms are defined in the FLSA regulations found at 29 C.F.R. Part 541. (*See* 41 U.S.C. 357(b); 29 C.F.R. 4.113.)
- (c) Section 6 of the SCA recognizes that other Federal laws, such as the FLSA, may require overtime compensation to be paid to service employees working on or in connection with contracts subject to the SCA. (*See* 41 U.S.C. 355; SCA, 29 C.F.R. 4.180-4.182; FLSA 29 C.F.R. Part 778.)

14a03 The Contract Work Hours and Safety Standards Act (CWHSSA).

The SCA recognizes that other Federal laws, such as the CWHSSA, may require overtime compensation to be paid to service employees working on or in connection with contracts subject to the SCA. The CWHSSA is more limited in scope than the FLSA and generally applies to government contracts in excess of \$100,000 that require or involve the employment of laborers or mechanics, including guards and “watchmen.” (See SCA 29 C.F.R. 4.180-4.182; CWHSSA 29 C.F.R. 5.5(b).)

14a04 WDOL.gov website.

WDOL.gov (<http://www.wdol.gov>) provides a single website for access to federal contract labor standards information and wage determinations (WDs) issued under the SCA and the Davis-Bacon Act (DBA). (See 29 C.F.R. 4.4(c).)

14b GENERAL AND STATUTORY PROVISIONS**14b00 SCA - Statutory provisions.**

- (a) Absent an exemption under Sections 4(b) or 7 of the Act, Section 2(a) mandates that every contract entered into by any agency or instrumentality of the United States or the District of Columbia in excess of \$2,500, the principal purpose of which is to furnish services in the United States through the use of service of employees, must contain:
- (1) Specified minimum monetary wages (MWs) and fringe benefits (FBs) determined by the Secretary of Labor (S/L) that are based upon wage rates and fringe benefits prevailing in the locality (or, in certain circumstances, the wage rates and fringe benefits contained in a collective bargaining agreement, if any, applicable to employees who performed on a predecessor contract) to be paid to the various classes of service employees employed by the contractor or any subcontractor in performance of the contract or subcontract;
 - (2) A requirement that working conditions provided by or under the control of the contractor or subcontractor meet safety and health standards;
 - (3) A requirement that notice be given to service employees on the day they commence work of the compensation due them under the minimum wage and fringe benefit provisions of the contract (or that such notice be posted in a prominent place at the worksite); and
 - (4) A statement of the wage rates and fringe benefits that would be paid by the contracting agency to the various classes of service employees if such employees were hired directly by the agency to perform the contract work. This statement is included in contracts for informational purposes only.
- (b) The remaining sections of the SCA direct DOL to administer and enforce the Act, and give no authority to contracting agencies to issue final coverage determinations. DOL must ultimately decide any issue concerning coverage under the SCA. (*See* 41 U.S.C. 351 *et seq.*; 29 C.F.R. 4.101(b), 4.102.)

14b01 Coverage – general.

- (a) The SCA applies to 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* 29 C.F.R. 4.107-4.114.)
- (b) Specifications for services in a contract which is not as a whole principally for services are not subject to the SCA. (*See* 29 C.F.R. 4.111(a).)
- (c) Contracts for services which are performed essentially by employees that qualify for exemption as bona fide executive, administrative, or professional employees under the FLSA and involve only a minor or incidental use of service employees would not require application of the SCA. (*See* SCA 29 C.F.R 4.113(a)(3); FLSA 29 C.F.R. Part 541.)

- (d) The term “contractor” as used in the contract clauses required by the SCA also applies to any subcontractors. When a contractor undertakes a contract subject to the SCA, the contractor agrees to assume the obligations that the labor standards will be observed in furnishing the required services. These obligations may not be relieved by shifting all or part of the work to another, and the prime contractor is jointly and severally liable with any subcontractor for any underpayments that constitute a violation of the prime contract. (*See* 29 C.F.R. 4.114.)

14b02 Agency of the United States or District of Columbia.

- (a) Section 2(a) of the SCA covers contracts (and any bid specification therefor) “entered into by the United States or the District of Columbia,” and Section 2(b) applies to contracts entered into “with the Federal Government.” Within the meaning of these provisions, contracts entered into by the United States and contracts with the Federal government include all contracts to which any agency or instrumentality of the United States Government becomes a party. (*See* 29 C.F.R. 4.107.)
- (b) Contracts of the District of Columbia include all contracts of all agencies and instrumentalities of the District which procure services for, or on behalf of, the District or under the authority of the District. (*See* 29 C.F.R. 4.108.)

14b03 Contracts to furnish services.

- (a) Based on the language of the SCA, if a contract is “entered into” by or with the Government, and if its principal purpose is “to furnish services in the United States through the use of service employees,” it is subject to the SCA. (*See* 41 U.S.C. § 351(a).)
- (b) The SCA is intended to be applied to a wide variety of service contracts. To illustrate this point, the SCA regulations provide a listing of examples of contracts that have been found to come within its coverage. (*See* 29 C.F.R. § 4.130(a).)
- (c) The nomenclature, type, or particular form of contract used is not determinative of SCA coverage. Contracts can be in writing, the result of competitive bidding, awarded on a cost plus basis to a single source (“sole” source), a purchase order, or a telephone call to a contractor. (*See* 29 C.F.R. § 4.111(a).)
- (d) Contracts do not have to involve direct services to the government or an agency, nor do they require the expenditure of funds by an agency. Concessionaire contracts in which the contractor provides a service to individual personnel or the general public, for which he or she charges a fee to the user and then remits a portion of sale receipts to the government, are contracts for purposes of the SCA unless exempted. (*See* 29 C.F.R. 4.133; FOH 14d00.)

14b04 Geographical scope of the Act.

- (a) Currently, the SCA applies to the 50 States, the District of Columbia, Puerto Rico, the Virgin Islands, Outer Continental Shelf lands as defined in the Outer Continental Shelf Lands Act, American Samoa, Guam, Wake Island, Eniwetok Atoll, Kwajalein Atoll, Johnston Island, Canton Island and the Northern Marianas. (*See* 41 U.S.C. 357(d); 29 C.F.R. 4.112(a).)
- (b) The term “United States” excludes any United States base or possession within a foreign country. (*See* 29 C.F.R. 4.112(a).)

- (c) For contracts in which any part of the services will be performed within the geographic limits of the United States, the SCA and appropriate WD must be incorporated in the bid documents and contract, and the service employees must be paid the proper SCA rates for all hours worked within these geographic limits. Work performed outside the geographic limits of the United States, even if pursuant to a contract for services that is performed in part in the United States, is not subject to the requirements of the SCA. (*See* 29 C.F.R. 4.112(b).)

14b05 **“Service employee”.**

- (a) Section 8(b) of the Act defines “service employee” as any person engaged in the performance of a covered contract except those persons who individually qualify for an FLSA exemption as bona fide executive, administrative or professional employees as defined in FLSA 29 C.F.R. Part 541. (*See* 41 U.S.C. 357(b); 29 C.F.R. 4.113, 4.156; FOH 14c07.)
- (b) The SCA 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,” except those persons expressly exempted from the definition of “service employee.” If a person is engaged in performing any service 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. (*See* 29 C.F.R. 4.155.)
- (c) Employees who do not perform the services required by a contract in excess of \$2,500 principally for services, 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 specified under Section 6(a)(1) of the FLSA assuming such MW obligations apply. (*See* 41 U.S.C. 351(b)(1); 29 C.F.R. 4.153.)
- (d) Most occupational titles for service employees listed on SCA area-wide prevailing WDs are defined in the “Service Contract Act Directory of Occupations,” which can be accessed via the WDOL.gov website (<http://www.wdol.gov>).
- (e) Occupational titles contained in SCA WDs based on CBA provisions will be defined by the terms of the CBA. (*See* 29 C.F.R. 4.163(j).)

14b06 **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. (*See* 29 C.F.R. 4.159.)
- (b) **Contracts exceeding \$2,500.**

In every covered contract in excess of \$2,500 or with no definite amount, the agency is required to include the SCA labor standards contract clauses set forth in 29 C.F.R. § 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 Sections 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 Section 6(a)(1) of the FLSA. (*See* 29 C.F.R. 4.6, 4.150, 4.159.)

- (c) The labor standards contract clauses included in the prime contract are by their terms required to be included as well in any subcontract or any lower tier subcontract made thereunder. (*See* 29 C.F.R. 4.114, 4.151.)

(d) **Contracts not exceeding \$2,500.**

The only clause required in Federal service contracts of \$2,500 or less is the clause reflecting the basic provisions of Section 2(b)(1) of the SCA relating to the payment of the MW required by Section 6(a)(1) of the FLSA to employees engaged in performing work on the contract. However, pursuant to Section 18 of the FLSA, no provision of the FLSA shall excuse noncompliance with any federal, state or local law establishing a MW higher than the FLSA MW. WHD staff will not interpret or enforce any law other than those administered by the WHD, and States cannot interpret or enforce the SCA or FLSA. (*See* 41 U.S.C. 351(b)(1); 29 C.F.R. 4.150; FOH 32j01.)

(e) **Determining contract amount.**

The value of the contract is determined by either the amount to be paid for the service or the amount which the contractor receives for providing the service. For example, concession contracts are considered to be contracts in excess of \$2,500 if the contractor's gross receipts under the contract may exceed \$2,500. (*See* 29 C.F.R. 4.141.)

(f) **CWHSSA contract clauses.**

Any federal contract in excess of \$100,000 that requires or involves the employment of “laborers” and “mechanics,” including “watchmen” and guards, is subject to the overtime provisions of CWHSSA. Such contracts, which may include SCA-covered contracts that employ many classes of service employees that fall within the terms “laborers” and “mechanics,” should include CWHSSA’s contract clauses set forth in 29 C.F.R. 5.5(b). However, failure to incorporate the CWHSSA contract clauses into a contract does not preclude CWHSSA coverage. (*See* SCA 29 C.F.R. 4.181(b); Davis-Bacon Act (DBA) 29 C.F.R. 5.5(b); FOH 15g02.)

14b07 **Child labor.**

The SCA contains no CL requirements. However, if the employer is covered under the FLSA, the FLSA CL provisions are applicable. (*See* FLSA 29 C.F.R. Parts 570 and 579; FOH 33.)

14c EXEMPTIONS AND EXCLUSIONS**14c00 Statutory exemptions.**

- Section 7 of the Act specifically exempts from coverage seven types of contracts (or work) which might otherwise be subject to the SCA. (*See* 41 U.S.C. 356(1) - (7); 29 C.F.R. 4.115-4.122.)
- (a) Any contract covered by the DBA for construction, alteration and/or repair, including painting and decorating of public buildings or public works. (*See* 41 U.S.C. 356(1); 29 C.F.R. 4.116.)
 - (b) Any work required to be done in accordance with the provisions of the PCA. (*See* 41 U.S.C. 356(2); SCA 29 C.F.R. 4.117; 41 U.S.C. 35, *et seq.*; PCA 41 C.F.R. Part 50-201.)
 - (c) Any contract for the carriage of freight or personnel by vessel, airplane, bus, truck, express railway line or oil or gas pipeline where published tariff rates are in effect. (*See* 41 U.S.C. 356(3); 29 C.F.R. 4.118.)
 - (1) This exemption applies only to contracts for carriage by a common carrier. A transportation service contract is exempt only if the service is actually governed by published tariff rates in effect pursuant to State or Federal law. The contracts between the Government and the carrier would be evidenced by a Government “bill of lading” citing published tariff rates. (*See* AAM No. 185.)
 - (2) This exemption typically does not apply to contracts for ambulance or taxicab services as they are usually not deemed common carriers or governed by published tariff rates.
 - (3) Mail haul contracts are not exempt because “mail” is not considered to be “freight” under Federal law.
 - (4) Contracts principally for packing, crating, and warehousing of household goods are also not exempt (even if performed by a “common carrier”) as the primary purpose of the contract is the warehousing (*i.e.*, storage) of household goods, while the local hauling is a minor, incidental purpose of the contract. (*See also* FOH 14c05.)
 - (d) Any contract for the furnishing of services by radio, telephone, telegraph, or cable companies subject to the Communications Act of 1934, 47 U.S.C. 151, *et seq.* (*See* 41 U.S.C. 356(4); 29 C.F.R. 4.119.)
 - (1) This exemption does not apply to any contracts where such companies are furnishing other kinds of services through the use of service employees.
 - (2) The Communications Act of 1934, has been amended by the Telecommunications Act of 1996. (See P.L. 104 - 104, 47 U.S.C. 151, *et seq.* (1996).)
 - (e) Any contract for public utility services, including electric light and power, water, steam, and gas. (*See* 41 U.S.C. 356(5); 29 C.F.R. 4.120.)

- (1) This exemption is applicable to contracts for such services with companies whose rates are regulated under federal, state, or local law governing operations of public utility enterprises.
 - (2) Contracts covered by this exemption include those between federal electric power marketing agencies and investor-owned electric utilities, Rural Electrification Administration cooperatives, municipalities, and state agencies engaged in transmission and sale of electric power and energy.
 - (3) Contracts entered into with public utility companies to furnish services through the use of service employees, other than those subject to “rate regulation”, are not exempt from the SCA.
- (f) Any employment contract providing for direct services to a federal agency by an individual or individuals. (*See* 41 U.S.C. 356(6); 29 C.F.R. 4.121.)
- (g) Any contract with the U.S. Postal Service, the principal purpose of which is the operation of postal contract stations. (*See* 41 U.S.C. 356(7); 29 C.F.R. 4.122.)

14c01 **Other exemptions.**

- Section 4(b) of the SCA as amended in 1972 authorizes the S/L (delegated to the Administrator) to “provide such reasonable limitations” and to “make such rules and regulations allowing reasonable variation, tolerances, and exemptions to and from any or all provisions of this [Act (other than Section 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.” (*See* 41 U.S.C. 353(b); 29 C.F.R. 4.123.)
- (a) The following types of contracts have been exempted from all of the provisions of the SCA pursuant to Section 4(b):
- (1) 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. (*See* 29 C.F.R. 4.123(d)(1).)
 - (2) 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 such as vacation, or for unexpected contingencies or emergency situations such as illness or accident. Application of this exemption depends on conditions existing at the time the contract is made. If the criteria for the exemption have been met, then SCA WD requirements would not apply to anyone subsequently engaged in the performance of the contract services during the term of the contract for reasons within the limitations described in 29 C.F.R. 4.123(d)(2). The term owner-operator refers to an individual, not a partnership, two closely related individuals (“mom & pop operations”), or a corporation.

- (3) Contracts for the carriage of freight or personnel where such carriage is subject to rates covered by Sec 10721 of the Interstate Commerce Act. (*See* 29 C.F.R. 4.123(d)(3).);
- (4) Prime contracts and subcontracts for the seven types of “commercial services” identified immediately below where an employee’s work on a Government service contract represents a small portion of time when compared to the balance of time spent on commercial work and where additional specific criteria for exclusion from SCA coverage are satisfied. This exemption does not apply to solicitations and contracts for any of the seven services listed below that are: (1) entered into under the Javits-Wagner-O’Day Act, 41 U.S.C. 47; (2) for the operation of a Government facility or portion thereof (“GOCO” or “GOPO”) (but may apply to subcontracts); or (3) subject to Section 4(c) of the SCA, as well as options or extensions under contracts subject to Section 4(c) provisions. (*See* 29 C.F.R. 4.123(e)(2).) The seven commercial services are:
 - a. Automotive (fleet of automobiles) or other vehicle (*e.g.*, aircraft) normal maintenance services (other than contracts to operate a Government motor pool). (*See* 29 C.F.R. 4.123(e)(2)(i)(A).)
 - b. Financial services involving the issuance and servicing of cards (including credit cards, debit cards, purchase cards, smart cards, and similar card services) for use by traveling Federal employees or to make small purchases of commercial items to meet the day-to-day needs of a Federal agency. (*See* 29 C.F.R. 4.123(e)(2)(i)(B).)
 - c. Contracts with hotels/motels for conferences of limited duration (*e.g.*, 1-5 days) that may include lodging, meals, and space (*e.g.*, conference rooms) as part of the contract. This exemption does not cover contracts for lodging on an as needed or continuing basis (*e.g.*, lodging for military recruits or for employees attending training at a training center over a longer period of time). (*See* 29 C.F.R. 4.123(e)(2)(i)(C).)
 - d. Maintenance, calibration, repair, and/or installation (not subject to the DBA, as provided in 29 C.F.R. 4.116(c)(2)) for all types of equipment where the services are obtained from the manufacturer or supplier under a contract awarded on a sole source basis. (*See* 29 C.F.R. 4.123(e)(2)(i)(D).)
 - e. Transportation by common carrier of persons by air, motor vehicle, rail, or marine vessel on regularly scheduled routes or via standard commercial services (*e.g.*, “City Pairs” contracts) (does not include charter services). (*See* 29 C.F.R. 4.123(e)(2)(i)(E).)
 - f. Real estate services, including real property appraisal services related to housing Federal agencies or disposing of real property owned by the Federal government. (*See* 29 C.F.R. 4.123(e)(2)(i)(F).)
 - g. Relocation services, including services of real estate brokers and appraisers, to assist Federal employees or military personnel in buying and selling homes (which shall not include actual moving or storage of household goods and related services). (*See* 29 C.F.R. 4.123(e)(2)(i)(G).)

- (b) The following categories of service employees have a variation to the prevailing wage requirements pursuant to Section 4(b):

(1) *Workers with disabilities -*

The SCA, like the FLSA, allows an employer to pay apprentices, student-learners, workers with disabilities in competitive employment, and workers with disabilities in rehabilitation facilities at special minimum wages (SMWs) that are less than the prevailing wages required by the WD. The SCA 29 C.F.R. 4.6(o) instructs the employer to follow the same "conditions and procedures" required for the employment of such workers as are set forth in Section 14 of the FLSA. This regulatory exception is from the prevailing wage only. Employers are still required to pay the full FBs, or equivalent cash payment in lieu of providing FBs, to service employees with disabilities for the work performed. (*See* 29 C.F.R. 4.6(o)(1) and 4.152(c)(2).) A SMW or commensurate wage will be based upon the prevailing wage listed in the applicable SCA WD for the classification of work to be performed on the contract. It will be determined by the individual productivity of the workers with disabilities in proportion to the productivity of experienced workers without disabilities who perform essentially the same type, quality, and quantity of work. (*See* SCA 29 C.F.R. 4.6(o)(1); FLSA 29 C.F.R. Part 525)

(2) *Apprentices -*

Apprentices will be permitted to work at less than the SCA predetermined rate for the work they perform when they are employed and individually registered in a bona fide apprenticeship program registered with a State apprenticeship agency that is recognized by DOL, or, if no such recognized agency exists in a State, under a program registered with the Office of Apprenticeship, ETA, DOL. The terms and conditions of the approved program will be followed in the employment of apprentices. Wage rates paid apprentices must not be less than the wage rate for their level of progress set forth in the registered program, usually expressed as a percentage of the journeyworker's rate in the applicable WD. The allowable ratio of apprentices to journeyworkers employed on the contract work must not be greater than the ratio permitted to the contractor under the registered program. Any employee who is not registered as an apprentice in an approved program must be paid the wage rate and FBs contained in the applicable WD for the journeyworker classification of work actually performed. (*See* 29 C.F.R. 4.6(p).)

14c02 Maintenance and repair of certain ADP, scientific, medical, office, and business equipment.

- (a) Pursuant to Section 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 equipment;
- (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;

- (3) Office/business machines not otherwise exempt under (1) above, where such services are performed by the manufacturer or supplier of the equipment.
- (b) This exemption is limited to the servicing of only the listed items of equipment furnished to the government that are also furnished commercially to the general public. The contract services must be furnished at catalog or market prices, and the contractor must utilize the same compensation plan for service employees performing on government work as it uses for its employees who service such equipment for commercial customers. 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* 29 C.F.R. 4.123(e)(1).)

14c03 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 the DBA. (*See* 29 C.F.R. 4.116.) 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 DBA would be applicable.
- (b) 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.

14c04 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.” (*See* 41 U.S.C. 356(2); FOH 14c00(b).)
- (b) The regulations provide 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 so long as the work is performed in a facility owned and operated by the contractor. Contracts for routine maintenance or repair, inspection, etc., continue to be subject to the SCA. (*See* 29 C.F.R. 4.117.)
- (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 the SCA or PCA to any type of contract not discussed in the regulations will be decided on a case-by-case basis by the Administrator. (*See* 29 C.F.R. 4.117(b)(4).)

14c05 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 Section 7(3) exemption to apply. An administrative exemption has also been provided for certain contracts where such carriage is subject to Section 10721 of the Interstate Commerce Act. (*See* 41 U.S.C. 356(3); 29 C.F.R. 4.118, 4.123(d)(3); FOH 14c00(c).)
- (b) The Section 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 Section 7(3) exemption would apply to that contract. (*See* 29 C.F.R. 4.118; FOH 14c00(c).)

14c06 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 Section 7(1) exemption (*i.e.*, such work is DBA-covered, except as provided in (b) below). Thus, for example, the SCA will not apply to contracts for the alteration and repair of merchant ships let by the Maritime Administration. (*See* 41 U.S.C. 356(1).)
- (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 Section 7(2) exemption for work subject to the PCA. (*See* 10 U.S.C. 7299; 41 U.S.C. 356(2).)
- (c) A contract that 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* 15d11.)

14c07 Contracts which have as their principal purpose the procurement of a type of service where service employees will not be used.

- (a) Coverage of the Act does not extend to contracts for services to be performed exclusively by persons who are not service employees, *i.e.*, persons who qualify as bona fide executive, administrative, or professional personnel as defined in the FLSA regulations found at 29 C.F.R. Part 541. For example, a contract for professional services performed essentially by bona fide professional employees, with the use of service employees being only a minor factor in contract performance, is not covered by the SCA. However, a contract for professional services that requires the use of service employees to a significant or substantial extent (in terms of number of employees or hours worked) is covered by the SCA, even though professional employees may be used in the performance of the contract. (*See* 41 U.S.C. 357(b); 29 C.F.R. 4.113(a)(3), 4.156; FOH 14b05.)

- (b) In practice, a 10 to 20 percent guideline has been used to determine whether there is more than a minor use of service employees. (*See* Preamble at 48 Fed. Reg. 49736, 49743-44 (Oct. 27, 1983).)
- (c) Coverage of the Act will not extend to contracts where it is contemplated that the services will be performed individually by the contractor, and the contracting officer knows when advertising for bids or concluding negotiations that service employees will in no event be used by the contractor in providing the contract services. (*See* 29 C.F.R. 4.113(a).)

14d COVERED SCA CONTRACTS

The SCA applies to a wide variety of contracts. The SCA does not define or limit the types of services that may be contracted for under a contract entered into by the United States or the District of Columbia. (*See* 41 U.S.C. 351(a); 29 C.F.R. 4.110.)

14d00 Beneficiary of contract services – concessionaires, etc.

- (a) Where the principal purpose of a Government contract is to furnish services through the use of service employees, the contract is subject to the 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 SCA coverage. (*See* 29 C.F.R. 4.133(a).)
- (b) An administrative exemption is provided in 29 C.F.R. 4.133(b) for certain concession contracts, such as those entered into by the National Park Service, including National Forests and in the National Wildlife Refuge System, 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. This exemption does not affect a concession contractor's obligation to comply with the labor standards provisions of any other statutes such as the CWHSSA, DBA, and FLSA. (*See* 29 C.F.R. 4.133(b).)
- (c) Questions arise in distinguishing between a contract whose principal purpose is the furnishing of services through the use of service employees (subject to the 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 the SCA.
 - (1) For example, where the concession 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 service, the contract would generally be considered to have as its principal purpose the furnishing of services desired by the Government for its personnel, and be subject to the SCA. (*See* 29 C.F.R. 4.133(a).)
 - (2) In contrast, SCA coverage would not be asserted on a concession contract or agreement which merely requires a contractor to comply with general police regulations designed to control traffic, maintain order, and suppress nuisances. SCA coverage would not be asserted where the requirements imposed by the contract or agreement on the contractor are limited to such matters 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.

14d01 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 the 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 the 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 the 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 Section 2(b) of the Act. (*See* 29 C.F.R. 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.

14d02 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 (in which case they would be DBA covered). (*See* FOH 15d05.)

14d03 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* 29 C.F.R. 4.131(a) and (e).) Thus, while professional services may be involved and individual employees may be exempt under FLSA 29 C.F.R. Part 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. (*See* 29 C.F.R. 4.130(a)(21); FOH 14c07.)

14d04 Surveying and mapping services.

Contracts for surveying and mapping services for transmission lines, highways, dams, etc., are subject to the SCA, even if they are preliminary to construction. Such contracts would not be subject to the SCA if they are directly related to construction (instead, they would be DBA covered). (*See* 29 C.F.R. 4.130(a)(46).)

14d05 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. If there is no general contractual agreement between the Government and a particular establishment for the provision of these services, SCA coverage will not be asserted.
- (c) Under the “commercial services” exemption, food and lodging contracts at hotels and motels for meetings and conferences of limited duration (one to five days) are excluded from SCA requirements if certain criteria are met. (*See* 29 C.F.R. 4.123(e)(2)(i)(C); FOH 14c01(a)(4)(c).)

14d06 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.

14d07 Contracts with States and political subdivisions.

A State or political subdivision 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* 29 C.F.R. 4.110.)

14d08 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 (if further construction were contemplated, the contract would be subject to the DBA), even though the contractor may receive salvaged materials. (*See* 29 C.F.R. 4.116(b), 4.131(f); FOH 15d03.)
- (b) If the principal purpose of a demolition contract is the sale of material, and services provided thereunder are incidental to the sale, the contract would not be covered by the SCA.
- (c) Asbestos or paint removal performed as a prelude to or in conjunction with a contract for the demolition of a public building or a public work would be subject to the SCA, if subsequent construction on the site is not contemplated. (*See* 29 C.F.R. 4.131(f).)

14d09 Contracts for disaster relief.

The SCA applies to cleanup, debris removal or damage assessment contracts awarded by a Federal agency. The U.S. Army Corps of Engineers, on behalf of the Federal Emergency Management Administration (FEMA), awards cleanup and assessment contracts in disaster areas. FEMA, too, may award service contracts following a disaster or in an emergency situation.

14d10 Contracts for scheduled or routine maintenance of building systems.

The SCA applies to contracts for scheduled or routine maintenance of building systems, including such operations as filter changing, oiling and greasing, gas or fluid replacement or loading, and cleaning. Such contracts are generally awarded on an annual basis calling for scheduled maintenance or troubleshooting (inspection) checks throughout that year. (*See* 29 C.F.R. 4.117(b)(3).)

14d11 Contracts for intermittent labor services.

The SCA applies to all contracts, purchase orders, or agreements, whether written or oral, which have as their principal purpose the furnishing of services through the use of service employees. (*See* 29 C.F.R. 4.110.) An "as needed" agreement with a contractor under which arrangements are made for individual calls or orders for intermittent labor services constitutes a contract in an indefinite amount. The individual calls or orders under this arrangement are subject to the WD provisions of Section 2(a) of the Act. The particular form of a contractual arrangement is immaterial, and contract amount is not determined by the amount of any individual call. (*See* 29 C.F.R. 4.142(a) and (b).)

14d12 Furnishing services involving more than use of labor.

- (a) If the principal purpose of a contract is to furnish services through the use of service employees, the SCA will apply even though the furnishing of non-labor items (such as tangible items to be supplied to the Government) may be an important element in the furnishing of services called for in the contract. (*See* 29 C.F.R. 4.131(a).)
- (b) Examples of covered contracts to furnish services through the use of service employees where the furnishing of non-labor items are an important element of the contract:
 - (1) Contracts for the maintenance and repair of typewriters that require the contractor to furnish typewriter parts as the need arises in performing the contract services does not change the principal purpose of the contract, which is to furnish maintenance and repair services through the use of service employees. (*See* 29 C.F.R. 4.131(b).)
 - (2) Contracts to supply a Government agency with freshly laundered items on a rental basis are covered as the principal purposes of these contracts are to launder and deliver tangible items through the use of service employees who launder and deliver such items. (*See* 29 C.F.R. 4.131(c).)

- (3) Contracts for the plowing and reseeded of a park area are covered service contracts even though the contractor is required to rent and furnish equipment. In general contracts under which the contractor agrees to provide the Government with vehicles or equipment on a rental basis with drivers or operators for the purpose of furnishing services are covered by the SCA. (*See* 29 C.F.R. 4.131(d).)
- (4) Contracts for data collection, surveys, computer services and the like are covered contracts, even though the contractor may be required to furnish tangible items such as written reports or computer printouts, as such items are considered to be of secondary importance to the services procured under the contract. (*See* 29 C.F.R. 4.131(e).)
- (5) Contracts for property removal or property disposal where the contractor receives tangible items in lieu of or in addition to monetary consideration are covered where the facts show that the furnishing of such services is the principal purpose of the contract. (*See* 29 C.F.R. 4.131(f); *see also* FOH 14e08.)

14d13 Services and other items to be furnished under a single contract.

The SCA applies only where a contract **as a whole** is principally for the furnishing of services as opposed to line items for specific work in a contract. The SCA reference to “bid specification” refers to the advertised specifications in a solicitation for bids rather than a separate line item or work requirement within a contract. (*See* 29 C.F.R. 4.132.)

14e CONTRACTS NOT SUBJECT TO SCA PROVISIONS**14e00 Government-owned – contractor operated (GOCO) prime contracts.**

A federal agency may enter into a contract in which the prime contractor is delegated the authority to act for and on behalf of the Federal agency (*i.e.*, as an agent of the U.S. Government). In such situations, if the principal purpose of the prime contract is not the furnishing of services through the use of service employees (*e.g.*, a contract to totally operate or manage a Federal installation or facility or a Federal program), then the prime contract would not be subject to the SCA. Such contracts are commonly referred to as "GOCO" contracts (Government owned-contractor operated). When such a prime contractor acting as an agent of the Government pursuant to delegated authority enters into a subcontract, which has services as its principal purpose, then such subcontract would be covered by the SCA. (*See* 29 C.F.R. 4.107(b).)

14e01 Federally-assisted contracts for services.

Service contracts entered into by State or local public bodies with contractors are not deemed to be entered into by the United States merely because such services are paid for with funds received from the Federal Government as a grant under a Federal program. For example, contracts let under the Medicaid program which are financed by Federally-assisted grants to the States, and contracts which provide for insurance benefits to a third party under the Medicare program, are not subject to the SCA. (*See* 29 C.F.R. 4.107(b), 4.134(a).)

14e02 Medical and related services.**(a) Contracts with hospitals for patient care.**

The SCA is not applicable to contracts with hospitals for the care of patients. For example, the SCA would not be applicable to agreements with the Social Security Administration under which patient care services are furnished by hospitals participating in the Medicare program. (*See* 29 C.F.R. 4.107(b).)

(b) Contracts with nursing homes.

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

(c) Contracts for ambulance services.

Generally, the SCA is not applicable to ambulance services furnished pursuant to contracts for Medicare or Medicaid. Federal contracts for the furnishing of ambulance services (*e.g.*, VA hospitals), however, are covered by the SCA as the exemption provided by Section 7(3) of the Act does not apply. (*See* 29 C.F.R. 4.118.)

14e03 Job Corps facilities.

The SCA is not applied to prime contracts entered into by the DOL with private firms for the operation of a Job Corps facility. The SCA, however, may apply to secondary or subcontracts let by such contractors if the principal purpose of these contracts is the furnishing of services through the use of service employees. Such service contracts awarded for or on behalf of the Job Corps facility by its operating contractor will be subject to the SCA to the same extent and under the same conditions as if they were awarded by the Government directly. (*See* 29 C.F.R. 4.107(b).)

14e04 Job Training Partnership Act contracts.

- (a) The SCA is not applicable 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 ETA programs.
- (b) 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.

14e05 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 to 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) Contracts entered into between the National Guard Bureau, DOD, and State National Guard units that provide for the acquisition of services for the direct benefit or use of the National Guard Bureau and signed by a U.S. Property and Fiscal Officer would be subject to the SCA.

14e06 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. “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 “section 8(a)” program, are covered by the SCA. (*See* 29 C.F.R. 4.110.)

14e07 Government contracts whose principal purposes are something other than services.

- (a) **Contracts for lease of building space for Government occupancy.**

Where the Government contracts for a lease of building space for occupancy and the building owner furnishes general janitorial and other building services on an incidental basis through the use of service employees, the leasing of the space rather than the furnishing of building services is the principal purpose of the contract, and the SCA would not apply. (*See* 29 C.F.R. 4.134(b).)

(b) **Contracts for the rental of parking space.**

This type of contract is outside the coverage of the SCA as the Government agency is simply given a lease or license to use the contractor's real property. Such a contract can be distinguished from contracts for storage of vehicles which are delivered into the possession or custody of the contractor, who will provide the required services including the parking or retrieval of the vehicles. (*See* 29 C.F.R. 4.134(b).)

14e08 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* 29 C.F.R. 4.131(f).)
- (b) The SCA would apply to service contracts that 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.

14e09 Storage and/or sale of surplus farm commodities.

Department of Agriculture contracts or agreements (usually designated as "Uniform (commodity name) Storage Agreement") awarded by or on behalf of the Commodity Credit Corporation (CCC) pursuant to various price support programs for the storage, handling, and/or sale of surplus farm commodities, including grain, cotton, tobacco, seeds, naval stores, dairy products, etc., by commercial warehouse establishments, are exempt from the PCA (*see* Section 12 of R & I No. 3), and a CWHSSA exemption has been granted for most of these contracts. (*see* 29 C.F.R. 5.15(b)(2).) WH has taken no position on the application of the SCA to such contracts.

14f APPLICATION OF THE SCA TO TYPES OF EMPLOYEES**14f00 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 CWHSSA 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* 29 C.F.R. 5.15(d)(3) for the variation from the CWHSSA OT requirements for pilots and co-pilots performing on contracts for firefighting or suppression and related services.)

14f01 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 are “service employees” under the SCA. This includes, among others, barbers, shoe-shiners, beauticians, and manicurists. (*See* FOH 14d00.) (Such employees are also “laborers and mechanics” for purposes of the CWHSSA.)

14f02 Flight instructors - contracts for flight training.

Flight instructors, who qualify for exemption as teachers under FLSA 29 C.F.R. 541.303, are not “service employees” for purposes of the SCA. (*See* FOH Chapter 22)

14f03 Air traffic control instructors.

To be “teachers” and consequently exempt from coverage under the SCA pursuant to Section 8(b) of the Act as a professionally exempt teacher under the FLSA, air traffic control instructors must be FAA “Certified Professional Controllers” in accordance with Regulations 14 C.F.R. Part 65, must successfully complete the FAA “Facility Instructor Training Course” furnished by the FAA Academy, and must, as their primary duty, deliver instruction by using FAA-certified curriculum in classes and laboratories funded by the FAA. (*See* FLSA 29 C.F.R. 541.303; SCA 29 C.F.R. 4.113(a)(2) - (3); Opinion letter dated 6-2-04 to FAA.)

14f04 Computer-related occupations.

Computer systems analysts, computer programmers, software engineers or other similarly skilled workers in the computer field who qualify for exemption under 29 C.F.R. 541.400 would not be “service employees” for purposes of the SCA. (*See* 29 U.S.C. 213(a)(1) and 13(a)(17); FOH Chapter 22)

14g SPECIAL RULINGS AND INTERPRETATIONS**14g00 Segregation: SCA-covered and non-covered work.**

If a contractor desires to segregate covered work from non-covered work under the 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 non-covered 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* 29 C.F.R. 4.169, 4.179.)

14g01 Segregation: employees performing work in more than one classification.

- (a) If an employee performs work which can be clearly identified and segregated under more than one job classification listed in the applicable WD, *i.e.*, working in different capacities in the performance of the contract, then the time spent by the employee in work properly related to each classification should be segregated and paid according to the wage rate specified for each classification. If the contractor cannot provide affirmative proof (employer records) of the hours spent in each class of work, then the contractor must pay the employee the highest of such rates for all hours worked in the workweek. (*See* 29 C.F.R. 4.169.)
- (b) Working in “different capacities” applies only to work in different job classifications (*e.g.*, janitors and window cleaners as defined in the SCA Directory of Occupations), not to levels within the same job classification (*e.g.*, security guards I and II as defined in the SCA Directory of Occupations). Thus, for example, segregating work performed by an employee as security guard I and II would not be permitted. In such a situation, the employee must be paid the highest rate listed in the WD for security guards (*i.e.*, security guard II rate) for all hours worked in the workweek on the covered contract.

14g02 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 as described below. 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 the FLSA 29 C.F.R. 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 that 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 training time for such employees would be compensable work time, but not at the compensation level provided in the applicable WD as the contract services for which wage rates and fringe benefits are

specified in the applicable WD are not being performed. The contractor must pay wages for this training time at rates not less than the MW specified under Section 6(a)(1) of the FLSA and Section 2(b)(1) of the SCA, unless otherwise specified in the applicable WD. (*See* 29 C.F.R. 4.146)

- (b) Time spent in on-the-job training (*i.e.*, after start of contract performance at the job site) must be paid for at not less than the SCA MW/FB specified for the guard classification listed in the WD included in the contract.

14g03 Mail haul contracts hours worked issues.

- (a) The basic principles for determining hours worked by a truck driver on duty for 24 hours or more as set forth in FOH 31b09 and 31b12 are applicable to SCA mail haul truck drivers.
- (b) Time during which an employee is considered on or off duty by the Department of Transportation is not governed by the same principles as apply under the FLSA. The DOT's regulations are concerned primarily with the safe operation of the vehicle and not compensable hours worked. Thus, the off-duty time required by DOT for safety purposes may exceed the amount of sleep time or other non-working time that may be deducted pursuant to FOH 31b09 or 31b12.
- (c) The principles set forth in FLSA 29 C.F.R. 785.14 through 785.22 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. If a contractor chooses to pay for layover and breakdown time, which would otherwise not be considered hours worked under FLSA 29 C.F.R. 785, for the purpose of not breaking a driver's continuous tour of duty on tours of 24 hours or more, then such time must also be paid at the applicable SCA WD rate.
- (d) WH considers the totality of the circumstances in determining whether layover or breakdown time is hours worked. Small remote towns with few amenities often do not provide an opportunity for an employee to use the time effectively for his own purposes. In such cases, the layover or breakdown time would be considered hours worked and compensation must be no less than the SCA WD rate.
- (e) **Overtime exemption applicable to mail haul contracts.**

Section 13(b)(1) of the FLSA provides an overtime exemption for employees who are within the authority of the Secretary of Transportation to establish qualifications and maximum hours of service pursuant to Section 204 of the Motor Carrier Act of 1935. On June 14, 1972, the Department of Transportation published a notice in the Federal Register (37 Fed. Reg. 11781) asserting its power to establish qualifications and maximum hours of service for contract mail haulers who operate in interstate or foreign commerce.

The FLSA's § 13(b)(1) exemption may therefore apply to certain employees of contract mail haulers, provided the tests for that exemption are met. See 29 C.F.R. § 782.8(b). Note, however, that drivers, driver's helpers, loaders, and mechanics, whose duties affect the safety of operation of a vehicle engaged in transportation on public highways in interstate or foreign commerce and who would otherwise satisfy the exemption, are nonetheless required to be paid overtime compensation if the vehicle used for mail haul purposes weighs 10,000 pounds

or less. This is known as the “small vehicle exception” to the motor carrier exemption. The small vehicle exception applies and overtime pay is due to an employee in any workweek when the employee’s work, “in whole or in part,” affects the safety of operation of a small vehicle. The phrase “in whole or in part” means an employee who performs such duties involving small vehicles for the entire week or part of the week must receive overtime pay for hours worked over 40 in that workweek.

Note that the small vehicle exception will not apply to certain vehicles A) designed or used to transport more than 8 passengers (including driver) for compensation, B) designed or used to transport more than 15 passengers (including driver) and not used to transport passengers for compensation, or C) used in transporting hazardous material requiring placarding under regulations prescribed by the Secretary of Transportation. See Fact Sheet #19 and FAB 2010-2.

- (f) In addition, the CWHSSA exempts all Federal contracts "for transportation by land, air or water" from its provisions for overtime pay. The overtime provisions of this statute would also not apply to employees working on USPS mail hauling contracts. (*See* 40 U.S.C. 3701(b)(3); FOH 15i00(2) & 15i01(c).)

- (g) **Applicable wage rate.**

The wage rate applicable to mail haul truck drivers is based upon the point of origin of the route required by the contract. This point of origin is commonly referred to as the “head out” point. The “head out” rate is applicable to all drivers who work on the contract regardless of where they may start their portion of the route.

14g04 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 contract, 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 is 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 below the required rate, the employer must bear the cost of providing clean uniforms and equipment up to the amount of any such deficiency. (*See* 29 C.F.R. 4.168(b).)
- (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 by the employee 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* 29 C.F.R. 4.168(b); FOH 30c12.)

- (c) Where uniform cleaning and maintenance is the responsibility of the employee, a contractor may satisfy its wage obligation under the Act by reimbursing employees \$3.35/wk or \$.67/day for such cleaning and maintenance. (*See* 29 C.F.R. 4.168(b)(1)(ii).)
- (d) 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 Section 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. (*See* 29 C.F.R. 4.168(b)(2).)

14g05 Military base installation contracts.

Operations and maintenance contracts let by the military whose principal purpose is to provide services may be subject to both the SCA and the DBA where there are substantial and segregable amounts of construction. When it is unclear whether the work required is SCA maintenance or DBA repair/painting, and where individual work orders have repair work that requires less than 32 hours to complete or painting of less than 200 square feet, WH will consider such work to be subject to the SCA. Work orders that exceed these amounts are subject to the DBA.

14g06 Military housing privatization.

Maintenance services performed on military housing constructed or managed under the Military Housing Privatization Initiative is not subject to the SCA as the contract is not principally for services. (*See* Administrator Letter dated December 20, 2006.)

14h SCA WAGE DETERMINATION/CONFORMANCE PROCESSES**14h00 SCA Wage Determinations (WDs).**

- (a) The SCA WD sets forth the MWs and FBs that contractors and their subcontractors must pay service employees working on covered contracts. (*See* 29 C.F.R. 4.3(a).)
- (1) Wages are defined as monetary compensation provided to employees. They are usually listed in the WD as hourly rates.
 - (2) The FBs specified in the WD depend upon the type of WD issued and the evaluation of source data used to develop the WD.
- (b) Most WDs are revised periodically, as new wage and benefit survey data become available. If a WD is properly included in the contract at the time of award, the contract does not need to be modified to include subsequent revisions to the WD prior to completion of the first year of the contract. (*See* 29 C.F.R. 4.5(a)(2).)
- (c) Section 10 of the Act requires a WD to be made by WH for every covered service contract in excess of \$2,500 and employing six or more service employees. If five or fewer service employees are employed under a contract, the contracting agency should obtain a WD, and if one is available, incorporate it into the contract. WH is not required by the Act to issue a WD for covered contracts that exceed \$2,500 with five or fewer service employees, but the contracting agency should still seek to obtain one. In instances where no WD has been issued for a service contract involving five or fewer service employees, the contractor can pay no less than the MW required by Section 6(a)(1) of the FLSA. (*See* 29 C.F.R. 4.2, 4.3(a), 4.4(b)(1).)
- (d) **Two Bases on which SCA WDs are issued:**
- (1) Prevailing in the locality WDs set forth MWs and FBs determined to be prevailing for various classes of service employees in the locality of the service contract after giving “due consideration” to the rates applicable to such service employees if directly hired by the Government. (*See* 29 C.F.R. 4.51.)
 - a. Rates are usually based on data collected by the BLS under the National Compensation and Occupational Employment Statistics Surveys; or
 - b. Rates may be based on union dominance where a single rate is paid to a majority (50 percent or more) of workers in a class of service employees engaged in similar work in a particular locality. (*See* 29 C.F.R. 4.51(b).)
 - (2) Section 4(c), or “successorship”, WDs set forth the wages and benefits, including accrued and prospective increases, contained in CBAs reached as a result of arm’s-length negotiations that were applicable to service employees employed on predecessor contracts in the same locality. (*See* 29 C.F.R. 4.163.)
 - a. For Section 4(c) to be applicable, the predecessor contract must involve substantially the same services being provided in the same locality. (*See* 29 C.F.R. 4.163(i).)

- b. The successor contractor is obligated to pay its service employees the CBA rates whether or not the employees of the predecessor contractor are hired by the successor contractor. (*See* 29 C.F.R. 4.163(a).)
- c. The provisions of Section 4(c) are self-executing and failure to include the CBA rates in the WD issued for the successor contract does not relieve a successor contractor of the statutory requirements to comply with the CBA rates. (*See* 29 C.F.R. 4.163(b).)
- d. 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* 29 C.F.R. 4.163(j).)
- e. The obligation of the successor contractor is limited to the wage and benefit requirements of the predecessor contractor's CBA and does not extend to other items such as seniority, grievance procedures, work rules, overtime, etc. (*See* 29 C.F.R. 4.163(a).)
- f. The successor contractor may satisfy the FB provisions of the CBA by furnishing any equivalent combination of benefits or by making equivalent or differential payments in cash in accordance with 29 C.F.R. 4.177. (*See* 29 C.F.R. 4.163(j).)
- g. Application of Section 4(c) is not negated because the contracting authority may change and the successor contract is awarded by a different contracting agency. (*See* 29 C.F.R. 4.163(g).)
- h. The successorship provisions of Section 4(c) apply to full term successor contracts. "Bridge" or short-term interim contracts due to bid protest, default by the predecessor contractor, temporary closing of facility, etc., are not predecessor contracts for Section 4(c) purposes and do not negate the application of Section 4(c)'s successorship provisions to the full term contract awarded after the temporary interruption or hiatus. Contractors are required to pay the predecessor contractor's CBA rates during short-term interim contracts. (*See* 29 C.F.R. 4.163(h).)
- i. Under Section 4(c), the predecessor contractor's existing CBA provides the basis for the WD applicable to the successor contract. If the CBA is no longer binding on the parties, *e.g.*, as a result of union decertification or a legitimate impasse recognized by the National Labor Relations Act, the successorship requirements of Section 4(c) would be broken. The CBA rates would not apply to the successor contract, but would continue to apply throughout the contract period during which the decertification or impasse was reached.
- j. Pursuant to Section 4(b) of the SCA, a variation limits the self-executing application of Section 4(c) for new and changed CBAs entered into by the incumbent contractor such that a new or changed CBA is not effective for successorship purposes if: (1) in the case of a successor contract for which bids have been invited by formal advertising, notice of the terms of the new or changed CBA is received by the contracting agency less than 10 days

before the date set for bid opening (provided that the contracting agency finds that there is not reasonable time still available to notify bidders), or (2) for awards of successor contracts to be entered into pursuant to negotiations or resulting from execution of a renewal option or extension, notice of the terms of the new or changed CBA is received by the contracting agency after the award of the successor contract, and the start of contract performance is within 30 days of the award, renewal option, or extension (however, if the contract does not specify a start of performance date within 30 days from the award, and/or performance of such procurement does not begin within this 30-day period, any notice of the terms of the new or changed CBA received by the contracting agency not less than 10 days before commencement of the contract will be effective for purposes of the successor contract under Section 4(c)). This variation will apply only if the contracting agency has given both the incumbent contractor and its employees' collective bargaining representative written notification at least 30 days in advance of applicable estimated procurement dates. Estimated procurement dates include bid solicitation, bid opening, date of award, commencement of negotiations, receipt of proposals, or the commencement date of a contract resulting from a negotiation, option, or extension, as the case may be. (*See* 29 C.F.R. 4.1b(b).)

- k. There are two types of appeals that can be made concerning collectively bargained rates where Section 4(c) applies -- based on substantial variance issues, or based on issues concerning arm's-length negotiations. Both types of appeals are resolved based on administrative proceedings handled by an Administrative Law Judge (ALJ) pursuant to 29 C.F.R. Part 6, and/or the Administrative Review Board (ARB) pursuant to 29 C.F.R. Part 8. (*See* 29 C.F.R. 4.10, 4.11, 4.163(c).)

14h01 Obtaining SCA Wage Determinations.

WDs can be obtained from the wdol.gov website (<http://www.wdol.gov>) by the agency in two different ways. The agency has total discretion as to the method it will follow.

- (a) **“e98” process.** (*See* 29 C.F.R. 4.4(b).)
 - (1) The e98 is an electronic application on the WDOL.gov website that contracting agencies may use to request WDs directly from DOL WH. The submission of an e98 requires the same general information as required by the SF 98.
 - (2) After a WD is sent to the agency, the e98 system continues to monitor the request and if the applicable WD is revised in time to affect the procurement, an amended response will be sent to the email address identified on the e98.
 - (3) If the bid opening date for invitations to bid (IFB), or if contract commencement for all other contract actions, is delayed by more than sixty (60) days the contracting agency must submit a revised e98.

- (b) **WDOL process.** (*See* 29 C.F.R. 4.4(c).)
- (1) Agencies may use the WDOL website to select the proper WD for the procurement. The WDOL website provides assistance to the contracting agency in the selection of the correct WD. The contracting agency is fully responsible for selecting the correct WD.
 - (2) Where the incumbent contractor furnishes services through the use of service employees whose wages and benefits are the subject of one or more CBA(s), the contracting agency may prepare a WD referencing and incorporating a complete copy of the CBA into the successor contract action.
 - (3) The contracting agency shall monitor the WDOL website to determine whether the applicable WD has been revised. Revisions published on the WDOL site or otherwise communicated to the contracting officer are applicable and to be included in the contract if published or communicated within the following timeframes:
 - a. For advertised procurement - **10 days** or more before the date set for bid opening;
 - b. For negotiated procurement - before the award date if start of performance is within 30 days of the award, or 10 or more days before commencement of the contract if the contract does not specify a start of performance date within 30 days from the award and/or performance of such procurement does not commence within this 30-day period. (*See also* 29 C.F.R. 4.5(a)(2).)
 - (4) If WH determines that the contracting agency failed to incorporate the SCA stipulations and WD into the contract, or inserted an incorrect WD to a specific contract, the contracting agency within 30 days of notice from WH, will amend the contract to incorporate the SCA stipulations and/or correct WD as determined by WH. (*See* 29 C.F.R. § 4.5(c)(1).)
 - (5) If a prevailing WD is not available on the WDOL website, the contracting agency must submit an e98.

14h02 Conformability of classifications/wage rates.

- (a) “Conformance” is the method used to establish wage rates for classes of service employees to be employed on a covered service contract that are not listed on the WD included in the contract (*i.e.*, the work to be performed is not performed by any classification listed in the WD). (*See* 29 C.F.R. § 4.6(b)(2).)
- (1) Contractors should conform wage rates for any unlisted class of service employee before such an employee performs any contract work and classify unlisted classes in a manner that provides a reasonable relationship (*i.e.*, appropriate level of skill comparison) between the unlisted class and the classes listed in the WD.
 - (2) Conformed wage rates must be paid to all employees in the affected class retroactive to the date such employees commenced any contract work. Such rates are treated as if the rates and classes had been included on the original WD issued for the contract. (*See* 29 C.F.R. 4.6(b)(2)(v).)

- (3) Conformances may not be used to artificially subdivide classes already listed in the WD. For example, a stock clerk as defined in the “SCA Directory of Occupations” is the same job in terms of knowledge, skills, and duties as the shelf stocker and store worker II. If a stock clerk was listed in the WD, a conformance cannot be based on splitting the job into two jobs and establishing a hybrid classification, *e.g.*, shelf stocker and stock clerk II. (*See* 29 C.F.R. 4.152(c)(1).)
 - (4) Where WDs list a series of levels within a job classification family, *e.g.*, Engineering Technicians I through VI, the lowest level listed for a job classification family is considered to be the entry level and establishment of a lower level through conformance is not permissible. A conformance cannot establish a job level below the entry level listed in the WD. (*See* 29 C.F.R. 4.152(c)(1).)
 - (5) Trainee classifications cannot be conformed. (*See* 29 C.F.R. 4.152(c)(1).)
 - (6) Helper classifications in skilled maintenance trades (*e.g.*, electricians, machinists, automobile mechanics, etc.) cannot be conformed. Helper classifications in skilled maintenance trades whose duties constitute separate and distinct jobs may be used if listed in the WD. (*See* 29 C.F.R. 4.152(c)(1).)
- (b) **Conformance Procedures.**
- (1) The contractor is required to provide a written report of a proposed conformance, including information as to whether the employees involved or their authorized representative agree or disagree with the conformed wage rates and FBs, to the contracting officer no later than 30 days after such unlisted class begins to perform work on the contract. (*See* 29 C.F.R. 4.6(b)(2)(ii).)
 - (2) The contracting officer, after reviewing the proposed conformance, is required to submit a report that includes the agency’s recommendation to the NO/Division of Wage Determinations/Branch of Service Contract Wage Determinations for review. (*See* 29 C.F.R. 4.6(b)(2)(ii).)
 - (3) The Branch will approve, modify or disapprove the proposed conformance or render a final determination within 30 days of receipt of the report or will notify the contracting agency that additional time is necessary to review the report. (*See* 29 C.F.R. 4.6(b)(2)(ii).)
 - (4) The Branch will transmit the final determination to the contracting officer who is to promptly notify the contractor of the action taken. The contractor is required to furnish each affected employee with a copy of the conformance determination or post it at the job site as part of the WD. (*See* 29 C.F.R. 4.6(b)(2)(iii).)
 - (5) If the contracting agency does not agree to submit a conformance, the WHD may initiate action pursuant to 29 C.F.R. § 4.6(b)(2)(vi) for a final determination of a proper conformed classification, wage rate and/or FBs.

- (6) In the case of a contract modification, an exercise of an option or extension of an existing contract, the conformance procedures provide an “indexing procedure” for previously conformed classifications. A contractor can increase a previously conformed rate by the average percentage increase between the rates listed in the current WD for all classifications to be used on the contract and those rates specified for the corresponding classifications in the previously applicable WD without obtaining WH approval or agreement by the employees involved, but must notify the contracting officer. (*See* 29 C.F.R. 4.6(b)(2)(iv)(B).)

14i WAGE PAYMENT REQUIREMENTS

Subpart D of 29 C.F.R. Part 4 (29 C.F.R. 4.159-4.186) contains the interpretations regarding MWs and FBs under the SCA. FOH 14i and 14j supplement these interpretations.

14i00 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* 29 C.F.R. 4.6(h), 4.165(b).)
- (b) Wages due service employees must be paid “free and clear” and without subsequent rebate, or kickback on any account, except deductions permitted by law. (*See* 29 C.F.R. 4.165-4.168.)
- (c) The Act makes no distinction, with respect to its compensation provisions, between temporary, part-time, and full-time employees, and the WD MW and FB apply, in the absence of an express limitation, equally to such service employees engaged in work covered by the SCA. (*See* 29 C.F.R. 4.165(a)(2), 4.176(a).)
- (d) If participation in a FB plan requires a contribution from the employee’s wages, whether through payroll deduction or otherwise, the employee’s concurrence is necessary before such payroll deduction can be made. (*See* 29 C.F.R. 4.168(a).)
- (e) 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* 29 C.F.R. 4.167, 4.170(a), 4.177(a)(1).)

14i01 Tipped employees.

- (a) Tips may generally be included in wages of employees working on SCA contracts (such as at military post barbershops, etc.) in accordance with Section 3(m) of the FLSA and 29 C.F.R. Part 531. (*See* 29 C.F.R. 4.6(q), 4.167; FOH 30d.)
- (b) Although the current tip credit provided under the FLSA requires a cash payment of no less than \$2.13, the tip credit taken by an SCA contractor is limited to \$1.34 per hour. In no event shall the sum credited be in excess of the value of tips actually received by the employee. The requirements for successor contractors under Section 4(c) are different and are described in (c) below. (*See* 29 C.F.R. 4.167.)
- (c) Where Section 4(c) of the SCA applies, the use of FLSA Section 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 obligations. (*See* 29 C.F.R. 4.163(k).)

14i02 **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 pursuant to § 13(a). The FLSA at § 6(e)(1) negates the exemption provisions of FLSA § 13 (except §§ 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 or to whom FLSA § 13(a)(1) does not apply. (*See* FOH 30e.)

14j FRINGE BENEFITS (FBs) REQUIREMENTS**14j00 General provisions.**

- (a) The FBs that an employer is required to furnish employees performing on a covered contract will be specified in the applicable WD included in the contract documents.
- (1) Any administrative costs (e.g., recordkeeping costs associated with payroll administration) incurred by a contractor directly in providing FB plans are considered business expenses of the firm and not contributions made on behalf of the employees. Such administrative costs cannot be credited toward meeting the FB obligations of the applicable WD. (*See* 29 C.F.R. 4.172.)
- (2) The cost incurred by a Government contractor's insurance carrier (or third party trust fund) in its administration and delivery of benefits to service employees can be credited toward the contractor's FB obligations under an SCA WD.
- (b) FB obligations may be discharged by furnishing any equivalent combination of cash or bona fide FBs. (*See* 29 C.F.R. 4.170, 4.177.)
- (c) The terms "equivalent fringe benefit" and "cash equivalent" mean equal in terms of monetary cost to the contractor. (*See* 29 C.F.R. 4.177(a)(3).)
- (d) It is the contractor's responsibility to satisfy the FB obligations set forth in an SCA WD. The contractor may choose the FBs to be provided, whether an employee accepts or refuses the FBs offered. If an employee desires cash payments or benefits other than those chosen by the contractor, that would be a matter for discussion and resolution between the employee and the employer. If the contractor furnished a lesser amount of the FBs called for by the applicable WD, the contractor must furnish the employee with the difference between the amount stated in the WD and the actual cost of the FB which the contractor provided. As set forth in 29 C.F.R. 4.175(a)(2), the contractor may make up the difference in cash to the employee, or furnish equivalent benefits, or a combination thereof. (*See* 29 C.F.R. 4.177.)
- (e) If participation in the FB plan requires a contribution from the employee's wages, whether through payroll deduction or otherwise, the employee's concurrence is necessary. No contribution toward FBs made by employees, or deducted from their wages, may be included or used by an employer in satisfying any part of any FB obligation under the Act. (*See* 29 C.F.R. 4.168(a).)
- (f) Service employees employed by a single employer are entitled to FB payments only up to a maximum of 40 hours per week, regardless of the number of contracts on which they work, unless otherwise specified by the applicable WD. This position only affects covered contracts subject to "prevailing" WDs with the "fixed cost" per employee H&W, paid vacation and holiday benefits. Service employees who work for a single employer on multiple contracts which may have other requirements, such as a collectively bargained FB or an "average cost" H&W FB, may be entitled to FB payments in excess of 40 hours per week. (*See* Dantran, Inc. v. U.S. DOL, 171 F.3d 58 (1st Cir. 1999).)

- (g) The FB requirements under successor contracts subject to SCA Section 4(c) are included in 29 C.F.R. 4.163. Terms of the CBA will dictate eligibility requirements, and the amount and extent of such FBs. Since a successor contractor's obligations are governed by the terms of the CBA, any interpretation of the wage and FB provisions of the CBA where they are unclear must be based on the intent of the parties, provided that such interpretation does not violate the law. Some of the principles discussed in the regulations regarding specific interpretations of the FB provisions of prevailing WDs may not be applicable to WDs issued pursuant to Section 4(c). The provisions of Section 4(c), however, do not supersede the provision of Section 2(a)(2) of the Act that allows a contractor to satisfy its FB obligations by furnishing any equivalent combinations of FBs or by making equivalent or differential payments in cash. (*See* 29 C.F.R. 4.163(j), 4.177.)

14j01 **“Bona fide” FB plans.**

- (a) To be considered “bona fide” for SCA purposes, a FB plan, fund, or program must constitute a legally enforceable obligation which meets certain criteria. The plan, fund, or program must be compliant with the Employment Retirement Income Security Act (ERISA), laws and regulations enforced by the IRS, and State insurance laws, and contributions must be made irrevocably to a trustee or third person pursuant to an insurance agreement, trust, or other funded arrangement. (*See* 29 C.F.R. 4.171(a).)
- (b) The primary purpose of a FB plan under the SCA must be to provide systematically for the payment of benefits to employees on account of death, disability, advanced age, retirement, illness, medical expenses, hospitalization, supplemental employment benefits, and the like. (*See* 29 C.F.R. 4.171(a)(2).) While not specifically enumerated in the regulations, supplemental unemployment plans and prepaid legal plans are considered “bona fide” FBs for purposes of the Act.
- (c) 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 except for plans to provide paid vacation and holiday FBs. (*See* 29 C.F.R. 4.171(b)(1).)
- (1) Under certain conditions, a contractor may request approval by the Administrator 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. The purpose of seeking advance approval is to avoid situations involving unfunded plans where monies allegedly allocated by a contractor to provide FBs are used for other purposes or are recouped without actually furnishing any benefits. This procedure is not intended to prohibit self-insured plans where irrevocable payments are made pursuant to a trust or other funded arrangement and other conditions are met. (See 29 C.F.R. 4.171(b)(2).)
- (2) “Stop loss” insurance payments that provide coverage in the event that claims paid from an unfunded self-insured plan exceed specified limits both in the individual and the aggregate can be credited against the FB obligations of the applicable WD.
- (d) Contractors may not take credit for any benefit required by Federal, State, or local law such as workers' compensation, unemployment compensation, and Social Security contributions. (*See* 29 C.F.R. 4.171(c).)

- (e) 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. (*See* 29 C.F.R. 4.171(d)-(f).)

14j02 Crediting of FB payments.

The FBs specified in the WD must be furnished separate from and in addition to the specified MWs 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 MWs 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* 29 C.F.R. 4.167, 4.170(a).)

14j03 Vacation pay.

(a) **General.**

Eligibility for vacation benefits specified in a prevailing WD is based on completion of a standard period of past service. The principles to be followed in determining an employee’s length of service for vacation eligibility are summarized below. (*See* 29 C.F.R. 4.173.)

(b) **Determining length of service.**

Most prevailing 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. (*See* 29 C.F.R. 4.173(a)(1)(i).)
- (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. (*See* 29 C.F.R. 4.173(a)(1)(ii).)

However, prior service as a Federal employee is not counted toward an employee’s eligibility for vacation benefits under the applicable WD. (*See* 29 C.F.R. 4.173(a)(3).)

(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 the specified amount of vacation with pay provided in the WD. 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* 29 C.F.R. 4.173(b).)

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

Where a prevailing WD specifies "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 benefits need not be provided by the employer on the date of vesting. 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* 29 C.F.R. 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 applicable WD on that date before the employee's next anniversary date, before the current contract is completed, or before the employee terminates employment, whichever occurs first. Thus, vacation benefits must be complied with in full on an annual basis. Any unused vacation benefits may not be "carried over" from year to year. (*See* 29 C.F.R. 4.173(c)-(d).)

(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, 29 C.F.R. 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. (*See* 29 C.F.R. 4.173(d)(2).)

(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. 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. (*See* 29 C.F.R. 4.173(e)(1).)

(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 29 C.F.R. 4.177(c)(5), such payments need commence only after the employee has satisfied the "after one year of service" requirement (in cases where there is such an eligibility 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* 29 C.F.R. 173(c)(1) and (e)(1).)

14j04 Holiday pay.

- (a) Most prevailing 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. 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. (*See* 29 C.F.R. 4.174(c)(1)-(2).)
- (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. (*See* 29 C.F.R. 4.174(c)(4).)
- (c) If the applicable WD does not include a paid holiday provision for any day declared by the U.S. President to be a holiday, or for any work day where the Federal facility is closed such as due to inclement weather, the contractor is not required to pay covered service employees who take that day off. Any pay provided would be a matter of discretion for the contractor, and contract payments for such time not worked would be a procurement matter within the purview of the contracting agency.

14j05 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. Unless otherwise specified in the WD, vacation and holiday benefits are based upon a full-time schedule that consists of 40 hours a week or eight hours a day. (*See* 29 C.F.R. 4.165(a)(2), 4.176(a); FOH 14i00(c).)
- (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 the temporary and part-time employee worked in the w/w prior to the w/w in which the holiday occurs. With respect to vacation obligations, the number of hours such employee worked in the year preceding the employee's anniversary date of employment may be utilized to determine vacation benefits due. (*See* 29 C.F.R. 4.176(a)(3).)

14j06 Health and welfare (H&W) and pension payments.

- (a) As set forth in AAM No. 188, a single “prevailing” nationwide H&W rate method has been established for determining FB requirements to be incorporated in most SCA WDs. The single rate is generally updated once a year based upon data from the Bureau of Labor Statistics (BLS) Employment Cost Index (ECI) summary of **Employer Cost for Employee Compensation**. (*See* 29 C.F.R. 4.52(a), 4.175.)
- (b) **“Fixed cost” per employee H&W FBs** (29 C.F.R. 4.175(a)).
 - (1) Most prevailing WDs containing H&W and/or pension requirements specify a fixed payment per hour on behalf of each service employee. This FB is due each service employee on the basis of “all hours paid for,” including paid vacations, holidays, and sick leave, **up to a maximum of 40 hours per week and 2,080 hours per year**. Payments are specified on the WD in hourly, weekly, and monthly amounts.
 - (2) If a WD specifies a FB that 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. The FBs and cash equivalent payments under the “fixed cost” per employee benefit requirement may be made in varying amounts to employees, provided the total amount paid by the contractor for FBs and/or cash equivalents to each individual employee is at least the amount required by the WD.
- (c) **“Average cost” H&W FBs** (29 C.F.R. 4.175(b).)
 - (1) Some WDs 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. It is also possible under the “average cost” concept for some employees to not receive any FBs.

- (2) The contractor'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**," including overtime hours, for all service employees that were employed on the contract during the payment period must be counted. The term "all hours worked" does not include paid leave hours, such as vacations, holidays, or sick leave. It also does not cover any unpaid leave time.
- (3) The contractor's total contributions for all service employees enrolled in the FB plan(s) must average at least the FB obligation stated in the WD. The types and amounts of benefits (if any) provided, and the eligibility requirements for service employees to participate in a FB plan, are decided by the employer.
- (4) If the contractor's contributions average less than the amount required during a payment period, the contractor must make up the deficiency by providing cash equivalent payments or equivalent FB payments to **all** service employees who worked on the contract during the payment period. However, cash equivalent payments under the "average cost" FB requirements can only be made in an amount determined to be deficient after payments have been made to the FB plans, and then must be made equally to all service employees based upon their hours worked. A contractor cannot make cash equivalent payments to some employees and not to others, nor can a contractor pay different cash amounts to employees under the same contract. A contractor must pay the same amount of cash equivalent payments per hour worked to all employees. (*See* 29 C.F.R. 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 FBs or be paid a cash equivalent payment during the period they are not eligible, or choose not to participate in the plan. An employee who desires to opt-out of the contractor's health plan must demonstrate that his or her other coverage specifically prohibits double coverage in writing. (*See* 29 C.F.R. 4.175(c).)
- (e) It is not required that all employees participating in a FB plan be entitled to receive payments from the plan at all times. For example, a contractor may be permitted 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). If no contributions are made for such employees, then no credit may be taken toward the contractor's FB obligations. (*See* 29 C.F.R. 4.175(c)(2).)
- (f) Payments to a "bona fide" H&W or pension insurance plan or trust program may be made on a periodic basis, but not less often than quarterly. If the plan requires that contributions be made on a monthly basis, then to be in compliance the contractor must reconcile the cost incurred by such contributions against its SCA FB obligations on a monthly (or no less often than monthly) basis. (*See* 29 C.F.R. 4.175(d)(1).)

- (g) Where the WD specifies a fixed contribution on behalf of 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* 29 C.F.R. 4.165(a)(1), 4.175(d)(1), 4.177(c)(1).)
- (h) The only restriction the SCA places on pension plans, including 401(k) plans, is that they be “bona fide” FB plans. Such plans are considered “bona fide” if they meet the requirements of Section 7(e)(4) of the FLSA. (See FLSA 29 C.F.R. 778.215; SCA 29 C.F.R. 4.170, 4.171(a).)
 - (1) Neither the SCA nor its implementing regulations address vesting requirements with respect to retirement plans. However, bona fide plans are required to meet the vesting requirements pursuant to ERISA. (*See* 29 C.F.R. 4.171(a)(5).)
 - (2) Pension plans that define a year’s service for vesting purposes in terms of a minimum number of hours worked by a participant and require certain number of years in service for a participant to become fully vested would be in compliance with the SCA so long as the plan’s vesting provisions meet ERISA’s requirements.
 - (3) Pension plans often provide that forfeitures of employees who do not vest under the plan will be used to reduce the employer’s contribution in the following year. For SCA purposes, an employer may **not** use forfeitures as a credit towards satisfying the requirements of an applicable WD. To allow an employer to do so would result in the employer’s taking double credit for the same contribution. Forfeitures that are allocated to the accounts of remaining eligible participants would, however, be creditable toward meeting FB obligations under the SCA.

14k OVERTIME PAY OF COVERED EMPLOYEES**14k00 General provisions.**

- (a) The SCA does not provide for compensation of covered employees at premium rates for overtime hours of work. Section 6 of the Act recognizes that other Federal laws, such as the FLSA and CWHSSA may require such compensation to be paid to employees working on or in connection with SCA-covered contracts. CWHSSA (40 U.S.C. 327 - 332) is more limited in scope than the FLSA (29 U.S.C. 201, et seq.) and generally applies to Federal Government contracts in excess of \$100,000 that require or involve the employment of laborers, mechanics, guards, and “watchmen.” (See SCA 29 C.F.R. 4.180 - 4.182; CWHSSA 29 C.F.R. 5.1 - 5.17; FLSA 29 C.F.R. 778; FOH 15g - k and 32.)
- (b) Overtime must be paid at one and one-half times the basic hourly rate (or the regular rate of pay, whichever is higher). (See SCA 29 C.F.R. 4.180 - 4.182; CWHSSA 29 C.F.R. 5.5(b)(1); FLSA 29 C.F.R. Part 778; FOH 15k00 - 15k09 and 32.)
- (c) The SCA excludes the amounts paid by a contractor or subcontractor for FBs in the computation of overtime under the FLSA and CWHSSA whenever the overtime provisions of either of those acts apply concurrently with the SCA’s wage provisions. (See SCA 4.177(e), 4.180; FLSA 29 C.F.R. 778.7.)
- (d) Neither the FLSA, nor the CHWSSA, preclude any State, territory, or municipality from implementing its own labor standards with respect to minimum wage and overtime compensation. If Federal and State laws have different requirements, a contractor would be obligated to satisfy both sets of standards in order to ensure compliance. (See FLSA 29 C.F.R. 778.5.)
- (e) The CWHSSA requires that “liquidated damages shall be computed, with respect to each individual employed as a laborer or mechanic in violation of any provision of this Act, in the sum of \$10 for each calendar day on which such individual was required or permitted to work in excess of the standard workweek of 40 hours without payment of the overtime required by this Act.” In addition, in all cases, liquidated damages are also required to be computed in situations where an employee is paid overtime at an incorrect basic hourly rate of pay. (See CWHSSA 29 C.F.R. 5.8; FOH 15k10.)

14k01 “Laborers” and “Mechanics” under CWHSSA.

Service employees may also be “laborers” and “mechanics” for purposes of CWHSSA. The terms “laborers” and “mechanics” include at least those employees whose duties are manual or physical in nature as distinguished from mental or managerial. Generally, employees whose duties are supervisory, professional, and clerical are not “laborers” or “mechanics” for purposes of CWHSSA. Determinations as to whether individual employees are “laborers” or “mechanics” are based on the duties actually performed under the contract rather than occupational titles or job descriptions. A job that requires manual and mechanical dexterity and is primarily reliant on the use of hands would be typical of mechanical or manual occupations that would fall with the scope of a “laborer” or “mechanic” under CWHSSA. The CWHSSA also applies to guards and “watchmen” employed on Government contracts in excess of \$100,000. (See SCA 29 C.F.R. 4.181(b); CWHSSA 29 C.F.R. 5.5(b); FOH 15j.)

14L PAYROLL AND RECORD KEEPING REQUIREMENTS.**14L00 Payroll and record keeping requirements.**

- (a) Payrolls and basic records relating thereto, including a copy of the contract, must be maintained and preserved for three years from the completion of the contract. (*See* 29 C.F.R. 4.6(g), 4.185.)
- (b) The failure of a contractor to make the required records available to a WHI may result in the suspension of contract payments until such violations cease. Contractors must also permit the WHI to conduct employee interviews at the worksite during normal working hours. (*See* 29 C.F.R. 4.6(g).)