

PREVAILING WAGE RESOURCE BOOK

U.S. Department of Labor
Wage and Hour Division

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PREVAILING WAGE RESOURCE BOOK

LEGAL DISCLAIMER

This publication contains materials developed primarily for use in prevailing wage training conferences. The contents are designed to enhance the knowledge of procurement personnel and others whose responsibilities include work with the Davis-Bacon and related Acts and the Service Contract Act. Study of this volume should facilitate dissemination of information to those who are interested in the administration and enforcement of these laws. This publication is intended to provide practical guidance to procurement personnel and the general public rather than definitive legal advice.

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ACRONYMS

USED IN THIS RESOURCE BOOK

&

USEFUL WEB LINKS

ACRONYMS USED IN THIS RESOURCE BOOK

AAM	All Agency Memorandum
ALJ	Administrative Law Judge
ARB	Administrative Review Board
CA	Copeland “Anti-Kickback” Act
CBA	Collective Bargaining Agreement
C.F.R.	Code of Federal Regulations
CWHSSA	Contract Work Hours And Safety Standards Act
DB	Davis-Bacon
DBA	Davis-Bacon Act
DBRA	Davis-Bacon Related Acts
DBA/DBRA	Davis-Bacon Act and Davis-Bacon “related Acts”
DOL	U.S. Department of Labor
FAR & DFARS	Federal Acquisition Regulations (Title 48 of the C.F.R.) Defense Federal Acquisition Regulation Supplement
FLSA	Fair Labor Standards Act of 1938, as Amended
GWD	Davis-Bacon General Wage Determinations
PCA	Walsh-Healey Public Contracts Act
SCA	McNamara-O'Hara Service Contract Act
WAB	Wage Appeals Board
WDOL	Wage Determinations On-Line
WHD	Wage and Hour Division
WHI	Wage and Hour Investigator

DEPARTMENT OF LABOR ON THE WEB

Department of Labor Home Page

<http://www.dol.gov>

The **Wage and Hour Division (WHD)** has administrative and enforcement responsibilities regarding laws discussed in this resource book. The WHD homepage is available at:

<http://www.dol.gov/whd/index.htm>

Government Contracts Compliance Assistance is available at:

<http://www.dol.gov/whd/govcontracts/>

These include links to:

- Posters
- Statutes
- Regulations that apply under laws administered by the Wage and Hour Division
- Davis-Bacon & SCA “Wage Determinations OnLine” (WDOL)
- *Service Contract Act Directory of Occupations*
- Interactive WH-347 Payroll Form and instructions
- And other information related to prevailing wages.

Davis-Bacon and SCA wage determinations are available at:

<http://www.wdol.gov/>

The WHD Construction Survey Website is:

<http://www.dol.gov/whd/programs/dbra/Survey/surveys.htm>

Key personnel in the Wage and Hour Division are listed at:

<http://www.dol.gov/whd/whdkeyp.htm>

The **Administrative Review Board**, which was established in 1996, and to which final rulings of the Wage and Hour Division concerning Davis-Bacon and Service Contract Act matters may be appealed, has a website at:

<http://www.dol.gov/arb/welcome.html>

The Department's **Office of Administrative Law Judges (OALJ)** has a library site at which a broader range of rulings may be accessed. To view decisions of the appeals boards that preceded the ARB, as well as ARB decisions and ALJ decisions on Service Contract Act and Davis Bacon Act cases go to the **OALJ Law Library's "DBA/SCA Collections"** at:

<http://www.oalj.dol.gov/libdba.htm>

**INTRODUCTION TO THE
LABOR STANDARDS STATUTES
COVERAGE**

**DAVIS-BACON ACT
(DBA)**

**DAVIS-BACON RELATED ACTS
(DBRA)**

DISTINGUISHING DBA VS. DBRA

**FAIR LABOR STANDARDS ACT
(FLSA)**

**CONTRACT WORK HOURS AND SAFETY STANDARDS ACT
(CWHSSA)**

**COPELAND “ANTI-KICKBACK” ACT
(CA)**

**WALSH-HEALEY PUBLIC CONTRACTS ACT
(PCA)**

**MCNAMARA-O’HARA SERVICE CONTRACT ACT
(SCA)**

DAVIS-BACON ACT (DBA)
40 U.S.C. §§ 3141-3144 and 3146-3148

Davis-Bacon Act (DBA)

- ◇ Enacted in 1931, amended in 1935 and 1964
 - 1935 amendments - predetermination language
 - 1964 amendments - fringe benefits
 - 2002 Congress revised without substantive changes, and codified the DBA provisions at 40 U.S.C. §§ 3141 *et seq.*

Purpose of DBA

- ◇ To protect communities and workers from the economic disruption caused by competition arising from non-local contractors coming into an area and obtaining federal construction contracts by underbidding local wage levels.

DBA Requirements

- ◇ The DBA requires the **locally prevailing wages** determined by DOL to be included in the bid specifications for covered contracts and paid to workers employed under such contracts.
- ◇ The DBA applies to **federal government and District of Columbia contracts** in excess of \$2,000 for construction, alteration, or repair (including painting and decorating) of public buildings and public works.

Examples:

1. General Services Administration contracts to build federal office buildings.
 2. Department of Defense contracts to paint and remodel a military base office building.
- ◇ Prevailing wages are determined in advance by the DOL National Office and included in the bid specifications for covered contracts.
 - ◇ The language of the Davis-Bacon Act requires **contractors and subcontractors** to pay “**all mechanics and laborers** employed **directly on the site of the work**, unconditionally not less often than **once a week**, and without subsequent deduction or rebate on any account, the full amounts accrued at time of payment,

computed at wage rates not less than those stated in the advertised specifications, **regardless of any contractual relationship which may be alleged to exist between the contractor or subcontractor and the laborers and mechanics.**" 40 U.S.C. § 3142.

- ◇◇ DBA requirements apply to contractors and subcontractors.
- ◇◇ "Laborers or mechanics" must be paid at least "prevailing wages."
- ◇◇ DBA applies only to employment on the "site of the work."
- ◇◇ The laborers and mechanics must be paid weekly.
- ◇◇ Persons performing the duties of laborers and mechanics must be paid the prevailing wage rate regardless of any contractual arrangement, e.g., an independent contractor or owner-operator relationship.
- ◇◇ The wage determination (including additional classifications and wage rates approved under the "conformance" process) and the Davis-Bacon poster (WH-1321) must be posted by the contractor and its subcontractors at the site of the work in a prominent and accessible place where they can be easily seen by the workers.

DBA Coverage

- ◇ The DBA applies to contracts "in excess of \$2,000, to which the **Federal Government or the District of Columbia is a party, for construction, alteration, or repair, including painting and decorating, of public buildings and public works.**" 40 U.S.C. § 3142.

In considering DBA coverage on contracts in excess of \$2,000, three criteria apply:

- (1) Is the agreement a contract to which the Federal Government or the District of Columbia is a party?
- (2) Is the agreement a "contract for construction"?
- (3) Is the "contract for construction" a contract for the construction of a public building or public work of the United States or the District of Columbia?

Within the meaning of the DBA, “public building or public work” includes a “building or work, the construction, prosecution, completion, or repair of which, as defined above, is carried on directly **by authority of or with funds of a federal agency** to serve the interest of the general public regardless of whether title thereof is in a Federal agency.” 29 C.F.R. § 5.2(k).

- ◇ The DBA applies to public buildings and public works of the Federal Government or the District of Columbia **within the geographic limits of the 50 States of the United States and the District of Columbia.**
- ◇ The DBA also applies in the Commonwealth of the Northern Mariana Islands as a result of a unique relationship established between the Northern Mariana Islands and the United States under the “*Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America.*”
- ◇ The DBA does not apply to federal construction contracts in Guam, Puerto Rico, the Virgin Islands or other territories; *however*, some “related Acts” which provide federal assistance to construction activities in these territories require the payment of DBA prevailing wage rates.

DAVIS-BACON RELATED ACTS (DBRA)

DBRA Purpose and Requirements

- ◇ Congress has extended DB prevailing wage requirements to other laws – related Acts – which provide **federal assistance** for construction through:
 - ◇◇ Grants
 - ◇◇ Loans
 - ◇◇ Loan guarantees
 - ◇◇ Insurance

(as contrasted with **direct** federal government contracts for construction).

DBRA Coverage

- ◇ Many of the related Acts are listed in 29 C.F.R. § 5.1(a). These laws include by reference the requirements for payment of prevailing wages determined in accordance with the DBA.

Examples:

- ◇◇ Federal Highway Administration provides grants to states for the reconstruction of roads and bridges on federal-aid highways.
- ◇◇ U.S. Department of Housing and Urban Development (HUD) finances the construction of low income residences on housing authority projects.
- ◇◇ Other federal agencies which assist construction through grants, loans, loan guarantees and insurance include the Departments of Health and Human Services, Education, and Environmental Protection Agency.
- ◇ The following DBRA statutes are frequently used to fund/assist construction:

- National Housing Act
- Housing Act of 1950
- Federal Aid to Highway Acts
- Federal Water Pollution Control Act
- U.S. Housing Act of 1937
- Housing and Community Development Act of 1974

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- ◇ Certain related Acts contain specific coverage criteria for construction supported by the federal assistance they provide. Thus, a determination of whether DB prevailing wage provisions apply in particular circumstances requires an analysis of the actual labor standards provision in the relevant related Act. For example:
 - ◇◇ The labor standards provision of the Housing and Community Development Act of 1974 does not apply to the rehabilitation of residential property that contains fewer than 8 units.
 - ◇◇ The Davis-Bacon labor standards provision of Title II of the National Affordable Housing Act of 1990, (HOME) does not apply if there are fewer than twelve HOME-assisted units in the project.
 - ◇◇ The labor standards provision of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) applies only to projects funded in whole or in part under Section 104 of the Act and not to clean-ups provided/funded through other sections of that Act.
- ◇ While DBA does not have any provision granting DOL the authority to waive its application, certain related statutes may provide for a waiver or exception by the administering agency.

DISTINGUISHING DBA VS. DBRA

- ◇ **DBA projects**: an agency of the federal government or the District of Columbia signs the contract. Such as:
 - ◇◇ Department of Veterans Affairs.
 - ◇◇ General Services Administration.
 - ◇◇ Department of Defense.
 - ◇◇ Department of the Interior.

- ◇ **DBRA projects**: a non-federal agency or grant recipient, rather than the federal government signs the construction contract. For example:
 - ◇◇ On a Department of Housing and Urban Development assisted project, a local housing authority or a city or town may sign the construction contract.
 - ◇◇ On an Environmental Protection Agency funded contract for a sewer project, a local public works/water-sewer authority may sign the construction contract.
 - ◇◇ On an interstate highway project, a state highway department signs a contract for highway construction.

**FAIR LABOR STANDARDS ACT OF 1938,
AS AMENDED (FLSA)**
29 U.S.C. §§ 201, *et seq.*

Purpose of FLSA

- ◇ The FLSA is the federal law of most general application concerning wages and hours of work. For most employment, the FLSA establishes minimum wage, overtime pay, recordkeeping, and child labor standards.
- ◇ The FLSA was enacted in 1938. It has been amended many times since to modify the scope of its coverage, enumerate exemptions, and revise the federal minimum wage. The FLSA established a nationwide overtime pay standard that continues in effect – a rate of not less than one and one-half times the “regular rate” of pay for all hours worked over 40 in a workweek. The basic minimum wage provisions of the FLSA are in section 6 of the Act, and the overtime requirements are in section 7; exemptions from both the minimum wage and overtime provisions are in section 13(a) and exemptions from the overtime requirements are in section 13(b).
- ◇◇ For example, under section 13(a)(1) of the FLSA, persons employed in a bona fide executive, administrative or professional capacity are exempt from that law’s minimum wage and overtime requirements. The rules that apply to determining whether the exemption applies are in 29 C.F.R. Part 541, which defines the terms “any employee employed in a bona fide executive, administrative or professional capacity.” Employees who are exempt from the FLSA under these rules are also exempt from the DBA and SCA wage requirements.

FLSA Requirements

- ◇ Federal Minimum Wage: The FLSA minimum wage of \$7.25 per hour took effect on July 24, 2009. This minimum wage applies to covered nonexempt employees.
- ◇ FLSA Overtime: Covered nonexempt employees must receive overtime pay for hours worked over 40 per workweek (any fixed and regularly recurring period of 168 hours – seven consecutive 24-hour periods) at a rate not less than one and one-half times the regular rate of pay. The FLSA does not require overtime pay for work on weekends, holidays, or regular days of rest, unless overtime – work over 40 hours in the week – is worked on such days.

- ◇ Hours Worked: Hours worked ordinarily include all the time during which an employee is required to be on the employer's premises, on duty, or at a prescribed workplace.
- ◇ Recordkeeping: Employers must display an official poster outlining the requirements of the FLSA. Employers must also keep employee time and pay records.
- ◇ Child Labor: FLSA child labor provisions are designed to protect the educational opportunities of minors and prohibit their employment in jobs and under conditions detrimental to their health or well-being. Federal child labor rules under the FLSA set both hours and occupational standards. Youths 16- and 17-years old may be employed in any job not declared hazardous. There is no limit on the number of hours employees 16 years or older may work in any workweek. Youths 14- and 15-years old may be employed outside school hours in a variety of non-manufacturing and non-hazardous jobs for limited periods of time and under specified conditions.

FLSA Coverage

- ◇ Unlike with the SCA or DBA, in order for the FLSA to apply to individual workers, an employment relationship must exist between an employer and an employee. The FLSA defines "employ" as "to suffer or permit to work." Thus, it is important to distinguish between employees to whom FLSA requirements apply and truly independent contractors to whom the FLSA protections do not apply.
 - ◇◇ A common problem arises where employers misclassify individuals as independent contractors, when in reality these workers are employees.
 - ◇◇ Employees are economically dependent on an employer, whereas independent contractors are in business for themselves.
 - ◇◇ The WHD applies a multi-factor "economic realities" test to analyze whether a worker is an employee under the FLSA or an independent contractor. While the factors considered can vary, and no one set of factors is exclusive, it is generally appropriate to include consideration of the following factors when determining whether an employment relationship exists:
 - 1) Whether work is an integral part of the employer's business.

If the work performed by a worker is integral to the employer's business, it is more likely the worker is economically dependent on the employer and less likely the worker is in business for himself or herself. For example, work is integral to the employer's business if it is a part of the production process or is a service that the employer is in business to provide.

- 2) Whether the worker's managerial skill affects his or her opportunity for profit and loss.

This factor should focus on the worker's managerial skill and whether this managerial skill affects the worker's profit and loss. The hiring and supervision of workers and investment in equipment may indicate the use of managerial skill.

- 3) The relative investments of the worker and the possible employer.

The worker must make some investment (and therefore, undertake at least some risk) in order to indicate that he or she is an independent business. However, even if the worker makes some investment that is a business investment, the worker's investment must compare favorably to the employer's investment to indicate the worker is an independent businessperson.

- 4) The worker's skill and initiative.

Both employees and independent contractors may be skilled workers. To suggest independent contractor status, however, the worker's skill should demonstrate that he or she exercises independent business judgment. Carpenters, construction workers, and electricians are not usually independent contractors and any specialized skills they possess to perform the work are not necessarily indicative of independent contractor status. Only carpenters, construction workers, and electricians who operate as independent businesses, as opposed to being economically dependent, may be independent contractors.

- 5) The permanency of the worker's relationship with the employer.

A permanent or indefinite relationship with the employer suggests the worker is an employee. A worker who is truly in business for himself or herself will eschew a permanent or indefinite relationship with an employer and the dependence that comes with such a relationship.

However, a lack of permanence or indefiniteness should not automatically suggest the worker is an independent contractor. The key is whether the lack of permanence or indefiniteness is due to operational characteristics of the industry (such as where employers hire part-time workers or use staffing agencies) or the worker's own business initiative.

6) Control.

This factor includes who controls hiring, firing, the amount of pay, the hours of work, and how the work is performed. An independent contractor typically works relatively free from control by an employer (or anyone else). However, a worker's control over the hours he or she works is not necessarily indicative of independent contractor status. The worker must control meaningful aspects of the work and the worker must actually exercise this control.

It is important to note that control, or the lack of control, is no more significant than any other factor.

- ◇◇ The "economic realities" factors are intended to focus the analysis on evidence that distinguishes between employees and independent contractors.
- ◇◇ The factors should not be applied mechanically or in a vacuum, and a simply tallying of which are met does not determine whether the worker is an employee or an independent contractor.
- ◇ Also, a single individual may be jointly employed by two or more employers at the same time under the FLSA. A determination of whether joint employment exists depends upon all the facts in the particular case. (*See* 29 C.F.R. Part 791.)
- ◇ The FLSA establishes two ways in which an employee can be covered by its requirements: "enterprise coverage" and "individual coverage."
- ◇◇ Enterprise coverage applies to employees who work for certain businesses or organizations (or "enterprises") which are engaged in interstate commerce or the production of goods for commerce and which have at least two employees; and gross sales of not less than \$500,000 a year. Enterprise coverage also applies to government agencies, to schools (including preschools), to hospitals, and to institutions primarily engaged in the care of

the sick, the aged, or the mentally ill who reside on the premises of such institutions.

- ◇◇ In addition, when there is no enterprise coverage, FLSA standards apply to individual employees if they are “engaged in commerce or in the production of goods for commerce.” Employees who come within individual coverage under the FLSA include those who: produce goods that will be sent out of state (such as a worker assembling components in a factory or a secretary typing letters in an office); regularly make telephone calls to persons located in other States; handle records of interstate transactions; are required to travel to other States; and perform janitorial work in buildings where goods are produced for shipment outside the State where the employee works.

Important FLSA Rules for Government Contracts

- ◇ The minimum wage and/or overtime pay requirements of the FLSA may apply along with the wage and fringe benefit and overtime pay requirements of the government contract laws discussed in this reference book.
- ◇ Various terms, rules, and regulations established under the FLSA also apply to employment under the government contracts laws discussed in this resource book.
- ◇ The FLSA requires employers to keep accurate records on identifying employees, their wages, work hours, etc. as specified in DOL recordkeeping regulations. Most of the information is of the kind generally maintained by employers in ordinary business practice and in compliance with other laws and regulations. The following records must be kept with respect to employees subject to the minimum wage and/or the overtime pay provisions of the FLSA:
 - ◇◇ Personal information, including employee’s name, home address, occupation, sex, and birth date if under 19 years of age.
 - ◇◇ Hour and day when workweek begins.
 - ◇◇ Total hours worked each workday and each workweek.
 - ◇◇ Total daily or weekly straight-time earnings.
 - ◇◇ Regular hourly rate for any week when overtime is worked.

- ◇◇ Total overtime pay for the workweek.
- ◇◇ Deductions from or additions to wages.
- ◇◇ Total wages paid each pay period.
- ◇◇ Date of payment and pay period covered.

Records required for exempt employees differ from those for nonexempt workers, and special information is required for employees working under uncommon pay arrangements and employees to whom lodging or other facilities are furnished.

- ◇ DOL regulations that implement the FLSA requirements are set forth in Title 29 of the Code of Federal Regulations. For example:
 - ◇◇ 29 C.F.R. Part 519 – Records to Be Kept by Employers.
 - ◇◇ 29 C.F.R. Part 531 – Wage Payments Under the Fair Labor Standards Act of 1938 (includes rules concerning when the reasonable cost or fair value of board, lodging or other facilities customarily furnished by the employer for the employee’s benefit may be considered part of wages).
 - ◇◇ 29 C.F.R. Part 541 – Defining and Delimiting the Terms “Any Employee Employed In A Bona Fide Executive, Administrative, or Professional Capacity (Including Any Employee Employed In the Capacity of Academic Administrative Personnel or Teacher In Elementary or Secondary Schools), or In the Capacity of Outside Salesman.”
 - ◇◇ 29 C.F.R. Part 776 – Interpretative Bulletin on the General Coverage of the Wage and Hour Provisions of the Fair Labor Standards Act of 1938.
 - ◇◇ 29 C.F.R. Part 778 – Overtime Compensation.
 - ◇◇ 29 C.F.R. Part 785 – Hours Worked.
 - ◇◇ 29 C.F.R. Part 790 – General Statement As to the Effect of the Portal-to-Portal Act of 1947 on the Fair Labor Standards Act of 1938.
 - ◇◇ 29 C.F.R. Part 791 – Joint Employment Relationship Under Fair Labor Standards Act of 1938. (*See also* 29 C.F.R. § 500.20(h)(1)-(5) – Definitions Under The Migrant and Seasonal Agricultural Worker

Protection Act (MSPA) for additional information relevant to determining whether or not a joint employment relationship exists.)

**CONTRACT WORK HOURS AND SAFETY STANDARDS ACT
(CWHSSA)**

40 U.S.C. §§ 3701-3708

Purpose of CWHSSA

- ◇ Enacted in 1962, the “Contract Work Hours Standards Act” consolidated a number of “eight hour” laws, some dating back to the 1890s, and originally provided for overtime pay after 8 hours a day on federal construction contracts, and provided for overtime pay after 40 hours a week. Amendments in 1969 added safety and health provisions and revised the name of the law to be the “Contract Work Hours and Safety Standards Act.” Pub. L. 91-54, August 9, 1969.

CWHSSA Requirements 40 U.S.C. § 3702.

- ◇ CWHSSA requires overtime pay for laborers and mechanics, including guards and watchmen, at a rate of one and one-half times the basic rate of pay for hours worked in excess of 40 in a workweek on **covered contracts**.
- ◇ Effective January 1, 1986, the daily (8-hour) overtime requirement was eliminated. Therefore, like the FLSA, CWHSSA requires overtime pay after 40 hours.
- ◇ In addition to back wages for unpaid overtime hours, CWHSSA also provides for an assessment of **liquidated damages** at the rate of \$10 per day for each day that each laborer and mechanic worked without payment of the required overtime compensation.
- ◇ In those situations where there are concurrent FLSA and CWHSSA violations, the back wages are generally computed and reported under CWHSSA rather than FLSA. This is because under CWHSSA:
 - ◇◇ Back wages due covered workers can be secured by agency withholding of funds due the contractor on account of work performed by the contractor or subcontractors.
 - ◇◇ Liquidated damages may be assessed against the employer.
 - ◇◇ Debarment action may be initiated.

- ◇ The safety and health provisions of CWHSSA are within the administrative jurisdiction of the Occupational Safety and Health Administration of DOL, rather than the WHD.

CWHSSA Coverage 40 U.S.C. §§ 3701 *et seq.*

- ◇ CWHSSA applies to DBA, DBRA, and SCA contracts in excess of \$100,000. In addition to laborers and mechanics covered under DBA/DBRA, CWHSSA also specifically covers **guards** and **watchmen**. 40 U.S.C. § 3701(b)(2).
- ◇ CWHSSA also applies to a contract in excess of \$100,000 that may require or involve the employment of laborers or mechanics if the contract is one:
 - ◇◇ to which the Federal Government, an agency or instrumentality of the Government, a territory of the United States, or the District of Columbia is a party;
 - ◇◇ which is made for or on behalf of the Government, an agency or instrumentality thereof, a territory, or the District of Columbia; or
 - ◇◇ which is a contract for work financed at least in part by loans or grants from, or loans insured or guaranteed by, the Federal Government or an agency or instrumentality under any federal law providing wage standards for the work.
- ◇ However, by its terms, CWHSSA does not apply where federal assistance is only in the nature of a loan guarantee or insurance. 40 U.S.C. § 3701. For example, HUD assistance in the form of loan guarantees under the National Housing Act is not subject to CWHSSA.
- ◇ CWHSSA is self-executing. The failure to include CWHSSA stipulations in a contract does not preclude its application.
- ◇ CWHSSA has no job site limitation. If an employee performs part of the construction work at the job site, part of the work at a shop, and/or travels between covered contract work locations, the statute applies to all hours of the contract work performed by covered workers.

CWHSSA Exceptions 40 U.S.C. §§ 3701(b)(3) and 3706 and 29 C.F.R. § 5.15.

- ◇ CWHSSA does not apply to contracts for:

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- ◇◇ Transportation by land, air or water.
- ◇◇ Transmission of intelligence.
- ◇◇ Purchase of supplies or materials or articles ordinarily available in the open market.
- ◇◇ Work required to be done in accordance with the provisions of the PCA.
- ◇◇ Construction or services where the contract is not greater than \$100,000.
- ◇◇ Agreements entered into by or on behalf of the Commodity Credit Corporation for storage in or handling by commercial warehouses of certain items including grain sorghums, beans, seeds, cotton, wool and naval stores.
- ◇◇ Certain sales of surplus power by the Tennessee Valley Authority (TVA).
- ◇◇ Work performed in a workplace within a foreign country, or
- ◇◇ Work performed within a territory under U.S. jurisdiction other than a state of the U.S.; the District of Columbia; Puerto Rico; the Virgin Islands; Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act (ch. 345, 67 Stat. 462); American Samoa; Guam; Wake Island; and Johnston Island.

COPELAND “ANTI-KICKBACK” ACT (CA)

(40 U.S.C. § 3145 and 18 U.S.C. § 874)

CA Purpose, Requirements, and Coverage

- ◇ The CA and implementing regulations in 29 C.F.R. Part 3 apply to DBA and DBRA contracts and provide for the following safeguards:
 - ◇◇ Prohibit “kickbacks” of wages and back wages.
 - ◇◇ Require each contractor and subcontractor on covered projects to submit weekly a “Statement of Compliance” (i.e. certifying that the contractor/subcontractor has paid the required wages). *See* 29 C.F.R. §§ 3.3 and 3.4, and in the DB contract clauses, 29 C.F.R. § 5.5(a)(3); FAR 48 C.F.R. § 52.222-8.)
 - ◇◇ Regulate payroll deductions from wages.
 - ◇◇ Specify methods of payment of wages.

CA Regulation of payroll deductions

- ◇ Rules at 29 C.F.R. § 3.5 permit the following deductions from wages **without DOL approval**:
 - 1) Any deduction made in compliance with the requirements of Federal, State or local law, such as social security or federal or state income tax withholding.
 - (2) Deductions for bona fide prepayment of wages.
 - (3) Certain deductions for court ordered payments.
 - (4) Deductions for contributions to fringe benefit plans, provided that the deduction is not prohibited by law; that it is either voluntarily consented to by the employee in writing in advance of the time the work is to be done (not as a condition of employment) or provided for in a collective bargaining agreement; that no profit or other benefit is obtained by the contractor (or its affiliates); and that the deduction serves the convenience and interest of the employee.

- (5) Deductions for purchase of U.S. savings bonds when voluntarily authorized by the employee.
 - (6) Deductions to repay loans or to purchase shares in a credit union, when requested by the employee.
 - (7) Deductions voluntarily authorized for contributions to organizations such as the Red Cross, United Way, or similar charitable organizations.
 - (8) Deductions to pay regular union initiation fees and membership dues, excluding fines or special assessments, provided that a collective bargaining agreement provides for such deductions.
 - (9) Deductions for the “reasonable cost” of board, lodging, or other facilities meeting the requirements of section 3(m) of the FLSA and 29 C.F.R. Part 531.
 - (10) Deductions for the cost of safety equipment of nominal value purchased (voluntarily or as provided for in a bona fide collective bargaining agreement) by the employee (as his or her own personal property) if such equipment is not required by law to be furnished by the employer, if such deduction is not prohibited by the FLSA or other law, and if the cost on which the deduction is based does not exceed the actual cost to the employer (where the employee purchases the equipment from the employer).
- ◇ Pursuant to 29 C.F.R. § 3.6, any contractor may apply to the DOL for permission to make any deductions not listed in 29 C.F.R. § 3.5. DOL **may approve payroll deductions** whenever **all** of the following conditions are met:
- (1) The contractor (and its affiliates) do not make a profit or benefit directly or indirectly from the deduction;
 - (2) The deduction is not otherwise prohibited by law;
 - (3) Either the deduction is provided under the terms of a bona fide collective bargaining agreement, or the employee voluntarily consented to the deduction in writing in advance of the time the DBA/DBRA work is to be performed (and the employee’s employment did not/does not depend on such consent); and

- (4) The deduction serves the convenience and interest of the employee.

CA “Statement of Compliance”

- ◇ Contractors and subcontractors on DBA/DBRA-covered construction projects must submit a weekly “Statement of Compliance” certifying compliance with the DBA/DBRA/CA requirements during the preceding workweek. This “statement of compliance” is usually referred to as the certified payroll. 29 C.F.R. Part 3, 29 C.F.R. § 5.5(a)(3) and FAR 48 C.F.R. § 52.222-8.
- ◇ Falsification of a certified payroll is a criminal violation that can result in a fine, up to 5 years in prison, or both. 18 U.S.C. § 874 & 1001. It can also be grounds for a private lawsuit under the False Claims Act. 31 U.S.C. § 3730.

CA “Anti-Kickback” provision 18 U.S.C. § 874.

- ◇ The CA provides penalties to preclude a contractor or subcontractor from in any way inducing an employee to give up any part of the compensation to which he or she is entitled.
- ◇ The “anti-kickback” provision of the CA provides that inducing any person employed on a federally funded or assisted construction project to give up any part of the compensation to which he/she is entitled is a criminal violation punishable by a fine, up to 5 years in prison, or both.
- ◇ As early as possible, the WHD should be notified of potential criminal violations such as the kickback of wages and the falsification of certified payroll records.

WALSH-HEALEY PUBLIC CONTRACTS ACT (PCA) (41 U.S.C. §§ 6501, *et seq.*)

PCA Purpose and Requirements

- ◇ The PCA provides labor standards for employees working on federal contracts over \$15,000 for the manufacturing or furnishing of goods, supplies, articles, or equipment. 41 C.F.R. Part 50-201.
- ◇ The PCA requires covered contracts to contain minimum wage, overtime, and safety and health standards, and prohibits the employment of children under 16 years of age and convict labor. 41 U.S.C. § 50-201.3.
- ◇ The minimum wage requirement under PCA is the FLSA minimum wage and the PCA overtime requirements are also the same as the FLSA. 41 C.F.R. §§ 50-201.102 and 50-202.2.
- ◇ The PCA requires the posting of the “Notice to Employees Working on Government Contracts” (WH Publication 1313) at the site of the contract work and the maintenance of employment records. 41 C.F.R. §§ 50-201.3(f), 50-201.501 – 50-201.502.
- ◇ The WHD has sole PCA enforcement responsibility, except that the Occupational Safety and Health Administration (OSHA) enforces the safety and health provisions of the Act. 41 C.F.R. § 50-201.2.

PCA Coverage

- ◇ The PCA applies to manufacturing and supply contracts exceeding \$15,000 (including indefinite-delivery contracts, basic ordering agreements, and blanket purchase agreements) and to subcontracts under section 8(a) of the Small Business Act. 41 C.F.R. § 50-201.1. (*See also* FAR 48 C.F.R. § 22.603.) (The threshold for PCA coverage was increased from \$10,000 to \$15,000 pursuant to provisions in Title VII of the Defense Authorization Act for Fiscal Year 2005, effective October 1, 2010, and is reflected in the FAR 48 C.F.R. § 22.602.)
- ◇ The PCA applies to employees engaged in or connected with the manufacture, fabrication, assembling, handling, supervision, or shipment of materials, supplies, articles, or equipment required under the contract. 41 C.F.R. § 50-201.101.
- ◇◇ The PCA does not apply to employees performing only office or custodial work.

- ◇◇ The PCA does not apply to any employee employed in a bona fide executive, administrative, professional, or outside salesman capacity, as those terms are defined by the FLSA regulations. 29 C.F.R. Part 541.
- ◇ The PCA applies to covered contracts or work performed in the 50 States, the District of Columbia, Puerto Rico, and the Virgin Islands. 41 C.F.R. § 50-201.603(b).
- ◇ Section 7201(a) of the Federal Acquisition Streamlining Act (FASA) of 1994 repealed the PCA requirement that every contractor be “a manufacturer of or a regular dealer . . . in the performance of the contract.” 41 U.S.C. § 35(a). Since this amendment became effective on October 1, 1995, PCA includes “a manufacturer, regular dealer,” or any supplier/distributor of the materials, supplies, articles, or equipment to be manufactured or supplied under the contract as eligible contractors. All Agency Memorandum No. 180.

PCA Statutory Exclusions 41 U.S.C. § 6505.

- ◇ Section 9 of the PCA exempts contracts for:
 - ◇◇ Open market purchases or purchases made without advertising for bids under circumstances where immediate delivery is required by the public exigency. 41 C.F.R. § 50-201.4(a).
 - ◇◇ Perishables, including dairy, livestock, and nursery products. 41 C.F.R. § 50-201.4(b).
 - ◇◇ Agricultural or farm products processed for first sale by the original producers. 41 C.F.R. § 50-201.4(c).
 - ◇◇ Purchase of agricultural commodities or the products thereof by the Secretary of Agriculture. 41 C.F.R. § 50-201.4(d).
 - ◇◇ Common carrier carriage of freight or personnel by vessel, airplane, bus, truck, express, or railway line, where published tariff rates are in effect. 41 C.F.R. § 50-201.4(e).
 - ◇◇ Furnishing of service by radio, telephone, telegraph, or cable companies, subject to the Federal Communications Act of 1934 (48 Stat. 1064 as amended; 47 U.S.C. Chapter 5). 41 C.F.R. § 50-201.4(f).

PCA Administrative Exemptions

- ◇ The following contracts have been exempted from the PCA pursuant to the procedures required under section 6 of the PCA. 41 C.F.R. §§ 50-201.601 – 50-201.603.
 - ◇◇ Contracts for public utility services including electric light and power, water, steam, and gas. 41 C.F.R. § 50-201.603(a).
 - ◇◇ Contracts for materials, supplies, articles, or equipment no part of which will be manufactured or furnished within the geographic limits of the 50 States, the District of Columbia, Puerto Rico, and the Virgin Islands. 41 C.F.R. § 50-201.603(b).
 - ◇◇ Contracts covering purchases against the account of a defaulting contractor where the PCA stipulations were not included in the defaulted contract. 41 C.F.R. § 50-201.603(c).
 - ◇◇ Contracts awarded to sales agents or publisher representatives, for the delivery of newspapers, magazines or periodicals by the publishers thereof. 41 C.F.R. § 50-201.603(d).

**THE MCNAMARA-O'HARA SERVICE
CONTRACT ACT (SCA)**
(41 U.S.C. §§ 6701, *et seq.*)

SCA Legislative History and Purpose

- ◇ The SCA took effect in January 1966. The law was amended in 1972 and 1976. It is the most recent of the government contract labor standards laws administered by the WHD.
- ◇ The SCA was enacted to “close the gap” in labor standards protection between supply contracts subject to the PCA and construction contracts subject to DBA. (Services were the remaining category of federal procurement not covered by labor standards law.) Thus, enactment of the SCA was intended to ensure all the major categories of government procurement included labor standards protections for affected employees.
- ◇ The SCA was intended to remove wages as a factor in the competition for federal service contracts by requiring the payment of locally prevailing wage rates (not just the FLSA minimum wage) and fringe benefits, or in certain cases, the wage rates and fringe benefits contained in a predecessor contractor's collective bargaining agreement (section 4(c) of the Act). (Labor costs are often the predominant factor affecting bids on federal service contracts being awarded to the lowest bidder.)

SCA Requirements

- ◇ The SCA applies to most contracts entered into by the United States or the District of Columbia whose principal purpose is the furnishing of services through the use of service employees.
- ◇ The major SCA labor standards provisions are:
 - ◇◇ Prevailing minimum wage and fringe benefit compensation standards for service employees working on contracts over \$2,500, and FLSA minimum wages for contracts of \$2,500 or less.
 - ◇◇ Recordkeeping and posting requirements.
 - ◇◇ Safety and health protection.

- ◇ WHD has sole SCA enforcement responsibility for the wage and fringe benefit requirements of SCA. The Occupational Safety and Health Administration (OSHA) enforces the safety and health provisions of the SCA.

SCA Coverage 29 C.F.R. §§ 4.107 – 4.113.

What federal government contracts are subject to SCA?

- ◇ Contracts entered into by any agency or instrumentality of the federal government, whether by the executive, judicial, or legislative branches, or by the District of Columbia. Examples: the Department of Defense, the Department of the Interior, the General Services Administration, etc.
- ◇ Contracts issued by wholly owned corporations of the government. Examples: Tennessee Valley Authority, Postal Service.
- ◇ Contracts with non-appropriated fund activities, i.e., concession contracts. Examples: military post exchanges (PX's), cafeteria boards in federal buildings.
- ◇ Contracts between a federal agency and a state or local government are covered. Contracts between federal agencies are not covered (examples: DOL and the General Services Administration).
- ◇ SCA applies only to federal contracts, not to federally “assisted” contracts.

Three elements necessary for coverage:

1. The contract is principally (i.e., primarily) for services (as distinguished from construction or manufacturing or some other purpose).
2. The contract involves work to be performed in any of the 50 States, the District of Columbia, Puerto Rico, the Virgin Islands, Outer Continental Shelf lands, American Samoa, Guam, Wake Island, Johnston Island, and the Northern Marianas. (Canton Island, Eniwetok Atoll, and Kwajalein Atoll are now independent and no longer a part of the U.S.)

Contract work performed in any other territory under U.S. jurisdiction or U.S. base or possession within a foreign country is not covered. For example, the SCA does not apply to a contract to provide cafeteria services on a military base in a foreign country.

3. The contract is performed through the use of service employees as defined in the SCA regardless of any contractual relationship that may be alleged to exist between a contractor and an employee. 41 U.S.C. § 6701(3).

The Act defines “service employee” as any person engaged in the performance of a covered contract except those persons who individually qualify for exemption as bona fide executive, administrative or professional employees as defined in 29 C.F.R. Part 541. 29 C.F.R. § 4.113(b); 29 C.F.R. § 4.156.

Coverage of service employees depends on whether they perform the work called for by an SCA-covered contract, regardless of any alleged contractual relationship between the service employee and the contractor. 29 C.F.R. § 4.155.

- ◇ Examples of contracts covered by SCA. 29 C.F.R. § 4.130.

- ◇◇ Guard and watchman security services
- ◇◇ Janitorial services
- ◇◇ Cafeteria and food service
- ◇◇ Grounds maintenance
- ◇◇ Laundry and dry cleaning
- ◇◇ Data processing
- ◇◇ Electronic equipment maintenance and operation
- ◇◇ Chemical testing and analysis
- ◇◇ Support services at government installations
- ◇◇ Drafting and illustrating and mapping services
- ◇◇ Operating, maintenance and logistical support of a Federal facility
- ◇◇ Warehousing or storage

- ◇ Examples of contracts not covered by SCA. 29 C.F.R. § 4.134.

- ◇◇ Any contract whose principal purpose is something other than the procuring of services through the use of service employees – for example, a construction, supply or manufacturing contract.
- ◇◇ Contracts for the leasing of space.
- ◇◇ Contracts for professional medical services (where the employment of “service employees” is not involved or is a minor factor).

- ◇◇ Contracts to operate or manage an entire federal facility or program (*i.e.*, government-owned contractor/privately-operated “GOCO” or “GOPO”).
- ◇◇◇ Sometimes contracts are entered into with a prime contractor to operate a federal facility or program for and on behalf of the government. Because the contractor is in effect operating in the place of the government as an “agent for the government,” such a contract is not considered subject to the SCA. However, contracts entered into by the operating contractor with secondary contractors, for and on behalf of the government, that have services as their principal purpose are subject to the SCA. 29 C.F.R. § 4.107(b).

SCA Statutory Exemptions SCA § 7; 29 C.F.R. §§ 4.115 – 4.122.

The SCA does not apply to the following:

- ◇ Any contracts of the United States for construction, alteration, and/or repair, including painting and decorating, of public buildings or public works (contracts subject to DBA). 29 C.F.R. § 4.116.
- ◇ Any work (work not contract) required to be done in accordance with the provisions of the PCA. 29 C.F.R. § 4.117.
- ◇ 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 (29 C.F.R. § 4.118). The effect of this exemption has become limited in scope due to changes in transportation laws. (*See All Agency Memorandum No. 185 for further information.*)
- ◇◇ 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. A contract between the government and the carrier would be evidenced by a government bill of lading citing the published tariff rates.
- ◇◇ Contracts for ambulance or taxicab services typically are not exempt because they are usually not deemed common carriers and/or the transportation is not governed by published tariff rates.

- ◇◇ Mail haul contractors are not within the scope of this exemption because “mail” is not considered to be “freight” under federal law. (However, see the discussion of relevant regulatory exemptions, below.)
- ◇◇ Contracts principally for packing, crating and warehousing of household goods are also not exempt, even though performed by an otherwise common carrier, because the local hauling is a minor, incidental purpose of the contract.
- ◇ Any contract for the furnishing of services by radio, telephone, telegraph, or cable companies, subject to the Communications Act of 1934. 29 C.F.R. § 4.119.
- ◇ Any contract for public utility services, including electric light and power, water, steam, and gas. 29 C.F.R. § 4.120.
- ◇ Any employment contract providing for direct service to a federal agency by an individual or individuals. 29 C.F.R. § 4.121.
- ◇ Any contract with the U.S. Postal Service, the principal purpose of which is the operation of postal contract stations. 29 C.F.R. § 4.122.

SCA Regulatory Exemptions 41 U.S.C. § 6707 and 29 C.F.R. § 4.123.

- ◇ The SCA authorizes DOL to provide reasonable limitations, and make rules and regulations allowing reasonable variations, tolerances and exemptions from SCA provisions in special circumstances where such action is necessary and proper in the public interest or to avoid serious impairment to the conduct of government business, and is in accord with the remedial purpose to protect prevailing labor standards.

INTERACTION AMONG

PCA & SCA & DBA

ON

FEDERAL CONTRACTS

**STANDARD CONTRACT CLAUSES (DOL & FAR CITATIONS)
& FAR 48 CFR 22.402(b)**

DISTINGUISHING BETWEEN PCA AND SCA

DISTINGUISHING BETWEEN SCA AND DBA

CONTRACTS REQUIRING PCA AND DBA

CONTRACTS REQUIRING SCA AND DBA

**STANDARD CONTRACT CLAUSES (DOL & FAR CITATIONS)
&
FAR 48 C.F.R. § 22.402(b)**

Standard Contract Clauses

◇	DBA/DBRA	29 C.F.R. § 5.5(a)	FAR: 48 C.F.R. §§ 52.222-5 through 52.222-15.
◇	SCA	29 C.F.R. § 4.6.	FAR: 48 C.F.R. §§ 52.222.41 through 52.222-44, 52.222-48 52.222-49, & 52.222-51 through 52.222.53.
◇	PCA	41 C.F.R. § 50-201.3	FAR: 48 C.F.R. §52.222-20.
◇	CWHSSA	29 C.F.R. § 5.5(b)	FAR: 48 C.F.R. §52.222-4.

FAR 48 C.F.R. § 22.402(b)

Subpart 22.4—Labor Standards for Contracts Involving Construction

22.402 Applicability.

(b) *Nonconstruction contracts involving some construction work.*

(1) The requirements of this subpart apply to construction work to be performed as part of nonconstruction contracts (supply, service, research and development, etc.) if—

(i) The construction work is to be performed on a public building or public work;

(ii) The contract contains specific requirements for a substantial amount of construction work exceeding the monetary threshold for application of the Davis-Bacon Act (the word *substantial* relates to the type and quantity of construction work to be performed and not merely to the total value of construction work as compared to the total value of the contract); and

(iii) The construction work is physically or functionally separate from, and is capable of being performed on a segregated basis from, the other work required by the contract.

(2) The requirements of this subpart do not apply if—

(i) The construction work is incidental to the furnishing of supplies, equipment, or services (for example, the requirements do not apply to simple installation or alteration at a public building or public work that is incidental to furnishing supplies or equipment under a supply contract; however, if a substantial and segregable amount of construction, alteration, or repair is required, such as for installation of heavy generators or large refrigerator systems or for plant modification or rearrangement, the requirements of this subpart apply); or

(ii) The construction work is so merged with nonconstruction work or so fragmented in terms of the locations or time spans in which it is to be performed, that it is not capable of being segregated as a separate contractual requirement.

DISTINGUISHING BETWEEN PCA AND SCA

- ◇ The PCA applies to federal contracts in excess of \$15,000 for the manufacture or furnishing of materials, supplies, articles or equipment.
 - ◇ Contracts principally for remanufacturing of equipment that is so extensive as to be equivalent to manufacturing are subject to PCA (not SCA).
 - ◇ Manufacturing is deemed to include remanufacturing, and PCA applies when certain criteria are met. Thus, PCA applies to:
 - ◇◇ Major overhaul, in a facility owned or operated by the contractor, of an item, equipment, or materiel that is degraded or inoperable and which is required to be substantially torn down into its individual component parts to be reworked, rehabilitated, altered, and/or replaced, and reassembled (usually commingling the disassembled parts with inventory parts) to furnish a rebuilt item or piece of equipment restored to its original life expectancy or nearly so by manufacturing processes similar to those used in manufacturing the item or equipment; or,
 - ◇◇ Major modification, in a facility owned or operated by the contractor, of an item, equipment, or materiel that is wholly or partially obsolete, and is required to be substantially torn down, have outmoded parts replaced, and then be rebuilt or reassembled, so that the contract work results in a substantially modified item in a usable and serviceable condition.
- 29 C.F.R. §§ 4.117(b)(1), (b)(2).
- ◇ Manufacturing does not include the repair of damaged or broken equipment that does not require such complete teardown, overhaul and rebuild of the item(s), equipment, or materiel. 29 C.F.R. § 4.117(b)(3).
 - ◇ In contrast with PCA application to manufacturing, including remanufacturing, SCA covers contracts for periodic and routine maintenance, preservation, care, adjustment, upkeep, or servicing of equipment to keep it in usable, serviceable, working order. 29 C.F.R. § 4.117(b)(3).
 - ◇◇ Such contracts typically are billed on an hourly rate basis – labor plus materials and parts.
 - ◇◇ A contract principally for work listed at 29 C.F.R. § 4.117(b)(3) is subject to SCA (not PCA). Examples of such work include:

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- ◇◇◇ repair of an automobile, truck, other vehicle, aerospace, air conditioning and refrigeration equipment, ground powered industrial or vehicular equipment; and inspecting , testing, calibration, painting, packaging, lubrication, tune-up, or replacement of internal parts of such equipment;
 - ◇◇◇ repair of electronic equipment or appliances; inspecting, testing, calibration, painting, packaging, lubrication, tune-up, or replacement of internal parts of equipment (if not exempt under 29 C.F.R. § 4.123(e)); and reupholstering, reconditioning, repairing, and refinishing furniture.
 - ◇◇◇ WHD may decide on application of SCA or PCA to a similar type of contract not addressed in 29 C.F.R. § 4.117(b)(1)-(3) on a case-by-case basis. 29 C.F.R. § 4.117(b)(4).
- ◇ “Any work required to be done in accordance” with PCA provisions is exempt from SCA requirements.
 - ◇◇ This SCA exemption, at 41 U.S.C. § 6702(b)(2), applies to “work”, i.e., specifications or requirements, rather than “contracts,” subject to the PCA.
 - ◇◇ The purpose of the SCA exemption of work subject to the PCA is to eliminate possible overlapping of the differing labor standards of the two laws.
 - ◇◇ If the principal purpose of a contract is the manufacture or furnishing of materials, supplies, etc., rather than the furnishing of services of the character referred to in the SCA, there is no overlap because such a contract is covered by PCA and is not covered by the SCA.
- 29 C.F.R. § 4.117(a).
- ◇ PCA applicability to work under an SCA contract
 - ◇◇ A procurement that requires tangible items to be supplied to the Government or the contractor as a part of the service furnished is covered by SCA so long as the contract is chiefly for services and the furnishing of such tangible items is of secondary importance. 29 C.F.R. § 4.131(a). (The use or furnishing of such items may be an important element in the furnishing of the services called for by the contract.)
 - ◇◇ On the other hand, if as a matter of convenience in procurement, the service specifications are combined in a single contract document with specifications

for the procurement of different or unrelated items, and the principal purpose of the contract is for services warranting SCA coverage, SCA would apply to the service specifications but PCA would apply to specifications, if any, requiring the manufacture or furnishing of materials, supplies, articles or equipment to the Government. 29 C.F.R. § 4.132.

DISTINGUISHING BETWEEN SCA AND DBA

- ◇ An important coverage concern is distinguishing DBA and SCA work under federal contracts. This is particularly important because federal contracting agencies are responsible to designate application of DBA and SCA requirements to different work under single contracts. The potential for cost adjustment changes for the agency, as well as administrative inconvenience for the agency and its contractor(s), also may result from failure to apply the DBA and SCA labor standards appropriately.
 - ◇◇ Routine and recurring maintenance work is covered by SCA and typically involves the activity of keeping something in such a condition that it may be continuously utilized.
 - ◇◇ By contrast, DBA typically covers activities such as rehabilitation or restoration of a facility.
 - ◇◇ Determining whether the activity is continuous in nature (SCA), as opposed to a single incident repair or replacement job (DBA), will often resolve the SCA/DBA coverage question.
- ◇ SCA covered maintenance work vs. DBA repair work:
 - ◇◇ SCA covered maintenance work – Work is typically scheduled, routine, and recurring. The workers are typically engaged in performing ongoing activities needed to keep something in such a condition that it may be continuously utilized. Thus, the SCA, rather than the DBA, will normally apply when the:
 - ◇◇◇ Activities are continuous in nature (such as daily or weekly);
 - ◇◇ DBA repair work – Typically covers activities such as the restoration of a facility by replacement, overhaul, or reprocessing of constituent parts or materials. Thus, the DBA, rather than the SCA, will normally apply when the:
 - ◇◇◇ Activity is a one-time fix to something not functioning;
 - ◇◇◇ Activity involves a service or repair order that generally takes 32 or more work hours to perform, such as for repair of a particular building component; or

- ◇◇◇ Activity involves the alteration, relocation, or rearrangement of architectural and structural components of a facility that affects the structural strength, stability, safety, capacity, efficiency, or usefulness of the facility.
- ◇ An important factor in determining coverage is whether the activity is undertaken as **part of a construction** project. For example:
 - ◇◇ **DBA** applies when cleanup, landscaping, carpet laying, and drapery installation activities are undertaken as an integral part of or in conjunction with new construction, such as under a construction contract where they precede and are conditional to acceptance of a building or public work by the owner.
 - ◇◇ The SCA applies when the same activities are performed after the construction contractor and subcontractors have finished, left the site and the contracting agency has accepted the building.
- ◇ Demolition work 29 C.F.R. § 4.116(b):
 - ◇◇ **SCA** applies where the contract is for the demolition or dismantling of buildings or other structures, and does not contemplate further construction activity at the site;
 - ◇◇ **DBA** applies where contract is for demolition and/or clearing of the site and contemplates subsequent construction of a public building or public work at the same location.
 - ◇◇ AAM No. 190 discusses the application of these labor standards to demolition contracts.
- ◇ Exploratory drilling and well drilling:
 - ◇◇ **SCA** applies when the drilling is for a purpose other than part of construction, such as exploratory drilling to obtain data to be used in engineering studies. 29 C.F.R. § 4.130(a)(16).
 - ◇◇ **SCA** may apply to a federal contract for drilling to obtain data to be used in planning of a construction project that has not been authorized or for which no funds have been appropriated.

- ◇◇ **DBA** applies to drilling holes for wells and other structures and improvements that fall within the term “work” as defined by 29 C.F.R. § 5.2(i).

CONTRACTS REQUIRING PCA AND DBA

- ◇ If a PCA-covered contract involves a substantial amount of construction work on a public building or work (exceeding the monetary threshold for DBA application), it is also subject to the DBA if the construction work is physically or functionally separate from, and is capable of being performed on a segregated basis from, the other work required by the contract. (The word *substantial* relates to the type and quantity of construction work to be performed and not merely to the total value of construction work as compared to the total value of the contract.) See FAR 48 C.F.R. § 22.402 (b).

For example:

- ◇◇ Contract for the supply and installation of a security system that requires:
 - ◇◇◇ Replacement of existing conduit,
 - ◇◇◇ Laying cable, and
 - ◇◇◇ Tearing out and replacing walls.

- ◇◇ Contract for the supply and installation of modular furniture or energy-efficient lighting fixtures that requires:
 - ◇◇◇ Bolting furniture or fixtures to floors, walls and/or ceilings,
 - ◇◇◇ Modifying walls, floors and/or ceilings to accommodate shelving,
 - ◇◇◇ Installing electrical connections for desk area outlets, or
 - ◇◇◇ Installing new ballasts and/or lighting fixtures.

- ◇◇ Contract that provides for the supply and installation of equipment requiring construction activity, such as:
 - ◇◇◇ Reconfiguration or alteration of building space,
 - ◇◇◇ Upgrade to utilities, or
 - ◇◇◇ Bolting or affixing equipment to floors, walls and/or ceiling.

CONTRACTS REQUIRING SCA AND DBA

- ◇ The DBA applies to an SCA-covered contract principally for the furnishing of services in the United States through the use of service employees if a **substantial** amount of construction work is also necessary for performance of the contract and the construction work is physically or functionally **segregable** from the other contract work.
 - ◇◇ **Substantial** relates to the type and quantity of construction work to be performed, not merely its value in dollars or the value of the construction work as compared to the total contract value, and
 - ◇◇ **Segregable** means that as a practical matter the construction work is functionally separate from, and is capable of being performed on a segregated basis from, the other work called for by the contract.

29 C.F.R. § 4.116(c)(2); FAR 48 C.F.R. § 22.402(b).

Examples:

- ◇◇ Contract for furnishing cafeteria and food services that includes requirements to renovate and paint the cafeteria and kitchen. While this is an SCA contract, the construction specifications of the contract are DBA-covered.
- ◇◇ Base maintenance and support contract that provides services for operation of a military base and requires substantial and segregable construction work orders such as:
 - ◇◇◇ Painting base housing and buildings.
 - ◇◇◇ Refinishing floors.
 - ◇◇◇ Reroofing buildings.
- ◇ Questions sometimes arise as to whether the work required under an individual work order, task order or service call is for SCA maintenance or DBA painting/repairs.
 - ◇◇ DFARS guidance regarding installation support contracts advises that where the distinction is unclear:

- ◇◇◇ Individual service calls or orders which will require a total of 32 or more work-hours to perform shall be considered to be repair work subject to the DBA. DFARS 48 C.F.R. § 222.402-70(d)(1).
- ◇◇◇ Painting work of 200 square feet or more to be performed under an individual service call or order shall be considered to be subject to the DBA regardless of the total work-hours required. DFARS 48 C.F.R. § 222.402-70(d)(3).
- ◇◇◇ Also, contracting officers may not avoid application of the DBA by splitting individual tasks between orders or contracts. DFARS 48 C.F.R. § 222.402-70(f).

DISPUTES CONCERNING COVERAGE DETERMINATIONS

- ◇ The contracting agency has the initial responsibility for determining the labor standards statutes applicable to a contract. This is important because many federal agency procurement officials are responsible, in the first instance, to designate application of PCA, DBA, and/or SCA requirements appropriately to federal contracts and multiple work elements of contracts that warrant the application of different labor standards. (See FAR 48 C.F.R. Subparts 22.3, 22.4, 22.6, 22.10, and 22.12.)
- ◇ Agency procurement personnel and contracting officers should seek guidance from their agency labor advisors when there are questions regarding coverage determinations.
- ◇ In addition, WHD may provide compliance assistance regarding appropriate application of the federal prevailing wage statutes.
- ◇ If an agency is found to have erred in its determination(s), substantial cost adjustment expenses and administrative burdens may result from failure to apply the PCA, DBA and SCA labor standards appropriately. For example, *see* FAR 48 C.F.R. § 22.404-6(b)(5), § 22.404-9 and § 22.1015.
- ◇ WHD has the authority for issuing final determinations on coverage. Each final ruling is based on the facts of a specific situation and how those facts relate to the coverage principles set forth by regulation, statute, and pertinent case law.
- ◇ In making coverage determinations, WHD generally solicits input from interested parties.
- ◇ Final WHD rulings may be appealed to the Administrative Review Board (ARB) under 29 C.F.R. Part 7 regarding DBA and DBRA cases, and 29 C.F.R. Part 8 regarding SCA cases.
- ◇ The members of the ARB are appointed by the Secretary of Labor to review final rulings and interpretations on wage determinations, coverage, and enforcement issues under the DBRA and SCA. The Board has the full authority of the Secretary of Labor in such matters.

DAVIS-BACON SURVEYS

INTRODUCTION

OVERVIEW OF DAVIS-BACON SURVEY PROCESS

KEY CLASSES

CERTIFIED PAYROLLS

SURVEY FORM WD-10 & INSTRUCTIONS

INTRODUCTION

- ◇ The WHD conducts a continuing program for obtaining and compiling wage rate information, including the conduct of surveys requesting the voluntary submission of wage data by contractors, contractors' associations, labor organizations, public officials, and other interested parties as the basis for developing Davis-Bacon wage determinations that reflect the wages paid to for laborers and mechanics employed on different types of construction in local areas across the country, which set minimum pay requirements for federal and federally assisted construction subject to DBA/DBRA prevailing wage requirements.
- ◇ Based on the data submitted in response to the such surveys, WHD determines the locally prevailing wages to be issued Davis-Bacon wage determinations for inclusion in DBA and DBRA covered contracts.

Statutory and regulatory requirements

- ◇ The DBA requires that minimum wage requirements to be included in covered contracts be “based on the wages the Secretary of Labor determines to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work” in the area (usually a county) in which proposed contract work is to be performed. 40 U.S.C. § 3142(b).
 - ◇◇ As noted in 29 C.F.R. § 1.1(a), the responsibility for such determinations has been delegated to the WHD Administrator and authorized representatives.
- ◇ 29 C.F.R. Part 1 establishes the procedures for issuing and applying Davis-Bacon wage determinations to covered contracts.
- ◇ The regulatory definition of the term “prevailing wage” is stated at 29 C.F.R. § 1.2(a)(1):
 - ◇◇ The *prevailing wage* shall be the wage paid to the majority (more than 50 percent) of the laborers or mechanics in the classification on similar projects in the area during the period in question. If the same wage is not paid to a majority of those employed in the classification, the *prevailing wage* shall be the average of the wages paid, weighted by the total employed in the classification.
- ◇ The regulation further states at 29 C.F.R. § 1.2(a)(2) that:
 - ◇◇ In determining the *prevailing wages* at the time of issuance of a wage determination, the Administrator will be guided by paragraph (a)(1) of this section and will consider the types of information listed in § 1.3 of this part.

- ◇ The WHD conducts a continuing program for the obtaining and compiling of wage rate information, in accordance with 29 C.F.R. § 1.3, which addresses “Obtaining and compiling wage rate information.” As mandated by 29 C.F.R. § 1.3(a):
 - ◇◇ The Administrator will encourage the voluntary submission of wage rate data by contractors, contractors' associations, labor organizations, public officials and other interested parties, reflecting wage rates paid to laborers and mechanics on various types of construction in the area, and .
 - ◇◇ The Administrator may also obtain data from agencies on wage rates paid on construction projects under their jurisdiction.
 - ◇◇ The information submitted should reflect not only the wage rates paid a particular classification in an area, but also the type or types of construction on which such rate or rates are paid, and whether or not such rates were paid on federal or federally assisted projects subject to Davis-Bacon prevailing wage requirements.
- ◇ A listing of types of information that “may be considered in making wage rate determinations is provided in 29 C.F.R. § 1.3(b). It includes:
 - ◇◇ Statements showing wage rates paid on projects, which should include:
 - ◇◇◇ the names and addresses of contractors, including subcontractors,
 - ◇◇◇ the locations, approximate costs, dates of construction and types of projects,
 - ◇◇◇ whether or not the projects are Federal or federally assisted projects subject to Davis-Bacon prevailing wage requirements,
 - ◇◇◇ the number of workers employed in each classification on each project, and
 - ◇◇◇ the respective wage rates paid such workers.
 - ◇◇ Signed collective bargaining agreements;
 - ◇◇ Wage rates determined for public construction by State and local officials pursuant to State and local prevailing wage legislation.; and
 - ◇◇ Any other information pertinent to the determination of prevailing wage rates.
 - ◇◇ Also, in making wage rate determinations pursuant to 23 U.S.C. § 113, the highway department of the State in which a project in the Federal-Aid highway system is to be performed shall be consulted, and before making a determination of wage rates for such a project the Administrator shall give due regard to the information thus obtained.

- ◇ This chapter of the *DOL Prevailing Wage Resource Book* provides information concerning the WHD survey process whereby data is requested, analyzed, compiled, and used to issue the Davis-Bacon wage determinations that are incorporated into DBA/DBRA covered contracts.

OVERVIEW OF DAVIS-BACON SURVEY PROCESS

- ◇ When a survey is started, national and local interested parties are notified of the survey, its boundaries, time frame, and cutoff date by letter which requests their participation by facilitating the survey briefing process, encouraging contractors/members to participate in the survey and through the submission of wage data.
- ◇ Contractors are identified initially from construction information provided on F.W. Dodge reports and are sent letters requesting wage data and lists of subcontractors. Subcontractors are also contacted for wage data.
- ◇ Follow-up on all non-responses. Analysts call contractors to obtain missing data and/or to clarify wage data submissions.
- ◇ Wage and fringe benefit data are collected from construction contractors and other interested parties on WD-10 survey forms including an electronic version found at: (<http://www.dol.gov/whd/programs/dbra/WD10Instrctns/wd10instructions.htm>).
- ◇ Wage data submissions are verified as to area, time frame, construction type, and timeliness. WHD analysis of survey data and resolution of “area practice” issues presented by the data are carried out. (“Area practice” issues arise in the survey process when multiple classifications perform the same work.)
- ◇ Third party verification, contractor verification, on-site verification are conducted.
- ◇ The wage data are tabulated in a computer program and prevailing wage rates and fringe benefits are calculated.
 - ◇◇ If a majority of the workers in a classification were paid the same rate, that rate will be determined to be the prevailing wage for the classification. For example, if a majority were paid the union rate negotiated for certain work under a collective bargaining agreement in the area, that rate will be determined to be the prevailing wage for the classification.
 - ◇◇ If the data does not show such a majority for a given classification, the average of the wages paid, weighted by the total employed in that classification, will be determined to be the prevailing wage for the classification. 29 C.F.R. § 1.2(a).
- ◇ These wage rates are tested for adequacy. Wage determinations are developed and issued where data adequacy tests have been met.
- ◇ Data from metropolitan counties cannot be used in determining wages for non-metropolitan areas; and vice versa. 29 C.F.R. § 1.7(b).

- ◇ Data collection for multiple construction type statewide surveys range from 4 to 6 months and follow-up analysis and clarification can take 12-18 months after the survey cut-off date.
- ◇ Accurate and comprehensive wage determinations are dependent upon interested party participation in the survey process.
- ◇ Survey participation by federal procurement agencies is sometimes required to issue a new wage schedule.
- ◇ Federal agencies may also play a key role in survey success by encouraging participation.
- ◇ The DOL/WHM prevailing wage determinations based upon survey data cannot reflect wage data that is not submitted. They can only reflect the data that is actually submitted.

KEY CLASSES

The following key classes are those normally necessary for each of the four types of construction, and every attempt is made to collect data on these classifications.

BUILDING	RESIDENTIAL
<ol style="list-style-type: none"> 1. Heat and frost insulators 2. Bricklayers 3. Boilermakers 4. Carpenters 5. Cement masons 6. Electricians 7. Iron workers 8. Laborers - common 9. Painters 10. Pipefitters 11. Plumbers 12. Power equipment operators (operating engineers) 13. Roofers 14. Sheet metal workers 15. Tile setters 16. Truck drivers 	<ol style="list-style-type: none"> 1. Bricklayers 2. Carpenters 3. Cement masons 4. Electricians 5. Iron workers 6. Laborers - common 7. Painters 8. Plumbers 9. Power equipment operators (operating engineers) 10. Roofers 11. Sheet metal workers 12. Truck drivers
HEAVY & HIGHWAY	
<ol style="list-style-type: none"> 1. Carpenters 2. Cement masons 3. Electricians 4. Iron workers 5. Laborers - common 6. Painters 7. Power equipment operators (operating engineers) 8. Truck drivers 	

CERTIFIED PAYROLLS

- ◇ Data from projects to which Davis-Bacon prevailing wage requirements applied may be needed to supplement wage data from private projects to allow for development of a wage determination. 29 CFR 1.3(d).
 - ◇◇ Data from all projects, including those on which Davis-Bacon prevailing wage requirements applied, are always used in determining the prevailing wages for heavy construction and for highway construction.
 - ◇◇ In determining the prevailing wages for building and residential construction, data from Davis-Bacon prevailing wage projects will not be used in calculating the prevailing wage if sufficient information is received from non-prevailing wage projects.
- ◇ Federal agencies may be requested to provide data from certified payrolls to supplement data submitted from other sources, where appropriate. Where that occurs:
 - ◇ It is not necessary to send a copy of every certified payroll submitted for a particular project. Only copies of those certified payrolls showing the peak employment week of a worker classification on a particular project by a particular contractor need be furnished.
 - ◇ Certified payroll information will be transcribed to the WD-10 form as it can be electronically scanned into WHD's survey computer program. The use of certified payroll data may materially affect the resulting wage determination.

SURVEY FORM AND WD-10 INSTRUCTIONS

U.S. DEPARTMENT OF LABOR DAVIS-BACON RESOURCE BOOK

DB SURVEYS

<p>Form WD-10 Davis-Bacon Wage Survey Report of Construction Contractor's Wage Rates</p> <p style="text-align: right;">U.S. Department of Labor Employment Standards Administration Wage and Hour Division</p>  <p style="font-size: small;">OMB No. 1215-0046 Expires 09/31/2002 Rev. Dec. 2000</p> <p>1. Please indicate the full name, address and phone number of the General/Prime Contractor or Subcontractor reporting wage data for the project indicated on this form.</p> <p>NAME OF CONTRACTOR/SUBCONTRACTOR</p> <p>ADDRESS</p> <p>CITY STATE ZIP</p> <p>PHONE EXTENSION FAX</p> <p>2. Submitter information</p> <p>LAST NAME AND FIRST NAME</p> <p>TITLE</p> <p>ORGANIZATION</p> <p>PHONE EXTENSION FAX</p> <p>EMAIL ADDRESS</p> <p>3. Please supply the complete name of the project, project description (area within a building, highway section, specific room number, etc.), address, and name of General/Prime Contractor if different from Item 1.</p> <p>FULL NAME OF PROJECT</p> <p>PROJECT DESCRIPTION</p> <p>ADDRESS</p> <p>CITY</p> <p>STATE COUNTY</p> <p>NAME OF GENERAL / PRIME CONTRACTOR</p>	<p>INSTRUCTIONS - Please enter the information in the white boxes and fill in the circles as appropriate. You can either handprint the information in blue or black ink, or use a typewriter or printer. Detailed instructions for completing this form (or obtaining additional copies), as well as definitions for many of the terms used on this form are found on a separate instruction page.</p> <p>We estimate that it will take an average of 20 minutes to complete this collection of information, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. If you have any comments regarding the burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, send them to: U.S. Department of Labor, Wage and Hour Division, Administrator, Room 5-3502, 200 Constitution Avenue NW, Washington, DC 20210.</p> <p>NOTE: This form is used by the U.S. Department of Labor to determine the locally prevailing wage rates under the Davis-Bacon and related Acts. The submission of wage data is encouraged but is voluntary. This is an optional form provided to ensure consistency in submission of wage data. Respondents may use an alternate form if all the information requested is included. The identity of the Respondent will be kept confidential to the maximum extent possible under existing law. Persons are not required to respond to this collection of information unless it displays a currently valid OMB control number.</p> <p>4. Indicate if project is subject to a Federal (Davis-Bacon) or state wage determination.</p> <p><input type="radio"/> FEDERAL <input type="radio"/> STATE <input type="radio"/> NEITHER</p> <p>5. Please select one choice at right.</p> <table style="width: 100%; border: none;"> <tr> <td style="width: 33%; vertical-align: top;"> <p>A. Please provide a list, on the enclosed form, of any subcontractors you used on this project, including addresses and phone numbers.</p> <p><input type="radio"/> THE LIST IS BEING RETURNED WITH THIS FORM</p> <p><input type="radio"/> THE LIST WAS PROVIDED EARLIER</p> <p><input type="radio"/> THERE ARE NO SUBCONTRACTORS</p> </td> <td style="width: 33%; vertical-align: top;"> <p>B. For the project being reported on this form state the date the work BEGAN</p> <p>BEGAN <input type="text"/>/ <input type="text"/>/ <input type="text"/>/ <input type="text"/>/ <input type="text"/>/ <input type="text"/></p> <p>ENDED <input type="text"/>/ <input type="text"/>/ <input type="text"/>/ <input type="text"/>/ <input type="text"/>/ <input type="text"/></p> <p><input type="radio"/> ESTIMATED <input type="radio"/> ACTUAL</p> <p>PROJECT VALUE <input type="text"/></p> </td> <td style="width: 33%; vertical-align: top;"> <p>C. If you are a Subcontractor for the project being reported indicate the date your work BEGAN</p> <p>BEGAN <input type="text"/>/ <input type="text"/>/ <input type="text"/>/ <input type="text"/>/ <input type="text"/>/ <input type="text"/></p> <p>ENDED <input type="text"/>/ <input type="text"/>/ <input type="text"/>/ <input type="text"/>/ <input type="text"/>/ <input type="text"/></p> <p><input type="radio"/> ESTIMATED <input type="radio"/> ACTUAL</p> <p>SUBCONTRACT VALUE <input type="text"/></p> </td> </tr> </table> <p>6. Please fill in the circle indicating the type of construction for the project being reported and all relevant descriptors. If the project has more than one type of construction please mark the additional type.</p> <table style="width: 100%; border: none;"> <tr> <td><input type="radio"/> APARTMENT BUILDING *</td> <td><input type="radio"/> MOTEL/HOTEL</td> <td><input type="radio"/> RESIDENTIAL *</td> </tr> <tr> <td><input type="radio"/> BICYCLEPATH</td> <td><input type="radio"/> NURSING/ASSISTED LIVING FACILITY</td> <td><input type="radio"/> ROAD/STREET/HIGHWAY/DRIVE</td> </tr> <tr> <td><input type="radio"/> BRIDGE OVER NAVIGABLE WATER</td> <td><input type="radio"/> OFFICE/COMMERCIAL BUILDING</td> <td><input type="radio"/> SCHOOL</td> </tr> <tr> <td><input type="radio"/> BRIDGE (ANY OTHER TYPE)</td> <td><input type="radio"/> PAVING</td> <td><input type="radio"/> SITE PREPARATION</td> </tr> <tr> <td><input type="radio"/> DORMITORY</td> <td><input type="radio"/> PARKING LOT</td> <td><input type="radio"/> TREATMENT PLANT</td> </tr> <tr> <td><input type="radio"/> HOSPITAL</td> <td><input type="radio"/> PLAYGROUND</td> <td><input type="radio"/> WATER/SEWER</td> </tr> <tr> <td colspan="3"><input type="radio"/> OTHER <input type="text"/></td> </tr> </table> <p>* If you selected APARTMENT, NURSING FACILITY, or RESIDENTIAL:</p> <table style="width: 100%; border: none;"> <tr> <td><input type="radio"/> NUMBER OF STORIES</td> <td><input type="radio"/> KITCHEN IN EACH UNIT? (If yes, fill in circle.)</td> <td><input type="radio"/> BATH IN EACH UNIT? (If yes, fill in circle.)</td> </tr> </table>	<p>A. Please provide a list, on the enclosed form, of any subcontractors you used on this project, including addresses and phone numbers.</p> <p><input type="radio"/> THE LIST IS BEING RETURNED WITH THIS FORM</p> <p><input type="radio"/> THE LIST WAS PROVIDED EARLIER</p> <p><input type="radio"/> THERE ARE NO SUBCONTRACTORS</p>	<p>B. For the project being reported on this form state the date the work BEGAN</p> <p>BEGAN <input type="text"/>/ <input type="text"/>/ <input type="text"/>/ <input type="text"/>/ <input type="text"/>/ <input type="text"/></p> <p>ENDED <input type="text"/>/ <input type="text"/>/ <input type="text"/>/ <input type="text"/>/ <input type="text"/>/ <input type="text"/></p> <p><input type="radio"/> ESTIMATED <input type="radio"/> ACTUAL</p> <p>PROJECT VALUE <input type="text"/></p>	<p>C. 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U.S. DEPARTMENT OF LABOR DAVIS-BACON RESOURCE BOOK

DB SURVEYS

Form WD-10
Davis-Bacon Wage Survey
Page 2 (see reverse for instructions)

CMB No. 1215-0048 Expires 09/31/2002 Rev. Dec. 2000

7. Classifications and Fringe Benefit Information. In the questions below, CBA stands for Collective Bargaining Agreement. In the five benefit-related columns, please describe the benefits (if any) for each classification, and also tell us how they are paid. If the benefit is paid out periodically, tell us how much you pay and how frequently you pay it, using a single letter abbreviation. Use "H" for hourly, "D" for daily, "W" for weekly, "M" for monthly, and "Y" for yearly. If the benefit is paid as a percentage of the hourly rate, check the appropriate box, then tell us the percentage using the boxes below the checkbox. Regarding the Vacation & Holiday and additional benefit columns, if appropriate, tell us how many days are paid annually.

If you only supplied building materials, and no employees worked on the project, then fill in the circle below. You may skip the rest of this question, and sign and date the form.

CLASSIFICATION	PEAK WEEK ENDING DATE	HOURLY RATE	HEALTH & WELFARE	PENSION (401K, ETC)	APPRENTICE TRAINING	VACATION & HOLIDAY	ONLY SUPPLIED MATERIALS	
TYPE OF WORK PERFORMED	# OF EMPLOYEES		\$ per EMP. per	\$ per EMP. per	\$ per EMP. per	\$ per EMP. per	\$ per EMP. per	\$ per EMP. per
			% OF HOURLY RATE	% OF HOURLY RATE	% OF HOURLY RATE	% OF HOURLY RATE	% OF HOURLY RATE	% OF HOURLY RATE
		PAID UNDER A CBA?				# DAYS PER YEAR	# DAYS PER YEAR	# DAYS PER YEAR
CLASSIFICATION	PEAK WEEK ENDING DATE	HOURLY RATE	\$ per EMP. per	\$ per EMP. per	\$ per EMP. per	\$ per EMP. per	\$ per EMP. per	\$ per EMP. per
TYPE OF WORK PERFORMED	# OF EMPLOYEES		% OF HOURLY RATE	% OF HOURLY RATE	% OF HOURLY RATE	% OF HOURLY RATE	% OF HOURLY RATE	% OF HOURLY RATE
		PAID UNDER A CBA?				# DAYS PER YEAR	# DAYS PER YEAR	# DAYS PER YEAR
CLASSIFICATION	PEAK WEEK ENDING DATE	HOURLY RATE	\$ per EMP. per	\$ per EMP. per	\$ per EMP. per	\$ per EMP. per	\$ per EMP. per	\$ per EMP. per
TYPE OF WORK PERFORMED	# OF EMPLOYEES		% OF HOURLY RATE	% OF HOURLY RATE	% OF HOURLY RATE	% OF HOURLY RATE	% OF HOURLY RATE	% OF HOURLY RATE
		PAID UNDER A CBA?				# DAYS PER YEAR	# DAYS PER YEAR	# DAYS PER YEAR
CLASSIFICATION	PEAK WEEK ENDING DATE	HOURLY RATE	\$ per EMP. per	\$ per EMP. per	\$ per EMP. per	\$ per EMP. per	\$ per EMP. per	\$ per EMP. per
TYPE OF WORK PERFORMED	# OF EMPLOYEES		% OF HOURLY RATE	% OF HOURLY RATE	% OF HOURLY RATE	% OF HOURLY RATE	% OF HOURLY RATE	% OF HOURLY RATE
		PAID UNDER A CBA?				# DAYS PER YEAR	# DAYS PER YEAR	# DAYS PER YEAR
CLASSIFICATION	PEAK WEEK ENDING DATE	HOURLY RATE	\$ per EMP. per	\$ per EMP. per	\$ per EMP. per	\$ per EMP. per	\$ per EMP. per	\$ per EMP. per
TYPE OF WORK PERFORMED	# OF EMPLOYEES		% OF HOURLY RATE	% OF HOURLY RATE	% OF HOURLY RATE	% OF HOURLY RATE	% OF HOURLY RATE	% OF HOURLY RATE
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TYPE OF WORK PERFORMED	# OF EMPLOYEES		% OF HOURLY RATE	% OF HOURLY RATE	% OF HOURLY RATE	% OF HOURLY RATE	% OF HOURLY RATE	% OF HOURLY RATE
		PAID UNDER A CBA?				# DAYS PER YEAR	# DAYS PER YEAR	# DAYS PER YEAR
8. COMMENTS OR REMARKS			DESCRIPTION OF ANY ADDITIONAL FRINGE (SEE LAST COLUMN OF ITEM 7)					
YOUR SIGNATURE			DATE MM/DD/YYYY					

Note: The willful falsification of any submitted information may result in civil or criminal prosecution. See 18 U.S.C.1001.



**Instructions for the WD-10
Davis--Bacon Wage Survey
Report of Construction Contractor's Wage Rates**

Information about Davis-Bacon Wage Surveys, including dates of current and future surveys, may be obtained at the Davis-Bacon and related Acts (DBRA) web site at <http://www.dol.gov/whd/programs/dbra/index.htm>

INSTRUCTIONS

- Use blue or black ink.
- Hand-print letters/numbers.
- Use one block for each letter, number, period, or space. If you use a typewriter or printer to complete this form, ignore the block spacing.
- Fill in circles completely.
- Use one WD-10 form for each construction project.

This form is machine readable, and should not be copied. For additional forms, please contact (1-866-487-9243), OR fill out and submit your forms electronically using the following site on the World Wide Web: <http://www.dol.gov/whd/programs/dbra/wd-10.htm>

KEY TERMS

Apprentice -- A person employed and registered in a bonafide apprenticeship program. (If these Apprentices/Trainees are in a formal program approved by the U.S. Dept. of Labor, Bureau of Apprenticeship and Training (BAT), or a state apprenticeship agency recognized by BAT, then information regarding wages and fringe benefits need not be provided.)

Helper -- A person that helps or assists and whose duties are distinct from the journey level class and laborer.

General/Prime Contractor -- The principal contractor on the project.

Subcontractor -- A contractor working on the project responsible for specific work but not the overall project. You are not a subcontractor for purposes of this survey if you supplied only materials.

Subcontractor List -- A machine--readable form for reporting the names and addresses of any subcontractors used by the contractor/subcontractor on the project being reported.

Trainee -- A person registered in a construction occupation program.

FORM SIDE 1***Sections 1 and 2 -- Contractor and Submitter Information***

1. Fill in with information about your company.
2. Fill in with information about the submitter of the form.

Sections 3, 4, 5, and 6 -- Project Information

3. Fill in information about the construction project your company worked on and the project's location and description.
4. Fill in one circle to identify if the project was subject to a federal or state wage determination.
5. Fill in one circle to identify yourself as either the general/prime contractor or a subcontractor.
 - a. Indicate if you had no subcontractors, OR if you did, then indicate whether you are enclosing a list of subcontractors along with the WD-10 form, or if you submitted a list earlier.
 - b. If you were the prime/general contractor, provide the date any work began on this project, the date the project ended (indicate if actual or estimated date), and the total project value.
 - c. If you were a subcontractor, provide the date your work started and ended (indicate if actual or estimated date) and the subcontract value.
6. Mark the type of construction project your company worked on. If none of the construction types matches your project, fill in the circle next to OTHER, and indicate the type of construction in the blocks. If you selected APARTMENT BUILDING, NURSING/ASSISTED LIVING FACILITIES, or RESIDENTIAL, indicate the number of stories, and fill in the circle if there was a kitchen and/or a bath in each unit.

FORM SIDE 2

Section 7 -- Classification and Fringe Benefits

If you only supplied materials, and no employees worked on the project, then fill in the circle marked "Only Supplied Materials," skip the rest of section 7, and sign and date the form.

The remainder of section 7 requests multiple types of information per classification. Fill in each item as defined and described as follows:

Classification(s) are the position titles of jobs within your company (e.g., Carpenter, Electrician, Laborer, Crane Operator, etc.). Fill in one classification per line. If the workers in a classification are paid more than one hourly rate or different fringe benefits, please list them on separate lines. If more than 6 classifications and wage rates need to be listed for a project, report the additional classifications and wage rates on a new WD-10. On the new WD-10 fill out only Sections 1, 3, and 7.

Type of Work Performed - Explain the type of work that each classification performs (e.g., Laborer: landscape, unskilled, pipelayer; Carpenter: carpentry, drywall; Operator: backhoe, etc.).

Examples:

CLASSIFICATION LABORER TYPE OF WORK PERFORMED UNSKILLED	CLASSIFICATION CARPENTER TYPE OF WORK PERFORMED CARPENTRY & DRYWALL	CLASSIFICATION OPERATOR TYPE OF WORK PERFORMED BACKHOE
--	--	---

Section 7 -- Classification and Fringe Benefits (continued)

Peak Week Ending Date is the week you had the largest number of employees in a classification.

Number of Employees is the largest number of employees working in this classification on this project.

Hourly Rate is the dollar amount you paid employees per hour working in this classification.

CBA -- If the employee is paid under a Collective Bargaining Agreement, fill in the circle that represents Yes, otherwise fill in the circle that represents No.

Fringe Benefits are paid in addition to the hourly rate. Report only the costs or contributions incurred by your company, NOT the employees. Do not include costs paid by the employer that are required by either Federal, State, or local law such as worker's compensation or unemployment insurance. Fill out the information under each fringe benefit that applies.

Health & Welfare -- Medical or hospital care, or insurance to provide such care, life insurance, long-- or short--term disability, sickness, or accident insurance.

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Pension (401K, etc.) -- Retirement/401K, defined contribution plans (including savings and thrift, deferred profit sharing and money purchase pension), annuity cost, or cost of insurance to provide such a benefit.

Apprentice Training -- Defrayment of the cost of apprenticeship or similar training programs.

Vacation & Holiday -- The payment of compensation for holidays and vacation.

Additional Fringe -- If you are not sure of the category of the fringe benefit(s), enter the rate information in the column, and specify the fringe type in the "Description of Any Additional Fringe" field at the bottom of the form.

Fringe benefits can be paid by a straight dollar amount, or by a percentage of the basic hourly rate. Indicate the cost or contribution your company paid to this classification during the peak week of this project.

If the fringe benefits were paid by a straight dollar amount:

Dollars (\$) per Employee (EMP.) per

Mark the circle before \$ per EMP. per

Fill in the dollar value in the blocks provided. Include the decimal position when you fill in the dollar amount. Do not include the \$ sign. (Example: 1.50 for one dollar and fifty cents.)

Indicate how often this dollar value was paid in the block following \$ per EMP. per with the values as follows: H for Hourly, D for daily, W or weekly, M for monthly, and A for annually/yearly.

Example - If an employee was provided a straight dollar amount of \$1.50 on a weekly basis for health and welfare:

HEALTH & WELFARE	
<input checked="" type="radio"/>	\$ per EMP. per W
<input type="radio"/>	% OF HOURLY RATE
	1 . 5 0

Item 8 -- Comments or Remarks and Signature

Comments or remarks -- Provide comments or additional information.

Signature -- Submitter must sign and date the for

**DAVIS-BACON
WAGE DETERMINATIONS**

DAVIS-BACON ACT (EXCERPT FROM 40 U.S.C. § 3142)

**PHYSICAL INCLUSION OF WAGE DETERMINATION(S) IN
BID SPECIFICATIONS AND CONTRACT**

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MODIFICATIONS AND SUPERSEDEAS DECISIONS

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LOCATION

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HOW TO INTERPRET A GWD

CLASSIFICATIONS, BASIC HOURLY RATES & FRINGE BENEFITS

CLASSIFICATION IDENTIFIERS (UNION AND NON-UNION RATES)

PROJECT WAGE DETERMINATION REQUEST FORM, SF-308

DAVIS-BACON ACT, AS AMENDED

(Excerpt from 40 U.S.C. § 3142)

The advertised specifications for **every [covered] contract** in excess of \$2,000 . . . **shall contain**

a provision stating the minimum wages to be paid various classes of laborers and mechanics.

. . . The minimum wages shall be based on the wages that **the Secretary of Labor determines to be prevailing** for the corresponding classes of laborers and mechanics

employed on **projects of a character similar** to the contract work

in the **civil subdivision of the State in which the work is to be performed**, or in the District of Columbia if the work is to be performed there.

[Emphasis added.]

PHYSICAL INCLUSION OF WAGE DETERMINATION(S) IN BID SPECIFICATIONS AND CONTRACT

DOL regulations, at 29 C.F.R. Part 1, establish the procedures for predetermining the **wage rates required to be included in bid specifications/contracts** for construction projects to which the Davis-Bacon and related Acts apply. (See excerpt, above, from the Davis-Bacon Act.) The Federal Acquisition Regulations (FAR) also discuss the application of proper wage determinations in 48 C.F.R. Subpart 22.4 – “Labor Standards for Contracts Involving Construction.”

It is important for the actual wage determination(s) to be physically included in the bid specifications/contract. Contractors need to see the minimum wages they will be required to pay while they develop their cost estimates for work to be performed. Most Davis-Bacon wage determinations are available at www.wdol.gov.

It is generally the responsibility of the **federal agency** that funds or assists Davis-Bacon covered construction:

- ◇ To **ensure that the proper Davis-Bacon wage determination(s) is/are applied** to such construction contract(s). (See 29 C.F.R. § 1.5, and 1.6(b)).
- ◇ To **advise contractors which schedule of prevailing wages applies to various construction items** if a contract includes multiple wage schedules.
- ◇ To be able/ready to advise contractors regarding the duties performed by the various crafts in the wage determination, if they inquire. If two or more classifications in the applicable wage determination may perform the work in question, an area practice survey may be required. Where the classifications are from a single sector of the industry (union or non-union), data needs to be collected only from that sector of the construction industry (for the type of construction involved). Where union and non-union-based classifications are involved, the data should be obtained from both segments. (See the “area practice” section of the materials in the “DB/DBRA Compliance Principles” chapter, below, for a detailed discussion of area practice surveys.)

Questions and disputes regarding the application of the proper Davis-Bacon wage determination(s) to covered construction projects should be referred to the WHD Branch of Construction Wage Determinations.

It can be disruptive and costly for an agency to correct a situation where a covered contract is awarded without a wage determination, or with the wrong wage determination (i.e., a

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wage determination that by its terms or according to the requirements of 29 C.F.R. Part 1, further discussed below, clearly does not apply to the contract). When this happens, **corrective action** is required:

The agency shall terminate and resolicit the contract with the valid wage determination, or incorporate the valid wage determination retroactive to the beginning of construction through supplemental agreement or through change order provided that the contractor is compensated for any increases in wages resulting from such change. The method of incorporation of the valid wage determination and adjustment in contract price, where appropriate, should be in accordance with applicable procurement law. [29 C.F.R. § 1.6(f)].

GENERAL AND PROJECT WAGE DETERMINATIONS

The WHD issues two types of Davis-Bacon wage determinations: general determinations and project determinations.

The term “wage determination” includes not only the original decision but any subsequent decisions modifying, superseding, correcting, or otherwise changing the rates and/or scope of the original decision.

General Wage Determinations (GWDs)

- ◇ GWDs are now in effect nationwide for most counties for each general type of construction – building, residential, highway, and heavy. In many areas separate schedules are also issued for sewer and water line construction, for dredging, and for certain other types of projects which would otherwise be categorized as “heavy” construction.
- ◇ **Annual editions** of the GWDs are issued in the first quarter of each calendar year (“rollover”). Each annual edition supersedes the previous GWDs, and the wage decision numbers reflect the year of a new edition.
- ◇ Any changes in wage rates on the GWDs are made in weekly updates, generally on Friday, and are reflected in modification numbers on the GWD.
- ◇ On September 26, 2005, the Wage Determinations On Line website (<http://www.wdol.gov>) became the official site for all Davis-Bacon GWDs. This is a free on-line service. The hard copy publication previously available through the Government Printing Office of the Superintendent of Documents is no longer published.

Project Wage Determinations

Project Wage Determinations are obtained on a case-by-case basis for individual projects where:

- ◇ There is no GWD in effect for a county/type of construction needed for an upcoming project, or

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- ◇ Virtually all the work on a contract will be performed by a classification that is not listed in the GWD that would otherwise apply **and** bid opening/award has not yet taken place.

To request a project wage determination, a **Standard Form 308 (SF-308)** “Request for Determination and Response to Request” should be used by the agency (normally a federal agency).

- ◇ If the project involves multiple types of construction, the requesting agency should attach information indicating the expected cost breakdown by type of construction.
- ◇ The time required for processing requests for a wage determination varies according to the facts and circumstances in each case. An agency should anticipate that such processing will take at least 30 days.
- ◇ The completed SF-308 should be sent to:
 - U.S. Department of Labor
 - Wage and Hour Division
 - Branch of Construction Wage Determinations
 - Washington, D.C. 20210
- ◇ SF-308’s can be downloaded from the “Library” section of the WDOL website (<http://www.wdol.gov>). The SF-308 is also available at FAR 48 C.F.R. § 53.301-330.

Project decisions are applicable **only to the particular project** for which they are issued and are **effective for 180 days**. If a project decision is not used in the period of its effectiveness, it is void.

- ◇ Accordingly, if it appears that a wage determination may expire between bid opening and contract award, the agency should request a new project wage determination sufficiently in advance of the bid opening to assure receipt prior thereto.
- ◇ However, when due to unavoidable circumstances, a project wage determination expires before award but after bid opening (or other date specified in 29 C.F.R. § 1.6(a)(1) for certain HUD programs), an extension of the project wage determination’s expiration date may be requested from and granted by the WHD Administrator if certain conditions are met. (*See* “Wage Determination Extensions,” below.)

“Special” Project Wage Determinations are issued for retroactive application to covered contracts let without a Davis-Bacon wage determination, or with a wage determination which by its terms or the provisions of 29 C.F.R. Part 1 clearly does not apply to the contract – for example, if a wage determination for the wrong county or an out-of-date wage decision has been included in an awarded contract, and there was no GWD in effect for the given county and type of construction at the time of contract award. 29 C.F.R. § 1.6(f).

MODIFICATIONS AND SUPERSEDEAS DECISIONS

Both GWDs and project wage determinations may be modified or superseded from time to time.

- ◇ Wage determinations are normally updated either:
 - ◇◇ to apply the results of a new survey, or
 - ◇◇ to update union rates to reflect collectively bargained changes in wage and fringe benefit rates (escalators) for classifications for which negotiated rates have been determined to be prevailing (for a given type of construction in the given geographic area).
- ◇ “Supersedeas wage decisions” replace the prior GWDs, and carry wage decision numbers that reflect the new year. Supersedeas decisions have a modification number of “0” followed by the date of issuance.
- ◇ ”Modifications” are listed numerically on the wage determination modification record for that year’s edition. The date of issuance of the modification follows the modification number. A modification to a GWD replaces the entire GWD that it modifies.

WAGE DETERMINATION EXTENSIONS AND CLERICAL ERROR CORRECTIONS

Extensions

Bid solicitation documents must be amended to include modifications to a GWD or a new project wage determination (if the project wage determination expired); unless the contracting/assisting agency requests an extension from the WHD and the WHD Administrator grants the extension. An agency may request an extension after bid opening if:

- ◇ GWD: Award does not take place within 90 days after the bid opening,
- or
- ◇ Project wage determination: The determination expires prior to award.

For certain HUD-assisted projects, different dates apply to when an extension may be requested. 29 C.F.R. §§ 1.6(c)(2)(iv) and 1.6(a)(1), respectively.

A request for an extension must be supported by a written finding, including factual support that the extension is necessary and proper in the public interest to prevent injustice or undue hardship or to avoid serious impairment in the conduct of government business.

Example: A public commission must review bid documents after bid opening and before award, and the prospective bidders have agreed to continue their bids in effect during the review period.

Correction Of Inadvertent Clerical Errors

Upon his or her own initiative, or at the request of an agency, the WHD Administrator may correct any wage determination if she/he finds that the determination contains an inadvertent clerical error. Such corrections shall be included in any on-going contracts containing the wage determination in question, retroactively to the start of construction, and also in any bid specifications containing the wage determination (for example, after bid opening). 29 C.F.R. § 1.6(d), reiterated in the FAR at 48 C.F.R. § 22.404-7.

SELECTING THE PROPER WAGE DETERMINATION(S)

The DBA requires the DOL to determine prevailing wage rates for inclusion in covered contracts based upon those paid to “corresponding classes of laborers and mechanics employed on **projects of a character similar to the contract work** in the **civil subdivision of the State in which the work is to be performed**, or in the District of Columbia if the work is to be performed there. . . .” (Emphasis added.)

A “wage determination” is the listing of wage rates and fringe benefit rates for each classification of laborers and mechanics which the WHD Administrator has determined to be prevailing in a given area (usually a county) for a particular type of construction.

Consider these three basic factors in selecting Davis-Bacon wage determinations:

1. Location
2. Type of Construction
3. Current Wage Determination(s)

Location

It is a longstanding practice that Davis-Bacon wage determinations are made on a county-by-county basis. Identify the **State and county** where the construction work will be performed. In some cases a project may be located in **more than one county and/or State**. In such cases include the proper wage determinations for each county/State where work is to be performed under the contract. The bid specifications must also include instructions specifying the contract work to which each wage determination applies.

Type Of Construction

“Projects Of A Similar Character”

As a matter of longstanding policy, DOL has distinguished four general types of construction for purposes of making prevailing wage determinations: building construction, residential construction, heavy construction, and highway construction. All Agency Memoranda Nos. 130 and 131 provide guidance in the application of this policy. Generally, for wage determination purposes, a project consists of all construction necessary to complete a facility regardless of the number of contracts involved, so long as all contracts awarded are closely related in purpose, time, and place.

All Agency Memorandum No. 130 – “Application Of The Standard Of Comparison ‘Projects of a Character Similar’ Under the Davis-Bacon And Related Acts” – provides general descriptions of each general type of construction and includes lists of examples in each general category. In brief:

Building Construction includes the construction, rehabilitation and repair of sheltered enclosures with walk-in access for the purpose of housing persons, machinery, equipment, or supplies.

Residential Construction includes the construction, rehabilitation, and repair of single family houses, townhouses, and apartment buildings of no more than four (4) stories in height.

Highway Construction includes the construction, alteration or repair of roads, streets, highways, runways, parking areas and most other paving work not incidental to building or heavy construction.

Heavy Construction is a “catch-all” category which includes those projects which cannot be classified as Building, Residential or Highway. Heavy construction is often further distinguished on the basis of the characteristics of particular projects, such as dredging, water and sewer line, dams, major bridges and flood control projects.

Any questions or disputes regarding the appropriate classification of a project with regard to type of construction should be referred to the WHD for resolution prior to bid opening (or other appropriate wage determination lock-in date; a discussion of “lock-in-dates” may be found in the “Area Practice” section of the “DBA/DBRA Compliance Principles” chapter of this Resource Book.) A request for a ruling should include a complete description of the project and other relevant information, such as wage payment data from similar construction projects in the local area, documentation of the views of parties in dispute, and other material interested parties wish to have considered. This may be appropriate where questions arise concerning the proper categorization of an entire project or particular portions of a project. (Below is a brief discussion on how to determine when multiple wage schedules should be applied to different types of construction to be performed on a project and when lesser portions of a project will be considered incidental to the main type of construction to be performed.)

Type Of Construction

“Multiple Types Of Construction” Versus “Incidental Construction”

All Agency Memorandum No. 131 provides further guidance, particularly on the application of multiple wage determinations for projects that involve more than one type of construction.

- ◇ Where a project includes construction items that in themselves would be classified differently with regard to type of construction, **multiple classification(a) as to type of construction may be justified if such items are a substantial part of the project.**
- ◇ The application of wage schedules/determinations for more than one type of construction is appropriate if such items that fall in a separate type of construction will comprise at least 20% of the total project cost and/or cost at least \$1 million.
- ◇ Generally, if such items that in themselves would be classified as a separate type of construction will be less than 20% of the total project cost and will cost less than \$1 million, they are considered **incidental** to the primary type of construction involved on the project, and a separate wage determination is not applicable, unless there is an established local area practice to the contrary.
- ◇ Where multiple wage determinations are incorporated into the bid specifications/contract it is very important also to **provide instructions specifying the contract work to which each wage determination applies.** 29 C.F.R. § 1.6(b), reiterated in the FAR at 48 C.F.R. § 22.404-2.
- ◇◇ Such instructions are needed not only when the wage determinations for different types of construction (and/or locations) are in separate “Wage Decisions,” but also where wage determinations for various types of construction (and/or counties) have been consolidated into a single “Wage Decision.” (This has often been done for administrative convenience in issuing wage determinations.)
- ◇◇ Because of the complexities in the application of multiple schedules, the contracting agency should consult with the WHD Branch of Construction Wage Determinations to resolve any questions.

Current Wage Determination(s)

It is the **responsibility of the federal agency** to ensure that the appropriate **up-to-date** wage determination is included in the bid/RFP or grant documents, and that **modifications** are included up to the time of award, or other applicable wage determination lock-in date.

Section 1.6 of Regulations, 29 C.F.R. Part 1 sets forth, in detail, the requirements regarding inclusion of **up-to-date** wage determinations in bid/contract documents:

- ◇ As a **general rule**, which particularly affects negotiated contracts (RFPs), the most up-to-date wage determination(s) issued at the time of **contract award** must be incorporated into Davis-Bacon covered contracts. 29 C.F.R. § 1.6(c)(2)(i).
- ◇ For contracts entered into pursuant to competitive bidding procedures, an **exception** provides that wage determination updates issued less than **10 days** before the opening of bids shall be effective unless there is not a reasonable time still available before bid opening to notify bidders of the update, and a report of the finding to that effect is inserted in the contract file. 29 C.F.R. § 1.6(a)(2)(i)(A).
 - ◇◇ However where a GWD applies, if the contract is not awarded within **90 days** after bid opening (or other applicable dates for certain HUD projects), modifications to the wage determination(s) must be incorporated into the contract up to award, unless the contracting/assisting agency requests and obtains an extension of the 90-day period. 29 C.F.R. § 1.6(c)(3)(iv).

Similarly, if, due to unavoidable circumstances, a **project wage decision** expires between bid opening and contract award (or other applicable dates for certain HUD projects), the contracting/assisting agency may request an extension instead of a new project wage determination. 29 C.F.R. § 1.6(a)(1).

- ◇◇ Note: For further guidance in the application of other dates to HUD-assisted projects, it is appropriate to contact a HUD labor advisor. See: <http://www.hud.gov/offices/olr/laborrelstf.cfm>.
- ◇ “Modifications” to Davis-Bacon wage determinations and “Supersedes” wage determinations issued after award of a contract do not apply to a contract. 29 C.F.R. § 1.6(c)(2)(ii). A Davis-Bacon wage determination that is appropriately applied to a covered contract normally establishes the minimum wage rates and fringe benefits which must be paid for the entire term of the contract.

- ◇◇ After bid opening/award of a contract, properly applied Davis-Bacon wage determinations will not be modified, except rarely, such as where a correction of an inadvertent clerical error is issued. 29 C.F.R. § 1.6(b) and (c), reiterated in the FAR at 48 C.F.R. §§ 22.404-2 and 22,404-7. *See also* 29 C.F.R. § 1.6(b)(e), (f) and (g), and FAR at 48 C.F.R. § 22.404-9.
- ◇◇ With regard to multi-year term contracts, such as are common at military installations, see All Agency Memorandum No. 157. (Also, FAR guidance at 48 C.F.R. § 22.404-12 applies to federal agencies.)
- ◇ **In pre-bid conferences, contractors should be advised/encouraged to review the Davis-Bacon wage determinations in the bid documents, and to raise any questions/complaints they have during the advertising period.** Often, out-of-date rates, errors, and wrong assumptions regarding the application of Davis-Bacon wage determinations can be corrected prior to bid opening/award, which, if not corrected then, and brought to light later will be deemed **untimely complaints**.

GENERAL WAGE DETERMINATIONS (GWDs)

How to Locate GWDs

The WDOL web site (<http://www.wdol.gov>) contains all current wage determinations as well as previous modifications to the wage determinations (archived wage determinations) and a listing of the wage determinations to be modified in the next publication cycle.

Current, archived, or due to be revised Davis-Bacon wage determinations can be found by selecting one of these options from the “Davis Bacon Act” main menu:

- Selecting DBA WDs
- Archived WDs
- WDs to be revised

Current GWDs

A current wage determination can be obtained by choosing “**Selecting DB WDs**” from the Davis Bacon Act Main Menu (illustrated below) and then by:

- ◇ Entering the wage decision number, if known,

OR

- ◇ Entering selection criteria, which will automatically select the applicable wage determination by:

- State
- County
- Type of Construction

OR

- ◇ Browsing by state/territory

Each of these methods is illustrated on the following sample screen.

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By WHD Number

Select DBA WD by number:

(Enter WD number in the following format: two letter abbreviation for the state and the number of the WD. For example, VA3, NOT VA030003 or MD150 NOT MD030150.)**OR****By Selection criteria**State: County: Construction Type: [\(Types of Construction Under DBA\)](#)WD Number: **OR****By State****Browse by state/territory.**

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Previous (Archived) GWDs

A previous modification of a wage determination can be obtained by choosing “**Archived WDs**” from the “Davis Bacon Act” Main Menu and entering the publication year of the wage determination and the wage determination number as illustrated in the sample screen below).

Archived Davis-Bacon Act Wage Determinations

When DBA WDs are revised, the current revision is available on WDOL.gov ([Selecting DBA WDs](#)). The old WD is archived on this page. (Archived WDs are for Information Purposes Only: [WDOL User’s Guide: Sec. C.4.e](#))

Search:

Enter a DBA WD Number: *(Enter DBA WD numbers in the following format: two-letter abbreviation for the state, and the number of the WD. For example, DBA WD "VA030003" is entered "VA3"; DBA WD "MD030150" is entered "MD150")*

Future GWDs (to be revised)

A listing of the wage determinations scheduled to be modified in the next publication cycle can be obtained by choosing “WDs due to be revised” from the “Davis Bacon Act” Main Menu as illustrated below in the sample screen.

Davis-Bacon Act Wage Determinations Due To Be Revised

The following DBA General Wage Determinations have been revised or created new and will be available at WDOL.gov on or after October 12, 2007

AL070056 WITHDRAWN
CA070001
CA070002
CA070004
CA070009
CA070013

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DB WAGE DETERMINATIONS

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DB WAGE DETERMINATIONS

How to Interpret a GWD

Each wage determination begins with a **cover sheet** that defines its applicability by:

- ◇ The decision number.
- ◇ The number of the decision superseded, if applicable.
- ◇ State(s) covered.
- ◇ Type of construction (building, heavy, highway, and/or residential).
- ◇ County(ies), parishes, and/or city(ies) covered.
- ◇ Description of the construction to which the wage determination applies and/or construction excluded from its application.
- ◇ Record of modifications, including the initial publication date, modification numbers and dates.

The cover sheet is illustrated in the sample screen below.

General Decision Number: LA130007 08/17/2007 LA7

Superseded General Decision Number: LA20120007

State: Louisiana

Construction Type: Heavy

Counties: Jefferson, Orleans, Plaquemines, St Bernard, St Charles, St James, St John the Baptist and St Tammany Counties in Louisiana.

HEAVY CONSTRUCTION PROJECTS (includes flood control, water & sewer lines, and water wells. Also includes elevated storage tanks in all listed parishes except Plaquemines and St. James. Excludes industrial construction-chemical processing, power plants, and refineries)

Modification Number	Publication Date
0	01/04/2013
1	01/18/2013

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Classifications, Basic Hourly Rates, and Fringe Benefits

In the body of each wage determination is the **listing of classifications (laborers and mechanics) and accompanying basic hourly wage rates and fringe benefit rates** that have been determined to be prevailing for the specified type(s) of construction in the geographic area(s) covered by the wage determination.

- ◇ Classification listings may also include classification groupings, fringe benefit footnotes, descriptions of the geographic areas to which sub-classifications and different wage rates apply, and/or certain classification definitions.
- ◇ Above each classification (or group of classifications) listed, an alphanumeric “identifier” and date provide information about the source of the classification(s) and wage rate(s) listed for it. The discussion of “Classification Identifiers,” below, focuses on information about the source of a rate (union or non-union).

In wage determination modifications, an **asterisk (“*”)** is used to indicate that the item marked is changed by that modification.

An example of this information is illustrated below:

PLUM0060-002 06/04/2012		
JEFFERSON, ORLEANS, PLAQUEMINES, ST. BERNARD, ST. CHARLES, ST. JAMES (Southeastern Portion), ST. JOHN THE BAPTIST, and ST. TAMMANY PARISHES		
	Rates	Fringes
PLUMBER/PIPEFITTER (excluding pipe laying).....	\$ 26.88	10.42

* PLUM0198-005 07/01/2007		
ST. JAMES PARISH (Northwestern Portion):		
	Rates	Fringes
PLUMBER (excluding pipe laying).....	\$ 25.04	10.38

SULA2004-007 05/13/2004		
	Rates	Fringes
CARPENTER (all other work).....	\$ 13.75	2.60
Laborers:		
Common/Landscape.....	\$ 9.88	0.00
Fence.....	\$ 11.24	0.00
Flagger.....	\$ 8.58	0.00
Mason Tender.....	\$ 7.25	0.00
Pipelayer.....	\$ 9.84	0.00
PIPEFITTER (excluding pipelaying).....	\$ 17.52	4.51

Classification Identifiers (Union Majority Prevailing and “Survey” Weighted Average)

The body of each wage determination lists the classifications and wage rates that have been found to be prevailing for the cited type(s) of construction in the area covered by the wage determination. The classifications are listed in alphabetical order of “**identifiers**” that indicate whether particular rates are union majority or survey weighted average wage rates.

Some wage determinations contain only survey weighted average wage rates, some contain only union-negotiated majority wage rates, and others contain both union majority and survey weighted average wage rates that have been found to be prevailing in the area for the type of construction covered by the wage determination.

Union Identifiers

- ◇ An identifier beginning with characters **other than SU** denotes that the **union** classification(s) and wage rate(s) have been found prevailing. The first four letters indicate the international union for the local union that negotiated the wage rates listed under that identifier (see listing below). The four-digit number that follows indicates the local union number.

Example:

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PLUM0198-005 01/01/2013
ST. JAMES PARISH (Northwestern Portion):
                                     Rates           Fringes
PLUMBER (excluding pipe
laying).....$ 25.04           10.42
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The identifier is PLUM0198-005 07/01/2007. PLUM = Plumbers; 0198 = the local union number (district council number where applicable); and 005 = internal number used in processing the wage determination. The date following these characters is the effective date of the most current negotiated rate.

- ◇ Special identifiers are necessary for two trades because the same local union number(s) is accompanied by different wage rates in different states. Bricklayers local union numbers are not unique nationwide, but are unique within each State. Similarly, Sprinkler Fitters Local Union No. 699 has negotiated different wage rates in each State within its territorial jurisdiction. Therefore, the identifiers for the Bricklayers unions are in the format “BR + state abbreviation,” (referenced below as BRXX), and the identifier “SF + state abbreviation” is used for Sprinkler Fitter Local No. 669’s rates.

- ◇ It is common for many local unions to negotiate wage rates for more than one classification. Where this is done, all the classifications for which that union's wage rates are determined to be prevailing will appear under the identifier for that union.

Example:

The same union may negotiate wage and fringe benefits for painters and glaziers. In such a case, the wage rate for the glazier, as well as that for the painter, will be found under an identifier beginning with "PAIN" (if the union rates were found prevailing for both glaziers and painters). Similarly, users may need to look under an identifier beginning with "CARP" to find not only rates for carpenters, but also those for millwrights, piledrivermen, and (marine) divers.

Union Identifier Code Abbreviations

Following are the **identifier codes** used to reference the various craft unions. Examples of classifications for which their local unions commonly negotiate wage and fringe benefit rates are shown in parentheses.

- ASBE = International Association of Heat and Frost Insulators and Asbestos Workers
- BOIL = International Brotherhood of Boiler Makers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers
- BRXX = International Union of Bricklayers, and Allied Craftsmen
(bricklayers, cement masons, stone masons, tile, marble and terrazzo workers)
- CARP = United Brotherhood of Carpenters and Joiners of America
(carpenters, millwrights, piledrivermen, soft floor layers, divers)
- ELEC = International Brotherhood of Electrical Workers
(electricians, communication systems installers, and other low voltage specialty workers)
- ELEV = International Union of Elevator Constructors
- ENGI = International Union of Operating Engineers
(operators of various types of power equipment)

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- IRON = International Association of Bridge, Structural and Ornamental Iron Workers
- LABO = Laborers' International Union of North America
- PAIN = International Brotherhood of Painters and Allied Trades (painters, drywall finishers, glaziers, soft floor layers)
- PLAS = Operative Plasterers' and Cement Masons' International Association of the United States and Canada (cement masons, plasterers)
- PLUM = United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada (plumbers, pipefitters, steamfitters, sprinkler fitters)
- ROOF = United Union of Roofers, Waterproofers, and Allied Workers
- SHEE = Sheet Metal Workers International Association
- TEAM = International Brotherhood of Teamsters

“Survey” Weighted Average Identifiers

Classification(s) for which the union rate(s) were not determined to be prevailing are listed under an “**SU**” identifier. **SU** means the rates listed under that identifier were derived from survey data by computing weighted average rates, which could, for example, be based on only non-union contractors' wage rates or a mixture of union and non-union contractors' wage rates. (The data reported for such a classification and used in computing the prevailing rate may include both union and non-union data. Note that various classifications, for which survey rates have been determined to be prevailing, may be listed in alphabetical order under this identifier.

Example:

	Rates	Fringes
SULA2004-007 05/13/2004		
CARPENTER (all other work).....	\$ 13.75	2.60
Laborers:		
Common/Landscape.....	\$ 9.88	0.00
Fence.....	\$ 11.24	0.00
Flagger.....	\$ 8.58	0.00
Mason Tender.....	\$ 7.25	0.00
Pipelayer.....	\$ 9.84	0.00

The identifier is SULA2004-007 05/13/2004. **SU** indicates rates that are in most cases weighted average wage rates (or, occasionally, non-union contractor majority wage rates); LA indicates the state of Louisiana; 2004 is the year of the survey and 007 is an internal number used in producing the wage determination.

A 1993 or later date indicate the classification(s) and wage rate(s) under that identifier were issued in the GWD on that date.

PROJECT WAGE DETERMINATION

REQUEST FORM, SF-308

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DB WAGE DETERMINATIONS



Request For Wage Determination And
Response To Request

(Davis Bacon Act as Amended and Related Statutes)

U.S. Department of Labor

Employment Standards Administration
Wage and Hour Division

<p>FOR DEPARTMENT OF LABOR USE</p> <p>Response To Request</p> <p><input type="checkbox"/> Use area determination issued for this area</p> <p>_____</p> <p>_____</p> <p><input type="checkbox"/> The attached decision noted below is applicable to this project</p> <p>Decision Number _____</p> <p>Date of Decision _____</p> <p>Expires _____</p> <p>Supersedes Decision Number _____</p> <p>Approved _____</p>	<p>Mail Your Request To:</p> <p>U.S. Department of Labor Employment Standards Administration Wage and Hour Division Branch of Construction Contract Wage Determinations Washington, D.C. 20210</p>			<p>CHECK OR LIST CRAFTS NEEDED (Attach continuation sheet if needed)</p> <p>_____ Asbestos workers</p> <p>_____ Boilermakers</p> <p>_____ Bricklayers</p> <p>_____ Carpenters</p> <p>_____ Cement masons</p> <p>_____ Electricians</p> <p>_____ Glaziers</p> <p>_____ Ironworkers</p> <p>_____ Laborers (Specify classes)</p> <p>_____ _____</p> <p>_____ _____</p> <p>_____ Lathers</p> <p>_____ Marble & tile setters, terrazzo workers</p> <p>_____ Painters</p> <p>_____ Piledriversmen</p> <p>_____ Plasterers</p> <p>_____ Plumbers</p> <p>_____ Roofers</p> <p>_____ Sheet metal workers</p> <p>_____ Soft floor layers</p> <p>_____ Steamfitters</p> <p>_____ Welders-rate for craft</p> <p>_____ Truck drivers</p> <p>_____ Power equipment operators (Specify types)</p> <p>_____ _____</p> <p>_____ _____</p> <p>_____ _____</p> <p>_____ _____</p> <p>Other Crafts</p> <p>_____</p> <p>_____</p> <p>_____</p>
	Requesting Officer (Typed name and signature)			
	Department, Agency, or Bureau		Phone Number	
	Date of Request	Estimated Advertising Date	Estimated Bid Opening Date	
	Prior Decision Number (if any)	Estimated \$ Value of Contract <input type="checkbox"/> Under 1/2 Mil <input type="checkbox"/> 1 to 5 Mil <input type="checkbox"/> 1/2 to 1 Mil <input type="checkbox"/> Over 5 Mil	Type of Work <input type="checkbox"/> Bldg. <input type="checkbox"/> Highway <input type="checkbox"/> Resid. <input type="checkbox"/> Heavy	
	Address to which wage determination should be mailed. (Print or type)			
	<div style="border: 1px solid black; width: 100%; height: 100%; margin: 0 auto;"></div>			
	Location of Project (City, County, State, Zip Code)			
	Description of Work (Be specific) (Print or type)			

**DAVIS-BACON
ADDITIONAL CLASSIFICATIONS
PROCESS**

CONTRACT CLAUSE STIPULATED AT 29 C.F.R. § 5.5(a)(1)(ii)

(Reiterated in the FAR at 48 C.F.R. § 52.222-6)

**CONFORMANCE/ADDITIONAL CLASSIFICATION REQUEST
PROCESS – CONTRACTING AGENCY ROLE**

CONFORMANCE REQUEST CHECKLIST

**CRITERIA FOR APPROVAL OF ADDITIONAL CLASSIFICATIONS
AND WAGE RATES**

REFERENCED APPEALS BOARD CASES

APPRENTICES, TRAINEES, HELPERS, AND WELDERS

FOREMEN, TECHNICAL AND SUPERVISORY EMPLOYEES

**STANDARD FORM 1444 – “REQUEST FOR AUTHORIZATION OF
ADDITIONAL CLASSIFICATIONS AND RATES”**

**THE DAVIS-BACON CONTRACT CLAUSE
STIPULATED AT 29 C.F.R. § 5.5(a)(1)(ii)**
(Reiterated in the FAR at 48 C.F.R. § 52.222-6)

- (A) The contracting officer shall require that any class of laborers or mechanics which is not listed in the wage determination and which is to be employed under the contract shall be classified in conformance with the wage determination. The contracting officer shall approve an additional classification and wage rate and fringe benefits therefore only when the following criteria have been met:
- (1) The work to be performed by the classification requested is not performed by a classification in the wage determination; and
 - (2) The classification is utilized in the area by the construction industry; and
 - (3) The proposed wage rate, including any bona fide fringe benefits, bears a reasonable relationship to the wage rates contained in the wage determination.
- (B) If the contractor and the laborers and mechanics to be employed in the classification (if known), or their representatives, and the contracting officer agree on the classification and wage rate (including the amount designated for fringe benefits where appropriate), a report . . . shall be sent by the contracting officer to the Administrator of the Wage and Hour Division, . . . Department of Labor, . . . [for approval, modification or disapproval with respect to each proposed classification and wage rate].
- (C) In the event the contractor, the laborers or mechanics to be employed in the classification or their representatives, and the contracting officer do not agree on the proposed classification and wage rate (including the amount designated for fringe benefits, where appropriate), the contracting officer shall refer the questions, including the views of all interested parties and the recommendation of the contracting officer, to the Administrator for a determination.
- (D) The wage rate (including fringe benefits, where appropriate) determined pursuant to subparagraphs (1)(B) or (C) of this paragraph, shall be paid to all workers performing work in the classification under this contract from the first day on which work is performed in the classification.

**CONFORMANCE/ADDITIONAL CLASSIFICATION
REQUEST PROCESS
CONTRACTING AGENCY ROLE**

Pre-Bid/Pre-Award

Look at the Wage Determination:

- ◇ Compare classifications on the wage determination with anticipated work to be performed to identify missing classes that may be needed.
- ◇ If virtually all the work is to be performed by a single missing classification, use Standard Form (SF) 308 to request an appropriate predetermined wage rate for incorporation in the bid specifications.

Tell contractors about the possible need to request additional classes and rates after award:

- ◇ Ensure that the Davis-Bacon clauses are in the solicitation, including the conformance criteria. (*See* 29 C.F.R. § 5.5(a) and FAR at 48 C.F.R. §§ 22.407 and 52.222-6(c).)
- ◇ During pre-bid/pre-award conferences discuss criteria to advise contractors concerning how requests for additional classifications are processed and proposed wage rates will be evaluated.
- ◇ Call the contracting agency's labor advisor or WHD for guidance where questions/disputes arise regarding proper application of Davis-Bacon wage determinations to specific upcoming projects.

After contract award

Identify Additional Classes that May Be Needed:

- ◇ Discuss the wage determination and conformance criteria in pre-construction conference.
- ◇ Review certified payrolls for classes not listed on the wage determination.
- ◇ Conduct on-site inspections/employee interviews and identify additional classes.

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- ◇ Consider subcontractor inquiries about missing classifications/rates.
- ◇ Consider complaints by employees/unions/competitors.

Work with the contractors and other affected parties to help develop the conformance request:

- ◇ Provide request form (SF-1444 or similar) to the contractor. Instructions on how to complete the form are pre-printed on the form. (The SF-1444 can be downloaded from the “Library” section on the WDOL website (<http://www.wdol.gov>) and it is in the FAR at 48 C.F.R. § 53.301-1444.) A copy is shown at the end of this chapter of the *DOL Prevailing Wage Resource Book*.
- ◇ Consider the views of affected parties:
 - ◇◇ Prime contractor
 - ◇◇ Subcontractor (if applicable)
 - ◇◇ Employee(s) (if known)
 - ◇◇ Union representative (if the employees are represented by a union)
- ◇ Review the contractor’s request for additional classes and rates in accordance with conformance criteria and ensure that all required information is furnished.
 - ◇◇ Work to be performed is not performed by a classification already listed on the applicable wage determination.
 - ◇◇ Rate bears a reasonable relationship to other rates in the wage determination. Please see AAM No. 213.
- ◇ Be sure that the criteria for the approval of additional classifications and wage rates have been followed.
- ◇ Determine whether affected parties are in agreement or have dispute(s).
 - ◇◇ Attempt to resolve disputes in accordance with conformance criteria, if possible.
 - ◇◇ Develop agency recommendation and documentation of disputes (if any).

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Submit conformance request for DOL review and ruling:

- ◇ Include the following:
 - ◇◇ Completed SF-1444 (or similar form or letter).
 - ◇◇ Related documentation and agency recommendation.
 - ◇◇ Copy of contract wage determination(s). WHD policy requires the submission of the contract wage determination with the conformance request.
- ◇ Submit by e-mail only. Please scan the completed form and all supporting documents into a 'pdf' file and attach to the email. Include the Contracting Officer's name, address, telephone, and email address. Submit the email to: WHD-CBACONFORMANCE_INCOMING@dol.gov. An automated confirmation response will be generated upon receipt of your submission.
- ◇ For assistance with completing form SF 1444, with questions concerning the conformance process, or to check the status of a conformance request submitted, please contact the WHD Branch of Construction Wage Determinations (BCWD) wage analyst with responsibility for the state where your project is located. A list of analysts and their states can be found at the following website: <http://www.dol.gov/whd/govcontracts/stateassignments.htm>.
- ◇ The BCWD responds to most requests within 30 days.

Communicate with DOL after submitting conformance request, as appropriate:

- ◇ Lack of a DOL response within 30 days does not mean that the request has been approved. Contact the WHD BCWD either by mail, e-mail, or by phone (at a phone number listed at the WHD BCWD website noted above) if no response is received within 30 days. All conformances are processed and responses issued to the contracting agency by email.
- ◇ Respond promptly to DOL requests for additional information that may be needed to process the request.

Communicate DOL determination to the contractor and other interested parties:

- ◇ The contracting agency is responsible to provide the conformance determination to the general/prime contractor. The contractor and its subcontractors shall post

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approved additional classifications and wage rates at the site of the work in a prominent and accessible place where they can be easily seen by the workers.

Advise the contractor and other interested parties of the reconsideration and appeal processes, as appropriate:

- ◇ WHD Administrator review and reconsideration of a BWCD conformance determination may be sought pursuant to 29 C.F.R. § 5.13. An interested party may appeal a final ruling of the Administrator pursuant to the provisions of 29 C.F.R. Part 7. Prior to sending a review and reconsideration to the WHD Administrator, interested parties have an option of appealing to the BCWD first.

Note: Disputes arising out of the labor standards provisions of DBA/DBRA covered contracts are not subject to the general disputes clause in any such contract. Such disputes, including disputes between the contractor (or any of its subcontractors) and the contracting agency, DOL, or the employees or their representatives must be resolved in accordance with DOL procedures set forth in 29 CFR parts 5, 6, and 7. 29 C.F.R. § 5.5(a)(9) (reiterated at FAR 48 C.F.R. § 52.222-14).

CONFORMANCE CHECKLIST FOR CONTRACTING AGENCIES

Agency officials should provide the following information when requesting additional classifications and wage rates:

- ___ 1. The Contract Number, Project Number or HUD Identifying Number.
SF 1444: Block 5

- ___ 2. The bid opening date (if advertised).
SF 1444: Block 6

- ___ 3. The award date of the contract.
SF 1444: Block 7

- ___ 4. The date the contract work started (if started).
SF 1444: Block 8

- ___ 5. Prime/General contractor.
SF 1444: Block 3

- ___ 6. Subcontractor (if any).
SF 1444: Block 10

- ___ 7. The project location: city, **county**, and state.
SF 1444: Block 12

- ___ 8. Brief description of project work.
SF 1444: Block 11

- ___ 9. Contract Wage Decision No(s).
SF 1444: Block 13
 ___ Modification No. (for each if multiple decisions).
 ___ Date of modification (for each if multiple decisions).

- ___ 10. Proposed classification(s); description of duties if other than a basic trade.
SF 1444: Block 13a
 (Note: See separate instructions for apprentices, trainees, helpers, welders, foremen, technical workers and supervisory employees.)

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___ 11. Proposed rates:

___ ◇ basic hourly rate(s).
 SF 1444: Block 13c

___ ◇ fringe benefits (if any).
 SF 1444: Block 13c

___ 12. Documentation that the interested parties are in agreement or their views regarding any dispute. SF 1444: Blocks 14, 15, 16 for contractors, employees, and representatives, respectively.

___ ◇ Contractor(s) signatures
 SF 1444: Blocks 14 and 15

___ ◇ Employees' or representative signature (if known when the request is submitted).
 SF 1444: Block 16
 (If the contractor is party to a collective bargaining agreement, the union representative may sign for the employees or the collective bargaining agreement may be submitted.)

___ ◇ If there are parties in disagreement, documentation of their views should also be attached.

___ 13. Agency signature and recommendation.

___ ◇ Contracting officer/agency signature.

___ ◇ No action will be taken on the request if the agency does not sign and provide its agreement/disagreement regarding the request, or its position regarding a dispute between other parties.

___ 14. Agency contact person's name, address and phone number (clearly legible please).

All proposed additional classification/conformance actions must be submitted to the WHD for review. The WHD may approve, modify, or disapprove any proposed additional classifications.

CRITERIA FOR APPROVAL OF ADDITIONAL CLASSIFICATIONS AND WAGE RATES

This section describes the detailed process for determining whether a request for an additional classification and wage rate can be approved. The criteria to be applied are:

- (1) The work to be performed by the classification requested is not performed by a classification in the wage determination; and
- (2) The classification is utilized in the area by the construction industry; and
- (3) The proposed wage rate, including any bona fide fringe benefits, bears a reasonable relationship to the wage rates contained in the wage determination.

29 C.F.R. § 5.5(a)(1)(ii).

Following the criteria ensures that DOL processing of requests for approval of conformance actions can be expedited, and complications minimized in the event of reconsideration and appeal actions. Where this process is not followed by the contracting agency, delays can be anticipated in DOL processing of additional classification requests, and reconsideration and appeals of such cases may occur.

Note: See separate guidance below for helpers, apprentices, trainees, welders, working foremen, technical and supervisory employees.

Step 1: Is the requested classification already listed in the contract wage determination for the appropriate county and type of construction?

If so, the classification and rate listed in the wage determination apply.

Step 2: Can a classification in the contract wage determination – for the appropriate county and type of construction – perform the work?

Note: If multiple wage determinations are included in the contract, reference is to work performed by classification(s) already in the wage determination on the portion of the project for which the additional classification is requested.

Step 3: If yes, is the wage determination classification that may apply a union or non-union rate?

- (A) **If** the classification in the applicable wage determination lists a **union rate** (the identifier above the classification will indicate the union source of the rate), then **only** information from the union segment of the industry for the type of construction in the area is relevant in determining whether the requested classification should be denied and the classification listed on the wage determination used for the work.
- (B) **If** the classification in the applicable wage determination lists a **non-union** rate (indicated by a “SU . . .” identifier above the relevant classification listing), then a non-union rate for the classification has been determined to be prevailing for the given type of construction in the area, and **only** the practices of non-union contractors in the area may be used as a basis for determining whether the requested classification should be denied and the classification listed on the wage determination used for the work.
- (C) If more than one classification in the applicable wage determination may perform the work, determining whether one of those classifications should be used, and the requested classification denied, depends on an examination of each in accordance with steps 3(A) and 3(B).

Step 4: For each classification in question, is there evidence that the duties in question were performed by workers employed by contractors whose rate prevailed (union or non-union, as listed in the wage determination) on **similar construction** in the area during the year **prior to bid opening/award of this contract?** (See *Fry Brothers Corp.*, WAB Case No. 76-6, dated June 14, 1977, and *American Building Automation*, ARB Case No. 00-067, dated March 30, 2001 (and cases cited therein)). A brief synopsis of these cases is provided below. (See Reference Case Nos. 1 and 4).

For example:

- ◇ For a building construction project, if the contract wage determination contains a union rate for the classification that may perform the duties in question, is there evidence that union workers in that classification performed those duties on building construction in the area during the year prior to award of this contract?

- ◇ On a highway construction project, if the contract wage determination contains a non-union rate for a classification that may perform the duties in question, is there evidence that non-union workers employed by non-union contractors in that classification performed the duties in question on highway construction project(s) in the area during the year prior to award of the contract?

Step 5: If there is such evidence, the request for the additional classification must be denied, as a classification already in the contract wage determination performs the work for which the additional classification was requested.

Example A - The wage determination classifications/rates are union:

- ◇ If a union rate is listed for a classification in the wage determination that may perform the duties in question, and if union worker(s) can be shown to have performed the duties in question in that classification on the same type of construction in the same area during the year prior to award of the contract in question, then in light of the first criterion for approval of an additional classification, the request for the additional classification must be denied.

NOTE:

A claim that the applicable union agreement applies to such work is normally **not** an adequate basis for denying the additional classification request when the work performed falls outside of what would generally be considered core craft work. **Specific information identifying project(s) on which the union workers in that classification performed such work, and identifying the contractor who employed them on such project(s)**, typically is needed to establish that the work in question was performed by a classification in the contract wage determination.

Such data generally is needed to support denial of a proposed classification on the basis that work is performed in the area by the classification already listed in the applicable contract wage determination. When there is evidence that union contractors in the area have established a local area practice of employing the union workers in a prevailing classification already listed in the contract wage determination when they perform the work for which an additional classification is requested, their project-based evidence is the basis for denial of the requested classification. While it is

important to have evidence that the union classification listed in the wage determination has been used to perform the duties in question; generally it is not necessary to demonstrate anew that the wage determination classification and rate already listed in the contract wage determination is prevailing in the area for the work at issue in a request for approval of a different classification and rate for the work in question. *See American Building Automation*, ARB Case No. 00-067 (March 30, 2001). (A synopsis of the ARB decision in that case is provided below.)

If there is evidence that the duties for which an additional classification is proposed have been performed using the union classification in the wage determination, then the work in question must be classified in accordance with the union classification in the contract wage determination, and at least the rate specified there, including fringe benefits, shall be paid to all workers performing work in the classification under the contract from the first day on which work has been performed.

If there is no evidence that the duties in question were performed by the classification in the contract wage determination, move to step 6, below.

Example B - The wage determination classifications/rates are non-union:

- ◇ **If a non-union** rate is listed in the contract wage determination for a classification that may perform the duties in question and non-union workers in the classification can be shown to have performed those duties on the same type of construction in the same area prior to award of the contract, then the request for the additional classification must be denied.

Step 6: If the duties of the proposed classification are not performed by a classification on the wage determination, it must then be determined whether or not the proposed conformed rate requested **bears a reasonable relationship** to the wage rates already listed in the applicable contract wage determination schedule **for the given county and type of construction. Please see AAM No. 213 for detailed guidance.**

- (A) Proposed rates should be compared to those already listed for classifications within appropriate subgroups. Thus, proposed rates for skilled classifications should be compared to those listed for skilled classifications on the wage determination; proposed power equipment operators should be

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compared to power equipment operators; proposed laborers to laborers; and proposed truck drivers to truck drivers.

- (B) A determination of whether union or non-union sector rates prevail in the appropriate subgroup (skilled classifications, power equipment operators, laborers, or truck drivers) should be made.
- (C) After reviewing the entirety of the rates within the appropriate category and sector, a rate that bears a reasonable relationship to those rates in the wage determination must be determined.
- (D) A determination of whether any other considerations also apply should be made. For example, if the classification being conformed is a skilled classification and some of the wage rates for skilled classifications in the wage determination are lower than the rates for laborer classifications, then the contracting agency should generally consider only those existing skilled classification rates that are higher than the laborer rates to determine the proposed rate.

Please see relevant decisions in appeals board cases, below:

- (A) Skilled craft rates should bear a reasonable relationship to other skilled craft rates and conformance requests for skilled classifications should not be approved at wage rates below those already listed for other skilled crafts (excluding laborers, truck drivers, and power equipment operators) – (*See M Z. Contractors Co., Inc.*, WAB Case No. 92-06, dated August 25, 1992, and *Tower Construction*, WAB Case No 94-17, dated February 28, 1995; reference case no. 2, below.)
- (B) Rates for additional laborer, truck driver, and power equipment operator classes should normally be compared with other laborers, truck drivers, and power equipment operators, respectively. (*See Tower Construction*, WAB Case No 94-17, dated February 28, 1995; reference case no. 2, below.)
- (C) “If the contract wage determination includes rates for skilled craft(s) where almost all skilled crafts are higher than the laborers’ rate but a few skilled classifications are below the laborers’ rate, it would be unreasonable to set a wage rate for the skilled conformed classification by simply setting the rate at the same level as the laborers’ rate. (*See M Z. Contractors Co., Inc.*, WAB Case No. 92-06, dated August 25, 1992).
- (D) Where most of the wage rates and fringe benefits in a wage determination for “skilled” crafts are substantially higher than the wages and fringe

benefits applicable to one or two other “skilled” classifications in the wage determination, mechanical adoption of the wage rate and fringe benefits applicable to the lowest paid “skilled” classification, or the wage rate and fringe benefit for the “laborer” classification, whichever is higher, does not satisfy the requirement that “the proposed wage rate, including any fringe benefits, bears a reasonable relationship to the wage rates contained in the wage determination.” See *M Z. Contractors Co., Inc.*, WAB Case No. 92-06, dated August 25, 1992).

REFERENCE CASE NO. 1

Fry Brothers Corp., WAB Case No. 76-6 (June 14, 1977)

Pursuant to the WAB decision in *Fry Brothers Corp.*, WAB Case No. 76-6, dated June 14, 1977, the proper classification for work performed on a particular Davis-Bacon covered project by laborers and mechanics is that classification used by contractors whose wage rates were found to be prevailing in the area and incorporated in the applicable wage determination. Accordingly, under the *Fry Brothers Corp.* decision, the classification practices utilized in the appropriate sector for such construction projects in the area in question must be used to determine the proper classification for work on this project.

Note: The above synopsis is provided for information purposes only. The full text of the decision can be obtained from the ARB and is available at:

<http://www.oalj.dol.gov/libdba.htm>

REFERENCE CASE NO. 2

Tower Construction, WAB Case No 94-17 (February 28, 1995)

In this case, the WAB confirmed the Administrator's ruling concerning the appropriate rate to be approved when the missing classification is in a separate and distinct subgroup.

The Board stated as follows:

In administering the conformance process Wage and Hour further groups classifications within the broad category of power equipment operators and distinguishes them from other skilled classifications since the operators are a 'separate and distinct subgroup of construction worker classifications.' [citation omitted]. Thus, when conforming omitted power equipment operator rates, Wage and Hour only looks to listed equipment operator rates for determining a reasonable relationship. Conversely, omitted skilled classifications are not conformed at operator rates. The unique skills and duties of power equipment operators are sufficiently distinguishable from the skills of mechanics in skilled construction trades, such that the Administrator's rejection of the equipment operator rates was well within the discretion granted her under the regulation

The Board further noted that the contract wage determination in this case also listed a truck driver classification and noted that truck driver skills are more akin to those of operators, that the truck driver rate was below that listed for an unskilled laborer, and that the Administrator also excluded that truck driver rate from consideration in determining the appropriate conformed rate for the skilled crafts in question. The Board concluded that:

where a rate within the clearly distinct equipment operator group is the 'floor' for a wage determination, it is reasonable to exclude those rates from consideration and conform missing skilled classifications to the next higher level for a skilled trade.

In this case, the Board also reiterated important positions it had stated in prior rulings, to the effect that:

a party seeking conformed classifications and rates 'may not rely on a wage determination granted to another party regardless of the similarity of the work in question.' *Inland Waters Pollution Control, Inc.*, WAB Case No. 94-12 (Sept. 30, 1994) slip op. at pp. 7-8."

and further that:

a contractor could not prospectively rely on Wage and Hour's prior approval of conformed classifications and rates for application to a contract performed at the same location. *E&M Sales, Inc.*, WAB Case No. 91-17 (Oct. 4, 1991).

Note: The above synopsis is provided for information purposes only. The full text of the decision can be obtained from the ARB and is available at:

<http://www.oalj.dol.gov/libdba.htm>

REFERENCE CASE NO. 3

M.Z. Contractors Co., Inc., WAB Case No. 92-06 (August 25, 1992)

The WAB remanded this matter to the WHD for further proceedings after the Acting Administrator had approved the addition (conformance) of an “insulator” classification, for pipe insulation work, at a wage rate equal to the rate listed on the wage determination for “laborers.” The WHD approval was in accordance with the former policy of approving conformance of a proposed rate for a skilled classification of worker so long as the proposed rate was equal to or exceeded the lowest rate for a skilled classification already contained in the contract wage determination. (The painters’ rate in the wage determination was lower than the laborers’ rate). The Board rejected this former WHD policy in its application to the present case because almost all the skilled classifications in the contract wage determination had wage rates substantially higher than the laborers’ rate. The Board ruled it was appropriate for the WHD to select the particular method to determine what conformed rate would meet the third regulatory requirement of bearing a reasonable relationship to the wage rates contained in the wage determination.

Note: The above synopsis is provided for information purposes only. The full text of the decision can be obtained from the ARB and is available at:

<http://www.oalj.dol.gov/libdba.htm>

REFERENCE CASE NO. 4

American Building Automation, ARB Case No. 00-067 (March 30, 2001)

In this case, the ARB concluded that the WHD Administrator properly denied a request for the addition of a “Building Automation and Controls Technician” (BACT) classification. The Administrator determined that the work of the proposed BACT classification was performed by another classification already found within the wage determination, and the ARB affirmed the Administrator’s denial of the conformance request.

The subcontractor who requested the BACT classification asserted that the work involved did not fall squarely within any single trade classification in the wage determination and that such workers had to be knowledgeable in all of the traditional trades, including electrical, mechanical, telecommunications and networks. The Davis-Bacon wage determination in the contract in question included a union wage rate for the plumber classification. Believing that the work to be performed by the proposed BACT classification might fall within the work performed by employees classified as plumbers, the WHD inquired into trade jurisdiction practices under the collective bargaining agreement negotiated by the Plumbers’ local union. The union provided a copy of its collective bargaining agreement and documentation of several construction projects where this work had been performed by workers classified and paid as plumbers. Based on this data, the Administrator determined that the first criterion for establishing a new classification under the conformance process was not satisfied.

In its decision affirming the Administrator’s determination, the ARB noted that “[a] conformance request does not call for a *de novo* evaluation of prevailing local practices or wage rates, questions that might appropriately be raised in a pre-award request for review and reconsideration of a wage determination under 29 C.F.R. § 1.8” and that:

[I]t is well-established that in a conformance situation the Division is not required to determine that a classification in the wage determination actually is the prevailing craft for the tasks in question, only that there is evidence to establish that the classification actually performs the disputed tasks in the locality. [citations to prior ARB and WAB decisions omitted)

Note: The above synopsis is provided for information purposes only. The full text of the decision can be obtained from the ARB and is available at:

<http://www.oalj.dol.gov/libdba.htm>

REFERENCE CASE NO. 5

Swanson's Glass, WAB Case No. 89-20 (April 29, 1991)

In this case, the WAB affirmed the WHD Administrator's denial of a request for the addition of a glazier classification on the ground that the contractor's proposed rate did not bear a reasonable relationship to the rates on the wage determination. The proposed wage rate was less than the lowest wage rate paid skilled classifications on the applicable wage determination, and also less than the hourly rate in the wage determination for laborers.

The WAB further characterized the petitioner's argument that the proposed glazier wage rate was "in reasonable conformity with the prevailing wage rate for glaziers for this locality" as essentially challenging the applicable wage determination, and emphasized that "the Board has consistently ruled that in order for a challenge to a wage determination to be timely, the challenge must be made prior to contract award (or the start of construction if there is no contract award)."

The contractor's contention that the contracting officer approved its proposed rate was also rejected. The WAB noted that the conformance regulations do not give the contracting officer final approval, and even if the contracting agency had described its actions as authoritative approval, erroneous contracting agency advice does not bar the DOL from requiring payment of the appropriate rate.

The Board also stated the WHD's failure to deny the requested classification within the 30-day timeframe contemplated by the regulations is not determinative, since this regulation is not jurisdictional. The conformance regulations do not provide that any failure by the Administrator to act within 30 days constitutes approval or acquiescence in the proposed classification or wage rate, and the absence of a response from the Administrator in the 30-day time period referenced in Section 5.5(a)(1)(ii)(B) therefore does not provide a basis to presume the requested classification and wage rate have been approved.

Note: The above synopsis is provided for information purposes only. The full text of the decision can be obtained from the ARB and is available at:

<http://www.oalj.dol.gov/libdba.htm>

APPRENTICES, TRAINEES, HELPERS, AND WELDERS

Apprentices and Trainees

- ◇ Additional classifications and wage rates are not needed for bona fide apprentices and trainees working on Davis-Bacon covered contracts. Rates for apprentices and trainees are not listed on Davis-Bacon wage determinations. Apprentices or trainees are permitted to work at less than the wage rates listed in the contract wage determination for the work they perform only if they meet the requirements of 29 C.F.R. Part 5, section 5.5(a)(4), such as being registered or certified in an appropriate apprenticeship or training program. (See FAR at 48 C.F.R. § 22.401 Definitions, “Laborers or mechanics,” paragraphs (1) and (2), and 48 C.F.R. § 52.222-6.)

Helpers

- ◇ Generally, conformance requests for helpers will not be approved unless the duties performed are clearly defined and distinct from those of any other classification on the wage determination, the use of such helpers is an established prevailing practice in the area, and the helper is not employed as a trainee in an informal training program. The conformance process cannot be used to add a “helper” classification where any work to be performed by the helper is performed by a classification in the wage determination. 29 C.F.R. §§ 5.2(n)(4) and 5.5(a)(1)(ii)(A).

Welders

- ◇ Additional classifications are not generally needed for welders. Welding is commonly considered incidental to the work of employees for whom classifications are issued. Thus, it is appropriate for welders to be classified in the same classification as the employees who are performing the duties to which the welding work is incidental (for example, ironworkers, plumbers, sheet metal workers, etc.). However, welders may sometimes represent a separate sub-classification and in those cases, may be conformed.

FOREMEN, TECHNICAL AND SUPERVISORY EMPLOYEES

An individual employed in a bona fide executive, administrative or professional capacity, as defined in Regulations, 29 C.F.R. Part 541, is not a “laborer” or “mechanic” as these terms are defined under the Davis-Bacon Act.

- ◇ However, if a supervisory employee who is not exempt from coverage under that regulation spends more than an incidental amount of work as a laborer or mechanic, the hours spent in these activities would be subject to the Davis-Bacon labor standards.

- ◇ For example, if a working foreman spends more than 20 percent of the time during a workweek performing laborer or mechanic duties at the job site, the hours spent in these activities should be paid at least the hourly rate specified in the contract wage determination for the appropriate laborer or mechanic classification(s).

29 C.F.R. § 5.2(m).

**U.S. DEPARTMENT OF LABOR
PREVAILING WAGE RESOURCE BOOK**

DB CONFORMANCES

STANDARD FORM 1444

**REQUEST FOR AUTHORIZATION OF
ADDITIONAL CLASSIFICATION AND RATE**

CHECK APPROPRIATE BOX
 SERVICE CONTRACT
 CONSTRUCTION CONTRACT

OMB Number: 9000-0089
Expiration Date: 7/31/2014

Public reporting burden for this collection of information is estimated to average 15 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the FAR Secretariat (MVP), Office of Acquisition Policy, GSA, Washington, DC 20405; and to the Office of Management and Budget, Paperwork Reduction Project (9000-0089), Washington, DC 20503.

INSTRUCTIONS: THE CONTRACTOR SHALL COMPLETE ITEMS 3 THROUGH 16, KEEP A PENDING COPY, AND SUBMIT THE REQUEST, IN QUADRUPPLICATE, TO THE CONTRACTING OFFICER.

1. TO: ADMINISTRATOR, Employment Standards Administration WAGE AND HOUR DIVISION U.S. DEPARTMENT OF LABOR WASHINGTON, D.C. 20210		2. FROM: (REPORTING OFFICE)		
3. CONTRACTOR				4. DATE OF REQUEST
5. CONTRACT NUMBER	6. DATE BID OPENED (SEALED BIDDING)	7. DATE OF AWARD	8. DATE CONTRACT WORK STARTED	9. DATE OPTION EXERCISED (IF APPLICABLE) (SCA ONLY)
10. SUBCONTRACTOR (IF ANY)				

11. PROJECT AND DESCRIPTION OF WORK (ATTACH ADDITIONAL SHEET IF NEEDED)

12. LOCATION (CITY, COUNTY AND STATE)

13. IN ORDER TO COMPLETE THE WORK PROVIDED FOR UNDER THE ABOVE CONTRACT, IT IS NECESSARY TO ESTABLISH THE FOLLOWING RATE(S) FOR THE INDICATED CLASSIFICATION(S) NOT INCLUDED IN THE DEPARTMENT OF LABOR DETERMINATION

NUMBER:	DATED:	b. WAGE RATE(S)	c. FRINGE BENEFITS PAYMENTS
a. LIST IN ORDER: PROPOSED CLASSIFICATION TITLE(S); JOB DESCRIPTION(S); DUTIES; AND RATIONALE FOR PROPOSED CLASSIFICATIONS (SCA ONLY) <i>(Use reverse or attach additional sheets, if necessary)</i>			

14. SIGNATURE AND TITLE OF SUBCONTRACTOR REPRESENTATIVE (IF ANY) 	15. SIGNATURE AND TITLE OF PRIME CONTRACTOR REPRESENTATIVE 	
16. SIGNATURE OF EMPLOYEE OR REPRESENTATIVE 	TITLE	CHECK APPROPRIATE BOX-REFERENCING BLOCK 13. <input type="checkbox"/> AGREE <input type="checkbox"/> DISAGREE

TO BE COMPLETED BY CONTRACTING OFFICER (CHECK AS APPROPRIATE - SEE FAR 22.1019 (SCA) OR FAR 22.406-3 (DBA))

- THE INTERESTED PARTIES AGREE AND THE CONTRACTING OFFICER RECOMMENDS APPROVAL BY THE WAGE AND HOUR DIVISION. AVAILABLE INFORMATION AND RECOMMENDATIONS ARE ATTACHED.
- THE INTERESTED PARTIES CANNOT AGREE ON THE PROPOSED CLASSIFICATION AND WAGE RATE. A DETERMINATION OF THE QUESTION BY THE WAGE AND HOUR DIVISION IS THEREFORE REQUESTED. AVAILABLE INFORMATION AND RECOMMENDATIONS ARE ATTACHED.

(Send copies 1, 2, and 3 to Department of Labor)

SIGNATURE OF CONTRACTING OFFICER OR REPRESENTATIVE 	TITLE AND COMMERCIAL TELEPHONE NO.	DATE SUBMITTED
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PREVIOUS EDITION IS USABLE

STANDARD FORM 1444 (REV. 12-2001)
Prescribed by GSA-FAR (48 CFR) 53.222(f)

APPEALS

REGARDING DAVIS-BACON

WAGE DETERMINATIONS

&

CONFORMANCE ACTIONS

**APPEALS REGARDING DAVIS-BACON WAGE
DETERMINATIONS & CONFORMANCE ACTIONS**

REGULATIONS, 29 C.F.R. PART 7, EXCERPTS

APPEALS REGARDING DAVIS-BACON WAGE DETERMINATIONS & CONFORMANCE ACTIONS

1. WHD national office and regional office inquiries

On survey-related matters initial contact, including requests for summaries of surveys, should be directed to the WHD regional office for the area in which the survey was conducted because regional offices have primary responsibility for the DB survey program. The appropriate regional office contact information is available through the WHD website at www.dol.gov/whd/programs/dbra/regions.htm.

With regard to any other questions or concerns involving wage determination and conformance matters, contact can be made with the Branch of Construction Wage Determinations (BCWD). The BCWD's address is: Branch of Construction Wage Determinations, Room S-3016, Wage and Hour Division, U.S. Department of Labor, 200 Constitution Avenue, N.W., Washington, D.C. 20210 (phone: 202-693-0087).

2. WHD Administrator

Any interested party may file a request for review and reconsideration of a BCWD determination regarding a wage determination or conformance with the WHD Administrator pursuant to 29 C.F.R. § 1.8 (for wage determinations) and 29 C.F.R. § 5.13 (for conformances). The request should include a full statement of the interested party's position and any documentation (wage payment data, project description, area practice material, etc.) that the requesting party considers to be relevant to the issue(s). The request should be sent to: Wage and Hour Division Administrator, Room S-3502, U.S. Department of Labor, 200 Constitution Avenue, N.W., Washington, D.C. 20210.

3. Administrative Review Board (ARB)

Any ruling of the WHD Administrator under (2) above may be appealed to the DOL ARB under 29 C.F.R. Part 7. The ARB's address is: Administrative Review Board, Room S-5220, U.S. Department of Labor, 200 Constitution Avenue, N.W., Washington, D.C. 20210 (phone: 202-693-6200).

REGULATIONS, 29 C.F.R. PART 7, EXCERPTS

Section 7.2 Who may file petitions for review [of wage determinations].

(a) Any interested person who is seeking a modification or other change in a wage determination under Part 1 ... and who has requested the administrative officer authorized to make such modification or other change under Part 1 and the request has been denied, after appropriate reconsideration shall have a right to petition for review of the action taken by that officer.

(b) For purpose of this section, the term “interested person” is considered to include, without limitation:

(1) Any contractor, or an association representing a contractor, who is likely to seek or to work under a contract containing a particular wage determination, or any laborers or mechanic, or any labor organization which represents a laborer or mechanic, who is likely to be employed or seek employment under a contract containing a particular wage determination, and,

(2) Any Federal, State, or local agency concerned with the administration of a proposed contract or a contract containing a particular wage determination issued pursuant to the Davis-Bacon Act or any of its related statutes.

Section 7.9 Review of decisions in other proceedings.

(a) Any party or aggrieved person shall have a right to file a petition for review with the [Administrative Review] Board (original and four copies), within a reasonable time from any final decision in any agency action under part 1, 3, or 5 of this subtitle.

(b) The petition shall state concisely the points relied upon, and shall be accompanied by a statement setting forth supporting reasons. Further, the petition shall indicate whether or not the petitioner consents to the disposition of the questions involved by a single member.

**DBA/DBRA
COMPLIANCE
PRINCIPLES**

LABORERS AND MECHANICS

SITE OF THE WORK

TRUCK DRIVERS

APPRENTICES AND TRAINEES

HELPERS

**AREA PRACTICE – PROPER CLASSIFICATION
OF WORKERS**

FRINGE BENEFITS

**CERTIFIED PAYROLLS & USE OF ELECTRONIC
SIGNATURES**

LEASES AS CONTRACTS FOR CONSTRUCTION

DBA/DBRA

Coverage and Compliance Principles

This section provides basic information regarding major aspects of compliance with the Davis-Bacon labor standards and CWHSSA overtime requirements. It addresses frequently asked questions such as:

- ◇ Who are the “laborers and mechanics” to whom the Davis-Bacon prevailing wage requirements apply?
- ◇ What is the “site of the work” where workers are covered by Davis-Bacon prevailing wage requirements?
- ◇ How are truck drivers affected by the “site of the work” limit on Davis-Bacon coverage?
- ◇ When can apprentices or trainees work on a Davis-Bacon project at less than the wages listed in the Davis-Bacon wage determination?
- ◇ Can helper classifications be used on Davis-Bacon covered projects?
- ◇ What happens if there is a dispute over how a worker should be classified?
- ◇ Does the Davis-Bacon prevailing wage include fringe benefits?
- ◇ How can a contractor’s fringe benefit costs count towards Davis-Bacon prevailing wages?
- ◇ How do you compute fringe benefit costs as an hourly rate that can count towards fulfilling your prevailing wage obligation?

LABORERS AND MECHANICS

Definition 29 C.F.R. § 5.2(m).

- ◇ The term “**laborer or mechanic**” includes at least those workers whose duties are manual or physical in nature (including those workers who use tools or who are performing the work of a trade), as distinguished from mental or managerial duties.

Laborers and mechanics include:

- ◇◇ Apprentices
- ◇◇ Trainees
- ◇◇ Helpers

For overtime coverage under CWHSSA, also:

- ◇◇ Guards and watchmen

Note: Although guards and watchmen are not considered laborers or mechanics under DBA/DBRA, they are covered by CWHSSA by virtue of its express statutory language.

- ◇ The term laborer or mechanic does not include workers whose duties are primarily administrative, executive, or clerical, rather than manual.
- ◇ Categories of workers normally considered not to be laborers or mechanics when, in the course of their duties, they perform no manual or physical work on the construction project are:
 - ◇◇ Architects and engineers
 - ◇◇ Timekeepers
 - ◇◇ Inspectors

Coverage of laborers and mechanics

- ◇ The DBA requires the payment of the applicable prevailing wage rates to all laborers and mechanics “regardless of any contractual relationship which may be alleged to exist.”
- ◇ Working foremen who devote more than 20 percent of their time during a workweek to mechanic or laborer duties, and who do not meet the exemption criteria of 29 C.F.R. Part 541, are laborers and mechanics for the time so spent. The working foreman is due the applicable rate listed in the contract wage determination for the hours spent as a laborer or mechanic.
- ◇ Persons “employed in a bona fide executive, administrative, or professional capacity” as defined in 29 C.F.R. Part 541 are deemed not to be laborers or mechanics.
- ◇ Business Owners: An individual who owns at least a bona fide 20 percent equity interest in the business and is actively engaged in its management is considered a bona fide executive, and is not a laborer or mechanic under the Davis-Bacon definition of the term “laborer or mechanic.” *See* 29 C.F.R. § 5.2(m) and 29 C.F.R. § 541.101-102.

SITE OF THE WORK

Definition 29 C.F.R. § 5.2(l).

- ◇ **5.2(l)(1)** – “Site of the work” is the physical place or places where the building or work called for in the contract will remain, and any other site where a significant portion of the building or work is constructed, provided that such site is established specifically for the performance of the contract or project.

For example:

- ◇◇ If a small office building is being erected, the “site of the work” will normally include no more than the building itself and its grounds.
- ◇◇ In the case of larger projects, such as airports, highways, or dams, the “site of the work” is necessarily more extensive and may include the whole area in which the construction activity will take place.
- ◇◇ Where a very large segment of a dam is constructed up-river and floated downstream to be affixed onto a support structure, the secondary construction site would be within the meaning of “site of the work” for Davis-Bacon purposes if it was established for and dedicated to the dam construction project.
- ◇ **5.2(l)(2)** - Except as provided in paragraph 5.2(l)(3), batch plants, borrow pits, job headquarters, tool yards, etc., are part of the “site,” provided they are dedicated exclusively, or nearly so, to the contract or project, and are adjacent or virtually adjacent to the site of the work as defined in paragraph 5.2(l)(1).
- ◇ **5.2(l)(3)** - Not included in the “site of work” are permanent home offices, branch plant establishments, fabrication plants, tool yards, etc., of a contractor or subcontractor whose location and continuance in operation are determined wholly without regard to a particular federal or federally assisted project.

Also excluded from the “site of the work” are fabrication plants, batch plants, borrow pits, job headquarters, tool yards, etc., of a commercial or material supplier which are established by a supplier of materials for the project before opening of bids and not on the site of the work as stated in paragraph 5.2(l)(1), even where such operations for a period of time may be dedicated exclusively, or nearly so, to the performance of a contract.

- ◇ CWHSSA has no site of work limitation. An employee performing part of the contract work under a construction contract at the job site who then continues contract work at a shop or other facility located elsewhere is subject to CWHSSA overtime pay for all the hours worked at both locations and travel time between them. (Different wage rates might be paid, as the Davis-Bacon prevailing wage requirements would apply only to activities performed on “the site of the work.”)

- ◇ Contracting agencies should consult the WHD when confronted with “site of the work” issues.

TRUCK DRIVERS

Definition 29 C.F.R. § 5.2(j).

- ◇ The terms “**construction, prosecution, completion, or repair**” mean all types of work done on a particular building or work at the site (including work at a facility deemed part of the “site of the work”) by laborers and mechanics of a construction contractor or construction subcontractor, including without limitation:
 - ◇◇ Altering, remodeling, installation (where appropriate) on the site of the work of items fabricated off-site.
 - ◇◇ Painting and decorating.
 - ◇◇ The manufacturing or furnishing of materials, articles, supplies or equipment on the site of the building or work.
 - ◇◇ Transportation between the “site of the work” (within the meaning of 29 C.F.R. § 5.2(l)) and a facility which is dedicated to the construction of the building or work and deemed a part of the “site of the work” (within the meaning of 29 C.F.R. § 5.2(l)).

Coverage of truck drivers

- ◇ Truck drivers **are covered** by Davis-Bacon in the following circumstances:
 - ◇◇ Drivers of a contractor or subcontractor for time spent working on the site of the work.
 - ◇◇ Drivers of a contractor or subcontractor for time spent loading and/or unloading materials and supplies on the site of the work, if such time is not *de minimis*. (Note: information provided regarding “material suppliers” may also be relevant.)
 - ◇◇ Truck drivers transporting materials or supplies between a facility that is deemed part of the site of the work and the actual construction site.
 - ◇◇ Truck drivers transporting portion(s) of the building or work between a site established specifically for the performance of the contract or project where a significant portion of such building or work is constructed and the

physical place(s) where the building or work called for in the contract(s) will remain.

- ◇ Truck drivers are **not covered** in the following instances:
 - ◇◇ Material delivery truck drivers while off “the site of the work.”
 - ◇◇ Drivers of a contractor or subcontractor traveling between a Davis-Bacon job and a commercial supply facility while they are off the “site of the work.”
 - ◇◇ Truck drivers whose time spent on the site of the work is *de minimis*, such as only a few minutes at a time merely to pick up or drop off materials or supplies. (See further information in the discussion below concerning “material suppliers.”)
- ◇ DOL has an **enforcement position** with respect to bona fide owner-operators of trucks who own and drive their own trucks. Certified payrolls including the names of such owner-operators do not need to show the hours worked or rates paid, only the notation “owner-operator”. This position does not apply to owner-operators of other equipment such as bulldozers, backhoes, cranes, welding machines, etc. (WHD does not view rental of a truck as equivalent to ownership.)
- ◇ Overtime pay requirements under CWHSSA apply to truck drivers employed by contractors and subcontractors regardless of whether the hours worked on the contract are on or off the site of the work.

Material suppliers

- ◇ The manufacture and delivery to the work site of supply items such as sand, gravel, and ready-mixed concrete, when accomplished by bona fide material suppliers, are activities not covered by DBA/DBRA requirements. (This would be so even though the materials are delivered directly into a contractor’s mixing facilities at the work site.)
- ◇ Bona fide material suppliers whose only contractual obligations for on-site work are to deliver materials and/or pick up materials are not considered contractors under the DBA/DBRA. Thus, their employees are not subject to the Davis-Bacon labor standards.
- ◇ However, if a material supplier, manufacturer, or carrier undertakes to perform a part of a construction contract as a subcontractor, its laborers and mechanics

employed at the site of the work would be subject to Davis-Bacon labor standards in the same manner as those employed by any other contractor or subcontractor.

- ◇◇ Laborers and mechanics employed by a material supplier who are required to perform more than an incidental amount of construction work in any workweek at the site of the work would be covered by the Davis-Bacon labor standards and due the applicable wage rate for the classification of work performed. For enforcement purposes, if such an employee spends more than 20% of his/her time in a workweek engaged in such activities on the site, he/she is Davis-Bacon covered for all time spent on the site during that workweek.

APPRENTICES AND TRAINEES

Definition (29 C.F.R. § 5.2(n)).

- ◇ *Apprentice* means (i) a person employed and individually registered in a bona fide apprenticeship program registered with the U.S. Department of Labor, Employment and Training Administration [ETA], Office of Apprenticeship Training, Employer and Labor Services [OA], or with a State Apprenticeship Agency recognized by the ... [ETA/OA], or (ii) a person in the first 90 days of probationary employment as an apprentice in such an apprenticeship program, who is not individually registered in the program, but who has been certified by the ..., [OA] or a State Apprenticeship Agency (where appropriate) to be eligible for probationary employment as an apprentice;
- ◇ *Trainee* means a person registered and receiving on-the-job training in a construction occupation under a program which has been approved in advance by the U.S. Department of Labor, ... [ETA], as meeting its standards for on-the-job training programs and which has been so certified by ... [ETA].

Coverage of apprentices and trainees

- ◇ Apprentices and trainees are laborers and mechanics but are not listed on Davis-Bacon wage determinations. Apprentices and trainees are permitted to work on DBA/DBRA covered projects only under very controlled circumstances, as follows.
- ◇ Apprentices and trainees may be used on DBA/DBRA covered projects and paid less than the specified journeyman rate for the work performed if:
 1. The apprentice or trainee is **individually registered** in an **approved** apprenticeship or training program.
 - ◇◇ The **apprenticeship program** has been approved by the ETA/OA or by a state apprenticeship agency recognized by the ETA/OA.
 - ◇◇ The registration requirements do not apply to apprentices and trainees employed on highway construction projects funded by the **Federal-Aid Highway Act** and enrolled in programs certified by the U.S. Department of Transportation.

2. Apprentices/trainees must each be paid the percentage (%) specified in the approved apprenticeship or trainee program for their level of progression calculated as a percent of the basic hourly rate required by the applicable wage determination for the applicable classification.
3. The contractor is limited in the number of apprentices/trainees permitted on the DBA/DBRA job site based on the **allowable ratio** of apprentices/trainees to journeymen specified in the approved program. (Note: In view of the apprenticeship regulations at 29 C.F.R. Part 29, as revised in 2008, any questions concerning portability of the wages and ratio provisions on DBA/DBRA covered projects in light of 29 C.F.R. 29.13(b)(7) may require careful consideration by WHD).
 - ◇◇ Compliance with the applicable ratio is determined on a daily, not weekly basis.
 - ◇◇ The use of “fraction thereof” in computing apprenticeship ratios is not permitted unless specified in the approved apprenticeship program.
4. **Fringe benefits** should be paid to apprentices/trainees in accordance with the provisions of the apprenticeship/trainee program. If the program is silent on the payment of fringes, the apprentices/trainees are to receive the full amount of the fringe benefits stipulated on the applicable wage decision (for the craft in which an individual apprentice/trainee is employed) unless it is determined that a different practice prevails for such apprentices/trainees.
5. When the contractor has exceeded the allowable ratio of apprentices/trainees in a classification, only the individuals who were employed before the applicable ratio was exceeded may be paid below the wage determination rate(s) for the work performed. Individuals whose employment on the site exceeds the allowable ratio must be paid the full wage determination rate for the classification of work performed.

HELPERS

Definition 29 C.F.R. 5.2(n)(4).

- ◇ A distinct classification of “helper” will be issued in Davis-Bacon wage determinations only where all of the following conditions are met:
 - ◇◇ The duties of the helper are clearly defined and distinct from those of any other classification on the wage determination;
 - ◇◇ The use of such helpers is an established prevailing practice in the area; and
 - ◇◇ The helper is not employed as a trainee in an informal training program.

A “helper” classification will be added to wage determinations pursuant to the Davis-Bacon contract clause at § 5.5(a)(1)(ii)(A) only where, in addition, the work to be performed by the helper is not performed by a classification in the wage determination.

Note: Helpers may be employed on a DBA/DBRA covered construction project only if the helper classification is listed in the Davis-Bacon wage determination in the contract or the classification is added with approval by DOL. Helper classes are issued or approved only where they are within the scope of the definition stated above.

AREA PRACTICE – PROPER CLASSIFICATION OF WORKERS

- ◇ To determine proper classifications for workers employed on a Davis-Bacon covered project, it may be necessary to examine **local area practice**.
- ◇◇ There are no nationwide standard classification definitions under the DBA. (This differs from the SCA, as SCA classifications are defined in the *SCA Directory of Classifications*.)
 - Note: The Dictionary of Occupational Titles, published by the Department's Employment and Training Administration, cannot be relied on for making Davis-Bacon determinations regarding proper employee classification.
- ◇◇ The Wage Appeals Board ruled in *Fry Brothers Corp.*, WAB Case No. 76-6 (June 14, 1977) that the proper classification of work performed by laborers and mechanics is that classification used by firms whose wage rates were found to be prevailing in the area and incorporated in the applicable Davis-Bacon wage determination.
- ◇◇ Questions concerning the proper classification of laborers and mechanics are resolved in accordance with prevailing local area practice. An “area practice survey” may be conducted by the WHD or by the contracting agency to determine the proper classification(s) of work.
- ◇ For advice regarding proper classification of workers and for guidance on the need to conduct an area practice survey to determine proper classification of laborers and mechanics on DBA/DBRA covered projects, consultation with the WHD Regional Government Contracts Enforcement Coordinator is appropriate.

Basic Principles for Conducting Surveys to Determine Prevailing Local Area Practice

- ◇ In accord with *Fry Brothers Corp.*, information to be considered in the area practice survey is from firms in the sector (union or non-union) whose wage rates were found to be prevailing in the area and incorporated in the applicable wage determination for each classification listed in the wage determination.
- ◇◇ If, in the applicable wage determination, the rates listed for all the classifications that may perform the work in question are non-union rates, the dispute will be resolved by examining the practice(s) of non-union contractors in classifying workers who have been performing the duties in question in the area.

- ◇◇ If, in the applicable wage determination, the rates listed for all the classifications that may perform the work in question are union rates, the dispute will be resolved by examining the practice(s) of union contractors in classifying workers who have been performing the duties in question in the area.
- ◇◇ If a combination of union and non-union rates are listed in the wage determination for the classifications that may have performed the work in the area, the dispute will be resolved based on the combined information from:
 - ◇◇◇ union contractors for the classification(s) for which union rate(s) are listed,
 - and
 - ◇◇◇ non-union contractors for the classification(s) for which non-union rate(s) are listed.
- ◇ Proper classification of the laborers or mechanics performing the work in question will be resolved by examining the classification practice(s) of contractors who performed the work in question:
 - ◇◇ On similar construction projects (building construction, residential construction, highway construction, heavy construction),
 - ◇◇ In progress in the same area (normally the same county),
 - ◇◇ During the year preceding the wage determination lock-in date for the contract in question (as discussed below; *see* 29 C.F.R. § 1.6(c)).
 - ◇◇◇ In the case of contracts entered into pursuant to competitive bidding procedures (sealed bid procurement, as contrasted with contracting by negotiation), the year prior to bid opening;
 - ◇◇◇ The year prior to contract award in the case of contracts entered into pursuant to contracting by negotiation (such as contracts arrived at through requests for proposals (RFPs) or similar contracting methods);
 - ◇◇◇ In the case of projects assisted under the National Housing Act, the year prior to beginning of construction or the date the mortgage was initially endorsed, whichever occurred first; or,

- ◇◇◇ In the case of projects to receive housing assistance payments under section 8 of the U.S. Housing Act of 1937, the year prior to beginning of construction or the date the agreement to enter a housing assistance payments contract was executed, whichever was first.
- ◇ The extent of the information required for making area practice determinations will depend on the facts in each case. For example:
 - ◇◇ If, in gathering preliminary data, all of the parties agree as to the proper classification, the area practice is thus established (i.e., a **“limited”** area practice survey).
 - ◇◇ However, if all parties do not agree (i.e., jurisdictional dispute between two unions, or management does not agree with the union, or where non-union rate(s) in the wage determination may apply and the practice among non-union contractors in the area varies), it will be necessary to determine by a **“full”** area practice survey which classification actually performed the work in question.
- ◇ More detailed information on procedures involved in conducting an area practice survey to resolve enforcement issues regarding the proper classification of workers employed on DBA/DBRA covered contracts is available in Chapter 15 of the WHD Field Operations Handbook (FOH) (Chapter 15 of the FOH is available at http://www.dol.gov/whd/FOH/FOH_Ch15.pdf).

FRINGE BENEFITS

Definition 29 U.S.C. § 3141(2); 29 C.F.R. §§ 5.2(p) and 5.23.

- ◇ Under the Davis-Bacon Act, the terms “wages,” “scale of wages,” “wage rates,” and “prevailing wages” include:
 - ◇◇ The basic hourly rate of pay,
 - ◇◇ Any contribution irrevocably made by a contractor or subcontractor to a trustee or third party pursuant to a bona fide fringe benefit fund, plan or program, and
 - ◇◇ The rate of costs to the contractor or subcontractor which may be reasonably anticipated in providing bona fide fringe benefits pursuant to an enforceable commitment to carry out a financially responsible plan or program, which was communicated to the employees in writing.

In practice

- ◇ The Davis-Bacon “prevailing wage” is made up of two interchangeable components – a basic hourly rate and fringe benefits found prevailing in an area and published in a Davis-Bacon wage determination. Along with the basic hourly rate listed on the wage determination, a fringe benefit amount is listed for any classification for which fringe benefits have been found prevailing. The sum of both the basic hourly rate and any fringe benefits listed comprise the Davis-Bacon “prevailing wage” requirement for a given classification. If no fringe benefits are found prevailing and listed for a given classification, the basic hourly rate itself is the “prevailing wage” requirement for that classification.
- ◇ The regulations at 29 C.F.R. § 3.10, issued under the Copeland Act, and applicable to wage payments on projects subject to Davis-Bacon prevailing wage requirements, specify the allowable “methods of payment” as follows:

§ 3.10 Methods of payment of wages.

The payment of wages shall be by cash, negotiable instruments payable on demand, or the additional forms of compensation for which deductions are permissible under this part. No other methods of payment shall be recognized on work subject to the Copeland Act.

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- ◇◇ Generally the “cash” portion of the prevailing wage, as discussed below, is the worker’s paycheck (which may be paid by electronic transmission of the wages to a worker’s account, if the worker authorizes such direct deposit).
- ◇ A contractor’s prevailing wage obligation may be met by any combination of cash wages and creditable “bona fide” fringe benefits provided for a covered worker:
 - ◇◇ The total, including any fringe benefits listed for the classification, may be paid entirely as cash wages;
 - ◇◇ Payments made or costs incurred by the contractor for “bona fide” fringe benefits may be creditable towards fulfilling the requirement; or
 - ◇◇ A combination of cash wages paid and “bona fide” fringe benefits may be used together to meet the total required prevailing wage.
- ◇ Davis-Bacon fringe benefits must be paid for all hours worked – both straight time and overtime hours.
- ◇ Each classification on a Davis-Bacon wage determination stands alone and each laborer and mechanic is due the full prevailing wage (including fringe benefits, if listed) for all hours of work in a classification.

Example:

A Davis-Bacon wage determination requires:

Basic hourly rate	\$14.00
Fringe benefit	<u>1.00</u>
Total prevailing rate	\$15.00

Here are some examples of how a contractor can comply:

1. \$15.00 in cash wages;
2. \$14.00 plus \$1.00 in pension contributions or other “bona fide” fringe benefits; or
3. \$12.00 plus \$3.00 in pension contributions or any combination of “bona fide” fringe benefits. (In this case, to compute the minimum overtime rate under CWHSSA, half the basic rate listed, i.e., \$7.00 must be added to the full \$15.00 straight time DBA prevailing wage. Thus, the CWHSSA overtime pay rate would be \$22.00 per hour.)

Note: Under DBA/DBRA monetary wages paid in excess of the basic hourly rate may be used as an offset or credit to satisfy fringe benefit obligations, and vice versa.

Application to all hours worked

- ◇ Under Davis-Bacon, fringe benefits must be paid for **all** hours worked, including overtime hours. However, the fringe benefit amounts listed in the applicable wage determination may be excluded from the half-time premium due as overtime compensation.

For example:

An employee worked 44 hours as an electrician. The wage determination rate was \$16.00 (basic hourly rate) plus \$2.50 in fringe benefits. The electrician would be due:

$$\begin{array}{rcl}
 44 \text{ hours} \times \$18.50 & = & \$814.00 - \text{(straight time pay)} \\
 4 \text{ hours} \times \frac{1}{2} \text{ of } \$16.00 & = & \underline{32.00} - \text{(overtime pay)} \\
 & & \$846.00
 \end{array}$$

Crediting fringe benefit contributions to meet DBA/DBRA requirements

- ◇ The Davis-Bacon Act and 29 C.F.R. § 5.23 list fringe benefits to be considered.

Examples:

Life insurance

Health insurance

Pension

Vacation

Holidays

Sick leave

Supplemental Unemployment Benefits

- ◇ The use of a truck is not a fringe benefit; a Thanksgiving turkey or Christmas bonus is not a fringe benefit. (See *Cody-Zeigler, Inc.*, WAB Case No. 89-19 (April 30, 1991).)

- ◇ No credit may be taken for a benefit required by federal, state or local law, such as:

- Workers compensation

- Unemployment compensation

- Social security contributions

Funded fringe benefit plans 29 C.F.R. §§ 5.26-5.27.

- ◇ The contractor's fringe benefit contributions made irrevocably to a trustee or third party pursuant to a bona fide fringe benefit fund, plan or program can be credited towards meeting the prevailing wage requirement without prior DOL approval. For example:
 - ◇◇ Contractor pays a third party provider for health insurance monthly premiums.
 - ◇◇ Contractor makes quarterly contributions to retirement plan trust.
- ◇ The amount of contributions for fringe benefits must be paid **irrevocably** to the trustee or third party.
- ◇ Contributions to fringe benefit plans must be made regularly, not less often than **quarterly**. (This requirement is specified in the standard Davis-Bacon contract clauses at 29 C.F.R. § 5.5(a)(1)(i).) Annual contributions into a fringe benefit plan fund do not meet this requirement.
- ◇ The contractor must make payments or incur costs in the amount specified by the applicable wage decision **with respect to each individual laborer or mechanic**. Thus, the amount contributed for each employee must be determined separately, and credit taken accordingly towards the prevailing wage requirement for each individual. (It is not permissible to take credit based on the average premium paid or average contribution made per employee.)
- ◇ Credit may not be taken for fringe benefit contributions made on behalf of employees who are not eligible to participate in the plan (e.g., those excluded due to age or part-time employment).
 - ◇◇ Some plans provide that contributions and allocations under the plan will only be made on behalf of participants who are employed on the last day of the plan year. No credit is permitted for such participants for whom no contribution is made or

for contributions made for employees whose accounts receive no allocation solely because they are not employed on the last day of the plan year.

- ◇◇ On the other hand, it is not required that all employees participating in a fringe benefit plan be entitled to receive benefits from the plan at all times. For example, an employee who is eligible to participate in an insurance plan may be prohibited from receiving benefits from the plan during a 30-day waiting period. Contributions made on behalf of these employees would be creditable against the contractor's fringe benefit obligations.
- ◇ A pension plan that meets the Employee Retirement Income Security Act (ERISA) requirements may be considered "bona fide" for DBA/DBRA purposes. In accordance with 29 C.F.R. § 5.26, the fringe benefit plan trustees must assume the usual fiduciary responsibilities imposed on trustees by applicable law. A contractor may be a pension plan trustee.
- ◇ Some pension plans contain "vesting" requirements. Where an employer contributes to the plan, employees may be required to complete a certain length of service before they have a nonforfeitable right to benefits based on the employer's contributions to the plan. Thus, an employee who leaves employment before completing the specified length of service may forfeit all or part of the accrued benefit.
 - ◇◇ Such forfeitures are permitted, provided the plan is a bona fide plan that meets applicable requirements under ERISA, including minimum vesting requirements.
 - ◇◇ Forfeited Davis-Bacon contributions may not revert to the employer, but should be distributed among the remaining plan participants.
- ◇ Credit for profit sharing or other discretionary employer contributions that fund pension benefit plans can be given if certain conditions are met:
 - ◇◇ DOL requires contractors to contribute irrevocably to an escrow account not less often than quarterly, during the period of the Davis-Bacon covered work, an amount sufficient to meet any claimed fringe benefit credit towards meeting the Davis-Bacon prevailing wage obligation (based on expected profit sharing pension plan contributions) on behalf of each employee participating in the plan.
 - ◇◇ Upon the annual determination of profits, monies placed in escrow are transferred to the pension trust fund and used as an offset against the contractor's obligation to the laborers and mechanics under the profit sharing plan.

- ◇◇ Allowable Davis-Bacon credit is limited to the contributions made which cover that portion of the total hours worked by the covered workers during the year which is attributable to work covered by Davis-Bacon labor standards.
- ◇◇ Any shortfall in profits which results in actual payments to the pension plan being less than the rate at which the contractor claimed Davis-Bacon credit throughout the year would have to be made up by the contractor when the account is settled at year end by paying the difference (shortfall) in cash directly to the covered workers or by making additional contributions to the pension fund in an amount to cover the shortfall.
 - ◇◇◇ A contractor cannot be given credit for more than the actual costs of, or payments made into, the pension plan trust fund.

Unfunded plans 29 C.F.R. § 5.28.

- ◇ A fringe benefit plan or program which the contractor funds from the company's general assets (rather than by payments to a trustee or third party) is referred to as an unfunded plan. A contractor's reasonably anticipated costs in providing bona fide fringe benefits under such a plan may be creditable towards meeting the Davis-Bacon prevailing wage obligations if certain requirements are met. Unfunded fringe benefit plans generally include:
 - ◇◇ Holiday plans
 - ◇◇ Vacation plans
 - ◇◇ Sick pay plans
- ◇ No type of fringe benefit is eligible for consideration as an unfunded plan unless it meets the following criteria:
 1. It can be reasonably anticipated to provide benefits described in the Davis-Bacon Act;
 2. It represents a commitment that can be legally enforced;
 3. It is carried out under a financially responsible plan or program; and
 4. The plan or program has been communicated in writing to the laborers and mechanics affected.

- ◇ To ensure that such plans are not used to avoid compliance with the Act, the DOL directs the contractor to set aside, in an account, no less often than quarterly, sufficient assets to meet the future obligations of the plan.

Annualization

- ◇ Annualization is a computation strategy used to determine the hourly rate of contribution that is creditable towards a contractor's prevailing wage obligation on DBA/DBRA covered projects.
 - ◇◇ This principle is important because the amount of credit a contractor may claim as an offset against the prevailing wage obligation can be as significant in determining Davis-Bacon compliance as whether a particular fringe benefit plan is a bona fide fringe benefit plan under the DBA.
 - ◇◇ Annualization is particularly important for computing the fringe benefit credit when a contractor employs workers on both DBA/DBRA covered projects and projects not subject to DBA/DBRA coverage and makes contributions to fund fringe benefit plan(s) during the year.
- ◇ Background and rationale
 - ◇◇ When the 1964 DBA amendments added fringe benefits as a component of DBA "prevailing wages," the fringe benefit plans that were prevalent were collectively bargained fringe benefit plans that called for the same rate of contribution for all hours worked by laborers and mechanics employed on both DBA/DBRA covered projects and other (non-covered) construction.
 - ◇◇ The annualization principle was originally applied in the 1970's in the context of health insurance plans.
 - ◇◇◇ A contractor sought to receive Davis-Bacon credit for the entire annual cost of purchasing health insurance for its employees who worked on both government and private work.
 - ◇◇◇ DOL took the position, in opinion letters, that the cost of the health insurance was appropriately apportioned among all hours worked by the employees, and that therefore the hourly Davis-Bacon credit would be derived by dividing the total annual cost of the health insurance by the total number of hours worked by employees on both Davis-Bacon and private work during the year.

- ◇◇ This principle was later applied to other fringe benefit plans as well, such as apprenticeship and training plans, vacation plans, and most pension plans under which contractors sought to receive Davis-Bacon credit for the entire cost of the plans.
- ◇ Applying annualization to compute the allowable Davis-Bacon fringe benefit credit:
 - ◇◇ Davis-Bacon credit for contributions made to fringe benefit plans are allowed based on the effective annual rate of contributions worked during the year by an employee.
 - ◇◇ In practice, annualization limits the Davis-Bacon credit to an amount equal to the hourly cost of the fringe benefit averaged over all hours an individual laborer or mechanic works during a year (both Davis-Bacon and non-Davis-Bacon hours).
 - ◇◇ To compute the contractor's allowable hourly credit towards meeting the prevailing wage obligation for a covered laborer or mechanic on a DBA/DBRA project, the total annual cost of the fringe benefit must be divided by the total number of hours the individual works in a year (including work on both covered and non-covered work).
- ◇ Effect of annualization
 - ◇◇ Application of the annualization principle to computing the fringe benefit credit for an individual's hours worked on DBA/DBRA covered projects ensures that a contractor does not fund a fringe benefit plan that provides benefits/coverage to the individual for all hours he/she works with wages earned solely on Davis-Bacon covered projects.
 - ◇◇ Thus, it prevents using the Davis-Bacon work as the disproportionate or exclusive source of funding for benefits that are continuous in nature and compensation for all the employee's work (e.g. for a benefit that is in effect during both Davis-Bacon covered and non-covered work).
 - ◇◇ Application of the annualization principle thus restricts employers from using a variety of temporary nontraditional plans as a means to avoid increasing workers' cash wages to meet prevailing wage requirements while performing Davis-Bacon covered work.
 - ◇◇ Thus, the annualization principle encourages traditional fringe benefit plans that provide meaningful and continuous benefits to covered workers.

- ◇ Exception from the annualization requirement
 - ◇◇ For contributions made to defined contribution pension plans which provide for immediate participation and immediate or essentially immediate vesting schedules (100% vesting after an employee works 500 or fewer hours), a contractor may take Davis-Bacon credit at the hourly rate specified by the plan, regardless of whether the contractor makes contributions to the plan when working on non-Davis-Bacon projects.
 - ◇◇◇ Under such plans, contributions are irrevocably made by the contractor, most, if not all, of the workers will become fully vested in the plan, and the higher contributions made during Davis-Bacon work result in an increase in the value of the individual employee's account.
 - ◇◇◇ Pursuant to this exception, the contractor may take credit for the full amount of contributions made to such a plan during periods of DBA/DBRA covered work without annualizing the credit claimed (even if the contractor makes no contributions to the plan during periods of non-Davis-Bacon work).
 - ◇◇◇ The amount of contributions to such plans should be in conformance with any limitations imposed by the Internal Revenue Code and ERISA.
- ◇ The two examples below illustrate the application of annualization.
 - ◇◇ Example 1 – Computing the DBA fringe benefit credit for a pension plan with a 5-year vesting schedule:
 - ◇◇◇ For all defined benefit pension plans and for defined contribution pension plans which do not provide for immediate or essentially immediate vesting schedules (100% vesting after an employee works 500 or fewer hours), Davis-Bacon credit for contributions made to the plan is allowed based on the effective annual rate of contributions for all hours worked during the year. In other words, if a contractor wishes to receive \$2.00 per hour credit for pension plan contributions, the contractor must contribute at this same rate for all hours worked during the year (or otherwise make regular contributions at least quarterly, that would result in a \$2 average contribution to the plan based on all hours worked in the year). If this is not done, the credit for DBA/DBRA purposes would have to be revised accordingly.

◇◇ Example 2

- ◇◇◇ Assume that a firm's contributions for the pension benefit were computed to be \$2,000.00 a year for a particular employee. If that employee worked 1,500 hours of the year on a DBA/DBRA covered project and 500 hours of the year on private non-Davis-Bacon jobs, \$1.00 per hour ($\$2,000 \div 2,000$ hours) would be creditable towards meeting the firm's obligation to pay the prevailing wage on the covered project. This method for determining the allowable Davis-Bacon credit for fringe benefit payments illustrates that employers are normally prohibited from using contributions made for covered work to fund the plan for periods of non-covered work.

Computing hourly fringe benefit equivalents for contributions made weekly, monthly, quarterly, etc. to claim credit towards fulfilling the prevailing wage requirement

- ◇ In determining cash equivalent credit for fringe benefit payments, the period of time to be used is the period covered by the contribution. If contributions are made weekly, cash equivalents should be computed weekly. If contributions are made quarterly, cash equivalents should be computed quarterly, etc.
- ◇◇ For example, if an employer contributes to a hospitalization plan on a monthly basis, the contribution made by the employer on behalf of an employee should be divided by the total hours worked (DB covered and non-covered) each month by the employee to determine the hourly cash equivalent the employer is entitled to count as credit towards the prevailing wage obligation for that employee.

Example: An employee works 160 hours a month as an electrician and the applicable wage determination rate is \$16.00 (basic hourly rate) plus \$2.50 in fringe benefits.

Where the employer provides the electrician with medical insurance in the amount of \$200 per month, the employer would divide the total monthly cost of the benefit by 160 hours to arrive at the allowable fringe benefit credit.

$$\$200 \text{ divided by } 160 \text{ hours} = \$1.25 \text{ per hour.}$$

If the employee in this example receives no other "bona fide" fringe benefits, then for each hour worked on a covered contract the individual is due \$16.00 (basic hourly rate) plus \$1.25 paid as cash wages (the difference between the \$2.50 per hour fringe benefit required under the applicable wage determination and the credit allowed for the provision of medical insurance.) Thus,

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Basic hourly rate	\$16.00
Medical insurance benefit	1.25
<u>Additional cash wages due</u>	<u>1.25</u>
Total paid per hour	\$18.50 (\$17.25+\$1.25)

- ◇◇ On occasion, a contractor or subcontractor may offset the annual cost of a particular fringe benefit by converting such costs to an hourly cash equivalent.
 - ◇◇◇ Since construction workers often do not work a full year (2,080 hours), where the contractor makes annual payments in advance to cover the coming year and actual hours worked will not be determinable until the close of that year, the total hours worked by the DB-covered laborers, mechanics and apprentices, if any, for the preceding calendar year (or plan year), will be considered as representative of a normal work year for purposes of the above formula. To illustrate, assume that the annual cost of a pension program is \$15,000. The total actual working hours (Davis-Bacon and hours worked not subject to federal Davis-Bacon requirements) are 15,000. Thus $\$15,000 / 15,000 \text{ hours} = \1.00 per hour cash equivalent.
 - ◇◇◇ Similarly, where the contractor pays monthly health insurance premiums in advance on a lump sum basis, the total actual hours worked in the previous month or in the same month in the previous year may be used to determine (i.e., estimate) the hourly equivalent credit per employee during the current month. Any representative period may be utilized in such cases, provided that the period selected is reasonable.
 - ◇◇◇ Where the cost incurred included contributions for employees other than covered laborers, mechanics, and apprentices, the hours of such non-covered employees must be included in the computation of the hourly cash equivalent or the contributions for such employees must be eliminated prior to determining the cash equivalent for covered employees.
- ◇ In computing cash equivalents, it should be kept in mind that under certain kinds of fringe benefit plans the rate of contribution for employees may vary. For example, under a hospitalization plan the employer often contributes at different rates for single and family plan members. In such situations, an employer cannot take an across the board average equivalent for all employees; rather, the cash equivalent can only be credited based on the rate of contributions for each individual employee.

CERTIFIED PAYROLLS & USE OF ELECTRONIC SIGNATURES

Copeland Act provision and implementing regulations

- ◇ The Copeland Act language requires DOL regulations to “include a provision that each contractor and subcontractor each week must furnish a statement on the wages paid each employee during the prior week.” 40 U.S.C. § 3145.
 - ◇◇ This requirement is implemented by DOL regulations at 29 C.F.R. Part 3 and Davis-Bacon contract clauses in 29 C.F.R. Part 5:
 - ◇◇◇ Davis-Bacon contract clause provisions at 29 C.F.R. § 5.5(a)(3) address “*Payrolls and basic records.*” Also, 29 C.F.R. §§ 5.5(a)(5) and (8) incorporate the requirements of 29 C.F.R. Part 3 and rulings and interpretations under 29 C.F.R. Part 3 in DBA/DBRA covered contracts. (These provisions are reiterated in the FAR 48 C.F.R. §§ 52.222-8, 52.222-10 and 52.222-13, respectively.)
 - ◇◇◇ Provisions at 29 C.F.R. § 3.3 address “Weekly statement with respect to payment of wages” and § 3.4 addresses “Submission of weekly statements and the preservation and inspection of weekly payroll records.”
- ◇ Regarding the weekly statement with respect to payment of wages, section 3.3(b) requires that:

Each contractor or subcontractor engaged in the construction, prosecution, completion, or repair of any public building or public work, or building or work financed in whole or in part by loans or grants from the United States, shall furnish each week a statement with respect to the wages paid each of its employees engaged on work covered by this part 3 and part 5 of this title during the preceding weekly payroll period. This statement shall be executed by the contractor or subcontractor or by an authorized officer or employee of the contractor or subcontractor who supervises the payment of wages, and shall be on the back of Form WH 347, “Payroll (For Contractors Optional Use)” or on any form with identical wording.
- ◇ Section 3.4(a) further requires that:

Each weekly statement required under § 3.3 shall be delivered by the contractor or subcontractor, within seven days after the regular payment date of the payroll

period, to a representative of a Federal or State agency in charge at the site of the building or work, or, if there is no representative of a Federal or State agency at the site of the building or work, the statement shall be mailed by the contractor or subcontractor, within such time, to a Federal or State agency contracting for or financing the building or work [Emphasis added.]

Payrolls and the “Statement of Compliance”

- ◇ In the administration and enforcement of Davis-Bacon labor standards references are generally made to “certified payrolls.” However, it is important to note that in the standard Davis-Bacon contract clauses established by 29 C.F.R. Part 5, section 5.5, there are two separate requirements that relate to the submittal of the “certified payrolls.”
 - ◇◇ Subsection 5.5(a)(3)(ii)(A) requires the weekly submittal of “a copy of all payrolls.” Specifically, it states that:

The contractor shall submit weekly for each week in which any contract work is performed a copy of all payrolls to the (write in name of appropriate federal agency) if the agency is a party to the contract, but if the agency is not such a party, the contractor will submit the payrolls to the applicant, sponsor, or owner, as the case may be, for transmission to the [agency]” (emphasis added).

The word “agency” in the preceding sentence refers to the federal agency.
 - ◇◇◇ Thus, on federal contracts to which the Davis-Bacon Act applies, the prime contractor is responsible for submittal of all weekly payrolls to the federal agency.
 - ◇◇◇ On federally assisted projects to which Davis-Bacon requirements apply under a Davis-Bacon “related Act,” the prime contractor generally submits the weekly payrolls to a state or local government agency (or an applicant or sponsor responsible to such an agency) for transmission to the federal agency responsible for the federal program under which federal assistance is provided.
- ◇ Apart from and in addition to the requirement stated in subsection 5.5(a)(3)(ii)(A), subsection 5.5(a)(3)(ii)(B) stipulates a separate, albeit closely related, requirement that each weekly payroll submitted be accompanied by a “Statement of Compliance.”

- ◇ The provisions at 29 C.F.R. §§ 5.5(a)(3)(ii)(B) and (C) require that:
 - (B) Each payroll submitted shall be accompanied by a “Statement of Compliance,” signed by the contractor or subcontractor or his or her agent who pays or supervises the payment of the persons employed under the contract and shall certify the following: (1) That the payroll for the payroll period contains the information required to be provided ..., the appropriate information is being maintained ..., and that such information is correct and complete; (2) That each laborer or mechanic ... has been paid the full weekly wages earned, ... ; and (3) That each laborer or mechanic has been paid not less than the applicable wages ... as specified in the applicable wage determination incorporated into the contract.
 - (C) The weekly submission of a properly executed certification set forth on the reverse side of Optional Form WH-347 shall satisfy the requirement for submission of the “Statement of Compliance” required by paragraph (a)(3)(ii)(B) of this section. [See page 2 at <http://www.dol.gov/whd/forms/wh347.pdf>.]
- ◇ The “Statement of Compliance,” which is required to be attached to each copy of a contractor’s weekly payroll for a covered project, pursuant to 29 C.F.R. § 5.5(a)(3)(ii)(B), requires a signature “by the contractor or subcontractor or his or her agent who pays or supervises the payment of the persons employed under the contract.”
 - ◇◇ The signature on each weekly “Statement of Compliance” attached to the weekly payroll may be either an original handwritten or an electronic signature.
- ◇ Thus, the payroll certification provision established by 29 C.F.R. § 5.5(a)(3)(ii)(B) continues to require that the properly signed “Statement of Compliance” be submitted or transmitted to the appropriate federal agency.
- ◇ Photocopies or “pdf” copies of the “Statement of Compliance,” faxed “Statements of Compliance,” or an electronically scanned “Statement of Compliance” e-mailed to an agency do not satisfy the requirement that a “Statement of Compliance” be “signed by the contractor or subcontractor or his or her agent who pays or supervises the payment of the persons employed under the contract.”
 - ◇◇ This fact is particularly important in the context of 29 C.F.R. § 5.5(a)(3)(ii)(D) which emphasizes the fact that: “The falsification of any of the above certifications may subject the contractor or subcontractor to civil or criminal prosecution under section 1001 of title 18 and section 231 of title 31 of the United States Code.”

Electronic submittal of payrolls with the related “Statement of Compliance”

- ◇ In 2004, WHD issued an advisory letter to the U.S. Army Corps of Engineers and the Federal Highway Administration advising that the submission of electronic signatures satisfied requirements of the Copeland Act and its regulations.
- ◇ A contracting agency or prime contractor may permit or require contractors to submit the weekly payrolls, each with the accompanying “Statement of Compliance” through an electronic system. Individual contracting agencies determine any such electronic submission options because contractors submit the information directly to each contracting agency, not to the DOL.
 - ◇◇ The use of electronic signatures to satisfy requirements of the Copeland Act and its regulations by the use of an “agency approved limited access Web-based portal” should include the legally valid electronic signature of the “contractor or subcontractor or his or her agent who pays or supervises the payment of the persons employed under the contract.” (*See 73 FR 77510.*)
 - ◇◇ Web-based certified payroll compliance solutions exist and some agencies and contractors have set up systems to comply electronically.
- ◇ Under pertinent provisions of the Copeland Act and the Government Paperwork Elimination Act (Pub. L. 105-277, Stat 2681, codified at 44 U.S.C. § 3504, note), WHD affirms that the use of electronic signatures is sufficient for compliance purposes under the Copeland Act.
 - ◇◇ WHD encourages all government agencies to permit contractors to submit certified payrolls electronically or through allowing access to appropriate agency approved limited access Web-based portals providing the required information and certification.
 - ◇◇ Web-based systems for the submission of electronic submission of certified payrolls often include compliance monitoring tools and can improve efficiency in the review of data reported, as well as reducing recordkeeping burdens and storage expenses.

LEASES AS CONTRACTS FOR CONSTRUCTION

AAM No. 176 – Basic DBA Principles

- ◇ AAM No. 176 provides guidance concerning the “Application of the Davis-Bacon Act to Buildings and Works Constructed and/or Altered for Lease by the Federal Government”
- ◇ AAM No. 176 initiates its discussion concerning leases that may be contracts covered by DBA by noting that:
 - ◇◇ The DBA applies to federal and District of Columbia contracts in excess of \$2,000 for the construction, alteration, and/or repair, including painting and decorating, of a public building or public work; and
 - ◇◇ The terms “public building” and “public work” are defined in 29 C.F.R. § 5.2(k) to include “every building or work, the construction, prosecution, completion, or repair of which is carried on directly by authority of or with funds of a Federal agency to serve the interest of the general public regardless of whether title thereof is in a Federal agency.”

AAM No. 176 Notice to Contracting Agencies on DBA Applicability to Lease/Construction Contracts

- ◇ On June 22, 1994, the WHD Administrator issued AAM No. 176 to advise the federal contracting agencies that in view of the Crown Point case and a May 23, 1994 Department of Justice/Office of Legal Counsel (DOJ/OLC) memorandum, DBA can apply to certain federal lease contracts that also call for construction of a public work or building. As stated in AAM No. 176:

DBA application to any lease contract can be determined only by reviewing the specific facts of the particular contract.

... [and]

Accordingly, any lease calling for the construction, alteration, and/or repair, of a public building or public work must be analyzed under specified criteria to determine whether it is necessary to include DBA requirements in the lease.

- ◇ AAM No. 176 reiterates the DOJ/OLC guidance by quoting from the 1994 memorandum:
 - [F]actors to be considered in determining whether a lease/construction contract calls for construction of a public building or public work may include:
 - [◇◇] length of the lease,
 - [◇◇] the extent of government involvement in the construction project [such as whether the building is being built to Government requirements and whether the Government has the right to inspect the progress of the work],
 - [◇◇] the extent to which the building will be used for private rather than public purposes,
 - [◇◇] the extent to which the costs of the construction will be fully paid for by the lease payments, and
 - [◇◇] whether the contract is written as a lease solely to avoid application of the DBA.
- ◇ AAM No. 176 concludes by advising agencies if there are any questions concerning the applicability of DBA coverage in a lease/construction situation, please contact WHD.

OVERTIME PAY

ON

DBA/DBRA CONTRACTS

APPLICATION OF CWHSSA

**EXAMPLES OF OVERTIME PAY
COMPUTATIONS ON DBA/DBRA CONTRACTS
WITH CWHSSA**

**APPLICATION OF FLSA OVERTIME PAY
REQUIREMENTS TO WORKERS EMPLOYED ON
DBA/DBRA CONTRACTS**

STATE AND LOCAL WAGE AND HOUR LAWS

CWHSSA/OVERTIME PAY ON DBA/DBRA CONTRACTS

Application of CWHSSA

- ◇ CWHSSA applies to **laborers, mechanics, guards and watchmen** for the time spent on covered contract work only.
 - ◇◇ Total up all time each employee spent working **on covered contracts** – off-site as well as on-site on DBA/DBRA projects;
 - ◇◇ Exclude all work not performed under DBA/DBRA and/or SCA contracts.
- ◇ CWHSSA requires the payment of time and one-half the basic rate of pay for all hours worked in excess of 40 hours in a week. (The daily overtime requirement under CWHSSA was repealed in 1986.)
- ◇ The basic rate of pay under CWHSSA is the straight time hourly rate – generally the amount listed in the “RATE” column, apart from the fringe benefit amount (if any) listed for a classification in the wage determination. The basic rate cannot be less than the basic hourly rate required in an applicable wage determination. See 29 C.F.R. § 5.24.
- ◇ Under DBA/DBRA, amounts paid to fulfill the fringe benefit portion of the prevailing wages listed in the wage determination – including both contractor contributions to bona fide benefit plans and cash payments made to comply with the fringe benefit portion of the prevailing wage requirement – are excluded in computing overtime obligations under CWHSSA.
- ◇ CWHSSA does not have a “site of the work” limitation on coverage. All hours worked on covered contracts (even at a fabrication shop away from the site) are combined for determining CWHSSA compliance. (For example: if an employee starts the day performing covered work at the fabrication shop and then travels to the work site, the time at the fabrication shop and the **travel time** between the fabrication shop and the work site is hours worked covered by CWHSSA.)
- ◇ If in a single workweek an employee works in more than one classification for which different non-overtime rates of pay have been established, the overtime pay may be computed based on the weekly average rate (or “regular rate”) – the total straight time pay for work (at all such rates) during the week, divided by the

total number of hours worked at all jobs worked in the workweek. (An employee who performs work in two or more classifications for which different straight time hourly rates are established may agree with his/her employer in advance of performing the work, to be paid during overtime hours at a rate not less than one and one-half times the hourly non-overtime rate established for the type of work he/she is performing during such overtime hours.) 29 C.F.R. §§ 778.6, 778.115, and 778.415-778.419.

- ◇ CWHSSA (as well as FLSA) requirements apply only to hours worked. Non-work hours such as paid holidays and paid leave are not counted in computing overtime pay. Rules concerning “Hours Worked” are at 29 CFR 785.

Examples of overtime pay computations on DBA/DBRA contracts with CWHSSA

- ◇ The following examples reflect the correct computations under DBRA and CWHSSA for an employee who worked 44 hours on a covered contract as an electrician, where the wage determination rate for an electrician is \$22.00 (basic hourly rate) plus \$5.00 in fringe benefits.

- ◇◇ If the employer paid \$22.00 in cash wages and paid \$5.00 for fringe benefits, the electrician would receive:

$$\begin{aligned}
 44 \text{ hours} & \times \$22.00 = \$ 968.00 \text{ for cash wages} \\
 44 \text{ hours} & \times \$ 5.00 = \$ 220.00 \text{ in fringe benefits} \\
 4 \text{ hours} & \times \frac{1}{2} \times \$22.00 = \underline{\$ 44.00} \text{ for CWHSSA earnings} \\
 & \qquad \qquad \qquad \$1232.00
 \end{aligned}$$

- ◇◇ If the employer paid \$20.00 in cash wages and \$7.00 cash in lieu of fringe benefits:

$$\begin{aligned}
 44 \text{ hours} & \times \$20.00 = \$ 880.00 \text{ in cash wages} \\
 44 \text{ hours} & \times \$ 7.00 = \$ 308.00 \text{ in fringe benefits} \\
 4 \text{ hours} & \times \frac{1}{2} \times \$22.00 = \underline{\$ 44.00} \text{ in CWHSSA earnings} \\
 & \qquad \qquad \qquad \$1232.00
 \end{aligned}$$

- ◇◇ If the employer paid \$24.00 in cash wages and \$3.00 in fringe benefits:

$$\begin{aligned}
 44 \text{ hours} & \times \$24.00 = \$1056.00 \text{ in cash wages} \\
 44 \text{ hours} & \times \$ 3.00 = \$ 132.00 \text{ in fringe benefits} \\
 4 \text{ hours} & \times \frac{1}{2} \times \$24.00 = \underline{\$ 48.00} \text{ in CWHSSA earnings} \\
 & \qquad \qquad \qquad \$1236.00
 \end{aligned}$$

- ◇ The following examples provide two methods for the computation of overtime premium pay required under CWHSSA and/or FLSA for an employee who worked in different job classifications and at different rates of pay in the same work week.

An employee is hired to perform work on a covered construction contract in two job classifications: painter and electrician. The wage determination rate for an electrician is \$12.00 (basic hourly rate) plus \$2.50 in fringe benefits. The wage determination rate for a painter is \$10.00 (basic hourly rate) plus \$3.00 in fringe benefits. The payroll shows that the worker performed painting and electrical duties as follows:

	S	M	T	W	T	F	S
Painter hours	10	10	10				
Electrician hours					10	8	

Method 1: Computation of the overtime **premium** based on the weekly average “regular rate” for the work week.

Step 1: Determine the straight time wages due – excluding fringe benefits

30 hours at the painter’s rate of \$10.00	= \$300.00
18 hours at the electrician’s rate of \$12.00	= <u>216.00</u>
Total straight time wages	= \$516.00

Step 2: Calculate the “regular rate”

$$(\$516.00 / 48 \text{ hours worked}) = \$10.75 \text{ “regular rate”}$$

Step 3: Compute the overtime premium due

$$\frac{1}{2}(\$10.75) \times 8 \text{ overtime hours worked} = \$43.00$$

Note: It is important to note that if a worker’s regular rate of pay exceeds the basic hourly rate listed in the applicable Davis-Bacon wage determination, then the employee’s regular rate of pay must be used in computing the overtime pay premium for FLSA purposes. *See* 29 C.F.R. §§ 778.107-778.109.

Method 2: Computation of the overtime premium based on the “rate in effect” when the overtime hours were worked.

In this example the eight overtime hours occurred on a Saturday.

The overtime **premium** could be computed as follows:

$$\frac{1}{2}(\$12.00) \times 8 = \$48$$

Note: In some cases, a question arises over whether a cash payment made to a laborer or mechanic is paid in lieu of a fringe benefit contribution or whether it is simply part of the individual’s normal basic hourly rate. In the latter situation, the cash payment is not excludable in computing the overtime pay obligation.

Application of FLSA overtime pay requirements to workers employed on DBA/DBRA contracts

- ◇ On contracts to which CWHSSA does not apply (for example, on a prime contract \$100,000 or less) overtime pay requirements may apply to a contractor or subcontractor under other laws, including the FLSA. On contracts to which CWHSSA applies, FLSA may also apply.
- ◇ As a general standard, Section 7(a) of the FLSA, as amended, provides that an employer shall not employ any employee to work in excess of 40 hours in a workweek unless such employee receives compensation for his or her employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he or she is employed. 29 C.F.R. § 778.101.
- ◇ Unless specifically exempted from FLSA overtime pay requirements, an employee who performs work on both federally funded/federally assisted projects and commercial work in the same workweek must receive an overtime premium for hours worked in excess of 40 in the workweek. 29 C.F.R. § 778. (Note: 29 C.F.R. §§ 5.32 and 778.6 discuss dual application of Davis-Bacon and FLSA overtime requirements.)

State and Local Wage and Hour Laws

- ◇ In some instances, State and local wage and hour laws apply similar or additional wage and overtime pay requirements and can apply concurrently. Where questions arise regarding wage and overtime pay requirements under State (or

local) law on DBA/DBRA projects, the appropriate State (or local) government agency should be consulted regarding compliance with the non-federal requirements.

INVESTIGATIVE PROCEDURES

UNDER

DBA/DBRA/CWHSSA

REORGANIZATION PLAN NO. 14 OF 1950

**DAVIS-BACON LABOR STANDARDS/
CONTRACT STIPULATIONS**

**SPECIFIC STEPS IN CONDUCTING DBA/DBRA/CWHSSA
INVESTIGATIONS**

CONCLUSION OF INVESTIGATION

REPORT WRITING

THE HEARING PROCESS

REORGANIZATION PLAN NO. 14 OF 1950

Purpose

- ◇ To promote responsibility for uniform and effective DBA/DBRA enforcement among federal procuring agencies under DOL coordination.

DOL Functions/Responsibilities Purpose

- ◇ Secretary of Labor – and, by delegation, the WHD – is responsible for:
 - ◇◇ Determining prevailing wages.
 - ◇◇ Issuing regulations and standards to be observed by contracting agencies.
- ◇ DOL performs an oversight function and has authority to conduct independent investigations.

Contracting Agency Functions/Responsibilities

- ◇ Federal agencies that award contracts and provide federal assistance have **day-to-day** enforcement responsibilities. The federal agency responsibilities include activities such as:
 - ◇◇ Ensuring the incorporation of Davis-Bacon contract stipulations and appropriate wage determinations in DBA/DBRA covered bid solicitations and contracts (and appropriate guidance concerning the application of multiple wage schedules) in accordance with 29 C.F.R. § 1.6(b) and 29 C.F.R. §§ 5.5-5.6.
 - ◇◇ Ensuring that the Davis-Bacon poster (WH 1321) and the applicable wage determination(s) and approved conformances are posted at the site of the work. 29 C.F.R. § 5.5 (a)(1)(i). This poster can be downloaded from the WHD website (<http://www.dol.gov/whd/>).
 - ◇◇ Reviewing certified payrolls in a timely manner. 29 C.F.R. § 5.6(a)(3).
 - ◇◇ Conducting employee interviews. 29 C.F.R. § 5.6(a)(3).

- ◇◇ Conducting investigations, as appropriate, and forwarding refusal to pay and/or debarment consideration cases to WHD for appropriate action. 29 C.F.R. § 5.6 and All Agency Memorandum No. 182.
- ◇◇ Submitting enforcement reports and semi-annual enforcement reports to the DOL. 29 C.F.R. § 5.7 and All Agency Memorandum No. 189.
- ◇ Contracting agencies cannot contract out responsibility for the enforcement of the DBA/DBRA requirements.
- ◇ Federal contracting agencies are responsible for ensuring that grant recipients who have contracting responsibilities properly apply and enforce DBA/DBRA.

**DAVIS-BACON LABOR STANDARDS
CONTRACT STIPULATIONS**
(29 C.F.R. § 5.5(a), reiterated at 48 C.F.R. § 52.222-6 through 52.222-15) &
CWHSSA STIPULATIONS (29 C.F.R. § 5.5(b), reiterated at 48 C.F.R. § 52.222-4)

Definition 29 C.F.R. § 5.2(f).

- ◇ The term “**labor standards**” within the meaning of the DBA means the requirements of:
 - ◇◇ The Davis-Bacon Act
 - ◇◇ The Contract Work Hours and Safety Standards Act (other than those relating to safety and health)
 - ◇◇ The Copeland Act
 - ◇◇ The prevailing wage provisions of the Davis-Bacon related Acts
 - ◇◇ Regulations, 29 C.F.R. Parts 1, 3 and 5, which govern the administration and enforcement of the DBA, DBRA, and CWHSSA

Davis-Bacon contract clauses

- ◇ 29 C.F.R. Part 5 requires contracting agencies to include in any DBA/DBRA covered construction contract the specified labor standards requirements (contract clauses). Normally these requirements are found in the contract under the heading “**Davis-Bacon Act**” or “**labor standards**” or “**prevailing wage requirements**” or “**federal requirements**” and include:
 1. **Minimum wages** - All laborers and mechanics employed or working upon the **site of work** must be paid at least the applicable prevailing wage rate for the classification of work performed as listed in the applicable wage determination or a rate approved in accordance with the “conformance process” set forth at 29 C.F.R. § 5.5(a)(1)(ii). The laborers and mechanics working on the site of work must be **paid weekly**.
 2. **Withholding** - The federal agency or the loan or grant recipient shall upon its own action or upon written request of an authorized representative of the DOL withhold or cause to be withheld from the contractor under this

contract or any other federal contract with the same prime contractor, or any other federally-assisted contract subject to Davis-Bacon prevailing wage requirements, which is held by the same prime contractor, so much of the accrued payments or advances as may be considered necessary to pay the full amount of wages required by the contract. (The processing of monies so withheld is discussed further in the “DBA/DBRA/CWHSSA Withholding & Disbursement” chapter of this resource book.)

- 3a. **Maintaining basic payroll records** - The contractor must maintain basic payroll records during the course of the work and preserve them for three years. Such records shall contain:
- ◇◇ Name of each worker
 - ◇◇ Address
 - ◇◇ Social security number
 - ◇◇ His or her correct classification(s)
 - ◇◇ Hourly rates of wages paid
 - ◇◇ Daily and weekly number of hours worked
 - ◇◇ Deductions made and actual wages paid
 - ◇◇ Contractors employing apprentices or trainees under approved programs must have written evidence of the registration of the apprenticeship program and certification of the trainee program, copies of the individual registration forms of the apprentices and trainees, and written evidence of the applicable ratios and wage rates.
- b. **Submission of certified payroll records** - The contractor must submit **weekly** a copy of all payrolls to the contracting agency. The payrolls submitted must set out accurately and completely all of the basic payroll information listed above, except that full social security numbers and home addresses shall not be included on weekly transmittals. Instead the payrolls shall only need to include an individual identifying number for each employee, such as the last four digits of a social security number.
- ◇◇ The payroll information may be submitted in any form desired. Optional payroll form WH-347 is available on the WHD website at:

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<http://www.dol.gov/whd/forms/wh347instr.htm>

The form available there can be used as an electronically fillable form. (The WH-347 form is also published in the Federal Acquisition Regulations at 48 C.F.R. § 53.303-WH-347).

- ◇◇ The prime contractor is responsible for the submission of the certified payrolls to the contracting agency (including for all subcontractors on the project).
 - ◇◇ Each payroll submitted must be accompanied by a “Statement of Compliance” as required by the Copeland Act and 29 C.F.R. Part 3. (A form for this purpose is available on the second page of Optional form WH-347.)
 - ◇◇ The falsification of any of the above certifications may subject the contractor or subcontractor to civil or criminal prosecution. Thus, the contractor is put on notice in the contract itself that criminal prosecution could result if falsified payrolls are submitted to the government. (*See* 29 C.F.R. § 5.5(a)(3)(ii)(D); reiterated at FAR 48 C.F.R. § 52.222-8(b)(4).)
 - ◇◇ The contractor or subcontractor must make the payroll records available for inspection, copying, or transcription by authorized representatives of the contracting agency or the DOL, and must permit such representatives to interview employees during working hours on the job.
 - ◇◇ If the contractor or subcontractor fails to submit the required records or to make them available, the federal agency may, after written notice to the contractor, sponsor, applicant, or owner, take such action as may be necessary to cause the suspension of any further payment, advance, or guarantee of funds.
 - ◇◇ Furthermore, failure to submit the required records upon request or to make such records available may be grounds for debarment action.
- 4a. **Apprentices** – Apprentices are permitted to work at less than the predetermined rate for the work they perform **only** when:
- ◇◇ They are employed pursuant to and **individually registered** in a bona fide apprenticeship program registered with the U.S. DOL,

Employment and Training Administration (ETA) Office of Apprenticeship (OA), or with a state apprenticeship agency recognized by ETA/OA. (**Note - the program itself must be registered and the apprentice must be individually registered in the program**);

- ◇◇ The allowable **ratio** of apprentices to journeymen **on the job site** in any craft classification does not exceed the ratio permitted to the contractor as to the entire work force under the registered program;
 - ◇◇◇ (Note: In view of the apprenticeship regulations at 29 C.F.R. Part 29, as revised in 2008, any questions concerning portability of the wages and ratio provisions on DBA/DBRA covered projects in light of 29 C.F.R. 29.13(b)(7) may require careful consideration by WHD.)
 - ◇◇ Fringe benefits are paid to apprentices according to the provisions of their apprenticeship program, or if the program is silent with respect to fringe benefits, they receive the full fringe benefit amount stipulated on the applicable wage decision for the craft in which they are employed (unless WHD determines that a different practice prevails for them).
 - ◇◇ Any worker listed on a payroll at an apprentice wage rate, who is not registered or otherwise employed as stated at 29 C.F.R. § 5.5(a)(4)(i), shall be paid not less than the applicable wage rate on the wage determination for the classification of work actually performed.
- b. **Trainees** – Trainees are not permitted to work at less than the predetermined rate for the work performed unless:
- ◇◇ They are employed pursuant to and **individually registered** in a program which has received prior approval (evidenced by formal certification by ETA). (**Note: State agency approval of trainee programs is not recognized for DBA/DBRA purposes**); and
 - ◇◇ The **ratio** of trainees to journeymen **on the job site** does not exceed that permitted under the plan approved by ETA.
 - ◇◇ The labor standards contract clause requirements regarding payments for fringe benefits for trainees are met.

◇◇ There is no portability of a trainee program from one locality to another.

5. **Copeland requirements** - All contractors must comply with the Copeland Act regulatory requirements in 29 C.F.R. Part 3, which prohibit kick-backs and set forth rules concerning deductions from employees' wages.

6. **Subcontracts** - The labor standards provisions require the contractor to insert the labor standards clauses in any subcontract. This clause further stipulates that the prime contractor shall be responsible for compliance by any subcontractor with the labor standards requirements in the contract.

Note: A subcontractor may be any person (other than an employee) or firm who has agreed, either verbally or in writing, to perform any of the work required under the contract.

7. **Contract termination and debarment** - If a contractor violates any of the labor standards requirements, the contractor may be terminated from the contract and/or debarred for a period not to exceed three years. (Debarment means that a firm and its responsible officers, and firms in which they have an interest (or substantial interest for related Act cases) are not permitted to work on covered contracts.)

8. All **rulings and interpretations** contained in 29 C.F.R. Parts 1, 3 & 5 are incorporated by reference in the contract.

9. **Disputes** under the contract relating to the Davis-Bacon labor standards requirements must be submitted to the DOL for resolution pursuant to the Secretary of Labor's authority under Reorganization Plan No. 14 of 1950, and 29 C.F.R. Parts 5, 6 and 7.

10. **Certification of eligibility** - By entering into the contract, the contractor certifies that neither it (nor he or she) nor any person or firm who has an interest in the contractor's firm is a person or firm ineligible to be awarded federal government contracts (debarred).

◇◇ This labor standards clause further stipulates that no part of the contract shall be subcontracted to any person or firm debarred.

◇◇ The penalty for making false statements about eligibility for government contract work can be criminal prosecution.

CWHSSA contract clauses

- ◇ 29 C.F.R. 5(b) requires contracting agencies to include CWHSSA contract clauses in covered contracts. The requirements at 29 C.F.R. § 5.5(b) include:
 1. **Overtime requirements** – The contractor or subcontractor contracting for any part of the contract work and employing any laborer(s) or mechanic(s), including watchmen or guards, over 40 hours in a workweek on such work is required to pay such laborer(s) and mechanic(s) at least one and one-half times the basic rate of pay for all hours worked in excess of 40 in the workweek.
 2. **Violation; liability for unpaid wages; liquidated damages** – The contractor and any subcontractor responsible for violation(s) of the above CWHSSA contract requirement are liable for the unpaid wages and, in addition, are liable for liquidated damages computed with respect to laborers and mechanics in violation of the CWHSSA overtime requirements.
 3. **Withholding** - The withholding requirements regarding CWHSSA parallel those in the Davis-Bacon contract clauses described above.
 4. **Subcontracts** - The CWHSSA contract clause requirements parallel those in the Davis-Bacon contract clauses described above.
- ◇ These requirements are reiterated at 48 C.F.R. § 52.222-4.

SPECIFIC STEPS IN CONDUCTING DBA/DBRA/CWHSSA INVESTIGATIONS

The following guidance is intended to list the various steps that are typically undertaken by contracting agencies and WHD in conducting a DBA/DBRA/CWHSSA investigation.

Preliminary Steps

- ◇ Obtain the following information:
 1. Copy of the labor standards clauses in the contract.
 2. Copy of the Davis-Bacon wage decision(s) included in the contract, and in the case of multiple schedules, any instructions concerning their application.
 3. Copies of the certified payrolls submitted by the contractor under investigation.
 4. Employer identification number.

Initial Employer Contact

- ◇ A responsible official of the firm must be contacted at the start of the investigation.
- ◇ When investigating a subcontractor, find out what information on labor standards and wage determinations have been provided by the prime contractor (or higher-tier subcontractor) to the subcontractor. Ask the subcontractor for a copy of the subcontract, if one exists.
- ◇ When a subcontractor is being investigated, the prime contractor should be notified at the beginning of the investigation.
 - ◇◇ The prime contractor can provide information on the subcontractor's performance and may have records relating to the number of employees the subcontractor had on the project, the hours they worked, and the period of time they were on the project. The prime contractor should be asked to provide a copy of the subcontract, if it exists.

- ◇◇ The prime contractor has responsibility for compliance on the contract and is liable for back wages not paid by the subcontractor, and may decide to withhold final payment from the subcontractor until the back wage issues are resolved.
- ◇ Inform the employer that the purpose of the investigation is to determine compliance with the pertinent statutes and regulations and outline in general terms the scope of the investigation, including the examination of pertinent records, employee interviews and physical inspection of the project.
- ◇ Obtain the exact legal name of the firm and any trade names, the full address, full names of owners or officers and their titles, number of persons employed, name and address of any subcontractors, and such similar information as may be necessary to conduct and complete the investigation.

Examination of Certified Payrolls

- ◇ The contractor's certified payrolls should be examined for accuracy, completeness, and true representation of the facts. The examination should cover the current or most recent payrolls as well as those for selected periods which reflect the practice of the contractor or subcontractor during the life of the contract.
 1. Check for completeness and accuracy of the payrolls as to the names, addresses, job classifications, hourly wage rates, daily and weekly hours worked during the payroll period, gross weekly wages earned, deductions made from wages, and net weekly wages paid the employee. Notice if there are distinctions made among the various classifications.
 2. If the Contract Work Hours and Safety Standards Act is applicable and an employee worked in excess of forty hours in any workweek, determine whether time and a half the employee's regular rate was paid.
 3. Certified payrolls should be examined for discrepancies such as a disproportionate number of laborers, apprentices or trainees on the project.
 4. The wage rates should be compared against those listed on the wage determination. If workers perform work in more than one classification, the payroll records should accurately reflect the time spent working in each. Unlisted classifications should be identified and additional classification procedures initiated, if applicable.

5. Check certified payrolls for information on contributions to fringe benefit plans and/or cash paid in lieu of fringe benefits.

Examination of Records

- ◇ Examine the current or most recent payroll as well as those for selected periods which reflect the practice of the contractor or subcontractor during the life of the contract. The examination should include a review of the basic time cards, time sheets, or other work or personnel records of a representative number of employees in each classification. These records should be checked against the certified payrolls in order to disclose any possible discrepancies, or to give reasonable assurance that none exist.
- ◇ Examine documents which indicate that the firm has made contributions (or incurred costs) to fringe benefit plans. These documents might include: portions of the pension plan; documentation from the Internal Revenue Service that indicates the plan has been approved by the IRS; and records of contributions made.

Check for Compliance with Apprenticeship/Trainee Requirements

- ◇ Apprenticeship/trainee program information should be obtained and examined to verify that the program has been approved by the appropriate authority. If the contractor's evidence is not sufficient, contact ETA/OA and/or the state apprenticeship council (where appropriate) for verification. A list of local ETA/OA offices is available at <http://www.doleta.gov/oa/stateoffices.cfm#CO>.
- ◇ Obtain copies of the individual employees' apprentice/training registration forms for the file, as well as copies of the approved apprenticeship/training program itself.
- ◇ The ratio of apprentices to journeyworkers in any classification on the project should not exceed the ratio provided for in the relevant apprenticeship/training program. The ratio is determined on a daily basis, not weekly.

Determine if a Conformance is Necessary

- ◇ Determine if the wage determination contains classifications and wage rates for all the types of work performed on the contract.

1. If the applicable wage determination does not contain a classification for the work performed, the conformance procedure in 29 C.F.R. § 5.5(a)(1)(ii) must be followed. Contracting agencies cannot arbitrarily determine a rate.
2. Questions as to whether or not a conformed rate has been approved should be coordinated with WHD.

Employee Interviews

- ◇ Employee interviews are essential to the completeness of the investigation.
 - ◇◇ They should be sufficient in number to establish the degree of adequacy and accuracy of the records and the nature and extent of any violations.
 - ◇◇ They should also be representative of all classifications of employees on the project under investigation.
 - ◇◇ In some situations interviews with former employees may be appropriate.
 - ◇◇ In cases involving alleged misclassification and/or falsification of payroll records, it is important to account, through the interview process, for as many employees as possible who worked on the contract.
 - ◇◇ Employees should be questioned regarding other employees they worked with and the duties performed by those employees.
- ◇ Each employee should be informed that the information given is confidential to the fullest extent of the law, and that his/her identity will not be disclosed to the employer without the employee's written permission insofar as the law permits. (*See 29 C.F.R. § 5.6(a)(5).*)
- ◇ Place of interview
 - ◇◇ Employees currently employed may be interviewed during working hours on the job, in accordance with 29 C.F.R. § 5.5(a)(3)(ii), provided the interview can be properly and privately conducted on the premises.
 - ◇◇ In cases of falsification of records, fear of reprisals or intimidation, it may be more advisable to conduct the interview elsewhere, such as in the employee's home, at the agency's office, or other suitable place where it may be arranged.

- ◇◇ Employees should never be interviewed in the presence of the employer, another employee, or any other person.

- ◇ Telephone Interviews
 - ◇◇ Ordinarily, an interview should be made by telephone only if a personal interview is impracticable. When a telephone interview is used, it is suggested that the contracting officer send the employee the statement together with a request that the employee read the statement, make and initial any changes, sign and date it and return the statement to the contracting officer. It is suggested that the contracting officer keep a copy of the statement until the original is returned.

- ◇ Mail interviews
 - ◇◇ Ordinarily, an interview should be made by mail only if a personal or telephone interview is impracticable.

- ◇ Preparation of interview statements
 - ◇◇ When a written statement is taken, it should be recorded in the manner stated by the employee; it should be read by him/her, and contain a statement that it has been read and that it is correct. The contracting officer may restate or summarize the employee's remarks, but should do so in the first person and should phrase it in the employee's manner of speaking.

 - ◇◇ The statement should be signed by the employee and the signature, except in mail interviews, should be witnessed by the responsible agency official. In government contract cases, it is preferred that all interviews be signed. Where the statement is not signed, the contracting officer should give, either in the statement or his/her report, the employee's reason for not signing. Any changes in a signed employee statement should be initialed by the employee.

 - ◇◇ Each interview statement should contain the following information:
 1. Place and date of interview.
 2. Name of employer (firm).
 3. Name and permanent address of employee being interviewed.
 4. Employment status (whether present or former employee).

5. Period(s) of employment.
6. If an apprentice, the age, date of birth, and information concerning his status as an apprentice.
7. The statement should include specific information regarding the:
 - ◇◇◇ rate(s) of pay and wages received,
 - ◇◇◇ hour for starting/stopping work and daily/weekly hours worked,
 - ◇◇◇ manner in which time and work are recorded,
 - ◇◇◇ job classification(s) and exact work performed.

In cases alleging misclassification, the interview statement must specifically address the various types of duties performed. It is not sufficient for an employee to only state he/she was a carpenter. The interview must state the specific carpentry duties, and the tools and materials used. If an employee worked in more than one classification, the employee must be asked how much time he/she spent in each classification.

8. When possible, the interview statement should corroborate statements given by other employees. For example, the employee should be asked to identify other workers who performed the same work.
9. The interview should cover all the allegations of violations (particularly those in a complaint).
10. The interview should also cover any other details necessary to indicate accuracy of the employer's records, statements, or certifications.

◇◇ *All interview statements must be legible.*

Restrictions on Disclosure of Information to Contractors

- ◇ The contracting officer should never release interview statements to a contractor. The contracting officer should never tell any employee the amount of back wages computed.

Case Record

- ◇ Transcriptions of records and computations of back wages must be made when violations are found.

Discharging DBA/DBRA Minimum Wage and Fringe Benefit Obligations

- ◇ “Prevailing wage” is made up of two interchangeable components – basic hourly wages and fringe benefits.
 1. Both may be paid in cash;
 2. Payments can be made or costs incurred for “bona fide” fringe benefits; or
 3. Any combination thereof.
- ◇◇ Additional discussion of how the Davis-Bacon prevailing wage obligation can be met, with examples, is provided in the discussion of “Fringe Benefits” in the “DBA/DBRA Compliance Principles” chapter of this resource book.
- ◇ Monetary wages paid in excess of the Davis-Bacon minimum wage may be used as an offset or credit to satisfy fringe benefit obligations, and vice versa.
- ◇ Fringe benefits listed in the applicable Davis-Bacon wage determination must be paid for all hours worked – both straight time and overtime hours.
- ◇ Excess payments for overtime may not be offset/credited towards minimum wages due.
- ◇ Excess wages paid for work in one classification may not be offset/credited towards wage deficiencies in another classification. Under DBA/DBRA, each classification stands alone.

Resolution of Disputes Regarding Proper Classification of Workers

- ◇ To determine the proper classification for work performed on a Davis-Bacon covered project, it may be necessary to examine **local area practice**. An “area practice survey” may be conducted by the WHD or by the contracting agency to determine proper classification of workers in accordance with local prevailing area practice. An overview of this topic is provided in the “DBA/DBRA Compliance Principles” chapter of this resource book.

Determining Compliance with CWHSSA

- ◇ See the “Overtime Pay on DBA/DBRA Contracts” chapter of this resource book for a detailed overview of determining compliance with CWHSSA overtime pay requirements. That discussion includes examples of how to assure that CWHSSA requirements are met.

CWHSSA Liquidated Damages

- ◇ Liquidated damages are computed at \$10.00 per day per employee for CWHSSA violations.

Example:

	M	T	W	T	F	S	S	<u>TOTAL</u>
REGULAR TIME	10	10	10	10	10	5	0	55

In the above example, no overtime premium was paid. The 15 weekly overtime hours were worked on two calendar days, Friday and Saturday. Thus, \$20.00 in CWHSSA liquidated damages would be computed.

- ◇ The decision on whether to assess liquidated damages is made by the federal contracting agency.
 - ◇◇ The contractor should be advised of the potential liquidated damages, and that they will be advised of the contracting agency’s determination concerning the assessment of liquidated damages.
- ◇ As a matter of administrative policy, liquidated damages are not computed for employees whose CWHSSA back wages are less than \$20.
- ◇ Liquidated damages in excess of \$500 may be waived or adjusted only with the concurrence of the appropriate WHD Regional Administrator. (At <http://www.dol.gov/whd/whdkeyp.htm>, see the listing of “WHD Regional Offices.”)
- ◇ If a federal Agency Head finds that a sum of liquidated damages administratively determined to be due under CWHSSA for a contract is \$500 or less, an appropriate adjustment may be made in such liquidated damages or the contractor or subcontractor may be relieved of liability for the liquidated damages without submitting recommendations or a report to the WHD if the Agency Head finds that:

- ◇◇ the sum of liquidated damages computed is incorrect, or
- ◇◇ the contractor or subcontractor inadvertently violated the provisions of CWHSSA notwithstanding the exercise of due care on the part of the contractor or subcontractor involved.

40 U.S.C. 3702(c); 29 C.F.R. §§ 5.8(d) and 5.15(c)(3).

Overtime Requirements under the Fair Labor Standards Act, as amended

- ◇ CWHSSA requires the payment of an overtime premium when a laborer or mechanic works in excess of 40 hours in a work week on covered contract(s). Overtime hours not subject to CWHSSA may be subject to FLSA overtime pay requirements.
- ◇ Where questions arise concerning overtime pay obligations under the FLSA, referral to the local WHD office is appropriate.

CONCLUSION OF INVESTIGATION

Final Conference Procedure

- ◇ Inform the contractor generally of the investigation findings, and indicate that these findings are based solely on the facts and information disclosed by the investigation.
- ◇ Detail specifically what must be done to eliminate the violations, if any, and provide any available informational material such as copies of 29 C.F.R. Part 3 and/or Part 5.
- ◇ Be willing to consider additional evidence from the contractor which may affect the findings, such as an unresolved conformance request, evidence of contractor contributions to a fringe benefit plan, or inspection reports.
- ◇ Request for payment of back wages:
 - ◇◇ The DBA contains no injunctive action procedures. Therefore, a demand for the payment of the back wages must always be made even if the employer refuses to comply.
 - ◇◇ Contracting officers may accept partial back wage restitution for undisputed issues.
 - ◇◇ Contracting officers may attempt to collect back wages even though the case meets the debarment criteria, unless there is evidence of possible Copeland “Anti-kickback” Act violations. However, in no event will a contractor be left with the impression that the payment of back wages will eliminate the possibility of debarment.
 - ◇◇ If the employer is a subcontractor and refuses to make full restitution, the prime contractor must then be requested to make restitution. The prime contractor is ultimately responsible for the payment of the back wages.
- ◇ Notify the subcontractor and/or prime contractor of the potential for the assessment of liquidated damages (\$10.00 per day per violation) under CWHSSA. The firm(s) should be advised that the contracting agency will make a decision on the assessment of liquidated damages at a later date.

- ◇ If there is no agreement to pay back wages, the file must be forwarded to the appropriate WHD Regional Office pursuant to 29 C.F.R. § 5.7 for review, collection of back wages, and debarment consideration. (See AAM No. 182. The updated addresses for the WHD regional offices are available at <http://www.dol.gov/whd/whdkeyp.htm> under the heading “WHD Regional Offices.”)

Withholding

- ◇ In refusal-to-pay cases under both DBA/DBRA and CWHSSA, the contracting agency shall withhold contract funds to cover the back wages due.
- ◇ If funds remaining on the contract under which the violations occurred are insufficient to cover the back wages due, the contracting agency can withhold funds from other contracts subject to DBA/DBRA/CWHSSA or any other federal contract held by the same prime contractor – “cross-withholding”.
- ◇ Contracting officers should immediately notify WHD if they become aware that the prime contractor may be filing for bankruptcy.
- ◇ In situations where WHD has instituted withholding actions, a letter to the prime contractor will describe the nature of the alleged violations and back wages found due. The prime contractor will have 15 days to provide written views on the alleged violations. Withholding procedures and the back wage disbursement process are discussed further in the “DBA/DBRA/CWHSSA Withholding and Disbursement” chapter of this resource book.

Due Process for Withholding Action

- ◇ To ensure that contractors and subcontractors receive “due process” prior to the withholding of funds at the direction of the WHD, the following steps are included in the WHD enforcement procedures.
 - ◇◇ Where a contractor refuses to pay back wages under DBA, DBRA, and/or CWHSSA and funds are available for withholding, WHD will generally send a “due process” letter to the prime contractor. This letter will include:
 - ◇◇◇ A statement that the final conference was conducted at which time the contractor was provided an opportunity to discuss alleged violations; or if a final conference was not held, provide the reason(s) why;
 - ◇◇◇ A brief description of the alleged violations;

- ◇◇◇ An affirmation that the contractor received a Summary of Unpaid Wages;
- ◇◇◇ A statement that the matter is being forwarded to a designated WHD deciding official, who will decide whether withholding action will be taken regarding the back wage findings;
- ◇◇◇ A statement that the contractor has fifteen (15) days to provide the WHD deciding official with written views on whether the violations occurred;
- ◇◇◇ A statement that any determination regarding the withholding of contract funds will not result in the distribution of the funds to the underpaid workers until such time as the administrative remedies available to the contractor have been completed. See discussion of “The Hearing Process And Appeal Rights,” below.
- ◇◇ If the deciding official determines that withholding action is warranted, a copy of the WHD withholding request to the contracting agency and a letter indicating the deciding official’s decision on withholding will be sent to the prime contractor.
- ◇ In certain cases, such as missed payrolls, likely bankruptcy filings, or imminent contract close out, it may be necessary to request withholding before the measures described above can be provided. In those cases, the procedures outlined above should be followed as quickly as reasonably possible after the withholding action; and based on the contractor’s submission, the WHD deciding official may decide to revoke an earlier withholding request.

Debarment

- ◇ Debarment occurs when a contractor or subcontractor is declared ineligible (debarred) from receiving federal or federally assisted contracts for **up to 3 years** because it was found to be “in aggravated or willful violation of the labor standards provisions” of any of the related acts, or declared ineligible **for 3 years** because violations of the DBA were a disregard of the contractor’s “obligations to employees or subcontractors.”
- ◇ At the conclusion of the investigation, the contracting officer may advise the contractor of the potential for debarment where appropriate, **but make no statement** to the contractor about any recommendation concerning debarment.

- ◇ In no event should a contractor be left with the impression that payment of back wages eliminates the possibility of debarment.

Debarment Criteria

- ◇ The facts and circumstances of a given case will dictate whether debarment is appropriate. Some of the more common instances in which the DOL finds debarment appropriate are when a contractor has:
 - ◇◇ Submitted falsified certified payroll records,
 - ◇◇ Required kickbacks of wages or back wages,
 - ◇◇ Committed repeat DBA/DBRA violations,
 - ◇◇ Misclassified covered workers in clear disregard of proper classification norms, or
 - ◇◇ As a prime contractor, failed to ensure compliance by subcontractors.
- ◇ DOL holds general contractors responsible not only for their own violations of the federal Davis-Bacon labor standards, but in appropriate circumstances also for those committed by their subcontractors. A July 26, 2012 WHD press release in a major case involving a prime contractor's enhanced compliance measures under a settlement agreement and debarment of multiple subcontractors is instructive in this regard. The July 26, 2012 press release is available at: <http://www.dol.gov/whd/media/press/whdpressVB2print.asp?pressdoc=Northeast/20120726.xml>.

Contracting agency reports to DOL

- ◇ Federal agency responsibility to conduct labor standards investigations under DBA and to submit investigation reports to DOL are described in the FAR at 48 C.F.R. § 22.406.8. Investigation reports to DOL are addressed there and at 29 C.F.R. § 5.7. Agency investigation/enforcement reports to DOL, with relevant information, are required where:
 - ◇◇ Underpayments by a contractor or subcontractor total \$1,000 or more, or
 - ◇◇ Where there is reason to believe that either the contractor has disregarded its obligations to employees and subcontractors under DBA or that the violations are aggravated or willful under one of the DBRA, or

- ◇◇ The agency investigation was made at the request of the Department of Labor, or
- ◇◇ Back wages have not been paid.
- ◇ In addition, upon DOL request, a federal agency head shall transmit to the WHD Administrator such information available to their agency with respect to contractors and subcontractors, their contracts, and the nature of the contract work as the WHD Administrator may find necessary for the performance of his or her duties with respect to the labor standards provisions referred to in this part. 29 C.F.R. § 5.7(c) and FAR 48 C.F.R. § 22.406.12.
- ◇ Also, semi-annual reports on compliance with and enforcement of the construction labor standards requirements of the DBA and CWHSSA are required from each contracting agency for the reporting periods October 1 through March 31 and April 1 through September 30. 29 C.F.R. § 5.7(b) and FAR 48 C.F.R. § 22.406.13. AAM No. 189 provides further guidance and includes the required reporting format.

REPORT WRITING

This is one of the most important aspects of the investigation.

- ◇ The report is reviewed at many levels, both inside and outside the contracting agency. For example:
 - ◇◇ WHD
 - ◇◇ DOL's Office of the Solicitor
 - ◇◇ The contracting agency
 - ◇◇ The Comptroller General.
- ◇ Plan the report.
- ◇ In the report, refer to exhibits included in the case file – do not repeat interviews in the reports.
- ◇ Avoid the use of abbreviations which may not be understood by other agencies.
- ◇ Except under CWHSSA, in most jurisdictions there is no right of individual employee action in government contract statutes. The government acts on the employee's behalf to recover back wages. Refusal-to-pay cases are usually resolved administratively by a hearing before a DOL Administrative Law Judge (ALJ).

THE HEARING PROCESS AND APPEAL RIGHTS

- ◇ Refusal-to-pay cases are resolved pursuant to 29 C.F.R. § 5.11.
 - ◇◇ If factual issues are in dispute, WHD notifies the contractors (both prime and sub) in writing of the investigation finding and offers the opportunity to request a hearing before an administrative law judge.
 - ◇◇ If only issues of law are in dispute, WHD offers the contractors the opportunity to appeal a WHD ruling before the Department's ARB.
- ◇ In both agreement-to-pay and refusal-to-pay cases where the debarment criteria are met, the contractors are offered a hearing before an ALJ pursuant to 29 C.F.R. § 5.12 on the issue of debarment.
- ◇ ALJ decisions may be appealed to the ARB under 29 C.F.R. Part 7.
- ◇ The ARB hears all appeals of ALJ cases. The ARB, which acts on behalf of the Secretary of Labor, consists of members appointed by the Secretary. The ARB also acts on petitions for review of rulings issued by the WHD Administrator on coverage, interpretations, and wage determination matters.

**DBA/DBRA/CWHSSA
WITHHOLDING
AND
DISBURSEMENT**

WITHHOLDING OF FUNDS

PRIORITY OF WITHHELD FUNDS

DISPOSITION OF WITHHELD FUNDS

**WITHHOLDING REQUEST LETTER
(DBA/DBRA/CWHSSA)**

VERIFICATION OF WITHHOLDING LETTER

WITHHOLDING OF FUNDS

- ◇ The labor standards clauses require the proper classification and payment of wages to:
 - ◇◇ Laborers and mechanics on construction projects subject to the DDBA, DBRA, and CWHSSA.

- ◇ To protect the rights of covered workers, these Acts and related Department of Labor (DOL) regulations provide for remedies when compliance with the prevailing wage requirements is in question. An important element is the withholding of contract funds sufficient to satisfy alleged wage underpayments pending resolution of a wage dispute. The contracting agency may withhold funds on its own initiative or at the direction of DOL.
 - ◇◇ The relevant statutory and regulatory provisions are 40 U.S.C. § 3142(c)(3), 40 U.S.C. § 3702(d), and 29 C.F.R. § 5.5(a)(2) and 5.5(b)(3).

- ◇ The withholding of contract funds is a very effective enforcement tool in DBA/DBRA/CWHSSA cases.
 - ◇◇ It ensures the availability of monies for the payment of the back wages if a contractor refuses to make restitution when back wages are found due to covered workers.
 - ◇◇ It ensures that when federal agencies, states and local communities have benefited from the work performed by the contractor's employees, funds will be used to pay the employees the applicable prevailing wage and overtime compensation.
 - ◇◇ The prime contractor is responsible for compliance on the contract, will be liable for payment of the back wages not paid by a subcontractor, and may decide to withhold payments from the subcontractor until the back wage issues are resolved.

- ◇ Ensuring that the proper wages are received by covered workers on government contracts lies with representatives of the contracting agency and/or DOL.
 - ◇◇ A contracting officer should withhold funds when he/she believes that a back wage violation exists.

- ◇◇ In addition, contracting officers shall withhold funds upon written request from DOL. Contracting officers should respond immediately confirming that the funds have been withheld.
- ◇◇ Additionally, if the request has been made by DOL, it is imperative that the agency preserve the withheld funds until notified in writing by DOL regarding final disposition of the withheld funds.

◇ **Davis-Bacon and CWHSSA contract clauses**

- ◇◇ The contract clause language set forth at 29 C.F.R. § 5.5(a)(2) states:

Withholding - The federal agency or the loan or grant recipient shall upon its own action or upon written request of an authorized representative of DOL withhold or cause to be withheld from the contractor under this contract or any other federal contract with the same prime contractor, or any other federally-assisted contract subject to Davis-Bacon prevailing wage requirements, which is held by the same prime contractor, so much of the accrued payments or advances as may be considered necessary to pay ... the full amount of wages required by the contract.

[and, further:]

In the event of failure to pay any laborer or mechanic, including any apprentice, trainee, or helper, employed or working on the site of the work, ... all or part of the wages required by the contract, the (Agency) may, after written notice to the contractor, sponsor, applicant or owner, take such action as may be necessary to cause the suspension of any further payment, advance, or guarantee of funds until such violations have ceased.

- ◇◇ 29 C.F.R. § 5.5(b)(3) is a similar provision concerning the withholding of contract funds to satisfy overtime pay obligations and liquidated damages determined to be due because of CWHSSA violations.
- ◇◇ The comparable FAR contract clause language “Withholding of Funds” is at 48 C.F.R. § 52.222-7 and “Contract Work Hours and Safety Standards Act – Overtime Compensation” is at § 52.222-4. (The FAR guidance for applying the DBA/DBRA/CWHSSA contract clauses is at 48 C.F.R. §§ 22.403-3, 22.403-4, 22.407(a)(2), and 22.305.)

- ◇◇◇ FAR guidance regarding the “Withholding from or suspension of contract payments” at 48 C.F.R. § 22.406-9(a) states:
 - (a) *Withholding from contract payments.* If the contracting officer believes a violation exists (see 22.406-9), or upon request of the Department of Labor, the contracting officer must withhold from payments due the contractor an amount equal to the estimated wage underpayment and estimated liquidated damages due the United States under the Contract Work Hours and Safety Standards Act. (See 22.302.)
- ◇◇◇ Continuing, the FAR guidance, at 48 C.F.R. § 22.406-9(a)(2), states:
 - (2) If subsequent investigation confirms violations, the contracting officer must adjust the withholding as necessary. However, if the DOL requested the withholding, the contracting officer must not reduce or release the withholding without written approval of the Department of Labor.
- ◇◇◇ At 48 C.F.R. § 22.406-9(a)(3) the FAR further requires that the withheld funds are to be used to satisfy assessed liquidated damages and (unless the contractor makes restitution) validated wage underpayments. (See also 48 C.F.R. § 22.406-9(c), “*Disposition of contract payments withheld or suspended*” and 48 C.F.R. § 406.10 “*Disposition of disputes concerning construction contract labor standards enforcement.*”)
- ◇◇◇ Cross-withholding provisions under the Davis-Bacon and related Acts give DOL and contracting agencies some recourse in collecting back wages in situations where the contract on which the violations occurred has been paid off by the contracting agency. Where funds remaining on the contract under which the violations occurred are insufficient to cover the back wages due, the contracting agency may withhold funds from other contracts subject to DBA/DBRA/CWHSSA or any other federal contract held by the same prime contractor. (See 29 C.F.R. § 5.5(a)(2) and 29 C.F.R. § 5.5(b)(3). For FAR guidance see 48 C.F.R. § 22.406-9(a)(1).)

PRIORITY OF WITHHELD FUNDS

- ◇ DOL's position is that accrued funds withheld for payment of wages may not be used or set aside for other purposes until such time as the prevailing wage issues are resolved. To give contracting agency reprocurement claims priority, for example, would essentially make the employees unfairly pay for the breach of contract between their employer and a federal agency or grant recipient.
- ◇ It is the Department's position that wages due underpaid employees have priority over any competing claims against a contractor, regardless of when the claims were raised. DOL believes that to hold otherwise would be inequitable and contrary to public policy since the affected employees have already performed the work subject to a contractual obligation to fulfill the labor standards requirements.
- ◇ It is also the Department's position that employees' wage claims for underpayment have priority over:
 - (1) An Internal Revenue Service levy for unpaid taxes;
 - (2) Reprocurement costs of the contracting agency after a contractor's default or termination for cause;
 - (3) Any assignee of the contractor ... including assignments made under the Assignment of Claims Act; and
 - (4) Any claim by a trustee in bankruptcy.

DISPOSITION OF WITHHELD FUNDS

- ◇ WHD Regional Offices (RO's) are responsible for directing the processing of back wage disbursements. After completion of administrative processes (and timely litigation, if any) in a DBA, DBRA and/or CWHSSA case, the WHD RO will request the contracting agency to transfer withheld funds due for underpayment of prevailing wages and overtime pay on DBA and DBRA projects to WHD for disbursement. The DOL/WHD request for release of monies to be disbursed to the workers will include information identifying the contractor(s) and contract(s) on which funds in question were withheld, describe the final determination preceding a request, and identify the amount of withheld funds to be transferred to WHD for disbursement to workers for work performed on the covered contract(s). Such requests for the release of withheld funds to WHD shall be made:
 - ◇◇ When a contractor agrees to distribution of contract funds to the covered workers (whether or not they have been subject to a formal withholding process); or
 - ◇◇ When a contractor (the prime contractor or subcontractor) does not request a hearing pursuant to 29 C.F.R. § 5.11(b); or
 - ◇◇ Following the issuance of administrative law judge decisions (including decisions approving settlement agreements); or
 - ◇◇ Following Administrative Review Board decisions; or
 - ◇◇ Subsequent to final resolution of further litigation.

- ◇ **Direct Davis-Bacon contracts**
 - ◇◇ On November 21, 2013, President Obama signed into law Public Law No. 113-50, the "Streamlining Claims for Federal Contractor Employees Act."
 - ◇◇◇ This new law transfers the authority to pay wages found due laborers and mechanics and withheld under direct DBA contracts from the Comptroller General to the Secretary of Labor. (It replaces two references to the Comptroller General with references to the Secretary of Labor at 40 U.S.C. § 3144(a)(1) and 40 U.S.C. § 3703(b)(3).)

- ◇◇◇ The disbursement of back wages due laborers and mechanics on contracts subject to the Davis-Bacon Act itself, previously a process handled by the Comptroller General's Claims Office, is now a responsibility of DOL. The WHD regional offices are responsible for managing the disbursement process for funds withheld by the federal contracting agencies under both DBA and CWHSSA requirements in such contracts.

◇ **Sending Funds to DOL for Disbursement in DBA, DBRA, and/or CWHSSA**

- ◇◇ AAM No. 215, dated March 10, 2014, provides contracting agencies with directions to follow in submitting refusal-to-pay and debarment cases to the WHD regional offices. It further discusses how contracting agencies are to send WHD withheld funds due covered laborers and mechanics for underpayment of prevailing wages and overtime pay for disbursement. These procedures apply to both direct DBA-covered contracts and DBRA-covered contracts. (The same procedures also apply to forwarding funds withheld for underpayment of wages due service employees on contracts subject to the SCA and/or CWHSSA.)
- ◇◇ When appropriate, WHD will send a written request to the contracting agency to transfer withheld funds to WHD for disbursement. The procedures here also apply to the processing of funds in cases in which a contractor authorizes the contracting agency to apply contract funds to back wages due covered workers.
- ◇◇ In cases other than the refusal-to-pay cases, when the agency has not sent the case file to WHD and, as a result of the agency's enforcement of DBA, DBRA, and/or CWHSSA requirements, a contractor authorizes the agency to use contract funds to cover back wages due or the agency forwards other funds collected to cover the back wages due, the agency should provide the appropriate WHD RO with the names, current addresses, social security numbers (if available), and back wage amount due each worker when it forwards such funds to WHD.
- ◇◇ WHD disbursement of the withheld monies is by two methods:
 - ◇◇◇ Incoming wire deposits will be processed by the Federal Reserve Bank of New York City (TREAS NYC) and must include the following information:

**U.S. DEPARTMENT OF LABOR
DAVIS-BACON RESOURCE BOOK**

**DBA/DBRA/CWHSSA
WITHHOLDING**

Bank Name:	TREAS NYC
ABA Routing Number:	021030004
Agency Location Code:	16010002
BETC (collections):	COLL
TAS:	16X6507
Case ID Number:	WHD WHISARD case ID number (if available)
Case Name:	Employer/Company name
If there is no WHD Case ID:	
Submitting Agency	_____
Agency contact & phone	_____

- ◇◇◇ Paper check deposits should include the name of the contractor and the contract number(s) for the contract(s) on which the work was performed on the check or a separate letter transmitting the check, made payable to WHD, and should be mailed to:

WHD Central Processing
P.O. Box 77752
Washington, D.C. 20013

◇ **Sample letters for withholding request and verification**

- ◇◇ Below is a sample withholding request letter used by WHD and a sample verification of withholding letter that may be used by agencies to provide WHD confirmation that the funds have been withheld.

WITHHOLDING REQUEST LETTER (DBRA)

Ms. Contracting Officer
U.S. Federal Agency
Anywhere, USA 00000

Dear Ms. Contracting Officer:

Re: Name of prime contractor
Contract number and location
Our file number: 98-000-00000

Our Wage and Hour District Office has conducted an investigation of the above-referenced contractor under the Davis-Bacon and related Acts (DBRA) and the Contract Work Hours and Safety Standards Act (CWHSSA).

The investigation has disclosed monetary violations resulting from failure to pay the required prevailing wage rates. DBRA back wages due have been computed in the amount of \$_____.

The contractor has not agreed to pay the back wages found due. Therefore, in order to protect the interests of the Federal government and the affected employees, and in accordance with Department of Labor Regulations, 29 C.F.R. § 5.5(a)(2), and as provided for in the Federal Acquisition Regulations at 48 C.F.R. § 52.222-4(c) and 52.222-7, it is requested that the aforementioned sum be withheld from contract payments due the prime contractor.

<1-Optional> If there are insufficient funds to withhold on this contract, cross-withholding of funds from any current Federal contract with the same prime contractor or from any federally-assisted contract with the same prime contractor which is subject to either Davis-Bacon prevailing wage requirements or Contract Work Hours and Safety Standards Act requirements, respectively, is authorized by the FAR (48 C.F.R. § 52.222-7 and/or 52.222-4(c), respectively).

<2-Optional> We request that you advise us immediately if you have any information that the prime contractor has filed bankruptcy proceedings.

Should we succeed in securing direct payments to the employees or should there be any change in the amount noted, we will advise you immediately. Thank you for your continuing cooperation in this matter. If you have any questions, please contact the Wage and Hour Regional Wage Specialist at the above address.

**U.S. DEPARTMENT OF LABOR
DAVIS-BACON RESOURCE BOOK**

DBA/DBRA/CWHSSA
WITHHOLDING

-2-

Please notify us in writing of your actions on this request no later than (date) . A withholding verification form is enclosed for your convenience.

Sincerely,

Representative from the
Wage and Hour Division

Enclosure

cc: Name of Prime Contractor

VERIFICATION OF WITHHOLDING LETTER

Case Name:

File Number:

VERIFICATION OF WITHHOLDING

This is to verify that \$_____ has been withheld from funds due (name of contractor) to cover wage underpayments under Contract Number _____ as of (enter date) per section 5.5(a)(2) of Regulations, 29 C.F.R. Part 5.

Contracting Officer

Agency

Telephone Number

**U.S. DEPARTMENT OF LABOR
PREVAILING WAGE RESOURCE BOOK**

**SCA ADMINISTRATIVE
VARIANCES & EXEMPTIONS**

**SCA ADMINISTRATIVE
VARIANCES & EXEMPTIONS**

**ADMINISTRATIVE LIMITATIONS, VARIANCES,
TOLERANCES, AND EXEMPTIONS**

**VARIANCE TO SCA PREVAILING WAGE REQUIREMENTS
FOR CERTAIN SERVICE EMPLOYEES**

WORKERS WITH DISABILITIES

APPRENTICES

CONTRACTS EXEMPT FROM ALL PROVISIONS OF SCA

POSTAL SERVICE CONTRACTS WITH COMMON CARRIERS

POSTAL SERVICE MAIL CONTRACTS WITH OWNER-OPERATORS

CERTAIN “COMMERCIAL” SERVICES

**ADMINISTRATIVE LIMITATIONS, VARIANCES,
TOLERANCES, AND EXEMPTIONS**

Section 4(b) of the SCA authorizes DOL to provide reasonable limitations, variations, tolerances and exemptions from provisions of the SCA, but only in special circumstances where it is necessary and proper in the public interest or to avoid serious impairment of government business and is in accord with the SCA's remedial purpose to protect prevailing labor standards. SCA § 4(b) and 29 C.F.R. 4.123.

VARIANCE TO SCA PREVAILING WAGE REQUIREMENTS FOR CERTAIN SERVICE EMPLOYEES

Workers With Disabilities 29 C.F.R. § 4.6(o).

Workers with disabilities who are employed under certificates issued by the WHD may be paid at “special minimum wage” rates below the rates that would otherwise be required for such work.

- ◇ SCA contractors are allowed to pay less than the SCA prevailing wage rates to workers with disabilities in business establishments, community rehabilitation programs (also known as work centers), hospitals and residential care facilities, and School Work Experience Programs, in accordance with section 14 of the Fair Labor Standards Act (FLSA).
- ◇ Section 14 of the FLSA provides for the employment of certain workers at rates below the federal minimum wage to the extent necessary in order to prevent curtailment of employment opportunities. As stated in section 14(c)(1):

The Secretary, to the extent necessary to prevent curtailment of opportunities for employment, shall by regulation or order provide for the employment, under special certificates, of individuals . . . whose earning or productive capacity is impaired by age, physical or mental deficiency, or injury, at wages which are –

- (A) lower than the [FLSA minimum wage];
- (B) commensurate with those paid to non-handicapped workers employed in the vicinity in which the individuals under the certificates are employed, for essentially the same type, quality, and quantity of work; and
- (C) related to the individual’s productivity.

The FLSA further requires employers to provide written assurances that the hourly wage rates of individuals will be reviewed regularly, and that the employees’ wages will be adjusted to reflect changes in the locally prevailing wages paid to experienced workers who do not have disabilities performing essentially the same work.

Certification

- ◇ Employers must obtain an authorizing certificate from the WHD prior to paying special minimum wages to employees who have disabilities for the work being performed. Applications are available from the WHD's Regional Offices and at http://www.dol.gov/whd/specialemloyment/workers_with_disabilities.htm. Completed applications must be mailed to the following address: U.S. Department of Labor, Wage and Hour Division, National Certification Team, 230 South Dearborn Street, Room 514, Chicago, Illinois 60604-1757.

Disability

- ◇ The fact that a worker may have a disability is not in and of itself sufficient to warrant the payment of a special minimum wage. Section 14(c) does not apply unless the disability actually impairs the worker's earning or productive capacity for the work being performed. A worker who has disabilities for the job being performed is one whose earning or productive capacity is impaired by a physical or mental disability, including those relating to age or injury. Disabilities which may affect productive capacity include blindness, mental illness, mental retardation, cerebral palsy, alcoholism and drug addiction.

Commensurate Rate

- ◇ A special minimum wage is a wage paid to a worker with a disability that is **commensurate** with that worker's individual productivity compared to the wages and productivity of experienced workers who do not have disabilities performing essentially the same type, quality, and quantity of work in the vicinity where the worker with a disability is employed. The commensurate wage is always a special minimum wage, *i.e.* a wage below that required by Section 6 of the FLSA or below the rate required under an applicable SCA wage determination. The commensurate rate is determined by the employer in accordance with 29 C.F.R. Part 525.

The key elements in determining commensurate rates are:

- ◇◇ Determining the standard for workers who do not have disabilities, the objective gauge against which the productivity of the worker with a disability is measured.
- ◇◇ Determining the prevailing wage. Most SCA contracts include a wage determination specifying the prevailing wage rates to be paid for work on the SCA contract. (On SCA contracts funded by

appropriated funds, the contract will be amended annually to include a new prevailing wage determination.)

- ◇◇ Evaluating the quantity and quality of the productivity of the worker with the disability.
- ◇ The productivity of hourly rate workers must be reevaluated at least every six months. Also, all special minimum wages must be reviewed and adjusted regularly, at least once a year, to assure that they reflect changes in locally prevailing wages. 29 C.F.R. § 525.1(b) & 525.9(b)(2). Where a worker is performing work subject to the SCA, the wage rate listed on the wage determination for the classification of work performed is the prevailing wage. If a covered contract does not contain a wage determination, (because the contract is for less than \$2,500, or involves fewer than six service employees and the WHD determined that no wage determination would be issued for the contract work to be performed), the employer should determine the prevailing wage rate in accordance with instructions provided at 29 C.F.R. § 525.10.

Fringe Benefits and Overtime

- ◇ Workers paid special minimum wages must receive the **full** fringe benefits (or cash equivalents) listed on the wage determination when performing work subject to the SCA. Temporary and part-time employees are entitled to an amount of the fringe benefits specified in an applicable wage determination that is proportionate to the amount of time spent in covered work. The SCA makes no distinction, with respect to its compensation provisions, between temporary, part-time, and full-time employees.
- ◇ Vacation pay and holiday pay may be based on the commensurate wage rate.
- ◇ Generally, workers with disabilities are subject to the overtime provisions of the FLSA and/or CWHSSA and must be paid at least 1½ times their regular rate of pay for all hours worked over 40 in a workweek.

FLSA Minimum Wage Application to Employees Who Do Not Perform Work Subject to the SCA in an Establishment where SCA Contract Work is Performed

- ◇ Section 6(e)(1) of the FLSA extends application of the FLSA minimum wage to employees not employed on the SCA contract. Thus, for example, in a work center, where SCA contract work is performed, certain staff and employees not working on the service contract must be paid at least the FLSA minimum wage.

(Commensurate rates would continue to apply to the workers with disabilities employed under special minimum wage certificates.)

Applicable Regulations

- ◇ Regulations set forth at 29 C.F.R. Part 525, “Employment of Workers with Disabilities under Special Certificates,” govern the issuance of certificates authorizing the employment of workers with disabilities at special minimum wages pursuant to section 14(c) of the FLSA. See also the SCA regulations at 29 C.F.R. § 4.6(o).

Apprentices 29 C.F.R. § 4.6(p).

- ◇ 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 the DOL, or, if no such recognized agency exists in a State, under a program registered with the DOL’s Employment Training Administration’s Office of Apprenticeship. See also 29 C.F.R. Part 29.
- ◇ The terms and conditions of the approved program will be followed in the employment of apprentices.
 - ◇◇ Wage rates paid apprentices shall 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 journeyman’s rate in the applicable wage determination.
 - ◇◇ The allowable ratio of apprentices to journeymen employed on the contract work shall 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 shall be paid the wage rate and fringe benefits contained in the applicable wage determination for the journeyman classification of work actually performed.

CONTRACTS EXEMPT FROM ALL SCA PROVISIONS

Postal Service Contracts with Certain Types of Common Carriers 29 C.F.R. § 4.123(d)(1).

U.S. Postal Service contracts entered into with common carriers for the carriage of mail by rail, air (except air star routes), bus, and ocean vessel, where such carriage is performed on regularly scheduled runs over regularly established routes and accounts for an insubstantial portion of the revenue therefrom, are exempt from the SCA.

Postal Service Mail Contracts With Owner Operators 29 C.F.R. § 4.123(d)(2).

- ◇ The SCA does not apply to Postal Service contracts entered into with an individual owner-operator of vehicles for transporting mail where it is not contemplated at the time of contract award that such owner-operators will hire any service employee(s) to perform the services under the contract except for short (brief) periods of vacation time or for unexpected emergency situations such as illness or accident. .
- ◇ The term “owner-operator” refers to an “individual.” An “owner-operator” does not refer to a partnership, two closely related individuals (mom & pop operation), or a corporation. According to the specific language of this administrative exemption, the contract is exempt from SCA if the facts show that at the time of award, the individual awarded the contract intended to deliver the mail him or herself without using other drivers (except for the short periods permitted).
- ◇ This exemption would not be applicable in situations where, due to the numbers or timing of the required mail runs or other contracts for which the contractor may be responsible, it is not physically possible for the individual contractor to perform the contract services without using other drivers.

Note: Contracts for transportation are exempt from CWHSSA coverage under section 103(b) of CWHSSA. *See* 40 U.S.C. § 3701(3)(A)(i)(II). Accordingly, CWHSSA does not apply to drivers on Postal Service mail haul contracts.

Certain “Commercial” Services 29 C.F.R. § 4.123(e).

There are two administrative exemptions that apply to specific types of “commercial” services.

Equipment items exemption 29 C.F.R. § 4.123(e)(1).

- ◇ Where certain conditions are met (as described below), this exemption applies to contracts or subcontracts for the maintenance, calibration, and/or repair of:
 - ◇◇ Automated data processing equipment and office information/word processing systems,
 - ◇◇ 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,
 - ◇◇ Office/business machines not otherwise exempt, where the services are performed by the manufacturer or supplier.
- ◇ Contracts and subcontracts principally for the maintenance, calibration, and/or repair of such equipment are exempt from SCA requirements where:
 - ◇◇ The equipment serviced are commercial items “sold or traded by the contractor (or subcontractor) in substantial quantities to the general public in the course of normal business operations” and used regularly for other than government purposes;
 - ◇◇ The services are furnished based on the established market price or established catalog price charged the general public for such maintenance, calibration, and/or repair services; and
 - ◇◇ The contractor uses the same compensation plan for all service employees performing under the government contract as the contractor uses for the same and equivalent employees servicing the same equipment of commercial customers.
 - ◇◇ The contractor certifies as to the compliance with these provisions. The certification is included in the prime contract or subcontract, and the certification by the prime contractor as to its compliance with respect to the prime contract also constitutes its certification as to compliance by its subcontractor if it subcontracts out the exempt services.
- ◇ For this exemption to apply with regard to the prime contract, the contracting officer must determine applicability on or before contract award, considering all factors, and by making an affirmative determination that all four conditions described above have been met. Similarly, for the exemption to apply to a

subcontract, the prime contractor must determine applicability of the exemption on or before subcontract award, based on all factors, and by making an affirmative determination that all of the four conditions have been met.

“Commercial” services exemption 29 C.F.R. § 4.123(e)(2).

- ◇ This exemption applies to contracts or subcontracts for the following **seven services** (provided that certain criteria for applicability are met, as described below).
 - ◇◇ Automobile or other vehicle maintenance services (e.g., aircraft maintenance; other than contracts to operate a motor pool or similar facility);
 - ◇◇ Financial services involving the issuance and servicing of cards, such as credit, debit, purchase, smart cards, and similar card services;
 - ◇◇ Contracts with hotels/motels for conferences of limited duration (e.g., one to five days), including lodging and/or meals which are part of the contract for the conference (excluding ongoing contracts for lodging on an as needed or continuing basis – such as longer term contracts to fulfill a continuing lodging need, e.g., lodging military recruits or government employees attending training at an agency training center);
 - ◇◇ Maintenance, calibration, repair and/or installation (where the installation is not subject to the DBA, as provided in § 4.116(c)(2)) services for all types of equipment where the services are obtained from the manufacturer or supplier of the equipment under a contract awarded on a sole source basis;
 - ◇◇ Transportation of persons by common carrier by air, motor vehicle, rail or marine vessel on regularly scheduled routes or by standard commercial services (not charter services);
 - ◇◇ Real estate services related to housing federal agencies or disposal of real property owned by the federal government (e.g. real property appraisal, broker, space planning, lease acquisition, lease negotiation, tax abatement, and real property disposal); and
 - ◇◇ Relocation services to assist federal employees or military personnel in buying and selling homes, including services such as home marketing assistance, home sales services, destination area services, management reporting services, mortgage counseling, property management services,

and other related services, but excluding actual moving or storage of household goods and related services.

- ◇ This exemption applies only when **all** of the following criteria are met:
- (A) The services are “commercial” services, “*i.e.*, they are offered and sold regularly to non-governmental customers, and are provided by the contractor (or subcontractor in the case of an exempt subcontract) to the general public in substantial quantities in the course of normal business operations”;
 - (B) The contract (or subcontract) will be awarded on a sole source basis or the contractor/subcontractor will be selected on the basis of factors in addition to price (*i.e.*, the combination of other non-price or cost factors must be equally or more important than price in selecting the contractor/subcontractor);
 - (C) The services are furnished at prices that are, or are based on, established catalog prices available to the general public or market prices established by trade between buyers and sellers free to bargain for such services;
 - (D) Each service employee who will perform services under the government contract/subcontract will spend only a small portion of his or her time servicing the government contract/subcontract – less than 20 percent of the individual’s available hours (during the contract period if the contract period is less than a month, otherwise monthly average on an annualized basis). This exemption cannot apply if the contractor will perform the services with a workforce dedicated to the government contract/subcontract;
 - (E) The contractor uses the same compensation (wages and fringe benefits) plan for all service employees performing work under the contract (or subcontract) as the contractor uses for these and equivalent employees servicing the same equipment of commercial customers;
 - (F) The contracting officer (or prime contractor with respect to a subcontract) determines in advance of receiving offers (based on the nature of the contract requirements and knowledge of the practices of likely offerors), that all or nearly all offerors will meet the above requirements. However, if the contracting officer finds, after bids are received, that the earlier determination that all or nearly all offerors would meet the exemption

requirements was incorrect, SCA requirements shall be applied to the procurement; and

- (G) The contractor certifies in the prime contract or subcontract, as applicable, to the requirements in paragraphs A, and C through and E, above. Certification by the prime contractor as to its compliance with respect to the prime contract also constitutes its certification as to compliance by its subcontractor if it subcontracts out the exempt services. If the contracting officer or prime contractor has reason to doubt the validity of the certification, SCA stipulations shall be included in the prime contract or subcontract.
- ◇ There are three categories of contracts **not** exempt from the application of SCA requirements under the 29 C.F.R. § 4.123(e)(2) exemption:
- ◇◇ Contracts subject to collectively bargained wages and fringe benefits applicable to a successor contract where such rates and benefits apply under section 4(c) of the SCA (as well as any options or extensions to such contracts);
 - ◇◇ Contracts for the operation of a government facility or portion thereof (the exemption may apply to subcontracts for services under such contracts if the subcontracts meet the criteria for exemption); and
 - ◇◇ Contracts entered into under 41 U.S.C. chapter 85 (traditionally known as the Javits-Wagner-O'Day Act).

SCA

WAGE DETERMINATIONS

SCA WAGE DETERMINATIONS

SCA WAGE DETERMINATION REQUIREMENTS

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SCA WAGE DETERMINATIONS

SCA Wage Determination Requirements

- ◇ SCA wage determinations apply to Federal Government and District of Columbia contracts, the principal purpose of which is to furnish services through the use of service employees. Each such contract in excess of \$2,500 (and the related bid solicitation) is required to contain provisions that specify the monetary wages and fringe benefits to be paid service employees engaged in the contract's performance.
- ◇ SCA wage determinations set forth the prevailing wages and fringe benefits that prime contractors and subcontractors must pay service employees working on covered contracts in specified geographic areas. SCA wage determinations are issued by the WHD Branch of Service Contract Wage Determinations.

- ◇◇ Wages – the minimum monetary compensation required to be paid to the various classes of service employees – are usually listed in the wage determination as hourly wage rates.

- ◇◇ Fringe benefits, as specified in the contract clause established by the statutory SCA fringe benefits requirement, include:

[M]edical or hospital care, pensions on retirement or death, compensation for injuries or illness resulting from occupational activity, or insurance to provide any of the foregoing, unemployment benefits, life insurance, disability and sickness insurance, accident insurance, vacation and holiday pay, costs of apprenticeship or other similar programs and other bona fide fringe benefits not otherwise required by federal, state, or local law to be provided by the contractor or subcontractor.

SCA § 2(a)(2), recodified at 41 U.S.C. § 6703(2).

- ◇◇ The various fringe benefits listed are illustrative of those which may be included in the wage determination. Which fringe benefits are included in a wage determination depends on the type of wage determination and the source data used to develop the wage determination.
- ◇◇ Most SCA wage determinations are revised periodically, as new health and welfare benefits or wage survey data become available. However, if a wage determination is properly included in the contract at the time of award, the contract should not be modified to include subsequent revisions of the wage

determination prior to completion of a contract term (unless the contract is a multi-year contract). (See further discussion concerning “Multi-Year Procurement” in the section below on “Obtaining SCA Wage Determinations.”)

- ◇ The SCA requires DOL to issue a wage determination for every service contract exceeding \$2,500 and employing more than five service employees. SCA § 10, recodified at 41 U.S.C. §§ 6702(a)(2) and 6707(f).
- ◇◇ If the contract requires five or fewer service employees, the contracting agency must obtain a wage determination from WDOL (if one is available there), or submit an e98 request for a wage determination.
 - ◇◇◇ There is a misconception among some contracting officers that they need not obtain or request a wage determination for a covered service contract if there will be five or fewer service employees performing on the contract. However, only the WHD has the authority to decide whether or not to issue a wage determination for a contract with five or fewer service employees.
- ◇◇ If an appropriate wage determination is not readily available for a service contract involving five or fewer service employees by use of the WDOL process for obtaining SCA wage determinations, the agency must submit an e98 request. WHD will either issue a wage determination reflecting such rates or notify the contracting agency that there is no wage determination applicable to the contract. If WHD issues a wage determination for such a contract, the agency must include it in the bid solicitation and resulting contract.
- ◇◇ If WHD decides not to issue an SCA wage determination for a service contract involving five or fewer service employees, the contractor must pay no less than the federal minimum wage required by section 6(a)(1) of the FLSA. (An overview of the FLSA is available in the “Introduction to the Labor Standards Statutes Coverage” chapter of this resource book.)
- ◇◇ If a contract involves more than five service employees, the contract must contain a wage determination. If a wage determination is not available as discussed under the heading “Obtaining SCA Wage Determinations” below, the agency must submit an e98 request for a wage determination.

SCA Wage Determinations Format

- ◇ Under the SCA, wage determinations are developed and issued for covered service contracts in the United States, including the District of Columbia, and certain territories.
- ◇ **Standard wage determinations** (sometimes referred to as “area-wide **wage determinations**”), have been issued since 1994 for specific locations. Each lists nearly 300 standard occupations defined in the *SCA Directory of Occupations*.
 - ◇◇ The WHD updates these wage determinations as wage survey data become available for the many geographic localities that comprise the geographic scope of the SCA.
- ◇ **“Non-standard” prevailing wage determinations** are issued for specific contracts or types of contracts and may be based on different data sources that may be industry specific and/or often cover different geographic areas that may be either narrower or broader than the standard wage determinations.
- ◇ **Section 4(c) Collective Bargaining Agreement (CBA) “Successorship” Wage Determinations** reflect a predecessor contractor’s CBA wage rates and fringe benefits and are issued only when certain criteria are met.
- ◇ Depending on the scope of work required by a specific contract, multiple wage determinations may need to be incorporated into a contract – e.g., a standard wage determination, non-standard and/or 4(c) wage determinations, determinations for multiple locations if the contract will be performed in multiple locations, and under certain circumstances (as discussed elsewhere in this resource book) a Davis-Bacon wage determination, as well.

Two Types of SCA Wage Determinations

- ◇ Two types of SCA wage determinations are issued: prevailing in the locality wage determinations (which include standard and non-standard wage determinations) and section “4(c)” wage determinations. The two types of wage determinations differ in how they are developed and issued, as required by the SCA and its regulations. *See* SCA §§ 2(a)(1), 2(a)(2), and 4(c), 41 U.S.C. 6703(a)(1), 6703(a)(2), and § 6707(c), and 29 C.F.R. Part 4.
1. Prevailing in the locality wage determinations set forth monetary wage and fringe benefits determined to be prevailing for various classes of service employees in the locality after giving “due consideration” to the rates applicable to such service

employees if directly hired by the Federal Government. SCA §§ 2(a)(1), 2(a)(2), and 2(a)(5) recodified at 41 U.S.C. §§ 6703(a)(1), 6703(a)(2), and § 6703(a)(5), respectively.

Wage rates prevailing in the locality. 29 C.F.R. § 4.51.

- ◇◇ In rare instances, a wage rate prevailing in a locality is based on a single rate paid to a majority (50 percent or more) of workers employed in a specific occupation in a particular locality. The SCA regulations provide that such a majority rate “is determined to prevail.” 29 C.F.R. § 4.51(b). Majority rate determinations are typically union dominance wage determinations.
- ◇◇ Usually wage rates are based on measures of central tendency as provided in data collected by the Bureau of Labor Statistics, such as the Occupational Employment Statistics Survey (OES).
 - ◇◇◇ The OES produces employment and wage estimates for over 700 occupations. These are estimates of the number of people employed in certain occupations, and estimates of the wages paid to them. Self-employed persons are not included in the estimates. These estimates are available for the nation as a whole, for individual states, and for metropolitan areas; national occupational estimates for specific industries are also available.

Fringe benefits prevailing determinations. 29 C.F.R. § 4.52.

- ◇◇ The applicable **health and welfare (H&W)** benefit rate is listed in each SCA wage determination.
- ◇◇ The H&W benefit rate in most SCA wage determinations is based on data from the Bureau of Labor Statistics Employment Cost Index summary of Employer Cost for Employee Compensation. The H&W rate reflects the total cost for private employers to provide all bona fide fringe benefits (not legally required) other than vacations and holidays. (Vacations and holidays are determined separately under SCA.)
 - ◇◇◇ Effective June 1, 1997, DOL established a new methodology for determining the H&W benefit requirement applicable to most employees under the SCA. The new single rate methodology has replaced a two-level H&W rate structure that involved issuing different H&W requirements, depending on the nature and history of each contract (each rate with its own method of determining compliance with SCA requirements).

To ease a transition from the two-tier rate structure to a new single rate methodology, there was a four-year phase-in of rate increases and the higher rate was grandfathered for continued application to contracts that succeeded those to which it had applied. Since June 1, 2004, a single H&W benefit rate has been issued. (*See* All Agency Memoranda Nos. and 188 and 197.)

- ◇◇ The SCA prevailing H&W benefits rate is adjusted annually, in June, based on new data. 29 C.F.R. § 4.52. (On June 17, 2012, the H&W benefit rate was increased to \$3.71 per hour, and on June 18, 2013, the new H&W benefit rate was increased to \$3.81 per hour.)
 - ◇◇ A discussion of how to comply with these H&W benefit requirements is included in the “SCA Compliance Principles” chapter of this resource book.
 - ◇◇ The paid **holiday and vacation** benefit requirements in most SCA wage determinations vary from locality to locality reflecting prevailing fringe benefit practices in the geographic scope of the wage determination, and the applicable requirements are stated in each wage determination.
2. CBA – “4(c)” wage determinations require a successor contractor to apply the wage rates and fringe benefits, including accrued and prospective increases, contained in a CBA that applied to the service employees who performed on the predecessor contract in the same locality. SCA §§ 4(c) and 2(a)(1) and (2). *See also* 41 U.S.C. §§ 6703(a)(1), 6703(a)(2), and § 6707(c).
- ◇◇ Wage rates and fringe benefits are based on the predecessor contractor’s CBA. 29 C.F.R. §§ 4.1(b) and 4.163.
 - ◇◇ For section 4(c) to apply, the predecessor contract and successor contract must involve furnishing substantially the same services in the same locality.
 - ◇◇ The SCA § 4(c) requirement, as reiterated at 29 C.F.R. § 4.163(a), is that:

No contractor or subcontractor under a contract which succeeds a contract subject to [the SCA] and under which substantially the same services are furnished, shall pay any service employee under such contract less than the wages and fringe benefits, including accrued wages and fringe benefits, and any prospective increases in wages and fringe benefits provided for in a collective-bargaining agreement as a result of arm’s-length negotiations,

to which such service employees would have been entitled if they were employed under the predecessor contract

- ◇◇◇ The 4(c) requirements may not apply if the collectively bargained rates were not a result of arm's-length negotiations or if the CBA rates are substantially at variance with those which prevail for services of a character similar in the locality. A later chapter of this resource book discusses administrative hearings to address issues of "substantial variance" and "arm's-length negotiations."

Application of "4(c)" Wage Determinations

- ◇ The successor contractor is obligated to pay its employees the wages and fringe benefits in the predecessor's CBA that they would have been entitled to if they were employed by the predecessor contractor. On a contract subject to annual fiscal appropriations of Congress, this obligation applies independently to the base year of a multi-year contract and each subsequent option. On other contracts, the obligation is for up to two years. (In the section below, concerning "Obtaining SCA Wage Determinations," see the discussion of "Multi-Year Procurement.")
 - ◇ This obligation exists whether or not the employees of the predecessor contractor are hired by the successor contractor. Thus, even if a successor contractor does not hire any of the predecessor contractor's employees, the successor contractor is nevertheless required to pay service employees employed on the contract the CBA rates established in the predecessor contractor's CBA.
- Note:** In accordance with Executive Order 13495 and its implementing regulations, and as discussed in the "Nondisplacement" chapter of this resource book, successor contractors providing the same or similar services at the same location as the predecessor often will have an obligation to offer a right of first refusal of employment to service employees on the predecessor contract.
- ◇ The obligation of the successor contractor is limited to the wage and benefits requirements of the predecessor contractor's CBA and does not extend to other items such as seniority, grievance procedures, work rules, overtime, etc.
 - ◇◇ Any interpretation of the wage and fringe benefit provisions of the CBA where its provisions are unclear must be based on the intent of the parties signatory to the CBA, provided that such interpretation does not violate any law.

- ◇ Generally, the provisions of section 4(c) are self-executing and failure to include the CBA rates in the wage determination issued for the successor contract does not relieve the successor contractor of the statutory requirements to comply with the CBA rates.
- ◇◇ The self-executing application of section 4(c) may be limited if notice of the terms and conditions of a new or changed collective bargaining agreement is not received within the timeframes and under the circumstances specified in 29 C.F.R. § 4.1b(b)(1) and (2).
 - ◇◇◇ These limitations apply only if the contracting officer has given both the incumbent (predecessor) contractor and the employees' collective bargaining representative written notification at least 30 days in advance of all applicable Estimated procurement dates, including 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.

The limitation on the self-executing application of the 4(c) provision will not apply, i.e. the 4(c) requirements will apply, if the contracting agency has given such notification, and the agency receives notice of the terms of a new or changed CBA which was consummated during the period of performance of the predecessor contract and which was applicable to the performance of work under the predecessor contract —

- ◇◇◇ For advertised procurement – 10 days before the date set for bid opening (or less if the contracting agency finds that there is still reasonable time to notify bidders);
- ◇◇◇ For negotiated procurement – before the award date if start of performance is within 30 days, or 10 days before commencement of the contract if start of performance is beyond 30 days.

The CBA must be received by the contracting officer (**Not DOL**) within specified timeframes.

If the CBA is not received by the contracting officer within these timeframes, then the CBA may not apply.

- ◇ Two types of appeals can be made concerning CBA rates where section 4(c) applies: appeals based on substantial variance issues, and appeals based on issues concerning “arm’s-length” negotiations. Both types of appeals may be resolved by

administrative hearings conducted by an Administrative Law Judge pursuant to 29 C.F.R. Part 6, or on appeal, by the ARB pursuant to 29 C.F.R. Part 8. *See* 29 C.F.R. §§ 4.10 and 4.11. The “4(c) Hearings” chapter of this resource book provides more detailed information on this subject.

SCA DIRECTORY OF OCCUPATIONS

Overview of the SCA Directory of Occupations

- ◇ Since April 1985, the Wage and Hour Division has published standard occupational titles and definitions in the *SCA Directory of Occupations*. This is a key resource to be utilized in obtaining and applying SCA wage determinations. The WHD home page (<http://www.dol.gov/whd/>) and the WDOL website “Library” have links to the Directory.
- ◇ For any SCA-covered contract exceeding \$2,500 the contracting agency must either obtain a wage determination by using the “e98” process or use the WDOL “Selecting SCA WDs” process for obtaining SCA wage determinations. The e98 process requires the contracting agency to specify the occupational titles of workers to be employed on the contract. Use of the *Directory* allows the contractor, federal procurement agency, and WHD staff to associate standard job descriptions with these titles.
- ◇ Each year, wage determinations are applied to approximately 60,000 government service contracts covered under the SCA. Total annual federal government service contracting has been estimated in the billions of dollars. These SCA-covered contracts involve the performance of a wide range of services, including such diverse activities as aerial spraying, barber and beauty shop services, computer services, electronic equipment maintenance, furniture repair, surveying and mapping, trash removal, and warehousing. Employees in a wide spectrum of occupations are needed to perform these services.
- ◇ A variety of data sources are utilized in the development of SCA prevailing wage determinations, including Bureau of Labor Statistics survey data. The *Directory* is now in its fifth edition, which was published in 2006.
- ◇ Since payroll titles and work assignments vary among establishments and geographic areas, such descriptions are useful as standards in classifying workers by occupation so that wage rates representing specific job content can be established. The *Directory* makes available uniform occupational information providing composites of similar jobs performed in many geographic areas all over the country. The *Directory* contains occupational titles and descriptions and a classification structure under which the occupations are arranged according to their interrelationships.

Federal Grade Equivalency (FGE) Information in the Directory

- ◇ The Fifth Edition of the *Directory* provides information on the federal civil service grade levels most likely to correspond to the occupations included.
 - ◇◇ This information reveals the grade levels that would be assigned to such occupations, if the work was being performed by a federal employee.
 - ◇◇ For WHD staff, such information is especially useful in connection with developing prevailing wage determinations for occupations for which no survey data are available or for which survey data are not available for various levels within a job family.
 - ◇◇ Contractors and federal procurement agency staff may utilize federal grade equivalency (FGE) data for guidance in developing wage rate proposals for occupations to be conformed. (See the “SCA Conformance Process” chapter of this resource book for further information on FGE use for conformances.)
- ◇ FGE rates are divided into the following four classifications for purposes of SCA administration:
 - ◇◇ “GS” (General Schedule) refers to grade rates utilized for non-supervisory appropriated fund “white-collar” positions;
 - ◇◇ “WG” (Wage Grade) refers to grade rates utilized for non-supervisory appropriated fund “blue-collar” positions;
 - ◇◇ “AS” refers to non-supervisory non-appropriated fund Administrative Services rates; and
 - ◇◇ “NA” refers to some non-appropriated fund classifications.

Using the SCA Directory of Occupations

- ◇ The *SCA Directory of Occupations* provides the occupational titles and describes the scope of duties for each occupation listed. It is available by use of a link on the WDOL website or <http://www.dol.gov/whd/contracts/sca.htm>. In addition to the Directory, links are provided for the:

- ◇◇ “Table of Contents,” which provides a numerical listing of occupational categories and titles, “Federal Grade Equivalencies,” and location of each in the Directory by page; and the
- ◇◇ “Occupational Index,” which provides an alphabetical listing of occupational titles.
- ◇ The classification system developed is structured on a three-tier arrangement: category, occupation, and level of difficulty. Each tier represents groupings in successively finer detail. This should enable users who so desire to tabulate or analyze data at different levels of aggregation.
- ◇ Note: Below are the 20 broad occupational categories arranged alphabetically and coded numerically.

01000	Administrative Support and Clerical Occupations
05000	Automotive Services Occupations
06000	Automotive Service (Retail) Occupations
07000	Food Preparation and Service Occupations
08000	Forestry and Logging Occupations
09000	Furniture Maintenance and Repair Occupations
11000	General Services and Support Occupations
12000	Health Occupations
13000	Information and Arts Occupations
14000	Information Technology Occupations
15000	Instructional Occupations
16000	Laundry, Dry Cleaning, Pressing and Related Occupations
19000	Machine Tool Operation and Repair Occupations
21000	Materials Handling and Packing Occupations
23000	Mechanics and Maintenance and Repair Occupations
24000	Personal Needs Occupations
25000	Plant and System Operation Occupations
27000	Protective Service Occupations
28000	Recreational Occupations
29000	Stevedoring/Longshoremen Occupational Services
30000	Technical Occupations
31000	Transportation/Mobile Equipment Operation Occupations

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- 47000 Water Transportation Occupations
- 91000 Wildlife Management and Animal Care Occupations
- 99000 Miscellaneous Occupations

- ◇ The detailed numerical listing presents the categories, occupations, levels of difficulty, federal grade equivalencies, and the page numbers on which the occupational descriptions can be found. The coding system utilized by the Directory has the following characteristics:
 - ◇◇ Each occupational title is identified by a five digit code.
 - ◇◇ The first two digits of each occupational code identify the broad category of occupations to which each specific occupation belongs. For example, since the code for the broad category of Administrative Support is 01000, each specific occupation within this category begins with the first two digits 01, such as, Court Reporter, 01040.
 - ◇◇ Within each broad category, occupations are listed in alphabetical order. Therefore, the third and fourth digit of each occupational code follow that alphabetical progression. For example, the code for Rental Clerk is 01290, while the code for Scheduler, Maintenance is 01300.
 - ◇◇ Occupations that reflect distinct levels in “job families” are prefaced by “base” statements that describe occupational content common to each level.
 - ◇◇ The levels of difficulty are denoted by Roman numerals placed after the title, with the numeral “I” being the least difficult, and each numeral thereafter indicating a more difficult level. In general, the higher the grade level, the greater the level of complexity and compensation. The codes for each level, such as General Clerk I, General Clerk II, and General Clerk III, utilize the fifth digit to differentiate one from the other. For example, General Clerk I, 01111₁; General Clerk II, 01112₂; and General Clerk III, 01113₃.
 - ◇◇ Each broad category is defined so that homogeneous groupings can be delineated. The titles represent those most commonly used in the wage determination process. The descriptions represent composites of jobs found in a number of establishments and may differ from those in use in individual establishments or those prepared for other purposes.

- ◇◇ Some of these definitions have been adjusted to meet SCA operations requirements. Immediately following the title, there may be one or more titles in parentheses. These are alternative titles for the titles with which they are shown. They are synonymous titles and appear in the alphabetical index in lower case.

Job Description and Federal Grade Equivalent Must Be Provided if the Directory Does Not Include a Class for the Given Job Duties

- ◇ Contracting agency officials who are unable to locate a given title or description, or who cannot match specific job duties with a corresponding occupational description in the Directory, should submit an appropriate occupational title and description with an “e98” request.
 - ◇◇ This procedure will assist the WHD Branch of Service Contract Wage Determinations in issuing wage determinations for occupations in response to “e98” requests.
 - ◇◇ Such information also provides the basis for future updates and revisions of the Directory.
 - ◇◇ Note that wage determinations will not be issued for occupational titles requested if the applicable job duties are performed by an occupational classification contained in the SCA Directory and listed in the wage determination.
- ◇ Job definitions included in the Directory may not be applicable when the service contract is governed by section 4(c) of the SCA.

OBTAINING SCA WAGE DETERMINATIONS (29 C.F.R. § 4.4)

Responsibility of Contracting Agency to Obtain SCA Wage Determinations

- ◇ Contracting agencies have the initial responsibility for determining whether a proposed contract may be subject to the SCA and, if the proposed contract is covered by the SCA and exceeds \$2,500, to obtain and incorporate the appropriate wage determination(s) in covered contracts.

Obtaining SCA Wage Determinations – Two Methods

- ◇ SCA wage determinations can now be obtained from the WDOL website (<http://www.wdol.gov>) by the contracting agency in two different ways. The contracting agency has total discretion as to which method to follow. *See* Final Rule “Service Contract Act Wage Determination Online Request Process” published in the *Federal Register* on August 26, 2005, 70 Fed. Reg. 50888-50899).
- ◇ First Method – “e98” process pursuant to 29 C.F.R. § 4.4(b).
 - ◇◇ For each proposed contract exceeding \$2,500, the contracting agency may request SCA wage determinations from the WHD by electronically submitting an “e98” that describes the proposed contract and occupations expected to be employed on the contract. An “e98” must be submitted for each anticipated contract. The wage determination(s) issued in response to each request must be incorporated into the bid specifications and the resultant contract.
 - ◇◇ The “e98” requires the requesting agency official to specify the:
 - ◇◇◇ Relevant procurement dates.
 - ◇◇◇ County and state where the work will be performed.
 - ◇◇◇ Type of services to be performed under the contract.
 - ◇◇◇ Occupational classes and the number of service employees who will perform work on the contract. Occupational titles and corresponding code numbers found in the *SCA Directory of Occupations* should be used where applicable. A detailed discussion of the *SCA Directory of Occupations* is provided in this chapter of the resource book. For occupations not

contained in the Directory, an appropriate job title and job description must be provided.

- ◇◇ Hourly rates or federal grade levels that would be paid if such workers were federal direct hires.
- ◇◇ Information on the incumbent contract, *i.e.*, incumbent contractor, previous wage determination, and any CBA that may apply.
- ◇◇ A correct e-mail address, as most responses will be provided via e-mail.
- ◇◇ If the incumbent contractor has furnished substantially the same services in the same locality through the use of service employees whose wages and fringe benefits are the subject of one or more CBAs, the contracting agency should reference the union and CBA on the “e98” and await a response from the WHD for instructions on how to submit the CBA. Upon receipt of the CBA, WHD will provide an e-mail response to the contracting agency attaching a copy of a section 4(c) wage determination based on the CBA.
- ◇◇ The “e98” system automatically provides an amended response if the applicable wage determination is revised, and such amended response will be provided via e-mail and will be deemed to be received by the contracting agency.
- ◇◇ A revised “e98” should be submitted by the contracting agency if the bid opening date, or if contract commencement, is delayed by more than 60 days.
- ◇ Second Method – WDOL process pursuant to 29 C.F.R. § 4.4(c).
 - ◇◇ Contracting agencies may use the WDOL website to select the proper wage determination for a proposed contract. The WDOL website provides assistance to the contracting agency in the selection of the correct wage determination.
 - ◇◇ The contracting agency is fully responsible for selecting the correct wage determination. If the DOL determines that the correct SCA wage determination was not included in a covered contract, the contracting agency shall amend the contract within 30 days of DOL notice to incorporate the correct wage determination as determined by the WHD. 29 C.F.R. § 4.5(c)(2).
 - ◇◇ If an applicable prevailing wage determination is not available on the WDOL website, the contracting agency must submit an “e98.”

- ◇◇ The contracting agency shall monitor the WDOL website to determine whether the applicable wage determination has been revised. Revisions published on the WDOL website or otherwise communicated to the contracting officer are applicable and to be included in the contract under the following time frames:
 - ◇◇◇ For advertised procurement – 10 days before the date set for bid opening, unless the contracting agency determines there is not reasonable time to notify bidders of the revision within 10 days;
 - ◇◇◇ For negotiated procurement – before the award date if start of performance is within 30 days, or 10 days before commencement of the contract if start of performance is beyond 30 days.
- ◇◇ If the incumbent contractor furnished substantially the same services in the same locality through the use of service employees whose wages and fringe benefits are the subject of one or more CBAs, the contracting agency may prepare a wage determination referencing and incorporate a complete copy of the CBA(s) into the successor contract action. A copy of the CBA(s) need not be submitted to the WHD unless requested.
- ◇ The general public may also access the WDOL website at no cost to obtain available wage determinations for **INFORMATION PURPOSES ONLY**. The contracting agency is required to incorporate the applicable wage determination(s) into the contract. Thus, *only* those wage determinations inserted into the contract at award, or by modification, are applicable.

Multi-Year Procurement

- ◇ In the case of multi-year contracts subject to annual fiscal appropriations of Congress, the contracting agency must obtain a new wage determination each year for use on the anniversary date of the contract. 29 C.F.R. §§ 4.4(a)(1) and 4.145(a).
- ◇ If the multi-year contract is not subject to annual fiscal appropriations, the contracting agency must obtain a new wage determination and apply it to the contract at least every two years, on the biennial anniversary date of the contract. SCA§ 4(d), recodified at 41 U.S.C. § 6707(d), and 29 C.F.R. § 4.145(b).

Two-Step Procurements

- ◇ When the place of performance of a contract is unknown at the time of solicitation, the contracting agency should follow the two-step procedure, as required by 29 C.F.R. § 4.4(a)(3):

- ◇◇ In the first step, the contracting agency will issue an initial solicitation with no wage determination, from which it identifies all interested bidders and their possible places of performance.
- ◇◇ In the second step, the contracting agency will obtain separate wage determination(s) for the various localit(ies) identified in the first step, to be incorporated in the solicitation prior to the submission of final bids. The appropriate wage determination(s) applicable to the geographic locations identified by the successful bidder must be incorporated in the resultant contract and must be observed, regardless of whether the contractor subsequently changes the place(s) of contract performances.

Using the WDOL Website to Obtain SCA Wage Determinations and to Submit “e98’s”

- ◇ To facilitate contracting officers selecting the appropriate SCA wage determination, the WDOL website provides a “decision tree” that leads the requester through a series of questions. Based upon the responses to these questions, the WDOL site will either identify an SCA wage determination or direct the requester to submit an e98.
- ◇ A direct link to the e98 site is provided. The WDOL site gives the requester the option of going directly to the e98 site without going through the “decision tree” wage determination selection process. If a contracting officer has any question regarding the selection of the proper SCA wage determination, the WDOL site directs the contracting officer to the e98.
- ◇ The WDOL website has a “User’s Guide” that includes a general overview and sections that focus on helpful information on SCA and DBA use of the website.
- ◇ As discussed previously, and as clearly indicated on the WDOL website, compliance with the decision tree selection process and the guidance provided by the User’s Guide does not relieve the contracting officer or other program user of the requirement to carefully review the contract or solicitation, the FAR (48 C.F.R., including any relevant FAR Supplement or other Federal agency acquisition regulations), and the DOL regulations related to these actions.
- ◇ To obtain the latest SCA wage determinations, click on the “Selecting SCA WDs” option. Respond to each question beginning with the state and county until you have obtained the appropriate wage determination.

- ◇◇ For each area DOL issues two “standard” prevailing wage determinations that are identical except for the fringe benefit requirements. Because the fringe benefit compliance standards are different, the two types of prevailing wage determinations are not interchangeable.
- ◇◇◇ **ODD-NUMBERED** wage determinations (*e.g.*, 2007-2011) apply to most SCA contracts. These wage determinations require the contractor to satisfy the health and welfare fringe benefit requirements on a “fixed cost” per employee basis. Compliance must be calculated using all hours paid for (including paid time off) up to 40 hours a week, 2080 hours a year, and the contractor must meet the minimum fringe benefit requirement as specified by the wage determination for each individual employee.
- ◇◇◇ **EVEN-NUMBERED** wage determinations (*e.g.*, 2005-2012) are to be applied only to contracts where an even-numbered SCA wage determination applied to the preceding contract of the same federal agency for the same services in the same location. These wage determinations allow the contractor to comply with the fringe benefit requirement on an “average cost” basis, as discussed more fully in the “SCA Compliance Principles” chapter of this resource book.
- ◇◇ DOL issues “Non-Standard” SCA wage determinations to reflect prevailing wages and benefits in specific service industries in designated localities. In the WDOL SCA wage determination selection process, the user will be asked to determine if the contract services are “non-standard” as designated by DOL.
- ◇◇◇ The menu will provide a drop-down listing of such designated Non-Standard services; the “Appendix A: SCA Non-Standard WDs” at <http://www.wdol.gov/usrguide/appdxa.html> also lists non-standard services.
- ◇◇◇ “Non-Standard” wage determinations may not be used in contracts for services other than those specified in the “Non-Standard” wage determination description.
- ◇◇ If a contracting officer has determined that neither a “standard” wage determination nor a “non-standard” wage determination available from the WDOL website is appropriate for a particular contract action, the contracting officer should request an appropriate “contract-specific” wage determination from DOL using the e98 system.

- ◇◇ An example of a “contract-specific” wage determination is for a sole-source contract with a county, state or municipality where wages and benefits are already established. The SCA wage determination applicable to such a contract will reflect the rates established by the sole-source contractor. (Note that not all sole-source contract actions are subject to a “contract-specific” wage determination.)

- ◇◇ DOL issues wage determinations based on the provisions of section 4(c) of the SCA (as reflected in 41 U.S.C. § 6707(c) and as required pursuant to 29 C.F.R. §§ 4.1(b) and 4.163)) when certain criteria have been met. “4(c)” wage determinations recognize the wages and fringe benefits contained in a predecessor contractor’s CBA as the wage determination requirements for the successor contract period of performance. A “4(c)” wage determination can be created by a federal agency using the WDOL website, as described below, and may be obtained by interested parties from the contracting agency.

Examples of the WDOL “SELECTING SCA WDs” Process to Select and Obtain SCA Wage Determinations

- ◇ Following are examples that show the sequences of questions and answers that enable the wage determination selection system to provide users with appropriate SCA wage determinations. The sequences are shown in these examples as they appear in the WDOL system for obtaining SCA wage determinations. Related “Wage Determination Sample Materials” are provided later in the “SCA Wage Determinations” chapter of this resource book.

- ◇◇ The first example shows a common sequence of “**YES**” and “**NO**” responses that take the WDOL user to a standard SCA wage determination.

- ◇◇ The second shows a sequence of “**YES**” and “**NO**” responses involved in obtaining a non-standard wage determination.

- ◇◇ The third shows the sequence for a “4(c)” wage determination.

- ◇ Following these examples is a copy of the blank e98 request form.

Example 1 – Standard SCA wage determination

Selecting SCA WDs

Select state & county where the services are to be performed then click Continue.

If you do not find the locality listed, please request a WD by [e-98](#).

[WDOL User's Guide: Sec. B.5.a](#)

Texas Bexar Continue

Were these services previously performed at this locality under an SCA-Covered contract?

Yes No --> **YES**

Are any of the employees performing work subject to a Collective Bargaining Agreement (CBA)?

[WDOL User's Guide: Sec. B.5.b](#)

Yes No --> **NO**

Are the contract services to be performed listed below as Non-Standard Services?

If so, high-light the service by clicking on it, and click "Yes". If the contract services are not listed below, then click "No".

Aerial Photographers/Seeding/Spraying Services
Aircraft Services (Large Multi-Engine Aircraft including CNET Postal Contracts)
Auto Concession Services
Baggage Inspection Services

Yes No --> **NO**

Description:

To see a description of each Non-Standard Service, please select it from the above drop-down list.

[Empty description box]

If the contract services are not listed as Non-Standard, or covered by the classifications listed on the Standard WD, the contracting officer must use the DOL [e-98](#) to request an appropriate SCA WD.

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Were these services previously performed under an SCA wage determination that ends in an even number? Example: 1994-2104; or 1994-2114. [WDOL User's Guide: Sec. B.5.a.\(1\)](#)

--> **NO**

The Wage Determination you have requested is below.
Please scroll down to review the WD carefully to ensure that it is appropriate for the specific contract action.

WD 05-2521 (Rev. -4) was first posted on www.wdol.gov on 10/02/2007

 REGISTER OF WAGE DETERMINATIONS UNDER | U.S. DEPARTMENT OF LABOR
 THE SERVICE CONTRACT ACT | EMPLOYMENT STANDARDS ADMINISTRAT
 By direction of the Secretary of Labor | WAGE AND HOUR DIVISION
 WASHINGTON D.C. 20210
 |
 | Wage Determination No. : 2005-2521
 William W. Gross Division of | Revision No. : 4
 Director Wage Determinations | Date Of Revision: 09/26/2007
 State: Texas

[Printer Friendly Version](#)

[WDOL User's Guide Sec. B.6.f](#)

By clicking on “Printer Friendly Version,” the user can obtain and print out the wage determination.

NOTE: Wage Determination No. 2005-2521, Revision No. 4, dated September 26, 2007, was generated by WDOL in response to the answers, shown above. In response to the question “Were these services previously performed under an SCA wage determination that ends in an even number?” the user answered “**NO.**” Therefore, the WDOL wage determination selection system provided an even numbered standard wage determination for the State/County identified by the user. As discussed previously, that wage determination has a “fixed cost” per employee H&W fringe benefit requirement.

If the user had instead answered the same question “**YES**” the WDOL wage determination selection process would have provided, instead, Wage Determination NO. 2005-2522, Revision No. 5, dated September 26, 2007. The classifications and

wage requirements listed are identical. The difference is that Wage Determination NO. 2005-2522, issued on the same date for the same State/County has an “average cost” H&W fringe benefit requirement, for which the method of achieving compliance may be very different, as explained elsewhere in this chapter and in the chapter of this resource book entitled “SCA Compliance Principles.”

This illustrates the importance of users responding carefully to the questions in the WDOL decision tree for obtaining SCA wage determinations for use in SCA contracts.

The screen that would have led to the even-numbered wage determination – Wage Determination No 2005-2522, Revision 5, also dated September 26, 2007, for the same area was:

The Wage Determination you have requested is below.
Please scroll down to review the WD carefully to ensure that it is appropriate for the specific contract action.

WD 05-2522 (Rev. -5) was first posted on www.wdol.gov on 10/02/2007

 REGISTER OF WAGE DETERMINATIONS UNDER | U.S. DEPARTMENT OF LABOR
 THE SERVICE CONTRACT ACT | EMPLOYMENT STANDARDS ADMINISTRATION
 By direction of the Secretary of Labor | WAGE AND HOUR DIVISION
 WASHINGTON D.C. 20210
 |
 | Wage Determination No.: 2005-2522
 William W. Gross Division of | Revision No.: 5
 Director Wage Determinations | Date Of Revision: 09/26/2007
 State: Texas

[Printer Friendly Version](#)

[Sign Up for Alert Service](#) [Find Another WD](#) [Exit](#)

[WDOL User's Guide Sec. B.6.f](#)

See the H&W provisions in “Wage Determination Sample Materials” provided below.

Example 2 – Non-standard SCA wage determination

Selecting SCA WDs

Select state & county where the services are to be performed then click Continue.
If you do not find the locality listed, please request a WD by [e-98](#).

[WDOL User's Guide: Sec. B.5.a](#)

District of Columbia Statewide Continue

Were these services previously performed at this locality under an SCA-Covered contract?

Yes No --> **YES**

Are any of the employees performing work subject to a Collective Bargaining Agreement (CBA)? [WDOL User's Guide: Sec. B.5.b](#).

Yes No --> **NO**

Are the contract services to be performed listed below as Non-Standard Services?
If so, high-light the service by clicking on it, and click "Yes". If the contract services are not listed below then click "No".

Residential and Halfway House Services
River Transportation
Towing and Tender
Vessels

Yes No --> **YES**

Description:

To see a description of each Non-Standard Service, please select it from the above drop-down list.

This WD may be used only for contracts for moving from one building to another or

If the contract services are not listed as Non-Standard, or covered by the classifications listed on the Standard WD, the contracting officer must use the DOL [e-98](#) to request an appropriate SCA WD.

The Wage Determination you have requested is below.
Please scroll down to review the WD carefully to ensure that it is appropriate for the specific contract action.

WD 95-0819 (Rev.-20) was first posted on www.wdol.gov on 06/05/2007
FL/HH/MS

REGISTER OF WAGE DETERMINATIONS UNDER U.S. DEPARTMENT OF LABOR
THE SERVICE CONTRACT ACT EMPLOYMENT STANDARDS ADMINISTRATIVE
By direction of the Secretary of Labor WAGE AND HOUR DIVISION
WASHINGTON, D.C. 20210

William W. Gross Division of Wage Wage Determination No: 1995-0819
Director Determinations Revision No: 20
Date Of Revision: 05/29/2007

States: District of Columbia, Maryland, Virginia
Area: District of Columbia Statewide

[Printer Friendly Version](#)

[Sign Up for Alert Service](#)
[Find Another WD](#)
[Exit](#)

[WDOL User's Guide Sec. B.6.f](#)

See WD No. 1995-1895 in the “Wage Determination Sample Materials” provided below.

Example 3 – 4(c) wage determination

Selecting SCA WDs

Select state & county where the services are to be performed then click Continue.
If you do not find the locality listed, please request a WD by [e-98](#).

[WDOL User's Guide: Sec. B.5.a](#)

Texas

Bexar

Continue

Were these services previously performed at this locality under an SCA-Covered contract?

Yes

No

--> **YES**

Are any of the employees performing work subject to a Collective Bargaining Agreement (CBA)? [WDOL User's Guide: Sec. B.5.b.](#)

Yes

No

--> **YES**

Is the WD in the current contract based on a Collective Bargaining Agreement (CBA)?

--> **YES**

If you have previously created a Collective Bargaining Agreement (CBA) WD applicable to this contract using this system, click Get CBA WD. If not click Continue to create a new CBA WD.

--> **Continue**

The Agency Contracting Officer should complete the following form in order to obtain a Collective Bargaining Agreement (CBA) WD for an SCA-applicable collective bargaining agreement. The Contracting Officer must prepare a separate CBA WD for each covered CBA applicable to a contract action (including separate CBA WDs for prime and subcontractors) [WDOL User's Guide Sec. B.5.b.\(2\)](#)

NOTE: The format for a “4(c)” WD is shown in the “Wage Determination Sample Materials” at the end of this chapter of this resource book.

**U.S. DEPARTMENT OF LABOR
PREVAILING WAGE RESOURCE BOOK**

**SCA
WAGE DETERMINATIONS**

e98

 <p>STANDARD FORM 98 ELECTRONIC VERSION U.S. DEPARTMENT OF LABOR EMPLOYMENT STANDARDS ADMINISTRATION</p>	<p>NOTICE OF INTENTION TO MAKE A SERVICE CONTRACT AND RESPONSE TO NOTICE</p> <p>Click Here For Help With This Form</p>	<p>Rev. Feb. 1973 1. Notice No. TBA</p>
<p>Procurement Type If Sole Source type of procurement, name of organization agreement is with</p> <div style="display: flex; justify-content: space-between;"> <div style="width: 25%;"> <input style="width: 95%;" type="text"/> </div> <div style="width: 70%;"> <input style="width: 98%;" type="text"/> </div> </div>		
<p>2. Estimated Solicitation Date</p> <input type="text" value="mm/dd/yyyy"/>	<p>3. Estimated Date Bids or Proposals to be Opened or Negotiations Begun</p> <input type="text" value="mm/dd/yyyy"/>	<p>4. Date Contract Performance to Begin</p> <input type="text" value="mm/dd/yyyy"/>
<p>5. Places of Performance</p> <div style="display: flex; justify-content: space-between; align-items: flex-start;"> <div style="width: 20%;"> <p>State</p> <input type="text" value="None"/> </div> <div style="width: 30%;"> <p>Counties</p> <input type="text" value="-----"/> </div> <div style="width: 10%; text-align: center;"> <p>ADD ▶</p> <p>◀ REMOVE</p> </div> <div style="width: 30%;"> <p>Counties Selected</p> <div style="border: 1px solid black; height: 30px; width: 95%;"></div> </div> </div>		
<p>6. Services to be Performed</p> <input type="text" value="Other"/>	<p>Description of Services to be Performed</p> <div style="border: 1px solid black; height: 50px; width: 98%;"></div>	
<p>7. Information about Performance</p> <p>A. <input type="checkbox"/> Services now performed by contractors B. <input type="checkbox"/> Services now performed by Federal employees C. <input type="checkbox"/> Services not presently being performed</p>		
<p>If box A in item 7 is marked, complete item 8 as applicable.</p> <p>8a. Name and Address of Incumbent Contractor ADD ADDITIONAL CONTRACTOR</p> <p>Number of Contractors: <input type="text" value="0"/></p> <hr/> <p>8b. Year and Sequence Number of any wage determinations in incumbent's contracts</p> <p>Number of Wage Determinations: <input type="text" value="0"/> ADD WAGE DETERMINATION</p> <hr/> <p>8c. Name of Union if services are being performed under collective bargaining agreements</p> <p>Mail or email copies of current applicable collective bargaining agreements (CBA) to DOL (Click Here for CBA Mailing Directions).</p> <p>Number of Unions: <input type="text" value="0"/> ADD ADDITIONAL UNION</p>		
<p>9. Official Submitting Notice</p>		<p>10. Department, Agency, Bureau, or Division</p>

**U.S. DEPARTMENT OF LABOR
PREVAILING WAGE RESOURCE BOOK**

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<p>First Name: <input type="text"/></p> <p>Last Name: <input type="text"/></p> <p>Email: <input type="text"/></p> <p>Phone: <input type="text"/> Ext: <input type="text"/></p> <p>Fax: <input type="text"/></p> <p>Date: 5/18/2013</p>	<div style="border: 1px solid black; padding: 2px; margin-bottom: 5px;"><input type="text"/></div> <p>11. Name and address of contact person</p> <p>Name: <input type="text"/></p> <p>Address: <input type="text"/></p> <p>City: <input type="text"/></p> <p>State: <input type="text"/> Zip: <input type="text"/></p>
<p>Standard Occupations ADD STANDARD OCCUPATION</p> <p>Number of Standard Occupations: <input type="text" value="0"/></p>	
<p>Non Standard Occupations ADD NON-STANDARD OCCUPATION</p> <p>Number of Non-Standard Occupations: <input type="text" value="0"/></p>	
<p>15. Comments</p> <div style="border: 1px solid black; height: 60px; width: 100%;"></div>	
<p>CLEAR FORM PRINT PROCEED TO CONFIRMATION PAGE</p>	

For help with the SF-98 Form
please contact the Wage and Hour Division at
(202) 515-2666.

Help Desk is open Monday through Friday, 8:00 AM until 5:00 PM EST.

CONTENTS OF AN SCA WAGE DETERMINATION

- ◇ Each wage determination developed and issued by the WHD contains the “Register of Wage Determinations” which is the official documentation of issuance by DOL.
- ◇ **Standard prevailing wage determinations** are most frequently issued and applied to SCA-covered contracts. These wage determinations contain the following types of information:
 - ◇◇ **Wage Determination Number** – is generally eight digits, that start with the year a new edition of the SCA Directory of Occupations is issued. For example, 2005-2xxx or 2005-3xxx (previously issued using 1994-2xxx or 1994-3xxx). Note: Two identical wage determinations, except with respect to fringe benefits, are issued for each locality.
 - ◇◇◇ **Odd-number** wage determinations, when incorporated in a covered contract, require compliance with the health and welfare fringe benefits on a “fixed cost” per employee basis. These apply most frequently.
 - ◇◇◇ **Even-number** wage determinations, when incorporated in a covered contract, require compliance with the health and welfare fringe benefits on an “average cost” basis. Since June 1997, the WHD has issued such wage determinations only for successor contracts. Thus, agencies should use even-numbered wage determinations only when a bid solicitation (or RFP) succeeds a contract that previously contained the “average cost” fringe benefit compliance requirement.
 - ◇◇◇ See the “SCA Compliance Principles” chapter of this resource book for information on how to comply with each of these fringe benefit requirements.
- ◇◇ **Revision No.** – is assigned when the wage determination is modified.
- ◇◇ **Date of Revision** – the date the wage determination was issued by the WHD. This date does not necessarily reflect the effective date of the wage determination in any particular contract.
- ◇◇ **Locality** – each wage determination will specify its geographic scope, usually by state and county.

- ◇◇ **Occupations** – standard wage determinations list approximately 300 occupations in 21 broad occupational categories (*e.g.*, “Administrative Support and Clerical Occupations”) that are contained in the *SCA Directory of Occupations*.
- ◇◇ **Wage Rates** – are specified for each occupation listed in the wage determination and are the minimum rates that must be paid to service employees working on the contract.
 - ◇◇◇ The wage rates and fringe benefits listed in “prevailing in the locality” wage determinations are based on the wages and fringe benefits determined to prevail in the locality covered by the wage determination. The best available information is used to determine what is prevailing, while giving due consideration to federal wage rates that would apply if the workers were federal employees.
- ◇◇ **Health and Welfare Fringe Benefits** – required by the wage determination for all occupations are specified in a footnote that follows the schedule of wage rates for the various occupations listed in the wage determination.
 - ◇◇◇ The footnote for the “**Fixed cost**” per employee health and welfare fringe benefit requirement is a single line specifying hourly, weekly, and monthly contribution amounts. For example:

HEALTH & WELFARE: \$3.81 per hour or \$152.40 per week or \$660.40 per month.
 - ◇◇◇ The footnote for the “**Average cost**” health and welfare fringe benefit requirement is a brief paragraph listing types of benefits and an hourly contribution amount. For example:

HEALTH & WELFARE: Life, accident, and health insurance plans, sick leave, pension plans, civic and personal leave, severance pay, and savings and thrift plans. Minimum employer contributions must cost an average of \$3.71 per hour computed on the basis of all hours worked by service employees employed on the contract.
- ◇◇ **Paid Vacation Benefits** – are specified in a footnote following the health and welfare fringe benefits footnote. Vacation benefits vary from locality

to locality and by total length of service of the service employee with the current contractor and any predecessor contractor(s).

- ◇◇ **Paid Holiday Benefits** – are specified in a footnote following the vacation benefits footnote.
- ◇◇ Remaining footnotes include:
 - ◇◇◇ Specific occupational footnotes;
 - ◇◇◇ Hazardous Pay Differential;
 - ◇◇◇ Uniform Allowance;
 - ◇◇◇ SCA Directory, which edition applies and how to obtain a copy; and,
 - ◇◇◇ Request for Authorization of Additional Classification and Wage Rate (SF 1444)
- ◇ **“Non-standard” prevailing wage determinations** – have most of the same information as the standard wage determinations.
 - ◇◇ Non-standard wage determinations are issued for specific contracts or types of contracts. They may be based on different data sources that may be industry specific and they often cover different geographic areas that may be either narrower or broader than the standard wage determinations for the area.
 - ◇◇◇ For example, a non-standard wage determination may apply only to a specific contract or federal facility rather than the broader geographic area listed on the standard wage determination. Conversely, the non-standard wage determination may apply statewide or regionwide to particular classification(s).
 - ◇◇ Non-standard wage determinations have numbers that reflect the year the wage determination was first issued. For example, a non-standard wage determination for “Forestry Services” covers the State of Alabama and carries a wage determination number of 2002-0147 Revision No. 20
- ◇ **Section 4(c) “Successorship” Wage Determinations** – reflect the predecessor contractor’s CBA wage rates and fringe benefits and are issued only when certain criteria are met.

- ◇◇ These wage determinations are “short form,” *i.e.*, they identify the specific contract, locality, the parties signatory to the CBA, and a brief statement regarding the application of section 4(c) to the contract.
- ◇◇ If the wage determination is issued by DOL, it will include an eight digit wage determination number starting with the year of first issuance (*e.g.*, 2007-0248 (Revision No. 1)). If the “successorship” wage determination is issued by the contracting agency via the wdol.gov website, it will include the letters “CBA” in the wage determination number, and the WHD will not have a copy of it on file.
- ◇◇ The wage and fringe benefits required under “4(c)” CBA “successorship” wage determinations are based on the wage rates and fringe benefits, including any accrued and prospective increases, contained in a predecessor or incumbent contractor’s CBA.
- ◇◇ *See* SCA § 4(c), 41 U.S.C. § 6707(c), and 29 C.F.R. §§ 4.1(b) and 4.163.
- ◇ **Note: Compliance with the SCA is determined by the wage determination contained in the federal service contract.**

WAGE DETERMINATION SAMPLE MATERIALS

Excerpts from WD Nos. 2005-2521 & 2005-2522

(1ST page and last 3 pages of each, showing footnotes; H&W different)

&

WD No. 95-0819 (Rev.-20)

(An example of a WD for non-standard classifications)

&

“4(c)” WD Format

**U.S. DEPARTMENT OF LABOR
PREVAILING WAGE RESOURCE BOOK**

**SCA
WAGE DETERMINATIONS**

WD 05-2521 (Rev.-4) was first posted on www.wdol.gov on 10/02/2007

REGISTER OF WAGE DETERMINATIONS UNDER
THE SERVICE CONTRACT ACT
By direction of the Secretary of Labor

U.S. DEPARTMENT OF LABOR
EMPLOYMENT STANDARDS ADMINISTRATION
WAGE AND HOUR DIVISION
WASHINGTON D.C. 20210

William W.Gross Division of
Director Wage Determinations

Wage Determination No.: 2005-2521
Revision No.: 4
Date Of Revision: 09/26/2007

State: Texas

Area: Texas Counties of Atascosa, Bandera, Bexar, Comal, De Witt, Edwards,
Gillespie, Gonzales, Guadalupe, Karnes, Kendall, Kerr, Kinney, McMullen, Medina,
Real, Uvalde, Val Verde, Wilson

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

OCCUPATION CODE - TITLE	MINIMUM WAGE RATE
01000 - Administrative Support And Clerical Occupations	
01011 - Accounting Clerk I	12.58
01012 - Accounting Clerk II	14.11
01013 - Accounting Clerk III	15.78
01020 - Administrative Assistant	19.97
01040 - Court Reporter	16.64
01051 - Data Entry Operator I	10.73
01052 - Data Entry Operator II	11.72
01060 - Dispatcher, Motor Vehicle	15.18
01070 - Document Preparation Clerk	12.10
01090 - Duplicating Machine Operator	12.10
01111 - General Clerk I	10.45
01112 - General Clerk II	12.10
01113 - General Clerk III	15.45
01120 - Housing Referral Assistant	18.16
01141 - Messenger Courier	9.73
01191 - Order Clerk I	10.97
01192 - Order Clerk II	12.73
01261 - Personnel Assistant (Employment) I	14.73
01262 - Personnel Assistant (Employment) II	16.48
01263 - Personnel Assistant (Employment) III	18.38
01270 - Production Control Clerk	16.98
01280 - Receptionist	9.83
01290 - Rental Clerk	13.43
01300 - Scheduler, Maintenance	14.56
01311 - Secretary I	14.56
01312 - Secretary II	16.29
01313 - Secretary III	18.16
01320 - Service Order Dispatcher	13.44
01410 - Supply Technician	19.97
01420 - Survey Worker	15.14
01531 - Travel Clerk I	11.01
01532 - Travel Clerk II	11.72
01533 - Travel Clerk III	12.31
01611 - Word Processor I	12.30

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31290 - Shuttle Bus Driver	12.89
31310 - Taxi Driver	10.81
31361 - Truckdriver, Light	12.89
31362 - Truckdriver, Medium	13.70
31363 - Truckdriver, Heavy	16.02
31364 - Truckdriver, Tractor-Trailer	16.02
99000 - Miscellaneous Occupations	
99030 - Cashier	8.58
99050 - Desk Clerk	8.80
99095 - Embalmer	16.85
99251 - Laboratory Animal Caretaker I	9.59
99252 - Laboratory Animal Caretaker II	10.32
99310 - Mortician	22.43
99410 - Pest Controller	14.42
99510 - Photofinishing Worker	10.76
99710 - Recycling Laborer	10.30
99711 - Recycling Specialist	11.14
99730 - Refuse Collector	9.36
99810 - Sales Clerk	10.73
99820 - School Crossing Guard	10.46
99830 - Survey Party Chief	16.24
99831 - Surveying Aide	11.32
99832 - Surveying Technician	13.52
99840 - Vending Machine Attendant	8.88
99841 - Vending Machine Repairer	10.58
99842 - Vending Machine Repairer Helper	8.88

ALL OCCUPATIONS LISTED ABOVE RECEIVE THE FOLLOWING BENEFITS:

HEALTH & WELFARE: \$3.16 per hour or \$126.40 per week or \$547.73 per month

VACATION: 2 weeks paid vacation after 1 year of service with a contractor or successor; 3 weeks after 5 years, and 4 weeks after 15 years. Length of service includes the whole span of continuous service with the present contractor or successor, wherever employed, and with the predecessor contractors in the performance of similar work at the same Federal facility. (Reg. 29 CFR 4.173)

HOLIDAYS: A minimum of ten paid holidays per year, New Year's Day, Martin Luther King Jr's Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, and Christmas Day. (A contractor may substitute for any of the named holidays another day off with pay in accordance with a plan communicated to the employees involved.) (See 29 CFR 4174)

THE OCCUPATIONS WHICH HAVE PARENTHESES AFTER THEM RECEIVE THE FOLLOWING BENEFITS (as numbered):

- 1) Does not apply to employees employed in a bona fide executive, administrative, or professional capacity as defined and delineated in 29 CFR 541. (See CFR 4.156)
- 2) APPLICABLE TO AIR TRAFFIC CONTROLLERS ONLY - NIGHT DIFFERENTIAL: An employee is entitled to pay for all work performed between the hours of 6:00 P.M. and 6:00 A.M. at the rate of basic pay plus a night pay differential amounting to 10 percent of the rate of basic pay.
- 3) AIR TRAFFIC CONTROLLERS AND WEATHER OBSERVERS - NIGHT PAY & SUNDAY PAY: If you work at night as part of a regular tour of duty, you will earn a night differential and receive an additional 10% of basic pay for any hours worked between 6pm and 6am.

**U.S. DEPARTMENT OF LABOR
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WAGE DETERMINATIONS**

If you are a full-time employed (40 hours a week) and Sunday is part of your regularly scheduled workweek, you are paid at your rate of basic pay plus a Sunday premium of 25% of your basic rate for each hour of Sunday work which is not overtime (i.e. occasional work on Sunday outside the normal tour of duty is considered overtime work).

HAZARDOUS PAY DIFFERENTIAL: An 8 percent differential is applicable to employees employed in a position that represents a high degree of hazard when working with or in close proximity to ordnance, explosives, and incendiary materials. This includes work such as screening, blending, dying, mixing, and pressing of sensitive ordnance, explosives, and pyrotechnic compositions such as lead azide, black powder and photoflash powder. All dry-house activities involving propellants or explosives. Demilitarization, modification, renovation, demolition, and maintenance operations on sensitive ordnance, explosives and incendiary materials. All operations involving regrading and cleaning of artillery ranges.

A 4 percent differential is applicable to employees employed in a position that represents a low degree of hazard when working with, or in close proximity to ordnance, (or employees possibly adjacent to) explosives and incendiary materials which involves potential injury such as laceration of hands, face, or arms of the employee engaged in the operation, irritation of the skin, minor burns and the like; minimal damage to immediate or adjacent work area or equipment being used. All operations involving, unloading, storage, and hauling of ordnance, explosive, and incendiary ordnance material other than small arms ammunition. These differentials are only applicable to work that has been specifically designated by the agency for ordnance, explosives, and incendiary material differential pay.

**** UNIFORM ALLOWANCE ****

If employees are required to wear uniforms in the performance of this contract (either by the terms of the Government contract, by the employer, by the state or local law, etc.), the cost of furnishing such uniforms and maintaining (by laundering or dry cleaning) such uniforms is an expense that may not be borne by an employee where such cost reduces the hourly rate below that required by the wage determination. The Department of Labor will accept payment in accordance with the following standards as compliance:

The contractor or subcontractor is required to furnish all employees with an adequate number of uniforms without cost or to reimburse employees for the actual cost of the uniforms. In addition, where uniform cleaning and maintenance is made the responsibility of the employee, all contractors and subcontractors subject to this wage determination shall (in the absence of a bona fide collective bargaining agreement providing for a different amount, or the furnishing of contrary affirmative proof as to the actual cost), reimburse all employees for such cleaning and maintenance at a rate of \$3.35 per week (or \$.67 cents per day). However, in those instances where the uniforms furnished are made of "wash and wear" materials, may be routinely washed and dried with other personal garments, and do not require any special treatment such as dry cleaning, daily washing, or commercial laundering in order to meet the cleanliness or appearance standards set by the terms of the Government contract, by the contractor, by law, or by the nature of the work, there is no requirement that employees be reimbursed for uniform maintenance costs.

The duties of employees under job titles listed are those described in the "Service Contract Act Directory of Occupations", Fifth Edition, April 2006, unless otherwise indicated. Copies of the Directory are available on the Internet. A links to the Directory may be found on the WHD home page at <http://www.dol.gov/whd/> or through the Wage Determinations On-Line (WDOL) Web site at <http://wdol.gov/>.

REQUEST FOR AUTHORIZATION OF ADDITIONAL CLASSIFICATION AND WAGE RATE {Standard Form

**U.S. DEPARTMENT OF LABOR
PREVAILING WAGE RESOURCE BOOK****SCA
WAGE DETERMINATIONS**

1444 (SF 1444)}

Conformance Process:

The contracting officer shall require that any class of service employee which is not listed herein and which is to be employed under the contract (i.e., the work to be performed is not performed by any classification listed in the wage determination), be classified by the contractor so as to provide a reasonable relationship (i.e., appropriate level of skill comparison) between such unlisted classifications and the classifications listed in the wage determination. Such conformed classes of employees shall be paid the monetary wages and furnished the fringe benefits as are determined. Such conforming process shall be initiated by the contractor prior to the performance of contract work by such unlisted class(es) of employees. The conformed classification, wage rate, and/or fringe benefits shall be retroactive to the commencement date of the contract. {See Section 4.6 (C)(vi)} When multiple wage determinations are included in a contract, a separate SF 1444 should be prepared for each wage determination to which a class(es) is to be conformed.

The process for preparing a conformance request is as follows:

- 1) When preparing the bid, the contractor identifies the need for a conformed (occupation) and computes a proposed rate).
- 2) After contract award, the contractor prepares a written report listing in order (proposed classification title), a Federal grade equivalency (FGE) for each proposed classification), job description), and rationale for proposed wage rate), including information regarding the agreement or disagreement of the authorized representative of the employees involved, or where there is no authorized representative, the employees themselves. This report should be submitted to the contracting officer no later than 30 days after such unlisted class(es) of employees performs any contract work.
- 3) The contracting officer reviews the proposed action and promptly submits a report of the action, together with the agency's recommendations and pertinent information including the position of the contractor and the employees, to the Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, for review. (See section 4.6(b)(2) of Regulations 29 CFR Part 4).
- 4) Within 30 days of receipt, the Wage and Hour Division approves, modifies, or disapproves the action via transmittal to the agency contracting officer, or notifies the contracting officer that additional time will be required to process the request.
- 5) The contracting officer transmits the Wage and Hour decision to the contractor.
- 6) The contractor informs the affected employees.

Information required by the Regulations must be submitted on SF 1444 or bond paper.

When preparing a conformance request, the "Service Contract Act Directory of Occupations" (the Directory) should be used to compare job definitions to insure that duties requested are not performed by a classification already listed in the wage determination. Remember, it is not the job title, but the required tasks that determine whether a class is included in an established wage determination. Conformances may not be used to artificially split, combine, or subdivide classifications listed in the wage determination.

**U.S. DEPARTMENT OF LABOR
PREVAILING WAGE RESOURCE BOOK**

**SCA
WAGE DETERMINATIONS**

WD 05-2522 (Rev.-5) was first posted on www.wdol.gov on 10/02/2007

REGISTER OF WAGE DETERMINATIONS UNDER
THE SERVICE CONTRACT ACT
By direction of the Secretary of Labor

U.S. DEPARTMENT OF LABOR
EMPLOYMENT STANDARDS ADMINISTRATION
WAGE AND HOUR DIVISION
WASHINGTON D.C. 20210

William W.Gross Division of
Director Wage Determinations

Wage Determination No.: 2005-2522
Revision No.: 5
Date Of Revision: 09/26/2007

State: Texas

Area: Texas Counties of Atascosa, Bandera, Bexar, Comal, De Witt, Edwards,
Gillespie, Gonzales, Guadalupe, Karnes, Kendall, Kerr, Kinney, McMullen, Medina,
Real, Uvalde, Val Verde, Wilson

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

OCCUPATION CODE - TITLE	MINIMUM WAGE RATE
01000 - Administrative Support And Clerical Occupations	
01011 - Accounting Clerk I	12.58
01012 - Accounting Clerk II	14.11
01013 - Accounting Clerk III	15.78
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01040 - Court Reporter	16.64
01051 - Data Entry Operator I	10.73
01052 - Data Entry Operator II	11.72
01060 - Dispatcher, Motor Vehicle	15.18
01070 - Document Preparation Clerk	12.10
01090 - Duplicating Machine Operator	12.10
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01113 - General Clerk III	15.45
01120 - Housing Referral Assistant	18.16
01141 - Messenger Courier	9.73
01191 - Order Clerk I	10.97
01192 - Order Clerk II	12.73
01261 - Personnel Assistant (Employment) I	14.73
01262 - Personnel Assistant (Employment) II	16.48
01263 - Personnel Assistant (Employment) III	18.38
01270 - Production Control Clerk	16.98
01280 - Receptionist	9.83
01290 - Rental Clerk	13.43
01300 - Scheduler, Maintenance	14.56
01311 - Secretary I	14.56
01312 - Secretary II	16.29
01313 - Secretary III	18.16
01320 - Service Order Dispatcher	13.44
01410 - Supply Technician	19.97
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01531 - Travel Clerk I	11.04
01532 - Travel Clerk II	11.72
01533 - Travel Clerk III	12.31
01611 - Word Processor I	12.30

**U.S. DEPARTMENT OF LABOR
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99000 - Miscellaneous Occupations	
99030 - Cashier	8.58
99050 - Desk Clerk	8.80
99095 - Embalmer	16.85
99251 - Laboratory Animal Caretaker I	9.59
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99310 - Mortician	22.43
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99820 - School Crossing Guard	10.46
99830 - Survey Party Chief	16.24
99831 - Surveying Aide	11.32
99832 - Surveying Technician	13.52
99840 - Vending Machine Attendant	8.88
99841 - Vending Machine Repairer	10.58
99842 - Vending Machine Repairer Helper	8.88

ALL OCCUPATIONS LISTED ABOVE RECEIVE THE FOLLOWING BENEFITS:

HEALTH & WELFARE: Life, accident, and health insurance plans, sick leave, pension plans, civic and personal leave, severance pay, and savings and thrift plans. Minimum employer contributions costing an average of \$3.16 per hour computed on the basis of all hours worked by service employees employed on the contract.

VACATION: 2 weeks paid vacation after 1 year of service with a contractor or successor; 3 weeks after 5 years, and 4 weeks after 15 years. Length of service includes the whole span of continuous service with the present contractor or successor, wherever employed, and with the predecessor contractors in the performance of similar work at the same Federal facility. (Reg. 29 CFR 4.173)

HOLIDAYS: A minimum of ten paid holidays per year, New Year's Day, Martin Luther King Jr's Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, and Christmas Day. (A contractor may substitute for any of the named holidays another day off with pay in accordance with a plan communicated to the employees involved.) (See 29 CFR 4174)

THE OCCUPATIONS WHICH HAVE PARENTHESES AFTER THEM RECEIVE THE FOLLOWING BENEFITS (as numbered):

- 1) Does not apply to employees employed in a bona fide executive, administrative, or professional capacity as defined and delineated in 29 CFR 541. (See CFR 4.156)
- 2) **APPLICABLE TO AIR TRAFFIC CONTROLLERS ONLY - NIGHT DIFFERENTIAL:** An employee is entitled to pay for all work performed between the hours of 6:00 P.M. and 6:00 A.M. at the rate of basic pay plus a night pay differential amounting to 10 percent of the rate of basic pay.

**U.S. DEPARTMENT OF LABOR
PREVAILING WAGE RESOURCE BOOK**

**SCA
WAGE DETERMINATIONS**

3) AIR TRAFFIC CONTROLLERS AND WEATHER OBSERVERS - NIGHT PAY & SUNDAY PAY: If you work at night as part of a regular tour of duty, you will earn a night differential and receive an additional 10% of basic pay for any hours worked between 6pm and 6am.

If you are a full-time employed (40 hours a week) and Sunday is part of your regularly scheduled workweek, you are paid at your rate of basic pay plus a Sunday premium of 25% of your basic rate for each hour of Sunday work which is not overtime (i.e. occasional work on Sunday outside the normal tour of duty is considered overtime work).

HAZARDOUS PAY DIFFERENTIAL: An 8 percent differential is applicable to employees employed in a position that represents a high degree of hazard when working with or in close proximity to ordnance, explosives, and incendiary materials. This includes work such as screening, blending, dying, mixing, and pressing of sensitive ordnance, explosives, and pyrotechnic compositions such as lead azide, black powder and photoflash powder. All dry-house activities involving propellants or explosives. Demilitarization, modification, renovation, demolition, and maintenance operations on sensitive ordnance, explosives and incendiary materials. All operations involving regrading and cleaning of artillery ranges.

A 4 percent differential is applicable to employees employed in a position that represents a low degree of hazard when working with, or in close proximity to ordnance, (or employees possibly adjacent to) explosives and incendiary materials which involves potential injury such as laceration of hands, face, or arms of the employee engaged in the operation, irritation of the skin, minor burns and the like; minimal damage to immediate or adjacent work area or equipment being used. All operations involving, unloading, storage, and hauling of ordnance, explosive, and incendiary ordnance material other than small arms ammunition. These differentials are only applicable to work that has been specifically designated by the agency for ordnance, explosives, and incendiary material differential pay.

**** UNIFORM ALLOWANCE ****

If employees are required to wear uniforms in the performance of this contract (either by the terms of the Government contract, by the employer, by the state or local law, etc.), the cost of furnishing such uniforms and maintaining (by laundering or dry cleaning) such uniforms is an expense that may not be borne by an employee where such cost reduces the hourly rate below that required by the wage determination. The Department of Labor will accept payment in accordance with the following standards as compliance:

The contractor or subcontractor is required to furnish all employees with an adequate number of uniforms without cost or to reimburse employees for the actual cost of the uniforms. In addition, where uniform cleaning and maintenance is made the responsibility of the employee, all contractors and subcontractors subject to this wage determination shall (in the absence of a bona fide collective bargaining agreement providing for a different amount, or the furnishing of contrary affirmative proof as to the actual cost), reimburse all employees for such cleaning and maintenance at a rate of \$3.35 per week (or \$.67 cents per day). However, in those instances where the uniforms furnished are made of "wash and wear" materials, may be routinely washed and dried with other personal garments, and do not require any special treatment such as dry cleaning, daily washing, or commercial laundering in order to meet the cleanliness or appearance standards set by the terms of the Government contract, by the contractor, by law, or by the nature of the work, there is no requirement that employees be reimbursed for uniform maintenance costs.

The duties of employees under job titles listed are those described in the "Service Contract Act Directory of Occupations", Fifth Edition, April 2006, unless otherwise indicated. Copies of the Directory are available on the Internet. A link to the Directory may be found on the WHD home page at <http://www.dol.gov/whd/> or through the Wage Determinations On-Line (WDOL) Web

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WAGE DETERMINATIONS**

site at <http://wdol.gov/>.

REQUEST FOR AUTHORIZATION OF ADDITIONAL CLASSIFICATION AND WAGE RATE {Standard Form 1444 (SF 1444)}

Conformance Process:

The contracting officer shall require that any class of service employee which is not listed herein and which is to be employed under the contract (i.e., the work to be performed is not performed by any classification listed in the wage determination), be classified by the contractor so as to provide a reasonable relationship (i.e., appropriate level of skill comparison) between such unlisted classifications and the classifications listed in the wage determination. Such conformed classes of employees shall be paid the monetary wages and furnished the fringe benefits as are determined. Such conforming process shall be initiated by the contractor prior to the performance of contract work by such unlisted class(es) of employees. The conformed classification, wage rate, and/or fringe benefits shall be retroactive to the commencement date of the contract. {See Section 4.6 (C)(vi)} When multiple wage determinations are included in a contract, a separate SF 1444 should be prepared for each wage determination to which a class(es) is to be conformed.

The process for preparing a conformance request is as follows:

- 1) When preparing the bid, the contractor identifies the need for a conformed (occupation) and computes a proposed rate).
- 2) After contract award, the contractor prepares a written report listing in order (proposed classification title), a Federal grade equivalency (FGE) for each proposed classification), job description), and rationale for proposed wage rate), including information regarding the agreement or disagreement of the authorized representative of the employees involved, or where there is no authorized representative, the employees themselves. This report should be submitted to the contracting officer no later than 30 days after such unlisted class(es) of employees performs any contract work.
- 3) The contracting officer reviews the proposed action and promptly submits a report of the action, together with the agency's recommendations and pertinent information including the position of the contractor and the employees, to the Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, for review. (See section 4.6(b)(2) of Regulations 29 CFR Part 4).
- 4) Within 30 days of receipt, the Wage and Hour Division approves, modifies, or disapproves the action via transmittal to the agency contracting officer, or notifies the contracting officer that additional time will be required to process the request.
- 5) The contracting officer transmits the Wage and Hour decision to the contractor.
- 6) The contractor informs the affected employees.

Information required by the Regulations must be submitted on SF 1444 or bond paper.

When preparing a conformance request, the "Service Contract Act Directory of Occupations" (the Directory) should be used to compare job definitions to insure that duties requested are not performed by a classification already listed in the wage determination. Remember, it is not the job title, but the required tasks that determine whether a class is included in an established wage determination. Conformances may not be used to artificially split, combine, or subdivide classifications listed in the wage determination.

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WD 95-0819 (Rev.-20) was first posted on www.wdol.gov on 06/05/2007

FL/HH/MS

REGISTER OF WAGE DETERMINATIONS UNDER 3 U.S. DEPARTMENT OF LABOR
THE SERVICE CONTRACT ACT 3 EMPLOYMENT STANDARDS ADMINISTRATION
By direction of the Secretary of Labor 3 WAGE AND HOUR DIVISION
3 WASHINGTON, D.C. 20210
3
3

William W. Gross Division of Wage 3 Wage Determination No: 1995-0819
Director Determinations 3 Revision No: 20
3 Date Of Revision: 05/29/2007

States: District of Columbia, Maryland, Virginia
Area: District of Columbia Statewide
Maryland Counties of Calvert, Charles, Frederick, Montgomery, Prince George's,
St Mary's
Virginia Counties of Alexandria, Arlington, Fairfax, Falls Church, Fauquier,
King George, Loudoun, Prince William, Stafford

Fringe Benefits Required Follow the Occupational Listing

OCCUPATION CODE - TITLE MINIMUM WAGE RATE

Food & Lodging:

(not set)	- Food Service Worker	8.51
07041	- Cook I	10.93
07042	- Cook II	13.14
07070	- Dishwasher	7.78
07250	- Waiter/Waitress	7.78
11060	- Elevator Operator	7.78
11210	- Laborer, Grounds Maintenance	8.51
11240	- Maid or Houseman	8.51
99030	- Cashier	8.51
99050	- Desk Clerk (1)	8.51

Halfway House & Residential Community Treatment:

(not set)	- Food Service Worker	8.51
(not set)	- Secretary	12.13
01011	- Accounting Clerk I	10.48
01012	- Accounting Clerk II	11.29
01115	- General Clerk I	9.72
01611	- Word Processor I	9.72
07041	- Cook I	10.93
07042	- Cook II	13.14
07070	- Dishwasher	7.78
11150	- Janitor	8.51
11210	- Laborer, Grounds Maintenance	8.51
11240	- Maid or Houseman	8.51
23370	- General Maintenance Worker	11.73
27101	- Guard I	9.58
27102	- Guard II	10.24
99050	- Desk Clerk (1)	9.72

Moving & Storage:

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21040	- Material Handling Laborer	9.33
21071	- Forklift Operator	10.93
21130	- Shipping Packer	10.93
21400	- Warehouse Specialist	10.93
31361	- Truckdriver, Light Truck	10.93
31362	- Truckdriver, Medium Truck	11.73
31363	- Truckdriver, Heavy Truck	12.43
31364	- Truckdriver, Tractor-Trailer	13.14

ALL OCCUPATIONS LISTED ABOVE RECEIVE THE FOLLOWING BENEFITS:

HEALTH & WELFARE: \$3.16 per hour or \$126.40 per week or \$547.73 per month

VACATION: 2 weeks paid vacation after 1 year of service with a contractor or successor; 3 weeks after 5 years, and 4 weeks after 15 years. Length of service includes the whole span of continuous service with the present contractor or successor, wherever employed, and with the predecessor contractors in the performance of similar work at the same Federal facility. (Reg. 29 CFR 4.173)

HOLIDAYS: A minimum of ten paid holidays per year: New Year's Day, Martin Luther King Jr.'s Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, and Christmas Day. (A contractor may substitute for any of the named holidays another day off with pay in accordance with a plan communicated to the employees involved.) (See 29 CFR 4.174)

THE OCCUPATIONS WHICH HAVE PARENTHESES AFTER THEM RECEIVE THE FOLLOWING BENEFITS (as numbered):

1) Rates are applicable only under the appropriate occupational category.

**** UNIFORM ALLOWANCE ****

If employees are required to wear uniforms in the performance of this contract (either by the terms of the Government contract, by the employer, by the state or local law, etc.), the cost of furnishing such uniforms and maintaining (by laundering or dry cleaning) such uniforms is an expense that may not be borne by an employee where such cost reduces the hourly rate below that required by the wage determination. The Department of Labor will accept payment in accordance with the following standards as compliance:

The contractor or subcontractor is required to furnish all employees with an adequate number of uniforms without cost or to reimburse employees for the actual cost of the uniforms. In addition, where uniform cleaning and maintenance is made the responsibility of the employee, all contractors and subcontractors subject to this wage determination shall (in the absence of a bona fide collective bargaining agreement providing for a different amount, or the furnishing of contrary affirmative proof as to the actual cost), reimburse all employees for such cleaning and maintenance at a rate of \$3.35 per week (or \$.67 cents per day). However, in those instances where the uniforms furnished are made of "wash and wear" materials, may be routinely washed and dried with other personal garments, and do not require any special treatment such as dry cleaning, daily washing, or commercial laundering in order to meet the cleanliness or appearance standards set by the terms of the Government contract, by the contractor, by law, or by the nature of the work, there is no requirement that employees be reimbursed for uniform maintenance costs.

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WAGE DETERMINATIONS****** NOTES APPLYING TO THIS WAGE DETERMINATION ****

Under the policy and guidance contained in All Agency Memorandum No. 159, the Wage and Hour Division does not recognize, for section 4(c) purposes, prospective wage rates and fringe benefit provisions that are effective only upon such contingencies as "approval of Wage and Hour, issuance of a wage determination, incorporation of the wage determination in the contract, adjusting the contract price, etc." (The relevant CBA section) in the collective bargaining agreement between (the parties) contains contingency language that Wage and Hour does not recognize as reflecting "arm's length negotiation" under section 4(c) of the Act and 29 C.F.R. 5.11(a) of the regulations. This wage determination therefore reflects the actual CBA wage rates and fringe benefits paid under the predecessor contract.

Source of Occupational Title and Descriptions:

The duties of employees under job titles listed are those described in the "Service Contract Act Directory of Occupations," Fourth Edition, January 1993, as amended by the Third Supplement, dated March 1997, unless otherwise indicated. This publication may be obtained from the Superintendent of Documents, at 202-783-3238, or by writing to the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402. Copies of specific job descriptions may also be obtained from the appropriate contracting officer.

REQUEST FOR AUTHORIZATION OF ADDITIONAL CLASSIFICATION AND WAGE RATE {Standard Form 1444 (SF 1444)}

Conformance Process:

The contracting officer shall require that any class of service employee which is not listed herein and which is to be employed under the contract (i.e., the work to be performed is not performed by any classification listed in the wage determination), be classified by the contractor so as to provide a reasonable relationship (i.e., appropriate level of skill comparison) between such unlisted classifications and the classifications listed in the wage determination. Such conformed classes of employees shall be paid the monetary wages and furnished the fringe benefits as are determined. Such conforming process shall be initiated by the contractor prior to the performance of contract work by such unlisted class(es) of employees. The conformed classification, wage rate, and/or fringe benefits shall be retroactive to the commencement date of the contract. {See Section 4.6 (C)(vi)} When multiple wage determinations are included in a contract, a separate SF 1444 should be prepared for each wage determination to which a class(es) is to be conformed.

The process for preparing a conformance request is as follows:

- 1) When preparing the bid, the contractor identifies the need for a conformed occupation(s) and computes a proposed rate(s).
- 2) After contract award, the contractor prepares a written report listing in order proposed classification title(s), a Federal grade equivalency (FGE) for each proposed classification(s), job description(s), and rationale for proposed wage rate(s), including information regarding the agreement or disagreement of the authorized representative of the employees involved, or where there is no authorized representative, the employees themselves. This report should be submitted to the contracting officer no later than 30 days after such unlisted class(es) of employees performs any contract work.

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3) The contracting officer reviews the proposed action and promptly submits a report of the action, together with the agency's recommendations and pertinent information including the position of the contractor and the employees, to the Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, for review. (See section 4.6(b)(2) of Regulations 29 CFR Part 4).

4) Within 30 days of receipt, the Wage and Hour Division approves, modifies, or disapproves the action via transmittal to the agency contracting officer, or notifies the contracting officer that additional time will be required to process the request.

5) The contracting officer transmits the Wage and Hour decision to the contractor.

6) The contractor informs the affected employees.

Information required by the Regulations must be submitted on SF 1444 or bond paper.

When preparing a conformance request, the "Service Contract Act Directory of Occupations" (the Directory) should be used to compare job definitions to insure that duties requested are not performed by a classification already listed in the wage determination. Remember, it is not the job title, but the required tasks that determine whether a class is included in an established wage determination. Conformances may not be used to artificially split, combine, or subdivide classifications listed in the wage determination.

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WAGE DETERMINATIONS**

“4(c)” WD Format

REGISTER OF WAGE DETERMINATIONS UNDER THE SERVICE CONTRACT ACT By direction of the Secretary of Labor		U.S. DEPARTMENT OF LABOR EMPLOYMENT STANDARDS ADMINISTRATION WAGE AND HOUR DIVISION WASHINGTON D.C. 20210	
(authorized signature)			
(name) Director	Division of Wage Determinations	Wage Determination No.:	
		Revision No.:	
		Date of Revision:	

State(s):

Area: **(counties, by state)**

Employed on **(federal agency)** contract for **(specified services)**
 Collective Bargaining Agreement between **(company)** and **(union)**
 effective **(date)** through **(date)** .

In accordance with Sections 2(a) and 4(c) of the Service Contract Act, as amended, employees employed by the contractor(s) in performing services covered by the Collective Bargaining Agreement(s) are to be paid wage rates and fringe benefits set forth in the current collective bargaining agreement and modified extension agreement(s).

SCA

CONFORMANCE PROCESS

CONTRACT CLAUSE -- 29 C.F.R. § 4.6(b)(2)
See also FAR 48 C.F.R. § 52.222-41(b)(2)

SCA CONFORMANCE PROCEDURES

CONTRACT CLAUSE – 29 C.F.R. § 4.6(b)(2)
See also FAR 48 C.F.R. § 52.222-41(b)(2)

4.6 Labor standards clauses for Federal service contracts exceeding \$2,500.

The clauses set forth in the following paragraphs shall be included in full by the contracting agency in every contract

. . . .

[(b)](2)(i) If there is . . . [an SCA] wage determination attached to this contract, the contracting officer shall require that any class of service employee which is not listed therein and which is to be employed under the contract (i.e., the work to be performed is not performed by any classification listed in the wage determination), be classified by the contractor so as to provide a reasonable relationship (i.e., appropriate level of skill comparison) between such unlisted classifications and the classifications listed in the wage determination. . . .

(ii) Such conforming procedure shall be initiated by the contractor prior to the performance of contract work by such unlisted class of employee. A written report of the proposed conforming action, including information regarding the agreement or disagreement of the authorized representative of the employees involved, or where there is no authorized representative, the employees themselves, shall be submitted by the contractor to the contracting officer no later than 30 days after such unlisted class of employees performs any contract work. The contracting officer shall review the proposed action and promptly submit a report of the action, together with the agency's recommendation and all pertinent information including the position of the contractor and the employees, to Wage and Hour Division, . . . the U.S. Department of Labor, for review. The Wage and Hour Division will approve, modify, or disapprove the action or render a final determination in the event of disagreement

(iii) The final determination of the conformance action by the Wage and Hour Division shall be transmitted to the contracting officer who shall promptly notify the contractor of the action taken. Each affected employee shall be furnished by the contractor with a written copy of the determination or it shall be posted as a part of the wage determination.

(iv)(A) The process of establishing wage and fringe benefit rates that bear a reasonable relationship to those listed in a wage determination cannot be reduced to any single formula. The approach used may vary from wage determination to wage determination depending on the circumstances. Standard wage and salary administration practices which rank various job classifications by pay grade pursuant to point schemes or other job factors may, for example, be relied upon. Guidance may also be obtained from the way different jobs are rated under Federal pay systems (Federal Wage Board Pay System and the General Schedule) or from other wage determinations issued in the same locality. Basic to the establishment of any conformable wage rate(s) is the concept that a pay relationship should be maintained between job classifications based on the skill required and the duties performed.

(B) In the case of a contract modification, an exercise of an option or extension of an existing contract, or in any other case where a contractor succeeds a contract under which the classification in question was previously conformed pursuant to this section, a new conformed wage rate and fringe benefits may be assigned to such conformed classification by indexing (*i.e.* adjusting) the previous conformed rate and fringe benefits by an amount equal to the average (mean) percentage increase (or decrease, where appropriate) between the wages and fringe benefits specified for all classifications to be used on the contract which are listed in the current wage determination, and those specified for the corresponding classifications in the previously applicable wage determination. Where conforming actions are accomplished in accordance with this paragraph prior to the performance of contract work by the unlisted class of employees, the contractor shall advise the contracting officer of the action taken but the other procedures in paragraph (b)(2)(ii) of this section need not be followed.

SCA CONFORMANCE PROCEDURES

Introduction

- ◇ The SCA conformance process is a method by which a contractor may propose job titles and wage rates to legally employ workers engaged in work on a contract in occupations that are not listed in the applicable SCA wage determination.
- ◇◇ When an applicable contract wage determination does not list an occupation in which covered workers will be or are employed, the conformance process allows contractors to conform the unlisted occupation at a wage rate that is reasonable in relationship to the wage rates of listed occupations in the applicable wage determination that have comparable skills and duties.
- ◇◇ It should be emphasized that “the conformance process of establishing wage rates that bear a reasonable relationship to those listed in a wage determination cannot be reduced to any single formula.” 29 C.F.R. § 4.6(b)(2)(iv)(A). The fringe benefits for such conformed occupations will be those already contained in the applicable wage determinations.
- ◇◇ *See* 29 C.F.R. § 4.6(b)(2) and 4.152(b) and, in the FAR, 48 C.F.R. §§ 22.1019 and 52.222-41(b)(2).

Contractor initiates the conformance action

- ◇ The contractor must forward the conformance request to the contracting agency no later than 30 days after employment of workers has begun in the occupation to be conformed.
- ◇ For contractor bids or offers to approximate actual costs, contractors may wish to develop the conformance proposals for their own use prior to responding to requests for proposals or invitations for bids. Such estimates may be submitted to the contracting officer only, not to DOL.
- ◇ Standard Form (SF) 1444 “Request for Authorization of Additional Classification and Rate” –
 - ◇◇ Although DOL does not require use of the SF-1444, contracting officers may request that contractors use the SF-1444 for conformances.
 - ◇◇ Instructions on how to complete the form are pre-printed on the form.

- ◇◇ The SF-1444 is in the FAR at 48 C.F.R. § 53.301-1444, and on the Government Services Administration (GSA) website. In addition, there is a link to the form in the WDOL “Library” (<http://www.wdol.gov/library.aspx>). Please note that the SF-1444 is not an SCA required form and DOL does not keep SF-1444 forms in stock for distribution.
- ◇ Upon receipt of a conformance request after award of the contract, the contracting officer will review the conformance proposal and make a recommendation of approving, modifying or disapproving the proposed action, and will submit the proposal to the WHD’s Branch of Service Contract Wage Determinations for final approval at scaconformance@dol.gov.
- ◇ The WHD reviews the conformance request package and approves, disapproves, or establishes the rate for the subject occupation. The Branch of Service Contract Wage Determinations should respond within 30 days of receipt.
- ◇ If the contractor does not initiate a conformance action for any unlisted occupation performing contract work and an investigation by the WHD discloses this fact, the WHD will conform the class as warranted. In these situations, the information obtained through the investigation is used as the basis for determining what the minimum wage rates and fringe benefits should be for each occupational class that must be conformed. The “Investigation Process under SCA/CWHSSA/FLSA” chapter of this resource book provides additional information.

Conformance principles

- ◇ An occupation may be conformed only if the work covered by that occupation is not covered by another occupation included in the governing wage determination.
- ◇ Conformed wage rates must bear a reasonable relationship to those listed in the applicable wage determination, maintaining pay relationships between job classifications based on the skills required and the duties performed.
- ◇ A conformance may not be used to artificially split or subdivide classifications listed in wage determinations.
- ◇ Helpers, trainees, and occupations below the lowest level of established job classification families may not be conformed. Note, however, that helpers in skilled maintenance trades, whose **duties are separate and distinct**, may be used if listed on the applicable wage determination.

- ◇◇ Apprentices are permitted to work at less than predetermined rates when 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 DOL's Employment Training Administration's Office of Apprenticeship.
- ◇ Leaders are conformed when their duties are significant enough to distinguish them from the related journey occupation listed on the applicable wage determination to create a new occupation. Note that leaders typically receive higher compensation than the related journey occupation.
- ◇ Agreement or disagreement of the employees involved, or their authorized representative, should be obtained in good faith and included in the conformance proposal.
- ◇ Adherence to these principles helps to ensure that an appropriate conformance action is developed. While applying these principles, contractors may use different techniques to develop proposed rates, in each case based on the skills and responsibilities of the proposed classification compared to those of the classifications listed in the applicable wage determination. Reliance may be placed on the information below to develop a conformable wage rate:
 - ◇◇ Standard wage and salary administration practices which rank various job classifications by pay grade pursuant to point schemes or other factors;
 - ◇◇ The way different jobs are weighted under Federal pay systems (Federal Wage Board Pay System and the General Schedule); and
 - ◇◇ Other wage determinations issued in the same locality.

Developing and processing an SCA conformance request

- ◇ While the SCA conformance principles set forth above provide guidance that follows regulatory intent, participants often require assistance in determining how these principles may be translated into specific action. The following information describes one way that this may occur:
 - ◇◇ When a contractor receives a solicitation or proposed contract modification, the contractor determines if the work to be performed by employees is covered by any of the classifications listed on the wage determination. (The work covered by most occupational titles listed in SCA wage determinations may be identified in the *SCA Directory of Occupations*, available online at a link on the WDOL website (<http://www.wdol.gov/>) "Library.")

- ◇◇ If all the work to be performed on the contract is included in job descriptions for the occupations listed in the applicable wage determination, a conformance will not be needed.
- ◇◇ If all the work to be performed on the contract is not included in job descriptions for the occupations listed in the applicable wage determination, the contractor needs to identify the work not included to be conformed.
- ◇◇ Once the work to be conformed is identified, the contractor needs to develop a job title and description of work for the occupation to be conformed.
- ◇◇ The contractor determines the wage rates for the proposed occupations. The proposed wage rate should bear a reasonable relationship to the wage rates listed in the applicable wage determination for occupations with similar skills and work duties.
 - ◇◇◇ The *SCA Directory of Occupations* includes information that the contractor may use to reflect the degree of complexity or difficulty of the skills required and duties performed by workers in the occupation to be conformed. In particular, skills and work duties shown for Federal Grade Equivalency (FGE) levels for listed occupations can be compared with similar skills and work duties to establish a conformed wage rate based on a reasonable relationship with the wage rates listed in the applicable wage determination for comparable occupations.
 - ◇◇◇ By using this information, the contractor will ensure that the conformed occupation and wage rate are in keeping with the salary and wage structure of the applicable wage determination.
 - ◇◇◇ The contractor may request assistance from the contracting officer with regard to obtaining an FGE for the proposed occupation.
 - ◇◇◇ The *SCA Directory of Occupations* and its use is discussed in detail in the “SCA Wage Determinations” chapter of this resource book.
- ◇ The contractor must present the proposed conformance action to the affected employees or their representative. Information regarding their agreement or disagreement must be included in the request.

- ◇ Approved wage rates and fringe benefits must be paid to all employees in the conformed occupation retroactive to the date such workers started work on the SCA-covered contract.

Indexing procedures for previously conformed wage rates

- ◇ When a contract, whether an option or extension period or a new contract, succeeds a contract under which a class was previously conformed, the contractor can use the indexing procedure to determine a new wage rate for the conformed class.
 - ◇◇ To index, the contractor calculates the overall percent change between the previously issued rates listed on the applicable wage determination for those occupations utilized on the contract and the rates for those occupations issued in the new wage determination for the new contract period. The resulting percentage increase (if any) is then applied to the wage rate of the conformed class. The new conformance rate need not be sent to the WHD, but must be provided to the contracting officer. Alternatively, the contractor may, instead of an indexing action, request a new conformance for the unlisted occupation to the new wage determination. 29 C.F.R. § 4.6(iv)(B), reiterated in the FAR at 48 C.F.R. § 52.222-41(b)(2)(iv)(B).

**REVIEW & RECONSIDERATION
&
APPEALS TO THE ARB
OF
SCA WAGE DETERMINATIONS
&
SCA CONFORMANCE ACTIONS**

INTRODUCTION TO REVIEW AND RECONSIDERATION

REQUEST PROCEDURES AND RELEVANT TIME FRAMES

**PROCESSING PROCEDURES AND DECISION-MAKING
CRITERIA**

APPEALS TO THE ARB

INTRODUCTION TO REVIEW AND RECONSIDERATION OF SCA WAGE DETERMINATIONS

- ◇ Review and reconsideration is the process by which an SCA wage determination or conformance action can be re-examined.
- ◇ Review and reconsideration provides an opportunity for any affected or interested party to request WHD Administrator review of a wage determination issued or conformance action in light of additional information provided and the issues raised.
- ◇ The WHD may decide to issue a new or revised determination or conformance, or affirm the wage determination or conformance action.
- ◇ Provisions concerning the review and reconsideration of SCA wage determinations are established by the SCA regulations at 29 C.F.R. § 4.56.
- ◇ Only final rulings of the WHD Administrator – signed by the Administrator (or Acting WHD Administrator) – are subject to appeal to the ARB.

REQUEST PROCEDURES

- ◇ A request for review and reconsideration by the WHD Administrator may be submitted by any affected and/or interested party, including, but not limited to: contracting agencies, contractors or prospective contractors; contractor or employer associations; employees or their representatives; labor unions; or other interested government agencies.
- ◇ The request is usually a letter addressed to the WHD Administrator asking for review and reconsideration.
- ◇ The letter should identify the specific wage determination and, if applicable, the conformance action, in question.
- ◇ The letter must provide supporting evidence that documents why the wage determination, or conformance action is incorrect.

RELEVANT TIME FRAMES

- ◇ For competitively advertised procurements, requests for reconsideration and review of an SCA wage determination must be submitted before the opening of bids.
- ◇ For negotiated procurements or the exercise of contract options or extensions, such requests must be submitted no later than 10 days before the contract or contract option/extension period begins.
- ◇ The WHD Administrator has 30 days from the date of receipt of the request to issue a decision, or notify the interested party in writing that additional time is necessary.
- ◇ In light of the 30 days that the WHD has to act on such a review and reconsideration request, the WHD recommends that interested parties submit any request for reconsideration and review of an SCA wage determination at least 40 days prior to the bid opening date or, in the case of negotiated procurements, the contract award date.

PROCESSING PROCEDURES AND DECISION-MAKING CRITERIA

If the request provides no supporting evidence or is untimely, the wage determination stands as is, and the WHD advises the interested party of that result in a written reply. Where the request is submitted in a timely manner and supporting evidence is provided as required by the regulations, the WHD will review and evaluate the data submitted.

Analysis of Request and Evidence

1. In addition to the supporting evidence provided by the interested party, the WHD will review:
 - ◇ Data originally used to develop and issue the wage determination.
 - ◇ Any additional relevant data that has since become available.
2. Data submitted as evidence supporting a change in the wage determination or the conformance decision, and additional data described above are reexamined based generally on the following criteria:
 - ◇ Is the survey or information provided in the review and reconsideration request current?
 - ◇ If the requester submits survey data regarding a wage determination, who conducted the survey and were statistical and analytical techniques used?
 - ◇ Does the survey or information provided cover the appropriate geographic locality of the contract in question?
 - ◇ Is the survey based on a proper sample of the population or universe that can be used to represent what is prevailing in the locality?
 - ◇ Does the survey or information provided cover the appropriate occupational classes, i.e., those addressed by the wage determination, or conformance decision, in question? The survey, or information, must be specifically pertinent to the occupations in question.
 - ◇ How does the data used to issue the wage determination, or the information used to make the conformance decision compare to the data submitted by the interested party? Which data result in more relevant and reliable

indicators of what is prevailing in-the-locality for purposes of the wage determination in question, or reasonable relationship for purposes of the conformance decision in question?

- ◇ If any additional data have since become available, how does it compare to the data submitted by the interested party and the data used to issue the wage determination or the conformance decision?
 - ◇ Did major differences exist between data submitted as evidence and data used to issue the wage determination or to make a conformance decision? Are there additional data sources that can be and should be used to determine why?
3. Review and reconsideration can result in either an affirmation, revision, or issuance of a new wage determination.
- ◇ If the data submitted as evidence in conjunction with that originally used, and any other relevant data that have since been released suggest that the wage determination was incorrectly developed, the wage determination is revised utilizing these resources as the basis for reissuing a wage determination.
 - ◇ Criteria and statistical techniques used to analyze the review and reconsideration request are the same as those used to develop a wage determination or to make a conformance decision.

APPEALS TO THE ARB

The Administrator's decision can be appealed to the ARB pursuant to the provisions of 29 C.F.R. Part 8: "Practice Before The Administrative Review Board With Regard To Federal Service Contracts."

- ◇ Only final rulings of the WHD Administrator – signed by the Administrator (or Acting Administrator) – are subject to appeal to the ARB.
- ◇ An appeal to the ARB may be submitted within 20 days of the issuance of the Administrator's final ruling that denies a request to make changes in the wage determination or conformance decision in question.
- ◇ The petition must be in writing and contain all necessary information as outlined in 29 C.F.R. § 8.4.
- ◇ The ARB may not request any federal contracting agency to postpone any contract action because of the filing of a petition.
- ◇ The ARB will not review a wage determination after award, exercise of an option, or extension of a contract unless the following conditions, prescribed by 29 C.F.R. § 8.6, are in effect:
 - ◇◇ A section 4(c) wage determination may be reviewed after award, exercise of option, or extension of a contract if it has been issued as a result of an ALJ finding following a section 4(c) hearing that substantial variance exists or that arm's-length negotiations did not take place.
 - ◇◇ Where a petition for review of a wage determination is filed prior to award, exercise of option, or extension of contract, the ARB may review it after the fact if the issue is a significant issue of general applicability. However, in the particular case, the ARB decision will not affect the contract in question after award or exercise of an option or extension.
- ◇ The ARB may decline review of a case, remand it to the Administrator with instructions for obtaining additional evidence or making new or modified findings, or choose to hear the case. There is no deadline for action by the ARB, only that it acts expeditiously, taking into consideration procurement deadlines.

**ADMINISTRATIVE HEARINGS
REGARDING APPLICATION OF**

SECTION 4(c)

**“SUBSTANTIAL VARIANCE” AND
“ARM’S-LENGTH” NEGOTIATIONS**

**INTRODUCTION TO SECTION 4(c)
“SUBSTANTIAL VARIANCE” AND “ARM’S-LENGTH”
ADMINISTRATIVE HEARINGS**

REQUEST PROCEDURES AND RELEVANT TIME FRAMES

APPEALS TO THE ADMINISTRATIVE REVIEW BOARD

**INTRODUCTION TO
SECTION 4(c)
“SUBSTANTIAL VARIANCE” AND “ARM’S-LENGTH”
ADMINISTRATIVE HEARINGS**

There are two types of hearing appeals under the SCA concerning section 4(c) wage determinations:

- ◇ an appeal based on “substantial variance” issues; or
- ◇ an appeal based on issues concerning “arm’s-length negotiations.”

Section 4(c) of the SCA and its implementing regulations provide that whenever a section 4(c) wage determination is issued:

- ◇ The successor contractor is required to pay the wage rates and fringe benefits contained in the predecessor contractor’s collective bargaining agreement (CBA).
- ◇ These rates are to be paid unless there is found to be a “substantial variance” between the collectively bargained rates and those prevailing in the locality, and/or the lack of “arm’s-length negotiations” in arriving at the collectively bargained rates.
- ◇ The implementing regulations are at 29 C.F.R. §§ 4.10 – 4.11.
- ◇ AAM No. 166 provides guidance regarding “Requirements for Substantial Variance Proceedings Under Section 4(c) of the Service Contract Act” and AAM No. 159 discusses types of arrangements that generally reflect a lack of arm’s-length negotiations.

“Substantial Variance” 29 C.F.R. § 4.10

A finding that a 4(c) “substantial variance” exists, at a hearing before an Administrative Law Judge (ALJ), requires that such wage rates and/or fringe benefits in the CBA are found to vary substantially from those that would otherwise prevail for services of a similar character in the locality.

- ◇ The SCA does not define the term “substantial variance.” However, the plain meaning of the term requires that a considerable disparity in rates must exist before the successorship obligation may be avoided. Furthermore, no discrete comparison

rate is conclusive. Collectively bargained rates often can be expected to exceed service industry “prevailing rates,” and where some variance should be the norm, a finding of “substantial variance” would require a collectively bargained rate clearly to fall out of line when compared to a comprehensive mix of rates.

- ◇ A request for a hearing must contain information and analysis concerning the differences between the collectively bargained rates issued and the rates contained in:
 - (a) Corresponding federal wage board rates and surveys. While it is not necessary that the challenged rate be higher than the corresponding federal rate, this is an important factor.
 - (b) Relevant Bureau of Labor Statistics survey data and the comparable SCA area wage determination.
 - (c) Other relevant wage data. For example, rates paid in local hospitals would be appropriate for comparison on contracts for hospital aseptic services, while the rates paid in local schools could be of value in comparison for janitorial or food service workers.
 - (d) Other collectively bargained wages and benefits.
- ◇ It is expected that a request for a hearing will address all relevant issues.
- ◇ However, it is recognized that a petitioner may not be able to submit complete data at the time the hearing request is made. Where efforts to obtain supporting evidence are in progress, information must be provided concerning the approximate time necessary to complete the gathering of additional data. Merely providing a statement that data are not available is not sufficient. The request must adequately demonstrate the effort made to obtain or develop such information.
- ◇ The WHD Administrator can grant or deny the “substantial variance hearing” request. A request is granted only if the review results in a determination that a “substantial variance” may exist. The WHD must respond to the request within 30 days of receipt.

If a “substantial variance” is found to exist, a new wage determination must be issued which reflects prevailing rates for the locality rather than those found in the predecessor contractor’s CBA. The collectively bargained rates in the 4(c) wage determination apply until a final decision from the ALJ or ARB.

“Arm’s-Length Negotiations” 29 C.F.R. § 4.11 and AAM No. 159

Under section 4(c), the wages and fringe benefits provided in the predecessor’s CBA must be reached “as a result of arm’s-length negotiations.”

- ◇ This provision precludes arrangements by parties to a CBA who either separately or together, act with an intent to take advantage of the wage determination process. In short, it addresses the “Sweetheart Agreement,” between contractor and union, which includes making a CBA contingent upon the issuance of a supporting wage determination requiring reimbursement of the contractor by the funding agency.
- ◇ The primary example of these types of agreements involves contingent CBA provisions that attempt to limit the contractor’s obligations by such means as requiring issuance of a wage determination by the WHD, requiring the contracting agency to include the wage determination in the contract, or requiring the contracting agency to adequately reimburse the contractor. Such contingent arrangements are evidence of an intent to take advantage of the wage determination scheme under the SCA and, generally, reflect a lack of “arm’s-length negotiations.”
- ◇ The determination as to whether the CBA has application for section 4(c) purposes must be made pursuant to the SCA and its implementing regulations by the WHD, not by the contracting agency.
- ◇ As a result of a section 4(c) “arm’s-length” hearing, investigation or otherwise pursuant to the SCA, if it is found that the CBA itself or any of the wage rates or fringe benefits contained therein were not established through “arm’s-length negotiations,” the CBA wage rates and fringe benefits cannot be issued for wage determination purposes. If a lack of “arm’s-length negotiations” is found to exist, a new wage determination must be issued that reflects the prevailing rates for the locality rather than those found in the predecessor contractor’s CBA.

For “arm’s-length negotiations” issues, however, a two-step process may be needed.

- ◇ The WHD Administrator must first issue findings before a hearing can be initiated.
- ◇ Such findings may result in the Administrator’s referral of the case to a hearing by an ALJ or the ARB.
- ◇ If the Administrator’s determination does not include referral of the case for a hearing, an interested party may then request a hearing.

REQUEST PROCEDURES AND RELEVANT TIME FRAMES

The following information on section 4(c) appeals discusses the use of the ALJ and the ARB hearing processes to adjudicate “substantial variance” or “arm’s-length negotiations” issues.

“Substantial Variance” Hearing and “Arm’s-Length” Determination Requests

Either request can be submitted by any affected interested party, including, but not limited to, contracting agencies, incumbent contractors, prospective contractors, contractor and employer associations, employees or their representatives, or other interested government agencies. The interested party submits a written request for the “substantial variance” hearing or “arm’s-length” determination to the WHD Administrator.

The request must contain information as specified in the regulations at 29 C.F.R. § 4.10(b)(1)(i) for “substantial variance” proceedings, and at 29 C.F.R. § 4.11(b)(1) for “arm’s-length” determinations, including the following information:

- ◇ The number of all wage determinations at issue, name of the contracting agency involved, and a brief description of the services to be performed under the contract (“substantial variance” request only).
- ◇ A statement regarding the status of the procurement and any estimated procurement dates, such as bid opening, contract award, or commencement date of the contract or its follow-up option period.
- ◇ That the applicable CBA wage rates and fringe benefits contained therein were not reached as a result of “arm’s-length negotiations,” or that the CBA rates substantially vary from those prevailing in the locality.

(Note: Supportive evidence such as data concerning wages and/or fringe benefits prevailing in the locality or information concerning “arm’s-length negotiations” should be included. If the only information submitted concerning a “substantial variance” of fringe benefits is an SCA wage determination, it is insufficient, and the party requesting the hearing will be so advised.)

- ◇ Names and addresses (to the extent known) of any interested parties.

For either type of request, information must be submitted as follows (according to 29 C.F.R. § 4.10(b)(3) for “substantial variance” hearing requests; and 29 C.F.R. § 4.11(b)(2) for “arm’s-length” determinations):

- ◇ Prior to 10 days before contract award of an advertised contract; or
- ◇ Prior to the contract or option period start date, if a negotiated contract, or existing contract with an option extension period.

Administrator’s “Arm’s-Length” Ruling

- ◇ The WHD Administrator, on his or her own motion or after receipt of a request for a determination, may make a finding on the issue of arm’s-length negotiations
- ◇ For “arm’s-length” determination requests, the WHD Administrator issues findings as to whether the wages and fringe benefits at issue were reached as a result of “arm’s-length negotiations” or that such negotiations did not take place, or a finding that there is insufficient evidence to make a determination, and the Administrator may refer the case to an ALJ hearing.
- ◇ If the Administrator determines that there may not have been arm’s-length negotiations, but finds that there is insufficient evidence to render a final decision, the Administrator may refer the case to an ALJ hearing.
- ◇ The regulations do not state a required response time frame for the Administrator’s decision.

“Arm’s-Length” Hearing Requests

For those cases not referred by the WHD Administrator for a hearing before an ALJ, any interested party may subsequently request a hearing, as follows:

- ◇ Submit a written request for a hearing to the Administrator within 20 days of the Administrator’s ruling.
- ◇ Include in the request a detailed statement of the following:
 - ◇◇ Reasons why the Administrator’s finding is incorrect.
 - ◇◇ Facts alleged to be disputed.

If no hearing is requested within the time limit, the Administrator’s ruling stands.

If an arm’s-length hearing is requested, the Administrator refers the request:

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4(c) HEARINGS

- ◇ If the Administrator finds facts to be in dispute, to the Chief ALJ for designation of an ALJ to conduct a hearing, or
- ◇ To the ARB if the Administrator determines that no material facts are in dispute.

ALJ Hearing Granted

- ◇ Once a hearing is granted by the Administrator, an Order of Reference, with supporting documentation attached, is submitted by the Administrator to the Chief ALJ and served on all interested parties. Hearings are conducted by a designated ALJ in accordance with procedures outlined in 29 C.F.R. Part 6.
- ◇ Within 20 days of the Order of Reference mailing date as indicated by the Certificate of Service, interested parties wishing to participate in the hearing must submit a hearing response to the Chief ALJ. The Chief ALJ appoints an ALJ to hear the case who will then notify all interested parties of the time and place for the prehearing conference and subsequent hearing. These must be scheduled within 60 days from the mailing date of the Order of Reference.

APPEAL TO THE ADMINISTRATIVE REVIEW BOARD

- ◇ Any interested party may appeal an ALJ decision to the ARB pursuant to the procedures set forth in 29 C.F.R. Part 8: “Practice before the Administrative Review Board with regard to Federal Service Contracts.”

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**“BONA FIDE” FRINGE BENEFITS
FRINGE BENEFIT REQUIREMENTS –
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**FRINGE BENEFIT REQUIREMENTS –
VACATION BENEFITS**

**FRINGE BENEFIT REQUIREMENTS –
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**EQUIVALENT BENEFITS
TEMPORARY AND PART-TIME EMPLOYMENT**

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RECORDKEEPING

INTRODUCTION

Service Contract Act (SCA) wage determinations set forth the prevailing wages and benefits that are to be paid to service employees working on covered contracts exceeding \$2,500.

◇ **Wages**

- ◇◇ Wages are the monetary compensation provided employees. The minimum monetary wages required under the SCA are usually listed in wage determinations applied to covered contracts exceeding \$2,500, as hourly wage rates for the various classes of service employees. 29 C.F.R. § 4.161.
- ◇◇ Where no SCA wage determination applies to a covered service contract, such as those valued at \$2,500 or less, the SCA requires payment of not less than the minimum wage under section 6(a)(1) of the FLSA to service employees engaged in contract work. 29 C.F.R. § 4.159.
- ◇◇ If an employee works in different capacities in the performance of a covered contract, then the time the employee spends in work in each classification should be segregated and paid according to the wage rate specified for each class of work. 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 in the applicable wage determination for all hours worked in the workweek. 29 C.F.R. § 4.169.
- ◇◇ Workers with disabilities and apprentices that meet certain criteria may work on SCA-covered contracts at wage rates below those contained in the applicable SCA wage determination pursuant to section 4(b) of the SCA. 29 C.F.R. §§ 4.6(o) – 4.6(p).

◇ **Fringe Benefits**

- ◇◇ As provided in section 2(a)(2) of the SCA, fringe benefits include:

[M]edical or hospital care, pensions on retirement or death, compensation for injuries or illness resulting from occupational activity, or insurance to provide any of the foregoing, unemployment benefits, life insurance, disability and sickness insurance, accident insurance, vacation and holiday pay, costs of apprenticeship or other similar programs and other bona fide

fringe benefits not otherwise required by Federal, State, or local law to be provided by the contractor or subcontractor. 29 C.F.R. § 4.162.

◇◇ Fringe benefits listed above are illustrative of those that may be furnished.

◇ **Two Separate Requirements – Monetary Wages and Fringe Benefits**

◇◇ The monetary wage requirement and the fringe benefit requirement are two separate requirements in the SCA. SCA §§ 2(a)(1) and 2(a)(2).

◇◇ SCA wage determinations generally state the fringe benefit requirements after the listing of monetary wage rates that apply to each classification of service employee.

◇◇ The fringe benefits required under the SCA must be furnished, separately from and in addition to the specified monetary wages, by the contractor/subcontractor to the employees engaged in the performance of a covered contract. 29 C.F.R. § 4.170.

◇◇ A contractor must keep appropriate records separately showing amounts paid for wages and amounts paid for fringe benefits. 29 C.F.R. § 4.170.

EMPLOYEE NOTIFICATION AND POSTER

SCA § 2(a)(4), 29 C.F.R. § 4.6(e) and FAR, 48 C.F.R. § 52.222-41(g)

- ◇ The SCA contract clauses require contractors on covered contracts to notify each service employee commencing work on the contract of the minimum monetary wage and any fringe benefits required to be paid under the contract (in accord with the SCA wage determination in the contract), or post the wage determination.
- ◇ Contractors are also required to post the “Notice to Employees Working on Government Contracts” (WH Publication 1313) in a prominent and accessible place at the worksite. WH 1313 is available at:

<http://www.dol.gov/whd/regs/compliance/posters/sca.htm>

TIMELY PAYMENT OF WAGES AND FRINGE BENEFITS

- ◇ **Wages**
 - ◇◇ The SCA does not permit pay periods longer than semi-monthly (twice a month). Wage payments at greater intervals are not proper payments in compliance with the SCA. 29 C.F.R. §§ 4.6(h) and 4.165(b).
 - ◇◇ Failure to pay for certain hours of work at the required rate cannot be offset by reallocating excess payments made for other hours. 29 C.F.R. § 4.166.
- ◇ **Fringes**
 - ◇◇ Cash payments to employees in lieu of payments for fringe benefits must be made promptly on the regular payday for wages. 29 C.F.R. § 4.165(a)(1).
 - ◇◇ Payments to “bona fide” fringe benefit plans may be made on a periodic payment basis that is not less often than quarterly. 29 C.F.R. § 4.175(d)(1).

HOURS WORKED

- ◇ The hours worked by employees on an SCA-covered service contract are determined in accordance with the principles established under the Fair Labor Standards Act (FLSA), as set forth in 29 C.F.R. Part 785. 29 C.F.R. § 4.178.
- ◇ In general, FLSA hours worked by an employee include all periods in which the employee is “suffered or permitted” to work, whether or not required to do so, and for all periods of time during which the employee is required to be on duty or to be on the employer’s premises or to be at a prescribed workplace.
- ◇ Hours worked subject to the compensation provisions of the SCA are those in which the employee is engaged in performing work on SCA-covered contracts. 29 C.F.R. § 4.178.
 - ◇◇ In any workweek where the contractor/subcontractor is not exclusively engaged in work on a covered service contract, the contractor should identify separately and accurately in its records, or by other means, those periods during which its employees are engaged in work on a covered service contract. 29 C.F.R. § 4.179.
 - ◇◇ In the absence of records that adequately segregate periods of covered contract work from non-covered work, all employees working in the establishment or department where such covered work is performed shall be presumed to have worked on or in connection with the covered contract during the period of contract performance. 29 C.F.R. § 4.179.

“BONA FIDE” FRINGE BENEFITS

- ◇ A contractor may discharge his/her obligation to provide SCA fringe benefits by paying the specified fringe benefit contributions to a trustee or third person pursuant to a bona fide fund, plan, or trust on behalf of covered employees. Examples are life or health insurance and pension or retirement plans. 29 C.F.R. §§ 4.170 and 4.171.
- ◇ To be considered a “bona fide” fringe benefit for purposes of the SCA, a fringe benefit plan, fund, or program must constitute a legally enforceable obligation which meets the following criteria. 29 C.F.R. § 4.171(a).
 - ◇◇ The fringe benefit plan, fund, or program must be specified in writing and must be communicated in writing to the affected employees.
 - ◇◇ The primary purpose of the plan 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 unemployment benefits, and the like.
 - ◇◇ The plan must contain a definite formula for determining the amount to be contributed by the contractor and a definite formula for determining the benefits for each of the employees participating in the plan.
 - ◇◇ Contributions must be made pursuant to the terms of such plan, fund, or program. Any contributions made by employees must be voluntary, and if such contributions are made through payroll deductions, such deductions must be made in accordance with 29 C.F.R. § 4.168. (No contribution towards fringe benefits made by the employees themselves or provided from monies deducted from their wages may be included or used by an employer in satisfying any part of any SCA fringe benefit obligation.)
 - ◇◇ Generally, the contractor’s contributions must be paid irrevocably to a trustee or third person, no less often than quarterly, pursuant to an insurance agreement, trust or other funded arrangement (except as indicated below with regard to certain “unfunded” fringe benefit plans).
 - ◇◇ Unfunded fringe benefit plans:

With the exception of fringe benefit plans to provide vacations and holidays, unfunded "self-insured" plans under which a contractor typically pays insurance

claims out of pocket to cover fringe benefit obligations are normally not considered “bona fide” plans or equivalent benefits for purposes of the SCA. 29 C.F.R. § 4.171(b). A contractor must request approval by the WHD Administrator for an unfunded self-insured plan. 29 C.F.R. § 4.171(b)(2).

- ◇ The following are not “bona fide” fringe benefits (nor can they be considered equivalent benefits for SCA purposes):
 - ◇◇ Benefit plans or trusts which are disapproved by the Internal Revenue Service as not satisfying the requirements of the Internal Revenue Code or which do not meet the requirements of the Employee Retirement Income Security Act of 1974. 29 C.F.R. § 4.171(a)(5).
 - ◇◇ Any benefit required by any other federal law or by any State or local law, such as unemployment compensation, workers’ compensation, or social security. 29 C.F.R. § 4.171(c).
 - ◇◇ Board, lodging or other facilities for which the cost or value, determined in accordance with regulations under the FLSA contained in 29 C.F.R. Part 531 (though they may be creditable toward the payment of monetary wages specified under the SCA). 29 C.F.R. §§ 4.167 and 4.171(d).
 - ◇◇ Facilities primarily for the benefit or convenience of the contractor or the cost of which is properly a business expense of the contractor, such as relocation expenses, travel and transportation expenses incident to employment; incentive or suggestion awards, recruitment bonuses; tools and other materials and services incidental to the employer’s performance of the contract and the carrying on of his business; and the cost of furnishing, laundering, and maintaining uniforms and/or related apparel or equipment where employees are required by the contractor, the SCA contract, by law, or by the nature of the work, to wear such items. 29 C.F.R. §§ 4.168 and 4.171(e).
 - ◇◇ Contributions by contractors for such items as 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 association or club dues. 29 C.F.R. § 4.171(f).
- ◇ Fringe benefits and overtime pay:

- ◇◇ CWHSSA requires that on contracts to which it applies, any laborer or mechanic, including any guard or watchman, who performs over 40 hours of contract work in a workweek must be compensated “at a rate not less than one and one-half times the basic rate of pay for all hours worked in excess of 40 hours in the workweek”. The basic rate of pay excludes “bona fide” fringe benefits and cash equivalent payments. 29 C.F.R. § 4.180.

- ◇◇ 29 C.F.R. § 778.215 and 29 C.F.R. §§ 4.177(e) and 4.182 discuss the parallel exclusion of fringe benefits from the “regular rate” for overtime purposes under the FLSA.

FRINGE BENEFIT REQUIREMENTS – HEALTH AND WELFARE BENEFITS

- ◇ The health and welfare fringe benefit requirement for covered service employees is indicated in the applicable contract wage determination.
- ◇ There are three types of health and welfare fringe benefit requirements under the SCA:
 - ◇◇ **“Fixed cost” per employee health and welfare benefit requirement** – Where the SCA wage determination states this type of fringe benefit, the health and welfare rate is required to be paid for each individual employee and the benefit is computed on the basis of “all hours paid for” up to 40 per week and 2080 per year. 29 C.F.R. § 4.175(a).
 - ◇◇ **“Average cost” health and welfare fringe benefit** – Where the SCA wage determination states this type of fringe benefit, the employer contribution is required to average at least the health and welfare rate stated in the SCA wage determination (\$3.71 per hour as of June 17, 2012) computed on the basis of all hours worked – including overtime hours – by service employees employed on the contract (or portion of the contract to which the wage determination applies). 29 C.F.R. § 4.175(b).
 - ◇◇ Pursuant to section 4(c) of the SCA, **collectively bargained fringe benefits** are required to be paid by a successor contractor under a contract to furnish substantially the same services as a predecessor contractor. 29 C.F.R. § 4.53.
- ◇ A single nationwide health and welfare rate method has been established for determining the health and welfare fringe benefit requirement incorporated in SCA wage determinations. Since June 1, 1997, adjustments to the single rate for the health and welfare fringe benefits listed on prevailing wage determinations are made annually. 29 C.F.R. § 4.52; All Agency Memorandum No. 188 (May 22, 1997).

“Fixed Cost” Per Employee Health and Welfare Fringe Benefit

- ◇ Most SCA wage determinations require health and welfare benefits to be paid on a per hour per employee basis. Such wage determinations state the health and welfare fringe benefit requirement as a simple rate. Annual adjustments are based on new data. For example, on June 17, 2012, the amount specified for upcoming contracts was raised from \$3.59 to \$3.71 per hour. Thus, wage determinations issued on or about June 17,

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2012, listed the “fixed cost” health and welfare fringe benefit amount as “\$3.71 an hour, \$148.40 a week, or \$643.07 a month.” *See* 29 C.F.R. § 4.175(a).

- ◇ This method requires health and welfare benefits in terms of a fixed contribution per hour on behalf of each service employee working on the contract. Under this type of wage determination, the specified health and welfare benefit 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.
 - ◇◇ Under this type of wage determination, the actual benefits may differ among employees, so long as the total amount paid by the contractor for fringe benefits (and/or cash equivalents) provided to each individual, on an hourly basis, totals at least the fringe benefit rate specified in the contract wage determination for the work the individual performs for all his/her paid hours up to 40 per week.
 - ◇◇ The type(s) and amount of bona fide fringe benefits (if any), or cash equivalents to be provided is strictly a matter to be decided by the employer.
 - ◇◇ Employees excluded from participation in a fringe benefit plan must be furnished equivalent bona fide fringe benefits or be paid a cash equivalent payment during the period that they are not eligible to participate in the plan. On the other hand, it is not required that all employees participating in a fringe benefit plan be entitled to receive benefits from the plan at all times. For example, an employee who is eligible to participate in an insurance plan may be prohibited from receiving benefits from the plan during a 30-day waiting period. Contributions made on behalf of these employees would be creditable against the contractor’s fringe benefit obligations. 29 C.F.R. § 4.175(c).
 - ◇◇ **Example: Bi-weekly Payroll** - \$3.71 per hour paid up to 40 hours a week per each employee:

<u>Employee</u>	<u>Hours Paid For</u>	<u>Cost of Fringe Benefits</u>	<u>Cash in Lieu of Fringes</u>	<u>Total Compensation</u>
Libby	80	\$180.80	\$116.00	\$296.80 (/ 80 = \$3.71)
Bill	*100	\$160.80	\$136.00	\$296.80 (/ 80 = \$3.71)
Alex	20	0	\$74.20	\$ 74.20 (/ 20 = \$3.71)
Tim	80	\$296.80	0	\$296.80 (/ 80 = \$3.71)
Crystal	60	\$200.00	\$22.60	\$222.60 (/ 60 = \$3.71)

* Note 20 hours of overtime excluded from payments.

“Average Cost” Health and Welfare Fringe Benefit

- ◇ In rare instances an average cost (even-numbered) wage determination applies. Such wage determinations apply only where an even-numbered wage determination applied to the preceding contract with the same agency contracts for substantially the same services at the same location.
- ◇ When an average cost, even-numbered, wage determination applies, the per hour health and welfare benefit is an average cost fringe benefit requirement computed on the basis of “**all hours worked**” by service employees on the contract.
 - ◇◇ The term “**all hours worked**” includes overtime hours and is not limited to 40 hours per week or 2,080 hours per year for each employee; the term “**all hours worked**” does not include paid leave hours, such as for vacations, holidays, or sick leave. Also, it does not include unpaid leave time, such as that provided under the Family and Medical Leave Act.
 - ◇◇ Under the average cost concept, the fringe benefits provided by the contractor may vary among individual service employees, and compliance is achieved when the actual cost of these benefits divided by the total hours worked by service employees in a payment period equals or exceeds the amount required by the wage determination. 29 C.F.R. § 4.175(b).
- ◇ The types and amounts of benefits, if any, to be provided, and the eligibility requirements for service employees to participate in a fringe benefit plan, are decided by the contractor.
- ◇ If the contractor’s contributions average less than the amount required by the applicable wage determination during a payment period, then the contractor must make up the deficiency by providing **cash equivalent payments** to all service employees who worked on the contract during the payment period.
- ◇ Cash equivalent payments under average cost fringe benefit requirements can only be made in an amount determined to be deficient after payments have been made to the fringe benefit plans, and the payments must be made equally to all covered service employees.

Examples:

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**SCA COMPLIANCE
PRINCIPLES**

- (a) \$3.71 average cost requirement - compliance through fringe benefit plan
contributions only:

<u>Employee</u>	<u>Hours Worked</u>	<u>Employer Contributions for Fringe Benefits</u>
Libby	250	\$1000
Bill	150	\$ 550
Alex	250	\$1000
Tim	50	0
Crystal	<u>100</u>	<u>\$ 418</u>
	800	\$2,968

\$2968 (total contributions)/800 (total hours) = \$3.71 average

- (b) \$3.71 average cost requirement - compliance through fringe benefit plan
contributions and cash payments:

<u>Employee</u>	<u>Hours Worked</u>	<u>Employer Contributions for Fringe Benefits</u>
Libby	250	\$650
Bill	150	\$450
Alex	250	\$650
Tim	50	0
Crystal	<u>100</u>	<u>\$250</u>
	800	\$2,000

\$2000 (total contributions)/800 (total hours) = \$2.50 average

Libby	250	x	\$1.21	\$302.50
Bill	150	x	\$1.21	\$181.50
Alex	250	x	\$1.21	\$302.50
Tim	50	x	\$1.21	\$ 60.50
Crystal	<u>100</u>	x	\$1.21	<u>\$121.00</u>
	800			\$968.00

Total contribution: \$2,000 (fringe benefits) + \$968 (cash) = \$2,968

\$2,968 (contributions)/800 (hours) = \$3.71

Collectively Bargained Fringe Benefits

- ◇ Section 4(c) of the SCA provides that no contractor or subcontractor under a contract which succeeds a contract subject to the SCA, under which substantially the same services are furnished, shall pay any service employee under such contract less than the wages and fringe benefits (including accrued wages and fringe benefits and any prospective increases in wages and fringe benefits) provided for in a collective bargaining agreement (CBA) to which such service employees would have been entitled if they were employed under the predecessor contract. 29 C.F.R. § 4.1b.
- ◇ In almost all cases, a wage determination is issued that requires payment for fringe benefits and wage rates established by the predecessor contractor's CBA. However, because section 4(c) of the SCA is self-executing, the collectively bargained fringe benefits and wage rates apply regardless of whether such a contract wage determination was issued or incorporated in the contract. Certain administrative requirements and limitations may affect application of the predecessor contractor's negotiated wages and fringe benefits. 29 C.F.R. §§ 4.1b(b).
- ◇ Section 4(c) of the SCA does not require a successor to follow terms of the CBA other than the wage and fringe benefit provisions.
- ◇ Where section 4(c) applies, the successor contractor may discharge the obligation to furnish fringe benefits by any combination of bona fide fringe benefits and equivalent cash payments (as is the case where no predecessor's CBA is involved).
- ◇ As the successor is not permitted to pay less than the fringe benefits (and wages) to which employees would have been entitled under the predecessor contractor's CBA, any interpretation of the wage and fringe benefit 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. Thus, some principles discussed in regulations 29 C.F.R. §§ 4.170 – 4.177 regarding specific interpretations for the fringe benefit provisions of SCA prevailing wage determinations may not be applicable to wage determinations issued pursuant to section 4(c). (Similarly, some principles discussed in 29 C.F.R. § 4.167, regarding wage payments, may also not be applicable in section 4(c) successorship situations.)
- ◇ In 29 C.F.R. § 4.163, regulatory guidance is provided specifically concerning compensation standards, including fringe benefits, under section 4(c) of the SCA.

**FRINGE BENEFIT REQUIREMENTS –
VACATION BENEFITS**

- ◇ Vacation fringe benefits can be determined from the language of the fringe benefit provision in the wage determination.

Example:

“One week paid vacation after one year of service with a contractor or successor.” 29 C.F.R. § 4.173(a). Two factors must be considered for vacation benefits under this wage determination requirement:

- ◇◇ The total length of time an employee has been in the employer’s service, both performing commercial work and performing on the federal contract, and
 - ◇◇ The total length of time an employee has been employed in any capacity in the continuous service of any predecessor contractor(s) who carried out similar contract functions at the same federal facility.
- ◇ By requiring prospective contractors who employ the same personnel to provide the same vacation benefits as an incumbent contractor, equity in bidding is achieved – otherwise the incumbent contractor would be at a distinct disadvantage when bidding.

Note: Not less than 10 days before contract completion, the incumbent prime contractor must furnish the contracting officer a list of all service employees who were on the contractor or subcontractor’s payroll during the last month of the contract, together with the employees’ anniversary dates of employment (when employment began with the incumbent as well as with any predecessor contractors). A copy of this list is provided to the successor contractor. 29 C.F.R. § 4.6(1)(2).

- ◇ Vacation benefits need not be provided, or payment made for them, immediately upon vesting, but must be provided at a mutually agreed upon time or payment made before the next anniversary date of employment, termination of employment, or completion of the current contract, whichever occurs first. 29 C.F.R. § 4.173(c)(2).
- ◇ If an employee’s rate increases during the period of the contract, the rate applicable to computation of any required vacation benefits is the hourly rate in effect in the

workweek in which the paid vacation (or the cash equivalent) is provided, unless the wage determination specifies otherwise. 29 C.F.R. § 4.173(e).

- ◇ Whether the previous contract was covered by a wage determination is immaterial.
- ◇ The contractor by whom a person is employed at the time the vacation benefit vests (i.e., the employee's anniversary date of employment) is liable for the full vacation benefit. 29 C.F.R. § 4.173(d).
- ◇ There is no accrual or vesting of vacation eligibility before the employee's anniversary date and no segment of time smaller than one year need be considered in computing the contractor's vacation liability, unless specifically provided for in the wage determination. 29 C.F.R. § 4.173(c)(1).
 - ◇◇ For example, if an employee entitled to one week paid vacation after one year of service has worked thirteen months for an employer (or one month with a successor contractor after one year with the predecessor contractor) and is separated without receiving any vacation benefit, he would be entitled to one week of paid vacation. The employee would not be entitled to the additional fraction of one-twelfth of one week's paid vacation for the month he worked in the second year unless so stated in the applicable wage determination.

Continuous service

- ◇ If an employee's total length of service adds up to one year, he/she would be eligible for one week's vacation. However, such service must have been rendered continuously for a period of not less than one year for vacation eligibility. 29 C.F.R. § 4.173(b).
 - ◇◇ The term continuous service does not require the combination of two entirely separate periods of employment. Whether or not there is a break in continuity so as to deprive an employee of his or her vacation entitlement is dependent upon the facts in each particular case.
 - ◇◇◇ The primary consideration in making a determination of "break in service" is what caused the interruption and why it occurred, not the length of time of the break.
 - ◇◇◇ In cases where employees have been granted leave with or without pay by their employer, or are otherwise absent with permission for such reasons as sickness or injury, or otherwise perform no work because of reasons beyond their control, there would not be a break in service. (Example of

situation where a break has not occurred - employee absent for five months due to illness but employed continuously for three years.)

29 C.F.R. § 4.173(b).

- ◇◇ If an employee quits or is fired for cause, a break in service would have occurred even if the employee was rehired at a later date. However, a contractor may not discharge and rehire at a later date in order to evade vacation fringe benefits requirements. 29 C.F.R. § 4.173(b)(2).

**FRINGE BENEFIT REQUIREMENTS –
HOLIDAY BENEFITS**

- ◇ An employee's entitlement to holiday pay vests by working in the workweek in which the named holiday occurs, or by being on paid sick leave or vacation leave in that workweek. 29 C.F.R. §§ 4.174(a)(1) – (2).
- ◇ Unless there is a provision in the wage determination to the contrary, an employee must receive the holiday fringe benefits even though he/she worked only part of the week in which the holiday occurred.
- ◇ An employee need not be paid for a holiday that occurs earlier in the workweek prior to his/her hiring, provided the holiday does not occur during the first week of the contract. 29 C.F.R. § 4.174(b).
- ◇ A contractor need not provide holiday pay to any employee who does not perform any work in the workweek in which the holiday occurred (excepting those on paid sick or vacation leave) provided that the employer did not lay off the employee during that workweek to avoid having to pay for the holiday. 29 C.F.R. § 4.174(a)(2).
- ◇ If the SCA wage determination applicable under a contract does not include a paid holiday provision for any day declared by the President of the United States to be a holiday, the contractor is not required to pay covered service employees for that day off, even if they do not work that day. For example if the building where they work is closed because of a presidential declaration affecting federal employees on a Friday, December 26, and the contract wage determination does not indicate that holiday pay is required for the day, holiday pay would not be required under SCA. Such pay 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.

EQUIVALENT BENEFITS

A contractor may discharge the obligation to provide specified fringe benefits (including vacation and holiday pay) by:

- ◇ Furnishing at least the benefit amount listed on the contract wage determination for each employee to a third party or trustee, such as for life or health insurance and/or a pension plan, or by
- ◇ Furnishing equivalent combinations of bona fide fringe benefits (the types of fringe benefits may be different for individual workers), or by
- ◇ Making equivalent payments in cash to the employee. “Equivalent” means equal in terms of monetary cost to the employer, or by
- ◇ Providing any combination of bona fide fringe benefits and cash payments needed to meet the fringe benefit requirements under the contract.

Cash equivalents for fringe benefits 29 C.F.R. § 4.177.

- ◇ Examples of cash equivalents:
 - ◇◇ If a wage determination requires health and welfare benefits of \$3.71 per hour, that fringe benefit obligation may be discharged by paying the employee \$3.71 per hour in cash in addition to his/her monetary wage, if separately stated in the employer’s records.
 - ◇◇ If a wage determination requires a successor contractor to pay the fringe benefits set forth in a collective bargaining agreement which has a health and welfare benefit of \$4.30 per hour, and a pension benefit of \$1.50 per hour, the fringe benefit obligation may be discharged by paying the employee \$5.80 per hour in cash in addition to his/her monetary wage, if separately stated in the employer’s records.
- ◇ Cash equivalents for fringe benefits stated in terms other than a cash amount:
 - ◇◇ Where fringe benefits are stated as a weekly or monthly amount, the hourly cash equivalent can be determined as shown in the following example.

Example: The fringe benefits for pension is \$120 per week, the hourly cash equivalent is \$120 divided by 40 hours or \$3.00 per hour.

Note: If the fringe benefits do not specify the daily or weekly hours of work for which fringe benefits are to be measured, a standard 8-hour day, 40-hour workweek will be applicable.

- ◇◇ Where fringe benefits are specified in terms such as “ten (10) paid holidays per year” or “one week paid vacation after one year of service,” the employee’s hourly rate of pay is multiplied by the number of hours making up the paid vacation or holidays to determine annual cost. (A standard 8-hour day and 40-hour week will be applicable unless the wage determination specifies otherwise.) The total annual cost is divided by 2,080 hours (40 hours a week x 52 weeks) to arrive at an hourly cash equivalent.

Example: The fringe benefit is 10 paid holidays per year.
Employee’s hourly rate is \$9.00.
 $\$9.00 \times 80 \text{ hours (10 days of 8 hours each)} = \$720.$
 $\$720/2,080 \text{ hours} = \0.346 per hour.

Example: The fringe benefit is one week paid vacation after one year of service. Employee’s hourly rate is \$10.00.
 $\$10.00 \times 40 \text{ hours} = \$400.$
 $\$400/2,080 \text{ hours} = \0.19 per hour.

- ◇◇ Where an employer decides to pay an hourly cash equivalent instead of the vacation fringe benefit, the cash payments need not commence until the employee has completed “one year of service.” However, if the employee should terminate employment before receiving the full cash amount of the vested fringe benefit due, the employee must be paid the full amount of any difference remaining as a final cash payment.

Example: An employee became eligible for one week paid vacation on May 1 and the employer elects to pay the hourly cash equivalent to the employee in lieu of the paid vacation beginning that date. The employee terminates his employment on July 1. If the employee has received only one-sixth (2 of 12 months) of the vacation to which he/she is entitled, the employee is still due the remaining five-sixths (10 of 12 months) of the vacation pay upon termination.

DISCHARGING WAGE AND FRINGE BENEFIT OBLIGATIONS

- ◇◇ Fringe benefits required under the SCA must be furnished, separate from and in addition to the specified monetary wages, by the contractor to the employees engaged in performance of the contract, as specified in the applicable SCA wage determination in a covered contract. A contractor must keep appropriate records separately showing amounts paid for wages and amounts paid for fringe benefits, and cannot simply assert that paying more than the required monetary wages offsets the fringe benefit requirement, or vice versa. 29 C.F.R. § 4.170.
- ◇◇ The obligation to furnish the specified benefits “may be discharged by furnishing any equivalent combinations of fringe benefits or by making equivalent or differential payments in cash,” in accordance with 29 C.F.R. § 4.177.
- ◇◇ Thus, in the following example, where a fixed cost per employee health and welfare fringe benefit applies assume that the contractor provides vacation and holiday benefits the wage determination specifies, available records show that an individual service employee is being paid a monetary wage of \$12.36 per hour, and the employer pays \$1.60 per hour (up to 40 hours per week) for the employee’s health insurance. The fringe benefit requirement would not be met

Wage Determination requires		Contractor has paid	
Wage	\$10.25	Wage	\$12.36
<u>H&W benefits</u>	<u>3.71</u>	<u>H&W benefits</u>	<u>1.60</u>
Total	\$ 13.96	Total	\$13.96

- ◇◇ In this example, the contractor/subcontractor would be in compliance with the wage requirement of the applicable minimum monetary wage requirement. However, the fringe benefit requirement would not be met. The cost of the fringe benefits furnished payment is \$2.11 below the minimum listed in the wage determination.
- ◇◇ In relation to this example, the contractor may discharge the obligation to furnish the specified benefits by furnishing any equivalent combination of fringe benefits, or by making equivalent or differential payments in cash as follows. If the contractor/subcontractor met the vacation and holiday benefit requirements, as listed on the wage determination, and beyond that, only provided health insurance benefits by contributing an hourly amount of \$2.49 for the worker’s health insurance, the remaining \$1.22 could be paid as a cash equivalent, or that

amount could be used to provide another benefit (such as by a contractor's contribution to the employee's 401(k) plan account) in order to be in compliance with the \$3.71 H&W benefit required by the wage determination. It is important to note that employer contributions to bona fide fringe benefit plans must be made regularly, at least quarterly.

TEMPORARY AND PART-TIME EMPLOYMENT

- ◇ SCA makes no distinction between temporary, part-time, and full-time employees. In the absence of an expressed limitation on a wage determination, wage and fringe benefit requirements apply equally to all such employees. 29 C.F.R. § 4.165(a)(2).
- ◇ However, part-time employees need only be provided with a proportionate amount of the vacation and holiday fringe benefits due full-time employees. 29 C.F.R. § 4.176.

Examples:

- ◇◇ Full-time employees are due one week vacation (40 hours). A part-time employee works a regularly scheduled workweek of 20 hours. The part-time employee is due one-half the hours ($20/40 = 1/2$) due the full-time worker's paid vacation, based on working half the time the full-time employee works.
- ◇◇ Full-time employee works an 8 hour day and receives 8 hours pay as a holiday benefit. A part-time employee works 5 hours per day. The part-time employee is due 5 hours pay ($5/8$) as holiday benefit.
- ◇◇ Holiday or vacation pay obligations to temporary and part-time employees working an irregular schedule of hours may be discharged by paying such employees a proportion of the holiday or vacation benefits due full-time employees based on the number of hours each such employee worked in the workweek prior to the workweek in which the holiday occurs, or with respect to vacations, the number of hours which the employee worked in the year preceding the employee's anniversary date of employment. 29 C.F.R. § 4.176(a)(3).
- ◇◇ Health and welfare fringe benefits must be paid at the specified amount in the wage determination for temporary and part-time employees. In general, the temporary and part-time employees are entitled only to an amount proportional to the amount of time spent in contract work. 29 C.F.R. § 4.176.

RECORDKEEPING

Basic Payroll Records

The SCA recordkeeping requirements are stated in the SCA contract clauses. 29 C.F.R. § 4.6(g). The employer is required to maintain the following records for each employee subject to the SCA and to make these records available for inspection and/or transcription on the request of an authorized representative of the Wage and Hour Division (WHD). These records must be maintained for three years from the completion of the work. Also, the contractor may be required to provide the basic time and payroll records required under the FLSA. 29 C.F.R. § 516.2.

- ◇ Name, address, social security number of each employee.
- ◇ The correct work classification(s), rate(s) of monetary wages paid and fringe benefits provided, rate(s) of cash payments in lieu of fringe benefits, and total daily and weekly compensation paid to each employee.

Note: If the employer chooses to pay a cash equivalent to meet the fringe benefit requirements of the wage determination, the cash payment must be clearly identified as fringe benefits in the employer's records. 29 C.F.R. § 4.170.

- ◇ The number of daily and weekly hours worked by each employee subject to SCA requirements.
- ◇ Any deductions, rebates or refunds from the total daily or weekly compensation of each employee.
- ◇ A list of monetary wages and fringe benefits for which wage rates and fringe benefits have been determined in accordance with the contract clause setting forth the conformance procedures.
- ◇ The list of a predecessor contractor's employees furnished to the contractor pursuant to 29 C.F.R. § 4.6(1)(2).
- ◇ Relevant records for any service employee(s) covered by a WHD certificate that allows for the payment of special minimum wages to workers with disabilities under Section 14 of the FLSA, and for any apprentices registered in an approved "bona fide" apprenticeship program. SCA: 29 C.F.R. §§4.6(o) – (p); FLSA: 29 C.F.R. Part 525; National Apprenticeship Act: 29 C.F.R. § 29.6.

**OVERTIME PAY ON
SCA CONTRACTS**

OVERTIME REQUIREMENTS OF FLSA AND CWHSSA

WORK IN MORE THAN ONE CLASSIFICATION IN A WEEK

OVERTIME REQUIREMENTS OF FLSA AND CWHSSA

- ◇ The SCA does not require overtime pay, but FLSA and/or CWHSSA overtime pay requirements may apply to SCA contracts. 29 C.F.R. §§ 4.180 and 4.181.
- ◇ FLSA has the broadest application, and contractors/subcontractors performing on contracts subject to the SCA may be required to compensate their non-exempt employees working on or in connection with SCA-covered contracts for overtime work pursuant to the FLSA overtime pay standards.
- ◇ CWHSSA applies to any service contract in excess of \$100,000 that may require or involve the employment of laborers, mechanics, guards, or watchmen.
- ◇ CWHSSA applies to **laborers, mechanics, guards, and watchmen** for the time spent on covered contract work only (i.e., all time each employee spent working **on covered contracts** - excluding all commercial, non-government work). (Service employees on the contract who are not laborers, mechanics, guards or watchmen, are not subject to CWHSSA).
- ◇ FLSA requires the payment of time and one-half the “regular rate of pay” for all hours worked in excess of 40 hours in a week. *See* 29 C.F.R. §§ 778.107-778.109.
- ◇ CWHSSA requires the payment of time and one-half the “basic rate of pay” for all hours worked in excess of 40 hours in a week. The “basic rate of pay” under CWHSSA is the individual’s straight time hourly rate and cannot be less than the required “basic hourly rate” (generally listed in the “RATE” column) in an applicable SCA wage determination.
- ◇ In computing overtime obligations under the FLSA and CWHSSA, the contractor may exclude contributions to “bona fide” fringe benefit plans and/or cash payments made to meet fringe benefit requirements in an applicable SCA wage determination. 29 C.F.R. §§ 29 C.F.R. §§ 4.177(e) and 778.7.
- ◇ For example, for an employee who worked 44 hours on a covered contract as a janitor, where the wage determination rate for a janitor is \$15.00 (basic hourly rate) plus cash payments of \$3.71 in lieu of health and welfare fringe benefits per hour per employee, the correct computations under the FLSA and CWHSSA would be:

$$\begin{array}{rcl}
 40 \text{ hours} \times \$ 3.71 & = & \$ 148.40 \text{ in fringe benefits} \\
 44 \text{ hours} \times \$15.00 & = & \$ 660.00 \text{ for prevailing wages} \\
 4 \text{ hours} \times \$15.00 \times \frac{1}{2} & = & \underline{\$ 30.00} \text{ for FLSA and/or CWHSSA O/T} \\
 & & \$ 838.40
 \end{array}$$

Note that for a wage determination including the “average cost” benefits the benefits would be computed for **all** hours worked ($\$3.71 \times 44 = \163.24).

- ◇ CWHSSA and FLSA do not require premium pay or overtime compensation for work on holidays, weekends, or days of rest. 29 C.F.R. § 778.102.
- ◇ CWHSSA and FLSA overtime pay requirements do not apply to non-work hours, such as paid holidays and paid leave. Such hours are not counted in the computation of overtime pay required under these federal overtime laws. Their overtime pay requirements apply only to hours worked. 29 C.F.R. § 778.218. Rules concerning “Hours Worked” are at 29 C.F.R. § 785.

WORK IN MORE THAN ONE CLASSIFICATION IN A WEEK

- ◇ When an employee in a single workweek works at two or more different types of work for which different nonovertime rates of pay have been established, his or her regular rate for that week is the weighted average of such rates. That is, the employee’s total earnings (except statutory exclusions) are computed to include compensation during the workweek from all such rates, and are then divided by the total number of hours worked at all jobs. 29 C.F.R. § 778.115.
- ◇ An employee who performs two or more different kinds of work for which different straight time hourly rates are established may agree with the employer, in advance of the performance of the work, to be paid during overtime hours at a rate not less than one and one-half times the hourly nonovertime rate established for the type of work he or she will perform during such overtime hours. (Thus, under this arrangement, the overtime pay is calculated based on the “rate in effect” for the type of work being performed during the overtime hours.) Additional detail specifying requirements that must be met in relation to “Computing Overtime Pay on the Rate Applicable to the Type of Work Performed in Overtime Hours” are at 29 C.F.R. §§ 778.415-778.419; in particular, section 778.419 addresses “Hourly workers employed at two or more jobs.”

**U.S. DEPARTMENT OF LABOR
PREVAILING WAGE RESOURCE BOOK**

**CWHSSA/OVERTIME PAY ON
SCA CONTRACTS**

◇ The following examples demonstrate two methods for computing the overtime premium pay under FLSA and/or CWHSSA for an employee who worked in different job classifications and at different rates of pay in the same workweek.

◇◇ An employee is hired to perform work on a covered service contract in two job classifications: painter and electrician. The wage determination rate for an electrician is \$22.00 (basic hourly rate). The wage determination rate for a painter is \$20.00 (basic hourly rate).

Method 1: Computation of the overtime **premium** based on the “regular rate” for the workweek.

Step 1: Determine the straight time wages due, excluding fringe benefits:

$$\begin{array}{rcl} 24 \text{ hours at the painter's rate of } \$20.00 & = & \$480.00 \\ 20 \text{ hours at the electrician's rate of } \$22.00 & = & \underline{440.00} \\ \text{Total straight time wages} & = & \$920.00 \end{array}$$

Step 2: Calculate the “regular rate”:

$$\$920.00 / 44 \text{ hours worked} = \$ 20.91 \text{ regular rate}$$

Step 3: Compute the overtime premium due:

$$\frac{1}{2} (\$20.91) \times 4 \text{ overtime hours worked} = \$41.82$$

Method 2: Computation of the overtime premium based on the “rate in effect” when the overtime hours were worked. (See section 7(g) of the FLSA.)

	S	M	T	W	T	F	S
Painter hours		8	8	8			
Electrician hours					8	8	4

In this example the overtime hours occurred on Saturday. The overtime **premium** could be computed based as follows:

$$\frac{1}{2} (\$22.00) \times 4 \text{ hours} = \$44$$

**INVESTIGATIVE PROCESS,
WITHHOLDING, AND
DISBURSEMENT OF FUNDS**

UNDER

SCA/CWHSSA/FLSA

INTRODUCTION TO THE INVESTIGATIVE PROCESS

SCA LABOR STANDARDS/CONTRACT STIPULATIONS

INVESTIGATION PROCEDURES

**DETERMINING COMPLIANCE WITH SCA/CWHSSA AND
RELATED FLSA REQUIREMENTS**

REMEDIES AND SANCTIONS

HEARING PROCESS AND APPEAL RIGHTS

INTRODUCTION TO THE INVESTIGATIVE PROCESS

The WHD is responsible for administering and enforcing a number of federal laws that set basic labor standards, among them:

- ◇ The Fair Labor Standards Act (FLSA)
- ◇ The Family and Medical Leave Act (FMLA)
- ◇ The Migrant and Seasonal Agricultural Worker Protection Act (MSPA)
- ◇ The Employee Polygraph Protection Act
- ◇ Certain employment standards and worker protections under the Immigration and Nationality Act
- ◇ The Davis-Bacon and related Acts
- ◇ The McNamara-O'Hara Service Contract Act

The WHD may conduct investigations under any one or more of the laws it enforces. A WHD investigator (WHI) may conduct an investigation to determine whether these laws apply to an employer. A WHI may also visit an employer to provide information about the application of, and compliance with, the labor laws administered by the WHD.

Most employers are subject to the FLSA, the federal law of most general application requiring payment of the minimum wage and overtime premium pay, keeping certain basic payroll and employment records, and limiting the working hours and types of jobs for certain underage youths. Section 11(a) of the FLSA authorizes representatives of DOL to investigate and gather data concerning wages, hours, and other employment practices; enter and inspect an employer's premises and records; and question employees to determine whether any person has violated any FLSA provision(s).

The WHD conducts investigations for a number of reasons, all having to do with enforcement of the laws and ensuring an employer's compliance. The WHD does not typically disclose the reason for an investigation. Many are initiated by complaints. **All complaints are confidential; the name of the worker and the nature of the complaint are not disclosable; whether a complaint exists may not be disclosed.** In addition to complaints, the WHD selects certain types of businesses or industries for investigation. Regardless of the particular reason that prompted the investigation, all investigations are conducted in accordance with established policies and procedures.

SCA LABOR STANDARDS/CONTRACT STIPULATIONS

Section 2(a) of the SCA requires that stipulations (contract clauses) be included in all covered contracts in excess of \$2,500. The stipulations are set forth at 29 C.F.R. § 4.6 and FAR 48 C.F.R. § 52.222-41. Among the contract clause requirements are:

- ◇ Minimum wages to be paid the various classes of service employees.
- ◇ Fringe benefits to be furnished to the service employees.
- ◇ Safety and health provisions.
- ◇ Furnishing employees notice of required compensation.
- ◇ Statement of rates the federal agency would pay to the various classes of service employees if they were federal employees.
 - ◇◇ DOL must give due consideration to such rates in making wage and fringe benefit determinations.

In addition to the SCA contract stipulations established in 29 C.F.R. § 4.6, contracts to which CWHSSA overtime requirements apply must also include the contract clause language set forth at 29 C.F.R. § 5.5(b) and FAR 48 C.F.R. § 52.222-4.

INVESTIGATION PROCEDURES

DOL has sole enforcement authority under the SCA (unlike the Davis-Bacon Act). The WHD applies the procedures described below in conducting investigations under the SCA, CWHSSA, FLSA, and other laws within its scope of enforcement responsibility.

The WHI will identify himself/herself and present official credentials. The WHI will explain the investigation process and the types of records required during the review.

Generally, a WHD investigation may consist of the following steps:

- ◇ Examination of records to determine which laws or exemptions apply. These records include, for example, those showing the employer's annual dollar volume of business transactions, involvement in interstate commerce, and work on government contracts. *Information from an employer's records will not be revealed to unauthorized persons.*
- ◇ Examination of payroll and time records, and taking notes or making transcriptions or photocopies essential to the investigation.
- ◇ Interviews with certain employees in private. The purpose of these interviews is to verify the employer's payroll and time records, to identify workers' particular duties in sufficient detail to decide which exemptions apply, if any, and to confirm that minors are legally employed. Interviews are normally conducted on the employer's premises. In some instances, present and former employees may be interviewed at their homes or by mail or telephone.

In a full SCA investigation, the WHI will include the following compliance issues in the investigation:

- ◇ Has the employer posted the "Notice to Employees Working on Government Contracts" (WH Publication 1313)?
- ◇ Did the federal agency incorporate the correct wage determination(s) in the contract?
- ◇ Did the employer post the wage determination or make it available to each employee?
- ◇ Are service employees paid the applicable prevailing wage(s) rate for the class(es) of work performed?

- ◇ Are service employees properly classified based on the work performed on a covered service contract?
- ◇ Has the employer kept accurate records of employees' hours of work, rate(s) of pay, payments made or costs incurred for fringe benefits, gross wages earned, and job classification(s)?
- ◇ Did individual service employees perform work in more than one classification; if so, was the work segregated in the employer's time and payroll records?
- ◇ If fringe benefits were not paid in cash, did the employer incur the appropriate costs to provide fringe benefits?
- ◇ Was overtime properly paid under either CWHSSA and/or FLSA?
- ◇ Are service employee(s) covered by a WHD certificate(s) that allows for the payment of special minimum wages to workers with disabilities under Section 14 of the FLSA?

Initial Employer Conference

- ◇ The WHI will contact a responsible official of the firm at the start of the investigation.
- ◇ Normally, the WHI will advise the official of the various steps that the investigation includes: the initial employer conference, contact with the federal contracting agency and prime contractor (if applicable), examination of the contract documents, examination of the basic payroll records, employee interviews, site inspection, and final conference.
- ◇ The contractor will be asked to provide information, such as the firm's legal name and responsible company officials, trade name(s) if any, address of the firm's headquarters, and federal tax identification (FEIN) number.
- ◇ Generally, the investigation covers a two-year period, but this period can be extended in certain instances. The contractor will be asked to make available basic time and payroll records for that period. (An FLSA investigation may be conducted concurrently with the SCA/CWHSSA investigation.)

Review the Prime Contract

The contracting agency and/or the contractor will be asked to identify:

- ◇ The contracting agency/prime contractor, name and telephone number of the contracting officer, contract number, amount of contract, purpose of contract, date of contract award, period(s) of performance (start and ending dates, if known), place(s) of performance.
- ◇ The WHI may request copies of the contract award letter, the labor standards clauses, wage determination(s) in the contract, conformance actions, contract modifications by which the federal contracting agency exercised options and/or extended the contract, and the e98 (if applicable) the federal contracting agency submitted to DOL to obtain SCA wage determination(s) for the contract. The WHI may review/duplicate portions of the scope of work from the contract.
- ◇ The WHI will review the contract to determine in particular:
 - ◇◇ Are required SCA contract stipulations in the contract?
 - ◇◇ Is the correct wage determination(s) in the contract?
 - ◇◇ Does the wage determination(s) apply to the geographic area(s) of contract performance?
 - ◇◇ Did the federal agency obtain and incorporate new wage determination(s) in the contract initially and/or at the execution of an option and/or extension of the contract term? 29 C.F.R. § 4.5(a)(2) and 29 C.F.R. § 4.6(b)(3).
 - ◇◇ Is a section 4(c) collective bargaining situation applicable to this contract?
 - ◇◇ Do employees considered to be outside the SCA definition of “service employees” because they are professional, administrative or executive employees meet the requirements for exemption under 29 C.F.R. Part 541? *See* SCA § 8 and 29 C.F.R. §§ 4.113 and 4.156.
 - ◇◇ Are all the classes of service employees who are employed on the contract listed in the contract wage determination and/or conformance actions approved by DOL? 29 C.F.R. §§ 4.6(b)(1)-(2).

Subcontracts

- ◇ The WHI will review documents or information regarding labor standards and wage determinations that were provided by the prime contractor to the subcontractor. The subcontractor will be asked to provide a copy of the subcontract and any other relevant documents.

- ◇ The SCA contract clauses included in the prime contract require the prime contractor to insert the SCA stipulations and applicable wage determinations in any subcontract subject to the SCA. 29 C.F.R. § 4.6(j).
- ◇ The prime contractor is responsible for violations by subcontractors. 29 C.F.R. § 4.114(b).
- ◇ When a subcontractor is investigated, typically the WHI will notify the prime contractor at the beginning of the investigation.

Contracts that do not contain the SCA contract clauses

- ◇ If an WHI finds that a service contract in excess of \$2,500 does not contain SCA stipulations and/or the applicable wage determination(s), the investigation may be suspended until the contract is amended by the contracting agency.
- ◇ Where appropriate, the WHD will advise the contracting agency to insert SCA stipulations and/or the applicable wage determination into the contract, and subsequently proceed with the investigation. The WHD may require retroactive application of the wage determination. 29 C.F.R. § 4.5(c).

Examination of Basic Payroll Records

- ◇ The WHI will examine the contractor's payroll records. The recordkeeping requirements of the SCA are stated in the SCA contract clauses. The contractor is required to maintain records for each employee subject to the SCA and to make these records available for inspection and/or transcription on the request of an authorized WHD representative. These records must be maintained for three years from the completion of the work. 29 C.F.R. § 4.6(g). Also, the contractor may be required to maintain and provide the basic time and payroll records required under the FLSA. 29 C.F.R. § 516.2.

Employee Interviews

- ◇ As stipulated in the SCA contract clauses, the contractor must permit authorized representatives of the WHD to conduct interviews with employees at the work site during normal working hours. 29 C.F.R. § 4.6(g)(4).
- ◇ Employee interview statements are confidential and therefore must be conducted in an area that provides privacy.
- ◇ The WHI may interview current and/or former employees.

Review of Conformance Actions 29 C.F.R. § 4.6(b)(2).

- ◇ If the WHI finds that the contractor employs classes of workers not listed on the wage determination, the WHI will:
 - ◇◇ Determine whether conformance procedures were followed for the unlisted class(es).
 - ◇◇◇ If the contractor has not received a response to a request for approval of a conformance action, the WHI will determine whether a conformance action was initiated, completed, approved, denied and/or returned to the agency for transmittal to the contractor.
 - ◇◇◇ If the contractor and contracting agency have not taken appropriate action to submit a conformance request, the WHI can request the contractor to submit a request. In addition, the WHD, upon discovery of a failure to follow the contract requirements regarding the submission of conformance requests, can determine a conformed classification, wage rate, and or fringe benefits that will apply retroactively to the date each affected class of employees commenced work on the contract. 29 C.F.R. § 4.6(b)(2)(vi).
- ◇ The investigator generally will wait until after the WHD conformance determination is made before proceeding to compute back wages due, if any, and complete the investigation.

Determining Compliance with CWHSSA

- ◇ See the “Compliance Principles” chapter of this resource book for a detailed discussion of determining compliance with CWHSSA overtime pay requirements, where applicable.

CWHSSA Liquidated Damages

- ◇ Liquidated damages are computed at \$10.00 per day per CWHSSA violation. 40 U.S.C. § 3702(c); 29 C.F.R. § 5.5(b)(2); FAR 48 C.F.R. §§ 22.302 and 52.222-4(b).
 - ◇◇ As a matter of administrative policy, WHD does not compute liquidated damages for employees whose CWHSSA back wages are less than \$20.
 - ◇◇ The contractor will be advised of the potential liquidated damages and the possibility of their assessment by the contracting agency.

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PREVAILING WAGE RESOURCE BOOK**

**SCA/CWHSSA
INVESTIGATIONS**

The decision whether to assess the damages is made by the federal contracting agency. (Liquidated damages in excess of \$500 may be waived or adjusted only with the concurrence of WHD.)

◇ Example:

	M	T	W	T	F	S	S	TOTALS
REGULAR TIME	10	12	13	9	8	3	0	55

In the above example, no overtime premium was paid. The 15 weekly overtime hours were worked on three calendar days, Thursday, Friday and Saturday. Thus, \$30.00 in CWHSSA liquidated damages would be computed, and may be assessed.

Final conference

- ◇ When all the fact-finding steps have been completed, the WHI will ask to meet with the contractor and/or a representative of the firm who has authority to reach decisions and commit the contractor to corrective actions if violations have occurred. The contractor will be told whether violations have occurred and, if so, what they are and how to correct them. If back wages are owed to employees, the WHI will request payment of back wages.
- ◇ The contractor will have an opportunity to respond to the alleged violations and/or provide an explanation as to why the violations occurred.
- ◇ Contractors may be represented by their accountants or attorneys at any point during this process. When the WHI has advised the contractor of his/her findings, the contractor or representative may present additional facts for consideration if violations were disclosed.
- ◇ If a subcontractor fails to make restitution of the back wage liability found due, the WHI should advise the prime contractor of the findings and request payment of the back wages. SCA § 3(a) and 29 C.F.R. § 4.187(c) and 4.187(e)(1).
- ◇ Although the WHI should advise the contractor of any potential CWHSSA liquidated damages assessment, the initial decision to assess liquidated damages for CWHSSA violations will be made by the contracting agency. FAR 48 C.F.R. § 22.302.
- ◇ The WHI may advise the contractor of the debarment sanctions under the SCA (discussed below). If it appears that the debarment criteria have been met, WHD will advise the contractor at the final conference of the possibility of debarment sanctions.

REMEDIES AND SANCTIONS

(29 C.F.R. §§ 4.187 – 4.191)

Withholding of Contract Funds to Cover Wages and Fringe Benefits Due

- ◇ To protect the rights of covered workers under the SCA and CWHSSA, DOL regulations provide for remedies when compliance is in question. An important element is the withholding of contract funds sufficient to satisfy alleged wage underpayments pending resolution of a wage dispute. Withholding action may be necessary to protect the employees' interests. It assures the availability of monies for the payment of the back wages if a contractor refuses to make restitution when back wages are found due to covered workers. The contracting agency may withhold funds on its own initiative or at the direction of DOL.
- ◇◇ The SCA contract clause set forth at 29 C.F.R. § 4.6(i) and FAR 48 C.F.R. § 52.222-41(k) directs the contracting officer to withhold or cause to be withheld, from the prime contractor, sums an appropriate DOL official requests or sums the contracting officer decides may be necessary to pay underpaid employees of the contractor or subcontractor(s). Such funds may be withheld from any federal contract with the prime contractor. (*See also* 29 C.F.R. § 4.187.) The same contract clause also stipulates that in the event of failure to pay the employees wages or fringe benefits due under the SCA, the agency may suspend further payments until the SCA violations have ceased; also, the agency may terminate the contractor's right to proceed with work under the contract and charge the contractor in default for any additional cost needed to complete the contract work under other arrangements.
- ◇◇ The comparable CWHSSA contract clause regarding the withholding of contract payments is at 29 C.F.R. § 5.5(b)(3) and FAR 48 C.F.R. § 52.222-4(c); *see also* FAR 48 C.F.R. § 52.22.406-9(a).
- ◇ There is no right of individual action (suit) to recover back wages under the SCA.
- ◇ The contracting agency is responsible for withholding actions.
- ◇◇ In the case of requirements-type contracts, it is the contracting agency and not the using agency that is responsible for withholding. 29 C.F.R. § 4.187.
- ◇◇ Contracting officers shall withhold funds upon written request from DOL. Contracting officers should respond immediately confirming that the funds have been withheld.

- ◇◇ Additionally, if the request has been made by DOL, it is important for the agency to preserve the withheld funds until notified in writing by DOL regarding final disposition of the withheld funds.

Due Process for Withholding Action

- ◇ To ensure that contractors and subcontractors receive “due process” prior to the withholding of funds at the direction of the WHD, the following steps are included in the WHD enforcement procedures.
 - ◇◇ Where a contractor refuses to pay back wages under the SCA and funds are available for withholding, WHD will generally send a “due process” letter. This letter will include:
 - ◇◇◇ A statement that the final conference was conducted at which time the contractor was provided an opportunity to discuss alleged violations; or if a final conference was not held, provide the reason(s) why;
 - ◇◇◇ A brief description of the alleged violations;
 - ◇◇◇ An affirmation that the contractor received a Summary of Unpaid Wages;
 - ◇◇◇ A statement that the matter is being forwarded for a decision to a designated WHD deciding official, who will decide whether withholding action will be taken based on the back wage findings;
 - ◇◇◇ A statement that the contractor has fifteen (15) days to provide the WHD deciding official with written views on whether the violations occurred; and
 - ◇◇◇ A statement that any determination regarding the withholding of contract funds will not result in the distribution of the funds to the underpaid workers until such time as the administrative remedies available to the contractor have been completed. *See* discussion of “The Hearing Process And Appeal Rights,” below.
 - ◇◇ If the deciding official determines that withholding action is warranted, a copy of the WHD withholding request to the contracting agency and a letter indicating the deciding official’s decision on withholding will be sent to the prime contractor.
- ◇ In certain cases, such as missed payrolls, likely bankruptcy filings, or imminent contract close-out, it may be necessary to request withholding before the

measures described above can be provided. In those cases, the procedures outlined above should be followed after the withholding action; and based on the contractor's submission, the WHD deciding official may decide to revoke an earlier withholding request.

Priority of withheld funds

- ◇ DOL's position is that accrued funds withheld for payment of wages may not be used or set aside for other purposes until such time as the prevailing wage issues are resolved. To give contracting agency reprocurement claims priority, for example, would essentially make the employees unfairly pay for the breach of contract between their employer and the Government.
- ◇ It is DOL's position that wages due underpaid employees have priority over any competing claims against a contractor, regardless of when the claims were raised. (*See* C.F.R. § 4.187(b).) DOL believes that to hold otherwise would be inequitable and contrary to public policy since the affected employees have already performed work from which the Government has received the benefit.
- ◇ Wage claims for underpayment have priority over:
 - (1) An Internal Revenue Service levy for unpaid taxes;
 - (2) Reprocurement costs of the contracting agency after a contractor's default or termination for cause;
 - (3) Any assignee of the contractor . . . including assignments made under the Assignment of Claims Act;
 - (4) Any claim by a trustee in bankruptcy.

Disposition of withheld funds

- ◇ The back wage disbursement process is typically handled by DOL.
- ◇ Electronic transfer of funds and paper check deposits to WHD should be performed in same manner as DBA funds are transferred – see AAM Number 215 dated March 10, 2014 for guidance.

Contract cancellation

- ◇ Pursuant to the contract clause at 29 C.F.R. § 4.6(i) and FAR 48 C.F.R. § 52.222-41(k), the agency may cancel the contractor's right to proceed with work under the contract and charge the contractor in default for any additional cost needed to complete the contract work under other arrangements.
- ◇ A contract may be cancelled by the contracting agency if any violation(s) are found of any of the SCA contract stipulations, and additional costs of completing the contract work under another arrangement may be charged to the original contractor. 29 C.F.R. § 4.190.

Debarment

- ◇ After a hearing or other final agency action, any contractor or person responsible for SCA violations may be debarred from receiving government contracts or performing as a subcontractor for a period of three years, unless the responsible DOL official (Administrative Law Judge or, if appealed, the ARB) recommends relief from debarment because of "unusual circumstances." SCA § 5; 29 C.F.R. § 4.188(b)(3).
- ◇ The term "unusual circumstances," which was added to the SCA by the 1972 amendments to the SCA, significantly restricted prior discretionary authority regarding the sanction of debarment.
- ◇ Although Congress did not define the term "unusual circumstances" in the SCA, Congress did indicate that the mere payment of back wages and the promise of future compliance are insufficient to preclude debarment. Criteria for determining "unusual circumstances" are stated at 29 CFR § 4.188(b)(2).
 - ◇◇ Relief from the debarment sanction cannot be provided where a respondent's conduct in causing or permitting SCA violations is willful, deliberate or of an aggravated nature or where the violations are a result of culpable conduct, as described in 29 C.F.R. § 4.188(b)(3)(i).
 - ◇◇ Furthermore, relief from debarment cannot be provided where a contractor has a history of similar violations, where a contractor has repeatedly violated the provisions of the Act, or where previous violations were serious in nature. Thus, a history of recurring violations of an identical nature prevents the finding of "unusual circumstances."

THE HEARING PROCESS AND APPEAL RIGHTS

(29 C.F.R. Part 6)

- ◇ In accordance with section 4(a) of the SCA, DOL is authorized to hold hearings and make decisions based upon findings of fact as deemed necessary to enforce the provisions of the SCA.
- ◇ In situations where the contractor refuses to agree to future compliance, fails to make back wage restitution, or debarment action is indicated, investigation files are referred by WHD to the Regional Solicitor for preparation for an administrative hearing before a Department of Labor Administrative Law Judge (ALJ).
- ◇ Employees do not have private rights of action under SCA to institute suits on their own behalf to collect unpaid wages.
- ◇ After review and concurrence by the Regional Solicitor's Office, a complaint is filed with the Office of the Chief Administrative Law Judge requesting that a hearing be held. The contractor is served a copy of this Complaint.
- ◇ The Office of the Chief Administrative Law Judge is responsible for the scheduling of the administrative hearing. The hearing is normally held in the city closest to the location of the contractor.
- ◇ During this period, the Regional Solicitor's Office may continue to contact the contractor, attempting to settle the matter without the need for a hearing; and funds will continue to be withheld from the contractor to cover the alleged back wage liability.
- ◇ When the ALJ renders a decision regarding the issues in a case (such as the amount of the alleged back wage liability and/or debarment), any aggrieved party may petition the Administrative Review Board (ARB) within 40 days for review of the decision. 29 C.F.R. 6.20.

**ADMINISTRATIVE REVIEW BOARD PROCEEDINGS
(29 C.F.R. Part 8)**

- ◇ The ARB, an appellate body within the DOL that was created in 1996, has a maximum of five members appointed by the Secretary of Labor. The ARB succeeded certain former DOL appeals boards. ARB cases arise on appeal from ALJ decisions and final rulings by the WHD Administrator. The ARB issues final agency decisions for the Secretary of Labor in cases arising under a wide range of labor laws, including the Service Contract Act and the Davis-Bacon and related Acts.

- ◇ Jurisdiction of the ARB under the SCA includes:
 - ◇◇ Wage determinations issued under the SCA;
 - ◇◇ Substantial variance proceedings or arm's-length negotiations proceedings pursuant to section 4(c) of the SCA;
 - ◇◇ Debarment or other enforcement proceedings;
 - ◇◇ Proceedings to determine substantial interest of debarred persons or firms;
 - ◇◇ Decisions of the WHD Administrator or authorized representative regarding recommendations of a Federal agency for adjustment or waiver of liquidated damages assessed under CWHSSA;
 - ◇◇ Other final actions of the WHD Administrator or authorized representative, such as additional classification actions and rulings with respect to application of the Act(s), or the regulations, or of wage determinations issued thereunder;
 - ◇◇ Other matters specifically referred to the ARB by the Secretary of Labor.

- ◇ To be timely, petitions to the ARB for review of:
 - ◇◇ Wage determinations must be filed within 20 days of issuance of the WHD Administrator's decision;
 - ◇◇ Coverage and interpretation matters must be filed within 60 days of issuance of the WHD Administrator's decision;

- ◇◇ ALJ decisions in enforcement proceedings must be filed within 40 days of the date of the decision.

- ◇ Appeals to the ARB typically are decided based on the written submissions of the parties and the record in the case

**NONDISPLACEMENT OF
QUALIFIED WORKERS UNDER
FEDERAL SERVICE CONTRACTS

EXECUTIVE ORDER 13495**

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INTRODUCTION

Executive Order (E.O.) 13495

- ◇ President Obama signed E.O. 13495 – “Nondisplacement of Qualified Workers Under Service Contracts” – on January 30, 2009.
- ◇ E.O. 13495 “establishes a general policy of the Federal Government concerning service contracts and solicitations for service contracts for performance of the same or similar services at the same location.” E.O. § 1.
 - ◇◇ Specifically, the E.O. mandates the inclusion of a contract clause entitled “Nondisplacement of Qualified Workers” in covered contracts requiring the successor contractor and its subcontractors to offer employees working under the predecessor contract whose employment will be otherwise terminated, a right of first refusal of employment under the successor contract in positions for which they are qualified.
- ◇ The E.O. required the issuance of DOL and FAR regulations in order for its implementation to take effect. E.O. § 10.

Purpose

- ◇ E.O. 13495 recognizes that prior to its issuance successor contractors and subcontractors often hired the majority of predecessor contractors’ employees when a service contract expired and a follow-on contract was awarded for the same or similar services at the same location.
 - ◇◇ However, sometimes successor contractors or subcontractors would displace a predecessor contractor’s employees and hire a new work force.
- ◇ As the E.O. states, the Federal Government’s procurement interests in economy and efficiency are served when a successor contractor hires the predecessor’s employees.
 - ◇◇ A carryover work force provides the Federal Government the benefits of an experienced and trained workforce familiar with the Federal Government’s personnel, facilities, and requirements, and
 - ◇◇ reduces disruption to the delivery of services during the period of transition between the predecessor and successor contractors.

Implementing Regulations

- ◇ The DOL and FAR regulations implementing E.O. 13495 took effect on January 18, 2013, and apply to solicitations issued on or after that effective date. (*See* 76 FR 53720-53762, August 29, 2011, and 77 FR 75760-75781, December 21, 2012.)

- ◇◇ DOL Regulations – 29 C.F.R. Part 9.
 - ◇◇ DOL Contract Clause – 29 C.F.R. Part 9, Appendix A.
 - ◇◇ FAR Regulations – 48 C.F.R. Part 22, Subpart 22.12.
 - ◇◇ FAR Contract Clause – 48 C.F.R. § 52.222-17.
- ◇ The FAR contract clause applies to all covered contracts except those not subject to the FAR, such as those of the United States Postal Service, which are subject to the DOL contract clause.

COVERAGE

SCA covered contracts & “service employees”

- ◇ E.O. 13495 defines “service contract” or “contract” to mean “any contract or subcontract for services entered into by the Federal Government or its contractors” covered by the SCA. E.O. § 2(b).
- ◇ Each federal agency solicitation and each resulting contract that succeeds such a contract or subcontract for the same or similar services at the same location must include the “Nondisplacement of Qualified Workers” contract clause (FAR 48 C.F.R. § 52.222-17), unless a specific exception applies.
 - ◇◇ *Same or similar service* means a service that is either identical to or has one or more characteristics that are alike in substance to a service performed at the same location on a contract that is being replaced by the Federal Government or a contractor on a Federal service contract. 29 C.F.R. § 9.2.
- ◇ The E.O.’s nondisplacement requirements apply to “service employees” as defined by the SCA. E.O. § 2(b).
 - ◇◇ Under the SCA, all employees performing work on the contract are considered service employees unless they are defined as executive, administrative, or professional employees exempt under the FLSA and its regulations at 29 C.F.R. Part 541.

E.O. 13495 exclusions from coverage E.O. § 3 *Exclusions*; *see also* 29 C.F.R. § 9.4 *Exclusions* and FAR 48 C.F.R. § 22.1203-2 *Exemptions*.

- ◇ E.O. 13495, by its terms, does **not** apply to:
 - ◇◇ Contracts or subcontracts under the simplified acquisition threshold (currently \$150,000). FAR 48 C.F.R. § 22.1203-2(a)(1); *see also* FAR 48 C.F.R. Part 13.
 - ◇◇ Contracts or subcontracts awarded under 41 U.S.C. chapter 85, Committee for Purchase from People Who Are Blind or Severely Disabled (traditionally known as the Javits-Wagner-O’Day Act);
 - ◇◇ Agreements for the operation of vending facilities in federal buildings entered into pursuant to the preference regulations issued under the Randolph-Sheppard Act (20 U.S.C. § 107), which authorizes priority to be given to licensed blind persons); or
 - ◇◇ Guard, elevator operator, messenger, or custodial services provided to the federal government under contracts or subcontracts with sheltered workshops employing

the “severely handicapped” as described in 40 U.S.C. § 593 (which provides protection for certain veterans preference employees).

FAR 48 C.F.R. § 22.1203-2(a)(2), (3) and (4).

- ◇◇ Service employees who were hired to work under a federal service contract and one or more nonfederal service contracts as part of a single job, provided that the service employees were not deployed in a manner that was designed to avoid the purposes of the E.O. and its implementing regulations. FAR 48 C.F.R. § 22.1203-2(a)(5).

CONTRACTING AGENCY AND PREDECESSOR CONTRACTOR OBLIGATIONS

Nondisplacement Contract Clause E.O. § 5; 29 C.F.R. § 9.11; FAR 48 C.F.R. § 52.222-17; 29 C.F.R. Part 9, Appendix A (Non-FAR-covered contracts only).

- ◇ E.O. 13495, § 5 requires the contracting agency to include a contract clause entitled “**Nondisplacement of Qualified Workers**” to “be included in solicitations for and service contracts that succeed contracts for performance of the same or similar work at the same location.” The implementing DOL and FAR regulations reiterate this requirement. 29 C.F.R. § 9.11(a) and FAR 48 C.F.R. §§ 22.1207 and 52.222-17.
- ◇ The FAR, at 48 C.F.R. § 22.1207, requires that:
 - The contracting officer shall insert the clause at 52.222-17, Nondisplacement of Qualified Workers, in solicitations and contracts for
 - (1) service contracts
 - (2) that succeed contracts for performance of the same or similar work at the same location and
 - (3) that are not exempted by 22.1203-2 or waived in accordance with 22.1203-3.
- ◇ As noted above, the clause at 29 C.F.R. Part 9, Appendix A shall be inserted in all such solicitations and contracts that are not subject to the FAR.

Notification to contractors and service employees 29 C.F.R. § 9.11(b); FAR 48 C.F.R. § 22.1205.

- ◇ Where a contract will be awarded to a successor for the same or similar services to be performed at the same location:
 - ◇◇ The contracting officer shall direct the predecessor contractor to provide written notice to the service employees employed on the predecessor contract of their possible right to an offer of employment with the successor contractor.
- ◇ The written notice shall be—
 - ◇◇ Posted in a conspicuous place at the worksite; or
 - ◇◇ Delivered to the service employees individually.

- ◇◇ If such delivery is via email, the notification must result in an electronic delivery receipt or some other reliable confirmation that the intended recipient received the notice.
- ◇◇ Appendix B to 29 C.F.R. Part 9 provides a notice that contracting officers may advise contractors to use to provide the written notice. 29 C.F.R. § 9.11(b); FAR 48 C.F.R. § 22.1205(b).
- ◇◇ Where a significant portion of the predecessor contractor's workforce is not fluent in English, the contractor must provide the notice in English and the language(s) with which service employees are more familiar. (English and Spanish versions of the notice are available on the Department of Labor Web site at <http://www.dol.gov/whd/govcontracts>.)
- ◇◇ Any particular determination of the adequacy of a notification, regardless of the method used, must be fact-dependent and made on a case-by-case basis.

Predecessor's certified service employee lists 29 C.F.R. § 9.12(e) and FAR 48 C.F.R. § 22.1204.

- ◇ Not less than 30 days before completion of the contract, the predecessor contractor is required to furnish to the contracting officer a certified list of the names of all service employees working under the contract and its subcontracts at the time the list is submitted.
 - ◇◇ The certified list must also contain anniversary dates of employment of each service employee under the contract and subcontracts for services.
 - ◇◇ The information on this list is the same as that on the seniority list required by the SCA contract clause at FAR 48 C.F.R. § 52.222-41(n).
- ◇ When there are changes to the workforce after submission of the 30-day list, the predecessor contractor shall submit a revised certified list not less than 10 days prior to contract performance completion.
 - ◇◇ If there are no changes to the workforce before 10 days prior to the completion of the predecessor contract, then the predecessor contractor is not required to submit a revised list.
- ◇ Immediately upon receipt of the certified service employee list, but not before contract award:
 - ◇◇ The contracting officer shall provide the certified service employee list to the successor contractor, and,
 - ◇◇ If requested, also provide the list to employees of the predecessor contractor or subcontractors or their authorized representatives.

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NOTE:

- ◇ Federal contracting agency obligations for enforcement of requirements under E.O. 13495 and its implementing regulations are discussed in the “Enforcement” section of this chapter of the *DOL Prevailing Wage Resource Book*.

SUCCESSOR CONTRACTOR OBLIGATIONS

Bona fide offers of employment and service employees' right of first refusal E.O. §§ 1 & 5; 29 C.F.R. §§ 9.2 and 9.12; FAR 48 C.F.R. §§ 22.1202(a), 22.1203-4, and 52.222-17(b).

- ◇ When a federal service contract succeeds a contract for performance of the same or similar services (as defined at 29 C.F.R. § 9.2) at the same location, the successor contractor and its subcontractors must:
 - ◇◇ Make a bona fide express offer of employment on the successor contract to each service employee employed under the predecessor contract whose employment will be terminated as a result of award of the successor contract or the expiration of the contract under which the service employees were hired, and
 - ◇◇ Give each such individual a “right of first refusal” in response to the offer of employment under the successor contract.
 - ◇◇ Such offers are required to be for employment in positions for which the service employees are qualified.

29 C.F.R. §§ 9.2 and 9.12(b)(1); FAR 48 C.F.R. § 22.1202(a).

- ◇ There shall be no employment opening under a covered contract, and the contractor and any subcontractors shall not offer employment under such a contract, to any person prior to having complied fully with this obligation. E.O. § 5 (b); 29 C.F.R. Part 9, Appendix A, paragraph (a); FAR 48 C.F.R. §§ 52.222-17(b)(2) and (c).
- ◇ The obligation to offer employment shall cease upon the employee’s first refusal of a bona fide offer of employment on the contract. 29 C.F.R. § 9.12(b).

Method of job offer FAR 48 C.F.R. § 22.1203-4; 29 C.F.R. § 9.12(b).

- ◇ The offer may be made in writing or orally, and
 - ◇◇ To ensure that the offer is effectively communicated, the successor contractor should take reasonable efforts to make the offer in a language that each worker understands.
 - ◇◇◇ For example, if the contractor holds a meeting for a group of employees on the predecessor contract in order to extend the employment offers, having a co-worker or other person who fluently translates for employees who are not fluent in English would satisfy this provision. 29 C.F.R. § 9.12(b)(3).
- ◇ Each bona fide express offer of employment made to a qualified service employee on the predecessor contract must state a time limit of not less than 10 days for an employee response.

- ◇◇ Prior to the expiration of the 10-day period, the contractor is prohibited from offering employment on the contract to any other person, except as otherwise allowed or required under provisions set forth in E.O. 13495 and its implementing regulations, as discussed below.

E.O. § 5(a); 29 C.F.R. § 9.12(b)(2); FAR 48 C.F.R. § 22.1203-4.

Bona fide offer of employment

- ◇ As a general matter, an offer of employment to a position on the successor contract will be presumed to be bona fide:
 - ◇◇ Even if it is not for a position similar to the one the employee previously held, but is one for which the employee is qualified, and
 - ◇◇ Even if it is subject to different employment terms and conditions, including changes to pay or benefits, than those of the position the employee held with the predecessor contractor.
 - ◇◇◇ For example, an offer of employment to a position providing lower pay or benefits than those of the position the employee held with the predecessor contractor may be considered bona fide if the business reasons for the offer are valid – *i.e.*, not related to a desire that the employee refuse the offer or that other employees be hired for the position.

29 C.F.R. § 9.12(b)(4) and FAR 48 C.F.R. § 22.1203-4.

- ◇ Note: Where an employee has been terminated under circumstances suggesting that the successor contractor's offer of employment may not have been bona fide, the facts and circumstances of the offer and the termination will be closely examined during any compliance action to ensure the offer was bona fide. 29 C.F.R. § 9.12(b)(6).

Employee eligibility & qualifications

- ◇ E.O. 13495 generally requires that successor contractors performing on federal service contracts offer a right of first refusal of suitable employment, *i.e.*, a job for which the employee is qualified. 29 C.F.R. § 9.12(a).
- ◇ A contractor must base its decision regarding an employee's qualifications on written credible information provided by a knowledgeable source such as the predecessor contractor, the local supervisor, the employee, or the contracting agency. 29 C.F.R. § 9.12(c)(4).
- ◇◇ The successor contractor may utilize employment screening processes only when such processes are provided for by the contracting agency, are conditions of the

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service contract, and are consistent with E.O. 13495. 29 C.F.R. § 9.12(b)(1); FAR 48 C.F.R. § 22.1203-4.

- ◇ Usually a person's entitlement to a job offer under E.O. 13495 and the implementing regulations will be based on whether he or she is named on the certified list of all service employees working under the predecessor's contract or subcontracts during the last month of contract performance.
 - ◇◇ However, a contractor must also accept other credible evidence of an employee's entitlement to a job offer under 29 C.F.R. Part 9.
 - ◇◇◇ For example, even if a person's name does not appear on the list of employees on the predecessor contract, an employee's assertion of an assignment to work on a contract during the predecessor's last month of performance coupled with contracting agency staff verification could constitute credible evidence of an employee's entitlement to a job offer.
 - ◇◇◇ Similarly, an employee could demonstrate eligibility by producing a paycheck stub identifying the work location and dates worked.
- 29 C.F.R. § 9.12(a)(3).
- ◇◇ The successor contractor's obligation to offer a right of first refusal exists even if the successor contractor has not been provided a list of the predecessor contractor's employees or the list does not contain the names of all persons employed during the final month of contract performance. 29 C.F.R. § 9.12(a)(2).
- ◇ The successor contractor and its subcontractors shall decide any question concerning an employee's qualifications based on the individual's education and employment history, with particular emphasis on the employee's experience on the predecessor contract. 29 C.F.R. § 9.12(b)(4); FAR 48 C.F.R. § 22.1203-4.

Reduced staffing FAR 48 C.F.R. § 22.1203-6; 29 C.F.R. § 9.12(d).

- ◇ A successor contractor and its subcontractors may employ fewer service employees than the predecessor contractor employed in connection with performance of the work.
- ◇ Thus, the successor contractor need not offer employment on the contract to all service employees on the predecessor contract, but must offer employment only to the number of eligible service employees the successor contractor believes necessary to meet its anticipated staffing pattern, except that:
 - ◇◇ Where a successor contractor does not initially offer employment to all the predecessor contract service employees, the obligation to offer employment shall continue for 90 days after the successor contractor's first date of performance on the contract. 29 C.F.R. § 9.12(d)(3) and FAR 48 C.F.R. § 22.1203-6.

- ◇◇ DOL regulations also provide that if there are staffing pattern changes when a contractor reduces the number of employees in any occupation on a contract with multiple occupations, resulting in some displacement, the contractor shall scrutinize each employee's qualifications in order to offer positions to the greatest number of predecessor contract employees possible. For examples, *see* 29 C.F.R. § 9.12(d)(3).
- ◇ The contractor's obligation to offer employment opportunities and to implement the right of first refusal under E.O. 13495 and the implementing regulations will end when all of the predecessor contract employees have received a bona fide job offer (including stating the time within which the employee must accept such offer, which must be no less than 10 days) or the 90-day window of obligation has expired. (Three examples that demonstrate this principle are provided at 29 C.F.R. § 9.12((d)(1)(ii)(A), (B) & (C)).
- ◇ DOL guidance at 29 C.F.R. § 9.12(d) addresses circumstances in which reduced staffing can occur.
 - ◇◇ The contractor and its subcontractors:
 - ◇◇◇ Determine the number of service employees necessary for efficient performance of the successor contract, and
 - ◇◇◇ May elect to employ fewer service employees than the predecessor contractor employed in connection with performance of the work, for bona fide staffing or work assignment reasons.

E.O. § 5(a); 29 C.F.R. § 9.12(d)(3); 29 C.F.R. Part 9, Appendix A, paragraph (a); FAR 48 C.F.R. § 52.222-17(b)(1).

 - ◇◇ The successor contractor, subject to certain restrictions – such as under non-discrimination laws and regulations – will determine which of the predecessor contractor's employees will receive its offers of employment while the process described above is implemented.

E.O. 13495 exceptions to the requirement to offer the right of first refusal of employment to the predecessor's service employees E.O. § 5; 29 C.F.R. §§ 9.4, 9.12(c) and (d); FAR 48 C.F.R. § 22.1203-5.

- ◇ The E.O. contract clause at § 5(b) states specific exceptions to the general requirement that the successor contractors offer a right of first refusal of employment.
- ◇ The successor contractor bears the responsibility of demonstrating the appropriateness of claiming any of the five exceptions discussed below, from the otherwise applicable obligation to offer a right of first refusal of employment to the predecessor contractor's service employees.

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- ◇ Under the successor contract, a successor contractor or its subcontractors may employ any of its current service employees who:
 - ◇◇ Have worked for the successor contractor or its subcontractors for at least three months immediately preceding the commencement of the successor contract, and
 - ◇◇ Would otherwise face lay-off or discharge.
- ◇ A successor contractor or its subcontractors are not required to offer employment to any service employee of the predecessor contractor who will be retained by the predecessor contractor.
 - ◇◇ The successor contractor must presume that all service employees hired to work under a predecessor's federal service contract will be terminated as a result of the award of the successor contract, absent an ability to demonstrate a reasonable belief to the contrary that is based upon credible information provided by a knowledgeable source such as the predecessor contractor or the employee.
- ◇ A contractor or subcontractor is not required to offer employment to any employee of the predecessor contractor for whom the successor contractor or any of its subcontractors reasonably believes, based on the particular service employee's past performance, has failed to perform suitably on the job.
 - ◇◇ The contractor must presume that all employees working under the predecessor contract in the last month of performance performed suitable work on the contract, absent an ability to demonstrate a reasonable belief to the contrary. that is:
 - ◇◇◇ Based upon written credible information provided by a knowledgeable source such as the predecessor contractor and its subcontractors, the local supervisor, the employee, or the contracting agency. (*See examples at 29 C.F.R. § 9.12(c)(4)(ii)(B).*)
 - ◇◇◇ The performance determination must be made on an individual basis for each employee. Information regarding the general performance of the predecessor contractor is not sufficient to claim this exception.

FAR 48 C.F.R. § 22.1203-5(a)(2) and 29 C.F.R. § 9.12(c)(4).
- ◇ A contractor or subcontractor is not required to offer employment to any employee hired to work under a predecessor's federal service contract and one or more nonfederal service contracts as part of a single job, provided that the employee was not deployed in a manner that was designed to avoid the purposes of the E.O. or 29 C.F.R. Part 9. However, the successor contractor must presume that no employees hired to work under a predecessor's Federal service contract worked on one or more nonfederal service contracts as part of a single job, unless the successor can demonstrate a

reasonable belief to the contrary. *See* 29 C.F.R. § 9.12(c)(5) and FAR 48 C.F.R. § 22.1203-2(a)(5).

- ◇ Compliance with any other E.O., regulation, or law of the United States E.O. § 1; 29 C.F.R. § 9.1(b)(2); 48 C.F.R. § 22.1202(b).
 - ◇◇ As stated in E.O. 13495, § 1, and reiterated at 29 C.F.R. § 9.1(b):
 - ◇◇◇ “Nothing in this order shall be construed to permit a contractor or subcontractor to fail to comply with any provision of any other Executive Order or law of the United States.”
 - ◇◇ As further explained at FAR 48 C.F.R. § 22.1202(b):
 - ◇◇◇ In certain circumstances, certain other legal requirements may conflict with the requirements of E.O. 13495. For example:
 - ◇◇◇◇ The requirements of the HUBZone Program (*see* FAR 48 C.F.R. § 19.13),
 - ◇◇◇◇ E.O. 11246 (Equal Employment Opportunity), and
 - ◇◇◇◇ The Vietnam Era Veterans’ Readjustment Assistance Act of 1974.
 - ◇◇ All applicable laws and executive orders must be satisfied in tandem with, and if necessary prior to, the requirements of E.O. 13495 and its implementing regulations. 48 C.F.R. § 22.1202(b).

Subcontracts E.O. § 5(e); 29 C.F.R. Part 9, Appendix A, paragraph (e); FAR 48 C.F.R. §§ 52.222-17(1).

- ◇ The nondisplacement contract clause required to be included in covered contracts includes a section concerning subcontracts, which provides that:
 - ◇◇ In every subcontract entered into in order to perform services under this contract, the contractor will include provisions that ensure that each subcontractor will honor the nondisplacement contract clause requirements with respect to the service employees of
 - ◇◇◇ A predecessor subcontractor or subcontractors working under this contract,
 - ◇◇◇ As well as of a predecessor contractor and its subcontractors.
 - ◇◇ The subcontract must also include provisions to ensure that the subcontractor will provide the contractor with the information about its employees needed by the contractor to comply with the requirement to furnish the list(s) of names and

anniversary dates of service employees working under the contract and its subcontracts during the last month of contract performance.

- ◇◇ The contractor will take such action with respect to any such subcontract as may be directed by the Secretary of Labor as a means of enforcing such provisions, including the imposition of sanctions for noncompliance:
 - ◇◇◇ provided, however, that if the contractor, as a result of such direction, becomes involved in litigation with a subcontractor, or is threatened with such involvement, the contractor may request that the United States enter into such litigation to protect the interests of the United States.

Recordkeeping 29 C.F.R. § 9.12(f).

- ◇ The nondisplacement contract clause requires that “Contractor and subcontractor shall maintain the following records (regardless of format, *e.g.*, paper or electronic) of its compliance with this clause for not less than a period of three years from the date the records were created.” 29 C.F.R. Part 9, Appendix A, paragraph (g); FAR 48 C.F.R. § 52.222-17(f).
- ◇ DOL regulatory requirements are set forth in 29 C.F.R. 9.12(f) and at FAR 48 C.F.R. §§ 52.222-17(f), and require the following:
 - ◇◇ The contractor (and subcontractors) shall maintain copies of any written offers of employment or a contemporaneous written record of any oral offers of employment, including:
 - ◇◇◇ The date, location, and attendance roster of any employee meeting(s) at which the offers were extended, and a summary of each such meeting,
 - ◇◇◇ A copy of any written notice that may have been distributed, and
 - ◇◇◇ The names of the employees from the predecessor contract to whom an offer was made.
 - ◇◇ The contractor (and subcontractors) shall maintain a copy of any record that forms the basis for any exclusion or exemption (including any federal agency waiver) claimed under the nondisplacement rules under E.O. 13495 and its implementing regulations.
 - ◇◇ The contractor (and subcontractors) shall maintain a copy of the employee list(s) provided to and received from the contracting agency.

29 C.F.R. § 9.12(f)(2).

- ◇◇ No particular order or form of records is prescribed for contractors (including subcontractors).

◇◇◇ A contractor may use records developed for any purpose to satisfy these requirements, provided the records otherwise meet the requirements and purposes of the regulations and are fully accessible.

29 C.F.R. § 9.12(f)(1).

- ◇◇ The contractor must provide copies of such documentation upon request of any authorized representative of the contracting agency or DOL. 29 C.F.R. § 9.12(f)(4).
- ◇ Additional recordkeeping requirements apply to each contractor who makes retroactive payment of wages or compensation under the supervision of the WHD Administrator pursuant to 29 C.F.R. § 9.24(b), as a remedy for “unpaid wages or other relief due” for violations of 29 C.F.R. Part 9.
 - ◇◇ *See* 29 C.F.R. § 9.12(f)(2)(iv) and § 9.24(b), and FAR 48 C.F.R. § 52.222-17(g)(4) for additional information regarding those requirements.

Cooperation with investigations & remedial action

- ◇ The contractor (and subcontractors) shall cooperate in any review or investigation conducted pursuant to 29 C.F.R. Part 9, and
 - ◇◇ shall not interfere with the investigation or intimidate, blacklist, discharge, or in any other manner discriminate against any person because such person has cooperated in an investigation or proceeding under 29 C.F.R. Part 9 or has attempted to exercise any rights afforded under E.O. 13495 and the implementing regulations.
 - ◇◇ This obligation to cooperate with investigations is not limited to investigations of the contractor’s own actions, but also includes investigations related to other contractors (*e.g.*, predecessor and subsequent contractors) and subcontractors.

29 C.F.R. § 9.12(g).

- ◇ In addition to satisfying any costs imposed against the contractor by an ALJ or the ARB pursuant to 29 C.F.R. §§ 9.34(j) or 9.35(d), a contractor who violates any provision of 29 C.F.R. Part 9 shall take appropriate action to abate the violation, which may include:
 - ◇◇ Hiring each affected employee in a position on the contract for which the employee is qualified,
 - ◇◇ Together with compensation (including lost wages), terms, conditions, and privileges of that employment.

29 C.F.R. § 9.24(b).

COMPLAINTS

Complaints 29 C.F.R. § 9.21.

- ◇ Any employee of the predecessor contractor or authorized representative of such employee(s) who believes the successor contractor has violated the DOL regulations at 29 C.F.R. Part 9:
 - ◇◇ May file a complaint with the WHD Branch of Government Contracts Enforcement,
 - ◇◇ Within 120 days from the first date of contract performance by the successor contractor.
 - ◇◇ The complaint may be sent by email to displaced@dol.gov, or mailed to:

Branch of Government Contracts Enforcement
Wage and Hour Division
U.S. Department of Labor
200 Constitution Avenue, N.W., Room S-3006
Washington, D.C. 20210
 - ◇◇ To contact WHD about the nondisplacement requirements under E.O. 13495, the public and interested parties can call (202) 693-1399.
- ◇ The phone line and the email address stated here are dedicated lines for complaints and other contacts regarding implementation and enforcement of the nondisplacement requirements under E.O. 13495 and its implementing regulations.

ENFORCEMENT

WHD investigation E.O. § 6; 29 C.F.R. § 9.23; FAR 48 C.F.R. § 22.1206(b).

- ◇ The Secretary of Labor is responsible for investigating and obtaining compliance with E.O. 13495.
- ◇ The WHD Administrator may initiate an investigation under 29 C.F.R. Part 9 either:
 - ◇◇ As the result of the unsuccessful conciliation of a complaint or
 - ◇◇ At any time on his or her own initiative.
- ◇ As part of the investigation, the Administrator may:
 - ◇◇ Inspect the records of the predecessor and successor contractors (and make copies or transcriptions thereof),
 - ◇◇ Question the predecessor and successor contractors and any employees of these contractors, and
 - ◇◇ Require the production of any documentary or other evidence deemed necessary to determine whether a violation of 29 C.F.R. Part 9 has occurred. (Such evidence may reflect conduct warranting imposition of ineligibility sanctions pursuant to § 9.24(d).)

Contracting agency action on complaints 29 C.F.R. § 9.11(d).

- ◇ Within 14 days of being contacted by the WHD, the Contracting Officer shall forward all information listed at 29 C.F.R. 9.11(d)(1)(ii), shown below, to the Branch of Government Contracts Enforcement, Wage and Hour Division, U.S. Department of Labor, Washington, DC 20210.
- ◇ The required report contents are detailed at 29 C.F.R. § 9.11(d)(1)(ii):
 - ◇◇ The contracting officer shall forward to the WHD Branch of Government Contracts Enforcement any:
 - ◇◇◇ Complaint of contractor noncompliance with 29 C.F.R. Part 9;
 - ◇◇◇ Available statements by the employee or the contractor regarding the alleged violation;
 - ◇◇◇ Evidence that a seniority list was issued by the predecessor and provided to the successor;

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- ◇◇◇ A copy of the seniority list;
- ◇◇◇ Evidence that the nondisplacement contract clause was included in the contract or that the contract was exempted by the contracting agency;
- ◇◇◇ Information concerning known settlement negotiations between the parties, if applicable;
- ◇◇◇ Any other relevant facts known to the Contracting Officer or other information requested by the Wage and Hour Division.

WHD Conciliation 29 C.F.R. § 9.22.

- ◇ After obtaining information regarding alleged violations, WHD may:
 - ◇◇ Contact the successor contractor about the complaint and
 - ◇◇ Attempt to conciliate and reach a resolution that is:
 - ◇◇◇ consistent with the requirements of 29 C.F.R. Part 9 and
 - ◇◇◇ is acceptable to both the complainant(s) and the successor contractor.

29 C.F.R. § 9.22.

Conclusion of Investigation

- ◇ Upon completion of a WHD investigation, and if a resolution is not reached by conciliation consistent with the regulatory requirements, the Administrator will issue a written determination of whether a violation has occurred, including a statement of the investigation findings and conclusions.
 - ◇◇ A determination that a violation occurred shall address appropriate relief and the issue of ineligibility sanctions where appropriate.
 - ◇◇ The Administrator will provide notice of the investigation findings to any complainant(s); employee representative(s); contractor, including the prime contractor if a subcontractor is implicated; and contractor representative(s).

29 C.F.R. § 9.31(a).

Subsequent Investigation

- ◇ The Administrator may conduct a subsequent, new investigation or issue a new determination if the Administrator concludes circumstances warrant, such as:

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- ◇◇ Where the proceedings before an Administrative Law Judge reveal that there may have been violations with respect to other employees of the contractor,
- ◇◇ Where imposition of ineligibility sanctions is appropriate, or
- ◇◇ Where the contractor has failed to comply with an order of the Secretary of Labor.

29 C.F.R. § 9.23(b).

Remedies and sanctions E.O. §§ 5 & 6; FAR 48 C.F.R. §§ 22.1206 and 52.222-17; 29 C.F.R. § 9.24.

- ◇ The Secretary of Labor has the authority to issue final orders prescribing appropriate sanctions and remedies, including, but not limited to, orders requiring the successor contractor to offer employment, in positions for which the employees are qualified, to service employees from the predecessor contract and payment of wages lost. E.O. § 6; FAR 48 C.F.R. § 22.1206(a); 29 C.F.R. § 9.24(a).
- ◇ The nondisplacement contract clause required to be included in covered contracts states that:
 - ◇◇ If it is determined that the contractor or its subcontractors are not in compliance with the requirements of this clause or any regulation or order of the Secretary,
 - ◇◇◇ appropriate sanctions may be imposed and remedies invoked against the contractor or its subcontractors, as provided in E.O. 13495, the regulations, and relevant orders of the Secretary, or as otherwise provided by law.

FAR 48 C.F.R. § 52.222-17(i); 29 C.F.R. Part 9, Appendix A, paragraph (d).
- ◇ If the contracting officer or WHD finds that the predecessor contractor has failed to provide the list of the names of employees working under the contract required by FAR 48 C.F.R. § 22.1204 (in accordance with 29 C.F.R. § 9.12(e)), the contracting officer may, in his or her discretion, or on request by WHD, take action to suspend the payment of contract funds until such time as the contractor provides the list to the contracting officer. FAR 48 C.F.R. § 22.1206(c).
- ◇ **Withholding of funds & debarment** E.O. § 6; 29 C.F.R. § 9.24(c); FAR 48 C.F.R. § 22.1206(b).
 - ◇◇ After an investigation and a determination by WHD that lost wages or other monetary relief is due, WHD may direct that so much of the accrued payments due on either the contract or any other contract between the contractor and the Government shall be withheld as are necessary to pay the monies due.

- ◇◇ Upon the final order that such monies are due, WHD may direct that such withheld funds be transferred to DOL for disbursement. 29 C.F.R. 9.24(c); 22.1206(b).
 - ◇◇ Where the WHD finds that a contractor or subcontractor
 - ◇◇ has failed to comply with any order of the Secretary or
 - ◇◇ has committed willful violations of E.O. or the implementing regulations or aggravated violations of 29 Part 9,
 - ◇◇ WHD may order that the contractor or subcontractor, and its responsible officers, and any firm in which the contractor or subcontractor has a substantial interest, shall be ineligible to be awarded any contract of the United States for a period of up to 3 years.
- E.O. § 6; 29 C.F.R. § 9.24(d); FAR 48 C.F.R. § 22.1206(d).
- ◇◇ Neither an order for debarment of any contractor or subcontractor from further Government contracts under this section nor the inclusion of a contractor or subcontractor on a published list of noncomplying contractors shall be carried out without affording the contractor or subcontractor an opportunity for a hearing. E.O. § 6; 29 C.F.R. § 9.24(d).

Mediation & Appeals 29 C.F.R. § 9.32 through 29 C.F.R. § 9.35.

- ◇ If any party desires review of the determination of the WHD Administrator, including judicial review, a request for an Administrative Law Judge (ALJ) hearing or petition for review by the Administrative Review Board (ARB) must first be filed in accordance with 29 C.F.R. § 9.31(b).
- ◇◇ Where efforts to resolve disputes in accordance with the conciliation procedures set forth at 29 C.F.R. § 9.22 have failed, the parties are encouraged to utilize settlement judges to mediate settlement negotiations pursuant to 29 C.F.R. § 18.9 when those provisions apply.
- ◇◇ At any time after commencement of a proceeding, the parties jointly may move to defer the hearing for a reasonable time to permit negotiation of a settlement or an agreement containing findings and an order disposing of the whole or any part of the proceeding.

ALJ hearings & ARB proceedings 29 C.F.R. §§ 9.34 and 9.35.

- ◇ The Office of Administrative Law Judges (OALJ) has jurisdiction to hear and decide cases pursuant to 29 C.F.R. § 9.31(b)(1) concerning questions of law and fact from determinations of the Administrator issued under 29 C.F.R. § 9.31.

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- ◇◇ In considering the matters within the scope of its jurisdiction, the ALJ shall act as the authorized representative of the Secretary of Labor and shall act fully and finally on behalf of the Secretary of Labor concerning such matters, subject to an appeal filed under 29 C.F.R. § 9.32(b)(2). 29 C.F.R. § 9.34(a).
- ◇ The ARB has jurisdiction to hear and decide appeals pursuant to § 9.31(b)(2) concerning questions of law and fact from determinations of the Administrator issued under 29 C.F.R. § 9.31 and from decisions of Administrative Law Judges issued under 29 C.F.R. § 9.34.
 - ◇◇ In considering the matters within the scope of its jurisdiction, the ARB shall act as the authorized representative of the Secretary of Labor and shall act fully and finally on behalf of the Secretary of Labor concerning such matters.
- ◇ If an order finding the successor contractor violated 9 C.F.R. Part 9 is issued, the ALJ or the ARB, respectively, may assess against the contractor a sum equal to the aggregate amount of all costs (not including attorney fees) and expenses reasonably incurred by the aggrieved employee(s) in the proceeding, to be awarded in addition to any unpaid wages or other relief due under 29 C.F.R. § 9.24(b). 29 C.F.R. § 9.34(j) and 9.35(d), respectively.
- ◇ A decision of the ALJ shall become the final order of the Secretary of Labor, unless a petition for review is timely filed with the ARB as set forth in § 9.32(b)(2). 29 C.F.R. § 9.34(k).
- ◇ A decision of the ARB shall become the final order of the Secretary of Labor. 29 C.F.R. § 9.35(e).

FEDERAL AGENCY EXEMPTION (“WAIVER”) PROCEDURES

E.O. § 4 *Authority to Exempt Contracts*;
29 C.F.R. § 9.4 *Contracts Exempted by Federal agency*; and
FAR 48 C.F.R. § 22.1203-3 *Waiver*.

- ◇ The head of a contracting department or agency, or, under the FAR, the senior procurement executive, without delegation, may waive the application of some or all of the provisions of E.O. 13495 and its implementing regulations:
 - ◇◇ **if**, he/she finds that the application of any of the requirements of the E.O and its implementing regulations:
 - ◇◇◇ would not serve the purposes of E.O. 13495, or
 - ◇◇◇ would impair the ability of the Federal Government to procure services on an economical and efficient basis.

FAR 48 C.F.R. § 22.1203-3(a).
- ◇ Such executive waivers, exempting specified procurement actions from the E.O. and related regulatory requirements, may be made for:
 - ◇◇ a contract, subcontract, or purchase order, or
 - ◇◇ with respect to a class of contracts, subcontracts, or purchase orders.

E.O. § 4; 29 C.F.R. § 9.4(d)(1); and FAR 48 C.F.R. § 22.1203-3(a).
- ◇ **The senior procurement executive shall not redelegate this waiver authority.** FAR 48 C.F.R. § 22.1203-3(a).
- ◇ In order for such a federal agency waiver to be operative, a written analysis supporting the waiver determination must be completed **by the solicitation date**.
 - ◇◇◇ If the written analysis supporting exemption by an agency waiver is not completed by the contract solicitation date, the waiver is **inoperative**.
 - ◇◇◇ In such a circumstance the nondisplacement contract clause shall be included in, or added to, the covered service contract(s) and their solicitation(s).

29 C.F.R. §§ 9.4(d)(1) and 9.4(d)(4)(i); 48 C.F.R. § 22.1203-3(b)(1) and (2).
- ◇ The written analysis must be retained in accordance with FAR 48 C.F.R. § 4.805.

Content of the written analysis

- ◇ The FAR directs the federal agency that “[t]he waiver must be reflected in a written analysis as described in 29 C.F.R. 9.4(d)(4)(i)” FAR 48 C.F.R. § 22.1203-3(a).
- ◇ The DOL regulation at 29 C.F.R. § 9.4(d)(4)(i) requires that:
 - ◇◇ The written analysis must compare the anticipated outcomes of hiring predecessor contract employees with those of hiring a new workforce.
 - ◇◇ The agency’s consideration of cost and other factors in exercising its exemption (waiver) authority, and in the required written analysis, shall reflect the general finding made by E.O.13495 that the government’s procurement interests in economy and efficiency are normally served when the successor contractor hires the predecessor’s employees.
 - ◇◇ The written analysis must also specify how the particular circumstances support a contrary conclusion. *See* 29 C.F.R. § 9.4(d)(4)(i) for more detailed requirements.
- ◇ The FAR also directs the federal agency to “See 29 C.F.R. § 9.4(d)(4) for regulatory provisions addressing circumstances in which a waiver could or would **not** be appropriate.” 48 C.F.R. § 22.1203-3(a). Pursuant to § 9.4(d)(4):
 - ◇◇ The head of a contracting department or agency/senior procurement executive of the procuring agency must not consider wage rates and fringe benefits of service employees in making an exemption/waiver determination except in the specific exceptional circumstances stated at 29 C.F.R. § 9.4(d)(4)(iii).
 - ◇◇ Also, the head of a contracting department or agency/senior procurement executive of the procuring agency **shall not consider** certain other factors in making a waiver determination, because they would contravene the E.O.’s purposes and findings. Such factors are identified at 29 C.F.R. § 9.4(d)(4)(iii).

Notification to workers and DOL

- ◇ In order for the federal agency exemption by a waiver issued under FAR 48 C.F.R. § 22.1203-3 to be operative, certain notification requirements must be met.
 - ◇◇ If the following notification requirements are **not met** within no later than **five business days after the solicitation issuance date**, the agency exercise of its exemption/waiver authority **shall be inoperative**:
 - ◇◇◇ When an agency exercises its waiver authority with respect to any contract, subcontract, or purchase order, the contracting officer shall direct the contractor to notify affected workers and their collective bargaining representative in writing, of the agency’s determination.

**U.S. DEPARTMENT OF LABOR
PREVAILING WAGE RESOURCE BOOK**

NONDISPLACEMENT
E.O. 13495

- ◇◇◇ Where a contracting agency waives application to a class of contracts, subcontracts, or purchase orders, the contracting officer shall, with respect to each individual solicitation, direct the contractor to notify incumbent workers and their collective bargaining representatives of the agency's determination.
- ◇◇◇ The agency shall notify the DOL of its waiver decision and provide the DOL with a copy of its written analysis. The waiver decision and related written analysis shall be sent to the following address: U.S. Department of Labor, Wage and Hour Division, Branch of Government Contracts Enforcement, 200 Constitution Avenue, N.W., Room S-3006, Washington, D.C. 20210, or by email to: *Displaced@dol.gov*
- ◇◇ If these notification requirements are not met, the contracting officer shall include the nondisplacement clause in the solicitation and contract.

FAR 48 C.F.R. § 22.1203-3(b) and 29 C.F.R. § 9.4(d)(2).

PREVAILING WAGE SEMINARS

Fair Labor Standards Act

Presented by the
U.S. Department of Labor
Wage and Hour Division



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Major Provisions

- Coverage
- Minimum Wage

- Overtime Pay
- Youth Employment
- Recordkeeping



Employment Relationship

- In order for the FLSA to apply, there must be an employment relationship between the “employer” and the “employee”



Employment Relationship

- The Supreme Court has indicated there is no single rule or test for determining whether an individual is an independent contractor or an employee for purposes of the FLSA.



Employment Relationship

Some of the factors considered are:

- The extent to which the services rendered are an integral part of the principal's business.
- The permanency of the relationship.
- The amount of the alleged contractor's investment in facilities and equipment.
- The nature and degree of control by the principal.



Employment Relationship

- The alleged contractor's opportunities for profit and loss.
-
- The amount of initiative, judgment, or foresight in open market competition with others required for the success of the claimed independent contractor.



PREVAILING WAGE SEMINARS



Coverage



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Coverage

More than 130 million workers in more than 7 million workplaces are protected or “**covered**” by the Fair Labor Standards Act (FLSA), which is enforced by the Wage and Hour Division of the U.S. Department of Labor



Coverage

Two types of coverage

- Enterprise coverage: If an enterprise is covered, all employees of the enterprise are entitled to FLSA protections
- Individual coverage: Even if the enterprise is not covered, individual employees may be covered and entitled to FLSA protections



Enterprise Coverage

- Enterprises with
 - At least two (2) employees engaged in commerce or producing or handling goods that have moved in commerce
 - At least \$500,000 a year in business
- Hospitals, businesses providing medical or nursing care for residents, schools, preschools and government agencies (federal, state, and local)



Individual Coverage

- Workers who are engaged in:
 - Interstate commerce;
 - Production of goods for commerce;
 - Closely-related process or occupation directly essential (GRADE) to such production; or
 - Domestic service
- Engaging in “interstate commerce,” which may include:
 - Making telephone calls to other states
 - Typing letters to send to other states
 - Processing credit card transactions
 - Traveling to other states



The Bottom Line

- Almost every employee in the United States is covered by the FLSA
- Examples of employees who may not be covered
 - Employees working for small construction companies
 - Employees working for small independently owned retail or service businesses



PREVAILING WAGE SEMINARS

Minimum Wage



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Minimum Wage: Basics

- Covered, non-exempt employees must be paid not less than the federal minimum wage for all hours worked
- The minimum wage is \$7.25 per hour effective July 24, 2009
- Cash or equivalent – free and clear



Minimum Wage: Issues

- Compensation Included
- Deductions

- Tipped Employees
- Hours Worked



Compensation Included

- Wages (salary, hourly, piece rate)
- Commissions

- Certain bonuses
- Tips received by eligible tipped employees (up to \$3.72 per hour effective July 24, 2007; \$4.42 per hour July 24, 2008; and \$5.12 per hour July 24, 2009)
- Reasonable cost of room, board and other “facilities” provided by the employer for the employee’s benefit



Deductions

Deductions from pay illegal if

- Deduction is for item considered primarily for the benefit or convenience of the employer; and
- The deduction reduces employee's earnings below required minimum wage

Examples of illegal deductions

- Tools used for work
- Damages to employer's property
- Cash register shortages



Minimum Wage Example

Employee receives \$9 per hour for 40 hours plus \$5 in commission and \$20 in reasonable cost of board, lodging or other facilities

Total earnings = $\$360 + \$5 + \$20 = \385

Total earnings/total hours $\$385/40 = \9.63



Tipped Employee

- Works in occupation in which he or she customarily and regularly receives more than \$30 per month in tips
- Paid at least \$2.13 in cash by employer, who may claim a “tip credit” for the rest of minimum wage



Tip Credit

Employer may claim “tip credit” only if

- The employer informs each tipped employee about the tip credit allowance, including amount to be credited before the credit is utilized
- The employer can document that the employee received at least enough tips to bring the total wage paid up to minimum wage or more
- All tips are retained by the employee and are not shared with the employer or other employees, unless through a valid tip pooling arrangement



Hours Worked: Issues

- Suffered or Permitted
- Waiting Time

- On-Call Time
- Meal and Rest Periods
- Training Time
- Travel Time
- Sleep Time



Suffered or Permitted

Work not requested but suffered or permitted
is work time



Waiting Time

Counted as hours worked when

- Employee is unable to use the time effectively for his or her own purposes; and
- Time is controlled by the employer

Not counted as hours worked when

- Employee is completely relieved from duty; and
- Time is long enough to enable the employee to use it effectively for his or her own purposes



On-Call Time

On-call time is hours worked when

- Employee has to stay on the employer's premises
- Employee has to stay so close to the employer's premises that the employee cannot use that time effectively for his or her own purposes

On-call time is not hours worked when

- Employee is required to carry a pager or cell phone
- Employee is required to leave word at home or with the employer where he or she can be reached



Meal and Rest Periods

Meal periods are not hours worked when the employee is completely relieved of duties for the purpose of eating a meal

Rest periods of short duration (normally 5 to 20 minutes) are counted as hours worked and must be paid



Training Time

Time employees spend in meetings, lectures, or training is considered hours worked and must be paid, unless

- Attendance is outside regular working hours
- Attendance is voluntary
- The course, lecture, or meeting is not job related
- The employee does not perform any productive work during attendance



Travel Time

- Ordinary home to work travel is not work time
- Travel between job sites during the normal work day is work time
- Special rules apply to travel away from the employee's home community



Sleep Time

Less than 24 hour duty:

- Employee who is on duty for less than 24 hours is considered to be working even if allowed to sleep or engage in other personal pursuits

Duty of 24 hours or more:

- Parties can agree to exclude bona fide sleep and meal periods of not more than 8 hours
- If the employee cannot get at least 5 hours sleep, the entire sleeping period is counted as working time



PREVAILING WAGE SEMINARS



Overtime



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Overtime Pay

Covered, non-exempt employees must receive one and one-half times the regular rate of pay for all hours worked over forty in a workweek



Overtime Issues

- Each workweek stands alone
 - Regular rate
 - Payments excluded from rate
 - Payments other than hourly rates
 - Tipped Employees
 - Deductions
-



Workweek

- Compliance is determined by workweek, and each workweek stands by itself
-
- Workweek is 7 consecutive 24 hour periods (168 hours)



Regular Rate

- Is determined by dividing total earnings in the workweek by the total number of hours worked in the workweek
- May not be less than the applicable minimum wage (including state and local minimum wages)



Regular Rate Exclusions

- Sums paid as gifts
- Payments for time not worked
- Reimbursement for expenses
- Discretionary bonuses
- Profit sharing plans
- Retirement and insurance plans
- Overtime premium payments
- Stock options



PREVAILING WAGE SEMINARS

“White Collar” Exemptions



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“White Collar” Exemptions

The most common FLSA minimum wage and overtime exemption -- often called the “541” or “white collar” exemption -- applies to certain

- Executive Employees
- Administrative Employees
- Professional Employees
- Outside Sales Employees
- Computer Employees



Three Tests for Exemption

Salary Level

Salary Basis

Job Duties



Minimum Salary Level: \$455

- For most employees, the minimum salary level required for exemption is \$455 per week
- Must be paid “free and clear”
- The \$455 per week may be paid in equivalent amounts for periods longer than one week
 - **Biweekly:** **\$910.00**
 - **Semimonthly:** **\$985.83**
 - **Monthly:** **\$1,971.66**



Salary Basis Test

- Regularly receives a predetermined amount of compensation each pay period (on a weekly or less frequent basis)
- The compensation cannot be reduced because of variations in the quality or quantity of the work performed
- Must be paid the full salary for any week in which the employee performs **any** work
- Need not be paid for any workweek when no work is performed



Deductions From Salary

- An employee is not paid on a salary basis if deductions from the predetermined salary are made for absences occasioned by the employer or by the operating requirements of the businesses
- If the employee is ready, willing and able to work, deductions may not be made for time when work is not available



Permitted Salary Deductions

Seven exceptions from the “no pay-docking” rule

1. Absence from work for one or more full days for personal reasons, other than sickness or disability
2. Absence from work for one or more full days due to sickness or disability if deductions made under a bona fide plan, policy, or practice of providing wage replacement benefits for these types of absences
3. To offset any amounts received as payment for jury fees, witness fees, or military pay



Permitted Salary Deductions (continued)

Seven exceptions from the “no pay-docking” rule (cont.)

4. Penalties imposed in good faith for violating safety rules of “major significance”
5. Unpaid disciplinary suspension of one or more full days imposed in good faith for violations of written workplace conduct rules
6. Proportionate part of an employee’s full salary may be paid for time actually worked in the first and last weeks of employment
7. Unpaid leave taken pursuant to the Family and Medical Leave Act



Executive Duties

- Primary duty is management of the enterprise or of a customarily recognized department or subdivision
- Customarily and regularly directs the work of two or more other employees
- Authority to hire or fire other employees or recommendations as to the hiring, firing, advancement, promotion or other change of status of other employees given particular weight



20% Owner Executives

- The executive exemption also includes employees who
 - own at least a bona fide 20-percent equity interest in the enterprise
 - are actively engaged in management of the enterprise
- The salary level and salary basis requirements do not apply to exempt 20% equity owners



Administrative Duties

- Primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers
- Primary duty includes the exercise of discretion and independent judgment with respect to matters of significance



Professional Duties

- Primary duty is the performance of work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction
- Primary duty is the performance of work requiring invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor



Field of Science or Learning

Occupations with recognized professional status, as distinguished from the mechanical arts or skilled trades

Law	Accounting	Actuarial Computation
Theology	Teaching	Physical Sciences
Medicine	Architecture	Chemical Sciences
Pharmacy	Engineering	Biological Sciences



Exempt Medical Professions

- Doctors
- Registered Nurses
- Registered or certified medical technologists
 - 3 years of pre-professional study in an accredited college or university, plus 1 year of professional study in an accredited school of medical technology
- Dental hygienists
 - 4 years of pre-professional and professional study in an accredited college or university
- Certified physician assistants
 - 4 years of pre-professional and professional study, including graduation from an accredited physician assistant program



Other Commonly Exempt Professions

- Lawyers
- Teachers
- Accountants
- Pharmacists
- Engineers
- Actuaries
- Chefs
- Certified athletic trainers
- Licensed funeral directors or embalmers



Additional Nonexempt Professions

- Licensed practical nurses
- Accounting clerks and bookkeepers who normally perform a great deal of routine work
- Cooks who perform predominantly routine mental, manual, mechanical or physical work
- Paralegals and legal assistants
- Engineering technicians



Computer Related Occupations

Primary duty is:

- The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software, or system functional specifications
- The design, development, documentation, analysis, creation, testing, or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;
- The design, documentation, testing, creation, or modification of computer programs related to machine operating systems



Computer Related Occupations (Cont'd.)

- A combination of the primary duties on the previous slide requiring the same level of skills, and the employee must also receive either
 - A guaranteed salary or fee of \$455 per week or more, or
 - An hourly rate of not less than \$27.63 per hour



PREVAILING WAGE
SEMINARS



Youth Employment



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Youth Employment

- Federal youth employment rules set both hours and occupational standards for youth
-



Youth Employment

Sixteen- and 17-year-olds may be employed for unlimited hours in any occupation other than those declared hazardous by the Secretary of Labor

Fourteen- and 15-year-olds may be employed outside school hours in a variety of non-manufacturing and non-hazardous jobs for limited periods of time and under specified conditions

Children under 14 years of age may not be employed in non-agricultural occupations covered by the FLSA



Recordkeeping

An accurate record of the hours worked each day and total hours worked each week is critical to avoiding compliance problems



Recordkeeping

The FLSA requires that all employers subject to any provision of the Act make, keep, and preserve certain records



Recordkeeping

- Records need not be kept in any particular form
 - Time clocks are not required
-



Recordkeeping

Every covered employer must keep certain records for each non-exempt worker



Required Posting

Covered employers must post a notice explaining the FLSA, as prescribed by the Wage and Hour Division, in a conspicuous place



PREVAILING WAGE SEMINARS

Common Errors to Avoid



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Common Errors to Avoid

- Assuming that all employees paid a salary are not due overtime
- Improperly applying an exemption
- Failing to pay for all hours an employee is “suffered or permitted” to work
- Limiting the number of hours employees are allowed to record



Common Errors to Avoid

- Failing to include all pay required to be included in calculating the regular rate for overtime
- Failing to add all hours worked in separate establishments for the same employer when calculating overtime due



Common Errors to Avoid

- Making improper deductions from wages that cut into the required minimum wage or overtime. Examples: shortages, drive-offs, damage, tools, and uniforms
- Treating an employee as an independent contractor
- Confusing Federal law and State law



The FLSA Does Not Require

- Vacation, holiday, severance, or sick pay
- Meal or rest periods, holidays off, or vacations
- Premium pay for weekend or holiday work
- A discharge notice, reason for discharge, or immediate payment of final wages to terminated employees
- Any limit on the number of hours in a day or days in a week an employee at least 16 years old may be required or scheduled to work
- Pay raises or fringe benefits



Compliance Assistance Materials - FLSA

- The Law
- The Regulations (29 C.F.R. Part 500-899)
- Interpretive Guidance (opinion letters, field operations handbook, and field bulletins)
- FLSA Poster
- Handy Reference Guide
- Fact Sheets
- Information for New Businesses
- Department of Labor Home Page



Enforcement

- FLSA enforcement is carried out by Wage and Hour staff throughout the U.S
- Where violations are found, Wage and Hour advises employers of the steps needed to correct violations, secures agreement to comply in the future and supervises voluntary payment of back wages as applicable
- A 2-year statute of limitations generally applies to the recovery of back pay. In the case of a willful violation, a 3-year statute of limitations may apply



Enforcement

In the event there is not a voluntary agreement to comply and/or pay back wages, the Wage and Hour Division may:

- Bring suit to obtain an injunction to restrain the employer from violating the FLSA, including the withholding of proper minimum wage and overtime
- Bring suit for back wages and an equal amount as liquidated damages



Employee Private Rights

An employee may file a private suit for back pay and an equal amount as liquidated damages, plus attorney's fees and court costs



Penalties

- Employers who willfully violate the Act may be prosecuted criminally and fined up to \$11,000
- Employers who violate the youth employment provisions are subject to a civil money penalty of up to \$11,000 for each employee who was the subject of a violation
- Employers who willfully or repeatedly violate the minimum wage or overtime pay requirements are subject to a civil money penalty of up to \$1,100 for each such violation



Additional Information

- Visit the WHD homepage at: www.wagehour.dol.gov
- Call the WHD toll-free information and helpline at
1-866-4US-WAGE (1-866-487-9243)
- Use the DOL interactive advisor system - *ELAWS*
(*Employment Laws Assistance for Workers and Small
Businesses*) at: www.dol.gov/elaws
- Call or visit the nearest Wage and Hour Division Office



Disclaimer

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