

**INTRODUCTION TO THE
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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** for each day that each laborer and mechanic worked without payment of the required overtime compensation. (See <http://www.dol.gov/whd/govcontracts/cwhssa.htm#cmp> for the current **liquidated damages** penalty amount for CWHSSA.)
- ◇ 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 applicable monetary thresholds. The CWHSSA applies to federal DBA and SCA contracts in excess of \$150,000 that are subject to Federal Acquisition Regulation (FAR) procurement. 48 C.F.R. § 22.305. CWHSSA also applies to DBRA and SCA contracts in excess of \$100,000 that are not subject to FAR procurement, such as certain concessions contracts on military bases. 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 subject to FAR procurement in excess of \$150,000, or to a contract not subject to FAR procurement 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:
 - ◇◇ 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 subject to FAR procurement and not greater than \$150,000.
 - ◇◇ Construction or services where the contract is not subject to FAR procurement and 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.