

Slide 1: My name is Benjamin Searle, and I am the Regional Enforcement Coordinator for government contracts here in the Northeast Region.

And today I am joined by my colleague Ashley Swopes. Ashley, would you like to introduce yourself?

Hi everyone, I'm Ashley Swopes, and I am also a Northeast Regional Enforcement Coordinator for government contracts.

Great! Well, welcome to prevailing wage seminars. And let's jump right into, Investigative Process, Withholding and Debarment.

Slide 2: So, today, our goal is to provide a brief overview of the Government Contract Investigative Process, Withholding, and Debarment sections

What I'll be covering is the investigative process, and then I will hand it over to Ashley for the Withholding and Debarment discussion. So, let's get to it.

Slide 3: For the investigative procedures portion of this training, we will cover, or I'm going to cover, the following:

One, initial steps in conducting an investigation

Two, determining compliance with the Service Contract Act and Davis Bacon Act

And three, concluding an investigation.

Slide 4: The Wage and Hour Division is responsible for administering and enforcing both the Service Contract Act and the Davis Bacon Act.

Under the Service Contract Act, Department of Labor has sole enforcement authority.

However, under the Davis Bacon Act, both the Department of Labor and the federal contracting agencies have authority to conduct investigations under Davis Bacon Act and the Davis Bacon Related Acts.

The regulations, standards and procedures are laid out in Title 29 of the CFR – Code of Federal Regulations. We will see several specific CFR citations throughout this presentation.

Our Wage and Hour team does work closely with contracting agencies to enforce both the Service Contract Act and the Davis-Bacon Act. We do rely on contracting agency's support when we're conducting our SCA and Davis-Bacon investigations. In fact, we are always seeking out opportunities to provide training with and for contracting agencies to increase enforcement capacity nationwide.

Slide 5: So, why me? Why am I getting investigated?

That is usually the first question that an investigator will get from the employer once we've initiated an investigation.

To answer this question, there are a variety of reasons we may conduct an investigation.

It could be that a complaint was filed. It could be that we looking at a particular type of work or industry where a pattern of non-compliance has been identified.

In other cases, we will get tips from a contracting agency or a contracting officer.

In any case, we follow the same investigative procedure. Complaints can be made confidentially, and we typically DO NOT disclose the reason for our investigation.

Also, investigators may initiate unannounced investigations in order to directly observe normal business operations. In some cases, unannounced investigations may help us obtain facts and determine compliance more quickly.

Slide 6: Compliance Issues:

First and foremost, with Government Contracts investigations we must begin with prime contract coverage.

What are those key questions in determining prime contract coverage?

First, are the correct contract clauses included in contract?

Second, does contract have the correct Wage Determinations?

Wage and Hour Investigators must make sure that the prime contract between the agency and the prime contractor was executed properly in order to proceed with our investigation. If the investigator identifies an error with respect to coverage in the prime contract, that investigator work with the agency to retroactively modify the prime contract and correct the coverage issue.

Also, the applicable Wage Determinations and Employee Rights Posters should be prominently displayed at the worksite. This can help clear up confusion about applicable prevailing wages and fringe benefits earlier rather than later.

Finally, the agency should have the certified payrolls available for inspection, and we will often start by asking the contracting officer to provide those certified payrolls

Slide 7: So, what are investigators looking for?

There are several key questions that the Investigator will always be asking during the course of an investigation

First, are the employees properly classified?

Are the employees paid the applicable prevailing wage rate for the class of work performed on the contract?

Did employees perform work in more than one classification? And if so, was the work segregated in the employer's time and payroll records?

Of course we also look at Fringe Benefits.

Are fringe benefits being properly paid?

If fringe benefits were not paid in cash, did the employer incur the appropriate costs to provide the benefits?

For Davis-Bacon Act and Davis-Bacon Related Act investigations, we look at the apprenticeship program and make sure those apprenticeship program requirements have been met. Very similar to an FLSA investigation, we look to see if "overtime" was correctly paid for all hours worked over forty in the workweek.

And then we also look at payroll records, did the employer keep accurate payroll records?

Are all classes of employees employed on the contract listed in the applicable wage determination? If not, the contractor will need to submit a request for additional conformances. To say it in a different way, if there are certain classifications that are missing from the wage determination, it would be the prime contractor's responsibility to submit a conformance request so that all of the work can be properly classified and paid.

Slide 8: At the outset of an investigation, it is necessary to establish coverage, and that applies to both prime contracts and subcontracts.

Earlier we talked about contracting agencies properly incorporating the applicable clauses and wage determinations.

Well, prime contractors must also properly execute subcontracts to directly incorporate the correct contract clauses and wage determination.

Investigators often find subcontracts that do not properly and directly incorporate the applicable Davis-Bacon clauses or wage determination.

In those cases, where the sub-contract does not properly incorporate the applicable Davis-Bacon clauses or wage determination, we are unable to hold those subcontractors liable for violations. So it is very important for prime contractors to flow down the clauses and wage determinations properly. In Davis-Bacon cases for example, most of our violations occur at the 1<sup>st</sup>-tier, or 2<sup>nd</sup>-tier, or even 3<sup>rd</sup>-tier subcontractor level.

And proper flow down of the wage determination and clauses at every single level is critical.

All subcontracts must contain the applicable clauses and wage determinations. And the prime contractor is always liable when the coverage is not properly flowed down.

As an Investigator, I always tell prime contractors... if there is potential non-compliance issue, you want to be the first to hear about it! So we want to make sure that on each worksite the wage determination and the employee rights poster are prominently displayed.

Final note on this slide is that we will also research the prime contractor and subcontractors via name

and EIN to see if the contractor has been investigated previously. As, Ashley will discuss later, when repeat violations are identified, that would be grounds for debarment.

Slide 9: So, there is a lot of leg work that goes into an investigation even prior to making contact with the employer.

When we do make contact with the employer, we start by scheduling an initial conference to obtain basic information about the subject firm under investigation.

The investigator will provide a records request letter that will typically request two years worth of payroll and time records along with other necessary information about the business. These key details would include:

Legal name and trade name of the employer;

Officers of the company;

Full addresses of all of the employees;

Federal tax identification number;

And key information on the business such as size, dollar volume, etc., and even other contracts held by the company.

Wage Hour Investigators also request copies of all relevant contract documents, including wage determinations and sub-contracts, if any are applicable.

If there are any subcontractors on the contract, copies of those subcontract agreements will also be requested and obtained in order to determine proper flowdown of the wage determinations and clauses. Again that is critical to determining compliance with the Davis-Bacon or Service Contract Act at all sub-contractor levels.

Good communication with both the contractor, prime contractor, and contracting agency is always helpful in expediting the investigative process. So thank you of course to all of our contracting officer partners across the country and all of our prime contractors who are helping us work through these cases as efficiently as possible.

Slide 10: So during this initial phase of the investigation, the investigator will inform the contractor of the investigative process, and we get right to work examining payroll records, conducting employee interviews and (when possible) inspecting the job site.

Investigators will often ask for time and payroll records electronically, which can expedite the records review process.

Slide 11: Examination of Payroll Records

This is the fun part! Especially for the nerdy investigators.

Some of the records, such as the Seniority List (in SCA cases) and the certified payroll records (in Davis-Bacon Cases) can be provided by the contracting agency which helps the investigator hit the ground

running.

But we still need the internal payroll and time records from the employer.

In Davis-Bacon cases, it is particularly fun because investigators cross compare multiple records from the same time period to verify the accuracy of the records and verify compliance with the prevailing wages and fringe benefits.

Investigators will take a profile payroll period and look at the Certified Payroll Records. They will compare the certified payroll records with the in house payroll records from the company, then they will compare the internal payroll and certified payroll to the timesheets and even Daily reports from the job site, and we will even as far as looking at statements showing bona fide fringe benefit payments, to a health care insurance provider for example.

The records review process is critical to determining compliance.

The CFR does note that a failure to make and maintain or to make available such records for inspection and transcription shall be a violation of the regulations, and that it could lead to suspension payment by the contracting agency until such violation ceases.

Slide 12: Employee interviews.

Employee interviews are also critical to government contract investigations.

Just like employers are required to provide certain records to investigators, employers must also permit authorized representatives of the Wage and Hour Division to conduct interviews on the worksite during normal hours. On this slide you can see the citations, the CFR citations, from Part 4 of the CFR for the SCA and Part 5 of the CFR for Davis-Bacon.

Slide 13: Employee interviews are essential to every investigation because they paint a vivid picture of the work that is being performed.

Interviews are confidential, and they can take some time. We are not just asking about FLSA minimum wage and overtime. Investigators are going into detail about each employee's unique duties, the tools they are using, the schedules that they are working, their payroll information, and that's just to name a few of the most basic elements of an employee interview.

Investigators often use cross-referencing and cross-interviewing. For example, we will typically ask an employee on a Davis-Bacon project to provide the names of other workers who were performing the same duties. Investigators will also compare the information provided by employees with the records that have been provided by the employers to figure out the facts in each case.

These interviews are confidential, and we protect the confidentiality of the employee statements to the maximum extent possible.

When a written statement is taken, it should be recorded in the employee's own words. Once the

interview is complete, the interview is read back to the employee, verified by the employee, and signed by the employee.

Slide 14: Unlike the Service Contract Act, with Davis-Bacon job classifications there is no nationwide standard, and “area practice” can vary and does vary from county to county.

The proper classification is determined based on the prevailing classification practice of employers -- union or non-union -- whose wage rates were found to be prevailing in the area and issued in the applicable WD. There is a team at the Department of Labor national office that conducts surveys across the country to determine prevailing wages for each county in the country.

When questions about the proper classification of laborers and mechanics arise, those questions are resolved via an “area practice survey”. An “area practice survey” may be conducted by the WHD or by the contracting agency to determine the proper classification(s) of the work.

We look at the applicable wage determination and work with relevant union and non-union contractors to understand the area practice and jurisdiction of each trade to resolve area practice disputes.

Contractors and contracting agencies can reach out to the Wage and Hour Division when there appears to be dispute or grey area regarding area practice.

Slide 15: After the fact-finding phase of the investigation is completed, the Wage and Hour investigator will -- in most cases -- hold a final conference with the contractor. The prime contractor, if separate from the subject of the investigation, and the contracting agency are also often invited to the final conference.

During the final conference, the investigator will present the findings, including and back wages found due, and request that the contractor make payment to the workers found due back wages.

We can consider additional evidence from the employer at any time. However, good communication throughout the investigation is always the best practice so that additional evidence can be received early on in the investigation rather than during the final conference.

If the contract is close to conclusion, the investigator may be obligated to submit a request to the contracting agency to withhold funds until an agreement to pay the back wages is reached.

If there is no agreement to pay back wages, consideration will be given to the possibility of debarment.

And with that, I will turn it over to Regional Enforcement Coordinator Ashley Swoops to discuss the Withholding and Debarment process in more detail!

Slide 16: Thanks Ben. Hi everyone, this is Ashley Swopes again. Now that you’ve learned about the investigative process, we’re going to talk more about the remedies that can happen when cases disclose violations. The first of those is withholding. The Acts included this tool as a means to protect the rights of the workers while the enforcement agency and contractor go through due process.

Slide 17: When a contractor of any tier is found to have underpaid workers, the SCA, Davis Bacon, and CWHSSA provide a mechanism for placing a hold on contract funds owed to the prime contractor in an amount that's equal to back wages and CWHSSA liquidated damages. Withholding 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. Each of these Acts holds the prime contractor ultimately responsible for compliance on the contract: This also means that if a sub refuses to pay back wages, the prime will be liable. Withholding is in the labor clauses that are made part of the prime contract.

Slide 18: The Acts give DOL the authority to request withholding through the Agency, and they allow the Contracting Agency to withhold of its own initiative when it has detected underpayments. In fact, we have seen instances where an Agency has detected violations, made its own estimate of back wage estimates, and then referred the matter to WHD for investigation. Particularly if the contract is near completion, it is essential that the Agency withhold funds to protect the rights of the workers until the matter can be resolved either administratively or through litigation. The Regulations and the FAR state that the contracting officer must withhold when DOL makes the request. It is not optional, because remember, the intent of the Acts is to equalize labor costs no matter where a contractor comes from. So where a contractor has undercut wages and the Agency has benefitted from that work, the Act provides the withholding mechanism to make workers whole and level the playing field among contractors.

Slide 19: If something is repeated, it must be important right? This slide emphasizes that the prime contractor is held responsible for any violations of their subcontractors of any tier. Sometimes we see subcontracting out to 4th, 5th, or even 8th tier. The farther down you go, the higher the violation rate we tend to encounter. And that makes sense... I mean, we ask ourselves, 'How can there be enough money after so many levels of contractors take a cut, to still afford the prevailing wage rates?' In reality, subcontractors have often underbid the job in order to get the work, or a higher tier has pressured a lower tier to underbid the work. When we see more than about three levels of subs, sometimes the prime isn't even aware of those lowest-tier subcontractors working on the contract. In scenarios where the sub has underbid and there's no accountability by the prime, these lower tier subs are often motivated to cheat the labor costs in order to make a margin. Even so, the Acts still hold the prime contractor responsible for compliance of all subcontractors performing on the contract. If we find violations – whether the prime knew that sub existed or not – whether the contractor underbid the contract or not – the Acts allow for withholding from the prime contract until the matter is resolved. If there are insufficient funds on one contract, we have the authority to cross-withhold the balance of back wages from other active contracts.

Slide 20: Now, as Wage Hour Division moves forward, it may refine the back wages based on additional information. The back wages can go up or the back wages can go down. If the back wages change, Wage Hour Division will adjust its withholding request accordingly in writing. Once DOL has requested withholding, the contracting officer may not reduce or release the withheld funds without written

approval from DOL. Those funds are to be held until an administrative resolution is agreed upon by the parties or a final order from a Judge is received. Upon a favorable resolution of the case, withheld funds will then be disbursed as back wages, and the Agency may use withheld funds to collect assessed CWHSSA liquidated damages.

Slide 21: The prime and any affected subs will be notified in writing of Wage Hour Division's intent to withhold. They will have 15 days to give a response and provide additional information they would like Wage Hour Division to consider. Withholding may happen before a complaint is filed with the Court. But again, funds will not be disbursed until the parties have reached an administrative resolution or received a final order.

Slide 22: It is DOL's position is that wage claims have priority over other types of claims, including IRS tax levies, agency re-procurement costs - if an agency terminates a contract because of the violations of a contractor and then seeks to replace that contractor, they may not use withheld funds to reimburse themselves for those re-procurement costs - as well as claims by bankruptcy trustee. In the event there are insufficient withholding amounts on the contract, the Government may also institute court action to recover a portion of the back wages and fringe benefits or from a contractor's surety.

Slide 23: To piggy back off the previous statement, the contracting agency may cancel a contract for any violation of the labor standards. If that takes place, the Agency may charge the additional costs associated with finding its replacement to the original contractor. These are all very good reasons for primes to be aware of its ultimate responsibility for compliance on the contract, and to create a robust, proactive compliance program to ensure that its own staff understands how to comply with the Acts, its subs comply with the Acts, and sets itself up to be ready to take action should it detect issues on its projects.

Slide 24: We're now going to discuss debarment under the Service Contract Act, direct Davis Bacon, and the Related Acts. Debarment means that a business entity and any responsible individuals become ineligible to obtain new contracts during a period of time. The debarment standard varies between SCA, direct Davis Bacon and the Related Acts, and we're going to discuss each of these. 29 CFR Part 4 states for the Service Contract Act that any person or business entity found to have violated the SCA may become ineligible to receive further contracts for three years unless there are unusual circumstances. Now, the Wage Hour Investigator should advise the contractor of the possibility of debarment sanctions under the SCA at some point during the investigation, usually in the final conference.

Slide 25: Contracts may not be awarded to any firm, corporate, partnership or association in which the debarred individuals or the debarred firms have a 'substantial interest'. What does substantial interest mean? A 'substantial interest' may be deemed to exist after considering the facts of each individual case. Factors to be examined include sharing a common premises or facilities, or occupying any position

that makes binding decisions, such as manager, supervisor, or even consultant to the entity. This includes anyone receiving indirect compensation – whether it be by virtue of family relationships or otherwise. A firm will be closely examined where there has been an attempt to sever an association with a debarred firm, or where the firm was formed by a person previously affiliated with the debarred firm or a relative of the debarred firm. We recently encountered a scenario involving a mail haul contractor who was still on the debarred bidders list. His wife had obtained a new contract under a new entity during that time and represented to the Government that her husband – who was debarred – was not involved as a manager. She attested that her husband was merely a mail haul driver. However, we obtained paychecks with the husband’s signature on them, which showed he was in fact actively managing the company, and we found out that he was a 50% owner in the firm that held the contract – both of which contradicted her attestations to the Government under penalty of perjury. We were able to work with the contracting agency to have the contract terminated for cause and referred both the husband and the wife to OIG.

Slide 26: DOL has developed criteria for determining when there are “unusual circumstances” within the meaning of SCA. A good compliance history, cooperation in the investigation, repayment of the moneys due, and sufficient assurances of future compliance are generally prerequisites at a minimum to begin consideration of relief. Where these are met, other factors must still be considered. These include whether the contractor has a previous history of violations (*is it a frequent flyer?*), has committed recordkeeping violations that impeded the investigation, because remember this in and of itself is a violation of the Act; or if it involves areas of unresolved legal issues of the law. If the violations of the SCA provisions on the contract were willful, deliberate, or of an aggravated nature, relief from debarment is not appropriate.

Slide 27: Debarment is slightly different between direct Davis Bacon and the Related Act: Under direct Davis Bacon, the debarment period is for three years where the contractor is found to have disregarded its obligations to its employees or its subcontractors. Under the Related Acts, including the Contract Work Hours & Safety Standards Act (or called CWHSSA), debarment is for up to 3 years where aggravated or willful violations are found on a DBRA covered contract. For Davis Bacon contracts, DOL initiates debarment action and recommends to the Comptroller General that the debarment action be taken. Under the Related Acts, the Copeland Act and CWHSSA, DOL has direct debarment authority.

Slide 28: Each case will be evaluated in its totality to determine whether debarment is appropriate. This slide lists some of the more common instances in which DOL finds debarment to be appropriate. For instance, when subcontractors falsify certified payrolls by underreporting the number of workers on site or misclassifying workers, these may not only be grounds for debarring the sub, but could also be grounds for debarring the prime. As we’ve discussed, the Acts place ultimate responsibility on the prime contractor for ensuring compliance by all tiers of subs. When some of these more egregious violations occur, we sometimes wonder how the prime – if they had any eyes and ears on the site of work – didn’t realize what was happening. Debarment, contract termination, and withholding can be disruptive to the prime contractor’s business. A prime needs to have a proactive compliance program that first sends the

message that compliance is important, as well as detects and cures issues as soon as possible, at a minimum in order to meet the spirit of the law. Genuine obliviousness and purposeful inattention are not best practices for avoiding the consequences provided for in the Acts.

Slide 29: In debarment cases under all of the Acts- SCA, direct Davis Bacon, the Related Acts, CWHSSA, Copeland Act - names of the firms and individuals who are found to be ineligible are placed on the Comptroller General's System for Award Management published by GSA at [www.beta.sam.gov](http://www.beta.sam.gov).

Slide 30: Early removal from the debarment list is only possible for contractors who have been debarred under the Related Acts, because the debarment period is up to three years. It is not possible for contractors who are debarred for disregarding their obligation under direct Davis Bacon or for having violated the SCA, as the statutes specifically state that those contractors will be placed on the debarment list for a period of three years.

Slide 31: So how do you get off this list if you've been debarred under the Related Acts? First, paying all of the back wages is a prerequisite for early removal, but only one of several. Payment of back wages alone is not sufficient reason to warrant early removal. Demonstrating current compliance, most likely through a subsequent investigation, is another important factor that is considered, but does not guarantee that an early removal will be granted. The severity of the violations and the contractor's past history will also be considered.

Slide 32: If the contractor refuses to comply moving forward, fails to pay back wages, or does not voluntarily agree to be placed on the debarred bidders list where debarment action is appropriate, the investigation files are referred to the Regional Solicitor for preparation for a hearing before an Administrative Law Judge (or an ALJ).

Slide 33: 29 CFR Part 6 lays out the hearing process. Under SCA, a contractor or subcontractor (called the respondent) has 30 days from the date of service of the complaint to file an answer with the Chief ALJ. The Office of the Chief ALJ is responsible for the scheduling of administrative hearings, and hearings are normally held in the city closest to the location of the contractor. Under direct Davis Bacon and the Related Acts, a letter will first be sent to the contractor or contractors offering them the opportunity to request a hearing before an ALJ. The contractor has 30 days from the date of the letter to request a hearing in writing. If a timely response is not received, the findings shall be considered final. That means back wages will be disbursed and, if debarment is included, debarment will be processed. If, however, a timely request for a hearing is received, the matter will be referred to the Solicitor's office. Within 40 days after the date of the ALJ's decision, any aggrieved party may file a petition for review of the decision with supporting reasons, and transmit the petition in writing to the ARB, the Administrative Review Board, copying the Chief ALJ. The petition must refer to the specific findings of fact, conclusions of law, or order at issue. A petition concerning the decision on debarment shall also provide a rationale

for why the debarment was not warranted under the corresponding Act. That concludes our presentation. Thank you for your participation and we look forward to talking with you in the live Q & A!