

Slide 1 and 2 – Hi, I’m Cinthya Guerra Senior Investigative Advisor for the Western Region and I will be covering overtime pay requirements on government contracts.

Slide 3 – Neither the Service Contract Act nor the Davis Bacon Act provide for compensation of covered employees at premium rates for overtime hours of work. Section 6 of the SCA recognizes that other Federal laws, such as the Fair Labor Standards Act, which I will refer to as the “FLSA” in this presentation and the Contract Work Hours Safety Standards Act, which I will refer to as “CWHSSA” in this presentation, may require such compensation to be paid to employees working on or in connection with SCA-covered contracts. Section 3142(e) of the Davis-Bacon Act recognizes that premiums may apply under other laws, and also provides guidance as to how the regular rate should be determined for work performed on Davis Bacon contracts. CWHSSA is more limited in scope than the Fair Labor Standards Act and generally applies to Government contracts in excess of \$100,000 (\$150,000 for contracts procured under the Federal Acquisition Regulations) that require or involve the employment of laborers, mechanics, guards, or watchmen.

Slide 4 – When enacted in 1962 CWHSSA consolidated a number of “eight hour” laws that provided for overtime pay on federally financed contracts employing “laborers” and “mechanics.”

In 1986, the federal daily overtime requirement was replaced to require overtime pay only after 40 hours a week.

Both CWHSSA and the FLSA now require overtime pay for work over 40 hours in a workweek, so the requirement is the same under both laws.

By statutory definition under the FLSA, the term of "employ" includes "to suffer or permit to work." The workweek ordinarily includes all time during which an employee is required to be on the employer's premises, on duty, or at a prescribed work place.

Slide 5 – CWHSSA requires overtime pay for laborers, mechanics, guards, and watchmen at a rate of one and a half times the basic rate of pay for hours worked in excess of 40 in a workweek on covered contracts.

The Davis-Bacon wage determination states the basic hourly rate separate from the fringe benefits as the basis for computing overtime under CWHSSA.

Liquidated damages can be assessed per day for each laborer, mechanic, guard, or watchman not paid proper overtime.

CWHSSA requires that “liquidated damages shall be computed, with respect to each individual employed as a laborer or mechanic in violation of any provision of this Act, in the sum of \$27 for each calendar day on which such individual was required or permitted to work in excess of the standard workweek of 40 hours without payment of the overtime wages required by this Act.” Liquidated damages are also required to be computed in situations where an employee is paid overtime at an incorrect hourly rate of pay. Under CWHSSA, a violation results when the computation for overtime is based upon a straight time rate below the applicable prevailing wage.

Back wages and liquidated damages due under CWHSSA may be withheld from contract funds.

Slide 6 – CWHSSA covers contracts over \$100,000, or \$150,000 for contracts procured under the Federal Acquisition Regulations, that require or involve the employment of laborers, mechanics, guards or watchmen on Davis Bacon Act covered construction contracts, Davis Bacon Related Act covered construction contracts, and Service Contract Act covered service contracts.

CWHSSA is self-executing so even if not stated in the contract it could apply.

It also has no “site of the work” limitation.

CWHSSA does not apply to contracts where Federal assistance is only in the nature of a loan guarantee or insurance. *For example*, U.S. Department of Housing and Urban Development assistance in the form of a loan guarantee under the National Housing Act.

CWHSSA is also not applicable on contracts for construction or service contracts of less than \$100,000, or the \$150,000 threshold.

It’s also not applicable for work performed in a workplace within a foreign country, and also not applicable for work required to be done under the PCA.

It is also important to note that the \$150,000 threshold will probably increase to \$250,000 in the near future, you might want to keep an eye out for that.

CWHSSA does not have a “site of the work” limitation on coverage. All hours worked on covered contracts are combined for determining CWHSSA compliance. For example, if an employee starts the day performing covered work at a 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.

Slide 7 – CWHSSA applies to laborers, mechanics, guards and watchmen for the time spent on covered contract work only.

When determining whether an employee has worked overtime hours under CWHSSA:

Total up all the time the employee spent working on covered contract work, on-site and off-site. Exclude all commercial, non-government, non-covered work.

If over 40 hours, then overtime is due under CWHSSA

If more than 40 hours are worked but not all hours are for the covered contracts, it does not mean you don’t have to pay for overtime, it means that overtime is still due at time and a half. However it’s captured under FLSA Section 7 overtime requirements rather than CWHSSA.

Slide 8 – 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 straight time hourly rate, which will generally be the amount listed under the column “Rates” on the applicable wage determination.

The “basic rate” cannot be less than the basic hourly rate required in an applicable wage determination, not including any required fringe benefit amount.

However, if an employee is paid a regular rate above the basic hourly rate (excluding the fringe benefits or cash payments in lieu of fringe benefits), that regular rate will be considered the basic rate.

For example, if the applicable wage determination has a basic hourly rate of \$20.00 for a painter, but the employer regularly pays his painters \$24.00 per hour for both contract and non-contract work, the regular rate of \$24.00 will be used when computing additional half-time for overtime hours.

Slide 9 – The fringe benefit rate listed on the wage determination is excluded in computing overtime obligations under CWHSSA.

This exclusion applies to both cash payments made to comply with the fringe benefit portion of the prevailing wage requirement and contractor contributions to bona fide plans made to comply with that requirement.

Slide 10 – Now we turn to the application of the FLSA overtime pay requirements.

On contracts to which CWHSSA does not apply, it does not mean overtime does not apply. It just means overtime pay requirements may apply to the prime or subcontractors under the FLSA. On contracts where CWHSSA does apply, FLSA OT can still apply as well.

The Fair Labor Standards Act applies to any individual employee who is engaged in interstate commerce and to all employees of any enterprise that has at least two employees engaged in interstate commerce or who regularly handle goods that have moved in interstate commerce and has a gross annual volume of sales not less than \$500,000, or is a named enterprise under the FLSA.

Slide 11 – As a general standard, Section 7(a) of the FLSA, provides that employers 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 40 hours at a rate not less than one and one-half times the regular rate at which he or she is employed.

Slide 12 – Unless specifically exempted from FLSA overtime pay requirements, an employee who performs work on both federally funded or 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.

Slide 13 – CWHSSA and FLSA requirements apply only to hours worked.

Non-work hours such as paid holidays and paid leave are not counted in computing overtime pay.

The federal overtime pay requirements under FLSA and CWHSSA apply only to hours worked over 40 in a workweek.

CWHSSA applies to hours worked over 40 in a workweek on covered contracts.

Also note that State laws and collective bargaining agreements may apply additional requirements.

Slide 14 - Hi, my name is Natalie Collins, and I am a Senior Advisor for Government Contracts Enforcement at our National Office, and now that Cinthya has explained the principles of overtime under CWHSSA and the FLSA, I'm going to talk about some examples of how those principles actually work in situations that you'll commonly encounter on government contracts.

One common issue that you encounter on government contracts is employees that work in more than one classification, and those classifications generally have different required rates of pay. For example, on a Davis Bacon contract, you might have a laborer or mechanic who is working as a carpenter and a painter, at different rates. Or on an SCA contract, you might have a worker who is working as a housekeeper, but also sometimes works as a cook, with those occupations also being paid at different rates.

Generally speaking, when you have an employee who is working in more than one classification with different rates, to figure out how to pay their overtime, you're going to need to figure out their weighted average rate, which is their regular rate for the purposes of computing overtime. The weighted average rate, or weekly average rate, is determined by taking the total straight time pay for all work, paid at all of the applicable rates during that week, and then dividing it by the total number of hours worked during the workweek.

Slide 15 - There is another method of paying overtime to workers who work in more than one classification, which is commonly called the rate in effect method. If a contractor keeps track of the hours that employees work in their different classifications very carefully, so that they know exactly what rate the employee was working at when they worked overtime hours, the contractor can pay the rate in effect for the overtime hours. They can use the rate that was in place for the work that was actually being performed during the overtime hours and base the half-time due for overtime on that rate. However, the contractor can only do that if they've established an agreement with the employees in advance that this is how overtime is going to be computed, and again, it does require very careful records to be kept of exactly what work the employees were doing when they worked the overtime hours.

The next few slides are going to provide examples of how overtime would be paid under both of those methods.

Slide 16 – For these examples, we have an employee who is performing work on a covered contract in two job classifications, painter and electrician, at different rates. The wage rate for electricians is \$12 an hour base hourly rate, with a \$2.50 fringe benefit rate, while the wage rate for painters is only a \$10 an hour base hourly rate, but with a \$3.00 an hour fringe benefit.

In this particular workweek, this worker worked 48 hours. 30 of those hours were painting hours, and 18 hours were electrical work. These next two slides are going to walk through the math on how to compute the weighted average rate for that worker.

Slide 17 – For the weighted average rate, the first thing that you need to have is the total straight time pay that that worker received in that week, and it's got to be based on the hours they worked at each rate, so you're going to multiply those totals. Here you're going to multiply the 30 hours at that painter's base hourly rate of \$10 an hour, for a total of \$300, and then the 18 hours at the electrician's rate of \$12 an hour, which totals \$216. You would have needed to do this calculation when doing payroll to make sure that this worker is getting the correct prevailing wages for their hours worked, so you would already have that total straight time pay of \$516.

Slide 18 – Next, you take that total straight time pay of \$516 and you divide that by the total hours worked that week, which as we stated on the previous slide was 48 hours. When you divide the \$516 by

48 hours, you get a weighted average rate of \$10.75. That was the worker's average rate throughout the week.

Then you use that weighted average rate to calculate the additional half-time due, because this worker has already been paid their straight-time at the painter's rate and the electrician's rate. All we need to do is figure out the extra half-time that they're due. To do that, you take half of that \$10.75 weighted average rate, and then you multiply the half-time rate by the 8 overtime hours worked, and the worker is due an additional \$43 of half-time using the weighted average method.

Note that this example assumes that the contractor is paying the different rates listed in the wage determination for the work that this worker is performing, but although the contractor can't compute overtime on a rate that's less than the base hourly rate in the wage determination, contractors can pay a higher regular rate than the base hourly rate listed on the wage determination. For example, the contractor could have chosen to just pay \$12 for all hours that the employee worked, regardless of whether it was electrician's work or painter's work. And that is of course permissible, but then the contractor would have to compute the overtime based on that higher regular rate of \$12 an hour that they'd established for all hours worked, and would not use this weighted average method based in part on the \$10 painter's rate listed in the wage determination, as that lower rate was not actually paid. So it's important to keep in mind that although the overtime rate can't be less than the base hourly rate in the wage determination, the contractor is able to establish that higher rate.

Slide 19 – The next example for how you would compute OT for a worker who works in more than once classification deals with that rate in effect method mentioned earlier, where the contractor has kept a very close track of exactly what work the worker was performing when they went into overtime hours, and is going to pay overtime based on the rate applicable to the kind of work they were doing when they worked the overtime.

For this example we're assuming that the worker was performing electrician's work for all 8 overtime hours. If the worker was performing electrician's work for all the overtime hours, then the electrician's rate has to be used for computing overtime. Again, the worker has already gotten all their straight-time due, so we just need to figure out the additional half-time due for these overtime hours. Because they were working as an electrician for the overtime hours, that is the rate in effect, so you multiply the 8 overtime hours worked by half of the \$12 electrician's rate, for a total of an additional \$48 of half-time due.

This example would of course vary if the worker had performed other work during those overtime hours. If this worker had been working as a painter for those 8 hours, instead of using that \$12 an hour rate to compute overtime, you would use the \$10 painter's rate. If the worker had spent 5 hours working as an electrician and 3 hours as a painter, you would do half-time for 5 hours based on the electrician's rate of \$12 and 3 hours based on the \$10 painter's rate, so the calculations will be very precise according to whatever kind of work the worker was performing during those overtime hours. The contractor and the employee cannot simply agree, for example, that because the majority of the worker's time is spent doing painting work, all overtime will be computed based on the painter's rate. That would not be permissible, as rate in effect computations must be based on the applicable rate for the actual work that was performed during the overtime hours.

Those slides provided examples of how to compute overtime when there is work in more than one classification during the workweek. Another question that comes up fairly often is how to deal with fringe benefits when computing overtime. In our next few slides, we're going to talk about that.

Slide 20 – First we're going to discuss how to compute the compensation due for someone who works overtime in a workweek on a Davis-Bacon contract, because for Davis-Bacon, fringe benefits are part of the overall prevailing wage rate, and the fringe benefit contribution rate can vary, as long as the total prevailing wage obligation is met, which can lead to some complications.

So for the next few slides, we're going to be discussing how you would compute overtime for an electrician who works 44 hours on a covered contract. The wage determination for the contract states that the electrician's base hourly rate is \$22 and the wage determination also lists a \$5.00 fringe benefit rate.

Slide 21 – In this first example, the contractor has chosen to meet their prevailing wage obligation by paying cash wages and making fringe benefit contributions exactly as stated in the wage determination, by paying \$22 an hour in cash wages and making \$5 an hour in fringe benefit contributions. This slide describes how you would compute the total wages due to the electrician for this 44 hour week in this scenario.

The worker will get \$22 an hour in cash wages, reflecting that base hourly rate, for all 44 hours worked, for a total of \$968.00. The employer has also made \$5.00 an hour in fringe benefit contributions for each of the 44 hours that this worker worked, so that's another \$220 total in fringe benefit contributions. But when figuring out the overtime due, you do not include those fringe benefit contributions in the regular rate, you only use that base hourly rate. So you'll take those 4 hours of overtime and multiply that by half the base hourly rate of \$22 an hour, so this employee would be due an additional \$44 in half-time, and the worker should receive a total compensation of \$1,232.00 for that week. The important point to note is that the overtime computation is based on that base hourly rate, and does not include fringe benefit contributions.

Slide 22 – On the next slide, the contractor has chosen to meet their prevailing wage obligation in a slightly different way, because again under Davis-Bacon, the contractor can divide up that prevailing wage obligation among cash wages and fringe benefit contributions in varying amounts. This contractor paid a cash wage of only \$20 an hour, and made \$7.00 in fringe benefit contributions.

In this situation, to compute the back wages due for our electrician, you would multiply the 44 hours times the \$20 an hour cash wage, which totals \$880. Those fringe benefit contributions still have to be made for every hour worked, so you're also going to multiply that \$7 an hour fringe benefit contribution by 44 hours, resulting in \$308 of total fringe benefit contributions due.

However, when you're computing the additional half-time due, it's very important to note that you don't compute the overtime based on the \$20 an hour cash wage. The contractor has chosen to make fringe benefit contributions in excess of the fringe benefits required by the wage determination, resulting in a lower cash wage, but that overtime computation is still going to be based on that \$22 base hourly rate listed in the wage determination. Because as we discussed earlier, the contractor can have a higher base hourly wage rate, but they cannot use a rate lower than the base hourly wage rate listed in the wage determination for the purposes of computing overtime.

So for this worker, even though a larger portion of their total prevailing wages are met by paying fringe benefit contributions, their computation for half-time due is still going to be exactly the same as on the previous slide. You're still going to multiply those 4 hours of overtime by half of the base hourly rate listed on the wage determination for electricians, that \$22 an hour, and this worker is still going to be due an additional \$44 in half-time. Similarly, the electrician's total compensation, just like in the previous example, is still going to be \$1,232.00. The total compensation is the same, the half-time is the same. The only difference is how that straight time compensation is divided up among cash wages and fringe benefits.

Slide 23 – The previous slide shows how to compute wages due when the contractor makes fringe benefit contributions in excess of the amount required, but what happens when a contractor makes fringe benefit contributions that do not equal the amount listed in the wage determination, and pays the difference in cash? This contractor chose to pay \$24 an hour in cash wages, including a \$2 an hour cash in lieu of fringe benefit contribution for the fringe benefits required in the wage determination, and \$3 in fringe benefit contributions. Here is how to compute the wages due in this situation.

Again, you multiply the 44 hours by \$22 base hourly wage rate, totaling \$968, and then you also multiply the 44 hours by the \$2 an hour cash in lieu of fringe benefits, which is \$88 in total. You also multiply the 44 hours by the \$3 per hour fringe benefit contributions that this employer makes, which is an additional \$132 in fringe benefits.

When you compute that additional half-time though, you're still going to compute it just the same, based on that \$22 base hourly wage rate in the wage determination. That's because that extra \$2 an hour in cash wages the worker is receiving is really fringe benefits, they're getting cash in lieu of fringe benefit contributions, and fringe benefits don't have to be included in the overtime calculation. So you're still going to multiply that 4 hours of overtime by half of that \$22 base hourly wage rate in the wage determination, and that worker will still be due \$44 in half-time for that workweek. The total compensation that worker received for the week is also not going to change, it's still that \$1,232, because again, the only difference is in how the straight time compensation is divided up among cash and fringe benefit contributions.

To sum up, in meeting prevailing wage obligations under Davis-Bacon, the exact division between cash wages, cash fringe benefits, and fringe benefit contributions may vary, but the end total and the total overtime premium is going to stay the same.

Slide 24 – On SCA contracts, there are also sometimes questions about health and welfare payments and overtime compensation. So we're going to discuss a couple of examples of how overtime and total weekly compensation would be computed for a janitor who works 44 hours a week, with a wage rate of \$15 an hour and a \$4.54 health and welfare. In one instance this janitor is working on a wage determination that has a fixed cost health and welfare, and on the other example, the janitor is working under a wage determination has an average cost health and welfare, and we'll see how those are different.

Slide 25 – In this first example, this janitor is working on a contract that has a fixed cost health and welfare benefit requirement. For fixed cost wage determinations under the SCA, those health and welfare benefits only have to be paid for the first 40 hours paid in the workweek. If the employee works more than 40 hours, or is paid for more than 40 hours in that workweek, that worker is not entitled to

health and welfare payments for those additional hours under a fixed cost wage determination. So when you're figuring out the compensation due, you're going to multiply 40 hours by that \$4.54 health and welfare benefit, for a total of \$180.60 health and welfare due. But the janitor actually worked 44 hours, so you're going to multiply 44 hours by the \$15 prevailing wage rate, which totals \$660.00 due.

For the overtime premium computation, you're not even going to look at that health and welfare payment. You're going to base the overtime computation just on that prevailing wage rate, 4 hours times half the \$15, for an additional \$30 in half-time premium due. For this week, the worker would be due a total of \$870.60 in compensation.

Slide 26 – In contrast, if this employee was working on an average cost wage determination under the SCA, the health and welfare benefit would have to be paid for all hours worked, not only the first 40 hours paid in the workweek. So in this scenario, for the same 44 hour workweek, you would multiply 44 hours times the \$4.54 health and welfare, for a \$199.76 total health and welfare payment, and you would multiply 44 hours by the \$15 prevailing wage rate, which again will total \$660 cash wages.

But that overtime calculation is not going to change, it's still going to be based just on that prevailing wage rate as in the first example. You will still multiply the 4 hours by half that hourly rate of \$15, resulting in an additional \$30 in halftime due.

The total here for this example is \$889.76 due for this workweek. This total has changed from the previous slide, but that's not because of any change in how you compute the overtime premium. That's only because under an average cost wage determination, unlike the fixed cost wage determination, this worker would be entitled to health and welfare for their hours worked over 40.

Slide 27 – Under CWHSSA, the statute does require that liquidated damages be computed for each day on which a worker didn't receive the overtime they should have received. Regardless of the type of overtime violation - if the worker didn't get paid for overtime hours at all, if they got paid straight time for overtime, or if they were paid overtime but not at the correct rate –the liquidated damages would be computed for each day on which there is any kind of overtime violation. The daily liquidated damages amount is \$27. That amount is adjusted annually, and when it increases, that increase is published in the Federal Register, so it is important to be aware of those potential increases.

Under CWHSSA it's important to note that liquidated damages are assessed by the contracting agency, not the Department of Labor. We will compute the liquidated damages, but then we provide that information to the contracting agency who makes the assessment. However, if the contracting agency wants to reduce or waive the liquidated damages, if the liquidated damages are over \$500, they do have to get the concurrence of the Wage & Hour Administrator to reduce or waive the liquidated damages, and that process is discussed in 29 CFR 5.8.

The Fair Labor Standards Act also has liquidated damages, but those liquidated damages are a little bit different. For CWHSSA liquidated damages, those liquidated damages are assessed by the contracting agency and are actually paid to the contracting agency, so under CWHSSA those liquidated damages are more like a fine or a civil money penalty. Under the Fair Labor Standards Act, liquidated damages are assessed in an amount equal to the unpaid overtime, they're assessed by the Department of Labor, the Wage and Hour Division, and that liquidated damages amount goes to the worker. So how the

liquidated damages are computed, who assesses them, and where that money ultimately goes does vary between the two acts.

Slide 28 – Here’s an example of how CWHSSA liquidated damages would be computed. In this scenario, this employee worked 55 hours and did not get paid the correct overtime. We would look at the certified payroll or the timesheets and figure out on which day the worker first went over 40 hours and the violation started. This worker went over that 40 hour mark on Thursday, and continued to work overtime hours on Friday and Saturday. That’s 3 days that they worked overtime hours and didn’t get the correct compensation, so the daily liquidated damage amount of \$27 would be multiplied by the 3 days that they worked overtime and didn’t get paid correct overtime, and for that workweek the liquidated damages would be \$81.

Slide 29 – That brings us to the end of our presentation on CWHSSA and FLSA overtime. Just as a reminder, if you have any questions after watching and listening to this presentation that you would like us to address at the Davis-Bacon Question and Answer sessions later in September, please feel free to email them to us either through your Eventbrite registration site or to Collins.natalie@dol.gov. Thank you for participating in our prevailing wage seminar.