Slides 1 and 2 (title slides)

My name is Seward Dinsmore. I’m a Senior Investigator Advisor working with the US Department of Labor, Wage-Hour Division. I work out of the San Francisco Regional office. I’m working with Beverly Kitchen, who is the Regional Enforcement Coordinator for Government Contracts who works out of the Southeast region. Today we discuss the general compliance principals under the Service Contract Act.

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There are seven major components of Service Contract Act compliance principals. They include the proper payment of wages and fringe benefits, including payment of vacation and holidays, authorized deductions from wages paid under the Service Contract Act, the types and manner of maintaining proper records, and the posting and notification requirements to employees.

The Service Contract Act wage determinations set forth the minimum wages and fringe benefits that contractors and their subcontractors must pay service employees working on covered contracts. These minimum wage levels are established for occupational classes of service employees to be employed on covered service contracts.

Wages are the monetary compensation provided employees. The minimum monetary wages required under the Service Contract Act are usually listed in the wage determination as hourly wage rates for the various classes of service employees.

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The Service Contract Act involves those contracts covering services in excess of $2,500. Such Service Contracts in excess of $2,500 require the prime contractors to pay service employees working in various classes, no less than the wage rates and fringe benefits found listed on the applicable wage determination which are reflective of prevailing wages in that locality. This includes paying those rates (including prospective increases) contained in a predecessor contractor’s collective bargaining agreement. Contracts equal to or less than $2,500 require contractors to pay the Federal minimum wage as provided in Section 6(a)(1) of the Fair Labor Standards Act. The current Federal minimum wage is $7.25 an hour.

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Monetary wages specified under the Service Contract Act are the minimum rates of pay that must be paid to all service employees employed on a covered contract. Contractors may pay higher wage rates than those contained in the contract wage determination.

To be in compliance, contractors must pay wages due to employees promptly and no later than one pay period following the end of the pay period in which the wages are earned. A bi-weekly or semi-monthly pay period may, however, be used if advance notification is given to the affected employees. A pay period longer than semi-monthly is not recognized as appropriate for service employees, and wage payments at greater intervals are not considered proper payments in compliance with the Service Contract Act.

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It is required that workers be paid the wage rates set forth in the wage determination for the classifications of work they perform. It is very important that a contractor fully utilize the
applicable wage determination to prevent misclassification. The Service Contract Act Directory of Occupations is an excellent guide to find the classification that most closely matches the workers’ duties. If no classification on the wage determination describes the workers’ duties, then a conformance must be sought.

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The following is an example when attempting to find the correct wage rates. Contractor X has been awarded a contract to provide refrigerated warehouse services. The scope of work required in this contract is described on this slide and involves an employee basically interacting with goods. Contractor X is trying to determine the correct classification for these employees performing such work and begins to read through the applicable wage determination and decides that Order Clerk 1 is the best classification. However, a further reading of the wage determination and Service Contract Act Directory of Occupations indicates otherwise.

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In this applicable wage determination occupation code 01191-titled Order Clerk 1 has a required rate of $11.31 an hour.

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In researching the Service Contract Act Directory of Occupations for Order Clerks, it’s important to note the occupational base description first. The occupational base description for 01190 Order Clerk in general involves a mixture of working with customers and products. The Order Clerk 1 position description adds additional duties which could include referring to a catalog, manufacturer's manual, or similar document to ensure that the proper item is supplied or to verify the price of order.

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Further research reveals a classification bearing a closer relationship to the scope of work being performed. This is occupation code 21130-titled Shipping and Receiving Clerk, which has a required rate of $12.87 an hour.

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The Service Contract Act Directory of Occupations description for the Shipping/ Receiving Clerk, occupational series 21130, reveals an almost identical description to the work being performed by employees working on this contract. The occupational base series for this classification is 21000 for Materials Handling and Packing Occupations. This category includes occupations concerned with largely interacting with goods and materials in different ways, including performing clerical and physical tasks in connection with shipping goods and receiving incoming shipments. This work doesn’t involve dealing directly with customers. After reviewing the Directory of Occupations description, the duties of the Shipping/Receiving Clerk is the correct classification to pay. It’s important to determine the correct classification of pay, as in this example the Shipping/Receiving clerk’s rate is $1.56 an hour higher that the Order Clerk 1 position.

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If an employee during a workweek works in different capacities in the performance of the contract and two or more rates of compensation from the applicable wage determination are applicable to the classes of work which they perform, the employee must be paid the highest of such rates for all hours worked in the workweek. The exception requires the employer to maintain proper records or other affirmative proof, showing which hours were worked in different classifications in the periods of work.

This rule is the same where an employee is employed for a portion of the workweek on Service Contract Act covered work and on non-Service Contract Act covered work that provides for a lower wage rate, the employer must segregate the work time spent in both.

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Tips may generally be included in wages of employees working on service contracts (such as military post barbershops) in accordance with section 3(m) of the Fair Labor Standards Act and 29 CFR 531. Employers may use a “tip credit” to meet their Service Contract Act prevailing wage obligation if all the above following conditions are met as listed on this slide. Where section 4(c) of the Service Contract Act applies, the use of the Fair Labor Standards Act section 3(m) tip credit must have been permitted under the terms of the predecessor’s Collective Bargaining Agreement in order for it to be utilized by the successor in satisfying the Service Contract Act minimum monetary wage obligations.

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To demonstrate that the tips actually received by an employee equal or exceed the tip credit claimed, the employer must keep an accurate record of the tips retained by the employee. The maximum tip credit for the Federal minimum wage is $5.12 an hour, with a minimum cash wage to be paid of $2.13 an hour.

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The hours worked by employees on Service Contract Act covered contracts are determined in accordance with the principles established under the Fair Labor Standards Act, as set forth in 29 C.F.R. Part 785 Hours Worked. In general, the hours worked by employees include all periods in which the employee is “suffered or permitted” to work, whether or not required to do so, and for all periods of time during which the employee is required to be on duty, or to be on the employer’s premises, or to be at a prescribed workplace.

The hours worked which are subject to the compensation principles of the Service Contract Act are those in which the employer is engaged in performing work on covered Service Contract Act contracts. In any workweek where the contractor/subcontractor is not exclusively engaged in work on a covered service contract, the contractor should identify separately and accurately in its records, or by other means, those periods during which its employees are engaged in work on a covered service contract.

In the absence of records that adequately segregate periods of covered contract work from non-covered contract work, all employees working in the establishment or department where such covered work is performed shall be presumed to have worked on or in connection with the covered contract during the period of contract performance.
The fringe benefits required under Service Contract Act shall be furnished, separately from and in addition to the specified monetary wages, by the contractor to the employees engaged in the performance of a covered contract. An employer cannot offset an amount of monetary wages paid in excess of the wages required under the wage determination in order to satisfy the fringe benefits obligations, and must keep appropriate records, separately showing the amounts paid for wages and amounts paid for fringe benefits. Fringe benefit contributions are discussed in more detail in the fringe benefits module.

In this example, the wage determination requires a prevailing wage of $10.25 an hour plus a $4.54 an hour fringe benefit. The contractor is paying his employees $12.61 an hour plus $2.12 an hour fringe benefit. Since the employer cannot offset an amount of monetary wages paid in excess of the wages required under the wage determination in order to satisfy the fringe benefit obligations, this employer still owes the employee $2.42 an hour for the fringe benefit shortfall.

Note there is a .06 an hour shortfall as well as the combined rate the employee was paid of $14.73 an hour doesn’t meet the required minimum rate of $14.79 an hour.

To be considered bona fide for Service Contract Act purposes, a fringe benefit plan, fund, or program must constitute a legal enforcement obligation which meets certain criteria as listed on this slide. The plan, fund, or program must be compliant with the Employment Retirement Income Security Act, or ERISA, laws and regulations enforced by the Internal Revenue Service (IRS), and state insurance laws. Contributions must be made irrevocably to a trustee or third person pursuant to an insurance agreement, trust, or other funded arrangement.

The fringe benefits listed in the Service Contract Act are illustrative of those that may be furnished by the employer and are defined in section 2(a)(2) of the Service Contract Act, which reads as follows:

“Such fringe benefits shall include medical or hospital care, pensions, retirement or death, compensation for injuries or illness resulting from occupational activity, or insurance to provide any of the foregoing, unemployment benefits, life insurance, disability and sickness insurance, accident insurance, vacation and holiday pay, costs of apprenticeship or other similar programs and other bona fide fringe benefits not otherwise required by Federal, State, or local law to be provided by the contractor or subcontractor.”

As set forth in All Agency Memorandum No. 188, a single prevailing nationwide health and welfare rate method has been established for determining fringe benefit requirements to be incorporated in most Service Contract Act wage determinations. The single rate is generally updated once a year based upon data from the Bureau of Labor Statistics, Employment Cost Index Summary of Employer Cost for Employee Compensation.
The “fixed cost” per employee health and welfare rate applies to most Service Contract Act covered contracts that require a prevailing wage determination.

The “average cost” health and welfare rate applies to those contracts where the formerly grandfathered “high” benefit would have applied as instructed by All Agency Memorandum No. 197.

The third type of health and welfare benefits is based upon those contained in a collective bargaining agreement issued in accordance with the provisions of section 4(c) of the Service Contract Act.

Because it is the contractor’s responsibility to satisfy the fringe benefit obligations set forth in the Service Contract Act wage determination, the contractor may choose the fringe benefits to be provided, whether an employee accepts or refuses the fringe benefits offered. If an employee desires cash payments or benefits other than those chosen by the contractor, that would be a matter for discussion and resolution between the employee and the employer. If participation in the fringe benefit plan, however, requires a contribution from the employee’s wages, whether through payroll deduction or otherwise, the employee’s concurrence is necessary.

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Most prevailing wage determinations containing health and welfare and/or pension requirements specify a fixed payment per hour on behalf of each service employee. This fringe benefit is due each employee on the basis of all hours paid for, including paid vacations, holidays, and sick leave, up to a maximum of 40 hours per week and 2,080 hours per year.

Payments are specified on the wage determination in hourly, weekly, and monthly amounts.

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Some wage determinations specifically provide for health & welfare and/or pension benefits in terms of average cost. In such cases, a contractor’s contributions per employee to a bona fide plan are permitted to vary, depending upon the individual employee’s marital or employment status. It is also possible under the average cost concept for some employees to not receive any fringe benefits. The contractor’s total contributions for all service employees enrolled in the plan must average at least the wage determination requirement per hour per service employees for the period of contribution. In determining average cost, all hours worked, including overtime hours, for all service employees that were employed on the contract during the period of employment must be counted. The term all hours worked does not include paid leave, such as vacations, holidays, or sick leave hours. It also does not cover any unpaid leave time.

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Section 4(c) of the Service Contract Act provides special minimum wage and fringe benefit requirements applicable to every contractor which succeeds a contract subject to the Act and under which substantially the same services as under the predecessor contractor are furnished in the same locality. Under section 4(c), no contractor succeeding a contract subject to the Act shall pay any of its service employees less than the wages and fringe benefits provided for in a collective bargaining agreement to which such service employees would have been entitled if they were employed under the predecessor’s contract, including accrued wages and fringe
benefits and any prospective increases provided for in the Collective Bargaining Agreement.

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The “fixed cost” per employee health and welfare benefits are required to be furnished on a fixed payment per hour on behalf of each service employee. This fringe benefit is due each service employee on the basis of “all hours paid for,” including paid vacations, holidays, and sick leave, up to a maximum of 40 hours per week and 2,080 hours per year on each contract.

The “fixed cost” per employee health and welfare benefits is stated hourly, weekly, and monthly on the wage determination at the rate of $4.54 an hour or $181.60 a week or $786.93 per month. Under the “fixed cost” per employee health and welfare benefit, employees excluded from participation in a fringe benefit plan must be furnished equivalent bona fide benefits or be paid a cash equivalent payment during the period that they are not eligible to participate in the plan, or for whatever reason do not participate in a fringe benefit plan.

On the other hand, it is not required that all employees participating in a fringe benefit plan be entitled to receive fringe benefits from the plan at all times. For an example, an employee who is eligible to participate in an insurance plan may be prohibited from receiving benefits from the plan during a 30-day waiting period. Contributions made on behalf of those employees during the waiting period would be creditable against the contractor’s fringe benefit obligations.

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The type or amount of benefits or cash equivalents to be provided is strictly a matter to be decided by the employer. The contractor may make participation voluntary, but is under no obligation to do so. The fringe benefits and cash equivalent payments under the “fixed cost” per employee health and welfare fringe benefit requirement may be made in varying amounts to employees, provided the total paid by the contractor for fringe benefits and/or cash equivalents to each individual employee is at least $4.54 per hour up to 40 hours a week.

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The “average cost” health and welfare fringe benefits include life, accident, health insurance plans, sick leave, pension plans, civic and personal leave, severance pay, and savings and thrift plans. Under the concept, contractor’s contributions for employees may vary, depending upon the individual employee’s marital or employment status. It is also possible under the “average cost” concept for some employees to not receive any fringe benefits. The footnote on the wage determination will indicate the contractor’s payment requirements.

The average cost fringe benefits are computed on the basis of “all hours worked,” including overtime hours, for all service employees as a group. The term “all hours worked” does not include paid leave hours such as vacations, holidays, or sick leave. It does not cover any unpaid leave time.

The contractor’s total contributions for all service employees enrolled in the fringe benefit plan or plans must average at least the fringe benefit obligation stated in the wage determination. If the contractor’s contributions average less than $4.54 per hour during a payment period, then the contractor must make up the deficiency by providing cash equivalent payments to all service employees who worked on the contract during the payment period. The types and amounts benefits provided, and the eligibility requirements for service employees to participate in a fringe benefit plan, are decided by the employer.
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A contractor is not required to make contributions to fringe benefit plans on behalf of all its service employees; nor is a contractor required to provide equivalent benefits to each service employee under the “average cost” health and welfare benefits compliance requirements.

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To make-up the shortfall in this example, cash payments must be equally made to each employee for each hour worked regardless of whether the employee participated in a health and welfare benefit plan.

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Eligibility for vacation benefits specified in a particular wage determination is based on completion of the stated period of past service. The individual employee’s anniversary date is the reference point for vesting of the right to vacation benefits.

Vacation benefits need not be provided immediately, but must be provided at a mutually agreed upon time before the next anniversary date of employment, termination of employment, or termination of contract, whichever is sooner. The rate applicable to the computation of vacation benefits is the hourly rate in effect in the workweek in which the actual paid vacation is provided or the cash equivalent is paid.

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In this example, JJ began work on July 01, 2017 and was entitled to vacation on July 01, 2018, after 12 months of service.

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To determine the contractor’s obligation to provide vacation benefits under a typical wage determination, two factors must be considered:
1. the total length of time an employee has been in the employer’s service, including time spent in performing commercial work and time spent performing on the Federal contract; and,
2. where applicable, the total length of time spent in any capacity as an employee in the continuous service of any predecessor contractor who carried out similar contract functions at the same Federal facility.

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For example, if the wage determination provides “one week paid vacation after one year of service” with a contractor or a predecessor, a contractor would need to provide one week of vacation pay for an employee who has worked for him for six months on regular commercial work and six months on service contract, as the total service adds up to 12 months or one year.
Similarly, if a contractor has an employee who worked for 16 months under a janitorial service contract at a particular Federal base for two different predecessor contractors, and only eight months with the present employer, that employee would also be eligible for the specified vacation benefits.

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Not less than 10 days prior to completion of any contract, the incumbent prime contractor shall furnish to the contracting officer a certified list of the names of all service employees on the contractor’s or subcontractor’s payroll during the last month of contract performance. The list shall contain anniversary dates of employment which the contracting officer shall provide to the successor contractor at the start of a new contract.

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Most Service Contract Act wage determinations list a specific number of named holidays for which payment is required. A full-time employee who is eligible to receive payment for a named holiday must receive a full day’s pay up to eight hours unless a different standard is stated in the wage determination as in one reflecting the provisions of a collective bargaining agreement. An employee’s entitlement to holiday pay vests by performing contract work, whether all or part of the workweek in which the named holiday occurs.

If the Service Contract Act wage determination applicable to a covered contract does not include a paid holiday provision for any day declared by the U.S. President to be a holiday, or for any work day where the Federal facility is closed, such as due to inclement weather, the contractor is not required to pay covered service employees who take that day off. Any pay provided would be a matter of discretion for the contractor and contract payments for such time not worked would be a procurement matter within the purview of the contracting agency.

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The Service Contract Act makes no distinction between temporary, part-time, and full-time employees. In the absence of express limitations, the fringe benefits listed in the applicable wage determination apply to all service employees, whether part-time or full-time employees, engaged in contract work.

A contractor is required to furnish fringe benefits based upon the employee’s normal daily and weekly work schedule. Unless otherwise specified in the applicable Service Contract Act wage determination, fringe benefits are based upon a full-time work schedule that consists of eight hours a day and 40 hours a week. The fringe benefit obligations for employees who work less than a full-time work schedule is determined on a *pro rata* basis. For example, an employee who works four hours a day, 20 hours a week, and is eligible for one week of vacation pay, is entitled to 20 hours of paid vacation. Using this same example, the employee would be entitled to four hours of holiday pay so long as the employee performed contract work in the holiday workweek.

Holiday or vacation pay obligations to temporary and part-time employees working an irregular schedule of hours may be discharged by paying such employees a proportion of the holiday or vacation benefits due full-time employees. For holiday obligations, it is based on the number of hours worked in the workweek prior to the workweek in which the holiday occurs. For vacation, it is based on the hours worked in the year preceding the employee’s anniversary date of employment.

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When a contractor discharges fringe benefit obligations by furnishing other *bona fide* fringe benefits, cash payments, or contributions thereof, instead of those benefits specified in the applicable wage determination, the substituted fringe benefits and/or cash payments must be
“equivalent” to the benefits specified in the wage determination.

For Service Contract Act purposes, the terms equivalent fringe benefits and cash equivalent mean “equal” in terms of monetary cost to the contractor. If the wage determination requires $4.02 in health and welfare benefits, the employer may discharge this obligation by providing an equivalent cash payment of $4.02 per hour; or provide a combination of benefits and cash such as $2.41 in health insurance benefits, $1.00 in life insurance benefits, and $.61 in equivalent cash payments that together equal $4.02. Where an employer fulfills the fringe benefit obligation on a weekly basis, for example, $16.00 per week for pension benefits, the hourly cash equivalent can be determined by dividing 40 hours (for a full-time employee) into $16.00 or $.40 per hour.

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Each employee shall be paid not less than the minimum monetary wages. The wage rate requirements will not be considered met in the weeks the employees’ wages are reduced due to unauthorized deductions and kickbacks.

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Title 29 of the Code of Federal Regulations Part 4.167 states that the employer may generally include the reasonable cost or fair value of furnishing an employee with “board, lodging, or other facilities,” in situations such facilities are customarily furnished to employees, for the convenience of the employees, not primarily for the benefit of the employer, and the employees' acceptance of them is voluntary and uncoerced. It further states that “board, lodging, or other facilities” and “reasonable cost or fair value” shall be determined under the Fair Labor Standards Act principles set forth in Title 29 Code of Federal Regulations Part 531.

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The contractor and subcontractor performing work subject to the Service Contract Act shall make and maintain records for 3 years from the completion of work. This slide and the next will provide a listing of the required records to be maintained.

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Failure to maintain or make these records available for inspection and transcription by an authorized representative of the Wage-Hour Division shall be a violation of the regulations and the contract.

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Contractors must notify service employees of the required wage rates and benefits to be paid for work performed on the contract. This shall be done by delivering a copy of the notice form WH-1313 and any applicable wage determination or determinations to each service employee or posting in a prominent and accessible place at the worksite.

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