

Hello,

Welcome to the Department of Labor's presentation on the McNamara O'Hara Service Contract Act of 1965 Coverage. This presentation is meant to provide you with the basic knowledge of what requirements must be met for there to be a SCA contract. Additionally this presentation will discuss Statutory and Regulatory exemptions provided under the Service Contract Act.

The Service Contract Act applies to "any contract" that (1) "is made by the Federal Government or District of Columbia," (2) "involves an amount exceeding \$2,500," (3) "has as its principal purpose the furnishing of services in the United States" (4) "through the use of service employees."

The SCA was signed into law in 1965 and is meant to remove wages as a bidding factor in the competition for federal service contracts.

The SCA is also meant to "close the gap" in labor standards protection for service workers.

The SCA will apply to any contract principally for services through the use of service employees, regardless of the name that is given to the contract. It is not required that appropriated funds or any contracts other government funding be used for the SCA to be applicable; a concessionaire's gross receipts from the sale of services to the general public may be used to determine the value of the contract.

The SCA was intended to apply to "a wide variety of contracts," the particular form of contract used by procurement agency is not determinative of coverage."

It makes no difference in the coverage of a contract whether the services are procured through negotiation or through advertising for bids.

The contract does not have to be of direct benefit to the federal government but can benefit the general public (such as a concessionaire contract).

The SCA, through Wage Determinations, sets minimum wages and fringe benefits that contractors and their subcontractors must pay service employees working on SCA contracts valued at over \$2,500. Prevailing Wage Determinations are based on the wage rates and fringe benefits determined to prevail in the locality where the contract work is to be performed. The best available data are used to determine what wages and benefits are prevailing in the locality, while giving due consideration to Federal wage rates that would apply if the work was performed by Federal employees.

The SCA requires contractors performing Government contract work to post a "Notice To Employees Working on Government Contracts" (which is Form WH 1313) during the period of performance in a prominent and accessible location to notify employees of required compensation.

The SCA provides that contractors or subcontractors holding a service contract for any dollar amount must pay its employees working on the contract at least the minimum wage specified by the Fair Labor Standards Act. As of July 24, 2009 the FLSA minimum wage is \$7.25 per hour.

All four elements must be present for a contract to be considered a SCA contract:

The Contract must be entered into by the Federal Government or the District of Columbia

The Contract must be principally for services. A contract whose primary purpose is other than services cannot be a SCA contract.

The Contract must be performed in the U.S.

And... the Contract must be performed through the use of service employees.

If any one of these requirements are not met then the contract is not a SCA contract.

SCA contracts are contracts "entered into by the United States or the District of Columbia" and may be such contracts as Department of Defense contracts or Military Post Exchange contracts created with Non-appropriated funds." Additionally, SCA contracts with wholly owned corporations of the government such as the U.S. Postal Service, are also included. Within the meaning of these provisions, contracts entered into by the United States and contracts with the Federal government include all contracts to which any agency or **instrumentality** of the United States Government becomes a party.

The SCA applies only to Federal contracts, unlike Federally "assisted" construction contract activities covered by the Davis-Bacon Related Acts.

According to the plain language of the statute, the SCA generally applies to any contract or agreement entered into by and with the Federal Government, if its principal purpose is to furnish services in the United States through the use of service employees. As discussed in 29 CFR Part 4, the SCA is intended to be applied to a wide variety of service contracts.

Some examples of SCA contracts are shown here:

-Contracts for security and guard services

-Janitorial services

-Cafeteria & Food Services

-And, Support services at Government Installations.

If all the criteria are met, any portion of the contract performed in the United States is covered by the Service Contract Act. In the United States also Includes:

The District of Columbia, Puerto Rico, the Virgin Islands, the Outer Continental Shelf, American Samoa, Guam, Wake Island, Johnston Island, and the Northern Mariana islands.

Any employee performing work called for on the contract or that portion of the contract is subject to SCA, is a service employee except those employees in *bona fide* executive, administrative, or professional capacities as those terms are defined in 29 CFR Part 541.

Coverage under SCA does not extend to contracts for services to be performed **exclusively** by persons who are *bona fide* executive, administrative, or professional employees under the FLSA. For example, a contract for medical services furnished only by medical doctors would not be covered. The SCA would apply, however, to a contract for services that may involve the use of service employees to a significant extent even though there is also some use of *bona fide* executive, administrative, or professional employees on the contract.

For instance, a contract for medical services that requires significant use of licensed practical nurses and other non-exempt support staff would be SCA-covered even though the work may be performed under the direction and supervision of FLSA professionally exempt medical doctors and registered nurses.

Additionally, the duties of the workers versus the contractual relationship is a determinative factor for SCA coverage.

Contracts primarily for something other than services, such as construction, are not SCA contracts. Additionally, a contract whose principle purpose is the leasing of space is not a SCA contract.

Contracts principally for services, but performed exclusively, or nearly so, by *bona fide* professional, executive, or administrative employees (where “service employees” are only a minor factor), would not be covered by the SCA.

Contracts for services that are Federally-assisted are not SCA-covered contracts. The SCA applies only to direct Federal contracts for services.

The SCA excludes from its coverage certain contracts and work regardless of whether or not they are principally to furnish services through the use of service employees. The seven statutory exemptions are listed on the next two slides.

SCA does not apply to the following:

- Contracts for construction covered by the Davis-Bacon Act
- manufacturing or supplies subject to the Public Contracts Act
- And, Contracts for carriage of freight or personnel where published tariff rates are in effect (But excluding mail haul contracts, which will be discussed later)

Be aware though that exemption does not apply where the principal purpose of the contract is packing, crating, handling, loading, and/or storage of goods prior to, or following, line-haul transportation to the ultimate destination.

Communication service contracts for services regulated by the Communications Act of 1934 are exempt from coverage under the SCA. The exemption does not apply to contracts with such companies to furnish **other kinds of services** through the use of service employees.

Included are contracts for public utility services, including electric, light, power, water, steam, and gas. Be aware, though, this exemption typically is for new utility services for new structures.

Employment contracts for direct hires by Federal agencies are exempt.

Additionally, the exemption of contracts for the operation of postal contract stations is limited to postal service contracts having the operation of such stations as their principal purpose.

Under the Act, the Secretary of Labor has the authority to provide variances, tolerances and/or exemptions. These are limited to special circumstances where the Secretary of Labor has determined that such exemption is -

- necessary and proper,
- in the public interest
- or to avoid serious impairment of Government business,
- and is in line with the **remedial** purposes of the Act, to protect prevailing labor standards.

Only after these conditions are met can an exemption be granted.

Criteria for granting an administrative exemption requires not only that it be in the public interest, or to prevent serious impairment of Government business, but also that such an action will protect the prevailing labor standards of the affected employees. In addition, requests for administrative exemptions or variances should be routed through the headquarters office of the contracting agency involved and include the views of such office on the matter.

The SCA, like the Fair Labor Standards Act, allows an employer to pay certain workers with disabilities, a special minimum wage that is less than the prevailing wages required by the SCA. Guidance found within 29 C.F.R. Part 4.6, paragraph (o)), instructs employers that they must follow the same requirements for the employment of workers with disabilities found under section 14(c) of the **FLSA regulations**. This exception is from the prevailing wage requirements only. Employers are still obligated to pay the full fringe benefits to service employees with disabilities for the work performed.

A Special Minimum wage will be based upon the prevailing wage listed in the applicable SCA Wage Determination. In the past, SCA contract-**specific** certificates were issued to employers, but that is no longer the case. The special minimum wage will be determined by the disabled worker's individual **productivity** in proportion to the **productivity** of experienced workers without disabilities, who perform essentially the same type, quality, and quantity of work. Employers who wish to pay the reduced Special minimum wage to service employees with disabilities on SCA contracts **MUST** follow the same certification procedures non-SCA contract employers follow.

The SCA exempts certain types of U.S. Postal Service Contracts, but not all.

One exemption is for U.S. Postal Service contracts entered into with common carriers for carriage of mail by rail, air, bus, and ocean vessel on regularly scheduled and established routes where the revenue for the carriage of mail under the contract is a small portion of the contractor's revenue. One note is that a special air route called Star Routes don't fall under this exemption.

Additionally, the SCA does not apply to U.S. Postal Service contracts entered into with an individual owner-operator of a vehicle for transporting mail where at the time of contract award, the owner-operator is not planning to hire any service employee to perform services under the contract except for short periods such as vacation or unexpected emergency situations such as an illness or accident. The term owner-operator refers only to an individual. It is not meant to refer to a partnership, two closely related individuals such as a husband and wife operation, or to a corporation. The facts must show at the time of contract award, that the owner-operator intended to deliver the mail himself or herself, and that person was physically able to do so.

The "commercial activities" exemption applies to commercial service contracts and subcontracts that the Government has difficulty acquiring, or is receiving limited competition.

For over 20 years, the Department has exempted from SCA coverage a number of commercial services. These services include contracts for -

- maintenance, calibration, and repair of ADP equipment,
- scientific and medical apparatus, and
- office and business machines,

So long as certain criteria are met on these types of contracts.

The SCA “commercial services” exemption covers contracts for seven types of services. This exemption is meant for contracts where service work on a Government contract represents a small portion of an employee’s time as compared to the remainder of time spent on other commercial work. A number of criteria MUST be met. Among the types of services affected are:

- **Normal** maintenance (emphasis is added that this exemption is for **NORMAL** maintenance service) that involves the servicing of vehicles of a Government fleet of **automobiles** such as a Government motor pool;
- Financial services through financial institutions that provide credit, debit or purchase cards for traveling Federal employees or to make small buys of commercial items to meet the day-to-day needs of Federal agencies; and
- Lodging services at hotels and motels for meetings or conferences of limited duration (for example: one to five days) that may involve lodging, meals and space.

Additional commercial services exemptions include:

- Real Estate services
- Transportation on regularly scheduled routes
- Relocation services, and
- Maintenance services for all types of equipment obtained from the manufacturer or supplier under a “sole source” type of contract. Sole Source meaning there is only one vendor/contractor available to provide the service needed for whatever reason.

As mentioned earlier, the commercial services exemption comes with certain criteria that must be met. The exemption is meant for contractors and subcontractors where the business follows normal business operations in furnishing services and compensation to service employees.

- The services are offered and sold regularly.
- The contracts are awarded on a sole source basis or on the basis of factors in addition to price.
- And services are furnished at market or catalog prices.

The other criteria that must be met for the commercial services exemptions are:

- That employees spend only a small portion of available hours on government contract work.

- Employees receive the same compensation plan for both types of work
- And lastly, that contracting officers and the prime contractor certify that all the criteria for the SCA exemption can be met and complied with for their specific contract.

This completes our presentation of "Service Contract Act Coverage."

The Department thanks you for your participation. Please be aware that the information provided in this presentation is intended as general information and does not carry the force or weight of a legal opinion.

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This concludes our presentation.