

McNamara-O'Hara

Service Contract Act of 1965 (SCA)

PRESENTED BY



GSAC NCMA

April 17, 2012

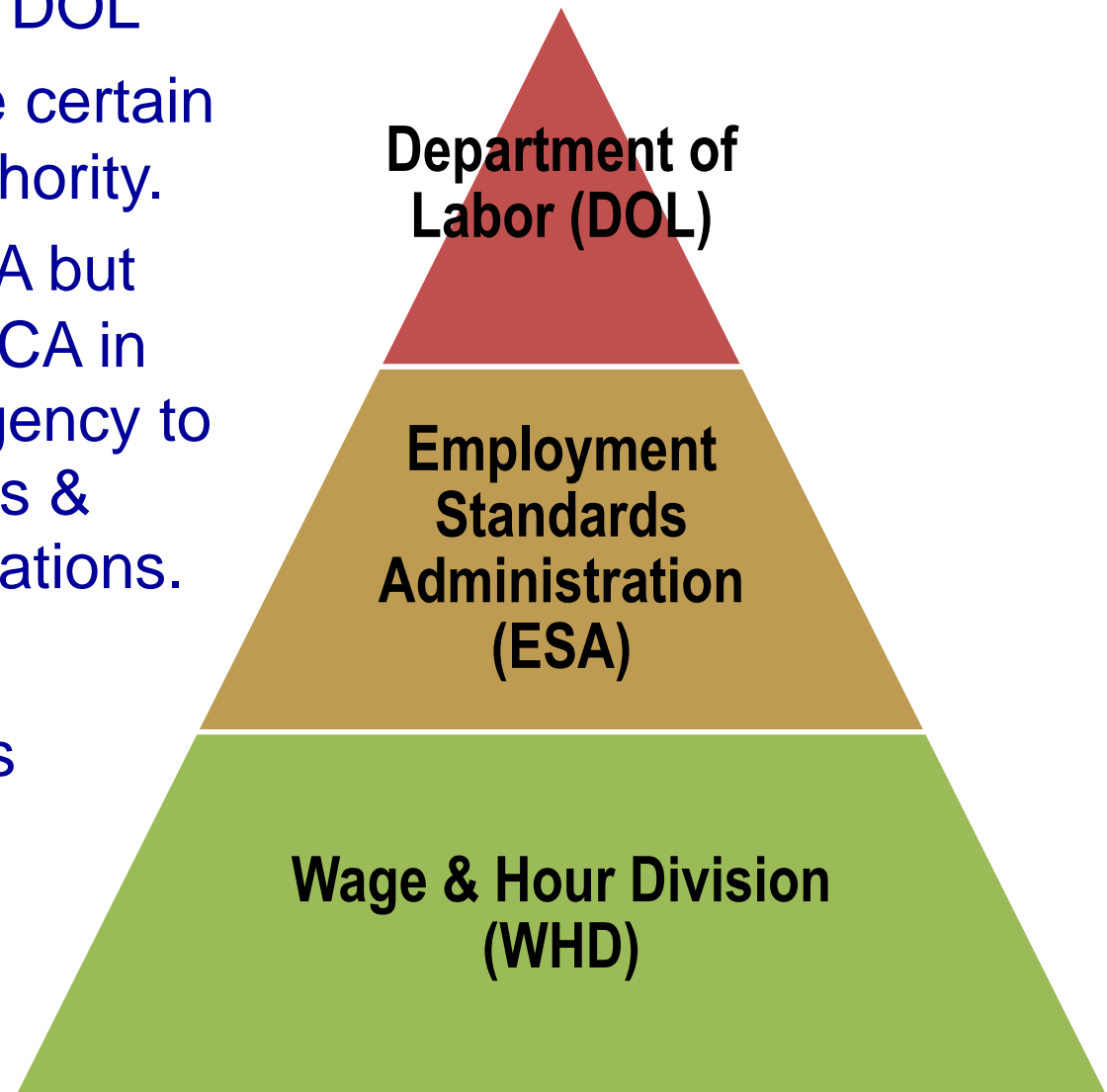
- **WHAT** is it?
- **WHO** interprets/administers it? and **WHO** is liable?
- **WHEN** does it apply?
- **WHERE** does it apply—the geographical boundaries?
- **WHY** was it enacted? and **WHY** should I comply?
- **HOW** do contractors comply?

McNamara-O'Hara Service Contract Act of 1965

- Pub. L. 89-286, 79 Stat. 103
- Codified at 41 USC §§ 351-57
- Amended twice:
 - 1972 – Successor Employer Obligation § 4(c)
 - 1976 – Extension to White Collar Employees
- Regulations:
 - 29 CFR Part 4, Section 4.6
 - Last major changes 1/30/84
 - FAR 52.222-41

WHO interprets & administers it?

- SCA is enforced **solely** by DOL
- Contracting agencies have certain responsibilities but **NO** authority.
- If contract is subject to SCA but agency does not specify SCA in contract, DOL will notify agency to insert SCA contract clauses & applicable Wage Determinations.
- Reliance on advice from contracting agency officials is not a defense against a contractor's back wages under the Act (29 CFR 4.187(e)(5)).



The Prime Contractor

- ❖ Must “**flow down**” the applicable SCA contract clauses to subcontractors (includes independent subcontractor – i.e., 1099s) (*29 CFR 4.155*)
- ❖ “**Jointly and severally**” liable for subcontractor’s non-compliance with SCA (*29 CFR 4.114(b)*)

To contracts that are. . .

- from any **Federal Agency** or any other Federal Government entity *or ARRA funded projects*;
- to be **performed in the U.S.**, its territories and possessions;
- principally for **services**;
- performed through the use of **service employees**; and
- in **excess of \$2,500**.

Geographical Limits

The SCA applies to all work performed within the United States. For purposes of the SCA, the term “United States” includes:

- Any State
- The District of Columbia
- Puerto Rico
- Commonwealth of Northern Mariana Islands
- Guam
- American Samoa
- Johnston Island
- Wake Island
- The Virgin Islands
- Outer Continental Shelf Islands as defined in the Outer Continental Shelf Lands Act



- ❖ **To level the playing field for Contractors**
- ❖ **To remove wages as a bidding factor in the competition for Federal Service Contracts**

SCA Sanctions & Remedies

(29 CFR 4.187 thru 4.190)

For violations, the U.S. Government may . . .

- Withhold from payment for the contract a sum adequate to pay back wages or fringe benefits to underpaid employees;
- Bring legal action against the Contractor or surety for the amount of underpayment;
- Terminate contract and hold Contractor liable for any resulting cost to the government; and
- Not award contracts to a violator for up to 3 years (debarment).

DOL Investigations

- FY2008 thru FY2011
 - averaged annually 650 SCA Investigations

- FY2012
 - **goal is 1800 SCA investigations**

- Debarments
 - **FY2011—60** government contracting companies were Debarred

Overview

- **Contract contains:**

- SCA clause(s)
- Applicable Wage Determination(s)

- **FLSA determination of Employee Status**

- Exempt vs. Non-Exempt

- **Wage Determination Minimums**

- Wages
- Health & Welfare
- Vacation
- Holiday



EITHER of the following two clauses:

❖ FAR 52.222-41 Service Contract Act of 1965, as Amended

FAR (Federal Acquisition Regulations) are the rules and regulations that implement acquisition policies for federal agencies and Contractors

— OR —

❖ 29 CFR Part 4, Section 4.6

The Code of Federal Regulations (CFR) is a compilation of the regulations that implement federal laws

AND . . .

Applicable Wage Determination (WD)

- ❖ **attached as an exhibit; or**
- ❖ **by reference** (*not recommended*)



The “Christian Doctrine”

- Mandatory clauses automatically become part of the contract despite their omission from the contract.

FAR 22.1006

- Details the mandatory clauses for service contracts governed by the Service Contract Act; therefore, they would be included in contracts even if they are inadvertently omitted.

Wage Determinations

What is a Wage Determination?

A WD sets the minimum wages and fringe benefits for job classifications for a specific geographical region.

- ❖ Minimum hourly **Wage** for the job position
- ❖ Minimum hourly **Health & Welfare** Benefit
 - ❖ Minimum annual **Vacation** Benefit
 - ❖ Minimum **Holiday** Benefit

Note: As a rule, SCA does NOT provide for Sick Leave Benefit. (That benefit, if given, is governed by the Contractor's company policy. An exception to this rule – Collective Bargaining Agreements (CBAs) may contain a Sick Leave requirement.)

Wages



- ❑ The prevailing rate established by the contract Wage Determination (WD) is the **minimum rate of pay**.
- ❑ Wages and hours worked must be **calculated on** a fixed and regularly recurring **“work week”** of seven consecutive 24-hour workday periods.
 - a. Payroll Records must be kept on this basis.
 - b. A bi-weekly or semi-monthly pay period may be used if advance notice is given to affected employees.
- ❑ **No distinction** is recognized in **wage compensation** requirements between **full-time, part-time, and temporary** employees.

Fringe Benefits



- Cash payments in lieu of** fringe benefits (FBs) must be paid on regular pay date
(29 CFR § 4.165(a))

- Payments into **bona fide FB plans** must be made no less often than quarterly
(29 CFR § 4.175(d))

- FB costs **may not be credited** toward wage requirements
(29 CFR § 4.167)



Discharging Minimum Wage & Fringe Benefit Obligations

Under SCA, the contractor may not credit excess wage payment against the FB obligation:

WAGE DETERMINATION		EMPLOYEE PAID	
Wage	\$20.00	Wage	\$21.00
FB	\$3.50	FB	\$3.50 <u>\$2.50</u>
TOTAL	\$23.50	TOTAL	\$23.50

Payment of benefits to employees on account of:

- Death
- Disability
- Advanced Age
- Retirement
- Illness
- Medical Expenses
- Hospitalization
- Supplemental unemployment benefits

□ “Fixed Costs” Fringe Benefit (Odd # WD)

- The type(s) and amount of benefits (if any), or cash equivalents to be provided is **strictly a matter to be decided by the employer** *(page 8)*

□ “Average Costs” Fringe Benefit (Even # WD)

- The types and amounts of benefits, if any, to be provided, and the eligibility requirements for service employees to participate in a fringe benefit plan, are **decided by the contractor** *(page 9)*

“Fixed Cost”—Odd# WD

Increased to \$3.59/hr on 6/17/11

- Each employee must receive \$3.59 in benefits or cash for all hours paid up to 40 in a week.
- **Hours Paid:** Includes all regular and all paid time-off, BUT does *not* exceed 40 hours per week or 2,080 hours per year.
- **Payment:** Shortfall must be paid in the same pay period unless H&W monies is managed by third-party plan/trust
- Amount is calculated per person.

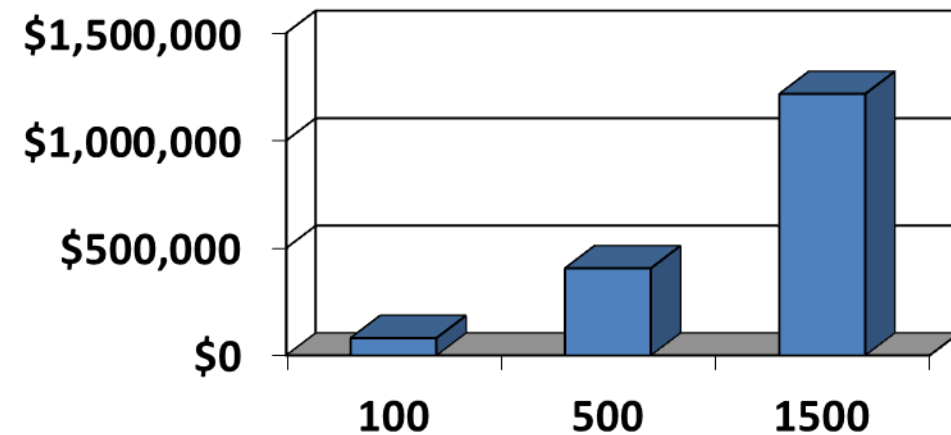
“Average Cost”—Even# WD

Increased to \$3.59/hr on 6/17/11

- The average of all employees’ benefits for this contract must equal at least \$3.59 an hour for all hours worked (including overtime hours.) **Excluded:** Paid leave time & holidays.
- **Payment:** Shortfall must be paid in an equivalent hourly amount to each employee who charged time to the contract during the evaluation period.
- Contributions may vary depending upon employee’s marital or employment status.

Benefit Plan v. "Cash in lieu of"

	Benefits	No Benefits
Base Wage	20.00	20.00
Cash		3.59
Fringe	3.59	
ER Payroll Burden (10.85%) •FICA (7.65%) •FUTA •SUTA •WC	2.17	2.56
Cost/Hour	\$25.76	\$26.15



Employees

100	500	1500
\$81,120	\$405,600	\$1,216,800

- Hourly Savings/per EE = \$0.39
- Monthly Savings/per EE = \$67.60
- Annual Savings/per EE = \$811.20

Vacation Fringe Benefits



Vested
and becomes due after
the SCA employee's
Anniversary date.

- **Date** the SCA employee
- **Began work** on a SCA contract
- **At** government **facility**

Vested Vacation Hours
need not be paid immediately
after the Anniversary date,
but must be discharged before,
whichever occurs first:

- The next anniversary date
- The completion of contract or
- The employee terminates employment

ACCRUAL

1. Each pay period leave is earned.
2. Leave earned is usually available for immediate use.
3. Some unused accrued leave is usually rolled over each year.

VESTING

1. Leave vests **after** completion of a specific time period.
2. Leave is only available after vested.
3. Under SCA, unused leave is paid out if not used before next Anniversary date.



Examples of Variances in Wage Determinations — Vacation

FORT HOOD - #94-2523:

- **VACATION:** 2 weeks paid vacation after 1 year of service with a contractor or successor; **3 weeks after 10 years, and 4 weeks after 20 years.** Length of service includes the whole span of continuous service with the present contractor or successor, wherever employed, and with the predecessor contractors in the performance of similar work at the same Federal facility. (Reg. 29 CFR 4.173)

FORT SAM HOUSTON - #94-2521:

- **VACATION:** 2 weeks paid vacation after 1 year of service with a contractor or successor; **3 weeks after 5 years, and 4 weeks after 15 years.** Length of service includes the whole span of continuous service with these present contractor or successor, wherever employed, and with the predecessor contractors in the performance of similar work at the same Federal facility. (Reg. 29 CFR 4.173)

TRAVIS AFB - #94-2069:

- **VACATION:** **1 week paid vacation after 6 months of service with a contractor or successor; 2 weeks after 1 year,** 3 weeks after 5 years, and **4 weeks after 10 years.** Length of service includes the whole span of continuous service with the present contractor or successor, wherever employed, and with the predecessor contractors in the performance of similar work at the same Federal facility. (Reg. 29 CFR 4.173)

Holiday Fringe Benefits



- ❑ If any work is performed in a work week in which the holiday falls, the employee is entitled to holiday pay.

- ❑ Holiday Pay is generally not applicable to days in which the Federal Government is closed by proclamation, such as the day before Christmas or on snow days, in other words, any holiday not named in the Contract or Wage Determination.



Examples of Variances in Wage Determinations--Holidays

DOVER AFB - #94-2097

- **HOLIDAYS:** A minimum of **eleven** paid holidays per year: New Year's Day, Martin Luther King Jr's Birthday, Washington's Birthday, Good Friday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, and Christmas Day. (A contractor may substitute for any of the named holidays another day off with pay in accordance with a plan communicated to the employees involved.) (See 29 CFR 4.174)

FT SAM HOUSTON - #94-2521

- **HOLIDAYS:** A minimum of **ten** paid holidays per year: New Year's Day, Martin Luther King Jr's Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, and Christmas Day. (A contractor may substitute for any of the named holidays another day off with pay in accordance with a plan communicated to the employees involved.) (See 29 CFR 4.174)

Maxwell AFB - #94-2011

- **HOLIDAYS:** A minimum of **eight** paid holidays per year: New Year's Day, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Veterans' Day, Thanksgiving Day, and Christmas Day. (A contractor may substitute for any of the named holidays another day off with pay in accordance with a plan communicated to the employees involved.) (See 29 CFR 4.174)

Part-Time & Temporary Employees



- **Part-time employees must be paid a proportionate amount of the mandated fringe benefits.**
- **Examples:**
 1. A full-time employee is entitled to 2 weeks (80 hours) of vacation. A part-time employee who works 20 hours per week would be entitled to **½ (40 hours) the paid vacation benefits** at the end of the anniversary year.
 2. The same part-time employee would be entitled to **½ the holiday pay benefits (e.g., 4 hours)**.
 3. The same part-time employee would be entitled to the **same hourly rate of the health & welfare** and pension benefits (e.g., \$3.59/hour).



DOL Investigations

- Are **SCA** stipulations included **in contract**?
- Does contract have **correct WD**?
- Are the **SCA poster & WD**, including any Conformance actions, posted at the site or made available to employees?
- Does **WD contain necessary classifications**?
- Is a **Conformance** necessary?
- Are employees **properly classified (WD & FLSA)**?
- Are **fringe benefits** properly paid?
- Is **Overtime** correctly paid under the FLSA or CWHSSA, if appropriate?
- Has employer kept **accurate payroll records**?

- This presentation is intended as general information only and does not carry the force of legal opinion.
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THANK YOU



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