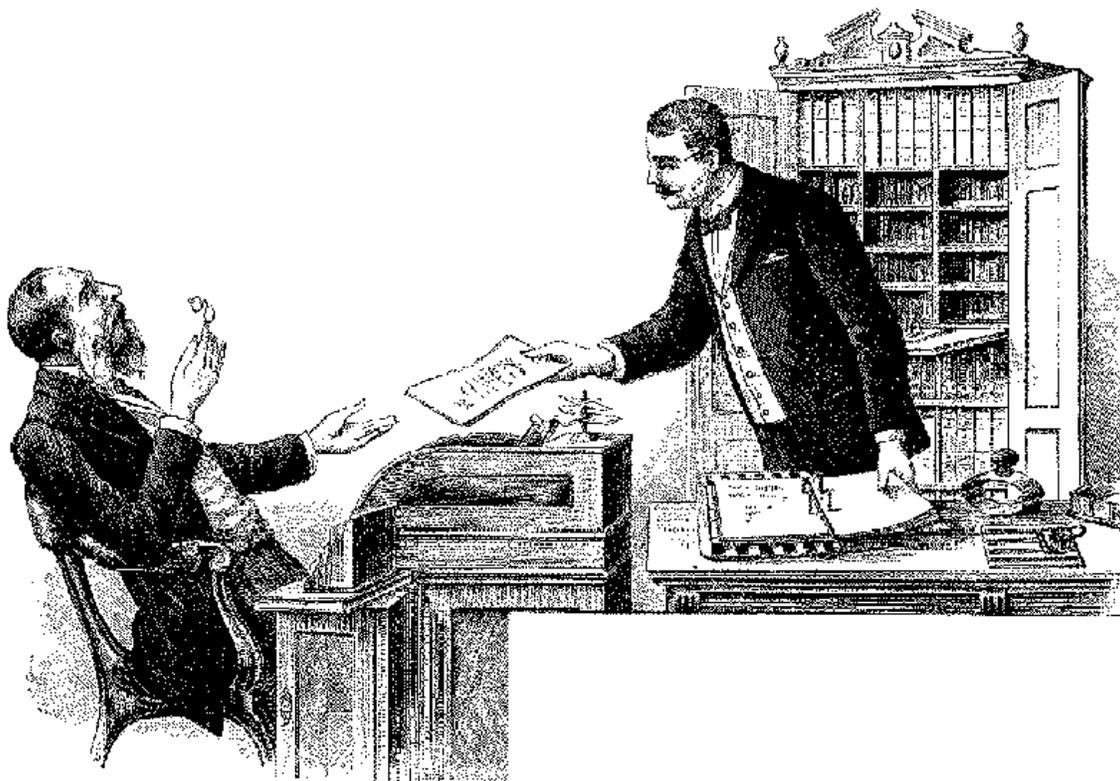


# *Chapter 14*

## **Selected Labor Standards**



*2014 Contract Attorneys Deskbook*

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## CHAPTER 14

### LABOR STANDARDS

<b>I. INTRODUCTION.....</b>	<b>1</b>
<b>II. FAIR LABOR STANDARDS ACT OF 1938 (FLSA).....</b>	<b>1</b>
A. Covered Workers:.....	1
B. Requirements.....	2
C. Enforcement. ....	2
<b>III. CONTRACT WORK HOURS AND SAFETY STANDARDS ACT (CWHSSA). ....</b>	<b>3</b>
A. Covered Workers.....	3
B. Requirements.....	3
C. Enforcement.....	4
D. Remedies for Violations.....	4
<b>IV. COPELAND (ANTI-KICKBACK) ACT. ....</b>	<b>5</b>
A. Covered Workers. ....	5
B. Requirements.....	5
C. Enforcement.....	5
D. Remedies.....	5
<b>V. DAVIS-BACON ACT (DBA).....</b>	<b>6</b>
A. Covered Workers and Contracts.....	6
B. Requirements.....	9
C. Enforcement.....	14
D. Military Privatized Housing Initiative (MHPI).....	16

E.	Remedies.....	16
<b>VI.</b>	<b>MCNAMARA-O’HARA SERVICE CONTRACT ACT OF 1965 (SCA).....</b>	<b>16</b>
A.	Covered Workers and Contracts. FAR 22.1002; FAR 22.1003.....	16
B.	Requirements.....	18
C.	Enforcement. ....	24
D.	Remedies. ....	24
<b>VII.</b>	<b>WALSH-HEALEY PUBLIC CONTRACTS ACT OF 1936 (WHA).....</b>	<b>24</b>
A.	Covered Workers and Contracts.....	24
B.	Requirements.....	25
C.	Enforcement by DoL.....	26
D.	Remedies. ....	26
<b>VIII.</b>	<b>DEFENSE BASE ACT.....</b>	<b>26</b>
A.	Covered Workers and Contracts.....	26
B.	Requirements.....	27
C.	Contract Actions. ....	27
D.	Enforcement. ....	27

## **CHAPTER 14**

### **LABOR STANDARDS**

#### **I. INTRODUCTION**

- A. Labor laws exist to prevent exploitation of the employees working on Government contracts and to eliminate the wage-depressing tendencies of the federal procurement process. This chapter summarizes these labor laws and the current application to Government contracts. Knowledge of the basic requirements will enable contract attorneys to advise contract officers on labor standards to ensure contractor compliance in order to avoid labor disputes that could cause costly delays in performance of contracts.
- B. Each Service has a designated Agency labor advisor to advise contracting agency officials on Federal contract labor matters. See FAR 22.1001 and 22.1003-7; DFARS 222.001; and <http://www.wdol.gov/ala.aspx> for names and phone numbers. The Defense Procurement and Acquisition Policy (DPAP) office has a helpful website to assist government officials. See [http://www.acq.osd.mil/dpap/cpic/cp/labor\\_information.html](http://www.acq.osd.mil/dpap/cpic/cp/labor_information.html).

#### **II. FAIR LABOR STANDARDS ACT OF 1938 (FLSA)**

29 U.S.C. §§ 201-219, 29 CFR Part 500-899, FAR Subpart 22.102-4

- A. Covered Workers:
  - 1. General Applicability. Almost every employee in the United States is covered by the FLSA. Its application is not limited to government contracts.
  - 2. “Exempted Employees.” Executive, Administrative, Professional, Computer, and Outside Sales Employees that meet the following standards are exempted from the wage and overtime requirements of the FLSA. (*See Exemption Test in 29 CFR Part 541.*)
    - a. Salary Level: earning an income of a minimum of \$455/week are exempt.
    - b. Salary Basis: receives regularly predetermined amount of compensation each pay period that does not vary based on the quality or quantity of work performed.
    - c. Job Duties: in addition to salary basis and level, there are minimum standards that must be met for each category to qualify as exempt.
      - (1) Executive (29 CFR Part 541.100)

- (2) Administrative (29 CFR Part 541.200)
- (3) Professional (29 CFR Part 541.300)
- (4) Computer Analysts, Programmers, Software Engineers, or similarly skilled workers (29 CFR Part 541.400)
- (5) Outside Sales (CFR Part 541.500)

B. Requirements.

1. Federal Minimum Wage: employers must pay all covered nonexempt employees a minimum of \$7.25 per hour (current rate through July 2014 under 29 USC §206).
2. Overtime Pay.
  - a. Employers must pay for any work performed over 40 hours in a work week at a rate not less than one and one half times the regular rate of pay (29 USC §207).
  - b. Practitioner's Note: Federal Government policy requires that contractors perform contracts without the use of overtime when practicable unless overall costs are lower for the Government or when necessary to meet urgent program needs. (*See* FAR 22.103-2 and 22.103-3 for procedures to include overtime in contracts.)
3. Record Keeping. All employers with FLSA covered employees must make, keep, and preserve certain records, to include wages, hours, conditions and practices of employment. There is no particular form required (29 USC § 211; 29 CFR Part 516).
4. Child Labor. Must be at least 16 years old to work in most non-farm occupations covered under the FLSA and at least 18 years old to work in non-farm hazardous jobs. (29 CFR Part 570)

C. Enforcement. Department of Labor (DoL) Wage and Hour Division enforces the requirements of the FLSA (*See* 29 U.S.C. § 204).

### III. CONTRACT WORK HOURS AND SAFETY STANDARDS ACT (CWHSSA)

40 U.S.C. §§ 3701 et seq., 29 CFR Part 5, FAR Subpart 22.3, FAR 22.403-3, FAR 52.222-4  
DFARS Subpart 222.3

- A. Covered Workers.
  - 1. Laborers and Mechanics.
  - 2. Includes: apprentices, trainees, helpers, watchmen, guards, firefighters, and workmen who perform services in connection with dredging or rock excavation in rivers and harbors (but not seamen).
  - 3. Working on construction and service contracts in excess of \$150,000.<sup>1</sup>
  - 4. Exemptions.
    - a. Contracts valued at or below \$150,000
    - b. Commercial items.
    - c. Transportation or transmission of intelligence.
    - d. Work performed outside the US.
    - e. Supplies.
  - 5. Specific exemption by the Secretary of Labor in special circumstances, such as public interest or to avoid serious impairment of government business.
- B. Requirements.
  - 1. Standard workweek: 40 hours of labor.
  - 2. Overtime pay:
    - a. Minimum of 1.5 times basic rate of pay for any hours in excess of 40 hours.

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<sup>1</sup> Although the CWHSSA directs applicability to contracts in excess of \$100,000, in accordance with section 807 of the 2005 National Defense Authorization Act, the FAR Council must review and adjust all acquisition-related thresholds for inflation every five years (except for the Davis Bacon Act and Services Contract Act). Effective 1 October 2010, FAR 22.305 was amended to \$150,000. *See* 75 Fed. Reg. 53133.



- a. Contracting officer withholds from payments due to contractor sufficient funds to satisfy subcontractor liabilities for unpaid wages and liquidated damages. (40 U.S.C. §3703; 29 CFR § 5.9; FAR 22.302 and 52.222-4(c)).
- b. Consult agency regulations for guidance on disposition of withheld funds.

#### **IV. COPELAND (ANTI-KICKBACK) ACT**

18 U.S.C. § 874, 40 U.S.C. § 3145, 29 C.F.R. Part 3, FAR 22.403-2

- A. Covered Workers. Any person engaged in the construction or repair of a public building or public work (including projects that are financed at least in part by federal loans or grants).
- B. Requirements.
  1. Purpose: Prohibits employers from exacting “kickbacks” from employees as a condition of employment.
  2. Reporting: For contracts in excess of \$2000, every covered contractor and subcontractor must provide the contracting officer with a weekly statement of compliance for wages paid to each laborer and mechanic during the preceding week. (See FAR 22.403-2; FAR 22.407(a)(5); FAR 52.222-10).
  3. Recordkeeping: both the contractors and the agency must keep payroll records for three years after completion of the contract. (See FAR 22.406-6).
  4. Contracts must contain the clause at FAR 52.222-10 requiring contractors and subcontractors to comply with regulations issued under the act.
- C. Enforcement.
  1. Contracting Agency: conducts day-to-day enforcement (because linked to Davis Bacon Act covered contracts).
  2. Department of Labor Wage and Hour Division administers the provisions of the Act.
- D. Remedies.
  1. Civil and or Criminal Prosecution: up to 5 years imprisonment and/or \$5000 fine.

2. Termination for Default: based on willful falsification of statement of compliance.
3. Debarment: based on willful falsification of statement of compliance.

## V. DAVIS-BACON ACT (DBA)

40 U.S.C. §§ 3141-3144, 29 C.F.R. Part 5, FAR Subpart 22.4, DFARS Subpart 222.4.

- A. Covered Workers and Contracts. 29 C.F.R. § 5.2(m) (1999); FAR 22.401.
  1. Laborers or mechanics. (*See* FAR 22.401).
    - a. Workers, employed by a contractor or subcontractor at any tier,<sup>2</sup> whose duties are manual or physical in nature, including:
      - (1) Apprentices, trainees, helpers;
      - (2) Watchmen and guards (only for contracts also subject to CWHSSA);
      - (3) Working foremen who devote more than 20 percent of their time during a workweek to performing duties as a laborer or mechanic; and
      - (4) Every person performing duties of laborer or mechanic, regardless of contractual relationship.
    - b. Exempted Employees: does NOT include workers with duties that are primarily executive, supervisory, administrative, or clerical in nature (*See* 29 C.F.R. Part 541).
  2. Working on federal construction, alteration, or repair of public buildings or public works contracts performed in the United States that exceed \$2,000.
    - a. “Public building” or “public work” means a construction or repair project that is carried on by the authority, or with the funds, of a federal agency to serve the interests of the general public.
    - b. “Site of the work.” FAR 22.401

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<sup>2</sup> The act applies to workers employed by a contractor or subcontractor at any tier. Cf. Ken’s Carpets Unlimited v. Interstate Landscaping, Inc., 37 F.3d 1500 (6th Cir. 1994) (non-precedential) (holding prime contractor alone responsible for DBA wages where prime failed to include proper clauses in subcontract).

- (1) The primary site of the work. The physical place or places where the construction called for in the contract will remain when on it is completed; and
  - (2) The secondary site of the work, if any. Any other site located in the U.S. where a significant portion of the building or work is constructed, if it is established specifically for the performance of the contract or project.
  - (3) This definition includes fabrication plants, mobile factories, batch plants, borrow pits, job headquarters, tool yards, etc., provided that they are: (1) dedicated exclusively (or nearly so) to performance of the contract or project, and (2) adjacent (or virtually adjacent) to the primary or secondary site of the work.
- c. Construction, Alteration, or Repair means all types of work done by covered workers on a particular building or work at the site, including:
- (1) Altering, remodeling, installation on the site of work of items fabricated off-site;
    - (a) Carpeting. If carpet installation is performed in connection with construction or general renovation project, DBA applies.
    - (b) Environmental Cleanup. Involves substantial excavation and reclamation or elaborate landscaping activity. Does not apply to simple grading and planting of trees, shrubs, and lawn unless in conjunction with substantial excavation and reclamation.
  - (2) Painting and decorating;
    - (a) Asbestos and/or Paint Removal. DBA applies unless asbestos or paint is removed prior to demolition. If prior to demolition, Service Contract Act applies.
    - (b) Refinishing wood floors or concrete sealant application.

- (c) For painting, the work is subject to the DBA if the service order requires painting of 200 square feet or more, regardless of work hours.
  - (3) Manufacturing or furnishing of materials, articles, supplies, or equipment on the site of the building or work;
  - (4) Transportation of materials within the site of the work (e.g., between the primary and secondary sites) is considered “construction” covered by the DBA.
  - (5) Transportation of materials to and from the site is not considered “construction” covered by the DBA.<sup>3</sup>
  - (6) Practitioner’s Note: Maintenance vs. Repairs. The DFARS provides a bright line test to determine whether work is maintenance (Service Contract Act work) or repair (Davis-Bacon Act work). If a service order requires 32 or more work hours, the work is “repair.” Otherwise, consider the work to be “maintenance.”
3. Non-Construction Contract Coverage. (*See* FAR 22.402(b); DFARS 222.402-70).
- a. Apply DBA standards if the contract requires a substantial and segregable amount of construction, repair, painting, alteration, or renovation that also exceeds the DBA monetary threshold of \$2000.
    - (1) Construction work that is merely incidental to other contract requirements does not qualify for DBA coverage.
    - (2) Construction work that is so merged with non-construction work, or so fragmented in terms of the locations or time spans in which it is to be performed, that it cannot be segregated as a separate contractual requirement, does not qualify for DBA coverage.
  - b. Supply Contracts where there is more than a minor or incidental amount of construction. For example, an information technology acquisition may include infrastructure improvements to the facility as well as the purchase of the various computers, servers, network cabling, and other hardware.

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<sup>3</sup> See 29 C.F.R. § 5.2(j) (1)(iv) and 5.2(j)(2)); Building & Constr. Trades Dep’t, AFL-CIO v. Department of Labor Wage Appeals Board, 932 F.2d 985 (D.C. Cir. 1991), rev’g 747 F. Supp. 26 (D.D.C. 1990).

B. Requirements. (See 40 U.S.C. § 3142; FAR 22.403-1).

1. Contractors must pay mechanics and laborers a “prevailing wage rate” on federal construction projects performed in the United States that exceed \$2,000.
  - a. Coverage is determined on the contract level. Meaning, any subsequent task orders or subcontracts that are less than \$2000 are still covered by the DBA once it was determined that the work on the overarching contract exceeded \$2000.
  - b. The Department of Labor determines the prevailing wage rate, which normally is based on the wage paid to the majority of a class of employees in an area. (See 29 C.F.R. § 1.2).
  - c. A wage determination is not subject to review by the Government Accountability Office or boards of contract appeals.<sup>4</sup>
  - d. “Wages” include the basic hourly pay rates plus fringe benefits.
2. Wage Determinations. (See 29 C.F.R. § 1.6; FAR 22.404-1; FAR 22.404-3).
  - a. General Wage Determinations. (See 29 C.F.R. §§ 1.5(b) and 1.6(a)(2); FAR 22.404-1(a)).
    - (1) Contains prevailing wage rates for the types of construction specified in the determination, and is used in contracts performed within a specified geographical area.
    - (2) Remain valid until modified or canceled by the Department of Labor.<sup>5</sup>
    - (3) General wage determinations incorporated into a contract remain effective for the life of a contract unless the contracting officer exercises an option to extend the term of the contract (FAR 22.404-12).

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<sup>4</sup> See American Fed’n of Labor - Congress of Indus. Org., Bldg., and Constr. Trades Dep’t, B-211189, Apr. 12, 1983, 83-1 CPD ¶ 386; Woodington Corp., ASBCA No. 34053, 87-3 BCA ¶ 19,957; but see Inter-Con Sec. Sys., Inc., ASBCA No. 46251, 95-1 BCA ¶ 27,424 (finding board has jurisdiction to consider effect of wage rate determination on contractual rights of a party).

<sup>5</sup> Current determinations are published by the Wage and Hour Division on their website at [www.wdol.gov](http://www.wdol.gov).

- (4) If a general wage determination is applicable to the project, the agency may use it without notifying DoL (FAR 22.404-3(a)).<sup>6</sup>
- b. Project Wage Determinations. 29 C.F.R. § 1.6(a)(1); FAR 22.404-1(b).
- (1) Issued at the specific request of a contracting agency only when no general wage determination applies.
  - (2) The determination is effective for 180 calendar days from date of issuance. If it expires, the contracting officer must follow special procedures for extension of the 180 day life depending on whether sealed bidding or negotiation was used (FAR 22.404-5).
  - (3) Once incorporated into a contract, the project wage determination is effective for the duration of that contract unless the contracting officer exercises an option to extend the term of the contract (FAR 22.404-12).
  - (4) Contracting officers may request a project wage determination from DoL by specifying the location of the project and including a detailed description of the types of construction involved and the estimated cost of the project.
  - (5) Processing time for a project wage rate determinations is at least 30 days.

3. Contract Process.

a. Solicitations.

- (1) The contracting officer must include the appropriate wage rate determination and designate the work to which each determination applies in each solicitation covered by the DBA.
- (2) When the construction site is unknown at the time of a contract award, the contracting officer will incorporate the most current DBA wage determination at the issuance of each task order.

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<sup>6</sup> DoL (Wage and Hour Division) defines types of construction for use in selecting proper wage rate schedules. (FAR 22.404-2(c)).

- (3) Solicitations issued without a wage rate determination must advise that the contracting officer will issue a schedule of minimum wage rates as an amendment to the solicitation. FAR 22.404-4(a).<sup>7</sup>
  - (a) Sealed Bidding: may not open bids until a reasonable time after furnishing the wage determination to all bidders.
  - (b) Negotiated Procurements: may open the proposals and conduct negotiations before obtaining the wage determination, but must include the wage determination in the solicitation before calling for final proposal revisions. FAR 22.404-4(c).
- b. When the contract is awarded without required wage determination, the contracting officer must:
  - (1) Modify the contract to incorporate the required wage rate determination, retroactive to the date of award, and equitably adjust the contract price, if appropriate. (FAR 22.404-9(b)(1); or
  - (2) Terminate the contract. (FAR 22.404-9(b)(2)).
4. Modifications of Wage Determinations. (FAR 22.404-6).
  - a. General Rule: the requirement to include a DOL wage determination modification in a solicitation depends upon when the agency “receives” notice.
    - (1) General wage determinations: receipt by the agency of actual written notice or constructive notice (publication on the WDOL: <http://www.wdol.gov>), whichever occurs first.
    - (2) Project wage determinations: actual receipt by the agency.
    - (3) Practitioner Note: “agency” receipt is broadly defined. It is not dependent on when the contracting officer receives notice (as that may occur later). Contracting officers should continually monitor the WDOL website for any modifications of wage determinations that may affect a solicitation.

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<sup>7</sup> If an offeror fails to acknowledge an amendment to an IFB that adds or modifies a wage rate, the offer may be nonresponsive. ABC Project Mgmt., Inc., B-274796.2, Feb. 14, 1997, 97-1 CPD ¶ 74.

- b. Sealed Bidding. FAR 22.404-6(b).
- (1) Before bid opening, a modification is effective if:
    - (a)  $\geq$  10 calendar days before bid opening date: the contracting agency receives it, or DoL publishes notice of the modification on the WDOL.
    - (b)  $<$  10 calendar days before bid opening: the contracting agency receives it, or DoL publishes notice on the WDOL, unless the contracting officer finds there is insufficient time before bid opening to notify prospective bidders.
    - (c) Practitioner's Note: when modifications of the wage determination for the primary site of work are effective before bid opening, the contracting officer must permit bidders to amend their bids. If necessary, bid opening must be postponed.
  - (2) After bid opening, but before an award, a modification is effective if:
    - (a) Award is not made within 90 days after bid opening. FAR 22.404-6(b)(6).<sup>8</sup>
    - (b) Practitioner's Note: when modifications of wage determinations for the primary site of work are effective after bid opening, but before award, the contracting officer must:
      - (i) Award the contract and incorporate the effective determination on the date of contract award; or
      - (ii) Cancel the solicitation in accordance with FAR 14.404-1.
  - (3) If the contracting officer receives an effective modification after award, the contracting officer must modify the contract to incorporate the wage modification retroactive to the date of award and equitably adjust the contract price. (FAR 22.404-6(b)(5)).

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<sup>8</sup> See Twigg Corp. v. General Servs. Admin., GSBGA No. 14639, 99-1 BCA ¶ 30,217 (holding contractor entitled to an equitable adjustment where agency failed to incorporate revised wage determination).

c. Negotiated Procurements. FAR 22.404-6(c).

- (1) A modification of a wage determination before award is effective if:
  - (a) Received by the contracting agency or published on the WDOL. FAR 22.404-6(c)(1).
  - (b) If the contracting officer receives and effective modification before award, the solicitation must be amended to incorporate the new wage determination. FAR 22.404-6(c)(2)
    - (i) If closing date has not passed, all prospective offerors who were sent solicitations must be given a reasonable opportunity to revise proposals.
    - (ii) If closing date has passed, all offerors who submitted proposals must be given a reasonable opportunity to revise proposals.
- (2) An effective modification of a wage determination received after award requires the contracting officer to do the following: (FAR 22.404-6(c)(3)).
  - (a) (a) Modify the contract to incorporate the rate modification retroactive to the date of award, and
  - (b) Equitably adjust the contract price.

5. Contracts with Options.

- a. Wage determinations must be updated when contract options are exercised to extend the term of the contract. The contracting officer must modify the contract to incorporate these updates (FAR 22.404-12(a)).
- b. Whether or not updated wage determinations will result in a contract price adjustment depends on type of contract and the contract clause incorporated by the contracting officer. (FAR 22.404-12(c), 52.222-30, 52.222-31, 52.222-32).

- C. Enforcement. While Department of Labor retains administrative and oversight enforcement, day-to-day enforcement is by the Contracting Agency.
1. Contracting Agency: Compliance Checks and Investigations. (FAR 22.406-7; DFARS 222.406-1).
    - a. Regular compliance checks:
      - (1) Employee interviews;
      - (2) On-site inspections;
      - (3) Payroll reviews; and
      - (4) Comparison of information gathered during checks with available data, e.g., inspector reports and construction activity logs.
    - b. Special compliance checks:
      - (1) When inconsistencies, errors, or omissions are discovered during regular checks; or
      - (2) Complaints are filed.
    - c. Labor Standards Investigations. (FAR 22.406-8; DFARS 222.406-8).
      - (1) The contracting agency investigates when compliance checks indicate that violations are substantial in amount, willful, or uncorrected. (NOTE: DoL also may perform or request an investigation).
      - (2) The contracting officer notifies the contractor of preliminary findings, proposed corrective actions, and certain contractor rights. FAR 22.406-8(c).
      - (3) The contracting officer forwards a report to the agency head who, must forward to DoL in the following circumstances:
        - (a) Contractor/subcontractor underpaid by \$1000 or more.
        - (b) Contracting officer believes violations are aggravated or willful.

- (c) Contractor/subcontractor has not made restitution.
    - (d) Future compliance has not been assured.
  - (4) If the contracting officer finds substantial evidence of criminal activity, the agency head must forward the report to the U.S. Attorney General.
- 2. Department of Labor (DoL).
  - a. Upon receipt of a complaint, DoL immediately refers the complaint to the Contracting Agency for enforcement action (see below on investigation and resolution).
  - b. If Contracting Agency Enforcement attempts fail, DoL reviews the investigative file for final attempt at resolution of disputes concerning the labor standards provisions of the contract. (FAR 22.406-10; FAR 52.222-14).
  - c. The Board of Contract Appeals and federal courts review claims relating to labor disputes if the dispute is based on the contractual rights and obligations of parties.<sup>9</sup>
  - d. Federal district courts have jurisdiction to review appeals of DoL's implementation of the DBA.<sup>10</sup>

D. Military Privatized Housing Initiative (MHPI).

- 1. The Army, Navy, and Air Force are improving the conditions of military housing in a project referred to as the Military Housing Privatization Initiative (MHPI). Under this initiative, in most instances, a private developer leases the land for a long term and then is responsible for constructing or renovating existing housing developments using military rental referrals to fund and maintain the newly renovated and privatized developments. Each Service has agreed to include DBA provisions and applicable wage determinations in all MHPI contracts and has agreed that all developers will be required to comply with the DBA labor standard provisions.

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<sup>9</sup> See, e.g., MMC Constr., Inc., ASBCA No. 50,863, 99-1 BCA ¶ 30,322 (claim for excessive DBA wage withholding); Commissary Servs. Corp., ASBCA No. 48613, 97-1 BCA ¶ 28,749 (dispute regarding DBA offset when ultimate issue was whether same prime contractor was involved in both contracts); American Maint. Co., ASBCA No. 42011, 92-2 BCA ¶ 24,806 (claim for reimbursement of fringe benefits); Central Paving, Inc., ASBCA No. 38658, 90-1 BCA ¶ 22,305 (claim that original wage rate information in contract was incorrect). Cf. Page Constr. Co., ASBCA No. 39685, 90-3 BCA ¶ 23,012 (declining jurisdiction over claim that government breached statutory obligation).

<sup>10</sup> See, e.g., Building and Constr. Trades Dep't, AFL-CIO v. Secretary of Labor, 747 F. Supp. 26 (D.D.C. 1990).

2. The Installation Housing Asset Manager administers the application of DBA to MHPI.<sup>11</sup>

E. Remedies.

1. Suspending Contract Payments. The contracting officer shall suspend any further payment, advance, or guarantee of funds otherwise due to a contractor if a contractor or subcontractor fails or refuses to comply with the DBA (FAR 22.406-9).
2. Withholding contract payments. The contracting officer shall withhold contract payments if the contracting officer believes a violation of the DBA has occurred, or upon request by the DoL. (40 U.S.C. § 3142(c)(3); 29 C.F.R. § 5.5(a)(2)(1999); FAR 22.406-9(a)(1)).<sup>12</sup>
3. Termination for Default (40 U.S.C. § 3143).
4. Debarment. The contractor may be debarred for disregard of its obligations to employees or subcontracts. (40 U.S.C. § 3144; 29 C.F.R. § 5.12).
5. Liquidated Damages. \$10/day for each employee paid improperly, per the CWHSSA. (40 U.S.C. § 3703).

## **VI. MCNAMARA-O’HARA SERVICE CONTRACT ACT OF 1965 (SCA)**

41 U.S.C. §§ 6702-6706 (formerly cited as 41 U.S.C. §§351-358)  
29 C.F.R. Part 4  
FAR Subpart 22.10  
DFARS Subpart 222.10.

A. Covered Workers and Contracts. FAR 22.1002; FAR 22.1003.

1. Service Contracts (41 U.S.C. § 6702; FAR 22.1001)
  - a. Contracts made by the federal government;

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<sup>11</sup> Army Assistant Chief of Staff for Installation Management (ACSIM) has prepared a Portfolio and Asset Manager’s Handbook that identifies the duties and responsibilities of the Asset Manager to include DBA compliance procedures.

<sup>12</sup> See Westchester Fire Insurance Co., v. United States, 52 Fed. Cl. 57 (2002) (although contract terminated five months earlier, contracting officer was required to withhold funds per DoL request).

- b. Amount >\$2500; and
- c. Principal purpose to furnish services through the use of service employees. (See 29 CFR § 4.130 and FAR 22.1003-5 for examples of service contracts covered).
  - (1) SCA does NOT apply if the principle purpose of the contract is to provide something other than services, or the services performed are merely incidental to a non-service contract.<sup>13</sup>
  - (2) “Service employee” (41 U.S.C. 6701).
    - (a) any person engaged in the performance of a service contract or subcontract;
    - (b) regardless of the existence of a contractual relationship with a contractor or subcontractor; but
    - (c) does NOT include persons employed in bona fide executive, administrative, or professional capacities.

2. Exemptions. (41 U.S.C. § 6702; 29 C.F.R. §§ 4.115 to 4.122; FAR 22.1003-3.

- a. Contracts principally for the construction, alteration, or repair (including painting and decorating of public buildings or public works).
  - (1) These are covered by the Davis-Bacon Act (DBA).
  - (2) NOTE: Contracting officers must incorporate DBA provisions and clauses into a service contract if there is a substantial amount of segregable construction work.
- b. Contracts principally for the manufacture or delivery of supplies, materials or equipment.

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<sup>13</sup> For example: (1) Rental of building office space is not a covered service contract even where the rental agreement includes janitorial services; however, the SCA does apply if janitorial services are contracted for separately; (2) Rental of vehicles alone is for a tangible item and not a covered service; however, the SCA does apply if rental is for vehicles with operators ; (3) Contracts for printing, reproduction, and duplicating are ordinarily for the principal purpose of furnishing written materials rather than the furnishing of reproduction services through the use of service employees; however, in some cases, the terms, conditions, and circumstances of the procurement may be such that the facts would show its purpose to be chiefly the furnishing of services (e.g. repair services, typesetting, photocopying, editing, etc.). See 29 CFR §4.134.

- (1) These are covered by the Walsh-Healy Public Contracts Act of 1938 (WHA).
    - (2) Note: some work under a service contract may be exempt from the SCA because it entails the manufacture or delivery of supplies, materials, or equipment.
  - c. Contracts for transporting freight or personnel by vessel, aircraft, bus truck, express, railroad, or oil or gas pipelines where published tariffs are in effect.
  - d. Contracts for public utility services.
  - e. Contracts for furnishing services by radio, telegraph, telephone, or cable companies subject to the Communications Act of 1934.
  - f. Employment contracts providing for direct services to a Federal agency by an individual or individuals.
  - g. Contracts for principally for operating postal contract stations for the US Postal Service.
3. Administrative Limitations, Variances and Exemptions.
- a. The DoL may establish reasonable variations, tolerances, and exemptions from SCA provisions (41 U.S.C. § 6707). DoL must find that:<sup>14</sup>
    - (1) necessary in the public interest, or
    - (2) avoids serious impairment of federal government business, and
    - (3) is within the overall purpose of protecting prevailing labor standards.
  - b. When services are to be performed by both non-exempt and exempt employees, if a substantial portion (20% or more) of the services are performed by non-exempt employees, then the SCA applies to that work performed by those employees.

B. Requirements.

1. Covered service contracts must contain mandatory provisions regarding:

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<sup>14</sup> Current DoL exemptions are found at 29 CFR § 4.123 and FAR 22.1003-4.

- a. Minimum wages (29 C.F.R. §§ 4.161 through 4.163 ; FAR 22.1002-2):
    - (1) A contractor must pay service employees not less than the prevailing wage rate determination issued by DoL for the contract, or
    - (2) In accordance with the collective bargaining agreement (CBA), or
    - (3) If there is no wage determination or an effective Collective Bargaining Agreement, the FLSA minimum wage applies.
  - b. Fringe benefits,<sup>15</sup>
  - c. Safe and sanitary working conditions,
  - d. Notification to employees of the minimum allowable compensation, and
  - e. Equivalent federal employee classifications and wage rates.
2. Wage Determinations. (FAR 22.1007 and 22.1008; DFARS 222.1008; 29 C.F.R. § 4.143; <http://www.wdol.gov>).
- a. The contracting officer must obtain wage determinations for:
    - (1) Each new solicitation and contract exceeding \$2,500;
    - (2) A contract modification that increases the contract to over \$2,500;
      - (a) And extends the contract pursuant to an option clause or otherwise; or
      - (b) Changes to the scope of a contract that affect labor requirements significantly.
    - (3) On multiple year contracts in excess of \$2,500, obtain
      - (a) Annually if funding is annual, or

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<sup>15</sup> Examples of those provided include medical/hospital care, pensions, workers compensation, unemployment benefits, life insurance, disability pay, and those not otherwise required under federal, state or local law.

- (b) Biennially if funding is not subject to annual appropriations and its proposed term exceeds two years.
- b. Proper Wage Determination (FAR 22.1008-1).
  - (1) General Rule: use the prevailing wage determination for the area or locality of contract performance from the WDOL database.
  - (2) Specific Wage Determination: where no standard prevailing wage determination is available, the contracting officer must request a contract specific determination from DoL.
  - (3) If DoL does not issue a WD to cover SCA employees, then the FLSA provisions apply. (41 U.S.C. § 6704).
- c. Modifications of Wage Determinations. (29 CFR § 4.5(a)(2)).
  - (1) Sealed bidding.
    - (a) If WD/CBA revision is received 10 days or more before bid opening, then incorporate the revision into the solicitation.
    - (b) If WD/CBA revision is received less than 10 days before bid opening OR a special rule applies (see FAR 22.1014), do not incorporate the WD/CBA revision into the solicitation, unless the Contracting Officer finds that there is reasonable time to notify bidders.
  - (2) Negotiations.
    - (a) If WD/CBA revision is received before award of contract or modification to exercise an option or to extend the contract, then incorporate the revision into the solicitation or the existing contract to be effective the first day of the new period of performance.
    - (b) If WD/CBA revision is received after award of contract or modification to exercise option or to extend the contract, and performance starts within

30 days, then do not incorporate the new or revised WD/CBA.

- (c) If WD/CBA is received after award and performance starts more than 30 days after award or modification, then incorporate the WD/CBA revision.

3. Successor Contract Rule. (41 U.S.C. § 6707(c); FAR 22.1008-2)

a. Must pay wages and fringe benefits at least equal to those contained in a CBA effective under the previous contract for:

- (1) new contracts for substantially the same services,
- (2) performed in the same locality,

b. Limitations. (FAR 22.1008-2(c)).

- (1) CBA is NOT effective if it does not become effective until after the expiration of the incumbent's contract.
- (2) Where contracting officer has given timely notice to both incumbent contractor and the collective bargaining agent of the applicable acquisition dates, the terms of new/revised CBA are NOT effective if:

(a) Sealed bidding:

- (i) Contracting agency receives notice of the terms of the CBA less than 10 days before bid opening, and
- (ii) there is not reasonable time to notify bidders

(b) Negotiations.

- (i) Contracting agency receives notice of the terms of the CBA after award and
- (ii) Start of performance is within 30 days
- (iii) CBA applies if received by contract agency after award, performance starts more than 30 days from date of award, and it is received

no later than 10 days prior to start of performance..

- (3) If DoL determines that the CBA was not negotiated in good faith or that the rates set by the CBA vary substantially from the prevailing rates, then CBA does not apply.
  - (4) The “Successor Contract” rule applies only to the base period of the follow-on contract. After the base period, the contractor and the employee bargaining unit may renegotiate the CBA. (29 C.F.R. §§ 4.143; 4.145)
4. Nondisplacement of Qualified Workers. (Executive Order 13495; 29 CFR § 9; FAR 22.12).
- a. Service contracts over the simplified acquisition threshold, with some exceptions, must include FAR 52.222-17 requiring the successor contractor and its subcontractors to offer the employees of the predecessor contractor:
    - (1) Right of first refusal of employment under the successor contract in positions for which they are qualified,
    - (2) if their employment will be terminated as a result of the award of the successor contract.
  - b. Successor contractor is permitted to hire fewer employees than its predecessor, and is not required to hire employees who it believes has failed to perform well under the predecessor contract.
  - c. Not less than 30 days before the completion of the contract, the predecessor contractor (incumbent) must provide a certified list of service employees to the contracting officer to facilitate the hiring process. FAR 22.1204.
  - d. DoL Wage and Hour Division (WHD) has authority to investigate complaints per 29 CFR § 9.23 and has a dedicated email address for such complaints ([displaced@dol.gov](mailto:displaced@dol.gov)). The contracting officer shall cooperate with DoL representatives in the examination of records, interviews with service employees, and all other aspects of the investigation as undertaken by DoL. FAR 22.1024.
5. Price Adjustments Contract Clauses. (FAR 52.222-43; 52.222-44).
  - a. Adjustments are allowed only for increases due to congressional or DoL action. If the FLSA minimum wage rate is amended or a

wage rate incorporated upon exercise of an option increases labor costs, the contractor is entitled to a price adjustment.<sup>16</sup>

- (1) Adjustments for increased wages arising out of a CBA negotiated during contract performance are not retroactive to date of CBA execution. Adjustments in these cases are required only upon option exercise.<sup>17</sup>
  - (2) A contractor is not entitled to a price adjustment for the increased costs of complying with a wage determination that existed at the time of contract award.<sup>18</sup>
- b. It is the contractor's responsibility to submit a detailed proposal to adjust the contract price to comply with a modified or new WD or CBA.
- (1) The contractor is only entitled to an adjustment when it demonstrates there is a causal relationship between the new or modified WD and the increased cost it incurs in wage and fringe benefits to its service employees.
  - (2) Contract price may also be adjusted downward when voluntarily made by the contractor. Request must be made within 30 days of the new or modified WD incorporated into the contract.
- c. Recovery under the price adjustment clauses is limited to wages, fringe benefits, social security, unemployment taxes, and workers' compensation. It will NOT include general or administrative costs, overhead, or profit.
- d. Limitations.

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<sup>16</sup> See United States v. Serv. Ventures, Inc., 899 F.2d 1 (Fed. Cir. 1990); Williams Servs., Inc., ASBCA No. 41121, 91-1 BCA ¶ 23,486; see also Gricoski Detective Agency, GSBCA No. 8901, 90-3 BCA ¶ 23,131 (disallowing adjustment because contract included priced option years and contractor failed to factor vacation pay costs into option year prices). Cf. Sterling Servs., Inc., ASBCA No. 40475, 91-2 BCA ¶ 23,714 (allowing partial relief on claim arising from corrected wage determination).

<sup>17</sup> See Ameriko, Inc., d/b/a Ameriko Maint. Co., ASBCA No. 50356, 98-1 BCA ¶ 29,505 (holding contractor was not entitled to price adjustment for increase in base year wages where increase was due to CBA executed after contract award); Classico Cleaning Contractors, Inc., DOTBCA No. 2786, 98-1 BCA ¶ 29,648 (holding contractor could not recover during first option year for increases under CBA executed during same year). Phoenix Management, Inc., ASBCA No. 53409, 02-1 BCA ¶ 31,704 (agency required to comply with DoL wage determination because contracting officer failed to seek clarification regarding employees included in the CBA).

<sup>18</sup> Holmes & Narver Servs., ASBCA No. 40111, 93-3 BCA ¶ 26,246 (holding contractor could not recover cost of complying with wage determination that had not changed). See Johnson Controls World Servs., Inc., ASBCA No. 40233, 96-2 BCA ¶ 28,548 (agency not liable for failing to inform contractor of previously disapproved conformance request).

- (1) Not all adjustments for increased wage rates are made under the FAR “price adjustment” clauses. The contractor may be able to show that recovery is based on a clause other than a price adjustment clause (e.g., changes clause).<sup>19</sup>
- (2) Mutual mistake concerning employee classification or the propriety of a wage determination may shift the cost burden to the government.<sup>20</sup>

C. Enforcement.

1. DoL enforces SCA compliance.
2. Contracting Agency responsibility is to ensure that the proper labor standard clauses and appropriate wage determinations are in the contract.

D. Remedies.

1. Termination for Default. 41 U.S.C. § 6705(c).
2. Three Year Prohibition on New Contracts. (41 U.S.C. § 6706).
3. Withholding of Contract Funds. (41 U.S.C. § 6705; 29 C.F.R. § 4.187).

## VII. WALSH-HEALEY PUBLIC CONTRACTS ACT OF 1936 (WHA)

41 U.S.C. §§ 6501-6511 (previously cited as 41 U.S.C. §§ 35-45)

41 C.F.R. Parts 50-201 to 50-210

FAR Subpart 22.6

DFARS Subpart 222.6.

A. Covered Workers and Contracts.

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<sup>19</sup> For example, the parties may agree to wage revisions outside the terms of the price adjustment clauses. Security Servs. Inc. v. General Servs. Admin., GSBCA No. 11052, 93-2 BCA ¶ 25,667; The price adjustment clauses may not apply where the adjustment occurred during base year of contract and was not due to a FLSA minimum wage increase. See, e.g., Lockheed Support Sys., Inc. v. United States, 36 Fed. Cl. 424 (1996) (holding that price adjustment clause did not apply to a wage rate price adjustment made four months after the start of a contract); Professional Servs. Unified, Inc., ASBCA No. 45799, 94-1 BCA ¶ 26,580 (price adjustment clause inapplicable where adjustment occurred after contract award).

<sup>20</sup> See, e.g., Richlin Sec. Serv. Co., DOTBCA Nos. 3034, 3035, 98-1 BCA ¶ 29,651 (mutual mistake as to employee classification).

1. Contracts for manufacture or furnishing of materials, supplies, articles, and equipment that exceed \$15,000.
  2. Exemptions.
    - a. Perishables, including livestock, dairy, and nursery products.
    - b. Agricultural or farm products processed for first sale by the original producer.
    - c. Agricultural commodities or products purchased under contract by the Secretary of Agriculture.
    - d. Public utility services.
    - e. Supplies manufactured outside the US.
    - f. Newspapers, magazines, or periodicals contracted for with sales agents or publisher representatives
    - g. Open market items usually with commercial items or where immediate delivery is required by public urgency for commercial services.
  3. Dual Coverage.
    - a. When supplies and services are under the same contract, WHA and SCA may apply to different portions of the procurement. (29 CFR 4.117, and 29 CFR 4.131 – 4.132).
    - b. If installation of supplies is “minor and incidental,” then DBA will not be required. If installation requires more than an incidental amount of construction, DBA will likely be required for that portion of contract performance. (FAR 22.402(b) and 29 CFR 4.116).
- B. Requirements. (41 U.S.C. § 6502).
1. Must pay the prevailing minimum wage.
    - a. DoL determines based on similar wages in the applicable industry and locale in which the supplies are to be manufactured or furnished under a contract.

- b. Presently, however, there is no wage rate determination activity under the Act. The FLSA minimum wage is the Walsh-Healey Act wage rate.
  2. Overtime Provisions. Maximum workweek is established as 40 hours.
  3. Child and Convict Labor. No one under the age of 16 or incarcerated individual.
  4. Health and Safety Requirements.
- C. Enforcement by DoL.
- D. Remedies. (41 U.S.C. § 6503-6504)
1. Termination for Default.
  2. Three Year Prohibition on New Contracts.
  3. Withholding Contract Funds.
  4. Liquidated Damages (\$10.00 a day for each employee paid improperly).

## **VIII. DEFENSE BASE ACT**

42 U.S.C. § 1651  
FAR 28.3.

- A. Covered Workers and Contracts.
1. Applies to following employees:
    - a. Performing services outside of the US.
    - b. Engaged in US government funded public works business outside US.
    - c. Public works or military contract with a foreign government which has been deemed necessary to US national security.
    - d. Provide services funded by US government outside realm of regular military issue or channels.
    - e. Any subcontractor of prime involved in a contract that qualifies under a-d supra.

2. Used in conjunction with the Longshore and Harbor Workers' Compensation Act of 1927, 33 USC 901 et seq. and War Hazards Compensation Act, 42 USC 1701 et seq.
  - a. Created to force uniformity of benefits and remedies available to longshoremen and harbor workers.
  - b. May be waived by the Secretary of Labor.
- B. Requirements.
  1. Covers injury or death of covered employees.
  2. Requires contractor to obtain Defense Base Act insurance prior to performance of contract.
  3. Provides injury benefits such as medical care, disability compensation, and death benefits.
  4. Provides minimum insurance coverage for covered employees.
- C. Contract Actions.
  1. Insert 52.228-3 in applicable contracts.
  2. Insert 52.228-4 when the Secretary of Labor waives applicability of the Defense Base Act. A list of countries that Defense Base Act Waivers as well as procedures for requesting a waiver can be found at the DPAP website (<http://www.acq.osd.mil/dpap/sitemap.html>).
- D. Enforcement. Office of Workers' Compensation Program (OWCP), DoL.