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Service Contract Act

Don't Get Tripped by the Traps of the SCA: Three Common Mistakes Contractors Make in Complying With the Service Contract Act



BY TRINA FAIRLEY BARLOW

The “black letter” requirements of the Service Contract Act (SCA), at first glance, appear straightforward. However, implementing these requirements and monitoring compliance with the Act’s obligations presents challenges and raises questions for even the most sophisticated contractors. The potential risks associated with non-compliance with these rules can be high. Penalties for violation of the SCA range from backpay to withheld contract payments from the government to debarment. They might even lead to jail time if the contractor certifies false wage information in claims it submits to the government. Just last week, a contractor was indicted for violations of the Davis-Bacon Act, a wage-hour statute with very similar requirements to the SCA, and faces prison and large fines.

As the Department of Labor (DOL) continues its aggressive investigation and pursuit of SCA violations, contractors should redouble their efforts to ensure compliance with the Act. Following are three common SCA

compliance traps that can trip an unsuspecting contractor.

Trap #1 –Failing to Properly Identify Workers Covered by the SCA. While it is clear that the SCA’s coverage is limited to “service employees,” it is frequently less clear which workers qualify as “service employees.” The SCA defines a service employee as *any person* engaged in the *performance* of an SCA covered contract, unless those persons qualify for *exemption* as a bona fide executive, administrative or professional under the Fair Labor Standards Act (FLSA).¹ This definition seems relatively straightforward, but its application can present myriad compliance challenges. Below are two common mistakes that contractors make in identifying covered workers.

Misclassifying “non-exempt” employee as “exempt” employees

SCA coverage depends on whether an employee qualifies for an executive, administrative or professional exemption under the FLSA. To make this determination, contractors must assess whether the employee’s salary and job duties satisfy the requirements for exemption under the FLSA. If the employee is exempt, the contractor is under no obligation to pay SCA wages and fringe benefits. However, problems arise when contractors misclassify “non-exempt” employees as “exempt.” These misclassification problems occur when,

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¹ 29 C.F.R. § 4.156.

for example, an employee has a job title that *appears* to satisfy the FLSA's "exempt" requirements, but examination of the employee's job duties reveals that the employee does not actually qualify for exempt status. Job titles, such as manager, supervisor, coordinator, and lead, present particular risks for misclassification problems. Contractors should always focus on the employee's actual job duties, not their job titles, when making classification decisions.

Misclassification issues also arise when employees' job duties change or evolve. When this happens, it is imperative that contractors reassess FLSA classification status. It is also advisable for contractors to conduct periodic re-assessments of employees' FLSA classification to identify and address shifts in job duties. Contractors should never simply adopt the FLSA classifications previously assigned by predecessor contractors. An independent assessment is critical. Additionally, in light of the DOL's anticipated implementation of amended FLSA regulations in 2016, contractors should be prepared to make necessary adjustments to comply with the new rules once implemented.

Handling non-traditional "employees" – part-time and temporary employees and independent contractors

Some contractors are surprised to learn that the SCA's definition of "service employee," covers all categories of workers, including full-time employees, part-time employees, temporary employees and independent contractors.² Failure to recognize the various categories of workers who qualify as "service employees" is a trap for the unwary contractor.

But understanding that SCA coverage extends to this broader category of workers is not enough. Contractors must also understand how to calculate the wages and fringe benefits due to these various classes of workers. Because most SCA Wage Determinations are based on a 40-hour work week, contractors may, for example, have to calculate holiday and vacation pay on a pro-rata basis (*i.e.*, based on the number of hours worked). This is a simple calculation if the employee works a regular and consistent weekly schedule. The calculation becomes more complex if the employee works an irregular or inconsistent schedule. In these circumstances, to comply with the SCA's requirements, a contractor may, for example, need to pay a part-time or temporary worker a proportion of the holiday or vacation benefits due to full-time employees. In the case of vacation, the contractor would need to calculate the number of hours the part-time or temporary employee worked in the year preceding the employee's anniversary date of employment to determine the amount of vacation benefits due to the employee.³

Thus, keeping accurate records and conducting periodic reconciliations to identify and redress calculation errors is essential to ensuring SCA compliance.

Trap # 2 - Failure to Take into Account Other Mandatory Federal and State Laws When Discharging H&W Fringe Benefits Obligations. A common mistake that some contractors make is failing to consider the impact of other state and federal laws when discharging health & welfare (H&W) fringe benefits obligations imposed by the SCA. The SCA recognizes an array of benefits, such as medical or hospital care, unemployment benefits, life insurance,

sick insurance, vacation and holiday pay, as bona fide fringe benefits that satisfy a contractor's H&W fringe benefits obligations. In discharging fringe benefits obligations, however, a contractor may not take credit for H&W fringe benefits that are otherwise required by state, federal or local law.⁴ Contractors may not, for example, count mandatory paid sick leave imposed by states' laws toward their H&W fringe benefits obligations. Similarly, contractors subject to Executive Order 13706, which becomes effective in 2017, will not be permitted to deduct their federally-mandated paid sick leave obligations from the H&W fringe benefits requirements due to employees under the SCA.⁵

Finally, although the SCA permits contractors to discharge their H&W fringe benefits obligations by paying "cash in lieu of benefits" to covered employees, the passage of the Affordable Care Act makes this option unworkable for many larger contractors. A decision to pay cash in lieu of benefits may result in substantial ACA penalties for each employee (not just those being paid cash in lieu of benefits) for failure to provide "affordable" care in accordance with the formula imposed by the ACA.⁶

Understanding the impact that other local, state and federal laws have on contractors' SCA obligations is not only critical to avoiding violations of the SCA, but to avoiding potential liability under other laws. Contractors should not make decisions about how to satisfy their SCA obligations in a vacuum, but should do so with an understanding of how the chosen compliance methods will impact overall legal risks and business operations.

Trap #3 - Failure to Pay Employees under the Applicable (Right) Wage Determination(s). Determining which wage determination is applicable to a particular service employee can also present compliance challenges. When an employee performs work on a single SCA contract in one labor category that is listed on the wage determination, calculating the wages and fringe benefits due to the employee is generally a straightforward proposition. Often, however, employees do not perform work on a single contract. It is also not uncommon for a single employee to perform work on commercial contracts and government contracts, or to perform work in more than one labor category on the same government contract. In these circumstances, contractors must keep accurate records of the time that employees spend on commercial versus SCA-covered contract work. Contractors must also ensure that they keep accurate records of the time employees spend performing work under each labor category. Failure to segregate the time and type of work performed and to maintain accurate records will result in the contractor being liable for paying employees at the highest SCA rate for all work.⁷

Additionally, employees who travel to various jurisdictions while working on service contracts can pose complications for applying the appropriate wage rates. In particular, the DOL's regulations make clear that a

⁴ 29 CFR § 4.162.

⁵ As currently written, if a state or local law has a more generous paid leave requirement than those outlined in the Executive Order, the Executive Order will require contractors to adhere to the more generous law.

⁶ 26 C.F.R. § 1.5000A-3(e).

⁷ See 29 C.F.R. § 4.169 and 29 C.F.R. § 4.179.

² See 29 C.F.R. § 4.155.

³ 29 C.F.R. § 4.176(a)(3).

new wage determination should be obtained for each jurisdiction in which service employees perform work, or the contractor may be forced to pay the employees at the highest wage determination rate for all work.⁸

In summary, when SCA questions arise, contractors should not ignore them, but should seek advice on the best way to remediate these issues. Furthermore, prime

contractors are well-advised not to ignore suspected violations by subcontractors, as prime contractors are jointly and severally liable for violations by subcontractors. Establishing a good compliance plan that includes clear policies, compliance checklists, identification of internal responsibilities, robust training of key personnel, and a procedure for prompt reconciliation of errors is key.

⁸ 48 C.F.R § 22.1009-4.