

HELPING YOUR CLIENT TRANSITION FROM COMMERCIAL TO FEDERAL GOVERNMENT CONTRACT WORK



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When employers expand their operation into federal government contract work as prime contractors or subcontractors, they are faced with number of rules that differ from those in the private sector. Statutes and regulations governing treatment of a federal contractor's employees present a significant challenge both for contractors and for the attorneys advising them. The consequences of noncompliance can be severe and can include monetary penalties, contract termination, and debarment. Increased government enforcement of these statutes and regulations is a trap for the unwary and uninformed; therefore, it is well worth the effort (and expense) to understand the different employment statutes and regulations and to bring employment-related practices into compliance with federal laws.

Wage and Hour Laws

Although most employers are aware of the Fair Labor Standards Act (FLSA), which establishes minimum wage and overtime pay requirements, many government contractors are subject to additional wage and hour laws that do not apply to commercial contracts. These laws include, among others, the Service Contract Act (SCA),¹ which deals with service contracts; the Davis-Bacon Act² and Davis-Bacon-related Acts (DBRA),³ which apply to contracts for construction, alteration, and/or repair of public buildings; and the Welsh-Healey Public Contracts Act (PCA),⁴ which relates to manufacturing or supply

contracts.⁵ If a contractor enters into a contract valued at more than \$100,000, the Contract Work Hours and Safety Standards Act (CWHSSA),⁶ which governs the payment of overtime premiums, may also apply.

The Department of Labor (DOL) enforces all these laws, issues Wage Determinations that establish employee classifications, and sets minimum wages for those various classes of employees. The minimum wages set forth in the Wage Determinations are often higher than the minimum wage established by the FLSA.

Classification of Employees: Which Employees Are Covered

Employees who are exempt from overtime requirements under the FLSA are exempt from the wage payment requirements set by the SCA, DBRA, and CWHSSA. If a contractor has a government contract subject to the PCA, SCA, or DBRA, the first step is to review the classification of employees to determine whether they are exempt or nonexempt. Employees must meet both the salary basis and duties tests to be exempt from being paid overtime under the FLSA and, thus, exempt under the SCA, DBA, and CWHSSA.⁷ Even if the contractor is already in compliance with the FLSA, a review can help the contractor avoid future problems, including debarment (which precludes a contractor from bidding on or obtaining new government contracts for a period of years).⁸

Next, the contractor should decide which employees

are covered by which laws applicable to the government contracts. For example, wages set by the SCA must be paid to nonexempt employees who “actually perform the specific services called for by the contract.”⁹ To avoid the risk of all employees being considered covered under the SCA, records for these employees should be kept separate from other employees’ records.

The DBRA applies to all laborers and mechanics employed directly on the site of the work being done on a contract that deals with construction, alteration, or repair of public buildings and works. Although this provision sounds simple enough, titles alone will not be conclusive. Under the DBRA, a “laborer or mechanic” includes “at least those workers whose duties are manual or physical in nature ... [and] in the case of contracts subject to [CWHSSA], watchmen or guards.”¹⁰ Working foremen and “independent contractors” may also be included in the “laborer or mechanic” category. In addition, there is a three-part definition that must be considered to determine which employees are employed “directly upon the site of the work.”¹¹

Classification of Employees: Which Job Positions Are Covered

Once the contractor decides which employees are covered by the law incorporated into the government contract, the next step is to determine what job classification applies to each employee. The SCA’s Directory of Occupations¹² provides a description of each job classification included in the act’s Wage Determinations. For contracts subject to the DBRA, the contractor must classify employees in accordance with the classifications used in the locality in which the work is performed¹³ and is responsible for classifying each employee’s position properly.¹⁴ If an employee’s job description is not included in the Wage Determination, the contractor must request the DOL’s approval of a proposed wage and benefit rate by requesting a “conformance.”¹⁵

Wages and Overtime Pay

Like the Fair Labor Standards Act, the SCA, PCA, and DBRA require employers to pay minimum wages, which are the same under the PCA as those under the FLSA: \$7.25 as of July 24, 2009. The minimum wages required under the SCA and DBRA Wage Determinations are usually higher and depend on geographic location and employee classification.¹⁶ Although the contracting officer is responsible for including the correct Wage Determination in the contract, the employer should review the contract and the incorporated Wage Determination to make sure it appears correct.¹⁷ The contractor should then review the hourly rates of covered employees to make sure they are paid at least the wages set forth in the Wage Determination.

Although the FLSA’s overtime requirements continue to apply to employees working on government contracts, the CWHSSA governs overtime pay for employees working on SCA and DBRA contracts of \$100,000 or more. The overtime pay requirements under the CWHSSA are virtually

the same as those under the FLSA; however, the CWHSSA has a liquidated damages provision that is not included in the FLSA.¹⁸ Thus, the contractor will want to ensure that the company’s payroll practices accurately reflect time worked and that employees are paid for all hours worked, including all overtime hours.

DBRA contracts are subject to the Copeland Anti-Kickback Act,¹⁹ which prohibits the kickback of wages to the employer through improper payroll deductions or otherwise and requires employers to submit weekly certified payroll reports. Although the SCA has an anti-kickback provision, it does not require the submission of certified payroll reports. Under either law, the contractor should take steps to ensure that there are no unauthorized deductions that would cause an employee’s hourly rate of pay to be less than the minimum wage.

Fringe Benefits

In addition to the minimum wage, the SCA requires the payment of hazardous duty pay, a uniform allowance,²⁰ health and welfare benefits, and vacation and holiday pay—all of which are listed in the SCA’s Wage Determinations. The DBRA requires the employer to pay “fringe benefits.” Under both statutes, the contractor can provide either benefits, such as retirement or health benefits, or can pay cash in lieu of benefits. Generally, any benefit that is qualified under the Employment Retirement Income Security Act (ERISA), 29 U.S.C. § 1001, et seq., is a “bona fide” benefit under the SCA and the DBRA.

The SCA’s Wage Determinations that are used most often in government contracts generally have a set amount for fringe benefits to be paid to each individual, which is currently \$3.50 per hour and payable for all hours paid, including holiday and vacation hours, up to 40 hours per week and 2,080 hours per year. (Some Wage Determinations require averaged benefits, or other hourly rates, however; therefore, it is important to read the Wage Determination carefully.) Under the SCA, the contractor must make sure that the employer can show that each employee is receiving the \$3.50 per hour in fringe benefits. Wages paid in excess of the minimum wage rate cannot be used to offset or satisfy the fringe benefits obligations under the SCA; the contractor must account for benefits or for cash paid in lieu of benefits separately.

The DBRA’s Wage Determinations, on the other hand, establish the fringe benefit amount according to the classification of the employee that is paid on all hours worked, including overtime hours. Unlike SCA contracts, wages paid in excess of an employee’s basic hourly rate can be used to satisfy the fringe benefits obligation under the DBRA. If a workforce is unionized, collective bargaining agreements (including those between prior contractors and unions), rather than a Wage Determination, may establish the wages and benefits that must be paid.

Vacation and Holiday Pay

Under the DBRA, the contractor is not required to pay employees for vacations or holidays. Vacation and holiday pay can be provided to meet the requirement to provide

fringe benefits, if those benefits meet certain standards. The SCA, on the other hand, does require the employer to pay for vacation and holiday hours.

Although the paid vacation requirements of the SCA seem straightforward, it can be surprisingly difficult to implement them if the contractor's existing vacation policy differs from the SCA's requirements. The SCA's Wage Determinations generally require paid vacations whose length is determined by an employee's years of service. The paid vacation vests on the employee's anniversary date and must be given in paid time off, or the employee must be paid in cash for the time before his or her next anniversary date. Required holidays, which are listed in the Wage Determinations, may be provided as paid days off, or the employee may be paid double time to work. To receive the benefit, an employee cannot be required to work the day before or after a holiday; however, different days may be substituted, as long as the employee receives the same benefit.

An employer's established vacation policy that differs from the SCA scheme can cause some problems. For example, many employers allow employees to carry over vacation days from year to year or take them before they are actually earned. If the employee is terminated early—before earning the vacation time that has been taken—contractors will often deduct vacation pay from the final paycheck. Any of these scenarios can result in a violation of the SCA.

In addition, the contractor must pay an employee for vacation hours based on "continuous service," which may include time that an employee performed similar contract functions at the same facility for a prior ("predecessor") contractor. The contractor who actually employs the employee on his or her anniversary date is the one who must provide the vacation benefit. The predecessor contractor must furnish the contracting officer a list that identifies service employees and their anniversary dates, but the predecessor's failure to do so does not relieve a successor contractor from the obligation to provide vacation benefits when they are due.

For example, a Wage Determination may require an employee who has five years of service to receive three weeks of paid vacation. If an employee started to work for the predecessor contractor on Jan. 1, 2005, and the successor contractor is awarded the follow-on contract in 2009 and then hires the predecessor's employee,²¹ on Jan. 1, 2010, the successor contractor owes that employee three weeks of vacation, even though he or she worked for that contractor only one year.

Additional Considerations and Requirements for Government Contract Work

In addition to wage and hour laws, the contractor will have to comply with other statutes and regulations related to employment. Starting with the bidding stage, the contractor should understand the Federal Acquisition Regulations (FAR) provisions incorporated in the government contract(s) that have been awarded or will be. Understanding these provisions will allow the contractor

to submit accurate bids on the jobs and to implement any programs and protocols necessary to avoid penalties. Which FAR provisions are applicable will depend on a variety of factors, including the size of the business, the contract dollar amounts awarded, and/or the number of employees employed by the contractor.

Written Code of Business Ethics and Conduct

Under FAR 3.1002, all government contractors are required to operate with the "highest degree of integrity and honesty." The FAR recommends having a written code of business ethics and conduct. For federal government contractors with contracts expected to exceed \$5.0 million and to last 120 days or more, the contractor *must* have a written code of business ethics and conduct within 30 days of being awarded the contract and provide a copy of that code to the employees who are performing work on that contract. Within 90 days of contract award, the contractor must establish ongoing programs related to awareness of and compliance with business ethics and an internal control system.²²

Although contractors have significant discretion in crafting such programs, the programs must be appropriate for the contractor's size and activities undertaken pursuant to the government contract and must include periodic training designed to educate employees about the contractor's business code and internal control system.²³ A one-size-fits-all training program may not be sufficient for a contractor's business code and internal control system, because the contractor may have different types of employees who have varying degrees of interaction with the government. For example, the contractor should consider whether having a separate training curriculum for its field workers that is distinct from the training for its sales staff and/or management personnel is appropriate, depending on the contractor's size and the amount of business conducted with the government.

It is important for a contractor's employees to understand that there is stark contrast between what may be allowed and even customary business practice in the private commercial sector and what is permissible in the context of government contracts. For this reason, the contractor's training program in business ethics should include a discussion of gratuities and bribery. Although most employees understand the basic concept of bribery without much formal training, in the context of government contracts, the limitations regarding gifts and gratuities is less clear and often misunderstood. Unlike his or her counterpart in the private sector, a government employee may not solicit *or accept*—either directly or indirectly—any gratuity, gift, favor, entertainment, loan, or anything else of monetary value from anyone who (1) is doing or seeks to do business with the government employee's agency, (2) conducts activities that are regulated by the government employee's agency, or (3) has interests that may be affected by the government employee's performance of his or her duties.²⁴ A contractor's employees should be properly trained to know that even an act as seemingly innocuous as buying

dinner for a government employee could have severe adverse consequences.

Internal Control Systems

Internal control systems are designed to “facilitate timely discovery of improper conduct in connection with government contracts.”²⁵ To be considered adequate, the employer’s internal control system must have oversight at a sufficiently high management or executive level and must be properly funded. The system must exclude, as principals of the contractor, individuals who have engaged in conduct that violates the contractor’s code, and it must include periodic reviews. The contractor needs to assess risk of improper conduct regularly and ensure that such conduct is reported internally—and, when appropriate, to the government. Furthermore, when an employee engages in improper conduct—or fails to take reasonable steps to detect and prevent such conduct—the contractor must take disciplinary action.

Equal Employment Opportunity Provisions

Executive Order 11246 requires certain federal contractors and subcontractors to take “affirmative action” to ensure that all individuals have an equal opportunity for employment, without regard to race, color, religion, sex, or national origin.²⁶ Required Equal Employment Opportunity (EEO) measures include the following:

- displaying the DOL’s Office of Federal Contract Compliance Programs (OFCCP) posters, as designated by the OFCCP;
- making specific EEO representations in employment solicitations and advertisements;
- maintaining the required personnel records;
- filing the annual EEO-1 Report on time; and
- allowing the OFCCP access to the contractor’s books and records when required to do so.

Some contractors are also required to develop and implement a written affirmative action policy.

Contractors with contracts or subcontracts in excess of \$10,000 must have an affirmative action policy in place. Employers who have federal contracts to provide supplies and services and have 50 or more employees and a contract of \$50,000 or more are required to develop and maintain a comprehensive written Affirmative Action Program (AAP).²⁷ The AAP, which must be developed within 120 days of the start of a contract and must be updated annually, has to evaluate the composition of the contractor’s workforce and institute action-oriented programs so that the contractor’s workforce appropriately reflects the population from which the employer draws its employees.²⁸

A contractor who has multiple establishments or business units may have multiple AAPs. Location usually determines which employees are included in a particular AAP; however, there are circumstances that would make use of an employee’s location inappropriate.²⁹

Poster Requirements

Even though federal laws require all employers to post a variety of information, federal contractors are required to post additional information, such as the OFCCP’s EEO poster, the American Reinvestment and Recovery Act poster, the Hotline poster prescribed under FAR Clause 52.203-14, the SCA/PCA poster, the DBA poster, and/or the applicable Wage Determinations.³⁰

Restriction on the Use of Mandatory Arbitration Agreements

The Fiscal Year 2010 Defense Appropriations Bill contained § 8116, commonly referred to as the Franken Amendment, which restricts the use of mandatory arbitration agreements by certain government contractors on specified covered contracts. The interim rule implementing § 8116 applies only to contracts—including task or delivery orders and bilateral modifications adding new work—involving more than \$1.0 million of FY 2010 funds. Contractors must agree not to enter into new agreements or enforce existing agreements to the extent that they contain such arbitration provisions. The interim rule also requires affected contractors to certify that their subcontractors agree to the same restriction for their employees and independent contractors performing work under the covered contract. A contractor who refuses to accept such language will not be eligible to receive FY 2010 funds on applicable contracts, modifications, or orders.³¹ Contractors affected by the Franken Amendment under § 8116 of the FY 2010 Defense Appropriations Bill should review their employment or independent contractor agreements as well as agreements with their subcontractors to ensure compliance.

Miscellaneous Issues

Depending on the type of government contract a contractor may win, they may encounter additional FAR requirements. For example, the contractor may need a facility or security clearance before beginning work on a contract. Employers’ contracts with the government may subject them to E-Verify requirements³² or may necessitate an update to their record keeping systems.³³ In addition, contractors should be aware of their profiles on the new Federal Awardee Performance Integrity Information System³⁴ and monitor it frequently. This system is a new database and repository for information related to contractors’ performance, and contracting officers are required to consult the database during their source selection process for specified government contracts.

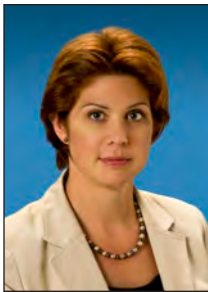
Conclusion

The topics discussed in this article do not constitute an exhaustive list of issues related to government contracts that a contractor may encounter, but the topics provide an overview of many common aspects related to employers’ compliance with government regulations. The contractor must carefully scrutinize all the requirements included in government contracts and the rules that govern them.

Knowing the significant differences between the

obligations and appropriate standards of conduct in the private commercial sector versus the public procurement context will be invaluable for the contractor who is aiming for a successful transition into federal government contract work. **TFL**

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Endnotes

- ¹⁴¹ U.S.C. § 351, et seq.
- ²⁴⁰ U.S.C. § 3141, et seq.
- ³ The Davis-Bacon related Acts, such as the American Recovery and Reinvestment Act, provide federal assistance through grants, loans, loan guarantees, and insurance for construction or construction-related work and incorporate the DBA.
- ⁴⁴¹ U.S.C. § 35–45 et seq.
- ⁵ In addition to the statutes, *see generally* 29 C.F.R., parts 4 and 5.
- ⁶⁴⁰ U.S.C. § 3701, et seq.
- ⁷ It is beyond the scope of this article to detail the differences between exempt and nonexempt employees under the FLSA.
- ⁸ There are differing standards for debarment under the DBA, the DBRA, and the SCA. Under the DBA, contractors are debarred for disregarding their obligations to their employees. 40 U.S.C. § 3144(b). Contractors are debarred for “aggravated or willful” violations of the DBRA, other than the DBA. 29 C.F.R. § 5.12(a)(1). The SCA provides for debarment for violations absent “unusual circumstances.” 41 U.S.C. § 354(a).
- ⁹²⁹ C.F.R. § 4.150–4.153.
- ¹⁰ *Id.*, § 5.2(m).
- ¹¹ *Id.*, § 5.2(k).
- ¹² *See* www.wdol.gov/library.aspx.
- ¹³ *Emerald Maintenance v. U.S.*, 925 F.2d 1425, 1427 (Fed. Cir. 1991).
- ¹⁴ *In re Teximara Corp.*, 98-1 B.Ca. (CCH) P29,543, 1998 ASBCA LEXIS 8 (ASBCA Jan. 15, 1998).
- ¹⁵ 29 C.F.R. § 4.6; 29 C.F.R. § 5.5.
- ¹⁶ Service contracts for less than \$2,500 or those that do not have a Wage Determination require payment of the minimum wages established by the FLSA. 41 U.S.C. § 351, 29 C.F.R. § 4.4.
- ¹⁷ If the contracting officer fails to include the Wage Determination or fails to include the correct Wage Determination, the contract may be modified to do so and the contractor should be permitted to adjust the pricing accordingly. 29 C.F.R. § 1.6(f).

¹⁸⁴⁰ U.S.C. § 3703.

¹⁹¹⁸ U.S.C. § 874.

²⁰ The uniform allowance is not applicable if the uniforms are “wash and wear.”

²¹ *See* the executive order entitled “Nondisplacement of Qualified Workers Under Service Contracts,” which requires successor contractors to hire a predecessor’s employees in certain circumstances; however, as of July 1, 2010, no regulations implementing this executive order have been finalized. It is not unusual for successor contractors to hire a predecessor’s employee.

²² Exceptions to these general time lines may be applicable if approved by the government agency’s contracting officer. *See* FAR, Part 52.

²³ *See generally* FAR, Subpart 3.1; FAR, Part 52.

²⁴ Although there are exceptions to the general rule set forth above, those exceptions are generally narrowly construed.

²⁵ *See* FAR, Subpart 3.1; FAR, Clause 52.203-13.

²⁶ There are exemptions for contracts for work performed completely outside the United States, etc., and contracts involving work on or near an Indian reservation. *See* 41 C.F.R. § 60-1.5.

²⁷ *See* Federal Contract Compliance Manual, located at www.dol.gov/ofccp/TAguides/New_Contractors_Guide.pdf

²⁸ *See* 41 C.F.R. § 60-2.

²⁹ *Id.*

³⁰ The required posters are usually available at no charge from the government agencies enforcing the statutes. *See* www.dol.gov/elaws/posters.htm for additional assistance regarding DOL poster requirements.

³¹ *See* DPAP Class Deviation Memorandum, Feb. 17, 2010, available at www.acq.osd.mil/dpap/policyvault/USA000476-10-DPAP.pdf.

³² E-Verify is an Internet-based system that allows employers to determine that employee’s eligibility to work in the United States.

³³ On Jan. 15, 2010, proposed rules were published defining contractor “business systems” as accounting systems, estimating systems, purchasing systems, earn value management systems (EVMS), material management and accounting systems (MMAS), and property management systems. The proposed rule also detailed the implementation of a compliance enforcement mechanism for business system deficiencies via contract clause that would allow administrative contracting officers to withhold a percentage of contract payments under certain circumstances for such deficiencies in a contractor’s business systems. *See* edocket.access.gpo.gov/2010/pdf/2010-392.pdf.

³⁴ *See generally* www.ppirs.gov/fapiis.html.