

**INTRODUCTION TO THE
LABOR STANDARDS STATUTES
COVERAGE**

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INTERACTION AMONG GOVERNMENT CONTRACTS

DISPUTES CONCERNING COVERAGE DETERMINATIONS

DAVIS-BACON ACT (DBA)
40 U.S.C. §§ 3141-3144 and 3146-3148

Davis-Bacon Act (DBA)

- ◇ Enacted in 1931, amended in 1935 and 1964
 - 1935 amendments - predetermination language
 - 1964 amendments - fringe benefits
 - 2002 Congress revised without substantive changes, and codified the DBA provisions at 40 U.S.C. 3141 *et seq.*

Purpose of DBA

- ◇ To protect communities and workers from the economic disruption caused by competition arising from non-local contractors coming into an area and obtaining federal construction contracts by underbidding local wage levels.

DBA Requirements

- ◇ Requires payment of locally prevailing wages and fringe benefits to laborers and mechanics employed on **federal government contracts** in excess of \$2,000 for construction, alteration, or repair (including painting and decorating) of public buildings or public works.

Examples:

1. General Services Administration contracts to build federal office buildings.
 2. Department of Defense contracts to paint and remodel a military base office building.
- ◇ Prevailing wages are determined in advance by the DOL National Office and included in the bid specifications for covered contracts.
 - ◇ The language of the Davis-Bacon Act requires **contractors and subcontractors** to pay “**all mechanics and laborers** employed **directly on the site of the work**, unconditionally not less often than **once a week**, and without subsequent deduction or rebate on any account, the full amounts accrued at time of payment, computed at wage rates not less than those stated in the advertised specifications, **regardless of any contractual obligation which may be alleged to exist between the contractor or subcontractor and the laborers and mechanics.**”
40 U.S.C. § 3142.

- ◇◇ DBA requirements apply to contractors and subcontractors.
- ◇◇ “Laborers or mechanics” must be paid at least “prevailing wages.”
- ◇◇ DBA applies only to employment on the “site of the work.”
- ◇◇ The laborers and mechanics must be paid weekly.
- ◇◇ Persons performing the duties of laborers and mechanics must be paid the prevailing wage rate regardless of any contractual arrangement, e.g., an independent contractor or owner-operator relationship.
- ◇◇ The wage determination (including additional classifications and wage rates approved under the “conformance” process, and the Davis-Bacon poster WH-1321 must be posted by the contractor and its subcontractors at the site of the work in a prominent and accessible place where it can be easily seen by the workers.

DBA Coverage

- ◇ The DBA applies to contracts “in excess of \$2,000 to which the **Federal Government or the District of Columbia is a party for construction, alteration, or repair, including painting and decorating, of public buildings and public works** of the Government or the District of Columbia located in a State or the District of Columbia.” 40 U.S.C. § 3142.

In considering DB coverage on contracts in excess of \$2,000, three criteria apply:

- (1) Is the agreement a contract to which the Federal Government or the District of Columbia is a party?
- (2) Is the agreement a “contract for construction”?
- (3) Is the “contract for construction” a contract for the construction of a public building or public work of the United States or the District of Columbia?

In this connection, “public building or public work” are defined as a “building or work, the construction, prosecution, completion, or repair of which, as defined above, is carried on directly **by authority of or with funds of a federal agency** to serve the interest of the general public regardless of whether title thereof is in a federal agency.” 29 C.F.R. § 5.2(k).

- ◇ The DBA applies to public buildings or public works of the Federal Government or the District of Columbia **within the geographic limits of the 50 States of the United States and the District of Columbia.**

The DBA does not apply to federal construction contracts in Guam, Puerto Rico, the Virgin Islands or other territories; *however*, some “related Acts” which provide federal assistance to in these territories do require the payment of DB prevailing wage rates.

◇ Lease Construction Contracts

WHD All Agency Memorandum No. 176, advises that the application of the DBA can apply to certain federal lease contracts that also call for construction of a public work or building. DBA application to any lease contract can be determined only by reviewing the specific facts of the particular contract. Among the factors to be considered in determining whether a lease contract is subject to the Act are:

- ◇◇ Length of the lease,
- ◇◇ The extent of government involvement in the construction project (e.g., the building is built to government specifications and the work is subject to periodic inspection by the government),
- ◇◇ The extent to which the building is used for private rather than public purposes,
- ◇◇ The extent to which the costs of the construction will be paid for by the lease payments, and
- ◇◇ Whether the contract is written to avoid application of the DBA.

DAVIS-BACON RELATED ACTS (DBRA)

DBRA Purpose and Requirements

- ◇ Congress has extended DB prevailing wage requirements to other laws – related Acts – which provide **federal assistance** for construction through:
 - ◇◇ Grants
 - ◇◇ Loans
 - ◇◇ Loan guarantees
 - ◇◇ Insurance

(as contrasted with **direct** federal government contracts for construction).

DBRA Coverage

- ◇ Most of the related Acts are listed in 29 C.F.R. § 5.1(a). These laws include by reference the requirements for payment of prevailing wages determined in accordance with the DBA.

Examples:

- ◇◇ Federal Highway Administration provides grants to states for the reconstruction of roads and bridges on federal-aid highways.
- ◇◇ U.S. Department of Housing and Urban Development (HUD) finances the construction of low income residences on housing authority projects.
- ◇◇ Other federal agencies which assist construction through grants, loans, loan guarantees and insurance include the Departments of Health and Human Services, Education, and Environmental Protection Agency.
- ◇ The following DBRA statutes are frequently used to fund/assist construction:

National Housing Act
Housing Act of 1950
Federal Aid to Highways Acts
Federal Water Pollution Control Act
U.S. Housing Act of 1937
Housing and Community Development Act of 1974

- ◇ Some of the related Acts contain specific coverage criteria for the construction affected by the federal assistance they provide. Thus, a determination of whether the DB prevailing wage provisions apply requires an analysis of the actual labor standards provision in the related Act. For example:
 - ◇◇ The labor standards provision of the Housing and Community Development Act of 1974 does not apply to the rehabilitation of residential property that contains fewer than 8 units.
 - ◇◇ The DB labor standards provision of Title II of the National Affordable Housing Act of 1990, (HOME) does not apply if there are fewer than twelve HOME-assisted units in the project.
 - ◇◇ The labor standards provision of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) applies only to projects funded in whole or in part under Section 104 of the Act and not to clean-ups provided/funded through other sections of that Act.
- ◇ While DBA does not have any provision granting DOL the authority to waive its application, certain related statutes may provide for a waiver or exception by the administering agency.

DISTINGUISHING DBA VS. DBRA

- ◇ **DBA projects**: an agency of the federal government or the District of Columbia signs the contract. Such as:
 - ◇◇ Department of Veterans' Affairs
 - ◇◇ General Services Administration
 - ◇◇ Department of Defense
 - ◇◇ Department of the Interior

- ◇ **DBRA projects**: an agency or grant recipient, rather than the federal government signs the construction contract. For example:
 - ◇◇ On a Department of Housing and Urban Development assisted project, a local housing authority or a city or town may sign the construction contract.
 - ◇◇ On an Environmental Protection Agency funded contract for a sewer project, a local public works/water-sewer authority may sign the construction contract.
 - ◇◇ On an interstate highway project, a state highway department signs a contract for highway construction.

**FAIR LABOR STANDARDS ACT OF 1938,
AS AMENDED (FLSA)**

29 U.S.C. 201, *et seq.*

Purpose of FLSA

- ◇ The FLSA is the federal law of most general application concerning wages and hours of work. For most employment, the FLSA establishes minimum wage, overtime pay, recordkeeping, and child labor standards.
- ◇ The FLSA was enacted into law in 1938. It has been amended many times since to modify the scope of its coverage and revise the federal minimum wage. The FLSA established a nationwide overtime pay standard that continues in effect – a rate of not less than one and one-half times the “regular rate” of pay for all hours worked over 40 in a workweek. The basic minimum wage provisions of the FLSA are in section 6 of the Act, and overtime requirements in section 7, exemptions from both the minimum wage and overtime provisions in section 13(a), and exemptions from the overtime requirements in section 13(b).
- ◇◇ For example, under section 13(a)(1) of the FLSA, persons employed in a bona fide executive, administrative or professional capacity are exempt from that law's minimum wage and overtime requirements. The rules that apply to determining whether the exemption applies are in 29 C.F.R. Part 541, which defines the terms “any employee employed in a bona fide executive, administrative or professional capacity.” Employees who are exempt from the FLSA under these rules are not covered by DBA or SCA.

FLSA Requirements

- ◇ **Federal Minimum Wage:** The FLSA minimum wage of \$6.55 per hour took effective on July 24, 2008; and is \$7.25 per hour effective July 24, 2009. This minimum wage applies to covered nonexempt workers.
- ◇ **FLSA Overtime:** Covered nonexempt employees must receive overtime pay for hours worked over 40 per workweek (any fixed and regularly recurring period of 168 hours — seven consecutive 24-hour periods) at a rate not less than one and one-half times the regular rate of pay. The FLSA does not require overtime pay for work on weekends, holidays, or regular days of rest, unless overtime – work over 40 hours in the week – is worked on such days.
- ◇ **Hours Worked:** Hours worked ordinarily include all the time during which an employee is required to be on the employer's premises, on duty, or at a prescribed workplace.

- ◇ Recordkeeping: Employers must display an official poster outlining the requirements of the FLSA. Employers must also keep employee time and pay records.
- ◇ Youth Employment: FLSA provisions designed to protect the educational opportunities of minors and prohibit their employment in jobs and under conditions detrimental to their health or well-being allow the employment of youths 16 and 17 years old to be employed in any job not declared hazardous. There is no limit on the number of hours employees 16 years or older may work in any workweek.

FLSA Coverage

- ◇ The FLSA establishes two ways in which an employee can be covered by its requirements: "enterprise coverage" and "individual coverage."
 - ◇◇ Enterprise coverage applies to employees who work for certain businesses or organizations (or "enterprises") which are engaged in interstate commerce or the production of goods for commerce and which have at least two employees; and gross sales of not less than \$500,000 a year. Enterprise coverage also applies to government agencies, to schools (including preschools), to hospitals, and to institutions primarily engaged in the care of the sick, the aged, or the mentally ill who reside on the premises of such institutions.
 - ◇◇ In addition, when there is no enterprise coverage, FLSA standards apply to individual employees if they are "engaged in commerce or in the production of goods for commerce." Employees who come within individual coverage under the FLSA include those who: produce goods that will be sent out of state (such as a worker assembling components in a factory or a secretary typing letters in an office); regularly make telephone calls to persons located in other States; handle records of interstate transactions; are required to travel to other States; and perform janitorial work in buildings where goods are produced for shipment outside the State where the employee works.

FLSA Rules Importance for Government Contracts

- ◇ The minimum wage and/or overtime pay requirements of the FLSA may apply along with the wage and fringe benefit and overtime pay requirements of the government contract laws discussed in this reference book.
- ◇ Various terms, rules, and regulations established under the FLSA also apply to employment under the government contracts laws discussed in this resource book.

- ◇ The FLSA requires employers to keep records on wages, hours and other items, as specified in DOL recordkeeping regulations. Most of the information is of the kind generally maintained by employers in ordinary business practice and in compliance with other laws and regulations. The following records must be kept with respect to employees subject to the minimum wage and/or the overtime pay provisions of the FLSA:
 - ◇◇ Personal information, including employee's name, home address, occupation, sex, and birth date if under 19 years of age.
 - ◇◇ Hour and day when workweek begins,
 - ◇◇ Total hours worked each workday and each workweek.
 - ◇◇ Total daily or weekly straight-time earnings.
 - ◇◇ Regular hourly rate for any week when overtime is worked.
 - ◇◇ Total overtime pay for the workweek.
 - ◇◇ Deductions from or additions to wages.
 - ◇◇ Total wages paid each pay period.
 - ◇◇ Date of payment and pay period covered.

Records required for exempt employees differ from those for nonexempt workers, and special information is required for employees working under uncommon pay arrangements and employees to whom lodging or other facilities are furnished.

- ◇ DOL regulations that implement the FLSA requirements are set forth in Title 29 of the Code of Federal Regulations. For example:
 - ◇◇ 29 C.F.R. Part 519 – Records to Be Kept by Employers
 - ◇◇ 29 C.F.R. Part 531 – Wage Payments Under the Fair Labor Standards Act of 1938 (includes rules concerning when the reasonable cost or fair value of board, lodging or other facilities customarily furnished by the employer for the employee's benefit may be considered part of wages)
 - ◇◇ 29 C.F.R. Part 541 – Defining and Delimiting the Terms “Any Employee Employed In A Bona Fide Executive, Administrative, or Professional Capacity (Including Any Employee Employed In the Capacity of Academic Administrative Personnel or Teacher In Elementary or Secondary Schools), or In the Capacity of Outside Salesman”

- ◇◇ 29 C.F.R. Part 776 – Interpretative Bulletin on the General Coverage of the Wage and Hour Provisions of the Fair Labor Standards Act of 1938
- ◇◇ 29 C.F.R. Part 778 – Overtime Compensation
- ◇◇ 29 C.F.R. Part 785 – Hours Worked
- ◇◇ 29 C.F.R. Part 790 – General Statement As to the Effect of the Portal-to-Portal Act of 1947 on the Fair Labor Standards Act of 1938
- ◇◇ 29 C.F.R. Part 793 – Joint Employment Relationship Under Fair Labor Standards Act of 1938
- ◇ A common problem arises where contractors hire so-called independent contractors, who in reality should be considered employees. In determining whether an individual is an independent contractor, or an employee who may be subject to requirements of the FLSA, “Wage and Hour Fact Sheet No. 13” presents factors considered to be in determining whether there is an employment relationship under the FLSA. Significant factors include:
 - 1) The extent to which the services rendered are an integral part of the principal's business.
 - 2) The permanency of the relationship.
 - 3) The amount of the alleged contractor's investment in facilities and equipment.
 - 4) The nature and degree of control by the principal.
 - 5) The alleged contractor's opportunities for profit and loss.
 - 6) The amount of initiative, judgment, or foresight in open market competition with others required for the success of the claimed independent contractor.
 - 7) The degree of independent business organization and operation.
- ◇ Where such questions arise, please contact a local WHD office for guidance. To identify the WHD Office closest to you, you may call the Wage-Hour toll-free help line at 1-866-4USWAGE (1-866-487-9243). A customer service representative is available to assist you from 8am to 5pm in your time zone. Alternatively, see: <http://www.dol.gov/esa/contacts/whd/america2.htm>.

CONTRACT WORK HOURS AND SAFETY STANDARDS ACT (CWHSSA)

40 U.S.C. §§ 3701-3708

Purpose of CWHSSA

- ◇ Enacted in 1962 – consolidated a number of “eight hour” laws, some dating back to the 1890s, and originally provided for overtime pay after 8 hours a day on federal construction contracts, and provided for overtime pay after 40 hours a week.

CWHSSA Requirements 40 U.S.C. § 3702.

- ◇ CWHSSA requires overtime pay for laborers and mechanics, including guards and watchmen, at a rate of one and one-half times the basic rate of pay for hours worked on **covered contracts** in excess of 40 in a workweek.
- ◇ Effective January 1, 1986, the daily (8-hour) overtime requirement was eliminated. Therefore, like the FLSA, CWHSSA requires overtime pay after 40 hours.
- ◇ In addition to back wages for unpaid overtime hours, CWHSSA also provides for an assessment of **liquidated damages** at the rate of \$10 per day for each day that each laborer and mechanic worked without payment of the required overtime compensation.
- ◇ In those situations where there are concurrent FLSA and CWHSSA violations, the back wages are generally computed and reported under CWHSSA rather than FLSA. This is because under CWHSSA:
 - ◇◇ The back wages can be withheld to ensure back wage restitution.
 - ◇◇ Liquidated damages may be assessed against the employer.
 - ◇◇ Debarment action may be initiated.
- ◇ The safety and health provisions of CWHSSA are within the administrative jurisdiction of the Occupational Health and Safety Administration of DOL, rather than the WHD.

CWHSSA Coverage 40 U.S.C. §§ 3701.

- ◇ CWHSSA covers most federal contracts which may require or involve the employment of **laborers** or **mechanics**. In addition to laborers and mechanics

covered under DBA/DBRA, CWHSSA also specifically covers **guards** and **watchmen**. 40 U.S.C. §§ 3701(b)(2).

- ◇ CWHSSA applies to DBA, SCA, and DBRA contracts in excess of \$100,000.
- ◇ CWHSSA applies to contracts in excess of \$100,000 —
 - ◇◇ to which the **Federal Government or an agency or instrumentality of the Government, or a territory of the United States**, or the District of Columbia is a party; or
 - ◇◇ which is made on behalf of the Government **or an Agency or instrumentality thereof, or a territory**, or the District of Columbia, or
 - ◇◇ which is a contract for work financed at least in part by loans or grants from, or loans insured or guaranteed by, the Government or an agency or instrumentality under any federal law providing wage standards for the work.
 - ◇◇ However, by its terms, CWHSSA does not apply where federal assistance is only in the nature of a loan guarantee or insurance. 40 U.S.C. §§ 3701. For example, HUD assistance in the form of loan guarantees under the National Housing Act is not subject to CWHSSA.
- ◇ CWHSSA is self-executing. The failure to include CWHSSA stipulations in a contract does not preclude its application.
- ◇ CWHSSA has no job site limitation. If an employee performs part of the construction work at the job site, part of the work at a shop, and/or travels between covered contract work locations, the statute applies to all hours of the contract work performed by covered workers.

CWHSSA Exceptions 40 U.S.C. §§ 3701(b)(3) and 3706 and 29 C.F.R. § 5.15.

- ◇ CWHSSA does not apply to contracts for:
 - ◇◇ Transportation by land, air or water.
 - ◇◇ Transmission of intelligence.
 - ◇◇ Purchase of supplies or materials or articles ordinarily available in the open market.
 - ◇◇ Work required to be done in accordance with the provisions of the PCA.
 - ◇◇ Construction or services where the contract is not greater than \$100,000.
 - ◇◇ Agreements entered into by or on behalf of the Commodity Credit Corporation for storage in or handling by commercial warehouse of certain items including grains, beans, seeds, cotton, wool and naval stores.
 - ◇◇ Certain sales of surplus power by the Tennessee Valley Authority (TVA).
 - ◇◇ Work performed in a workplace within a foreign country.

COPELAND “ANTI-KICKBACK” ACT (CA)

(40 U.S.C. § 3145 and 18 U.S.C. § 874)

CA Purpose, Requirements, and Coverage

- ◇ The CA and implementing regulations in 29 C.F.R. Part 3 apply to DBA and DBRA contracts and provide for the following safeguards:
 - ◇◇ Prohibits the “kickbacks” of wages and back wages.
 - ◇◇ Require contractors on covered projects to submit weekly a “**Statement of Compliance**” (i.e. certifying that the contractor has paid the required wages). *See* 29 C.F.R. §3.3 and 3.4, and in the DB contract clauses, 29 C.F.R. § 5.5(a)(3); FAR at 48 C.F.R. § 52.222-8.)
 - ◇◇ Regulate payroll deductions from wages.
 - ◇◇ Specify methods of payment of wages.

CA Regulation of payroll deductions

- ◇ Rules at 29 C.F.R. § 3.5 permit the following deductions from wages **without DOL approval**:
 - (1) Deductions for social security or federal or state income tax withholding.
 - (2) Deductions for bona fide prepayment of wages.
 - (3) Deductions for court ordered payments.
 - (4) Deductions for contributions to fringe benefit plans, provided that the deduction is not prohibited by law, that it is either voluntarily consented to by the employee in writing in advance of the time the work is done or provided for in a collective bargaining agreement, that no profit or other benefit is obtained by the contractor, and that the deduction serves the convenience of the employee.
 - (5) Deductions for purchase of U.S. savings bonds when voluntarily authorized by the employee.
 - (6) Deductions to repay loans or to purchase shares in a credit union.

- (7) Deductions voluntarily authorized for contributions to organizations such as the Red Cross, United Way, or similar charitable organizations.
 - (8) Deductions to pay regular union initiation fees and membership dues, provided that a collective bargaining agreement provides for such deductions.
 - (9) Deductions for the “reasonable cost” of board, lodging, or other facilities meeting the requirements of section 3(m) of FLSA.
 - (10) Deductions for the cost of safety equipment purchased by the employee if such equipment is not required by law to be furnished by the employer, if such deduction is not prohibited by FLSA or other law, and if the cost on which the deduction is based does not exceed the actual cost to the employer.
- ◇ Pursuant to 29 C.F.R. § 3.6, any contractor may apply to the DOL for permission to make any deductions not listed in 29 C.F.R. § 3.5. DOL **may approve payroll deductions** whenever **all** of the following conditions are met:
- (1) The contractor does not make a profit or benefit directly or indirectly from the deduction.
 - (2) The deduction is not otherwise prohibited by law.
 - (3) Either the employee voluntarily consented to the deduction in writing in advance of the time the DBA/DBRA work is performed or the deduction is provided under the terms of a bona fide collective bargaining agreement.
 - (4) The deduction serves the convenience and interest of the employee.

CA “Statement of Compliance”

- ◇ Contractors and subcontractors on DBA/DBRA-covered construction projects must submit a weekly “Statement of Compliance” certifying compliance with the DBA/DBRA requirements during the preceding workweek. This “statement of compliance” is usually referred to as the certified payroll. 29 C.F.R. Part 3, 29 C.F.R. § 5.5(a)(3) and FAR 48 C.F.R. § 52.222-8.
- ◇ Falsification of a certified payroll is a criminal violation that can result in a fine, up to 5 years in prison, or both. 18 U.S.C. § 1001.

CA “Anti-Kickback” provision 18 U.S.C. § 874.

- ◇ The CA provides penalties to preclude a contractor or subcontractor from in any way inducing an employee to give up any part of the compensation to which he or she is entitled.
- ◇ The “anti-kickback” provision of the CA provides that whoever induces any person working on a federally funded or assisted construction project to give up any part of the compensation to which he/she is entitled is a criminal violation punishable by a fine, 5 years in prison, or both.

As early as possible, the WHD should be notified of potential criminal violations such as the kickback of wages and the falsification of certified payroll records.

WALSH-HEALEY PUBLIC CONTRACTS ACT (PCA)

(41 U.S.C. §§ 35-45)

PCA Purpose and Requirements

- ◇ The PCA provides labor standards for employees working on federal contracts over \$10,000 for the manufacturing or furnishing of goods, supplies, articles, or equipment. 41 C.F.R. Part 50-201.
- ◇ The PCA requires covered contracts to contain minimum wage, maximum hours, and safety and health standards, and prohibits the employment of children under 16 years of age and convict labor. 41 U.S.C. § 50-201.3.
- ◇ The minimum wage requirement under PCA is the FLSA minimum wage and the PCA overtime requirements are also the same as the FLSA. 41 C.F.R. §§ 50-201.102 and 50-202.2.
- ◇ The PCA requires the posting of the “Notice to Employees Working on Government Contracts” (WH Publication 1313) at the site of the contract work and to maintain employment records. 41 C.F.R. §§ 50-201.3(f), 50-201.501 – 50-201.502.
- ◇ The WHD has sole PCA enforcement responsibility, except that the Occupational Safety and Health Administration (OSHA) enforces the safety and health provisions of the Act. 41 C.F.R. § 50-201.2.

PCA Coverage

- ◇ The PCA applies to manufacturing and supply contracts exceeding \$10,000 (including indefinite-delivery contracts, basic ordering agreements, and blanket purchase agreements) and to subcontracts under section 8(a) of the Small Business Act. 41 C.F.R. § 50-201.1.
- ◇ The PCA applies to employees engaged in or connected with the manufacture, fabrication, assembling, handling, supervision, or shipment of materials, supplies, articles, or equipment required under the contract. 41 C.F.R. § 50-201.101.
 - ◇◇ The PCA does not apply to employees performing only office or custodial work;
 - ◇◇ The PCA does not apply to any employee employed in a bona fide executive, administrative, professional, or outside salesman capacity, as those terms are defined by the FLSA regulations. 29 C.F.R. Part 541.

- ◇ The PCA applies to covered contracts or work performed in the 50 States, the District of Columbia, Puerto Rico, and the Virgin Islands. 41 C.F.R. § 50-201.603(b).
- ◇ Section 7201(a) of the Federal Acquisition Streamlining Act (FASA) of 1994 repealed the PCA requirement that every contractor be “a manufacturer of or a regular dealer . . . in the performance of the contract,” (41 U.S.C. § 35(a)) . Since this amendment became effective on October 1, 1995, PCA includes “a manufacturer, regular dealer,” or any supplier/distributor of the materials, supplies, articles, or equipment to be manufactured or supplied under the contract as eligible contractors. All Agency Memorandum No. 180.

PCA Statutory exemptions 41 U.S.C. § 43.

- ◇ Section 9 of the PCA exempts contracts for:
 - ◇◇ Open market purchases or a purchases made without advertising for bids under circumstances where immediate delivery is required by the public exigency. 41 C.F.R. § 50-201.4(a).
 - ◇◇ Perishables, including dairy, livestock, and nursery products. 41 C.F.R. § 50-201.4(b).
 - ◇◇ Agricultural or farm products processed for first sale by the original producers. 41 C.F.R. § 50-201.4(c).
 - ◇◇ Purchase of agricultural commodities or products by the Secretary of Agriculture for the. 41 C.F.R. § 50-201.4(d).
 - ◇◇ Common carrier carriage of freight or personnel by vessel, airplane, bus, truck, express, or railway line, where published tariff rates are in effect. 41 C.F.R. § 50-201.4(e).
 - ◇◇ Furnishing of service by radio, telephone, telegraph, or cable companies, subject to the Federal Communications Act of 1934 (48 Stat. 1064 as amended; 47 U.S.C. Chapter 5). 41 C.F.R. § 50-201.4(f).

PCA Administrative Exemptions

- ◇ The following contracts have been exempted from the PCA pursuant to the procedures required under section 6 of PCA. 41 C.F.R. §§ 50-201.601 – 50-201.603.
 - ◇◇ Contracts for public utility services including electric light and power, water, steam, and gas. 41 C.F.R. § 50-201.603(a).

- ◇◇ Contracts for materials, supplies, articles, or equipment no part of which will be manufactured or furnished within the geographic limits of PCA. 41 C.F.R. § 50-201.603(b).
- ◇◇ Contracts covering purchases against the account of a defaulting contractor where the PCA stipulations were not included in the defaulted contract. 41 C.F.R. § 50-201.603(c).
- ◇◇ Contracts awarded to sales' agents or publisher representatives, for the delivery of newspapers, magazines or periodicals by the publishers thereof. 41 C.F.R. 41 § 50-201.603(d).

**THE MCNAMARA-O'HARA SERVICE
CONTRACT ACT (SCA)**
(41 U.S.C. §§ 351-358)

SCA Legislative History and Purpose

- ◇ The SCA became effective in January 1966. The law was amended in 1972 and 1976. It is the most recent of the government contract labor standards laws administered by the WHD.
- ◇ The SCA was enacted to, in effect, "close the gap" in labor standards protection between supply contracts subject to the PCA and construction contracts subject to DBA. (Services were the only remaining category of federal procurement not covered by labor standards law.)
- ◇ The SCA was intended to remove wages as a factor in the competition for federal service contracts by requiring the payment of not less than the locally prevailing wage rates (apart from the FLSA minimum wage) and fringe benefits, or in certain cases, the wage rates and fringe benefits contained in a predecessor contractor's collective bargaining agreement (section 4(c) of the Act). (Labor costs are often the predominant factor affecting bids on federal service contracts being awarded to the lowest bidder.)

SCA Requirements

- ◇ The SCA applies to most contracts entered into by the United States or the District of Columbia that are principally for the furnishing of services through the use of service employees.
- ◇ The major SCA labor standards provisions are:
 - ◇◇ Prevailing minimum wage and fringe benefit compensation standards for service employees working on contracts over \$2,500, and FLSA minimum wages for contracts of \$2,500 or less.
 - ◇◇ Recordkeeping and posting requirements.
 - ◇◇ Safety and health protection.
- ◇ WHD has sole SCA enforcement responsibility of the wage and fringe benefit requirements of SCA, while the Occupational Safety and Health Administration (OSHA) enforces the safety and health provisions of the SCA.

SCA Coverage 29 C.F.R. §§ 4.107 – 4.113.

What federal government contracts are subject to SCA?

- ◇ Contracts entered into by any agency or instrumentality of the federal government, whether by the executive, judicial, or legislative branches, or by the District of Columbia. Examples: the Department of Defense, the Department of the Interior’s General Services Administration, etc.
- ◇ Contracts issued by wholly owned corporations of the government. Examples: Tennessee Valley Authority, Postal Service.
- ◇ Contracts with non-appropriated fund activities, i.e., concession contracts. Examples: military post exchanges (PX's), cafeteria boards in federal buildings.
- ◇ Contracts between a federal agency and a state or local government are covered. Contracts between federal agencies are not covered (examples: DOL and the General Services Administration).
- ◇ SCA applies only to federal contracts, not to federally “assisted” contracts.

Three elements necessary for coverage:

1. The contract is principally (i.e., primarily) for services (as distinguished from construction or manufacturing or some other purpose).
2. The contract involves work to be performed within the United States as defined in section 8(d) of the SCA.

The SCA applies to service contracts performed in any of the 50 States, the District of Columbia, Puerto Rico, the Virgin Islands, Outer Continental Shelf lands, American Samoa, Guam, Wake Island, Johnston Island, and the Northern Marianas. (Canton Island, Eniwetok Atoll, and Kwajalein Atoll are now independent and no longer a part of the U.S. even though still listed in the statute.)

Contracts that are performed entirely outside the U.S. are not covered. For example, a weather service contract performed on a vessel operating exclusively in international or foreign waters.

3. The contract is performed through the use of service employees as defined in section 8(b) of the SCA regardless of any contractual relationship that may be alleged to exist between a contractor and an employee.

Section 8(b) of the Act defines “service employee” as any person engaged in the performance of a covered contract except those persons who individually qualify for exemption as bona fide executive, administrative or professional employees as defined in 29 C.F.R. § Part 541. 29 C.F.R. § 4.113(b); 29 C.F.R. § 4.156.

Coverage of service employees depends on whether they perform the work called for by an SCA-covered contract. 29 C.F.R. § 4.155.

- ◇ Examples of contracts covered by SCA. 29 C.F.R. § 4.130.
 - ◇◇ Security and guard services
 - ◇◇ Janitorial services
 - ◇◇ Cafeteria and food service
 - ◇◇ Grounds maintenance
 - ◇◇ Laundry and dry cleaning
 - ◇◇ Data processing
 - ◇◇ Electronic equipment maintenance and operation
 - ◇◇ Chemical testing and analysis
 - ◇◇ Support services at government installations
 - ◇◇ Drafting and illustrating, mapping and charting services
 - ◇◇ Operating and maintenance of government bases
 - ◇◇ Warehousing

- ◇ Examples of contracts not covered by SCA. 29 C.F.R. § 4.134.
 - ◇◇ Any contract whose principal purpose is something other than the procuring of services through the use of service employees – for example, a construction, supply or manufacturing contract.
 - ◇◇ Contracts for the leasing of space.
 - ◇◇ Contracts for professional medical services (where the employment of “service employees” is not involved or is a minor factor).
 - ◇◇ Contracts to operate or manage an entire federal facility or program (*i.e.*, government-owned contractor/privately-operated “GOCO” or “GOPO”).

Sometimes contracts are entered into with a prime contractor to operate a federal facility or program for and on behalf of the government. Because the contractor is in effect operating in the place of the government as an “agent for the government,” such a contract is not considered subject to the SCA. However, contracts entered into by the operating contractor with secondary contractors, for and on behalf of the government, that have services as their principal purpose are subject to SCA. 29 C.F.R. § 4.107(a).

SCA Statutory Exemptions SCA § 7; 29 C.F.R. §§ 4.115 – 4.122.

The SCA does not apply to the following:

- ◇ Any contracts of the United States for construction, alteration, and/or repair, including painting and decorating, of public buildings or public works (contracts subject to DBA). 29 C.F.R. § 4.116.
- ◇ Any work (work not contract) required to be done in accordance with provisions of the PCA. 29 C.F.R. § 4.117.
- ◇ Any contract for the carriage of freight or personnel by vessel, airplane, bus, truck, express, railway line, or oil or gas pipeline where published tariff rates are in effect (29 C.F.R. § 4.118). The effect of this exemption has become limited in scope due to changes in transportation laws. (See All Agency Memorandum No. 185 for further information.)
 - ◇◇ This exemption applies only to contracts for carriage by a common carrier. A transportation service contract is exempt only if the service is actually governed by published tariff rates in effect pursuant to state or federal law. A contract between the government and the carrier would be evidenced by a government bill of lading citing the published tariff rates.
 - ◇◇ Contracts for ambulance or taxicab services are typically not exempt because they are usually not deemed common carriers and/or the transportation is not governed by published tariff rates.
 - ◇◇ Mail haul contractors are not within the scope of this exemption because “mail” is not considered to be “freight” under federal law. (However, see the discussion of relevant regulatory exemptions, below.)
 - ◇◇ Contracts principally for packing, crating and warehousing of household goods are also not exempt, even though performed by an otherwise common carrier, because the local hauling is a minor, incidental purpose of the contract.

- ◇ Any contract for the furnishing of services by radio, telephone, telegraph, or cable companies, subject to the Communications Act of 1934. 29 C.F.R. § 4.119.
- ◇ Any contract for public utility services, including electric light and power, water, steam, and gas. 29 C.F.R. § 4.120.
- ◇ Any employment contract providing for direct service to a federal agency by an individual or individuals. 29 C.F.R. § 4.121.
- ◇ Any contract with the U.S. Postal Service, the principal purpose of which is the operation of postal contract stations. 29 C.F.R. § 4.122.

SCA Regulatory Exemptions SCA § 4(b); 29 C.F.R. § 4.123.

- ◇ The SCA authorizes DOL to provide reasonable limitations, variations, tolerances and exemptions from provisions of SCA. but only in special circumstances where it is found that such action is necessary and proper in the public interest or to avoid serious impairment to the conduct of government business and is in accord with the remedial purpose to protect prevailing labor standards.

INTERACTION AMONG THE GOVERNMENT CONTRACTS LABOR STANDARDS STATUTES

Standard Contract Clauses

◇	DBA/DBRA	29 C.F.R. § .5.5(a)	FAR: 48 C.F.R. §§ 52.222-5 through 52.222-15.
◇	SCA	29 C.F.R. § 4.6.	FAR: 48 C.F.R. §§ 52.222.41 through 52.222-44, 52.222-48 and 52.222-49.
◇	PCA	41 C.F.R. § 50-201.3	FAR: 48 C.F.R. §§ 52.222-20.
◇	CWHSSA	29 C.F.R. § 5.5(b)	FAR: 48 C.F.R. §§ 52.222-4.

Contracts Requiring PCA and DBA

- ◇ If a PCA-covered contract involves **more than an incidental** amount of construction work, it is also subject to the DBA. For example:
 - ◇ Contract for the supply of a security system that requires:
 - ◇◇ Replacement of existing conduit,
 - ◇◇ Laying cable, and
 - ◇◇ Tearing out and replacing walls.
 - ◇ Contract for the supply and installation of modular furniture or energy-efficient lighting fixtures that requires:
 - ◇◇ Bolting furniture or fixtures to floors, walls and/or ceilings,
 - ◇◇ Modifying walls, floors and/or ceilings to accommodate shelving,
 - ◇◇ Installing electrical connections for desk area outlets, or
 - ◇◇ Installing new ballasts and/or lighting fixtures.

Contracts Requiring SCA and DBA

- ◇ SCA contracts principally for services which contain specific requirements for substantial amounts of construction, reconstruction, alteration, or repair work physically or functionally separate from the other work called for by the contract, are also subject to the DBA.

- ◇ DBA would apply to a contract that is principally for services, but also involves construction work. DBA would apply to an SCA contract, which is principally for services if a substantial amount of construction work is also necessary for performance of the contract and the construction work is physically or functionally **segregable** from the other contract work. 29 C.F.R. § 4.116(c)(2); FAR 48 C.F.R. § 22.402(b).
- ◇◇ **Substantial** relates to the type and quantity of construction work to be performed; not merely its value, in dollars or cost percentages, compared to the total contract value, and
- ◇◇ **Segregable** means that as a practical matter the construction work is functionally separate from, and is capable of being performed on a segregated basis from the other work called for by the contract. 29 C.F.R. § 4.116(c)(2); FAR 48 C.F.R. § 22.402(b).
- ◇ **Examples:**
 - ◇◇ Contract for furnishing cafeteria and food services that includes requirements to renovate and paint the cafeteria and kitchen. While this is an SCA contract, the construction specifications of the contract are DBA-covered.
 - ◇◇ Base maintenance and support contract that provides services for operation of a military base and requires substantial and segregable construction work orders such as:
 - ◇◇◇ Painting base housing and buildings.
 - ◇◇◇ Refinishing floors.
 - ◇◇◇ Reroofing buildings.
- ◇ Questions sometimes arise as to whether the work required under an individual work order, task order or service call is for SCA maintenance or DBA painting/repairs.
 - ◇◇ Defense Federal Acquisition Regulation Supplement guidance regarding installation support contracts advises that where the distinction is unclear:
 - ◇◇◇ Individual service calls or orders which will require a total of 32 or more work-hours to perform shall be considered to be repair work subject to the DBA. 48 C.F.R. 222.402-70(d)(1).
 - ◇◇◇ Painting work of 200 square feet or more to be performed under an individual service call or order shall be considered to be subject to the

DBA regardless of the total work-hours required. 48 C.F.R. 222.402-70(d)(2).

- ◇◇◇ Also, contracting officers may not avoid application of the DBA by splitting individual tasks between orders or contracts. 48 C.F.R. 222.402-70(f).
- ◇◇ “Painting and decorating” are explicitly included in DBA coverage by the language of the Act, specifically that refers to its applicability to contracts “for construction, alteration, or repair, including painting and decorating, of public buildings and public works.”

Distinguishing between PCA and SCA

- ◇ A federal contract exclusively for services is not covered by the PCA. It is covered by the SCA. 29 C.F.R. § 4.117.
- ◇ A federal contract in excess of \$10,000 for the manufacture or furnishing of materials, supplies, articles, or equipment is covered by the PCA. Contracts that require services that are incidental to or are an integral part of the contract requirements for the manufacture or furnishing of materials, supplies, articles, or equipment, are not covered by the SCA. 41 C.F.R. § 50-201.1.
- ◇ A federal contract exceeding \$10,000 that is principally for services and also contains a significant manufacture or supply requirement has coverage under
 - ◇◇ SCA for the services performed under the contract, and
 - ◇◇ PCA for the work connected with the manufacture, fabrication, assembling, handling, supervision, or shipment under the contract.

29 C.F.R. § 4.117(a).
- ◇ PCA applies to contracts principally for re-manufacturing of equipment that is so extensive as to be equivalent to manufacturing. 29 C.F.R. §§ 4.117(b)(1)-(2).
 - ◇◇ The work, which must be performed in a facility owned or operated by the contractor, includes:
 - ◇◇◇ Major overhaul of an item, equipment, or material which is degraded or inoperable that is restored to its original life expectancy or nearly so. Manufacturing processes similar to those used in the manufacturing of the item or equipment are utilized; or,
 - ◇◇◇ Major modification of an item, equipment, or material, which is wholly or partially obsolete, that is rebuilt or reassembled. The

contract work results in a substantially modified item in a usable and serviceable condition.

- ◇ In contrast, SCA covers contracts for periodic and routine maintenance, preservation, care, adjustment, upkeep, or servicing of equipment to keep it in usable, serviceable, working order. 29 C.F.R. § 4.117(b)(3):
 - ◇◇ Contracts that typically are billed on an hourly rate – labor plus materials and parts – basis.
 - ◇◇ Contracts to repair motorized vehicles, or appliances; to inspect, test, calibrate, lubricate, tune-up, or replace internal parts of equipment; and to reupholster, recondition, repair, and refinish furniture.

Distinguishing between SCA and DBA

- ◇ An important coverage concern is distinguishing DBA and SCA work under federal contracts. This is particularly important because many federal agency procurement officials are responsible, in the first instance, to designate application of DBA and SCA requirements to different work under single contracts.
 - ◇◇ Routine and recurring maintenance work is covered by SCA and typically involves the activity of keeping something in such a condition that it may be continuously utilized.
 - ◇◇ By contrast, DBA typically covers activities such as rehabilitation or restoration of a facility..
 - ◇◇ Other factors considered in interpreting the application of the statutes are:
 - ◇◇◇ whether the activity is continuous in nature as opposed to a single incident repair or replacement job.
 - ◇◇◇ how much time is necessary to complete the task, i.e., is the activity accomplished in an hour or two hours of work versus days, weeks or months for repair of a particular building component.
- ◇ SCA covered maintenance work vs. DBA repair work:
 - ◇◇ SCA covered maintenance work – Work is typically scheduled, routine, and recurring. The workers are typically engaged in performing ongoing, activities needed to keeping something in such a condition that it may be continuously utilized –
 - ◇◇◇ Activity is continuous in nature;

- ◇◇◇ Activity may include touch-up painting less than 200 square feet;
- ◇◇◇ Activity generally accomplished within 32 hours.
- ◇◇ DBA repair work – Typically covers activities such as the restoration of a facility by replacement, overhaul, or reprocessing of constituent parts or materials.
 - ◇◇◇ Activity is a one-time fix to something not functioning;
 - ◇◇◇ Activity generally takes more than 32 hours for repair of a particular building component;
 - ◇◇◇ Activity involves the alteration, relocation, or rearrangement of architectural and structural components of a facility that affect the structural strength, stability, safety, capacity, efficiency, or usefulness of the facility. Off-site alterations of non-fixed components that are not an integral part of the building or work are likely to be SCA-covered activities.
- ◇ An important factor in determining coverage is whether the activity is undertaken as **part of a construction** project. For example:
 - ◇◇ **DBA** applies when janitorial, cleanup, landscaping, carpet laying, and drapery installation activities are undertaken as an integral part of or in conjunction with new construction, such as under a construction contract where they precede and are conditional to acceptance of a building or public work by the owner.
 - ◇◇ If performed after construction contractor and subcontractors have finished, left the site, and the contracting agency has accepted the building, the work would be SCA.
 - ◇◇ **SCA** applies when the same activities are scheduled as part of routine maintenance and upkeep, such as replacing worn-out carpeting in a public building, daily janitorial work, weekly mowing of grass, etc.
- ◇ Demolition work 29 C.F.R. § 4.116(b):
 - ◇◇ **SCA** applies where contract for the demolition or dismantling of buildings or other structures, and does not contemplate further construction activity at the site; or
 - ◇◇ **DBA** applies where contract for clearing of the site is to be followed by the construction of a public building or public work at the same location

- ◇◇ All Agency Memorandum No. 190 provides a discussion of the application of these labor standards to demolition contracts.

- ◇ Exploratory drilling and well drilling:
 - ◇◇ **SCA** applies when the drilling is for a purpose other than part of construction, such as exploratory drilling to obtain data to be used in engineering studies. 29 C.F.R. § 4.130(a)(16);

 - ◇◇ **SCA** may apply to a federal contract for drilling for to obtain data to be used in planning of a construction project that has not been authorized or for which no funds have been appropriated.

 - ◇◇ **DBA** applies to drilling holes for water wells, oil wells, or other structures and improvements that fall within the term “work” as defined by 29 C.F.R. § 5.2(i).

- ◇ On DBRA projects, these considerations do not apply, as there is no SCA coverage with respect to such contracts.

DISPUTES CONCERNING COVERAGE DETERMINATIONS

- ◇ The contracting agencies have the initial responsibility for determining which labor standards statutes apply to particular contracts.
- ◇ WHD provides compliance assistance regarding appropriate application of prevailing wage statutes.
- ◇ DOL has the authority for issuing final determinations on coverage. Each final ruling is based on the facts of a specific situation and how those facts relate to the coverage principles set forth by regulation, statute, and pertinent case law.
- ◇ In making coverage determinations, WHD generally solicits input from the affected parties.
- ◇ Final WHD rulings may be appealed to the ARB (ARB) under 29 C.F.R. § 7 regarding DBA and DBRA cases, and 29 C.F.R. § 8 regarding SCA cases. On April 17, 1996, the ARB was established, to it were transferred the authorities and responsibilities previously delegated by the Secretary of Labor to the Wage Appeals Board (WAB) and the Board of Service Contract Appeals, and the latter Boards were eliminated. (See 61 FR 19982).
- ◇ The members of the ARB are appointed by the Secretary of Labor to review final rulings and interpretations on wage determinations, coverage, and enforcement issues under the DBRA and SCA. The Board has the full authority of the Secretary of Labor in such matters.