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VARIANCES & EXEMPTIONS**

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TOLERANCES, AND EXEMPTIONS**

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## **ADMINISTRATIVE LIMITATIONS, VARIANCES, TOLERANCES, AND EXEMPTIONS**

Section 4(b) of the SCA authorizes DOL to provide reasonable limitations, variations, tolerances and exemptions from provisions of the SCA, but only in special circumstances where it is necessary and proper in the public interest or to avoid serious impairment of government business and is in accord with the remedial purpose to protect prevailing labor standards. SCA § 4(b) and 29 CFR 4.123.

## **VARIANCE TO SCA PREVAILING WAGE REQUIREMENTS FOR CERTAIN SERVICE EMPLOYEES**

### **Workers With Disabilities** 29 C.F.R. § 4.6(o).

Workers with disabilities who are employed under certificates issued by the WHD may be paid at “special minimum wage” rates below the rates that would otherwise be required for such work.

- ◇ SCA contractors are allowed to pay less than the SCA prevailing wage rates to workers with disabilities in competitive employment, workers with disabilities in rehabilitation facilities, and student learners, in accordance with section 14 of the Fair Labor Standards Act (FLSA).
- ◇ Section 14 of the FLSA provides for the employment of certain workers at rates below the federal minimum wage to the extent necessary in order to prevent curtailment of employment opportunities . As stated in section 14(c):

The Secretary, to the extent necessary to prevent curtailment of opportunities for employment, shall by regulation or order provide for the employment, under special certificates, of individuals . . . whose earning or productive capacity is impaired by age, physical or mental deficiency, or injury, at wages which are –

(A) lower than the [FLSA] minimum wage;

(B) commensurate with those paid to non-handicapped workers employed in the vicinity in which the individuals under the certificates are employed, for essentially the same type, quality, and quantity of work; and

(C) related to the individual’s productivity.

The FLSA further requires employers to provide written assurances that the hourly wage rates of individuals will be reviewed regularly, and that the employees’ wages will be adjusted to reflect changes in the locally prevailing wages paid to experienced workers who do not have disabilities performing essentially the same work.

### **Certification**

- ◇ Employers must obtain an authorizing certificate from the WHD prior to paying special minimum wages to employees who have disabilities for the work being performed. Applications are available from the WHD’s Regional Offices. Completed applications must be mailed to the following address: U.S. Department of Labor, Employment Standards Administration, Wage and Hour

Division, National Certification Team, 514, 230 South Dearborn Street, Room 524, Chicago, Illinois 60604-1591.

### Disability

- ◇ The fact that a worker may have a disability is not in and of itself sufficient to warrant the payment of a special minimum wage. Section 14(c) does not apply unless the disability actually impairs the worker's earning or productive capacity for the work being performed. A worker who has disabilities for the job being performed is one whose earning or productive capacity is impaired by a physical or mental disability, including those relating to age or injury. Disabilities which may affect productive capacity include blindness, mental illness, mental retardation, cerebral palsy, alcoholism and drug addiction.

### Commensurate Rate

- ◇ A special minimum wage is a wage paid a worker with a disability that is **commensurate** with that worker's individual productivity compared to the wages and productivity of experienced workers who do not have disabilities performing essentially the same type, quality, and quantity of work in the vicinity where the worker with a disability is employed. The commensurate wage is always a special minimum wage, *i.e.* a wage below that required by Section 6 of the FLSA or below the rate required under an applicable SCA wage determination. The commensurate rate is determined by the employer in accordance with 29 C.F.R. Part 525.

The key elements in determining commensurate rates are:

- ◇◇ Determining the standard for workers who do not have disabilities, the objective gauge against which the productivity of the worker with a disability is measured.
- ◇◇ Determining the prevailing wage. Most SCA contracts include a wage determination specifying the prevailing wage rates to be paid for work on the SCA contract. (On SCA contracts funded by appropriated funds, the contract will be amended annually to include a new prevailing wage determination.)
- ◇◇ Evaluating the quantity and quality of the productivity of the worker with the disability.
- ◇ The productivity of hourly rate workers must be reevaluated at least every six months. Also, all special minimum wages must be reviewed and adjusted regularly to assure that they reflect changes in locally prevailing wages. Where a worker is performing work subject to the SCA, the wage rate listed on the wage determination for the classification of work performed is the prevailing wage. If a covered contract does not contain a wage determination, (because the

contract is for less than \$2,500, or fewer than six service employees and no wage determination was available for the contract work to be performed), the employer should determine the prevailing wage rate in accordance with instructions provided at 29 C.F.R. § 525.10.

#### Fringe Benefits and Overtime

- ◇ Workers paid special minimum wages must receive the **full** fringe benefits (or cash equivalents) listed on the wage determination when performing work subject to the SCA. Temporary and part-time employees are entitled to an amount of the fringe benefits specified in an applicable wage determination that is proportionate to the amount of time spent in covered work. SCA makes no distinction, with respect to its compensation provisions, between temporary, part-time, and full-time employees.
- ◇ Vacation pay and holiday pay may be based on the commensurate wage rate.
- ◇ Generally, workers with disabilities are subject to the overtime provisions of the FLSA and/or CWHSSA and must be paid at least 1½ times their regular rate of pay for all hours worked over 40 in a workweek.

#### FLSA Minimum Wage Application to Employees Who Do Not Perform Work Subject to the SCA in an Establishment where SCA Contract Work is Performed

- ◇ Section 6(e)(1) of the FLSA extends application of the FLSA minimum wage to employees not employed on the SCA contract. Thus, for example, in a work center, where SCA contract work is performed, certain staff and employees not working on the service contract must be paid at least the FLSA minimum wage. (Commensurate rates would continue to apply to the disabled workers employed under special minimum wage certificates.)

#### Applicable Regulations

- ◇ Regulations set forth at 29 C.F.R. Part 525, “Employment of Workers with Disabilities under Special Certificates” govern the issuance of certificates authorizing the employment of workers with disabilities at special minimum wages pursuant to section 14(c) of the FLSA. See also the SCA Regulations at 29 C.F.R. § 4.6(o).

#### **Apprentices** (29 C.F.R. § 4.6(p)).

- ◇ Apprentices will be permitted to work at less than the SCA predetermined rate for the work they perform when they are employed and individually registered in a “bona fide” apprenticeship program registered with a State apprenticeship agency that is recognized by the DOL, or, if no such recognized agency exists in a State,

under a program registered with the DOL's Employment Training Administration's Office of Apprenticeship. See also 29 C.F.R. Part 29.

- ◇ The terms and conditions of the approved program will be followed in the employment of apprentices.
  - ◇◇ Wage rates paid apprentices shall not be less than the wage rate for their level of progress set forth in the registered program, usually expressed as a percentage of the journeyman's rate in the applicable wage determination.
  - ◇◇ The allowable ratio of apprentices to journeymen employed on the contract work shall not be greater than the ratio permitted to the contractor under the registered program.
- ◇ Any employee who is not registered as an apprentice in an approved program shall be paid the wage rate and fringe benefits contained in the applicable wage determination for the journeyman classification of work actually performed.

## **CONTRACTS EXEMPT FROM ALL SCA PROVISIONS**

### **Postal Service Contracts With Common Carriers** 29 C.F.R. § 4.123(d)(1).

Postal Service contracts entered into with common carriers for carriage of mail by rail, air (except air star routes, bus and ocean vessel on regularly scheduled runs over regularly established routes where the revenue received for the carriage of the mail is an insubstantial portion of the revenue) are exempt from the SCA.

### **Postal Service Mail Contracts With Owner Operators**

- ◇ SCA does not apply to Postal Service contracts entered into with an individual owner-operator of vehicles for transporting mail where it is not contemplated at the time of contract award that such owner-operators will hire any service employee(s) to perform the services under the contract except for short (brief) periods of vacation time or for unexpected emergency situations such as illness or accident. 29 C.F.R. § 4.123(d)(2).
- ◇ The term "owner-operator" refers to an "individual," not a partnership, not two closely related individuals (mom & pop operation), nor a corporation. According to the specific language of this administrative exemption, the contract is exempt from SCA if the facts show that at the time of award, the individual awarded the contract intended to deliver the mail himself or herself without using other drivers (except for the short periods permitted).
- ◇ This exemption would not be applicable in situations where, due to the numbers or timing of the required mail runs or other contracts for which the contractor may be responsible, it is not physically possible for the individual contractor to perform the contract services without using other drivers.

Note: Contracts for transportation are exempt from CWHSSA coverage under section 103(b) of such Act. Accordingly, CWHSSA does not apply to drivers on Postal Service mail haul contracts.

### **Certain "Commercial" Services**

There are two administrative exemptions that apply to specific types of "commercial" services. 29 C.F.R. § 4.123(e).

Equipment items exemption 29 C.F.R. § 4.123(e)(1).

- ◇ Where certain conditions are met, this exemption applies to contracts or subcontracts for the maintenance, calibration, and/or repair of:
  - ◇◇ Automated data processing equipment and office information/word processing systems,
  - ◇◇ Scientific and medical apparatus or equipment where the application of microelectronic circuitry or other technology of at least similar sophistication is an essential element,
  - ◇◇ Office/business machines not otherwise exempt, where the services are performed by the manufacturer or supplier.
- ◇ Contracts and subcontracts principally for the maintenance, calibration, and/or repair of such equipment are exempt from SCA requirements where:
  - ◇◇ The equipment serviced are commercial items “sold or traded by the contractor (or subcontractor) in substantial quantities to the general public in the course of normal business operations,”
  - ◇◇ The services are furnished based on the established market price or established catalog price charged the general public for such maintenance, calibration, and/or repair services, and
  - ◇◇ The contractor uses the same compensation plan for service employees performing under the government contract as the contractor uses for the same and equivalent employees servicing the same equipment of commercial customers.
  - ◇◇ The contractor certifies as to the compliance with these provisions. The certification is included in the prime contract or subcontract, and the certification by the prime contractor as to its compliance with respect to the prime contract also constitutes its certification as to compliance by its subcontractor if it subcontracts out the exempt services.
- ◇ For this exemption to apply with regard to the prime contract, the contracting officer determines applicability on or before contract award, considering all factors, and by making an affirmative determination that all four conditions described above have been met. Similarly, for it to apply to a subcontract, the prime contractor determines applicability of the exemption on or before subcontract award, based on all factors, and by making an affirmative determination that all of the four conditions have been met.

“Commercial” services exemption 29 C.F.R. § 4.123(e)(2).

- ◇ This exemption applies to contracts or subcontracts for the following **seven services** (provided that certain criteria for applicability are met).
  - ◇◇ Automobile or other vehicle maintenance services (e.g. aircraft maintenance; other than contracts to operate a motor pool or similar facility);
  - ◇◇ Financial services involving the issuance and servicing of cards, such as credit, debit, purchase, smart cards, and similar card services;
  - ◇◇ Contracts with hotels/motels for conferences of limited duration (e.g. one to five days), including lodging and/or meals which are part of the contract for the conference, (excluding ongoing contracts for lodging on an as needed or continuing basis – such as longer term contracts to fulfill a continuing lodging need, e.g. lodging military recruits or government employees attending training at an agency training center);
  - ◇◇ Transportation of persons by common carrier by air, motor vehicle, rail or marine vessel on regularly scheduled routes or by standard commercial services (not charter services);
  - ◇◇ Real estate services related to acquiring and disposal of real property owned by the federal government (e.g. real property appraisal, broker, space planning, lease acquisition, lease negotiation, tax abatement, and real property disposal); and
  - ◇◇ Relocation services to assist federal employees or military personnel transferred to new duty stations anywhere within the continental United States and Puerto Rico and offer a multitude of services such as home marketing assistance, home sales services, destination area services, management reporting services, mortgage counseling, property management services, and other related services, but excludes actual moving or storage of household goods and related services.
- ◇ This exemption applies only when **all** of the following criteria are met:
  - (A) The services are “commercial” services, “*i.e.*, they are offered and sold regularly to non-Governmental customers, and are provided by the contractor (or subcontractor in the case of an exempt subcontract) to the general public in substantial quantities in the course of normal business operations,”
  - (B) The contract (or subcontract) will be awarded on a sole source basis or the contractor/subcontractor will be selected on the basis of factors in addition

to price (i.e., the combination of other non-price or cost factors must be equally or more important than price in selecting the contractor/subcontractor),

- (C) The services are furnished at prices that are, or are based on, established catalog prices available to the general public or market prices established by trade between buyers and sellers free to bargain for such services,
  - (D) Each service employee who will perform services under the government contract/subcontract will spend only a small portion of his or her time servicing the government contract/subcontract – less than 20 percent of the individual’s available hours (during the contract period if the contract period is less than a month, otherwise monthly average on an annualized basis). This exemption cannot apply if the contractor will perform the services with a dedicated workforce.
  - (E) The contractor uses the same compensation (wages and fringe benefits) plan for all service employees performing work under the contract as the contractor uses for these and equivalent employees servicing the same equipment of commercial customers.
  - (F) The contracting officer (or prime contractor with respect to a subcontract) determines in advance, that all or nearly all offerors will meet the above requirements). However, if the contracting officer determines when bids are received that the earlier determination that all or nearly all bidders would meet the exemption requirements was incorrect, SCA requirements shall be applied to the procurement; and
  - (G) The contractor certifies in the prime contract or subcontract, as applicable, to the requirements in paragraphs A through C, and E, above. Certification by the prime contractor as to its compliance with respect to the prime contract also constitutes its certification as to compliance by its subcontractor if it subcontracts out the exempt services. If the contracting officer or prime contractor has reason to doubt the validity of the certification, SCA stipulations shall be included in the prime contract or subcontract.
- ◇ There are three categories of contracts **not** exempt from the application of SCA requirements under the 29 C.F.R. § 4.123(e)(2) exemption:
- ◇◇ Contracts subject to collectively bargained wages and fringe benefits applicable to a successor contract where such rates and benefits apply under section 4(c) of the SCA (as well as any options or extensions to such contracts);

- ◇◇ Contracts for the operation of a Government facility or portion thereof (the exemption may apply to subcontracts under such contracts if the subcontracts meet the criteria for exemption); and
- ◇◇ Contracts entered into under the Javits-Wagner-O'Day Act (41 U.S.C. 47).