

A Look At Recent Service Contract Act Compliance Challenges

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Enacted in 1965, the McNamara-O'Hara Service Contract Act¹ imposes certain wage and fringe benefit payment requirements on federal service contractors. Through its Wage and Hour Division, the U.S. Department of Labor uses a team of investigators — which the DOL has been growing² — to review compliance in SCA-covered contracts across the country.

Although meeting these obligations may seem straightforward, seasoned contractors will know that complying with the SCA — and showing it in a DOL audit — can be onerous, and at times even puzzling.

Figuring out how to satisfy these obligations is important, though, because the DOL has the authority to impose various remedies for SCA violations, ranging from substantial back pay awards to debarment.

Compliance has only grown tougher since the COVID-19 pandemic began. Even as companies continue returning to the office, many service contractors have had to rely on a workforce working from remote locations, many of which differ from the locations initially contemplated for performance of the contract. And then there are the upward pressures on wages from inflation that SCA-covered contractors have faced this year, in particular.

This article focuses on three areas of recent SCA compliance challenges and offers suggestions for managing these compliance risks: (1) ensuring accurate labor classification mapping; (2)

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segregating covered and noncovered work; and (3) ensuring wage determinations are current and incorporated for the correct places of performance in an age of increased remote work.

Picking the Right Labor Categories

One topic DOL investigators have on their compliance checklists is how individual service employees' duties are mapped to the labor categories set forth in a contract's wage determinations. As we have seen handling SCA audits, investigators commonly find compliance issues and assert back wage liability based on mapping decisions.

The SCA makes this mapping, from employees' job duties to SCA labor-category definitions, the linchpin of determining each covered employee's required minimum wage.

The DOL has published an SCA directory of occupations³ to help service contractors map employees' duties to SCA labor categories. This mapping can in many cases be straightforward. There's usually little confusion about when someone is working as a court reporter, for example.

But, it gets harder as the complexity of services provided increase. And because it is the contractor's burden to select the appropriate labor category, selecting the wrong category, or even the wrong classification level within a category, i.e., project assistant I versus project assistant II, might itself lead to audit findings and costly back pay.

Plus, often the mapping is not so clear. For example, contractors providing specialized services involving unique or industry-specific positions, or those working in business or performance models new to federal contracting, can find that the wage determinations incorporated into their contracts may not include a labor category to which each service employee can be readily mapped.

The SCA has a solution for these situations, but it's cumbersome even when it works at all. The DOL can add new labor categories to wage determinations through so-called conformances. However, that process is resource-intensive, time-consuming and often slow. And there's no guarantee the DOL will agree to add the proposed new labor category or, perhaps more important, the wage rate proposed to go with it.

So what is a contractor to do when the DOL refuses to add a new labor category through conformances?

Sometimes the DOL gives the answer in declining the conformance, saying something along the lines of "We won't add New Labor Category X because the job duties you describe fit under the definition of Existing Labor Category Y."

Other times, contractors are on their own in mapping job duties to the closest of the existing labor categories found in the applicable wage determination, however ill-fitting.

Either way, it's a safe bet that when a contractor must map an employee's job duties to an ill-fitting labor category, that ill-fitting category will in many cases require an hourly wage higher than the going rate for those services in the commercial labor market.

So contractors who priced their proposals based on the commercial wage rate for particular types of labor may find themselves having to pay more, all because the DOL has not defined a labor category that provides a good fit for the services being provided.

To be sure, we are sympathetic to the task facing the DOL. The labor market for services continues to evolve quickly, even setting aside the pandemic's impact, and it takes a lot of resources for definitions of labor categories to keep pace.

But the solution to this challenge is really for the DOL to rethink its overall approach to determining covered employees' required wages, versus leaving contractors stuck with mapping new and evolving job duties to ill-fitting labor categories – and shouldering the risk of having a DOL auditor disagree months or years later.

Until the DOL does change how it sets SCA-covered employees' wage rates, contractors' best bets to limit compliance risk are as follows:

- Identify and propose potential conformances as early in the procurement life cycle as possible.
- Document mapping decisions in the contract file early on so they can be shared with a DOL auditor if needed to either explain the company's decision or show the company at least made a good faith effort in mapping.
- Ensure that proposal pricing personnel understand where the SCA's relatively limited set of labor categories may not match up well with the local labor market – and what the resulting impact on pricing may be.

Segregating Covered and Noncovered Work

Many contractors may have employees who perform both SCA-covered and noncovered services in the same workday or workweek.

In some cases, keeping the work separate is straightforward: A security guard can't be at a bank and a federal courthouse at the same time, for example. But many other times, a contractor cannot readily separate work for SCA versus non-SCA customers. Just think of all the commercially oriented services the government buys.

The simple solution would seem to be paying the SCA-required wages and fringe benefits for all hours worked during the week, including non-SCA work. But this solution can often result in a contractor paying employees more than required and can be difficult to pay for at the prices the contractor can charge for these services in the commercial market.

The alternative is itself a challenge: developing a defensible way to segregate the SCA hours from the non-SCA hours if possible. Unfortunately, the DOL provides very little guidance in its regulations on acceptable ways to segregate work when the nature of the performance does not lend itself to straightforward timekeeping methods like using multiple time-charging codes.

This uncertainty leaves contractors facing the risk of the DOL directing them to pay their personnel the SCA wage rate for all hours worked. The way to mitigate this risk is developing a fair, defensible model, methodology and process that shows how a contractor ensures SCA-covered personnel receive SCA wages for the portion of work they perform that is SCA covered.

This is essential in order to navigate a DOL SCA audit. This model won't eliminate the risk — only treating all hours as SCA covered can — but just having documented the care and effort that the company put into developing a model that's fair and equitable can go a long way toward a manageable resolution in a later SCA audit.

Ensuring Wage Determinations Are Current and Incorporated for the Correct Places of Performance

The SCA regulations include detailed requirements for when contracting agencies must update a covered contract's wage determinations during performance. The most familiar time to contractors is probably at option exercise, though there are other points during performance that require these updates as well.

This timing is well established. But not infrequently, we review SCA-covered contracts that are years into performance, yet haven't had their wage determinations updated since award. These contracts are easy targets for DOL auditors and catching up to the current wage determinations could require the contractor to incur significant back pay costs.

Keeping the wage determinations current, and managing the associated audit risk, grows more complicated when the place of performance changes. Most SCA wage determinations are geographically based, so choosing the right ones usually requires knowing where the covered employees will be working.

Now consider, as a recent salient example, the impact of the COVID-19 pandemic on the work location of a swath of employees. Contractors subject to the SCA have faced significant challenges managing remote and hybrid workers. A contractor might have planned for performance to be in New York, but then they hire an SCA-covered employee to work remotely from Nebraska.

So far, the DOL has not published guidance addressing this issue in the context of SCA compliance, and we have seen DOL auditors reach differing conclusions on the issue. Some auditors have asserted that remote or hybrid work at locations other than the stated place of performance require incorporating SCA wage determinations covering those remote/hybrid geographic locations. Other auditors take the opposite position.

Now imagine remote employees join the contract team from different geographic locations each year. A contracting officer has to be kept up to date on each location where employees work to keep the contract's SCA wage determinations current. And even then, contracting officers usually have many competing priorities. It's not hard to see the resulting administrative and compliance pain.

Given the lack of guidance from the DOL on the place of performance for remote and hybrid workers, and that contracting agencies often fail to incorporate updated wage determinations into contracts, SCA contractors face audit risk from outdated wage determinations.

To mitigate potential liability in these areas, we recommend that contractors proactively address these place-of-performance issues through dialogue and formal or informal inquiries to the contracting officer. Another possible avenue for guidance is to approach the DOL Wage and Hour Division for informal advice, particularly if the issue involves a fact-specific SCA compliance scenario or situation.

To the extent these avenues prove unproductive, we always recommend that contractors include language in their bids or in relevant contract modifications reserving the right to seek equitable adjustments to the contract associated with agency action or inaction in these areas.

Conclusion

As the SCA and contractors' work environments continue to evolve, the burden on federal service contractors to ensure compliance with the SCA will continue to grow. Given this, we recommend that all federal services contractors take the time to ensure they have an SCA compliance plan in place and that the plan is up-to-date with the latest SCA-related developments.

¹ (41 U.S.C. §§ 6701-6707).

² <https://www.dol.gov/newsroom/releases/whd/whd20220201-2>.

³ <https://www.dol.gov/agencies/whd/government-contracts/service-contracts>.