# Don't Get Caught Off Guard by a Service Contract Act Compliance Audit

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For nearly 50 years, the McNamara-O'Hara Service Contract Act (SCA)[1] has required federal service contractors to pay specified minimum compensation to "service employees" performing on SCA-covered contracts. Complying with the core requirements imposed by the SCA (including payment of prevailing wages and fringe benefits, basic recordkeeping, and notifications) may appear to be straightforward, but there are challenging nuances to these requirements, many of which may not become apparent until a contractor is facing a US Department of Labor (DoL) SCA audit or investigation.

DoL's Wage & Hour Division has an active cadre of approximately 1,100 investigators reviewing compliance under SCA-covered contracts. SCA audits and investigations can cover a wide range of compliance issues, and any audit or investigation can expand to include SCA compliance topics wholly unrelated to those that triggered the inquiry. The potential sanctions for SCA noncompliance—including statutory debarment—can cripple the viability of a contractor's business.[2] Moreover, recent executive actions will likely expand a contractor's obligations regarding past violations. In mid-2014, President Obama issued the "Fair Pay and Safe Workplaces" Executive Order, which will require contractors to affirmatively disclose determinations of SCA and other federal and state labor law violations to contracting agencies before contract award and during contract performance. Further, the executive order will require contracting agencies to determine whether a disclosed violation warrants taking any action on their existing contracts.[3] Suffice it to say, there is simply no substitute for full compliance with the SCA, particularly in the current environment.

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Although many contractors focus on SCA considerations when pricing their bids and proposals, SCA compliance is an ongoing, "living" obligation that persists throughout the contract lifecycle. Indeed, many aspects of performance can change during a contract's lifespan, such as the place of performance, job duties, and fringe-benefit offerings. These changes can have a significant impact on SCA compliance. Service contractors must therefore continually assess such changes during performance or be exposed to significant liability and remedial action resulting from a DoL audit or investigation.

With all this in mind, we identify in this article certain commonly recurring issues that can present significant SCA compliance challenges to contractors performing in today's federal service-contracting environment. These issues include: (a) labor classification mapping and work segregation, particularly on performance-based contracts; (b) incorporation of wage determinations (WDs) and the potential impact of changing places of performance; (c) fringe-benefit offerings and "bona fide" fringe benefits; (d) compliance of covered independent contractors; and (e) payment of covered service employees using a method other than an hourly rate. Although by no means the only compliance challenges a contractor could face, we expect these areas to continue to be the focus of DoL SCA audits and investigations and, in some cases, present even greater compliance challenges for contractors as the regulatory environment continues to evolve.

## Mapping Labor Categories and Segregating Work Hours

As part of an audit or investigation, a contractor can expect the DoL investigator to review how the individual service employees' duties have been mapped to the labor categories set forth in the applicable WD(s). In our experience, DoL investigators commonly question, and in some cases challenge, contractors' labor classification and mapping rationale. Under the SCA, contractors bear the burden of mapping each worker to the appropriate labor category.[4] Those found to have mapped employees to the "wrong" labor category, or classification level within a labor category (e.g., General Clerk I versus General Clerk II), could be required to provide substantial back wages to

employees that DoL retrospectively "re-maps" to higher-paying categories and/or levels.

Mapping labor categories is an inexact science at best, rendering it an exercise fraught with potential liability for service contractors. In a typical WD, DoL includes a wide range of labor categories for use in mapping.[5] Although contractors may find it straightforward to map their employees to labor categories for services that have been performed for many decades (e.g., personnel that only clean windows are Window Cleaners, Occupation Code 11360), they may find that mapping becomes significantly more complicated and subjective for contracts requiring newer types of services. For instance, contractors staffing a call center will often find that the applicable WDs do not include a labor category to which some personnel can be readily mapped. Furthermore, the more complex the services, the more the subjectivity is heightened, particularly if the applicable WD is not regularly updated to keep pace with the services' increasing complexity. For example, a contract that requires a contractor to review and analyze an agency's social media presence could entail using personnel with a combination of technology, writing, and other media skills that do not fit in traditional WD categories. In addition, the skills of SCA-covered personnel needed to navigate these ever-changing areas and/or the newest "must-use" platforms will inevitably evolve far faster than the labor categories of DoL's WDs.

Nevertheless, whether for long-standing or cutting-edge services, contractors can limit the risk that DoL will disagree with mapping decisions. To start, contractors should document their mapping decisions at the outset of contract performance, and seek the contracting officer's concurrence with the mapping. (Although the concurrence may not prevent DoL from disagreeing during an investigation or audit, the concurrence nonetheless should help build credibility for the mapping decisions.) If a contractor finds that a contract requires performing work that cannot reasonably be mapped to any labor categories in an applicable WD, the contractor should submit a timely conformance request to DoL to add a new labor category to the WD.[6]

Mapping is challenging enough for employees who perform just one job during the week. It becomes even more complicated when a contractor performs a fixed-price performance-based contract (or similar contract) for which the contractor cross-trains its SCA-covered personnel to perform services that map to multiple labor categories. Such fixed-price contracts may not require the contractor to track hours workers spend performing specific tasks, particular work functions, or certain work items—and thus may not require the contractor to track the hours each SCA-covered worker spends working in each labor category. In addition, the contractor's performance model or existing business systems may not allow tracking time spent by personnel performing SCA-covered tasks, functions, or items. In such cases, contractors may track the total time that personnel spend working on the SCA contract, but do not (or in some cases cannot) record hours by particular labor category. These contract and business constraints are understandable, but the fact remains that if a contractor's SCA-covered personnel work in multiple labor categories in the same week, the contractor must segregate hours worked in each labor category in its records and must pay personnel at least the specified wages for the hours worked under each labor category.[7] If a contractor cannot segregate the time its SCA-covered personnel spend within each SCA labor category in a work week, then DoL investigators will expect the contractor to have paid these employees for all SCA hours at the highest applicable labor rate.[8]

Contractors face similar challenges with personnel who perform both SCA-covered services and services for commercial customers during the same work week. Here, too, contractors must segregate hours.[9] Without such segregation, a contractor takes on significant risk that DoL will direct the contractor to pay *all* hours worked by relevant employees (whether for government customers or commercial customers) at no less than the applicable SCA wage rate, even though not all of the workers' hours were spent on SCA-covered work.[10] In these cases, contractors should consider one of two options. They should evaluate whether to (a) modify their systems to segregate the SCA-covered workers' hours as needed, or (b) pay SCA-covered workers at the highest applicable SCA rates for all hours worked in any week.[11]

In all circumstances involving segregated hours, contractors should choose whichever option is more cost-effective, is more likely to ensure that the SCA employees receive no less than the prevailing wages as required by the SCA regulations, and is most readily deployed given the contractors' business systems.

Finally, as if mapping employees and paying them the correct wages were not challenging enough, another wage obligation has recently been added. Many contractors will soon be required to pay certain service employees at least the minimum wage required by Executive Order (EO) 13658, as implemented through a final rule published on October 9, 2014, by DoL.[12] The EO and DoL final rule cover nearly all SCA-covered contracts, and also other contract types, to require at least a $10.10 hourly wage for labor directly charged to those contracts *and* labor performed "in connection with" those covered contracts by employees who spend at least 20 percent of their time supporting contracts subject to this minimum wage.[13] Further complicating this process, DoL announced that it will not revise WDs so that all listed prevailing wages equal or exceed $10.10, but instead "will publish a prominent general notice on SCA . . . wage determinations that will state the [EO 13658] minimum wage and that the [EO 13568] minimum wage applies to all . . . SCA-covered contracts."[14] This means that many WDs may continue to list prevailing wages below $10.10 even though contractors will be required to pay at least the $10.10 minimum wage. As just one example, in the

WD covering the parts of North Carolina that include Camp Lejeune and Fort Bragg, prevailing wages below $10.10 per hour are listed for many labor categories such as dishwasher, janitor, maid, chore aide, parking lot attendant, and cashier.[15]

Accordingly, contractors must be mindful of the applicable minimum wage (e.g., federal minimum wage or SCA WD minimum wage) when determining the wages that each employee performing under an SCA-covered contract—and some employees not directly performing the contract—must receive. For those employees who perform labor "in connection with" contracts subject to the SCA and the minimum wage rule, contractors have more incentive to segregate those employees' hours to (a) confirm whether 20 percent or more of the employees' hours are spent working "in connection with" covered contracts, and (b) segregate those hours from the time employees spend performing other work, so that the contractor can demonstrate which hours are subject to the minimum wage.

Although this obligation will only take effect beginning with contracts awarded based on solicitations issued after January 1, 2015, or awarded without solicitations after that date,[16] contractors should monitor newly issued or amended solicitations and contracts for any custom clauses or class deviations inserted by agencies to impose the same obligations. Contractors should also implement procedures to monitor their contracts and solicitations beginning on January 1, 2016, and each year after, for increases in the minimum wage required by the EO and DoL rule.[17] Simply put, all contractors performing SCA-covered contracts need to be familiar with the scope of their minimum wage obligations and how it will impact the minimum wages due to the company's personnel involved in SCA-covered work.

### Updated WDs and Changes in Place of Performance

The SCA, its implementing regulations, and the Federal Acquisition Regulation (FAR) contain detailed guidance on incorporating the correct WDs—some of which is honored in the breach. Nevertheless, under that guidance, contracting agencies are charged with ensuring that WDs are kept up-to-date in contracts.[18] Our experience has shown that contractors often overlook ensuring that an agency has incorporated the correct and current WDs into their SCA-covered contracts. Although the SCA and FAR place the obligation to incorporate new WDs on agencies, contractors would be wise to pay close attention to WDs in their contracts, because correcting a WD-related incorporation issue after the fact (especially as part of an SCA audit) can be a challenge.

Under the SCA, contracting officers must request a WD, or an updated WD, from DoL before any of several stages in a contract's lifespan: (a) invitation for bids; (b) request for proposals; (c) commencement of negotiations; (d) exercise of option or contract extension; (e) annual anniversary date of a multiyear contract subject to annual fiscal appropriations of the Congress; or (f) biennial anniversary date of a multiyear contract not subject to such annual appropriations, if so authorized by the Wage and Hour Division.[19] Contracting officers must incorporate WDs (or updated WDs) into federal contracts, and typically do so when exercising options or at the anniversary dates for multiyear contracts.[20]

Contractors should be proactive in encouraging their contracting officers to incorporate updated WDs into their contracts at the required times listed above. Although by their terms the SCA regulations do not appear to obligate a contractor to pay higher prevailing wages required by an updated WD until the contracting officer incorporates the updated WD in a contract, such matters typically are not so simple to address from both employee relations and contractual perspectives.[21] Indeed, contractors incur substantial risk by continuing to perform with an outdated WD past the date on which a newer WD should have been incorporated.

First, contractors should expect a contracting officer (and covered service employees or their representatives) to challenge any assertion of nonliability by the contractor for increases in wages or fringe benefits required by an updated version of a WD where the contractor knew about both the updated WD and the CO's oversight in not timely incorporating it.[22] Second, contractors that do not ensure that updated WDs are timely incorporated could face challenges in obtaining appropriate price adjustments for any increases in wages or fringe benefits.[23] Moreover, if DoL discovers that a contracting officer has failed to incorporate the most recent WD, DoL may direct the contracting officer to incorporate it in the contract (both prospectively *and* retrospectively), which, if incorporated "late," could similarly hinder the contractor in obtaining appropriate price adjustments.[24]

Being proactive is also important for contractors adding or changing their place(s) of performance after contract award. In SCA-covered procurements, the locality or place of performance (when known) is identified in the solicitation or by the contractor in its proposal. The locality will determine which WD is incorporated into the resulting contract.[25] As contract performance progresses, it is possible that the place of performance may change. For instance, a contractor may acquire or open a new facility to support contract performance or may permit certain employees to telecommute and thus perform services in a locality not identified in the contract. Contractors must timely report such changes so that the contracting officer can incorporate any additional or different WDs to cover the new performance locations.[26] Contractors that fail to coordinate a change in place of performance may encounter several problems down the line. First, they may not be able to recover any higher wage amounts above the wage rates required for the place of performance originally identified in the contract.[27] In addition, in extreme cases, such as if DoL suspects a contractor intentionally misled the contracting

officer about a location change, the contractor may be held in default or subject to other sanctions. Further, contractors that fail to report changes in place(s) of performance will almost always complicate the process for incorporating and updating WDs.[28]

We recommend being vigilant about incorporating the appropriate WDs and any changes in the place of performance into the contract at any stage in contract performance. A failure to do so can lead to confusion, potential problems in cost recovery, and uncomfortable discussions with DoL investigators about why the contractor is not paying in accordance with the appropriate WD.

## Providing and Taking Credit for Bona Fide Fringe Benefits

Contractors must provide service employees minimum fringe benefits for their time spent on SCA-covered work, as described in the applicable WD. The health and welfare (H&W) fringe benefit is one of the required fringe benefits required by WDs, and the current minimum H&W rate is $4.02 per hour.[29] Although contractors have wide discretion in determining how to satisfy the H&W requirement, all fringe benefits must qualify as "bona fide" to be credited against the H&W obligation.[30]

Contractors must take appropriate steps to ensure that any fringe benefits they count towards their H&W obligations qualify under the SCA regulatory regime. The SCA regulations require that a "fringe benefit plan, fund or program" meet the following criteria (among others) to be considered a "bona fide" fringe benefit: (a) the plan's provisions must be specified in writing and communicated in writing to the affected employees; (b) contributions must be made under the terms of the plan; (c) any employee contributions must be voluntary (and taken in accordance with specified payroll deduction regulations, if applicable); (d) the primary purpose of the plan must be to provide systematically for the payment of benefits; (e) the plan must contain a definite formula for determining the amount to be contributed by the contractor and by the employees participating in the plan; and (f) any contractor contributions must be paid irrevocably to a trustee or third person pursuant to an insurance agreement, trust, or other funded arrangement.[31]

There are some allowable deviations—for example, DoL may accept unfunded and self-insured medical plans—but a company must affirmatively seek DoL's approval to treat such plans as bona fide fringe benefits.[32] As part of the approval process, DoL considers factors such as whether the plan could be reasonably anticipated to provide the prescribed benefits and whether it is carried out under a financially responsible program.[33] If a contractor decides to satisfy its H&W obligations with a self-funded or unfunded insurance plan that has yet to be approved by DoL, that contractor risks a finding by DoL that amounts paid by the contractor for such a plan should not have been credited against the SCA's H&W requirement.

Contractors also should understand that not all offered benefits are considered bona fide fringe benefits by DoL. Among those that typically do not qualify are benefits specifically disallowed under the SCA (e.g., gift cards, incentive rewards, and referral bonuses) and others that are typically disallowed because they are found to be primarily for the convenience of the contractor and not primarily for the benefit of the employee (e.g., language training, travel, and security clearance incentives).[34] In addition, benefits that a contractor is required by federal, state, or local law to provide its personnel would not qualify as bona fide fringe benefits under the SCA.[35] These benefits cannot be credited towards meeting the contractor's SCA H&W requirement.[36]

Furthermore, compliance with SCA fringe-benefit requirements is not static. Contractors must periodically assess whether any changes to fringe-benefit requirements (typically by DoL) or changes to the fringe benefits offered by a contractor will impact compliance with the SCA's fringe-benefit requirement. For instance, new fringe benefits may be needed to satisfy an increased H&W rate that the contracting agency has incorporated into a contract or to replace a fringe benefit that can no longer be counted towards a contractor's H&W obligation because it is now required by a new state law or simply no longer qualifies as a bona fide fringe benefit based on changes to the fringe-benefit program itself (such as changing from a fully funded to self-funded health insurance plan).[37] Such periodic assessment can benefit the contractor as well, as it may identify newly offered benefits that qualify for credit towards the contractor's H&W obligation. Regardless of the impetus, when contractors change the fringe benefits offered to SCA-covered employees, they should consider whether: (a) they still meet the current H&W requirements; (b) they have replaced bona fide fringe benefits that may have been discontinued since they last evaluated their H&W calculation; and (c) they take full credit for the complete range of fringe benefits provided and have determined that these benefits qualify and remain as bona fide fringe benefits.

Finally, it should be noted that contractors can still meet their H&W obligations by providing additional cash payments instead of fringe benefits. As a general matter, a contractor "cannot offset an amount of monetary wages paid in excess of the wages required under the determination in order to satisfy his fringe benefit obligations under the Act . . . ."[38] However, the SCA and its regulations permit a contractor to provide "cash equivalent" payments to SCA-covered employees instead of providing bona fide fringe benefits, as long as such payments are "separate from and in addition to the monetary compensation [i.e., wages] required under" the SCA.[39] In other words, the DoL regulations allow cash to be paid in lieu of benefits, but the cash cannot be part of wages: the payments must be separately identified as fringe-benefit payments, must be communicated to the employee as such, and must be documented as such.[40] Nevertheless, cash-equivalent payments are another

permitted method for contractors to use to satisfy the SCA's H&W fringe-benefit requirement.

For SCA-covered contractors, complying with the SCA's requirements for providing bona fide fringe benefits is no easy task. It requires careful attention to the nature and cost of each fringe benefit provided to covered employees—which only adds to contractors' obligations to comply with all the other various applicable federal, state, and local laws.

## Oversight of Independent Contractors

To say that the SCA's definition of "service employees" covered under the Act is broad would be a blatant understatement. In fact, the SCA's coverage of service employees depends "not on any contractual relationship that may be alleged to exist between the contractor or subcontractor and such persons," but only on whether a person is engaged in the performance of a contract the principal purpose of which is to furnish services in the United States (and not otherwise exempt under the FLSA's executive, administrative, or professional tests).[41] This oft-overlooked definition establishes an extremely broad scope of SCA coverage for personnel or entities performing work under an SCA-covered contract. A DoL-published compliance guide reinforces the point, stating that wages and fringe benefits specified in a WD must be provided "irrespective of any alleged 'independent contractor' or non-employment relationship."[42] And thus, contractors can expect that DoL could review the compensation provided not just to employees but also to independent contractors

during an audit or investigation and require that contractor to demonstrate that compensation provided to independent contractors satisfies the WD-required wage and fringe-benefit minimums.

Indeed, a higher-tier contractor must ensure that its SCA-covered independent contractors receive the appropriate wages and fringe benefits, and contractors that fail to do so risk DoL's finding them liable for any underpayments because higher-tier contractors are jointly and severally liable for SCA violations by their subcontractors and independent contractors.[43] (This means that a higher-tier contractor could be found responsible for an independent contractor's receiving payments from the higher-tier contractor and then failing to "pay" him or herself the minimum required wages and fringe benefits.) This obligation may frustrate contractors who hired independent contractors to reduce their administrative burden in the first place, but it does not change the fact that DoL treats independent contractors as covered by the SCA.

Contractors have many potential solutions to reduce the burden of this obligation, though in choosing any of them, they must limit their control of independent contractors' work so as to avoid creating any appearance that an independent contractor is considered an "employee" (for tax and withholding purposes). As potential solutions, contractors might consider requiring independent contractors to bill hourly rates so that the contractor can ensure that the pay exceeds the minimums required under the WDs. Companies should also consider contractually requiring independent contractors to certify that they are paying the appropriate wages and fringe benefits, to allow auditing by the contractor, and to indemnify the higher-tier contractor for damages incurred as a result of any SCA violations by the independent contractor. Also, as part of the contractor's ongoing contract-administration procedures, the contractor should, perhaps annually or more often, review independent contractor pay, recordkeeping, and certifications—and identify and direct corrective actions as needed.[44]

At bottom, when assessing their compliance obligations, contractors should consider independent contractors on their SCA-covered contracts as if they are the contractor's own employees for purposes of SCA compliance. That said, contractors can employ varying approaches to monitoring so that the burdens of compliance do not outweigh the benefits of relying upon independent contractors in the first place or create other collateral issues.

## Compensation by Methods Other than Hourly Wages

SCA WDs typically prescribe wages and fringe benefits on an hourly basis, but the SCA does not require that all SCA-covered workers be paid that way. The SCA allows other methods, such as paying employees by the week or month, or paying them on a production or piece-rate basis.[45] No matter the basis for pay, contractors still must track SCA-covered workers' hours to ensure each employee receives at least the equivalent of the hourly wages and fringe benefits required by the WD. Similarly, contractors must track hours to determine whether any employees are owed overtime each week—an obligation for SCA-covered contracts.[46] Finally, contractors need to track hours to determine the pro rata holiday and vacation benefits that must be provided to part-time and irregular employees.[47] There simply is no reliable substitute for tracking employee hours spent performing SCA-covered work regardless of compensation method.

Contractors should expect DoL auditors to carefully review employees not paid on an hourly basis. Contractors should make these reviews straightforward for DoL investigators by keeping time records generated by the SCA-covered workers themselves and by contemporaneously verifying that the workers are receiving the equivalent of at least their hourly rates. And let us be clear: the worst thing a contractor can do is "back into" actual hours worked on a SCA-covered contract. That is, a contractor cannot take the weekly/production pay earned by a service employee, identify the minimum hourly rate for that employee, and then calculate the number of hours that the service employee presumably "worked" so that the hours times the rate equals the worker's weekly/production earnings.

A recent decision shows that DoL takes this type of reverse engineering of actual hours seriously—and will consider imposing statutory debarment under the SCA where appropriate. In 2014, DoL debarred a timber contractor that had paid employees on a production basis, and then later created information about the actual hours worked so that the earnings met or exceeded the hourly rates required by the applicable WD.[48] Making matters worse, this was not the first time that that contractor had been flagged for SCA noncompliance.[49] DoL debarred the contractor and its principals for three years. Do not make the same mistake. For any SCA-covered contract, always record actual hours no matter your compensation scheme.

## Conclusion

SCA compliance can be difficult even for what appear to be the most straightforward issues. But many current compliance issues are far from straightforward and require difficult business judgments that are likely to be questioned by aggressive DoL investigators down the road. If there is one unifying point to the issues discussed above, it is that SCA compliance cannot be delegated to just one corporate function. SCA compliance is an ongoing, company-wide effort that requires coordination throughout an SCA-covered contract's lifespan between legal, human resources, program management, payroll, timekeeping, business capture, purchasing and supplier management, and executive leadership. Companies that take such a holistic approach to compliance will find themselves well positioned should they ever be subject to an SCA audit or investigation. PL

## Endnotes

1. 41 U.S.C. §§ 6701-6707.
2. *See id.* § 6706 (requirement for three-year debarment for violations absent "unusual circumstances"); 29 C.F.R. § 4.188 (regulation implementing debarment requirement); *see also generally* 29 C.F.R. §§ 4.187–4.191 (DoL regulations for SCA enforcement).
3. 79 Fed. Reg. 45309 (July 31, 2014). The EO requires DoL and the Federal Acquisition Regulation (FAR) to promulgate implementing rules. Those rules had not been published by the time this article went to press.
4. Johnson Controls World Servs., Inc., ASBCA Nos. 40233, 47885, 96-2 B.C.A. (CCH) ¶ 28,458 (July 31, 1996).
5. DoL has published a SCA Directory of Occupations to aid contractors in mapping personnel to the appropriate labor categories in applicable WDs. The directory is available online at http://www.dol.gov/whd/govcontracts/sca.htm.
6. For discussion of these conformance requests, *see* 29 C.F.R. § 4.6(b)(2).
7. *Id.* §§ 4.169, 4.179.
8. *Id.*
9. *Id.*
10. *Id.*
11. Presumably, the SCA rate will be higher than any non-SCA rates.
12. 79 Fed. Reg. 9851 (Feb. 12, 2014) (EO 13658); 79 Fed. Reg. 60634 (Oct. 7, 2014) (DoL final rule).
13. *See* 79 Fed. Reg. at 60724 (new 29 C.F.R. § 10.4(f) implementing 20-percent rule for coverage).
14. *Id.* at 60670, 60725.
15. *See* WD 2005-2393, rev. 15 (July 25, 2014), *available at* http://tinyurl.com/m8uoqtr.
16. 79 Fed. Reg. at 60722 (DoL final rule explaining the timing of the minimum wage's application).
17. *See id.* at 60721 (new 29 C.F.R. §§ 10.1(a)(2), 10.1(b)(2)), 60724 (new §§ 10.5(a)(2)), 10.5(b)(2)) (requiring annual updates to the minimum wage effective beginning January 1, 2016).
18. *See* 29 C.F.R. §§ 4.3, 4.4, 4.55, 4.143–4.145.
19. *Id.* § 4.4(a). Similar timing rules apply when a collective bargaining agreement will serve as a WD.
20. *See id.* §§ 4.5(a), 4.55. Note, however, that a contracting officer can potentially modify a contract to incorporate a revised WD before the option or anniversary date.
21. *See generally id.* § 4.5(a)(2).
22. In such a circumstance, there is a possibility that the updated WD might be held to have been incorporated by operation of law. Under the "*Christian* doctrine," SCA clauses (other than 52.222-41) and initial WDs have been held to be incorporated into contracts even when omitted from a contract if the SCA clearly applied to the contract and the omission was a mere administrative oversight. *See, e.g.*, Miller's Moving Co., ASBCA No. 43114, Jan. 14, 1992, 92-1 BCA ¶ 24707; BellSouth Communications Sys., Inc., ASBCA No. 45955, Sep. 27, 1994, 94-3 BCA ¶ 27231 (highlighting importance of whether SCA clearly applied and clauses and WDs were omitted by oversight); *see also* Bui Constr. & Bldg. Supply, ASBCA No. 28707, Feb. 15, 1984, 84-1 BCA ¶ 17183 (same result under parallel Davis-Bacon Act applicable to construction contracts). Whether this same rationale would apply to a CO's failure to incorporate an updated WD is questionable especially given the language in FAR 22.1015, but contractors certainly should be prepared to address such arguments. Similarly, even though there are significant questions whether the same rationale under *Christian* would apply to incorporate the SCA FAR clause itself, contractors should be prepared to counter attempts to assert that an *updated* SCA WD version should have been automatically incorporated if it clearly applied.
23. For instance, FAR 52.222-43 and -44, the SCA price adjustment clauses, require requests for equitable adjustment within 30 days of the effective date of a wage change. *See* DTS Aviation Servs., Inc., ASBCA No. 56352, Oct. 14, 2009, 09-2 BCA ¶ 34288 (noting that recovery can be barred if government can show prejudice from notification after 30 days); *but see* FAR 22.1015.
24. *See* FAR 22.1015 (authorizing DoL to require incorporation and providing for equitable adjustments). In any event, a contracting officer cannot waive application of the SCA. *See* IBI Sec. Serv., Inc. v. United States, 19 Cl. Ct. 106, 107 (1989), *aff'd*, 918 F.2d 188 (Fed. Cir. 1990). Contractors who hold General Services Administration (GSA) Schedule contracts for services should ensure that their schedule contracts are kept up-to-date. Schedule orders may not include the SCA clause or a WD, but as long as the schedule is SCA covered, the orders involving work primarily for services will be as well.
25. Note that the place of performance and applicable WDs may be identified in the solicitation, but they could be left open, per FAR 52.222-49, Place of Performance Unknown.
26. FAR 22.1009-4(e) provides for adding WDs at award if a solicitation did not include one for the offeror's chosen place of performance, and under FAR 52.204-8 and 52.215-6, contractors must certify their place(s) of performance unless the government has specified the place(s).
27. *Cf.* FAR 22.1009-4(e). In addition, if no WD was incorporated following any change, the contractor may not realize that a different WD applies, resulting in a potential underpayment of wages (or an overpayment).
28. For example, the contractor will have to work with the contracting agency to determine appropriate equitable adjustments based on changes that preceded incorporation of the WD for the new place(s) of performance by a significant period of time.
29. DoL All Agency Memorandum 216 (July 22, 2014). DoL-issued WDs typically require vacation, holiday, and H&W fringe benefits.
30. *See* 29 C.F.R. § 4.171(a).
31. *Id.* § 4.171(a).
32. *Id.* § 4.171(b).
33. *Id.* § 4.171(b)(2)
34. *See id.* § 4.171(e).
35. *See id.* § 4.171(c).
36. Nevertheless, many programs beyond the "traditional" H&W benefits (medical insurance, disability insurance, etc.) may qualify as bona fide fringe benefits, including tuition reimbursement, severance, and certain types of bereavement leave. The terms and conditions of these programs must be carefully constructed to satisfy each of the factors DoL considers, and each must be evaluated on its specific provisions and features.
37. *See id.* § 4.52(a) (prohibiting contractors from counting benefits "required as a matter of law" towards their H&W obligations).
38. *Id.* § 4.170(a).
39. *Id.* § 4.177; *accord* SCA § 2(a)(2).
40. 29 C.F.R. § 4.177.
41. *Id.* § 4.155; *accord id.* § 4.113(b)
42. DoL's *Field Operations Handbook*, § 14b05(b)
43. *See* 29 C.F.R. § 4.114(b).
44. The same advice applies to subcontractors, which as far as the relevant SCA provisions are concerned, are really just larger independent contractors.
45. 29 C.F.R. § 4.166.
46. *See generally id.* §§ 4.180–4.182.
47. *See id.* § 4.176.
48. Garcia Forest Svc., LLC et al., 2011-SCA-00002 (DOL Mar. 27, 2014) *available at* http://tinyurl.com/ka29um9.
49. *Id.* at 4–5.