



# Trends & challenges in Federal Contractor Labor Law Compliance

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# Agenda

- ▶ Service Contract Act (“SCA”)
- ▶ Davis-Bacon Act (“DBA”) & Davis-Bacon Related Acts (“DBRA”)
- ▶ SCA vs. DBA Comparison
- ▶ Common Compliance Challenges & Penalties of Non-Compliance
- ▶ The Current Enforcement Environment
- ▶ Paid Sick Leave
- ▶ OFCCP
- ▶ Pay Equity
- ▶ Questions

# Service Contract Act ("SCA")

# SCA Overview

- ▶ McNamara-O'Hara Service Contract Act of 1965 ("SCA")
  - 41 U.S.C. 351 et seq.
  - 29 C.F.R. Part 4
  - Federal Acquisition Regulation (FAR) Subpart 22.10, FAR clause 52.222-41
- ▶ Last in the line of federal statutes protecting wages and working conditions for federal contractor employees
  - 1931: Davis-Bacon Act (Construction workers)
  - 1936: Walsh-Healey Public Contracts Act (Manufacturing workers)
- ▶ Protects service workers from the consequences of low bidding by specifying required minimum wages and fringe benefits
- ▶ Administered by the Department of Labor's ("DOL") Wage & Hour Division ("WHD")

# “Principal Purpose” Test

- ▶ SCA applies to contractors and subcontractors with federal services contracts in excess of \$2,500 for services performed in the “United States”
  - “United States” defined at FAR 22.1001
  - District of Columbia contracts also covered
  - Presume coverage for indefinite-quantity contracts
- ▶ BUT ONLY if the “principal purpose” of the contract is to furnish services to the government using “service employees.” FAR 22.1003-1
- ▶ No precise rules for “principal purpose” determination - broadly interpreted but does not cover “incidental” service work on construction and supply contracts

## “Principal Purpose” Test (cont’d)

“Non-exhaustive” list of 55 example service contract types:

- (5) Cafeteria and food service
- (10) Computer services
- (12) Custodial, janitorial, and housekeeping services
- (23) Guard and watchman security service
- (27) Landscaping (other than part of construction)
- (37) Nursing home services
- (38) Operation, maintenance, or logistic support of a Federal facility
- (51) Trash and garbage removal
- (52) Tree planting and thinning, clearing timber or brush, etc.
- (55) Warehousing or storage

# “Exempt” Employee Types

- ▶ *Bona Fide Executive, Administrative, and Professional* (“EAP”) employees, as defined under FLSA
- ▶ EAP employees are exempt even if they perform on a SCA-covered contract or subcontract
- ▶ Additional exemption for apprentices, student learners, and handicapped individuals
- ▶ Service Contract Act also does not apply to other classes of employees as defined by 29 CFR Part 541. For example:
  - Teachers: primary duty of teaching/instruction, no salary requirement, work an educational institution
  - Computer employees: perform higher-level duties (e.g., design, development work with great responsibilities, paid NLT \$27.63/hour or \$455/week

# SCA Requirements

## Wage Determination (WD)

Sets the minimum wages and fringe benefits for job classifications for a specific geographical region. ALL four must be met:

Minimum hourly  
Wage for the job  
position

Minimum hourly  
Health & Welfare  
(H&W) Benefit

Minimum annual  
Vacation Benefit

Minimum Holiday  
Benefit

- ▶ Wages and H&W are stipulated as hourly rates
- ▶ Vacation and Holiday require minimum weeks and days, respectively as set forth in the WD
- ▶ H&W payment requirements vary between odd and even-numbered WDs
  - Odd-numbered WDs require H&W payment “per employee” for all hours compensated up to 40
  - Even-numbered WDs require payment by “Average cost” for all hours worked by service employees
- ▶ SCA also requires the contractor to post DOL notice WH 1313 and applicable wage determinations in a prominent area at the work site



# Davis-Bacon Act (“DBA”) and Davis-Bacon Related Acts (“DBRA”)

# DBA Overview

- ▶ Enacted in 1931
  - Amended in 1935 and 1964
- ▶ Provides protection of prevailing wages and benefits for “laborers” and “mechanics”
- ▶ Intended to prevent outside contractors from winning federal awards through reductions in local wages and benefits
- ▶ Applies to contracts, in excess of \$2,000, with the Federal Government or District of Columbia
- ▶ Nature of contract must be for public buildings or public works, such as:
  - Construction
  - Alteration
  - Repair (including painting and decorating)
    - Includes painting and decorating of public buildings or public works
    - Painting 200+ Square Feet is considered DBA
    - On mixed SCA/DBA contracts, repair or alteration in 32+ hours is DBA-covered DFAR 222.408-70(d)

# Davis-Bacon Related Acts (“DBRA”)

- ▶ Davis-Bacon Related Acts (DBRA) extends coverage to similar, federally-assisted contracts
- ▶ Davis-Bacon prevailing wage provisions apply to approximately 60 additional laws
  - Where federal agencies assist in construction projects through grants, loans, loan guarantees, and insurance
  - Exclusions may apply in accordance with each statute
- ▶ Examples of these “related Acts” include:
  - Federal-Aid Highway Acts
  - Housing and Community Development Act of 1974
  - Federal Water Pollution Control Act

# SCA vs. DBA comparison

# DBA vs. SCA

Requirements	SCA	DBA
1) Wages and Fringes mandated via Wage Determinations	✓	✓
2) Wage determinations generally locality based	✓	✓
3) Requires compliance with Fair Labor Standards Act	✓	✓
4) Service contracts over \$2,500 in the US and its territories	✓	
5) Federal Construction contracts over \$2,000		✓
6) Pay no less than weekly		✓
7) Pay no less than semimonthly	✓	
8) Standard Labor Category Definitions, nationwide	✓	
9) Fringes & Wages may be combined on pay statement		✓

## DBA vs. SCA

Requirements	SCA	DBA
10) Requires submission of a weekly certified payroll		✓
11) WD must be posted	✓	✓
12) DOL has sole enforcement responsibility	✓	
13) Contracting Agencies have enforcement responsibility		✓
14) DOL determines wages and establishes wage determinations	✓	✓
15) Wage Determinations vary by type of work (e.g., residential, building, highway, heavy)		✓
16) Requirements must be flowed down to subcontractors	✓	✓
17) Presumption of Debarment	✓	

# Common Pitfalls and Penalties of Non-Compliance



# SCA/DBA Compliance Challenges

## Common Pitfalls:

- Failure to determine SCA/DBA applicability
- Failure to recognize other applicable Labor Laws (e.g., Sick, Federal Min. Wage, NDQW)
- Misunderstanding of employee coverage
- Incorrect Labor Category Classification
- Identifying bona-fide benefits
- Lacking WDs and WD updates (SCA)
- Separation of Wages vs. Benefits (SCA)
- Common vacation policies
- Non-hourly wages
- Self-funded Insurance plans
- Benefits compliance in complex business environments
- Subcontractor Compliance





# Consequences of non-compliance

Non-compliance can result in severe consequences, some of which include

- Back Payments
- Civil Penalties
- Contract Withholds
- Payment of Government's re-procurement costs
- Contract Termination
- Personal Liability for Corporate Officers
- Suspension and/or Debarment
- False Claims Liability

# The Current Enforcement Environment

# Current enforcement environment

## ▶ Previous Administration (2008 - 2016)

- Heightened focus on Labor Law Compliance
- DOL increased its enforcement army and placed contractor compliance with labor laws under greater scrutiny
- Increased number of audits and more in-depth audits
- More severe consequences for violators

## ▶ Current Administration (2017 - Present)

- Limited leadership especially at the outset
- Largely operating under status quo enforcement levels
- Some increase in compliance agreements?

# Current enforcement environment (cont'd)

## ▶ Recent Developments

- On March 7<sup>th</sup>, NPRM to increase FLSA overtime exemption salary thresholds to \$679 per week (equivalent to \$35,308 per year)
- On October 9<sup>th</sup>, 2018, DOL extends PAID Program for six months to allow employers to conduct audit, and self-report potential overtime and minimum wage violations
- DOL issued AAM No. 227 to increase the prevailing health and welfare fringe benefits hourly rate to \$4.48 / \$4.18
- As of January 1<sup>st</sup>, 2018, DOL is issuing opinion letters again
- New rules coming; Michele King became Acting Branch Chief in Government Contracts Enforcement through January 2019
- The federal contractor minimum wage increased to \$10.60 in 2019

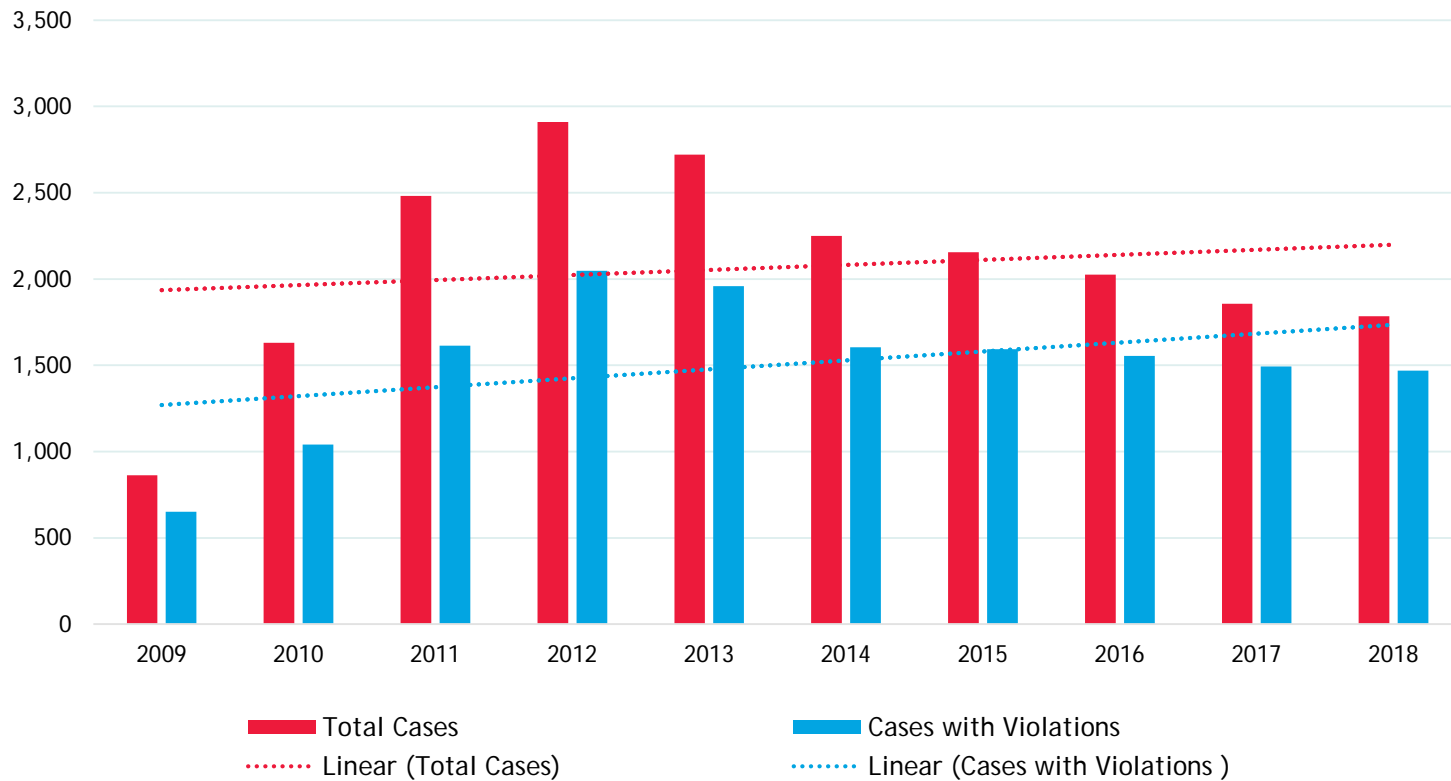
## ▶ FY 2018 SCA/DBA Audit Statistics

Act	Investigations	Assessed Back Wages	Employees Affected	Debarments
SCA	609	\$40,267,450	28,207	9
DBA/DBRA	601	\$15,308,739	9,613	21

# Total cases (FY 2009 to FY 2018)

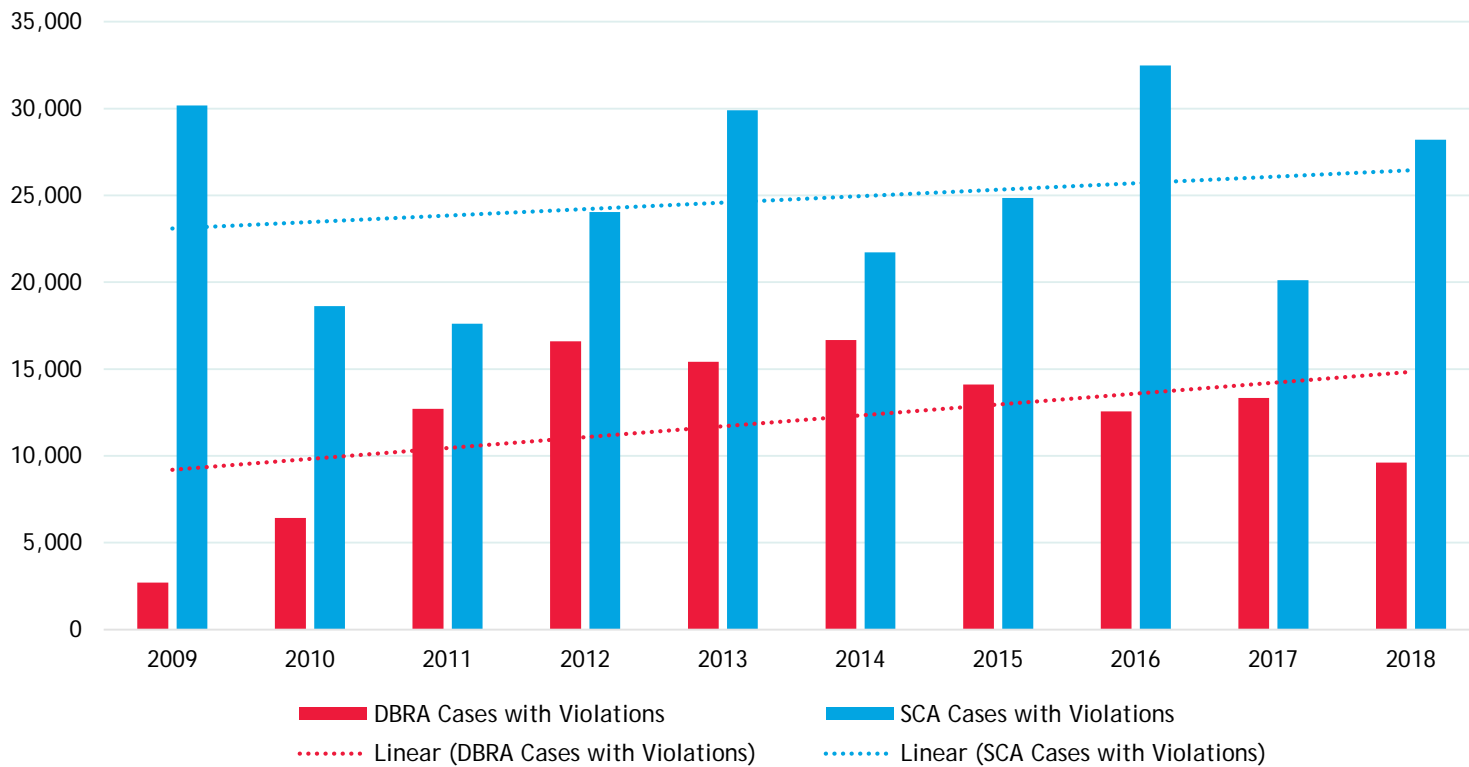
Includes SCA, DBA, and Contract Work Hours and Safety Standards ("CWHSSA") Act Cases

### All Acts - Total Cases

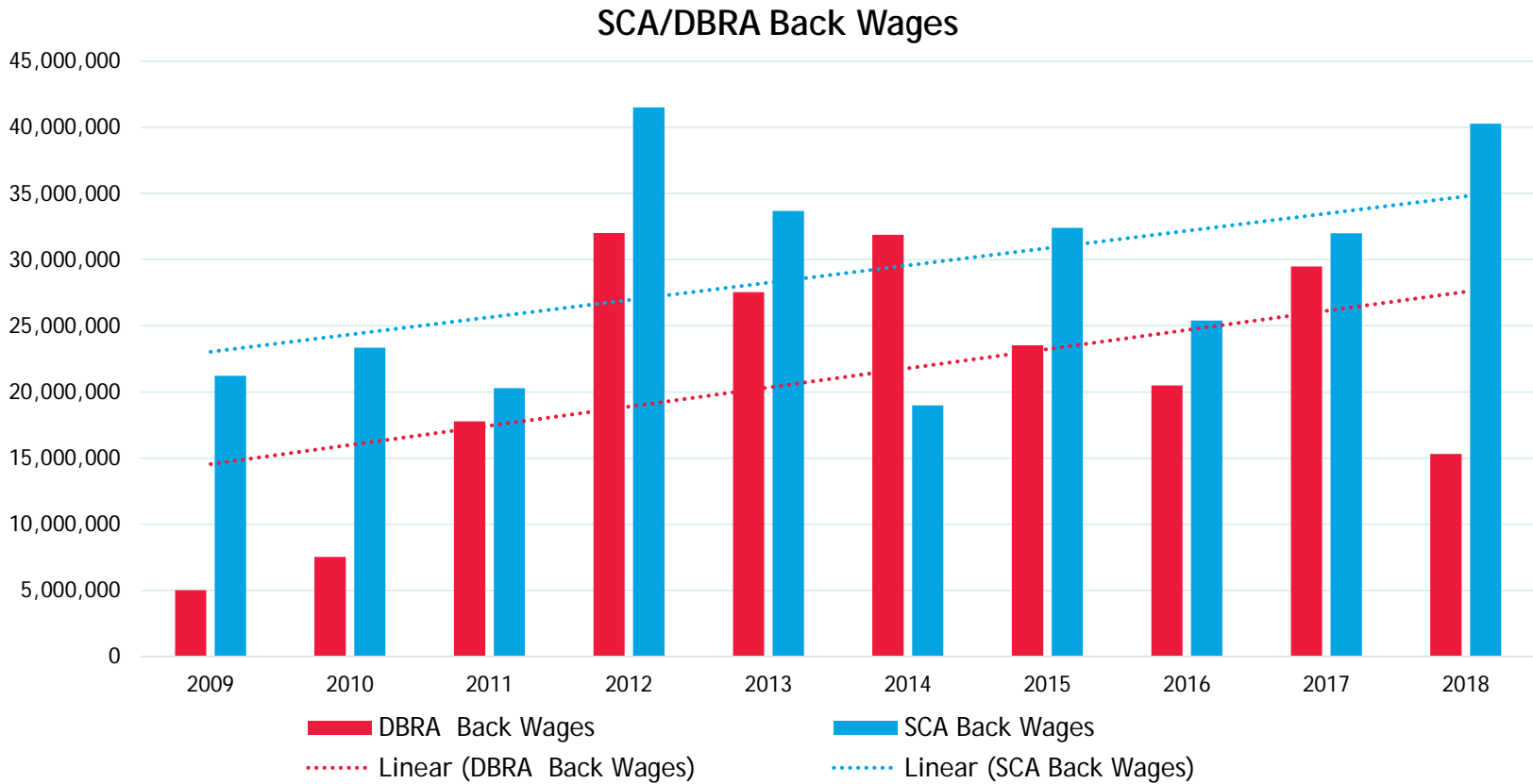


# SCA/DBRA Violations (FY 2009 to FY 2018)

SCA/DBRA Total Violations

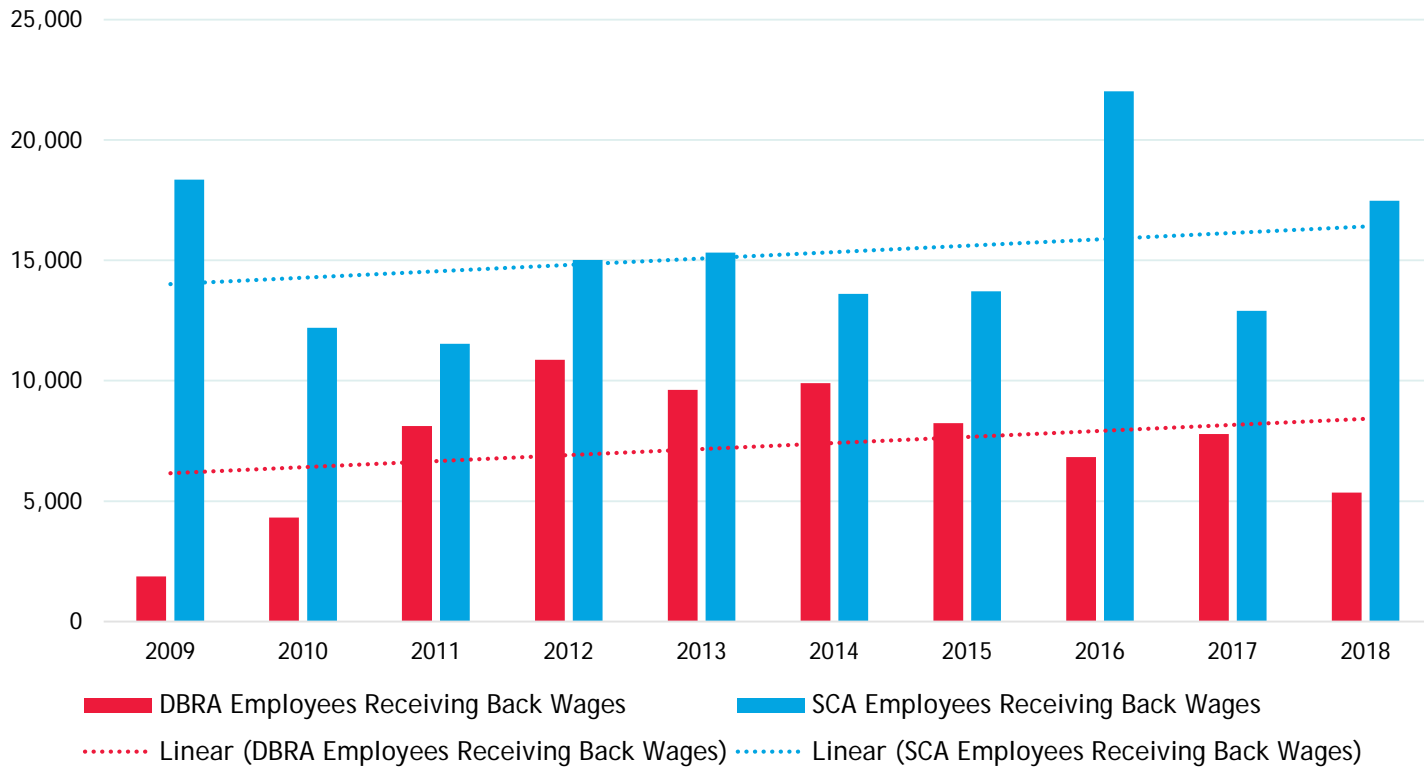


# SCA/DBRA Back Wages (FY 2009 to FY 2018)



# SCA/DBA Employees Receiving Back Wages (FY 2009 to FY 2018)

SCA/DBRA Number of Employees Receiving Back Wages





# Executive Order 13706, establishing paid sick leave for federal contractors

- ▶ On February 25<sup>th</sup>, 2016 DOL issued its proposed rule implementing Executive Order 13706 on Establishing Paid Sick Leave for Federal Contractors
- ▶ Covers new contracts entered into on or after January 1, 2017 and applies to SCA, DBA, concession contracts and contracts in connection with Federal property or land
- ▶ Requires contractors to allow covered employees to accrue at least 1 hour of sick leave per 30 hours worked, up to a minimum of 56 hours or 7 days per year
  - Contractors would no longer be able to offset their health and welfare requirement with this paid sick leave (unless in excess)

# Executive Order 13706, Establishing Paid Sick Leave for Federal Contractors (cont'd)

- ▶ Covered in connection with employees include those spending at least 20% of their workweeks performing work on covered contracts and FLSA exempt employees
- ▶ Employers must allow carryover (different from SCA) of no less than 56 hours, but are not required to pay out sick leave upon termination
  - Contractors must re-instate paid sick leave forfeited upon separation for any employees rehired within 12 months
- ▶ Most recent SCA WDs provide a lower H&W rate (\$4.18) for contracts subject to this rule
- ▶ The rule contains onerous record keeping requirements related to employee sick leave balance notices, requests for leave, written denials, etc. for 3 years after contract
- ▶ Must flow down to covered subcontractors

# Office of Federal Contract Compliance Programs

# OFCCP Background

- ▶ Office within the Department of Labor
- ▶ Enforces EO 11246, VEVRAA, Section 503
- ▶ Structure
  - National, Regional, and District offices
  - Decentralized - audits by District offices
- ▶ Enforcement mechanisms - audits and investigations
  - Focus on compensation and hiring discrimination
- ▶ Remedies
  - Back pay, instatement, reinstatement
  - Press releases
  - No civil or criminal fines or penalties

# Key Legal Obligations

- ▶ Development of “Affirmative Action Plans” (AAPs)
  - Create AAPs annually for each “establishment”
  - Combination of statistical analysis and narrative
  - Conducted on job group basis
- ▶ Solicit EEO data - race, gender, disability, and veteran status
- ▶ File Vets 4212 (September 30) and EEO-1 (May 31)\*
- ▶ Post (almost) all jobs - state employment service
- ▶ Engage in “good faith efforts” and document same

# OFCCP Initiatives

- ▶ 12 directives issued in 2018
  - **DIR 2018-01 – Use of Predetermination Notices**
  - DIR 2018-02 – Extension of TRICARE moratorium
  - DIR 2018-03 – Religious exemption
  - **DIR 2018-04 – Focused Reviews**
  - **DIR 2018-05 – Analysis of Compensation Practices**
  - DIR 2018-06 – Contractor recognition program
  - DIR 2018-07 – Affirmative Action Program (AAP) verification
  - **DIR 2018-08 – Transparency in compliance activities**
  - DIR 2018-09 – OFCCP ombud service
  - **DIR 2019-01 – Compliance Review Procedures**
  - DIR 2019-02 – Early Resolution Procedures
  - DIR 2019-03 – Opinion letters and online help desk
  
- ▶ Stated goal of greater efficiency and transparency

# OFCCP Compensation Analysis

- ▶ Effective August 24, 2018
- ▶ Rescinds Directive 307
- ▶ Purpose to clarify OFCCP approach to compensation evaluation and provide greater consistency and efficiency
- ▶ Broad definition of “compensation”
  - Salary, bonuses, commissions, pay additions or other forms of incentive pay
  - Training or advancement opportunities
  - Assignment outcomes such as placement into particular jobs or differential access to earnings opportunities

# OFCCP Compensation Analysis

- ▶ Analysis must be based on similarly situated employees
  - those who would be expected to be paid the same based on: (a) job similarity (e.g., tasks performed, skills required, effort, responsibility, working conditions and complexity); and (b) other objective factors such as minimum qualifications or certifications
- ▶ Will control for structural differences (division, product, location) and employee characteristics (tenure, prior experience, grade level) if “reasonable” and “reflected in the contractor’s compensation policies”
- ▶ Will provide data to replicate OFCCP results
- ▶ Less likely to pursue where statistical data not supported by anecdotal evidence



# Predetermination Notices

- ▶ OFCCP must issue a PDN for discrimination findings prior to issuing a Notice of Violation (NOV)
- ▶ Must be reviewed by regional Office of the Solicitor and National Office before issuance
- ▶ Contractor has 15 days to respond to preliminary findings

# Other Notable Directives

- ▶ Focused Reviews
- ▶ Transparency in compliance activities/compliance review procedures
- ▶ AAP Verification
- ▶ TRICARE subcontractor moratorium

# Best Practices

- ▶ Prepare Affirmative Action Plans in timely manner; take action on areas of underutilization/adverse impact
- ▶ Analyze disabled and veteran outreach efforts to ensure effectiveness
- ▶ Validate pre-employment tests
- ▶ Review compensation policies to ensure they detail compensation structure/methodology
- ▶ Conduct privileged analysis of compensation

# Pay Equity



# The Issue

- ▶ Women, particularly women of color, earn significantly less than men
- ▶ Substantial attention from legislatures, media and shareholders on “wage gap”
- ▶ Pay transparency coupled with pay equity

# OFCCP

- ▶ At the forefront of the Administration's pay equity enforcement efforts
- ▶ Substantial Settlements
  - State Street Corp - \$5M
  - Dell EMC - \$2.9M
  - Humana Inc. - \$2.5M
- ▶ Oracle amended complaint - filed January 22, 2019
  - Alleges pay discrimination against women, African Americans, Asians
  - Seeking \$400M in damages

# EEO-1

- ▶ September 2016 - Obama administration implements changes to EEO-1 Report to include wage and hours worked data by race and gender
- ▶ Significant pushback from business community
  - Substantial burden and minimal value
  - Confidentiality concerns
- ▶ August 2017 - Trump administration freezes implementation
- ▶ March 2019 - DC District Court rules that freeze was arbitrary and capricious; reinstates reporting obligation
- ▶ Current status - in flux

# EEO-1

- ▶ Adds 12 pay bands to each of the 10 EEO-1 categories
- ▶ Within each pay band must disclose:
  - Hours worked
  - Number of employees
  - Race
  - Gender
- ▶ EEOC underestimates administrative burden
- ▶ Aggregate W-2 data not probative of actual discrimination



# Pay Transparency EO

- ▶ Cannot discriminate against an employee or applicant for discussing or disclosing compensation
  - Applies to managerial and non-managerial employees
  - Exception for disclosure based on information obtained in the course of performing essential job functions
  - Mandatory handbook language

# California Fair Pay Act

- ▶ Cannot discriminate in compensation on basis of gender or race
- ▶ Comparators - those performing “substantially similar work” - skill, effort, responsibility
- ▶ Need not be at same geographic establishment - can be in different labor markets
- ▶ Defenses - differential in pay due to:
  - Seniority or merit system
  - System that measures quantity/quality of production
  - “Bona fide factor other than sex, such as education, training, or experience”
  - Must be job related and consistent with business necessity
- ▶ Factors must “account for the entire wage differential”



# Massachusetts

- ▶ Effective July 1, 2018
- ▶ Equal pay for “comparable work”
- ▶ May take into account geographic location
- ▶ Prohibits employers from asking candidates or prior employers about salary history
- ▶ Expressly permits class actions
- ▶ Private litigation or enforcement by Mass Attorney General



# Massachusetts

▶ Safe Harbor of Proactive Analyses

- Conducted self-evaluation of its pay practices that is “reasonable in detail and scope in light of the size of the employer” within the three years prior to action
- Made “reasonable progress” toward eliminating pay differentials uncovered by the evaluation



# Salary History Bans

- ▶ Employers may not inquire into salary history during hiring process, or rely on salary history in setting compensation
- ▶ Laws enacted in California, Connecticut, Delaware, Hawaii, Massachusetts, Oregon, Puerto Rico, and Vermont; San Francisco, New York City, Washington DC. Other laws pending

# Best Practices

- ▶ Conduct Privileged Analyses of Pay
  - Base pay
  - Pay changes
  - Other rewards (bonus, equity)
- ▶ Define Clearly “Comparable” Jobs
  - Document what job titles/employees are and are not comparable
- ▶ Pay Upon Hire - Key Driver of Pay Differences
  - Cease requesting or making initial pay decisions based on prior salaries
  - Restrict discretion – bands based on comparators
- ▶ Acquisitions - Normalize Pay



# Questions?

## Contact

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