

# Service Contract Act

REQUIREMENTS, BEST PRACTICES  
AND TRENDS

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# With You Today



**LESLIE STOUT-TABACKMAN**

Managing Director

703-663-3148

[lstout-tabackman@bdo.com](mailto:lstout-tabackman@bdo.com)



**ESTHER PUJOL RODRIGUEZ**

Senior Manager

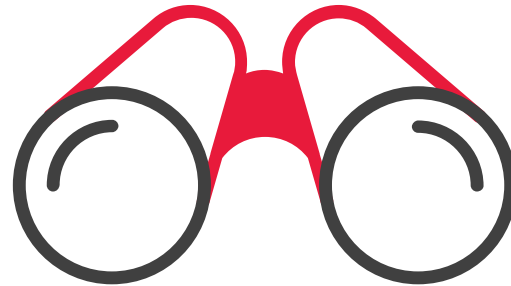
703-770-1063

[epujolrodriguez@bdo.com](mailto:epujolrodriguez@bdo.com)

# Learning Objectives



Define key requirements of the SCA, and the penalties for violations



Identify the most challenging aspects of the SCA and best practices for achieving compliance



Review current enforcement environment, trends and impact on DOL's SCA administration and enforcement

# Agenda for Today

<b>1</b>	<b>SCA Purpose and Coverage</b>
<b>2</b>	<b>Key SCA Requirements</b>
<b>3</b>	<b>Enforcement and Non-Compliance</b>
<b>4</b>	<b>Recent Developments</b>
<b>5</b>	<b>Best Practices</b>
<b>6</b>	<b>Q&amp;A</b>

# SCA Purpose and Coverage



# SCA: Purpose

- ▶ The McNamara-O'Hara Service Contract Act of 1965, as amended, covers most federal service contracts in excess of \$2,500 (41 USC § 351 et seq. and 29 CFR Part 4).
- ▶ Now also known as “Service Contract Labor Standards.”
- ▶ Provides minimum labor standards protection to service employees if a Wage Determination is incorporated into the contract/subcontract.
- ▶ Wage Determinations are issued by the Department of Labor (“DOL”) that set wage rates and benefits for classes of employees used in service contracts.



# What is Covered?



Contracts in excess of \$2,500 entered into by federal and District of Columbia agencies in which the principal purpose of the contract is to furnish services in the U.S. through the use of “service employees.”



SCA provisions apply to all subcontractors (including staffing agencies and vendors providing services) under SCA-covered prime contracts.



Contract/subcontract should contain both SCA provision and applicable Wage Determination (selected and incorporated by agency and flowed down into contracts).

# Who Is Covered?

- ▶ “Service employee” includes any worker engaged in performing services on a covered contract except for those who are exempt under the Fair Labor Standards Act (“FLSA”).
  - Includes independent contractors, part-time, and temporary employees of both the prime contractor and subcontractors.
- ▶ Employees whose services are necessary to the performance of the contract, but who are not directly engaged in the performance of specified contract services, may be excluded from coverage.





# Covered Employees

- ▶ All employees are covered unless exempt from the overtime and minimum wage requirements under the “white collar” exemptions of the FLSA.
  - Executive exemption
  - Administrative exemption
  - Professional exemption - requires advanced degree
  - Computer employees

- ▶ Exemptions have three tests - must meet all three for exemption to apply:
  - Salary level/amount
  - Salary basis
  - Duties

# Key SCA Requirements

# Key SCA Requirements

- ▶ Wages and fringe benefits minimum rates are separately specified and must be paid/provided separately to workers.
  - Determined by the DOL in Wage Determinations (“WD”s).
  - Includes holidays, vacation, and bona fide health and welfare fringe benefits or cash equivalent.
- ▶ Posting requirements—notice and WD rates and benefits.
- ▶ Recordkeeping requirements.

# Wage Determinations

## Wage Determinations (“WD”s) Contain

Job classifications

Hourly wage rates for each job classification (but must be at least the federal contractor minimum wage amount if requirement is in contract)

Required vacations benefits

Required holiday benefits

A Health & Welfare (“H&W”) hourly rate (and a lower H&W rate for contracts with E.O. 13706 paid sick leave requirement)

Uniform allowances

Sometimes special premium rates

# Wage Determinations

- ▶ WDs are issued by state and county and reflect wages specific to that county.
- ▶ There are two types of WDs:
  - Prevailing—based on wage surveys.
  - 4(c)—based on previous or current contractor’s collective bargaining agreement (“CBA”).
- ▶ WDs are developed by DOL based on available data showing the rates that are prevailing in a specific locality.
- ▶ Most WDs are updated by DOL twice a year, but updates apply only when your contract is modified by the contracting agency/prime contractor to include updated WD.



# The Process



Contracting agency is responsible for selecting appropriate WD(s) and incorporating WD(s) into contract. Prime contractor is responsible for including in subcontracts.



New WD(s), as applicable during course of contract, should be selected by contracting agency and incorporated into contract.



If job descriptions for the WD positions do not match job descriptions of the contract work, contractor must seek a “conformance” from DOL through the Contracting Officer (“CO”).

# When Are New WDs Applicable?

- ▶ Anniversary date of contract in multi-year contract (non-appropriated funds contracts generally require new WDs every two years rather than annually).
- ▶ Extension of contract (but not if contractor just granted extra time to fulfill original commitment) or exercise of option.
- ▶ Major modification or amendment of contract affecting labor requirements.
- ▶ New WDs should be provided by the agency to the prime contractor and from prime to subcontractor by incorporation into contract (via a modification).



# Classification of Workers

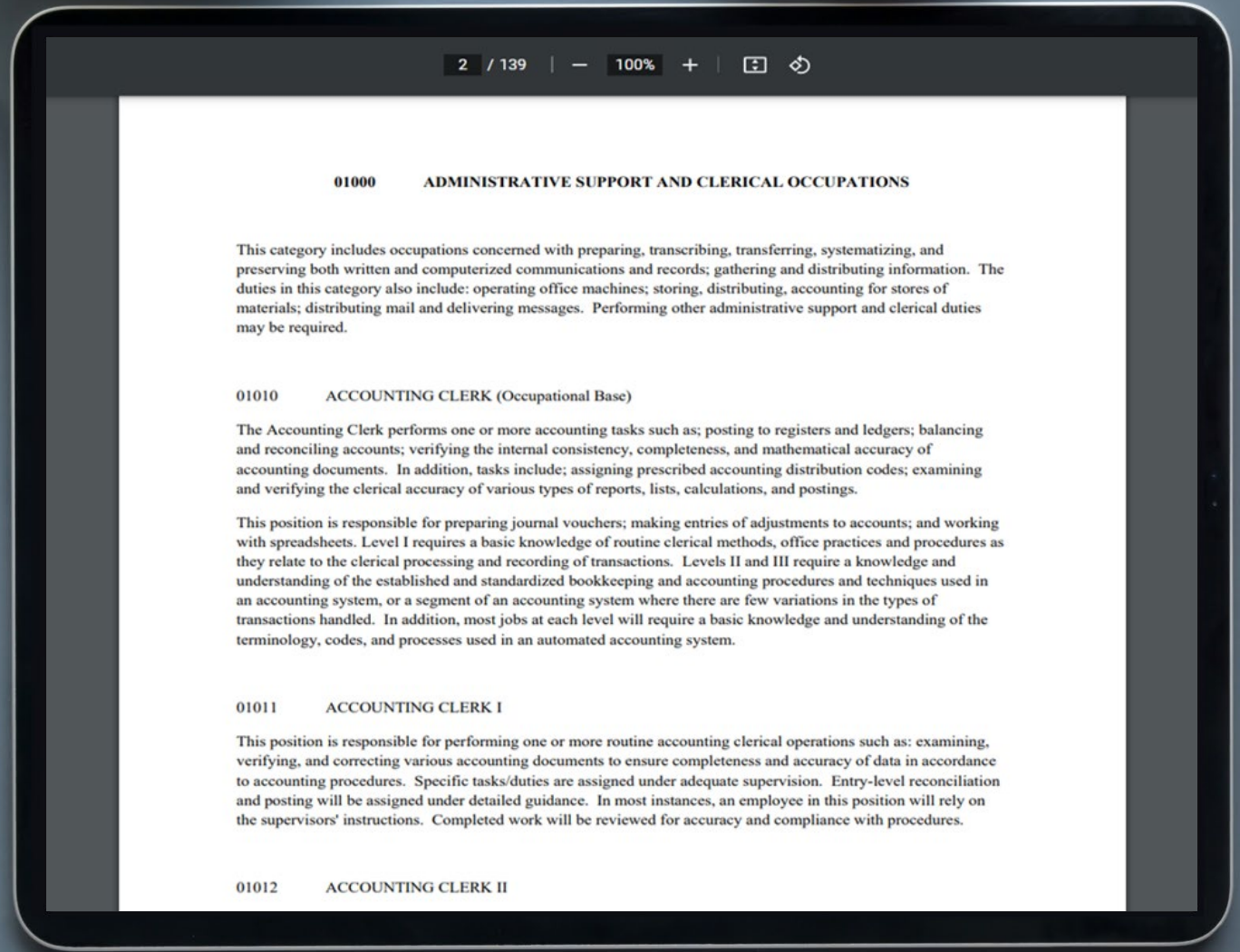
All non-exempt workers on an SCA contract must be classified by comparing duties performed to job classifications on WD to determine correct wage rates for the position.

Review all workers on the contract and compare to the job classifications on the contract WD.

Match the contract Statement of Work and review actual job duties with SCA Directory of Occupations (or descriptions in the CBA WD) - don't rely on job descriptions alone.

Job classifications are defined by the DOL so don't always fit well into existing commercial practices.

# Classification of Workers - SCA Directory of Occupations



## 01000 ADMINISTRATIVE SUPPORT AND CLERICAL OCCUPATIONS

This category includes occupations concerned with preparing, transcribing, transferring, systematizing, and preserving both written and computerized communications and records; gathering and distributing information. The duties in this category also include: operating office machines; storing, distributing, accounting for stores of materials; distributing mail and delivering messages. Performing other administrative support and clerical duties may be required.

### 01010 ACCOUNTING CLERK (Occupational Base)

The Accounting Clerk performs one or more accounting tasks such as; posting to registers and ledgers; balancing and reconciling accounts; verifying the internal consistency, completeness, and mathematical accuracy of accounting documents. In addition, tasks include; assigning prescribed accounting distribution codes; examining and verifying the clerical accuracy of various types of reports, lists, calculations, and postings.

This position is responsible for preparing journal vouchers; making entries of adjustments to accounts; and working with spreadsheets. Level I requires a basic knowledge of routine clerical methods, office practices and procedures as they relate to the clerical processing and recording of transactions. Levels II and III require a knowledge and understanding of the established and standardized bookkeeping and accounting procedures and techniques used in an accounting system, or a segment of an accounting system where there are few variations in the types of transactions handled. In addition, most jobs at each level will require a basic knowledge and understanding of the terminology, codes, and processes used in an automated accounting system.

### 01011 ACCOUNTING CLERK I

This position is responsible for performing one or more routine accounting clerical operations such as: examining, verifying, and correcting various accounting documents to ensure completeness and accuracy of data in accordance to accounting procedures. Specific tasks/duties are assigned under adequate supervision. Entry-level reconciliation and posting will be assigned under detailed guidance. In most instances, an employee in this position will rely on the supervisors' instructions. Completed work will be reviewed for accuracy and compliance with procedures.

### 01012 ACCOUNTING CLERK II

# Classification of Workers

- ▶ For occupations with different levels (e.g., Accounting Clerk I, Accounting Clerk II, Accounting Clerk III), pay close attention to descriptions of work at each level to properly match workers.
- ▶ If job is not on the WD, must conform it by filing SF 1444 “Request for Authorization of Additional Classification and Rate.”
- ▶ Employees must stay within their job classification (ok to perform lower classification duties but not higher-level duties) or will need to be paid at higher classification rate.
- ▶ Beware of “job creep” - must periodically check actual job duties being performed and change classification if necessary (discuss with CO/prime contractor and modify contract to match change).
- ▶ Ensuring proper classifications for work performed applies to Company employees, staffing agency workers, subcontractor and vendors.
- ▶ In addition to back pay for improper classification, penalties under the Contract Work Hours and Safety Standards Act for improper OT pay based on misclassification.



# SCA Hours Worked and Payment of Wages

- ▶ Hours worked subject to SCA wages (and benefits) are hours worked on covered contract.
- ▶ Employer must track/segregate time and keep records of time spent on SCA-covered and non-SCA covered work each workweek or else all work may need to be paid at SCA rate.
- ▶ Employer must track and keep proof of SCA-covered work performed by employees who perform work in different job classifications or else all work may need to be paid at the highest SCA rate.
- ▶ If employee in a job classification with more than one level performs higher level work for any amount of time in a workweek the employee must be paid at the higher level for the whole week.



# Fringe Benefits

- ▶ H&W rate, vacation and holidays (or benefits in CBA).
  - ▶ Unless otherwise specified on the applicable WD, health and welfare payments are due for all hours, including paid vacation, sick leave and holiday hours; up to a maximum of 40 hours per week/2,080 hours per year on each contract.
  - ▶ Employer may provide H&W rate through bona fide fringe benefits (employer contribution only and must be made no less than quarterly) or in cash payments each payroll.
- ▶ Choice of how to provide H&W belongs solely to the employer.
  - ▶ Employer cannot count any benefits mandated by law toward the H&W benefit required (e.g., social security taxes, unemployment compensation, worker's compensation, required paid sick leave).
  - ▶ Must be provided to all SCA workers including part-time workers, temporary workers and independent contractors.

# Examples of Fringe Benefit Plans



Life Insurance



Health (medical, dental,  
vision) Insurance



Disability Insurance



Pension/401(k)



Sick leave - but not if  
required by federal, state  
or local law



Vacation, holidays,  
PTO provided in excess of  
WD requirements

# Vacation

- ▶ Amount of vacation due employees is listed on the WD.
- ▶ Many vacation policies may be in conflict with or fail to fully meet the SCA's vacation requirements.
  - The SCA doesn't provide for carryover of vacation.
  - Vacation is determined based on anniversary date of employee, not calendar year or employer's fiscal year.
  - SCA provides that vacation is granted and vests in a lump amount on employee's anniversary date (but employers are allowed to provide it on an accrual basis).
  - Part-time employees are entitled to pro-rata vacation; temps and independent contractors must also receive vacation or cash equivalent.





# Vacation

- ▶ Continuous service” determines employee’s eligibility for vacation benefits and is determined by the length of time the employee:
  - Worked for the contractor in any capacity (includes non-SCA work); and/or
  - Worked for the predecessor contractor in performance of same or similar contract at same facility.
- ▶ Vacation becomes vested upon employee’s anniversary date (date of employment with current employer or predecessor contractor) - not contract anniversary date, or employer’s calendar or fiscal year PTO dates.
- ▶ Vacation becomes vested and due on anniversary date, but need not be used or paid out until the earliest of:
  - The employee’s next anniversary date;
  - The date of contract completion; or
  - The employee terminates employment



# Holidays

- ▶ Named holidays are listed on WD.
  - Number and named holidays can vary among WDs so always check WD for each contract
- ▶ Employee entitled to holiday pay if he/she works during holiday workweek.
- ▶ Employee is also entitled to holiday pay if he/she is on paid vacation or sick leave during holiday workweek.
- ▶ Holiday benefits must be provided regardless of the length of time the employee has worked for the employer at the time a holiday occurs and regardless of whether he/she works the day before or after the holiday (as some employers require).

# Equivalent Fringe Benefits

## Contractor may provide FBs:

- ▶ By furnishing the benefits listed in WD, or
- ▶ Furnishing equivalent combinations of bona fide FBs, or

- ▶ Making equivalent cash payments:
  - Equal in cost
  - Separately stated in employer's record
  - Not used to offset wage requirements

# Notice and Posting Requirements

Employer performing work covered by the SCA is required to:

- ▶ Provide each employee working on the contract notice of the SCA payment and fringe benefit requirements for the different classes of service employees (by posting the WD or providing individual letters/notices), and

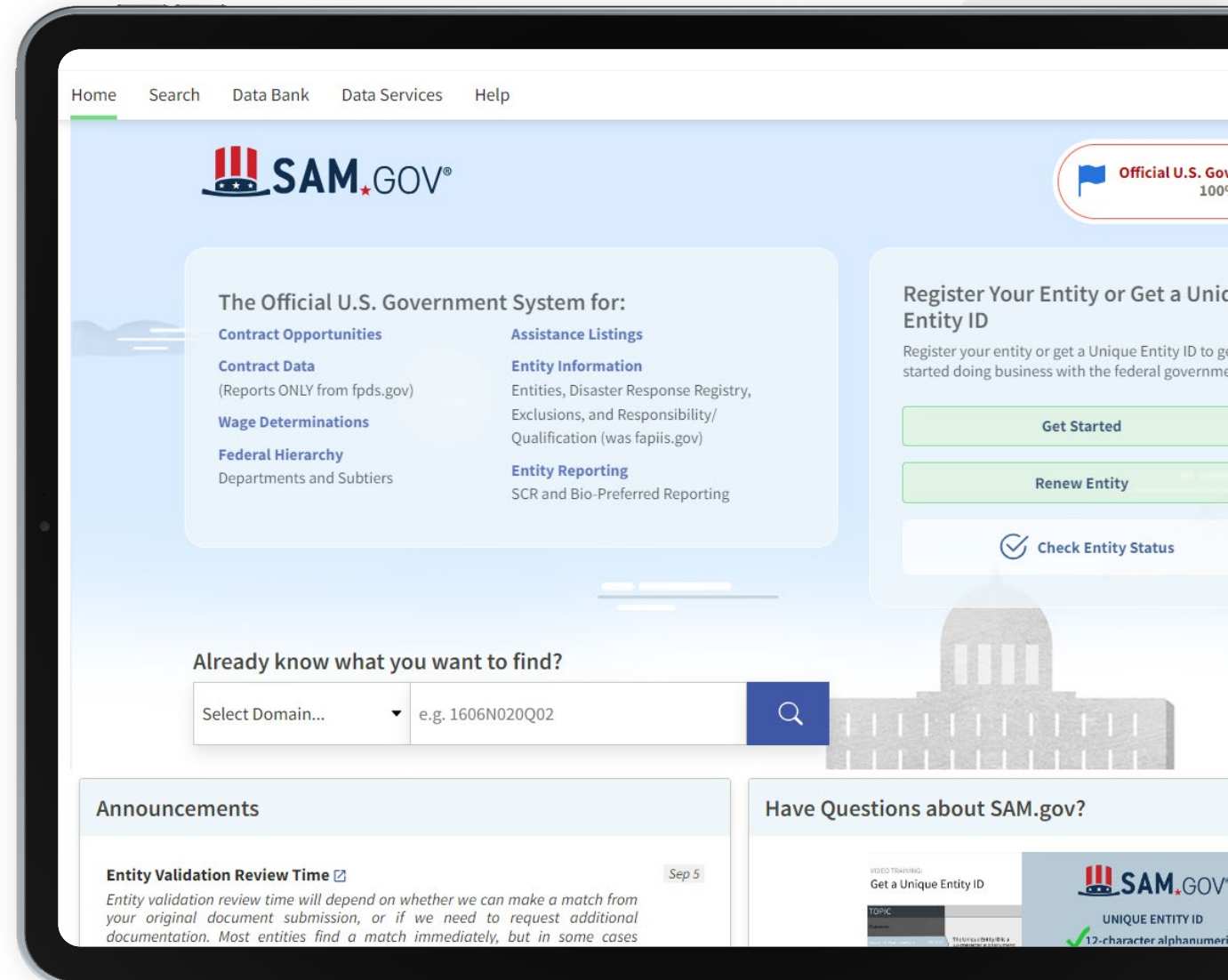
- ▶ Post the “Employee Rights on Government Contracts” notice (including any applicable WD) at the site of the work in a prominent and accessible place where it may be easily seen by employees.

## Recordkeeping

- ▶ Some of the records required under the SCA are also required under the Fair Labor Standards Act (see Wage and Hour Division Fact Sheet #21: Recordkeeping).
- ▶ Contractors and subcontractors are required to maintain certain records for each employee performing work on the covered contract. Basic records, such as name, address, and Social Security number of each employee must be maintained for three years from completion of the work.
- ▶ In addition, records on the following must be maintained for three years:
  - The correct work classification(s), wage rate(s), and fringe benefits provided (or cash equivalent payments provided in lieu of fringe benefits);
  - The total daily and weekly compensation of each employee;
- ▶ The number of daily and weekly hours worked by each employee;
- ▶ Any deductions, rebates, or refunds from each employee's compensation;
- ▶ Any list of a predecessor contractor's employees which had been furnished showing employee's length of service information;
- ▶ A list of wages and fringe benefits for those classes of workers conformed to the WD attached to the contract; and
- ▶ The contractor shall also make available a copy of the contract upon request from the Wage and Hour Division.

# Subcontractors

- ▶ Joint and several liability for prime contractors and subcontractors.
- ▶ Contractor and higher-level subcontractor are responsible for SCA flow-down provisions including wage determination.
- ▶ Check debarred contractor list at [www.sam.gov](http://www.sam.gov)
- ▶ Contractors should ensure subcontractors understand SCA requirements.
- ▶ Consider certification requirements and include specific indemnification provisions.





# Enforcement and Non-Compliance

# Enforcement

- ▶ DOL is the enforcement agency and relies on audits.
- ▶ DOL audits may be triggered by complaints or DOL's selection.

Often, an initial DOL complaint or audit focuses on alleged FLSA or Family and Medical Leave Act (“FMLA”) compliance.

Once DOL is “in the door” DOL can then audit for SCA compliance.

DOL can and will expand audit to multiple contractors and/or multiple locations where initial audit shows violations that may be systemic or are found to be willful.

# Consequences of Non-Compliance

SCA non-compliance can result in severe consequences, some of which include:

Back  
Payments

Payment of  
Government's  
re-procurement  
costs

Contract  
Termination

Debarment

Contract  
Withholds

Personal Liability  
for Corporate  
Officers

Enhanced  
Compliance  
Agreements

# Recent Developments

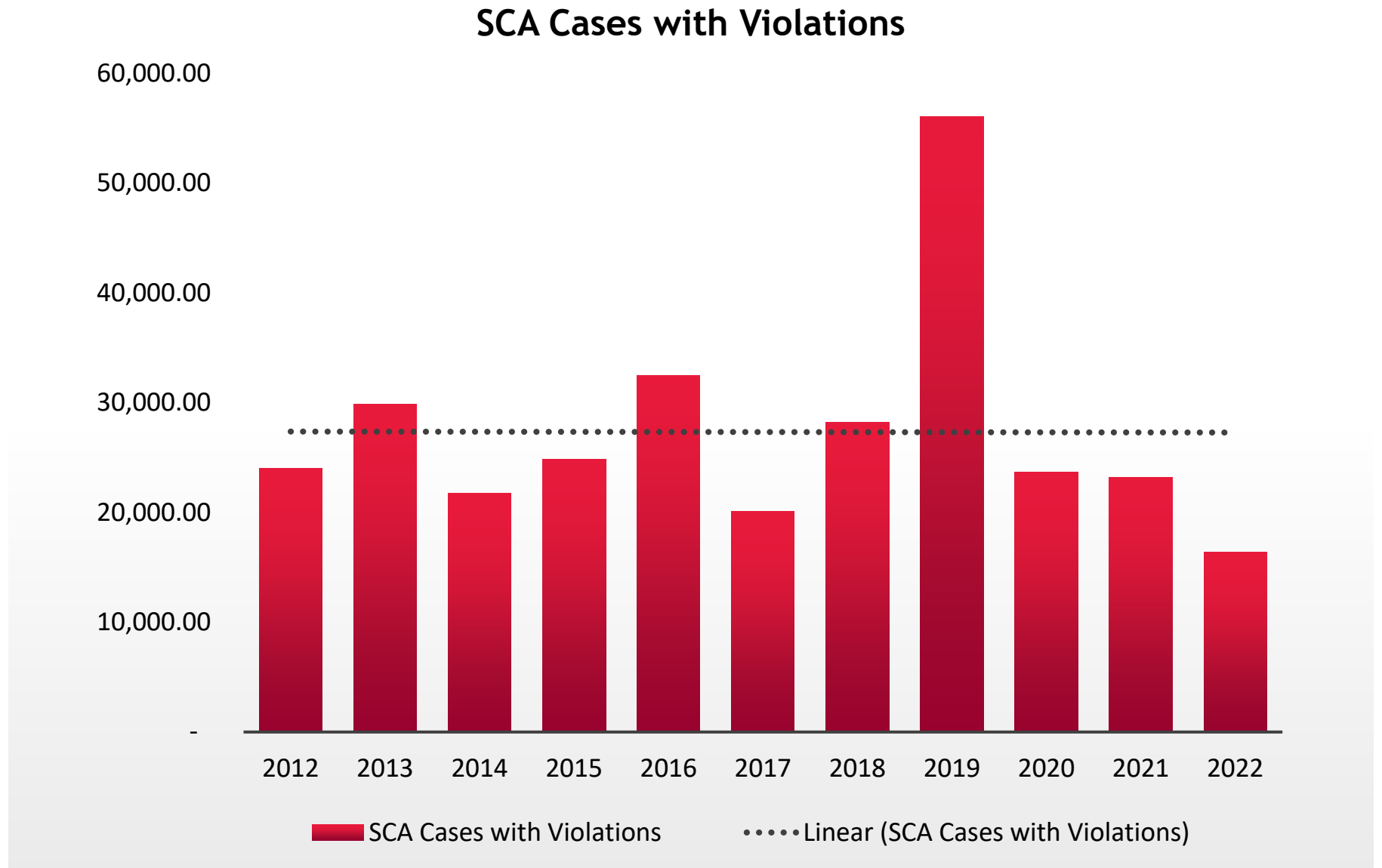
# Current Enforcement Environment

## RECENT DEVELOPMENTS

- ▶ October 13, 2022, the DOL announced proposed rule on classifying employees and independent contractors seeking to return to longstanding interpretation.
- ▶ On September 8, 2023, DOL published a proposed rule seeking to raise the annual salary threshold for the FLSA's administrative, executive and professional exemptions - the "white collar" exemptions - from \$684 per week (\$35,568/year) to \$1,059 per week (\$55,068/year).
- ▶ DOL has undertaken a major revision of the Davis-Bacon Act regulations through a rulemaking, with a final rule published August 23, 2023 - likely implications for SCA.
- ▶ The DOL has made more easily available online records of federal contractors who have been caught violating the Wage and Hour Division ("WHD") enforced laws, which includes several labor laws: [enforcedata.dol.gov/views/search.php](https://enforcedata.dol.gov/views/search.php)
- ▶ Return of the Nondisplacement of Qualified Workers Executive Order ("EO") issued on November 18, 2021. On July 15, 2022, the DOL published proposed rules to implement the regulations, which are expected any time. FAR Council will also publish a rule.
- ▶ The minimum wage under EO 14026 increased to \$16.20 per hour on January 1, 2023, and increased to \$12.15 per hour under the prior EO 13658.

# SCA Violations

FY 2012 TO FY 2022





# Best Practices

# Best Practices

- ▶ Review current service contracts and opportunities knowing that SCA (and likely) federal paid sick leave may or does apply and check for those requirements and for WDs for covered locations.
- ▶ Confer internally to determine what work is required and who will be performing contract work.
- ▶ Determine system for identifying hours worked segregated from other work and what will work best for operations (only a few employees will perform the work; work will be evenly distributed?)
- ▶ Calculate your labor costs by comparing what is already being paid/provided to employees and wages and benefits required under SCA - you want to win/keep the business and make a profit!
- ▶ Develop and follow internal systems to track SCA hours and pay in compliance with WD requirements, provide SCA notice and postings.
- ▶ Determine if any subcontracts and flow-down requirements.

# Q&A

# Appendix

# Leslie Stout-Tabackman

## GOVERNMENT CONTRACTOR ADVISORY SERVICES MANAGING DIRECTOR



Leslie Stout-Tabackman regularly counsels and represents clients with matters before the U.S. Department of Labor's (DOL) Wage and Hour Division, including Fair Labor Standards Act (FLSA) issues and prevailing wage and benefits issues arising under the Service Contract Act (SCA), the Davis-Bacon Act (DBA), and requirements under related Executive Orders and the FAR. Her prevailing wage practice includes counseling federal contractors and providing comprehensive training on SCA and DBA prevailing wages and benefits requirements, coverage, exemption and worker classification issues, and related contracting procedures from the solicitation and bid stage through completion of the contract. conducting voluntary FLSA compliance audits. She regularly works with contractors to conduct internal compliance audits and provides education and training sessions for clients on these topics. Her practice also includes prevailing wage and related laws and Executive Orders due diligence reviews in buy/sell transactions.

She is a frequent speaker at seminars and conferences on wage and hour and prevailing wage law matters, including presentations for the AGC of America, the National Contractor Management Association, the Practicing Law Institute, the Power & Communications Contractors Association, and LCPTracker.

### PROFESSIONAL AFFILIATIONS

- ▶ American Bar Association: Section of Public Contracts Law; Employment and Labor Committee, Fair Labor Standards Legislation Committee
- ▶ District of Columbia Bar Association

### EDUCATION

- ▶ J.D., summa cum laude, American University Washington, College of Law
- ▶ B.A., International Relations/Political Science, Colgate University

Direct: 703-663-3148

Mobile: 703-989-1325

[lstout-tabackman@bdo.com](mailto:lstout-tabackman@bdo.com)

# Esther Pujol Rodriguez

## INDUSTRY SPECIALTY SERVICES SENIOR MANAGER

Esther has provided accounting services, internal audit, compliance, process improvement, cost optimization, and other risk based consulting projects to Fortune 500 companies, small private entities, and nonprofit organizations. Prior to this role, Esther served as chief financial officer (CFO) for several organizations in the government contracting arena and nonprofit sector. She has also performed a multitude of Deltek CostPoint implementations. She also served in multiple roles at Siemens AG Germany (\$100 billion in multinational sales, with operations in 192 countries and approximately 400,000 employees) leading internal audits worldwide. In her last role as a controller for Siemens Government Technologies, she was a member of Siemens' senior management team.

Esther also worked for seven years with the NASD (National Association of Security Dealers, currently FINRA) where she was promoted through the ranks of their internal audit department, eventually departing as an associate audit director. There she conducted audits to assess the organization's compliance with applicable securities laws, as well as departmental adherence to internal policies and procedures. She has also worked for a variety of public practice clients, performing financial and operational audits for government programs, as well as for private entities. Esther is an avid world traveler. She is fluent in Spanish, English, and German with working knowledge of French.

### PROFESSIONAL AFFILIATIONS AND CERTIFICATIONS

- ▶ Certified Public Accountant
- ▶ Certified Internal Auditor
- ▶ Managing Successful Programmes certification
- ▶ Certificate in Government Contracting, George Mason University
- ▶ "Zertifikat Deutsch vom dem Beruf" diploma, Goethe Institute

### EDUCATION

B.S., Accounting, Florida State University



Direct: 703-770-1063

Mobile: 646-262-7855

[epujolrodriguez@bdo.com](mailto:epujolrodriguez@bdo.com)



# Thank You!



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